

Case Name:
R. v. Cormier

Between
Kimberleigh Cormier, Appellant, and
The Queen, Defendant

[2008] O.J. No. 4964

2008 ONCJ 633

Ontario Court of Justice
Belleville, Ontario

G.J. Griffin J.

Heard: November 20, 2008.
Oral judgment: November 20, 2008.

(23 paras.)

Charge: Speeding - Contrary to The Highway Traffic Act

Counsel:

Fred Davies, Esq. H.E.L.P./For Appellant.

R.D. Fairman, Esq. POA Prosecutor.

REASONS FOR JUDGEMENT
(POA Appeal)

1 G.J. GRIFFIN J.: (orally):-- Ms. Kimberleigh Dawn Cormier has appealed her conviction of speeding 79 kilometers per hour in a posted 50 kilometer per hour zone. Justice of the Peace Cureatz, having hearing from the investigating officer at the trial on May 12, 2008, found her guilty and imposed a total fine with surcharge of \$160.50.

2 The main ground of appeal set out in the Notice of Appeal is as follows:

"The Learned Justice of the Peace erred in law by accepting evidence of speed from a radar speeding measuring device when the evidence at trial revealed that the investigating officer did not follow the implicit instruction from the manufacturer of the device when using same"

3 After hearing submissions, I think that the ground of appeal should be amended to read:

"The investigating officer did not follow the explicit instruction from the manufacturer of the device when using same".

4 I say this because it is clear that the appellant's position is that the officer by failing to follow the explicit instructions set out in the Genesis II Directional User and Installation Manual that he should not have taken any enforcement action.

The Evidence at Trial:

5 The only witness who testified was Constable Darren Heasman. He's a police officer with the Stirling Rawdon Police Service.

6 On Sunday, October 14, 2007 at 4:25 in the afternoon, he observed a southbound motor vehicle on Belleville Road traveling at a high rate of speed. He activated his antenna on the radar in his cruiser in the opposite direction mode. It was his front antenna as he tracked the speed of the subject motor vehicle approaching him from 86 kilometers per hour in a posted 50 kilometer zone, accelerating up to 94 kilometers per hour in a 50 kilometer per hour zone.

7 He locked the speed in the radar; hand-motioned the driver of the subject vehicle to stop. He activated his emergency lights; turn his cruiser around and conducted a vehicle stop. He was provided with a driver's license as well as insurance. Using his discretion, he issued Provincial Offence Notice at 79 kilometers per hour in a posted 50 kilometer per hour zone rather than the higher speed of 94 kilometers per hour.

8 There were no other vehicles in the operational beam of the radar system when he tracked the appellant's vehicle.

9 He had tested and re-tested the Genesis II Spectre directional radar on the day in question. It was tested at 1:30 p.m. according to the Manufacturer's Specifications and again at 5:30 p.m. - the officer being properly trained on this device. The officer, apart from doing the automatic test, had tested the device on the road comparing the speed of the radar to the speedometer of his cruiser. He satisfied himself that the speedometer of his car and the radar were identical.

10 He also testified that that the location of where he pulled the appellant over, there was nothing in the area that should interfere with the radar.

11 In cross-examination, the officer was shown excerpts from the Genesis II Directional Users and Installation Manual. A portion of that manual was read to him. That portion provides as follows:

"In addition to this road test, as part of the tracking history for any violation in which enforcement action is to be taken, it is a mandatory requirement that there be this correlation between the patrol speed of the police vehicle and the patrol speed displayed on the radar unit at that time. Without this correlation no enforcement action shall be taken."

12 The officer testified that he does not know how many things you can do at once. He interprets the manual to mean that once he tested his radar unit at 1:00 o'clock and at 4:30 and determined that it's accurate, that he has done what is required of him. He testified that at the time of the offence, he was focusing on the investigation.

13 The officer testified that he did not determine the correlation between the patrol speed of the police vehicle and the patrol speed displayed on the radar unit at the time of the infraction. The officer testified that he has been instructed that during a traffic stop for speeding violation when you're in the same direction mode, he has to document his patrol speed in correlation with the vehicle that is traveling in the same direction.

14 He testified as well that in that case, he was not in the same direction mode as he was in parallel direction mode or non-parallel.

The Decision of the Justice of the Peace:

15 The Justice of the Peace was confronted with the argument being advanced that the officer did not follow all of the test procedures required by the manufacturers of the Genesis II Directional Users and Installation Manual 53; that is, that the officer did not correlate the patrol speed of the police vehicle and the patrol speed displayed on the radar unit at the time of the violation.

16 The Justice of the Peace ruled as follows:

"Mr. Davies' position is that there has to be right at that time, a correlation. You know what? The Court takes a broader view on that and finds that the instrument has been tested adequately and that it was correlated throughout the day. The Court convicts the accused. Speaking to penalty?"

My Analysis:

17 In my view, it is not open to the Justice of the Peace to second guess the manufacturer's mandatory requirement that there be a correlation between the patrol speed of a police vehicle and the patrol speed displayed on the radar unit at the time of the infraction.

18 The manual is very clear. The wording being,

Without this correlation, no enforcement action shall be taken"

19 I would apply the principles set out in Justice Schnall's decision of R. v. Niewiadomski [2004] O.J. No. 478 where at para. 29 she writes:

"It can be assumed that the absence of full compliance with the testing and operational process should make the reading suspect There could be no reason for the device manufacturer to set out specifications and directions if it mattered not whether they were complied with".

20 In this case, there was not full compliance with the testing and operational process. It was not open to the officer to comply with some but not all of the requirements set out by the manufacturer nor is it open to the Justice of the Peace to ignore the mandatory requirements set out in the manual of the device in question by taking what he referred to as "a broader view".

21 The appeal is allowed with the conviction being set aside as the officer failed to correlate his patrol speed of his vehicle and the patrol speed displayed on the radar at the relevant time. There can never be a conviction on this matter so I'm registering a finding of not guilty and dismissing the charge. The fine paid should be returned to the appellant.

22 MR. DAVIES: Thank you, Your Honour.

23 THE COURT: Thank you.

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