

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under clause 135(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

SKLYAR ELL
Appellant

— AND —

HER MAJESTY THE QUEEN
Respondent

Before Justice R.J. LeDressay
Heard on May 4, 2012
Reasons for Judgment released on June 11, 2012

J.Stewart for the Crown, *Respondent*
F. Alfanofor Sklyar Ell, *Appellant*

LeDRESSAY J.:

[1] On May 17, 2011 the appellant was found guilty after trial of the offence of speeding, 98 kilometres per hour in a 60 kilometre per hour zone, contrary to s. 128 of the *Highway Traffic Act of Ontario*.

[2] There was only one witness called at trial, officer Hanowski. He was the police officer who charged the appellant with the speeding offence. The officer indicated that he was in an unmarked police car enforcing the speed limit in a 60 kilometre per our speed zone

in the Town of Milton.

[3] The officer was using a Lidar Laser Truespeed 20/20 device. The officer testified that the Lidar Laser device was a speed measuring device used to accurately measure the speed of moving motor vehicles. The officer's evidence in examination in chief was that he was first qualified to operate the Lidar Laser device in June of 2005 and that he had been re-qualified as required since that date. He was most recently re-qualified in April of 2011.

[4] The officer further testified that he tested the Lidar Laser device both before and after he used the device to measure the speed of the appellant's motor vehicle. The officer's evidence was that he tested the Lidar Laser device in accordance with the manufacturer's instructions and found the device to be working properly.

[5] At approximately 2:09 on March 12, 2010, the officer observed the appellant operating his motor vehicle southbound on Tremaine Road in the Town of Milton. The appellant's vehicle was the only vehicle travelling southbound at this time. The officer estimated the speed of the appellant's motor vehicle to be approximately 100 kilometres per hour, which is well above the posted 60 kilometres per hour speed limit. The officer used the Lidar Laser device to confirm his observation and he measured the speed of the appellant's vehicle at 98 kilometres per hour using the Lidar Laser device. The officer subsequently stopped the appellant, obtained his identification and issued a Provincial Offences Certificate to the appellant for the offence of speeding.

[6] As noted, in examination in-chief the police officer's evidence was that he had tested the laser device in accordance with the manufacturer's instructions and found it to be

in proper working order both before and after he used the Lidar Laser device to measure the speed of the appellant's motor vehicle.

[7] In cross-examination when asked to specify which tests he had completed to test the Lidar Laser device, the officer said that he completed the Display Integrity Test, the Self Test, the Scope Alignment Test, the Fixed Distance Zero Velocity Test, and another Self Test on each occasion. The police officer said that he did not do the Delta Distance Test as he is not required to do so when the Fixed Distance Zero Velocity Test is done according to the manual. The police officer also said that he did not do the Local Speed Limit Test as it is not a required test according to the manufacturer's manual.

[8] There was no evidence at trial to contradict the police officer on any of his evidence regarding the manufacturer's instructions as to which tests were required and which tests were optional in order for the police officer to form an opinion regarding whether the Lidar Laser device was in proper working order. Therefore the Justice of the Peace was entitled to make the finding that all of the tests recommended by the manufacturer had been undertaken by the police officer in the sense that no additional tests such as the Delta Distance Test or the Local Speed Limit Test were tests required by the manufacturer in order for the police officer to conclude that the Lidar Laser device was in proper working order.

[9] On page 31 of the transcript the officer Hanowski said that the Fixed Distance Zero Velocity Test was done using the back of a sign at the police station. The police officer said that he did not personally measure the 50 metre distance used to complete this test. However, he said that he was told it was 50 metres by Police Constable Ivey and that the 50 metres was measured out and marked from the sign in order to do this test.

[10] The Justice of the Peace in her reasons acknowledged that this evidence was hearsay but indicated the following at page 35 of the transcript:

And in terms of the Fixed Distance Test he indicated to the court that he uses a sign at the 11 division detachment, the back of the sign, which he has been advised, is 50 metres. I'm not overly concerned that the officer hasn't actually measured this particular distance himself personally. He is relying on, yes, what I acknowledge is hearsay evidence but he is relying on his instructor that the distance is indeed 50 metres and I'm not 100 percent how crucial it is that that particular distance be 100 percent accurate. Notwithstanding that uncertainty in my mind I would say his evidence is based on reliable information from a fellow officer.

[11] At page 36 of the transcript the court concluded:

So it's all there and I'm satisfied that the prosecution has discharged the onus of establishing this offence beyond a reasonable doubt that there is no evidence to the contrary. There will be a finding of guilt and a conviction entered.

[12] The appellant submits that the Crown failed to establish the necessary *prima facie* criteria needed in order to admit the laser speed measuring device data as evidence. The appellant submits that the Fixed Distance Velocity Test is required to ascertain the working condition of the unit and the appellant submits that the test was not conducted properly in that the police officer who tested the Lidar Laser device did not determine for himself whether the distance he used was correct. The appellant submits that in order for the court to determine that the test was conducted at a distance of 50 metres as is required by the manufacturer's manual the court had to accept hearsay evidence. The appellant submits that the

results of the Lidar Laser speed measuring device were not admissible evidence given that the required *prima facie* case regarding the accuracy of the unit had not been established by the Crown. The appellant further submits that if this evidence is inadmissible there would therefore be no evidence upon which to base the finding of guilt with respect to the appellant.

[13] The issue on this appeal then is whether the officer's opinion that the Lidar Laser device was in good working order is undermined by the fact that the officer in conducting the Fixed Distance Velocity Test relied on information provided to him by a fellow officer regarding the 50 metre distance. This distance was measured out and marked off at the police station for the purpose of conducting this test. This specific distance is a required aspect of the Fixed Distance Velocity Test required by the manufacturer's manual in order for the officer to formulate the opinion that the Lidar Laser device was in proper working order.

[14] The information provided to police officer Hanowski who testified at trial regarding the 50 metre distance used in the Fixed Distance Velocity Test came to him from a reliable and trustworthy source in that it was his training officer, P.C. Ivey, who told him the information that the distance was 50 metres. Officer Hanowski's information was that this distance had been measured out and marked at the police station and the clear inference is that he had seen and utilized these markings himself in completing the Fixed Distance Velocity Test. However, he had not specifically measured out this distance himself.

[15] In a sense all the information officer Hanowski possessed regarding how to properly test the Lidar Laser device was obtained by him through verbal or written hearsay. His training was done by an instructing officer who instructed him how to complete the tests and

the manual itself imparts information through written hearsay. The police officer is not required to know the technical workings of the Laser device. Therefore, the police officer relies on credible and reliable hearsay regarding how to properly test the Laser device throughout the entire process of formulating his opinion that the Lidar Laser device was in proper working order on the day in question. For the police officer to rely on this additional piece of credible and reliable hearsay, i.e., the 50 metre measured distance, to assist in formulating his opinion regarding whether the Laser device is properly functioning is similar to the reliance he must place on all of the other information provided to him regarding how to properly test the Laser device. It is no different than a police officer during the course of an impaired driving investigation relying on the information on the sticker affixed to the approved screening device indicating that the device was properly calibrated by a qualified technician to formulate his opinion that the approved screening device was in proper working order and able to be used to accurately test the breath of a suspected impaired driver to determine the driver's blood alcohol concentration.

[16] The opinion that the police officer provides regarding whether the Laser device was in proper working order, the basis of the police officer's opinion and his qualifications or lack thereof to provide such an opinion are all factors that the Justice of the Peace at trial can take into consideration when weighing the evidence to decide whether the rate of speed has been established beyond a reasonable doubt by the Crown. Of course, any contradictory evidence presented would be an important factor to consider in weighing the evidence. If evidence had been called in this case to raise a doubt concerning the accuracy of the information relied upon by officer Hanowski the court may not have made the finding it did.

[17] This reasoning finds support in the decision of the Alberta court of Appeal in *R. v. Chow* (1991) 68 C.C.C. (3rd) 190. In the *Chow* case the recorded speed that was repeated in the testimony of the operator was hearsay evidence. In that case the court indicated the following in deciding the issue regarding the admissibility of hearsay evidence in similar circumstances:

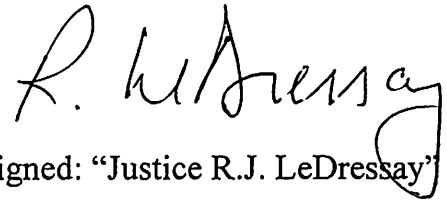
This case can be resolved by resort to the application of fundamental principles surrounding the potential admissibility of hearsay evidence. The disputed evidence here is not the photograph of the suspected vehicle, but the mechanical recording on the photograph of its speed as measured by the radar device. Obviously, the recorded speed, repeated in the testimony of the operator, Constable Somerset, is hearsay evidence and therefore prima facie inadmissible. But such evidence may still be receivable if the surroundings reveal that the evidence is both accurate and enjoys circumstantial guarantees of trustworthiness. We are of the view, that given the record we have, the electronic print-out on the photograph of the offending vehicle bearing Alberta Licence Number HWL 581 does not offend the fundamental requisites of admissible evidence. Phipson, Evidence, 14th ed., 1990, 21-19.

[18] The court in *Chow* also noted that a relevant factor in that case concerning both the admissibility of the evidence and the weight to be given to it was that there was no competing or contrary evidence.

[19] In this case the Justice of the Peace had sufficient evidence to conclude that officer Hanowski had properly tested the Lidar Laser device and that his opinion that the device was in proper working order was justified. The totality of the evidence demonstrated a circumstantial guarantee of trustworthiness and accuracy for the device. Notwithstanding officer Hanowski's lack of direct knowledge of the distance required for the testing of the device, in that he did not measure it himself, he was entitled to rely on the credible and reliable information he received from a fellow police officer regarding this distance used to test the device to ensure that it was in proper working order. The court was entitled to give this evidence some weight particularly when there was no contradictory evidence before the court. There

was therefore a reasonable body of evidence in this case that would permit the trier of fact to conclude that the offence had been made out to the exclusion of reasonable doubt. The Justice of the Peace made that finding and she was clearly entitled to do so based on the evidentiary record in this case.

Released: June 11, 2012

A handwritten signature in black ink, appearing to read "R. LeDressay". The signature is written in a cursive style with a large, looped initial "R" and a stylized "LeDressay".

Signed: "Justice R.J. LeDressay"