

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

MICHAEL GOODMAN

P.O.A. APPEAL

BEFORE THE HONOURABLE JUSTICE S. FUERTH
on April 23, 2009, at CHATHAM, Ontario.

CHARGES: s. 128 H.T.A. - Speeding

APPEARANCES:

F. Creed

M. Higgins

Counsel for the Crown

Counsel for accused

THURSDAY APRIL 23, 2009

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MR. HIGGINS: Thank you again, Your Honour.
Higgins, initial M, for Michael Goodman. No doubt,
Your Honour has read it. I'll be very brief. I'll
take you right to the issues.

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The Viegabatista issue, the Agnoletto issue are
both here, and I'm glad they are. You've gone
through the other cases and I'll be very quick on
that issue.

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The officer has indicated he was tested, trained
again by the Ontario Provincial Police. You've
made your ruling on that with regards to it. I
know where you put your position roughly on that.
You certainly have some knowledge of this issue.

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My main issues with this, is that in the evidence
in-chief the officer indicates that when he
observes the vehicle, it appears to be speeding and
there is a tractor trailer behind it. And this is
of course in his evidence in-chief. And he gives
us that tracking history on the Genesis unit on
page ten.

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During cross on page 16, my questions going from 10
to 20, and I'll read in there, question, "Indicate
to me exactly how far away the vehicle was when you
first observe it?" Answer, "Not in my notes, sir."
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Question, "Do you recall exactly how far away it
was when you first observed it?" "No, I do not
recall." Question, "In your indication, I would

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imagine without knowing how far away it was when you actually observed it, you have no notation or recollection of how far it was away when you first activated the radar?" Answer, "That is correct. I have no notation, I have no recollection, whatsoever."

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Now, on page 17, in cross, starting at about seven, I questioned, "This particular unit though, has a specific limitation for its accuracy, am I correct?" Answer, "As I understand yes, sir."
"And you're not able to tell us what that distance is?" Answer, "No, I couldn't tell you." Then he says, "Maybe a kilometre, maybe two kilometres."
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And again, "You're not able to tell us exactly?"
"Not for certain."

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Now, so what we have is the officer operating a radar unit on a motor vehicle. The distance of which he has no notation of, and absolutely no recollection of, which I think is the most incredible point, to be put forth to it.

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The officer indicates that he's trained and he's given a manual, at the bottom of 17, and that's the very bottom words, an O.P.P. manual. He's given that by the O.P.P. He's never compared that to a manufacturer's manual, on page 18. And again that goes for the Angnoletto issue, which, Your Honour
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has read up on speed with this morning.

Further down on 18, this is a very important point at line 18, on 18. My question, "Okay, you'd agree with me that operating the machine within its limitations is essential for accuracy, am I correct?" Answer, "Without a doubt, sir."

So, going through that information, what we have is; that the officer agrees that the machine has a limitation on distance, thinks its one to two kilometres but doesn't know, and has no recollection whatsoever of Mr. Goodman's vehicle. And what I find, just a little bit troubling - and I'm asking Your Honour, to really focus more on this than anything else, is on page 30.

And, sorry, when he is actually going on to - that's my submissions. The re-examination on page 20, which I find a little bit troubling, and that is at page 20, line 18. Mr. McIlroy says, "I believe your answer was there's a certain distance, your just not sure of it, and you think, you said a kilometre or two." Answer, "Effective range, yeah." Question, "And officer was the target motor vehicle being operated by the defendant, was it inside that effective range?" "Yes, I believe it was. I believe it was within one kilometre."

For someone to say conveniently, it's inside the range when he has no recollection whatsoever, of it I find it just a little bit troubling, especially in an absolute liability offence. You either remember this offence, you can testify to it, or

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you conveniently say, I don't know anything about it, I don't remember but, yup it certainly applies. Because it would've - and I'm presuming he's thinking, because otherwise I wouldn't have done it. We could read all those other answers into it, but given the answer given by the officer in both his initial cross I submit no weight should be given to that other answer on re-examination.

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What we have then is an officer indicating that it is essential for accuracy to be operated within limitations. He didn't have a manual with him on that day. That's in the cross. He has not operated the machine, I submit, on its face within the limitations that the court could rely upon.

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Given that, as I said I find it quite troubling that it is conveniently within the effective range. We have no estimate of the second vehicle, that tractor trailer, some 200 meters behind him which again, I find strange. How do you qualify a tractor trailer 200 meters behind when you don't know how far away your target vehicle is?

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Nor is there a vehicle estimate speed for the tractor trailer, whether it could have been operating in that rate of speed whether it was gaining or losing or - a little bit more detail. Given that, I think a reasonable doubt should have been raised. I know, Your Honour's read the transcript. That is the most salient point I see

in it, and the most troubling point, subject to any questions you have.

And, again the Agnoletto argument I made earlier, not having seen an original manual. What we have here as a final point is an officer who has trained about 6 months before this event, and he's already, from what I can see, operating the machine with certainly a limited scope of knowledge on it.

I use to teach these to Toronto police. They get manuals, they should follow them, and this is the way, I submit it really should be.

He should follow it. He should know the distance. He should know how far away that vehicle is, and conveniently later on you don't say, well yeah, it was inside the range.

If you have no recollection, and that's your honest answer, and I think it was, stick to it. Subject to any questions you have, my final submissions.
MR. CREED: I am going to deal with the issue that is phrased as the most salient issue that is before you.

My understanding in the submissions before you that is the one that defence is relying on, at least to a greater degree. And this is a matter that was raised at trial. Justice of the Peace Hoffman, I believe in the reasons starting on page 48 deals with it.

Now, near the last paragraph of that page of the distance, as I understand, that is the question. There is no evidence raised, or to contradict what the officer said as far as believing it was in - I believe that they use the word, effective range.

When he first asked some questions, he's asked how far - I believe the word is, do you know exactly, yes, "Indicate to me exactly how far this vehicle was when you first observed it?" was the first question. The emphasis is on precision.

So, it is understandable how an officer would not be able, I don't think we have officers out on the 401 with lasers being able to give that type of information. It simply isn't going to happen. But that is how my friend started his examination.

Then when the officer replies that way, because he is not in the position to say exactly, he clarifies it on re-examination. And that is accepted by the Justice of the Peace, and I urge you to do the same.

R E C E S S

U P O N R E S U M I N G:

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Reasons for Ruling

R E A S O N S F O R R U L I N G

FUERTH, J. O.C.J. (Orally):

In the case of Michael Goodman, the evidence of the officer was that he was trained at O.P.P. Headquarters by a person qualified in the use of radar devices.

He was using the device as part of his daily work, and experienced in its use in the field. The only attack on his qualifications was the fact that he was not trained by the manufacturer. As I have indicated earlier today, that is not a requirement or prerequisite for qualification.

Based on a consideration of the evidence as a whole, the Justice of the Peace accepted the evidence establishing the officer's qualifications to operate the radar unit. There is no reason to interfere with her finding.

The officer's evidence accepted by Justice of the Peace Hoffman, was that he tested the device both before, and after the use of the device in clocking Mr. Goodman. There was no reason to doubt therefore, that the machine was operating properly.

The findings of Justice of the Peace Hoffman, of the facts are entitled to difference upon appeal. That is clearly set out in case law and is a fundamental principle on appeal.

The issue in this appeal is whether Justice of the

Reasons for Ruling

Peace Hoffman's decision reflects any palpable error on the record.

The officer's evidence was that he did not know the distance that the vehicle was when the reading was obtained. At best he was able to give a broad estimate of the distance at one to two kilometres.

The officer also did not know what the effective distance for accuracy of the radar unit he was operating was on the day in question based on his training.

He gave evidence on reply that the defendants vehicle was within the effective range of the radar at the time that he obtained the reading. This evidence of the officer was conclusory evidence at its best. He did not know the effective range for accuracy of the radar unit, and consequently he could not possibly or reliably know, that the defendants car was within the necessary range for reliability and accuracy of the device.

While Justice of the Peace Hoffman's findings on the facts are entitled to difference, in this case I examined the reasons for decision that she gave.

Her reasons for decision do not reflect any consideration of the evidence with respect to the effective range of the radar, and whether the defendants vehicle fell within that effective

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Reasons for Ruling

range. She failed to deal with that evidence in coming to a determination of the facts in this case which I believe is a palpable error on the record.

In my view, fairly assessing the evidence of the officer in this case, the evidence is unclear as to exactly how far the car was when he clocked the vehicle. I am certainly of a view, that there was a reasonable doubt as to whether or not this vehicle was within the effective range of the radar at the time that the clocking occurred.

In those circumstances, I would grant the appeal and dismiss the charge.

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Certification

FORM 2

CERTIFICATION OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

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15 original of which has been certified in Form 1.

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Date

June 3/09

Court Reporter

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