

ONTARIO COURT OF JUSTICE

B E T W E E N :

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— AND —

RUSSELL L. HAWKINS

2009 ONCJ 101 (CanLII)

Before Justice of the Peace M.A. Cuthbertson
Heard on 3 October 2008
Reasons for Judgment released on 6 January 2009

Charge: Section 128, HTA - Speeding

Cases cited:

R v Bigioni, [1998] O.J. No. 2220
R v Colangelo, [2007] O.J. No. 407
R v Desgagne, [1997] A.J. No. 1307
R v Fliss, (2002), 161 C.C.C. (3d) 225; 209 D.L.R. (4th) 347
R v Gwozdowski, [1973] 2 O.R. 50
R v K.G.B., [1998] O.J. No. 1859
R v Martin, [2008] O.J. No. 2709
R v Muise, [1974] 22 C.C.C. (2d) 487
R v Nauma Kassam, [2007] O.J. No 2104
R v Vancrey, [2000] O.J. No. 3033

References cited:

Eliciting Evidence from the Reluctant, Adverse or Hostile Witness" by Marilyn Bartlett

R Murray **for the prosecution**
M Lawrie **for the defendant**

JUSTICE OF THE PEACE CUTHBERTSON:

1: THE BACKGROUND

[1] On 13 January 2008, at approximately 10:58 AM, Ontario Provincial Police (OPP) Officer S. Vallier was conducting speed enforcement, with a Genesis VP radar device, at Wellington Rd 109 and Concession 9 of Mapleton Township in Wellington County. He testified that he was a qualified operator of that radar unit and had tested the device both before and after the traffic stop, according to the manufacturer's specifications. After each test, he was satisfied that the Genesis radar unit was operating correctly.

[2] Officer Vallier observed an eastbound motor vehicle travelling at what he visually perceived to be a higher rate of speed than the permitted speed of 80 kilometres per hour (kph) zone, as posted for that stretch of the highway.

[3] He activated the radar device by the use of the trigger and locked three readings of 109 kph each, as the speed of the approaching vehicle. This motor vehicle was the only one in the radar beam and in fact the only one in his line of sight. He subsequently stopped the car without losing sight of it.

[4] The male driver provided a valid Ontario Driver's licence with photo, in the name of the defendant. The officer was satisfied that the photo was of Mr Russell Hawkins.

[5] The defence chose not to call evidence.

2: ISSUES BEFORE THE COURT

[6] This matter revolves around whether PC Vallier properly followed all of the requirements of the manufacturer when using the Genesis VP radar. The Prosecutor submitted that the police officer properly operated it when he targeted Mr Hawkins vehicle.

[7] The Defence submitted Officer Vallier did not perform a 'tracking history' procedure, as required by the manufacturer, before locking the speed of the car, on the unit. Mr Lawrie further submitted that the Officer had no reliable memory of hearing the tone, which forms part of the tracking history before activating the radar device.

[8] The issues require analysis.

2.1 What testing of a laser speed detection device is required for a speeding charge?

[9] In *R v Bigioni*, [1998] O.J. No. 2220 and *R v Vancrey*, [2000] O.J. No. 3033, the Ontario Court of Appeal (OCA) made findings on standards required for the Crown to make a prima facie case for speeding where speed measuring devices are used. In *Vancrey*, the OCA expanded on its earlier decision concerning the testing of radar units in *Bigioni*. The Court held in paragraph 22 :

In my view, the position of the Crown is correct. The court received evidence that the officer who operated the laser device was trained and experienced and that he tested the device both before and after its use in accordance with the manufacturer's instructions to

ensure that it was operating properly on the date in question. The court also received evidence of the accuracy of the device for measuring the speed of vehicles on a highway by comparing its readings with those of an accurate radar unit. The radar test provides the independent guarantee of the accuracy of the particular laser unit to measure the speed of a moving vehicle.

[10] These requirements were recently reconfirmed by the Ontario Court of Appeal in *R v Martin*, [2008] O.J. No. 2709, when Blair, J.A., writing for the Court in a denial of leave to appeal in a s.128 HTA case, stated:

It is pretty clear from *Vancrey* and from this court's earlier decision in *R. v. Bigioni* [1988] O.J. No. 2220 (C.A.), however, what evidence has been found to be sufficient on the issues raised in this case.

[11] In the matter at bar, this Court accepts that Officer Vallier as a qualified operator did conduct a standard test to verify the operating capabilities of the device, according to the manufacturer's specifications both before and after the speed enforcement stop. In both instances the device was found to be working correctly.

2.2 What is a Tracking History and is it required for a speeding charge?

[12] Exhibit 1 sets out page 30 of the Genesis-VP User's Manual. This manual is a product of the manufacturer of that particular radar unit. It states:

6.4 Tracking History

For each enforcement action taken by the police with respect to a speeding offence arising out of the use of this radar unit a tracking history must occur. The tracking history shall consist of:

- 1) A Visual Observation of an approaching or receding Motor Vehicle that appears to be in excess of the posted speed limit in the area and an estimation by the officer of the speed of that motor vehicle is traveling. Generally, skilled officers are able to estimate the speeds of moving motor vehicles within plus or minus 5 Km/H per hour of the actual speed. This is an acquired skill that is taught on the basic operators course.
- 2) Having made the visual observation and estimate of the rate of speed, the radar unit will be placed in the operational mode.
- 3) Note, that the target displayed on the radar unit is consistent and confirms the officers initial observations and estimate, and that the audio tracking tone emitted by the radar unit is consistent with the visual observations and the target speed displayed.
- 4) Absence of any one of the above tracking history components and NO ENFORCEMENT ACTION shall be undertaken.

[13] It is clear from the Tracking History description in Exhibit 1 that the position of the manufacturer is an officer may not lay a speeding charge unless all of the components of the tracking history exist.

[14] There is case law that illustrates the importance of a tracking history. In *R v Desgagne*, [1997] A.J. No. 1307, Constable Parsons of the Royal Canadian Mounted Police (RCMP) gave evidence on a speeding charge. Cst Parsons was a certified instructor for the RCMP in radar. At the time of the offence he had over 10,000 hours of operation of radar. The constable was operating what was described at paragraph 189, as a ‘Decater Genesis’ radar unit, which I understand to be similar to the radar unit, in the case at bar.

(NB: This Court believes the correct spelling of the manufacturer’s name is Decatur).

[15] Cst Parsons, in paragraphs 180 through 198 of *Desgagne*, described his actions in maintaining a tracking history with elements similar to those of Exhibit 1, on a target motor vehicle prior to laying a speeding charge. Having accepted the evidence, Reimer J., convicted Mr Desgagne of the offence of speeding.

[16] From *Desgagne*, I draw the following conclusions:

(a) A tracking history is considered to be a necessity by a very experienced RCMP radar instructor before laying a charge, when operating a Genesis radar speed detection device.

(b) The evidence of the tracking history was a requirement to satisfy the Court that the Crown had proven its case, beyond a reasonable doubt.

[17] A plain reading of the Tracking History in Exhibit 1 indicates to this Court that the tracking history provides one final test to ensure the operator that the unit is functioning accurately. In support of this view, I note that the Tracking History requires that once the unit is placed in operational mode, then the operator must ensure ‘that the target displayed on the radar unit is consistent and confirms the officers initial observations and estimate, and that the audio tracking tone emitted by the radar unit is consistent with the visual observations and the target speed displayed’. Only then can enforcement action be taken.

[18] In my view, an officer operating a speed detection unit, for which the device’s manufacturer requires a tracking history, is obligated to follow this part of the manufacturer’s instructions, as well as all others.

[19] I note that the prosecution did not take a contrary position on this issue.

2.3 Did Officer Vallier conduct a Tracking History?

[20] Officer Vallier testified during the qualification of his notes that he had an independent recollection of the events but everything he recalled was disclosed to the defendant in his notes.

[21] In cross examination, the officer testified initially that he had never heard of the term ‘tracking history’. When pressed on the issue of what a tracking history is, he stated “I thought you were saying something like tracking our records as in something to do with the radar unit.” When asked again whether he had heard of the term, he then agreed that he had. When asked if he knew what it means, he stated: “Not completely. Some people refer to this to like tracking a target motor vehicle and observation – a visual observation.”

[22] After reading Exhibit 1, Officer Vallier was asked if he had previously seen it. He stated: “Yes. At some point I must have read it but...”

[23] The officer then agreed that the audio tone must be consistent with the visual observations of the speed of the vehicle, as a necessary part of the tracking history. Officer Vallier further testified that the Genesis VP radar unit has a volume control which can be selected to be either on or off. As well, it has five different levels of volume. Additionally he indicated that the audio tone would increase in pitch depending on the speed of the vehicle. Effectively, a unique higher pitch would indicate a unique higher speed. He acknowledged that he had not testified as to whether he heard an audio tone nor had he recorded any such tone in his notes.

[24] Then, in further re-examination, the officer stated he recalled hearing a tone and that he had estimated the speed of the vehicle as approximately 110 kph, prior to activating the radar unit.

2.3.1 Did Officer Vallier hear an audio tone?

[25] Not surprisingly, Mr Lawrie and Mr Murray took opposing views as to whether Officer Vallier’s testimony of hearing of a tone was reliable. Mr Lawrie’s view was that the Officer’s earlier statement that his entire recollection of the traffic stop was disclosed in his notes, made the testimony suspect. Mr Murray took the view, as the officer had an independent recollection of the tone, the Court could rely on it.

[26] I will approach this issue by considering the case law regarding Present Memory Refreshed. In *R v Colangelo*, [2007] O.J. No. 407 Lampkin J., in an appellate decision regarding an officer refreshing his or her memory, held:

33 A somewhat similar issue as in the case at bar came before Mr. Justice Nadel of the Ontario Court of Justice as recently as April 18th, 2007 in *R. v. Nauma Kassam* [2007] O.J. No. 2104. The authority is persuasive and not binding upon me. However I endorse what Justice Nadel has stated and refer to certain passages of his judgment. In paragraph 32 he states as follows:

- There are in my view two answers to the complaint made by Mr. Houlahan on behalf of Mrs. Kassam. The first and most significant is that Mr. Houlahan's submission that a witness must have an independent recollection before he is entitled to have that recollection refreshed and become greater or more clear is not in accordance with binding authority, and it is that error that has caused him to make the submissions that he has made The second answer to his complaint is

one that is also shown in the authorities, namely that once notes are qualified and allowed to be used the question of the bona-fides of the professed present recollection is a matter for the trier of fact to consider and a matter for the trier of fact to weigh. The authorities also disclose that.

34 His Honour then reviewed an article titled "Eliciting Evidence from the Reluctant, Adverse or Hostile Witness" by Marilyn Bartlett, an Assistant Crown Attorney, as well as *R. v. Gwozdowski*, [1973] 2 O.R. 50; *R. v. K.G.B.*, supra; *R. v. Muise* [1974]. 22 C.C.C. (2d) 487; and *R. v. Fliss* (2002), 161 C.C.C. (3d) 225; 209 D.L.R. (4th) 347 (S.C.C.), following which he stated:

- I take it from the passage from Fliss and from the passage from K.G.B. that it does not matter if a witness has no present or current recollection before that witness' recollection is sparked by reference to some other item, whether it is a piece of music, or a person, or in most cases some item written by him, or confirmed by him to be accurate. It is that item which then is the spark that revives the recollection.
- So I reject the formulation submitted by Mr. Houlahan that there is some obligation in law that a witness must have some independent recollection before that witness is entitled to have the recollection revived by reference to an aide-memoire; rather, it is the aide-memoire which allows a current recollection to be revived.

[27] Based on *Colangelo*, I accept that almost anything can 'spark' a memory but it is up to the trier of fact to determine the weight to be placed on the evidence.

[28] I reject Mr Lawrie's view that despite Officer Vallier having an independent recollection of the events, his testimony that all of his recollections were contained in his notes, precluded him from testifying on anything outside of that which was contained in those notes. In my opinion, there is nothing which prohibits Officer Vallier to have his memory refreshed not only by his notes but also to have his memory sparked to additional details, as the trial progresses.

[29] However, the weight which this Court places on that testimony is another matter. From the testimony reviewed above, I am satisfied that Officer Vallier was unfamiliar with what a tracking history is, what its essential components are and the requirement for it, prior to using the radar unit for enforcement purposes. His evidence on hearing a tone was never volunteered rather it had to be extracted in extended re-examination by Mr Murray. When finally provided, his memory of hearing the tone rang more of wishful thinking than of certainty.

[30] There were additional doubts generated on the issue of hearing the tone. The officer stated that the tone could be turned on or off and yet never testified that it was turned on. As well, if it was turned on, the Court was never advised as to what volume control level to which the device had been set. Under other circumstances, these issues may not have been definitive but when considered with the totality of the less than credible testimony around the hearing of the tone, they further detract from the reliability of the officer's memory of

hearing it.

[31] Finally, despite Officer Vallier’s testimony he heard a tone, no evidence was led “that the audio tracking tone emitted by the radar unit is consistent with the visual observations and the target speed displayed”, as required by the manufacturer in the Tracking History.

3: DECISION

[32] This Court finds that the requirements set in the manufacturer’s Tracking History for the Genesis VP radar speed measuring device, as set out in Exhibit 1, are required tests to be performed by an operator before enforcement action is undertaken.

[33] I find that the requirements of the Tracking History were not properly followed. Therefore, the tests required by *Bigioni*, *Vancrey* and *Martin* were not met.

[34] I also find that no weight can be placed on the evidence of the officer that he heard an audio tone.

[35] This Court is therefore, left with a reasonable doubt as to whether the radar device was working properly and/or properly operated.

[36] Consequently, the charge is dismissed.

Released: January 6, 2009

Signed: “Justice of the Peace M.A. Cuthbertson”