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① R. v. Mahaney

¶ 1 On March 11, 2005, Justice of the Peace Ballam dismissed a charge of speeding, 110 kilometres an hour in an 80 kilometre per hour zone, against the Respondent, Ryan Mahaney. The arresting officer, Ontario Provincial Police Constable Hoogerdyk, was not permitted when testifying at trial to refresh his memory from his notes, but only from his memory, with the result that Justice of the Peace Ballam found the Crown had not proven its case beyond a reasonable doubt. Constable Hoogerdyk was the only witness called at the trial. The City of Kawartha Lakes appealed.

¶ 2 A photocopy of the officer's copy of Offence Notice Number 75946884 (the form for the Enforcement Agency Record) and a photocopy of the officer's template, completed by him and glued to the back of the document (titled Enforcement Agency Notes) was made Exhibit Number One on this appeal. It was agreed between the Appellant and the Respondent that the Respondent need not attend at the appeal, since the only issue is on a point of law.

THE ISSUE:

¶ 3 The only issue is whether or not the learned Justice of the Peace Ballam erred in law by not permitting the police officer to refer to his completed template when giving evidence in order to refresh his memory as to the particulars of the speeding offence.

DECISION:

¶ 4 Provincial Constable Hoogerdyk testified that the document that is part of Exhibit Number One and referred to in this judgment as the "template" was developed by him in response to complaints about his handwriting. His practice is to complete the pre-printed template at the time of the incident, at the time of writing out the Offence Notice. He fills in the blanks where applicable and then glues it to the back of the ticket titled "Enforcement Agency Record" of the ticket, which he keeps as his copy of his notes. It is subsequently disclosed to the Defendant.

¶ 5 An officer's notes, notebook, dash pad notes or completed templates are not evidence. They are used as an aid to refresh the police officer's memory as to pertinent details such as time, place, sequence of events, serial numbers, descriptions, and any utterances. With police officers issuing so many tickets each day for all kinds of provincial offences, they need a format or aid that they can follow when testifying, so that they can describe the relevant particulars of the case at trial. They use their notes to refresh their memory, provided that the following three main conditions precedent are met:

- 1) the notes or aids were made at the time of the incident or shortly thereafter;
- 2) there were no changes, additions, alterations or deletions since the making of the notes originally; and,
- 3) the officer has an independent recollection and needs his notes to refresh his memory.

¶ 6 I do not see that it makes any difference if he starts with his own template that he has developed, provided no changes are made after he glues it onto the back of the record. In other words, no replacements are made.

¶ 7 If the notes themselves were intended to be entered as evidence, then it would not be an error to require the bar to be raised higher before their admission; but the notes are to refresh the police officer's memory only, not as evidence.

¶ 8 I find that the learned justice of the peace did err when curtailing Provincial Constable

Hoogerdyk's use of his notes (the template) in order to refresh his memory because, in this case, the conditions precedent were met by the police officer.

¶ 9 Accordingly, the appeal will be allowed, and the dismissal will be set aside. Now, with respect to setting a new date for the trial.

¶ 10 MS. PAGE: I would suggest if the matter could go to As Your Honour has indicated earlier in the decision, it is not the City's intention to proceed with the charge against Mr. Mahaney. Ultimately, if it goes back to POA court, we will be asking the charge be stayed, and perhaps I could make that request at this point in time.

¶ 11 THE COURT: All right. Based on the prior agreement with the Respondent, the charge will be stayed.

¶ 12 MS. PAGE: Thank you very much, Your Honour.

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