

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

(Respondent)

v.

EMMALEE MANICCIA

(Appellant)

P.O.A. APPEAL
P R O C E E D I N G S

BEFORE THE HONOURABLE MR. JUSTICE BENNETT
on June 15th, 2004, at HAMILTON, Ontario

CHARGE: Disobey Stop Sign

APPEARANCES:

G. Murphy

Representative for
the City of Hamilton

S. Pelaccia

Agent for Appellant

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Tuesday, June 15, 2004

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MR. MURPHY: I understand that there's an agent here for the matter of Maniccia. It appears as number 23 on the docket.

MR. PELACCIA: Good morning, Your Honour.

THE COURT: Yes, good morning.

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MR. PELACCIA: The last name for the record is Pelaccia, spelled P-E-L-A-C-C-I-A, initial S. I'm appearing as agent for the appellant who is not before the court. I do have instructions to proceed in her absence, Your Honour.

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COURT CLERK: I'm sorry, P-E-L-A-C-

MR. PELACCIA: C-I-A.

COURT CLERK: Thank you.

MR. PELACCIA: Initial S, thank you. Your Honour, this is a defence appeal and....

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THE COURT: Is there a transcript here?

MR. PELACCIA: No, it's a deemed not to dispute conviction pursuant to section 9 of the *Provincial Offences Act*, Your Honour.

THE COURT: I see.

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MR. PELACCIA: And essentially the grounds of the appeal are that the learned justice of the peace erred in entering a conviction when the certificate was not complete or regular on its face. I'd like to draw your attention to the certificate itself, Your Honour, and in particular the section that appears - the section that appears in this particular certificate is section 136(1)(a).

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THE COURT: Just let me....

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MR. PELACCIA: Certainly.

COURT CLERK: Did you file this caselaw for His Honour?

THE COURT: Yes, I have it here.

MR. PELACCIA: Yes. I've actually organized it - I've bound those cases. Maybe this might be a better....

THE COURT: Okay.

MR. PELACCIA: If I can pass it up to Madam Clerk?

COURT CLERK: Thank you.

THE COURT: To fail to yield to traffic, 136(1)(a), yes.

MR. PELACCIA: 136(1)(a) is actually an offence for failing to stop at a stop sign, Your Worship - excuse me - Your Honour.

THE COURT: Right.

MR. PELACCIA: And essentially it's not consistent with what appears in the wording of the offence. The section is incorrect and for those reasons, Your Honour, the justice of the peace when reviewing a certificate of offence pursuant to section 9 of the *Provincial Offences Act* shall review it and only if the certificate is complete and regular on its face, shall enter a conviction and, if it's not complete and regular on its face, shall quash the certificate. There are no powers of amendment at that stage. It goes before a justice of the peace in an office and it's dealt with administratively. And section 9 sets out quite clearly what a justice of the peace shall do if the certificate is not complete and regular on its face.

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Now essentially, Your Honour, I'm relying on some cases, some Appeal Court decisions, to support the defence's - the appellant's position that the certificate should have been quashed. I'd first be relying obviously on section 9 of the *Provincial Offences Act*, which states quite clear that only if the certificate of offence is complete and regular on its face shall the justice enter a conviction and, if it's not, shall quash the proceedings.

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Now, Your Honour, the four cases that I would like to rely on, the first one beginning at tab one is the case of *R. v. Xinos*.

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COURT REPORTER: Could you spell that name please?
MR. PELACCIA: Certainly, it's X-I-N-O-S. And it's a decision from Judge August back in February of 1996. Now this is a situation where the section was incorrect. The section that appeared on the certificate was section 109, however the section should have been section 128.

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This was a case that was considered by the Crown in that, under section 9 the certificate was not complete and regular on its face and a quashing should have taken place, and the actual appeal was granted and the conviction set aside.

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The second case I'd be relying on, Your Honour, is the case of *R. v. Eugene Dopp*, last name....

THE COURT: These are matters where in fact people are tried in absentia?

MR. PELACCIA: They are matters where defendants do

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not appear at trial or do not apply for trial dates and so they are subject to section 9 of the *Provincial Offences Act*.

THE COURT: So these are all under section 9 where in fact a justice of the peace can make a finding without the accused being present?

MR. PELACCIA: Correct. They are basically a default conviction.

THE COURT: Okay.

MR. PELACCIA: And I'd submit that section 9, the wording of section 9 is such, as a safeguard in light of the fact that a default conviction may be entered, to ensure the certificate is complete and regular on its face.

In regards to the second case, Your Honour, it deals again with a similar situation, a section 9 conviction, a deemed not to dispute conviction where this section is not present. And His Honour, Judge Allen, ruled in that particular case that the justice of the peace had no jurisdiction, pursuant to section 9, to enter a conviction and that the actual certificate should have been quashed.

MR. MURPHY: Sorry, if I might interrupt, is that the matter of Eugene Dopp?

MR. PELACCIA: That's correct.

THE COURT: Dopp.

MR. MURPHY: D-O-P-P?

THE COURT: Yes.

MR. PELACCIA: On page four, Your Honour, line - I believe it's three, His Honour goes on to say, I've examined the certificate, no such number is included,

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I agree with the submission and, on that basis, in my view, the justice had no jurisdiction, so the conviction is set aside.

The third case I'd like to rely on, Your Honour, is the case of *R. v. Wilson*, spelled W-I-L-S-O-N. This is a case from London...

THE COURT: Yes.

MR. PELACCIA: ...where Judge Livingstone...

THE COURT: Right.

MR. PELACCIA: ...ruled on this particular issue in regard to section 9 and defects that appear on certificates and on page - paragraph 21, His Honour sets out specific information that must be present in order for there to be a conviction pursuant to section 9.

THE COURT: Is that paragraph...?

MR. PELACCIA: Twenty-one.

THE COURT: Twenty-one, right. This is her - in her judgment she indicated what was necessary to be regular on its face, is that correct?

MR. PELACCIA: Correct. And she goes on to indicate....

THE COURT: Statute name and statute number.

MR. PELACCIA: That's correct, Your Honour. And essentially, in her ruling, although the appeal dealt with other issues, such as service or what have you, she did set out what should appear in order for there to be a conviction pursuant to section 9 of the *Provincial Offences Act*.

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5 And the fourth case I would like to rely on is a recent case from Newmarket, a decision of R. v. Bargis, spelled B, as in Bob, A-R-G-I-S. And it dealt specifically with a certificate, where a conviction was entered pursuant to section 9 of the *Provincial Offences Act*, where the certificate had an incorrect section number and essentially the error was, instead of the certificate reading section 106(3), it indicated section 106(2), which was inconsistent with the wording on the certificate itself. Judge Armstrong ruled that this was an error, that it was not complete and regular on its face, and went on to indicate exactly what is considered regular on its face and complete, and essentially, in this particular case and on page 3, line 26:

10 However, in this case the section number contained an error. It specifically stated 106(2) instead of 106(3). I find that this error was something that was in conflict with the description and cannot be said to be - and here I am quoting Justice Daudlin's phrase, surplusage, in no way confuses. I find that the conflict was something which could not be said to in no way confuse and, given the scheme of the Provincial Offences Act and the premium that is put on the form in the context of default conviction proceedings, this conviction cannot stand.

30 And essentially the appeal was allowed and the certificate was quashed, Your Honour.

THE COURT: All right.

MR. PELACCIA: I would submit this particular case

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5 is - or, these appeals are on point with this particular appeal, the case at bar, Your Honour. I'd submit that this certificate should have been quashed pursuant to section 9 of the *Provincial Offences Act* and I'd ask that this appeal be granted for those reasons.

THE COURT: Thank you. Yes, Mr. Murphy?

10 MR. MURPHY: Just a couple of points, Your Honour. First of all, in regards to the first case that my friend spoke about, that was the matter of Xinos, X-I-N-O-S and that dealt with the issue of the section number. In that particular matter the section number is completely wrong, 109, 128. Those are the two section numbers.

15 THE COURT: Right.

20 MR. MURPHY: I submit that's distinguishable from the matter at bar today. I don't have the last case that my friend spoke about, but the matter of Eugene Dopp, in that particular matter there was no section number included on the certificate of offence at all. Clearly that's not complete and regular on its face.

25 In regards to the last or the second last matter, *R. v. Wilson*, at paragraph 21, indeed it does set out what process the justice of the peace ought to go through with respect to a certificate of offence when you're reviewing it from the perspective of fail to respond or deemed not to dispute docket. And it says what the process is - sorry - at paragraph 21. From that definition I conclude that the certificate....

30 THE COURT: You are referring to what now?

MR. MURPHY: This is *Wilson*, Your Honour.

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THE COURT: Yes.

MR. MURPHY: Paragraph 21. I think it's on...

THE COURT: Yes.

MR. MURPHY: ...page three.

"From that definition, I conclude that the certificate of offence, to be 'regular on its face' must set out:

who is commencing the process - an informant;

who is charged under the process - name of the defendant;

what the process is - statute name and section number...."

THE COURT: Right.

MR. MURPHY: In this particular matter, we do have all of those items, including the section number.

THE COURT: But it is an incorrect section number, Mr. Murphy. That is the point.

MR. MURPHY: I don't disagree, Your Honour.

THE COURT: And that is the point. I mean, it has to be correct.

MR. MURPHY: And I just made a copy of certain sections of the *Provincial Offences Act* that I could perhaps refer Your Honour to. For the benefit of the court, section 9 is right at the top, which deals with the default process.

Then I might refer you to the very bottom of the first page, section 34 deals with powers of amendment with respect to certificates of offence, and it says:

"The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

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(a) fails to state or states defectively anything that is requisite to charge the offence;....
(c) is in any way defective in substance or in form."

So I would submit, Your Honour, that it's codified in the sense that at any time during the process, and I submit that includes the deemed not to dispute provision or the fail to respond provision.

THE COURT: But that did not take place, Mr. Murphy.

MR. MURPHY: Sorry?

THE COURT: That did not take place before the Justice made a finding.

MR. MURPHY: I agree.

THE COURT: In default - yes, if he had amended it prior, then maybe this argument may not have proceeded.

MR. MURPHY: Fair enough.

THE COURT: But he did not. So I mean, frankly, one has to fall back on section 9.

MR. MURPHY: Okay. If I might just direct Your Honour to one other section. It's over on, I think, the last page of the three pages I gave to you, and it deals with section 90, and it says:

"The validity of any proceeding is not affected by... any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance...."

And I submit that the wording that's used in the certificate of offence, it's the wording set out by the regulation, regulation 950, that says that this

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is the appropriate wording for fail to yield to traffic on through highway.

5 The defendant is directed, or the justice of the peace in the circumstances is directed to section 136, which includes not only disobeying the stop sign, but failing to yield to traffic on the through highway, and I submit that....

10 THE COURT: Have you got section 136(1) of the *Highway Traffic Act*?

MR. MURPHY: I do. Well, I have the H.T.A. here.

THE COURT: Okay.

MR. PELACCIA: I can pass it to Your Honour.

15 THE COURT: I just have the *Ontario Provincial Offences Act*.

MR. MURPHY: There's 136....

MR. PELACCIA: We're talking about the *Highway Traffic Act*, Your Honour.

20 THE COURT: Yes.

MR. MURPHY: 1(a) and 1(b). It falls under 1(b). And I don't disagree that the sub-subsection is incorrect in the circumstances, but I submit that it's not of such a significant nature that the justice of the peace ought to quash the certificate. It's minor in nature, it's directed to the correct section that deals with the offences of failing to stop or failing to yield. Those are my submissions.

REASONS FOR JUDGMENT

BENNETT, J.:

Thank you very much, Mr. Murphy. That seems to be contrary to the caselaw that has been established in connection with proceedings under s.9 of the *Provincial Offences Act*. Other justices have had an opportunity, in reviewing this particular section, to make a determination of the meaning of the wording as set out in s.9(1)(a):

"Where the certificate of offence is complete and regular on its face the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine.

(b) Where the certificate of offence is not complete and regular on its face the justice shall quash the proceedings."

It is fairly clear.

In connection with this matter I am going to rely upon the two judgments that have been presented to this court.

In *R. v. Wilson* [2001] O.J. No. 4907, a decision of Madam Justice Livingstone in London, she had an opportunity to review many appeals in connection with *Wilson* and came to a conclusion, having reviewed the caselaw, although this matter does not specifically relate to *Wilson* in terms of her findings; what she did determine, however, was, to be regular on its

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face the certificate of offence must set out - one of the criteria is statute name and statute number. It is fairly clear.

Justice Armstrong in the matter of *R. v. Bargis* dealing with a similar situation - in that particular case, that is, the *Bargis* matter, the driver was issued a certificate of offence dealing with the offence of fail to wear a complete seatbelt assembly contrary to s.106(2). The subsection number was incorrect. It should have been 106(3). So that is on all fours...

MR. MURPHY: It is.

THE COURT: ...with the situation before this court today. And he goes on to say:

"There is a very significant difference in the case where a defendant appears at trial and default conviction proceedings, such as this case, where the defendant did not appear. In this case where the defendant did not appear, he must therefore be deemed not to dispute the charge as mandated under s.9.1(1). The justice of the peace was therefore required to act in the defendant's absence under s.9.1(2), and examine the certificate to determine whether it was complete and regular on its face."

Then he referred to Justice Blacklock's decision in *R. v. Singh*, which sets out the following:

"That section is an exceptional section, in that it permits the justice of the peace without any evidence at all to convict an accused person who does not

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appear, and it seems to me that to invoke that exceptional power and section requires compliance with its terms."

As a result, there was some conflict. Section 9.1 was not complied with. It is an exceptional provision and I intend to quash the conviction.

MR. MURPHY: Thank you, Your Honour.

MR. PELACCIA: Thank you, Your honour. I thank my friend.

Form 2
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I, Tricia Reed, certify that this document is a true and accurate transcript of the recording of R. v. Maniccia, in the Ontario Court of Justice held at 45 Main Street East, Hamilton, Ontario taken from Recording No. R17-148-04, which has been certified in Form 1.

August 23, 2004


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