

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under clause 116(2) (a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

MICHAEL MCLACHLAN
Appellant

Before Justice Paul H. Reinhardt
Heard on 24 & 26 July 2006
Reasons for Judgment released on 31 August 2006

Jeunesse Hosein for the respondent
James A. Girvan for the appellant

On appeal from a conviction by Justice of the Peace Robinson on 3 November 2003.

REINHARDT J.:

[1] Michael McLachlan was convicted after trial for speeding 136 kilometres per hour in a posted 100 kilometres zone on 30 January 2003.

[2] The prosecution called one witness, Ontario Provincial Police constable David Aucoin, who testified that on 30 January 2003 at 11:30 a.m. he was on Highway 400 south of Steeles Avenue in Toronto with his vehicle parked on the far left shoulder of Highway 400 southbound next to lane number one which is the passing lane in a posted 100 kilometres per hour maximum zone.

[3] Constable Aucoin testified that he was watching for speeders. He testified that he is a trained and qualified laser operator and instructor and was operating a laser Marksman LTI 2020, serial number 01147 on which he has received training in its use and has taught the use of this instrument of members of the Ontario Provincial Police. He testified that he has

received certification from the manufacturer as a qualified user of this instrument and has “shot” approximately 15000 motor vehicles with the instrument.

[4] Constable Aucoin testified that at 7:28 a.m. that day he tested the instrument according to the manufacturers’ instructions and found it to be in working order and at the end of his day he re-tested the device according to the manufacturers’ instructions and found the instrument to be still working properly.

[5] Constable Aucoin testified that at 11:30 a.m. he observed a blue P.T. Cruiser motor vehicle travelling in the passing lane coming towards him. He testified that the car was moving faster than any other vehicle in his sight so he aimed the laser device directly at the front grill and activated the device, which gave a speed reading of 136 kilometres per hour from a distance of 330.7 metres away.

[6] Constable Aucoin testified that there was no debris or obstruction interfering with the working of the device. He also testified that he never lost sight of the motor vehicle and after obtaining the reading he placed the laser device on the front seat of police cruiser without taking his eyes off the motor vehicle and stood on the shoulder, close to lane number one and motioned the driver to pull over and stop, which the driver did.

[7] The driver provided his identification and driver’s licence in the name of Michael McLachlan of Toronto, and he was charged accordingly, with speeding.

[8] The defence called no evidence at the trial.

[9] In this appeal, the defence raises four issues:

- 1) Was Constable Aucoin a properly qualified expert?
- 2) Did Constable Aucoin properly test the device?
- 3) Should the device have been tested with a conventional radar device?
- 4) Did the crown prove the case beyond a reasonable doubt?

[10] On the first point, the defence submits that the officer must provide the court with his actual credentials in the form of a certificate or other documentation and cannot just state that he is qualified and has received certification.

[11] Constable Aucoin testified that he tested the instrument “according to the manufacturer’s instructions” both before and after he used the instrument to establish Mr. McLachlan’s speed. In cross-examination he testified that there are four steps required by the manufacturer and they conclude with the pointing the laser at a stationary object a known distance away and obtaining a reading of that distance. He testified that he did this sequence of steps both before and after he used the laser instrument on the highway.

[12] In cross-examination Constable Aucoin conceded that he did not test the instrument with a conventional radar device and that he did not test the instrument on a moving object. He testified that the manufacturer does not require these two forms of testing.

[13] Under the fourth point the defence made two arguments. Firstly, on the evidence, the officer could not say with certainty that there was not a false reading due to debris and did not conduct a second test on the car prior to stopping the vehicle. Secondly, the defence argues that the maintenance records for the machine were not produced at trial, and therefore there was a possibility of a malfunction.

1: The Case Law

[14] On the question of the officer's credentials, the defence relies on the Manitoba Court of Appeal decision in *R. v. Tummillo* [1998] M.J. No. 311. In that case a speeding conviction was set aside in part because the prosecution had not established at trial that the officer was an expert. The officer's expertise had to be established in that case because there was no other way of establishing that the laser device was working properly. In *Tummillo*, the Manitoba Court of Appeal rejected the prosecution evidence on the operation of the laser device because a procedure for certifying the accuracy of any particular laser device was provided for in the governing provincial legislation. The legislation provided for the appointment of qualified testers and for the reception of a certificate of such a tester certifying as to the accuracy of the device to be relied upon in any particular case. At the time of the decision in *Tummillo*, no such tester had been appointed.

[15] In *Tummillo* the Manitoba Court of Appeal also questioned whether a stationary object test was scientifically valid. This was done without any evidence and seems to be premised on the proposition that because the prosecution could not rely on the qualified tester certificate the prosecution needed to call an expert on this point or establish that this type of test was approved by the manufacturer.

[16] I have concluded that the trial justice in this case, Justice of the Peace Robinson, was entitled to rely on the officer's statement of his qualifications without further written proof. The evidence of the officer in fact goes beyond simple certification, as he testified that he has been an instructor for the Ontario Provincial Police and has used the instrument 15000 times. This is ample evidence of his qualifications. In my view, the filing of a certificate is not required in Ontario and Justice of the Peace Robinson was correct in his conclusion that the officer was qualified to operate the laser device.

[17] On the question of what the prosecution needs to show to establish that the particular instrument was working properly, there has been a bit of an evolution in the case law regarding the use of laser technology in the traffic courts in Ontario.

[18] At one time some judges in the Ontario Court of Justice treated laser devices as "novel technology" and therefore concluded that, in addition to the manufacturer's recommended tests the laser device must be tested independently through a "comparison test" with an older technology, a radar device. This was the conclusion in *R. v. Wong* [2000] O.J. No. 1442 and *R. v. Bourne* [2001] O.J. No. 2869 where Justices Terry O'Hara and James Karswick decided that the prosecution needed to provide scientific evidence of the independent verification of the accuracy of the laser device. A notable dissent from this view was articulated by Justice Gregory Pockele in *R. v. Mukasa*; *R. v. Spinosa*; *R. v. O'Brien*

[2001] O.J. No. 262, where Justice Pockele concluded that laser speed detection was no longer a novel form of technology and did not need to be tested scientifically against older and proven technology. In **Bourne**, Justice Karswick specifically relied on the decision of Justice Kathryn Feldman of the Ontario Court of Appeal in **R. v. Vancrey** [2000] O.J. No. 3033 in concluding that there needed to be evidence of independent “comparison” testing.

[19] In a subsequent decision which reviewed the earlier cases, **R. v. Le** [2002] O.J. No. 894, Justice David Fairgrieve of this court concluded that Justice Pockele’s view was the correct one, and ruled that it was no longer necessary for the prosecution to lead evidence of “comparison” testing with an accurate radar unit or other device. In so doing, Justice Fairgrieve specifically addressed the reasoning of Madam Justice Feldman in **Vancrey** and in his view the decision in **Vancrey** does not require testing against older technology, as Justice Karswick concluded. On this point I prefer Justice Fairgrieve’s interpretation to that of Justice Karswick.

[20] Justice Fairgrieve’s decision is that, because of the consistent and regular use of the laser speed technology, we have now reached a time in Ontario and elsewhere in Canada that trial judges may take judicial notice of the fact that the laser speed device is settled technology and that the manufacturer’s recommended procedures to test the accuracy of the machine are sufficient. Justice Fairgrieve’s view has been followed by at least three other judges in this court in reported cases, Justice Marion Lane in **R. v. Odusanya** [2002] O.J. No. 3209, Justice Joseph Kenkel in **R. v. Sepiashvili** [2003] O.J. No. 3996 and Justice Jeff Casey in **R. v. Khalatbari** [2004] O. J. No. 4167.

[21] In my view it can now be stated with certainty that the laser technology is no longer “novel” and may be received in evidence in Ontario without expert evidence, where the laser operator can testify that he has been trained in the use of the device and has followed the manufacturer’s recommended testing procedures both before and after using the device.

[22] In his reasons, at page 21 of the transcript, after finding as a fact that the officer had properly tested the machine on the day of its use and therefore had a basis in fact to testify that it was working properly, Justice Robinson stated:

As to the accuracy of the comparison test, there is no requirement that this Court knows of, for there to be a requirement to test the laser and radar.

[23] In my view this correctly states the law with regard to the comparison testing.

[24] The defence has also argued that the prosecution has not proven its case beyond a reasonable doubt because there was only one test on the moving car and because the maintenance records were not produced, and therefore that there was a possibility of debris interfering with the proper functioning of the machine.

[25] In my view the judgment of the justice in this case shows that he was alive to the issues raised by the defence and based his decision on the evidence properly before him. In his judgment, Justice Robinson stated at page 22 of the transcript:

The officer has indicated that there was no debris in his path on the date in question. There is no evidence to the contrary to suggest that there is. Indeed, it's simply speculation.

[26] It is trite to say that it is not the job of this court to second-guess the conclusions of the trial court where they disclose no error in law and are based upon the evidence.

[27] In the result, the appeal herein is dismissed.

Released: 31 August 2006

Signed: “Justice Paul H. Reinhardt”