

**ONTARIO COURT OF JUSTICE
(Toronto Region)**

BETWEEN:

HER MAJESTY THE QUEEN
(Respondent)

- and -

RUSSELL MONTGOMERY
(Appellant)

Yolande December for the respondent
Ben Salsberg for the appellant

On appeal from the conviction registered by Justice of the Peace B. Hundal, at Toronto, on July 28, 2003

MacDONNELL J. :

[1] This is an appeal by Russell Montgomery from the conviction entered by Justice of the Peace B. Hundal on July 28, 2003, in the Ontario Court of Justice, on a charge of driving while under suspension, contrary to s. 53(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[2] The appellant argues that the trial judge misapprehended his evidence in relation to whether he received the notice of suspension that was sent to him by the Registrar of Motor Vehicles, and thus that he misapplied the deemed notice provision set out in s. 52(2) of the *Highway Traffic Act*. For the reasons set out below, I agree that the trial judge mischaracterized the appellant's evidence in relation to receipt of the notice, but I am also satisfied that this error did not affect the verdict. Accordingly, I affirm the finding of guilt and dismiss the appeal.

A. The Facts

[3] Shortly after 3:00 a.m. on February 8, 2002, the appellant was operating a motor vehicle on the Gardiner Expressway in Toronto. He was observed by a police officer to be exceeding the speed limit. The officer pulled the appellant

over and asked him to produce his driving papers. In the course of the roadside investigation, the officer received information from the police computer that the appellant's driver's license was under suspension.

[4] At trial, the Crown produced documents under the seal and signature of the Registrar of Motor Vehicles establishing that the appellant's licence had been suspended on December 6, 2001 for failure to pay a fine and that the suspension was still in effect on February 8, 2002. The documents also established that notice of the suspension was sent to the appellant by mail to 6 Locksley Place, Brampton, Ontario, on December 6, 2001.

[5] The appellant testified in his own defence. He agreed that at all material times he resided at 6 Locksley Place in Brampton. However, he stated that at no point prior to February 8, 2002 was he aware that his license had been suspended. He believed that his license had expired in December 2001.¹

[6] Under cross-examination, the appellant agreed that at some point in 2001 he received a speeding ticket. His evidence as to what he did with that ticket was, to say the least, unclear:

Q. So you remember getting a speeding ticket?

A. I do remember getting a speeding ticket.

Q. And what did you do with that ticket?

A. I believe that ticket was paid.

Q. By?

A. By myself.

Q. Do you have receipts to that effect?

A. No I do not.

Q. Do you still believe that ticket was paid?

A. I am not sure. I had not received any confirmation that it wasn't paid.

Q. Well, do you recall when you got the ticket, it said on the back of the ticket what your options were in terms of going to court, do you recall?

A. Yes I do.

Q. And what option did you take?

A. I don't recall at this time.

Q. Is it possible you ignored the ticket?

A. I would not say so.

Q. It's not possible?

A. Perhaps – perhaps it could be possible.

¹ It appears to have been common ground at trial that the appellant's driver's license had expired in September 2001. Section 54 of the *Highway Traffic Act* provides that where a person to whom a suspension applies is not the holder of a license, he shall be deemed to be a person whose license has been suspended.

Q. It could be possible?

A. It could be possible that I ignored the ticket.

Q. And if you ignore the ticket, do you know what would happen?

A. No, I was not aware.

Q. So you weren't aware that if you didn't pay the fine your license would be ultimately suspended?

A. No, I was not aware of that.

Q. Your license hadn't been suspended in the past for failure to pay a fine?

A. Yes it was, I believe.

Q. It had been?

A. Yes.

Q. So you're aware of that process, then, that if you don't pay a fine, it ultimately suspends your license?

A. Yes.

Q. So you were aware, then, if you ignore the speeding ticket

A. I was aware that that actually ultimately happens. In this case I was not aware that it did happen.

Q. But had you made any inquiries just to find out what you'd done with the ticket, what had happened to it?

A. No, I had not.

Q. Okay, so you got the ticket and for all intensive purposes [*sic*; 'for all intents and purposes'?] you ignored it and you made no inquiries as to what the status of your license was after that?

A. No I had not.

[7] The appellant was never asked whether he received the notice of suspension that was sent to his home on December 6, 2001. He never explicitly stated that he did not receive the notice.

B. The Reasons for Judgment

[8] In his reasons for judgment, the trial judge stated as follows:

This is a strict liability offence and a defence of due diligence is available for strict liability offences. Applying the due diligence defence, the court is of the opinion that the defendant did not do all a reasonable person would have done under the circumstances in this case. He has not been able to convince the court that he took due care of the speeding ticket he received in the past and he admitted during cross-examination that he had a speeding ticket somewhere in the year 2001. He was not even sure whether he had paid the ticket or not, or what action he took to deal with the ticket.

The defendant from the past experience is also aware of the process that if he ignores the speeding ticket and does not pay the fine, it ultimately suspends his licence. So considering all this the Court is of the opinion that the defence of due diligence does not apply in this matter.

[9] The trial judge then considered whether in the circumstances of the case a defence of necessity might be available². After rejecting that possibility, he turned his mind to whether the appellant's testimony had raised a reasonable doubt with respect to whether he was aware of the suspension. He referred to s. 52(2) of the *Highway Traffic Act*, which provides, in essence, that where notice of a suspension has been mailed to a person, it shall be deemed to have been given seven days later "unless the person establishes that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice". With respect to the applicability of this provision, the trial judge stated:

And as I mentioned before, the court never heard from Mr. Montgomery that he did not receive the notice. Therefore, at this point, there is proof beyond a reasonable doubt that the defendant had received, by mail, the Notice of Suspension of his driver's license on or about December 13th, 2001, and as a result of this he should have been aware of the suspension. [emphasis added]

C. The Ground of Appeal

[10] The sole ground of appeal advanced on behalf of the appellant is that the trial judge misapprehended his evidence in relation to his lack of knowledge of the suspension of his driver's license. While accepting that the appellant never specifically testified that he did not receive the notice that was mailed on December 6, 2001, counsel for the appellant submits that his testimony that he never became aware of the suspension was "equivalent to a statement that he did not receive the notice". He further submits that the only issue in the case was "whether [he] exercised due diligence in respect of the Notice of Suspension" and that "the uncontradicted evidence at trial was that he had."

D. The Law

[11] Driving while under suspension contrary to s. 53 of the *Highway Traffic Act* is a strict liability offence within the meaning of the classification scheme described by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie*, [1978], 2 S.C.R. 1299, 40 C.C.C. (2d) 353; see *R. v. Middlebrook*; *R. v. Miller*; *R. v. Laporta* (1988), 5 M.V.R. (2d) 236 (Ont. C.A.); *R. v. MacDougall*, [1982] 2

² In his submissions at trial, counsel for the appellant did not rely on this defence. The trial judge addressed it because the appellant testified that he drove because the individual he was with was too intoxicated to drive.

S.C.R. 605; *R. v. Lowe* (1991), 29 M.V.R. (2d) 265 (N.S.C.A.). Because it is a strict liability offence, the burden on the Crown is discharged upon proof of the *actus reus* of the offence, namely (i) that the defendant's license to drive was suspended, and (ii) that while it was suspended, he drove. The Crown does not have to prove knowledge of the suspension, although in most cases it will attempt to do so with the aid of s. 52(2) of the *Highway Traffic Act*.

[12] In the case at bar, there is no dispute that the evidence proved the *actus reus* of the offence of driving under suspension beyond a reasonable doubt. Once the Crown establishes the *actus reus* of a strict liability offence, the burden shifts to the defendant to show that he was not at fault. Accordingly, if the appellant hoped to avoid conviction, the burden was on him to establish that he exercised due diligence – *i.e.*, that he was not negligent – in relation to whether his license was under suspension. Evidence that the notice of suspension mailed by the Registrar of Motor Vehicles was not received would be an important circumstance to consider in relation to this issue: *R. v. Middlebrook*, *supra*. However, such evidence would not necessarily discharge the burden on the appellant unless he also established that he did not otherwise know of the suspension and that his lack of knowledge was not due to his negligence.

E. Discussion

[13] I agree with the appellant that the trial judge's statement that "the court never heard from Mr. Montgomery that he did not receive the notice" and his conclusion, based on that fact, that it had been established beyond a reasonable doubt that the appellant did receive the notice, reflect a misapprehension of the evidence. I acknowledge that the appellant never specifically asserted that he did not receive the notice, but in my respectful view that assertion was necessarily implicit in what he did say. Both in examination-in-chief and in cross-examination the issue of his state of mind concerning the suspension was dealt with either just before or just after questions in relation to his address at the material time. The appellant's address had no relevance except in relation to whether he had received the notice sent to that address. In the circumstances, his denial of knowing about the suspension amounted to a denial of receiving the notice. Accordingly, I am of the view that the trial judge erred in holding that by virtue of s. 52(2) of the *Highway Traffic Act* the appellant should be deemed to have received notice of the suspension.

[14] I am also of the view, however, that this error did not cause any substantial wrong or miscarriage of justice and that the appeal should be dismissed pursuant to the provisions of s. 120(1)(b)(iii) of the *Provincial Offences Act*. I reach that conclusion for the following reasons.

[15] The trial judge recognized that driving under suspension is a strict liability offence and that once the appellant was shown to have driven while suspended the burden was on him to establish due diligence. The trial judge addressed the

due diligence issue early in his reasons. He considered the appellant's evidence that he knew that he had been charged with speeding and that if he did not pay the fine his license would be suspended. He took into account the appellant's testimony that he did not know what he had done about the charge, that it was possible that he had ignored it, and that he never made any inquiries as to the status of the matter. In light of those circumstances, he concluded, the appellant had not exercised due diligence. In rejecting the defence of due diligence, the trial judge was clearly proceeding on the assumption that the appellant had not received the notice of suspension that was sent in the mail. This portion of his reasons cannot reasonably be read any other way.

[16] In my opinion, the trial judge's reasons for concluding that due diligence had not been established are unassailable. The circumstances he referred to plainly establish that if the appellant lacked knowledge of the suspension it was because of his negligence. The trial judge's finding that any lack of knowledge on the part of the appellant was due to a failure to take reasonable care was dispositive of the due diligence issue. Once the due diligence defence was rejected, the Crown was entitled to a verdict of guilty.

[17] The trial judge did not end his consideration of the case after rejecting the due diligence defence. He went on, unnecessarily in my view, to consider whether there was a reasonable doubt with respect to the appellant's receipt of the notice of suspension. It was in that context that he made the error described above. However, that error had no effect on his earlier conclusion that due diligence had not been established because, as I have said, the due diligence analysis was based on an assumption that notice had not been received. In my opinion, the verdict would necessarily have been the same had the error not been made.

F. Disposition

[18] For the foregoing reasons, the appeal is dismissed.

June 7, 2006