

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

PATRICK MURPHY

P R O C E E D I N S A T A P P E A L

BEFORE THE HONOURABLE JUSTICE D.C. DOWNIE.
on December 16th, 2004 at KITCHENER, Ontario

CHARGES: Section 128(1)(c) Highway Traffic Act
 - Speeding -

APPEARANCES:

C. MacDonald

L. Carter

Counsel for the Crown

Agent for the accused

6145/1428

Notes:

Accident: Accident

Day of April 2004 Time 2255

Name: MURPHY, Patrick M.

I was stationary on Hwy 401 E/B S/S
@ H. Watson O/P. I was monitoring
E/B TOFVETP 100 km/h speed limit. I

had with me a Decatur Electronics
Genesis II radar set, ser. # 6333. ADDI
ACOAMTSOAMV. I tested this radar
at 2015 and 0155 according to the mfg's
instructions. I was satisfied it was in
good working order. Forks 55 km/h
serial # 086509, 105 km/h serial #

089027. I have been a qualified radar
operator since 1987. I was trained on
the Genesis II radar on 28 Jul 2000. I
was last requalified on the Genesis II
radar on 21 Jan 04. I was utilizing the
rear radar antennae that was pointing
out the rear window of my cruiser.

At 2255 a vehicle approached at a
HROS in lane # 2 E/B alone. When
the vehicle was approx 75 metres
from my cruiser I activated the radar
and observed a reading of (131). This
was consistent with my visual observ-
ations. I stopped this vehicle on Hwy
401 E/B S/S west of Grand River Bridge

The driver identified him self with an
OutDLP as alone.

I subsequently charged him with
(charge) 129/100
WWYDSF? I have to go to
the bathroom

Cruiser 6-729 marked, clean roof

Weather Cloudy 30C

Roads Dry

Passengers female FR

Traffic Light (Sat P:M)

Vehicle 2001 Chev Impda 4D Whi

DSR, DS, DO

(w) exp. ins. card (Mar 04)

coming from London, explained

RECEIVED
APR 29 2004

PRE
M

INITIALES

SR

59

CODE POSTAL

PROV

ON

SOLVED

DUE

W/NOH

Exhibit # 1

Regina vs.

Date

COMMUNICATE

Justice of the Peace

NA
ONE

Act

THESSIA
TOMORROW
CODE
R

W/NOH

DATE

APPROXIMATION

SECTION

UNIT

UNIT

COSTS AND APPLICABLE

COUPLE COMPREND LES

ENDE COMPENSATIONS

REUFF

M

RE H/

W-LLP.A

Green Pen
By Def.

Training
NOT
IS

ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

R E A S O N S F O R R U L I N G

ENTERED ON PAGE

DOWNIE, J. (Orally) 25

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Her Majesty v. Patrick Murphy
Proceedings at Appeal

THURSDAY, DECEMBER 16, 2004

MR. MacDONALD: Patrick Murphy, please. It's partway down the list, number 17.

MS. CARTER: Good morning, Your Honour.

THE COURT: Good day.

MS. CARTER: For the record, it's Lynn Carter and I am here as agent for the defendant.

THE COURT: Okay.

MS. CARTER: This is an appeal brought forward by us, Your Honour, in regards to the justice allowing the officer to read his notes into testimony. Um, I believe that there is a transcript with this and I'm not sure if you've had an opportunity to review it, but I believe....

THE COURT: A, there is a transcript; and b, I have not seen it before.

MS. CARTER: All right. I'm, I'm not as concerned with you having a look at the transcript, as I would ask you to turn your attention to - there's an exhibit with the matter. And you've had an opportunity in a previous matter here today to have a look at the disclosure in regards to the officer's notes in another matter where we were talking about a fail to drive at marked lane. In this particular matter, this is the disclosure as well as the officer's notes that were presented to us for the trial of Mr., um, Mr. Murphy. Um, during the evidence and it is in the transcript, the clarification in regards to the, to the notes being utilized, as they were being clarified by Mr. Schmidt, the Crown of the date, um, he

indicated that uh....

THE COURT: You got a page you are looking at?

MS. CARTER: It's actually just on page one with the examination-in-chief of the officer. And it just basically identifies him as being an O.P.P. officer or an Ontario Provincial Police officer for 17 years and that he was working in that capacity on this day and that he had made notes that were made in ink and there had been no additions or deletions to those notes and he was going to use them to refresh his memory. He was also asked when were the notes made and he said in the cruiser immediately after the offence. And if you have a look at the disclosure, you'll note on there that they are actually typewritten notes. So at the - at the time of the trial I raised the concern that I didn't believe that the officer had a typewriter in his cruiser and so I had some concerns in regards to the notes that he would be referring to. As such, her Worship of the day decided that it would hear the evidence of the officer and award weight depending on how the evidence was to unfold. If we turn our attention to the actual evidence of the officer, on page six; but if you watch the disclosure and I read from the transcript, what you will find is that the officer is not utilizing those typewritten notes first off - which I have a concern with because of the amount of information that is in that which was not made at the time of the offence; however, has extreme bearing on what the case was. But if I read from the transcript

and you follow along on the officer's notes, you'll see that it's almost verbatim for what the notes of the officer are. I was stationary on Highway 401 eastbound on the south shoulder; there again the eastbound being abbreviated in the south shoulder. The officer has already indicated at some other date, when he makes these typed notes that he knows he's going to be stationary. The only handwritten notes in there are the 401 eastbound. He then gives a location in his handwriting, which is at the Homer Watson overpass. He then gets into....

THE COURT: It looks like these notes are boiler plate and all he does is fill in the blanks.

MS. CARTER: Exactly, Your Worship, and that's my concern. Because....

THE COURT: I am Your Honour.

MS. CARTER: I'm sorry, Your Honour.

THE COURT: He was Your Worship.

MS. CARTER: I've been in the other courts way too long. And that's my concern with this, Your Honour. This isn't, this isn't notes to refresh the officer's memory specifically to this case and what took place. These are notes that are given the officer his evidence that he needs to be able to give to the court in order to have any speeding matter be qualified for. He goes in to say that he was satisfied with the good working order - he's already typewritten that at some earlier date and not on this specific date with this specific officer ... or this specific client, um, defendant. A lot of the officers dc

utilize pre-typed information. Pre-typed information that they use usually comes in the effect of the test that they would perform on the laser or the radar unit. And when they're under cross-examination and we ask them as an agent did you test this unit prior to? A lot of the times they will say yes, we did. I have made up myself a little card with the testing procedures on it and this is what I follow each and every day. They have the card there for cross-examination and they go through step-by-step. In this particular case, this is specific evidence that this police officer, at some date well previous to the offence date, has already established his evidence. He's already typewritten exactly what his evidence is going to do, what his evidence is going to say and then he comes into court and he reads it virtually verbatim. He indicates in his testimony that I was monitoring eastbound and then as he says I was monitoring eastbound, he has the acronym for traffic observing for vehicles exceeding the posted - puts in the hundred - kilometres. Now when I'm reading to you I was monitoring eastbound traffic observing for vehicles exceeding the posted 100 kilometres, that's from the transcript. His notes are showing exactly that prior to him putting in his two cents worth. He then goes on to talk about....

THE COURT: Where does it say that on his note?

MS. CARTER: Which, Your Worship?

THE COURT: What you just ...

MS. CARTER: Your Honour, sorry.

THE COURT: ... read to me?

MS. CARTER: The um, on his notes, if you have a look down where it says A-C-O-A-, I'm sorry, no - it's where it says eastbound and the east, east slash B is written in. Do you see that about one inch down? Just where it says Homer Watson, just underneath that?

THE COURT: Oh, I see, okay.

MS. CARTER: Okay? So then he says he was monitoring eastbound and then in acronyms, he puts and I'll read from his, from his evidence, traffic observing for vehicles exceeding the posted - then he writes in a ...

THE COURT: Okay ...

MS. CARTER: ... hundred ...

THE COURT: ... I see what you're doing now, yes.

MS. CARTER: ... so it's an acronym that he's already established that that's what he's doing. And his evidence comes out word for word verbatim. The next acronym he has is just underneath that, just below the Genesis Two. And the Genesis Two he's talking about that radar unit - and, or that - yes, that radar unit and then he says and capable of accurately measuring the speed of a motor vehicle and if you break out that acronym that he's got, it's exactly what his testimony is.

THE COURT: Okay, did you raise this with the Justice of the Peace?

MS. CARTER: I did, Your Worship. The Justice of the Peace's ruling is, is laid out in the back where she feels that he is a qualified operator,

and that he's tested the - she basically - I raised the issue and that is why I put into evidence my disclosure on that particular day, because it was virtually verbatim.

THE COURT: Yes.

MS. CARTER: He has come to court, he's made some adjustments in his testimony but like I said, if I read this transcript to you, it's almost verbatim throughout the whole thing in regards to what his previously typewritten evidence is.

THE COURT: It is certainly canned.

MS. CARTER: I understand ...

THE COURT: Does that make it invalid?

MS. CARTER: I believe that when an officer is investigating a situation, he's been given the opportunity to utilize a piece of equipment which is better going to enable him to accurately measure the speed of moving vehicles. To accurately give him the authority to identify a vehicle and to specifically come in before the court and being a professional, hired by the public, to ensure that our roadways are safe, I believe that there is a higher standard that each and every case should and must be measured on its own merit. In this particular case, I understand that the officer has 17 years of experience. However, in the same sense, for the notations that you saw on the, on the marked lane conviction that was previous today, the officer was able to, in handwriting, on that specific day, able to get his point across in a professional manner - in a competent manner - to

show that he was an officer who observed those factual actions. In this particular case, all we have is the officer has filled in the blanks. Did he, in fact, test it according to manufacturer's specifications? Or did he just test the radar unit at 20:15 and 1:55? Did he in fact, um, see that this was consistent with my visual observations, which is three-quarters of the page down? That was also in his testimony. Did he in fact have those ... those feelings or those visuals at the time or was it something that he didn't even concern himself with, because he knew he already had the answers pre-typed and sitting in his notebook in the fashion of 400 unprinted pages he had?

THE COURT: What does W-W-Y-D-S-F supposedly stand for?

MS. CARTER: And whereabouts is that, Your Honour?

THE COURT: Before the words, I have to go to the bathroom.

MR. MacDONALD: I can answer that, if it assists, Your Honour.

THE COURT: Sure.

MR. MacDONALD: Why were you driving so fast.

THE COURT: The Justice of the Peace routinely accept this canned evidence?

MR. MacDONALD: Your Honour's terming it canned, I don't know....

THE COURT: Well, it is canned. I mean it is all printed out. He just fills in a few blanks.

MR. MacDONALD: Well, it's not all printed out.

There are some blanks there. I want to start by saying first, the notice of appeal that you have before you, does not say that this is going to be argued. So I am not prepared, technically speaking, for this argument. I spoke to Ms. Carter about that before court.

THE COURT: Yes, okay.

MR. MacDONALD: My understanding of the argument that we were facing here today, and Ms. Carter was very clear on what I was referring to before court, because I spoke to her about it, was we were arguing whether or not the officer read his notes verbatim and now, all of a sudden, in creeps another argument which I know she wanted to argue but, as I'd said, I wasn't prepared to argue that portion of it. I certainly will respond to Your Honour's comments and I am quite happy to, and I think the Justice of the Peace, the learned Justice of the Peace on the date in question, did quite properly respond to it. And I'm also prepared to respond to what we're actually here for, which is stated on the grounds for appeal, which is Ms. Carter's argument, that the officer didn't use his notes just to refresh his memory but he actually read them.

THE COURT: Okay, I'll get back to you.

MR. MacDONALD: Okay.

MS. CARTER: And, and I - I agree that that is my purpose here. However, yes, I am concerned in regards to it being canned, as your terminology ...

THE COURT: Quite frankly, I am too.

MS. CARTER: ... and I feel that um, you know if this person is out there, causing some, some havoc on the roadway, that he should be dealt with as an individual as opposed to a number of other people who have already been pre-identified and - well, not identified but pre-evidenced, for lack of a better term.

THE COURT: Okay, go on.

MS. CARTER: My, my appeal, Your Worship, is very much that; that the officer was allowed to read and that's where I was going. That if I read his testimony from the transcript and you follow along on his disclosure, you will see that it is virtually verbatim. And that's where we established with the acronyms on two of those, two of those specifics in regards to the accuracy of the moving radar and as well as the uh, was consistent with my findings.

THE COURT: Okay, where did the Justice of the Peace deal with this argument?

MS. CARTER: The argument in regards to the notes per se, were first raised when we clarified the officer's notes and on page two, I requested to have a look at the officer's notes as the disclosure I was given was the one that you have in front of you here today and that I was uh, concerned that - well, and actually I did indicate, down on approximately line 20 - that I am assuming he didn't have a typewriter in his vehicle prior to having the stop with - and then to put the blank - that he had put the answers in the blanks and that the typewriter was not in the

vehicle. And I indicated that as long as he was only referring to the blanks and not to the information typed, I had no problem with him referring to his notes. And then, Her Worship, then after a bit of - indicates on page five at around line five is where the Worship, Her Worship then goes into her evidence and she indicates on line five of page six, I still believe the officer has enough experience that if there is any deviation from what is pre-printed on the form, that he would make the necessary corrections. So she's not looking at it as being canned; she's looking at it as being the entire information of his notes. It's his typewritten notes, it is his notes, it's information that he believes he has and as such, she's allowing him to use anything that he has established as being his property or his notes. We then go forward, because virtually that argument has been we'll wait and see; as such, that's when we get into the testimony of the officer on page six at 15 and that's where I was - or line 15 - and that's where I began reading as you were following along with the disclosure.

THE COURT: Okay.

MS. CARTER: And then it just gets into my argument in regards to things being verbatim and Her Worship's....

THE COURT: Is there any case law that says an officer cannot read from his notes. I know I routinely say well, we do not want you to read from your notes; we want you to use them only to

refresh your memory. But is there case law that says that is invalid?

MS. CARTER: The tradition....

THE COURT: I would certainly think it goes to the weight. The weight diminishing I would think, in this kind of case, to almost zero. I mean when they, when you - what does he - where do we get this A-D-D-I ... I mean there is what? About 15 letters here and then he testifies that that is according to manufacturer's....

MS. CARTER: Specifications - instructions, sorry. According to manufacturer's instructions, page six, line 25.

THE COURT: According to manufacturer's instructions - no, it is the one just ahead of that. A device designed for and capable of ...

MS. CARTER: Accurately measuring....

THE COURT: A device designed for and capable of making....

MS. CARTER: Of accurately measuring the speed of a motor vehicle.

THE COURT: Okay, I think you have made your point. Where does the Justice of the Peace deal with this?

MS. CARTER: I believe page ten. And she actually indicates, and there are no numbers to the side, but just above halfway down. The fact that Mr. Moriarty or Sergeant Moriarty might have been reading from his notes or going from memory. But even from memory, I would imagine if you repeat these things often enough, that the wording pretty much stays the same.

THE COURT: Okay.

MS. CARTER: Those would be my submissions.

THE COURT: What do you say?

MR. MacDONALD: I'll deal with the....

THE COURT: I must confess if this was a criminal trial, I would never convict on the basis of that kind of canned evidence.

MR. MacDONALD: Well, and I ...

THE COURT: It was just rote, it is just rattling it off ...

MR. MacDONALD: ... let me explain why ...

THE COURT: And all these acronymns. You know, did he really check the damn thing or not? I would have to guess - very problematic. He just writes in here that he always checks it.

MR. MacDONALD: But there is no evidence to suggest that he didn't. There were no questions asked ...

THE COURT: The way it is presented leaves a big stink as far as I am concerned.

MR. MacDONALD: Well, I respectfully disagree, Your Honour. I'll say this. I'll say that the, the portions of evidence or some portions of notes that are typed and with fill in the blank, uh, that's not completely uncommon in Provincial Offences courts, especially in matters like this, so, so in complex, in complex of speeding. Things that officers do on a regular basis, over and over at the same location - it's not completely uncommon. It may well be in criminal cases, and I can appreciate that; a little bit of a different scheme and generally much more complex.

THE COURT: Do you not have to prove speeding cases beyond a reasonable doubt?

MR. MacDONALD: Well, the burden of proof isn't any different, Your Honour, and I'm not suggesting it is. But if we look back at the comments or the argument made by Ms. Carter, in the first instance with Mr. Schmidt being the prosecutor in front Her Worship DeJong at the time, if you look on page two, after Ms. Carter made the argument and suggested that the officer ought not to be able to refer to the notes in that fashion basically, if I can just sum it up that way, Mr. Schmidt said well, okay, maybe I should go down the road in clarifying what those typed portions are and that will be reflected in the Justice's ruling down the road, and I'll take you to that in a moment. So he asked at the bottom of page two and continuing onto page three, says - and this is Mr. Schmidt - perhaps I'll go down that road if need be. Sir I understand a portion of your notes that you are intending on using are typed, is that correct?

Answer: Correct. All right, how does that come to be - I'm still at the top of page three now.

Answer: I conduct a speed enforcement exercise at common places along the 401 in our area so a lot of the information is the same from traffic stop to traffic stop. If I am using the same radar one time and the same radar next week, a lot of it is similar information that I would repeat anyways from time to time in court. Um, Mr. Schmidt goes on to find out who typed the notes. Of course, we

know it was the police officers and we know that he simply fills in the blanks. He talked about uh, talked about the type of radar being used and I believe you'll find that he had answered the question further on, that he's always using Genesis radar, the same radar. It's just a different serial number. That's all he uses. That was his answer, so that's one reason why he can in his own mind, pre-type that and he also said that he always sits or very commonly sits at that particular location so he knows exactly where he's going to be and that he does that on future dates, so he pre-types it for the sake of ease. Um, there is plenty of information that is inputted, that is peculiar to the defendant for that particular traffic stop so it's not as though he is pre-determining who he's going to stop and what they're going to be doing. He's a police officer of a lot of experience, a lot of years of experience. I believe Ms. Carter said 17 years and I'm not going to quibble about that. I believe that was mentioned perhaps at the beginning.

THE COURT: It says he is a sergeant so he is no spring chicken.

MR. MacDONALD: No, that's right. And I can tell you, Your Honour, that I've, I have actually been in court on a number of occasions where Sergeant Moriarty has given evidence and 90 per cent of the time, he's giving evidence on a speeding case and uh, the evidence is very similar to what you've heard or what you see, I should say, in

the transcript. Um, one has to remember and bear in mind, he's an Ontario Provincial Police officer, so he's not a city police officer and they do do a lot of enforcement on the highways which involves a ton of speeding charges. And, uh, it's no secret that I think a lot of cars are travelling above the speed limit so there certainly are tickets to be issued out there should a police officer want to, in relation to speeding. The Justice of the Peace looks at it, the argument that Ms. Carter has made - I think it's on page six. After the questioning of Mr. Schmidt on the notes, no, sorry - it's page five, halfway down, Your Honour. My apologies, it's uh - starts at around line 14. The court: Okay, in regards to the notes that the officer is wishing to use. Sergeant Moriarty is on the 401 and other areas frequently conducting speed enforcement, uses various force cruisers that are all equipped with the Genesis II radar. The only difference is that they do, of course, have different serial numbers. Because of his continued use with this equipment, Sergeant Moriarty has prepared himself a typed document which is fairly generic in nature and then he types in or writes in portions that are relevant to the particular stop he is doing. Sergeant Moriarty is an officer with considerable experience. It would seem to me that if there was any variation - and this is something that Ms. Carter did touch on - the variation from the generic typed document that he has with him, that he would make that change at

the time he was utilizing the form. It's really no different than any pre-printed form that we use to expedite matters instead of writing everything out. Much the same as a provincial offence notice or a part three summons. I mean there are lots of areas that are pre-typed on those and these are my comments now, not the Justice of the Peace's. But lots of areas that are pre-typed and it's a fill-in-the-blank so to speak. Um, she continues on to say, even allowing for the fact that there might be stuff the defence wishes the court to take note of, that may not be particularly generic, I still believe the officer has enough experience that if there was any deviation from what's pre-printed on the form, he would make the necessary correction as he was going along. I am going to allow him to use the entire form as part of his notes. So they continue on and he does of course go through his evidence and he gives it in what I'll call a very complete fashion and I will not argue with Your Honour on the point that the notes that have been provided in disclosure to the defence which were made a part of the proceeding as an exhibit - I will not argue that his evidence is not very, very close to that, to the notes. I won't argue that, because it's true. But if you look at the Justice of the Peace's comments in the judgment, she's turned her mind to that. And I can tell you again, as an officer of the court, and as being - as of a prosecutor - being in the court for a number of years and having Sergeant Moriarty

testify a number of times, that is the way that speeding evidence comes out and I don't think it's because he's reading his notes. There's no evidence at all, evidence that he was reading his notes. Ms. Carter never had any....

THE COURT: Well, the fact that the testimony is exactly the same as the notes would give a pretty strong implication on that way, I mean....

MR. MacDONALD: I disagree, Your Honour, uh....

THE COURT: Well, you might disagree, I do not.

MR. MacDONALD: Okay, well, and let me just explain why I do. Sergeant Moriarty testifies over and over and over again. He sometimes has five to ten, twelve speeding cases in one given court appearance. And the evidence, other than particulars of the defendant, type of motor vehicle et cetera, really don't change. I mean, speeding trials are very simple trials. They are not complex and the same evidence is given over and over and it's not just by Sergeant Moriarty. I mean, if you looked at the speeding evidence of another Ontario Provincial Police officer, it probably wouldn't be a whole lot different. It's going to at least highlight all the main areas that are required to proof these charges beyond a reasonable doubt. Everybody knows, including Ms. Carter, that an officer, at some point during his testimony, either through himself or being questioned by the prosecutor is going to say and have to say in order for a conviction to be registered, that the um, the device that he was using is capable of accurately measuring the

speed of a moving motor vehicle. It's super common phraseology used by all police officers. So Ms. Carter makes it sound like it's something so unique to Sergeant Moriarty but that's not the case. That is something that virtually every police officer testifying in a speeding case says. And that he's qualified. It's one of the required pieces of evidence that higher courts have held and we all know - that's in provincial offences court, we all know - and Ms. Carter knows as well as I do, exactly what elements the Crown needs to prove. Over time, obviously, officers have learned that. They know what is required. They learn to testify in a very - at least Sergeant Moriarty probably better than some - testify in a very complete fashion, in a very simple fashion such that anyone reading can understand it. And there's where I'm getting now, to the judgment of Her Worship and that's what she says. If we look on page 10, she says certainly - and this is in response to the submissions made by Ms. Carter, which I believe are the subject of the appeal today, more so than anything else - that um, court's indulgence for a moment. She had made comments. In listening to the officer's testimony that - and this is on page nine - the typed version of his testimony in several spots, was verbatim with the typed notations as opposed to recollection. I'm not sure how Ms. Carter can just take that leap and say well, he's reading from his notes because he has testified so closely to what's on the notes.

I don't think that means he's reading the notes. I think that means that he's got a very good handle on what he's going to be saying and needs them to refresh his memory. And to look down from time to time to see an acronym, for instance, to give you a buzz phrase, so to speak, so that you're telling your or giving your evidence in a logical fashion, I don't think that necessarily leads to the conclusion that the officer is reading from his notes. There was no objection throughout the evidence, where Ms. Carter stood up and said well, I object, Your Worship, he's reading from his notes. There was, there was nothing about that at all. It's only mentioned in submissions by Ms. Carter. Mr. Schmidt addresses it, for the prosecution and then the court, uh, Her Worship DeJong says certainly - and this is on page ten - and there's no line number but uh, in the judgment. Certainly officers that regularly give testimony in a courtroom, on traffic matters such as this, especially something so routine to Sergeant Moriarty, that in order to assist him in performing his duties, he has taken the trouble to type up notes where he can fill in the blanks. That the testimony would vary very little except with respect to specifics, on a regular basis. No issue was raised with the fact that Sergeant Moriarty might have been reading from his notes or even going from memory. But even from memory I would imagine that if you repeat these things often enough, that the wording pretty much stays the same. It

is one way that the court appreciates, and she goes on, just to say how it would make sense to anybody listening and I can just - I can only suggest to Your Honour as an officer of the court, having been there and listen to police officers testifying speeding cases over and over for 11 years, that it is very common. The ones that do it on such a regular basis, do generally tell the story in the same fashion and the phraseology is much the same each time over and over again. And I just don't think it's fair to make the leap when there were no questions asked by Ms. Carter at the time about reading the notes or no objections made at all about that. I don't think it's fair to take the leap that Sergeant Moriarty is reading from his notes. In the alternative....

THE COURT: Have you looked up any caselaw about whether you can read from your notes?

MR. MacDONALD: And the alternative, I was just going to say that I don't think that reading from his notes is going to necessarily eviciate the proceeding or suggest that the conclusion can't be of guilt. Um, we're either dealing with past recollection recorded or past memory refreshed, generally speaking, when it comes to referring to notes and uh, present memory refreshed obviously, looking at notes that you are just using to refresh your memory meaning you do have some recollection of it once you've seen the notes and read them and get some - I guess I'm going to use the word buzz-word or buzz phraseology from the

notes. You won't remember all the details without the usage of them. And that's why it's very common in court for officers to be able to do that, given the number of tickets they might issue on a regular basis and the number of people they have dealings with and investigations they may be involved in. Um, past recollection recorded, I would suggest, would be when a person can't say, even after looking at the notes, and reading the notes, that he has absolutely zero present memory of that event. He can say yes, I wrote those notes obviously, and those are mine, and they certainly would have been accurate at the time I wrote them and I don't claim them to be anything other than that and I can tell you what's in it, but I don't remember the event at all, even after reading them. And, and that generally isn't the case in our court. It's generally - it's present memory refreshed and the officers certainly do have some recollection and that's what you have here. Um, I, I see the way it sounds, I hear Your Honour's concerns, but respectfully I do disagree that uh, it's canned, uh, the word that was chosen. I think this officer, in particular, I mean I can't speak for every officer and I'm not going to try but I can speak for Sergeant Moriarty. He, he is very good at what he does. There is no question about that. He's very good at giving evidence; one of the best I've seen in terms of giving evidence in traffic court and when I - sort of the benchmark or the ruler, measuring stick for that, for me,

often is speeding cases. How they give their evidence. And whether they require much questioning from the Crown, to draw out evidence that they may not have given, where that might be required proof. And I can, I can just tell you that Sergeant Moriarty is very, very good. He is one of the best at what he does and I don't think the fact that he assists himself with speed enforcement by typing or pre-typing certain things in notes that he knows will occur, I don't think that means that the defendant on this particular date was not speeding at the rate of speed indicated on the certificate, which mind you, was reduced at the side of the road and lower than uh, what the officer actually clocked him at. I uh, don't think I can add a whole lot to that. I, I again would just stress the argument in relation to the using the typed notes or portions of typed notes um, rather than completely hand-written notes. That argument, this morning, I wasn't expecting until I spoke to Ms. Carter and I, I wasn't you know, I wasn't prepared to argue that. I was prepared to argue what's in the grounds of appeal which were simply the officer reading from his notes, and I can quite, in my opinion, candidly say I don't believe Sergeant Moriarty was reading from his notes. I watch him when he testifies and I don't think the fact that the notes are so very close to what he actually said in court, I don't think that means he's reading from his notes....

THE COURT: If you're going to testify, should we

not swear you?

MR. MacDONALD: I'm sorry. Sorry?

THE COURT: If you are going to testify, should we not swear you in?

MR. MacDONALD: Just giving my opinion, I, I apologize, Your Honour, but I can tell you that again, just from seeing him on a regular basis, listening to him testify and watch him while I'm there, that I just think it's a leap that, that we can't comfortably take, to say that he's definitely reading from his notes. There's no objection raised at the time about reading from his notes, there's no stoppage during his testimony or any cross-examination on that point by Ms. Carter. And I think the Justice of the - the learned Justice of the Peace actually, quite fairly, uh, resolved that issue, at least in her mind and gave judgment in respect of that issue that was raised by Ms. Carter in submissions. So, those are my comments, subject to any further questions you may have.

THE COURT: What is W-W-Y-D-S-F stand for?

MS. CARTER: Why were you....

MR. MacDONALD: I'm sorry, where are you looking?

THE COURT: That's the one you gave me, the one before he says I have to go to the bathroom.

MR. MacDONALD: Oh, why were you driving so fast?

MS. CARTER: Just two comments, um, Your Honour. But you're right. The standard for the criminal code charges versus the standards of the P.O.A. is exactly the same: beyond a reasonable doubt. And I would venture to think that Mr. or Officer

Moriarty does give excellent evidence because he's already pre-typed it out. If he repeats it often enough, yes, it's going to be the information that he's going to give before the court. He has not only just pre-typed his usual practice in where he sits and how he sits there and what he's going to do; he has pre-typed required pieces of evidence. As my friend just so adequately pointed out, that there are certain aspects that must be proven at a speeding trial. Well, Officer Moriarty has already pre-typed those out so he knows when he gets up to testify, regardless if it's done roadside, when he gets up to testify he will have the opportunity to make sure he hits every single one of those points, and I think back to the original reason for us being here, and that he was allowed to read his typewritten notes, you have both documents. You have seen both documents of the disclosure as well as the transcript and they are virtually verbatim.

THE COURT: All right, frankly I am going to sit on this one over the lunch hour.

MS. CARTER: And Your Worship, I need to be in St. Catharine's at 1:30 on three trucking matters.

THE COURT: You better get someone to tell you the results. I'm still going to sit on it until 2:15.

MS. CARTER: I can ... I can check back with Mr. MacDonald, if that's all right with him.

THE COURT: Okay.

Reasons for Ruling - J. Downie

MS. CARTER: Thank you.

THE COURT: Okay.

MR. MacDONALD: Continue on? Continue on, Your Honour?

THE COURT: Sure.

...THE COURT GOES ON TO UNRELATED MATTERS.

U P O N R E S U M I N G :

R E A S O N S F O R R U L I N G

DOWNIE, J. (Orally):

Patrick Murphy was stopped by an O.P.P. sergeant on the third day of April at 11:55 p.m. and was clocked by the O.P.P. sergeant doing 131 kilometres in a 100-kilometre zone.

The matter proceeded to trial and the accused was represented by an agent. The officer, in the form of disclosure, has prepared sheets, which it turns out, constituted the great majority of his evidence at the trial. And some of it I can certainly understand. There is a certain repetition to doing speeding tickets and speeding charges and I can see using some sort of a form where you could fill in the date and the location of where the O.P.P. cruiser was parked at the

time. But he then gets into acronyms which are dealing with whether or not the equipment is a particular type of equipment and whether it is in good working order and that is all canned evidence, the way it comes out.

And when one compares the evidence that is in the disclosure with the officer's testimony starting on page six of the transcript - it would appear that he repeated what is in his disclosure almost word for word except that where he has the acronyms, he filled it out. For example, he says I had with me a Decader Electronics Genesis Two Radar Set, serial number and then it is filled in. And then it says A-D-D-A-C-O-A-N-T-S-O-A-M-V, which looks like something written in the Greek language to me. It turns out that this is a device designed for accurately measuring the speed of the motor vehicle. And that appears word for word in his testimony. A little further along he says at 22:55, a vehicle approached at a H-R-O-S in lane two. Well, that turns out to mean high rate of speed.

He says I was monitoring and he has a spot where he fills in eastbound T-O-F-V-E-T-P which turns out to mean traffic observing for vehicle exceeding the posted and then 100 kilometre limit is filled in. I would think this fails as disclosure because how is anyone, who has not seen this before, to have the faintest idea what these little acronyms mean. This is certainly a failure to provide adequate disclosure.

In addition, the defence has raised the issue of the fact that the officer is just reading this stuff and that it is canned evidence.

In my view this sort of evidence amounts to a failure by the prosecutor to present an original case and not just canned evidence. I think the learned justice of the peace erred when she accepted this canned evidence and that she erred in basing a conviction on it.

I am going to allow the appeal and order a new trial where proper evidence can be submitted, not canned evidence. The appellant's agent is no

longer here so how do we know what day she should come to court?

MR. BURKA: Your Honour, if I may intervene? My office received a phone call from Ms. Carter.

THE COURT: Yes.

MR. BURKA: She had to go to St. Catherine's and I'm here just to ...

THE COURT: Okay, so you will tell her?

MR. BURKA: ... agree to a date.

THE COURT: All right. So a new trial is ordered.

MR. BURKA: And my name for the record is Burka, initial M.

THE COURT: Mr. Murphy lives in Burlington so do these cases come to Kitchener or Cambridge?

Kitchener, I think.

MR. MacDONALD: Cambridge.

THE COURT: Cambridge?

MR. MacDONALD: Yes.

MR. BURKA: I believe it is going to go to set a date in any event.

MR. MacDONALD: It will. January 25th, Your Honour, 2005, please at nine o'clock in the morning in Courtroom number 103, marked to set a date, please.

THE COURT: Okay, so appeal allowed, new trial ordered and appellant to appear in Number Three, Cambridge, 152 Main Street, at 9:00 a.m. to set new date on January 25th. Okay?

MR. BURKA: Thank you, Your Honour.

THE COURT: You will convey that message?

MR. MacDONALD: Thank you, Your Honour.

... THE COURT GOES ONTO OTHER UNRELATED MATTERS.

FORM 2
Certificate of Transcript
Evidence Act, subsection 5(2)

I, Debra Scott, certify that this document is a true and accurate transcript of the recording of *Her Majesty v. Patrick Murphy* in the Ontario Court of Justice held at 200 Frederick Street, Kitchener, Ontario, taken from Recording No. 4411-POA-0001/2004 to 4411-POA-0002/2004, as certified in Form 1.

March 6/2005

Debra Scott

(Date)

(Signature of authorized person)

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