

Case Name:
R. v. Pizzuro

Between
Her Majesty the Queen, and
Hugo Pizzuro

[2012] O.J. No. 860

Court File No. 999-11-2329433A-00

Ontario Court of Justice
Bracebridge, Ontario

W.G. Beatty J.

Oral judgment: January 30, 2012.

(13 paras.)

Counsel:

D. Powell, Counsel for the Crown.

H. Pizzuro, Self-Represented.

REASONS FOR DECISION

1 W.G. BEATTY J. (orally):-- Mr. Pizzuro is appealing conviction on June the 30th, 2011 of driving a motor vehicle while holding or using a handheld wireless communication device that is capable of receiving or transmitting telephone conversations, electronic data, mail, or text messages.

2 The investigating officer testified that on February the 14th, 2011 he was travelling southbound on Highway 11 at 6:40 p.m. and noticed while overtaking that Mr. Pizzuro had excessive light coming from the front of his vehicle.

3 He said that Mr. Pizzuro had a GPS in the windshield and a cell phone in his left hand while driving, and that he was either typing or reading it and it was emitting light.

4 Mr. Pizzuro appeared to notice the officer and dropped the cell phone. On stopping Mr. Pizzuro, he noted a cell phone in the passenger seat or in the console.

5 On examination in chief, the Prosecutor asked at page seven, line 28, Question, "And you were satisfied that this was a cell phone and you said he dropped it?" Answer, "Yes, it appeared to me that when he looked over to the left and I was right beside him, he set the phone down."

6 On brief cross examination, Mr. Pizzuro at page eight, line 29 asks, Question, "All right, and then it appeared that I had a cell phone in my hand?" Answer, "Yes sir." Question, "And then as you pulled behind, then I dropped it?" Answer, "Yes sir."

7 Mr. Pizzuro asked for a Directed Verdict and did not testify on his own behalf. He argued that the prosecutor had not proven an essential element of the offence, namely that the device was capable of anything beyond emitting light.

8 The Prosecutor argued that the burden shifted to the Defendant to prove that the device was in-operative for the purposes of section 78.1(1), whereas the Justice of the Peace agreed and entered a conviction.

9 In reviewing the evidence, the Prosecutor has proven that Mr. Pizzuro was driving and that he appeared to have a cell phone in his hand. No evidence was proffered that such device was capable of receiving or transmitting telephone communications, electronic data, mail, or text messages, which is an essential element of the offence.

10 I agree with Mr. Pizzuro that the burden rests upon the Prosecutor to prove the essential elements of the offence, failing which it is an error in law to enter a conviction.

11 Had the Prosecution produced some evidence that the device was operative as set out in section 78.1(1), Mr. Pizzuro would have been put to his election to call some evidence to the contrary, or that his use was excepted.

12 I would also note that distraction while driving by holding any device in the hand, whether operating or not, might support a charge of careless driving.

13 The appeal is allowed, a dismissal is entered.

qp/s/qlacx/qljxr

