

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ANDREW VINCENT STEVENS

Before Justice of the Peace M. Coopersmith
Heard on June 24, 2010
Reasons for Judgment released on August 19, 2010

A. Midwood for the prosecution

J. Smart for the defendant Andrew Vincent Stevens

JUSTICE OF THE PEACE COOPERSMITH:

[1] Andrew Stevens is before the Court charged with operating a motor vehicle on Dundas Street in Whitby, on June 21, 2009, while performing a stunt by speeding 121 kilometres per hour in a 50 kilometre per hour zone, contrary to subsection 172(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended (“*HTA*”). He also faces a charge of failing to stop his motor vehicle when signalled or requested to stop, pursuant to subsection 216(1) of that Act, by a police officer readily identified as such, contrary to subsection 216(2) of the *HTA*.

[2] On June 24, 2010, the Court heard evidence from Durham Regional Police Officer Chmelowsky and from the defendant. On many issues, their testimonies differed.

1. Evidence of Police Officer Chmelowsky:

[3] June 21, 2009, was a warm and mainly sunny day and the roads along Dundas Street were dry. Officer Chmelowsky was assigned uniformed patrol in a marked police cruiser. He had parked his vehicle on Kathleen Street, just north of Dundas Street East in Whitby, Regional Municipality of Durham, in order to undertake speed enforcement.

Standing outside his vehicle on the sidewalk on the northwest corner of that intersection, he was able to monitor the speed of eastbound and westbound traffic on Dundas Street. The speed limit on these roads is posted at 50 kilometres per hour. There are two eastbound and two westbound lanes alone Dundas Street. At first, Officer Chmelowsky first gave evidence of moderate to heavy traffic by 5:00 that afternoon. A short time later, he described the traffic as light to moderate.

[4] Officer Chmelowsky was using an Ultralite 20/20 laser, which was capable of accurately measuring the speed of moving motor vehicles. He had tested the unit according to the manufacturer's specifications at 8:30 that morning and then again at 5:30 that afternoon and found it to be in good working order. He was first qualified to use that device in 2000-2001, re-qualified annually and used this device almost exclusively.

[5] The police officer first saw the defendant's blue Yamaha Sports Motorcycle about 300 metres away, travelling towards him in the westbound curb lane. It then moved quickly into the passing lane, accelerating rapidly behind a silver motor vehicle which was travelling at the speed limit. There was a third blue vehicle in the curb lane, staggered slightly behind the silver vehicle and when the blue vehicle dropped back and the silver and the blue vehicles were about a car's length apart, the motorcycle quickly accelerated between the two vehicles, switching into the curb lane ahead of the vehicle in that lane. At that moment, the motorcycle was between 80 and 100 metres from the officer who clearly heard the motorcycle gears change. As the motorcycle accelerated ahead, Officer Chmelowsky locked in the speed measuring device. At a distance of 55 metres, he received a reading of 121 kilometres per hour. In the officer's words, "He was well above the speed limit. There's no question in my mind. He was flying. It doesn't take much for those sports bikes to achieve great speeds." In cross examination, he stated, "... and when he took off like a rocket, that's when I obtained the reading with the speed measuring device." Officer Chmelowsky testified that the laser reading of 121 kilometres per hour was consistent with his visual observations.

[6] The officer stepped partially onto the roadway and flagged the motorcycle driver to pull over. From years of experience, he felt confident that the driver had seen him step out onto the roadway in front of him. As the driver of the motorcycle downshifted and applied his brakes, the officer could hear the pitch of the exhaust and could see the nose of the motorcycle dip down from the braking. As the motorcycle drove past the officer, it had slowed, thereby allowing the officer to note its Ontario plate 578E7. According to Officer Chmelowsky, the motorcycle driver wore a flashy multicolour helmet, an orange T-shirt under a dark leather jacket and blue shorts. With the visor down, the officer could not see the motorcycle driver's face or eyes.

[7] Officer Chmelowsky was under the impression that the driver was about to stop. There were no obstructions, impediments or other observable reasons why the motorcycle driver could not stop. Instead, the driver took off and pulled into the parking lot off of Dundas Street, just west of where the officer had been standing. The lot continued past Hooters and then zigzagged up and around to an LCBO. Officer Chmelowsky got into the police cruiser, drove north and entered another entrance to the

parking lot off Kathleen Street. Between one half and one minute later after the motorcycle passed Officer Chmelowsky on Dundas Street, he saw the same person he believed was the driver enter into the LCBO. Noting the same plate number, he parked his police cruiser behind the motorcycle and went into the LCBO. Inside, he saw the motorcycle driver at the cash, sweaty, panicky and with helmet indentations on his head. The officer waited for the driver to finish what he was doing and then made a demand for documents. Comparing the photograph on the valid Ontario drivers licence, Officer Chmelowsky was satisfied that the motorcycle driver, in fact, was the defendant before this Court.

2. Evidence of Defendant:

[8] The defendant tells a different story. He testified that he left his residence around 4:40 pm on June 21, 2009, headed for the LCBO in Whitby. It was a hot day, about 26 degrees Celsius. In that heat, the defendant rode with sunglasses and with his visor up. He agreed that he was wearing an orange shirt, but he was not wearing his leather jacket in that heat. He drove his motorcycle south on Thornton Road, then west on Dundas Street in moderate traffic, stopping at a red light at Garrard Road. When the light turned green, he proceeded in the curb lane behind a white Pontiac 6000 which had just pulled out of a Tim Horton's parking lot. The Pontiac was braking as its driver attempted to open his coffee or donut bag. In the other lane was a vehicle driving at about the speed limit. After it passed the motorcycle, the defendant pulled into that passing lane. Once there was enough room, the defendant signalled to move back into the curb lane. However, the white Pontiac beside him sped up. Consequently, the defendant accelerated to a maximum speed of 78 kilometres per hour, as observed by him on his digital speedometer, and pulled back into the curb lane. Upon seeing the police officer, the defendant slowed to 64 kilometres per hour, beside a red Grand Am and with the white Pontiac on his tail. The defendant noticed the police officer had looked at him, but at no time did the defendant see the police officer signal or make any gesture for him to stop.

[9] In order to get to the LCBO parking lot, normally, the defendant would have continued west on Dundas to Thickson Road, then turn right onto Thickson and right again into the parking lot. However, because the Pontiac was travelling so close behind and he wanted to get away from this vehicle, the defendant pulled off of Dundas Street, before reaching Thickson Road, into the first driveway and into the parking lot by Hooters. There he stopped, put his motorcycle into neutral, put his kick stand down and, knowing he had been speeding more than 15 kilometres per hour over the speed limit, he waited and looked right at the police officer. The white motor vehicle pulled in behind the motorcycle and the defendant motioned for the driver to drive around him. The Pontiac driver then proceeded to park by the furniture store and went over to hand a piece of paper to the police officer who had not yet moved from his location. All of this took about three minutes – the time it takes for the motorcycle's extra fans to engage when the bike is in idle. When the police officer still did not approach, the defendant figured everything was alright and it was his lucky day as he proceeded to the liquor store.

[10] The defendant was in the LCBO and took about eight minutes to select a wine and some beer and reach the cash. It was a very warm day, but the defendant kept his helmet on in the air conditioned store. At 5:00pm, the doors to the store were locked and the police officer had to knock on the glass in order to be let in. The officer approached the defendant and asked him for documents and for the keys to his motorcycle. The defendant handed over his documents and the keys to his motorcycle and, believing something serious had occurred, called a friend to come and get him.

[11] The defendant testified that eleven to twelve minutes passed between the time the defendant first drove along Dundas Street past the police officer and the time the officer approached the defendant inside the LCBO. The defendant further stated that his maximum speed was 78 kilometres per hour approaching the officer along Dundas Street. He regularly had his motorcycle maintained and calibrated every three to six months and had just gotten it out of the shop and onto the road one week prior to this incident. Furthermore, he had been driving motorcycles for about 30 years. In the city, he rode only in 1st and 2nd gear, shifting out of 1st gear around 50 kilometres per hour and out of 2nd gear around 60 kilometres per hour. Had he been travelling at 106 kilometres per hour, the front wheels of his motorcycle would have come up off the pavement.

3. Relevant Legislation:

[12] The defendant is charged with performing a “stunt” under subsection 172(1) of the *HTA*, as defined by section 3, paragraph 7 of *Ont. Reg. 455/07* made under that *Act*. Subsection 172(1) of the *HTA* reads:

172.(1) Racing, stunts, etc., prohibited – No person shall drive a motor vehicle on a highway in a race or contest, while performing a stunt or on a bet or wager.

[13] Section 3, paragraph 7 of *Ont. Reg. 455/07* defines “stunt” as:

3. Definition “stunt” – For the purposes of section 172 of the *Act*, “stunt” includes any activity where one or more persons engage in any of the following driving behaviours:

7. Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit.

[14] The defendant also is charged under subsection 216(1) and 216(2) which state:

216.(1) Power of police officer to stop vehicle – A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

(2) Offence – Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable, subject to subsection (3),

- (a) To a fine of not less than \$1,000 and not more than \$10,000;
- (b) To imprisonment for a term of not more than six months; or
- (c) To both a fine and imprisonment.

4. Analysis and Findings:

[15] The police officer and the defendant have each provided differing versions of what transpired around 5:00 pm, on June 21, 2009, on Dundas Street in Whitby. Consequently, I have applied the provisions of *R. v. W.D.*, [1991] 1 S.C.R. 742. I must, therefore, assess the evidence to determine that upon which I intend to rely. I am guided by *Faryna v. Chorney*, [1952] 2 D.L.R. 354(B.C.C.A.), a case relied on over the years at every court level. At paragraphs 10 and 11, Justice O'Halloran writes:

“If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. **In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.** Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.” [Emphasis added.]

[16] I must determine whether to rely upon the testimony of the police officer or that

of the defendant. I am mindful of the prohibition on treating the assessment of credibility as a credibility contest between the defendant and the police and simply choosing that which I prefer and necessarily rejecting the other. Keeping that prohibited reasoning in mind, I have been particularly careful to give the defendant's evidence fair consideration in the context of all of the evidence and avoid any pre-mature acceptance of the police evidence that would interfere with my assessing the possibility of being left with a reasonable doubt on the defendant's evidence and the evidence as a whole.

[17] I do not find the police evidence in this matter to always be reliable, objective or compelling for several reasons. Firstly, the officer's testimony was not unwavering. At one point he described the traffic on Dundas Street as moderate to heavy. Then it changed to light to moderate. Furthermore, I have applied *Faryna v. Chorney, supra*, "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." Officer Chmelowsky testified that it took him between 30 seconds and a minute from the time he left the spot where he stood, close to the northwest corner of Kathleen Street and Dundas Street, and signalled to the defendant to pull over, then got into his vehicle, drove around to the LCBO parking lot, parked behind the defendant's motorcycle, exited his vehicle, went into the LCBO and approached the defendant who was already paying for his purchases at the cash in the LCBO. I am not satisfied that the defendant could drive his motorcycle into the parking lot, zigzag his way to park in front of the LCBO, enter into the store, peruse the wines before making his select, move to the beer section to pick up some beers, walk over to the check out cashier and be in the process of paying with a debit card in the short time period of between thirty seconds and one minute. Accordingly, I rely upon the evidence of the defendant to find that approximately eleven minutes had elapsed from the time the defendant drove past the officer's location on Dundas Street, to the time the officer approached him at the checkout cashier in the LCBO.

(a) Performing a stunt pursuant to section 172 of the HTA:

(i) Original offence of performing a stunt:

[18] There is no dispute that the defendant before the Court was the driver of the blue Yamaha Sports motorcycle driving westbound on Dundas Street East in Whitby just before 5:00pm on June 21, 2009, at a rate of speed above the maximum speed limit of 50 kilometres per hour.

[19] It was Officer Chmelowsky's testimony that as the defendant approached to a distance of 55 metres from where the officer was standing, he was travelling 121 kilometres per hour in the 50 kilometre per hour speed zone. The defendant, on the other hand, stated that he was in the passing lane when he sped up to a maximum speed of 78 kilometres per hour in order to pass the white Pontiac which was in the curb lane. He moved back into the curb lane, ahead of this vehicle, when he saw the police officer up ahead, causing him to slow down from 78 kilometres per hour to about 64 kilometres per

hour.

[20] From Officer Chmelowsky's unchallenged evidence I find that the defendant was 80 to 100 metres east of the police officer's location when he pulled passed the Pontiac and moved his motorcycle back into the curb lane. At that time, evidence supports that the vehicles were travelling at about the speed limit. Between 25 and 45 metres later, at a distance of 55 metres from the officer's location, the officer stated that the defendant was travelling at a rate of speed of 121 kilometres per hour. However, if I were to accept the defendant's testimony wherein he stated that he slowed after seeing the officer, it follows, then, that at a distance of 55 metres, the defendant could not be travelling at 121 kilometres per hour, but at a rate of speed below the defendant's stated maximum speed of 78 kilometres per hour. Although the officer testified to an extremely rapid rate of acceleration, I have no evidence that behaviour, such as the front tire of the motorcycle lifting off the ground, was observed. Moreover, the police officer first testified that traffic was moderate to heavy and in these circumstances I would reasonable infer that travelling at 121 kilometres per hour might prove not only dangerous, but also a difficult task to achieve in the surrounding moderate to heavy traffic.

[21] For these reasons, as well as those previously provided, I do not find the testimony of the officer reliable. Consequently, I reject his evidence that the defendant was driving 121 kilometres per hour and I rely upon the defendant's submission that he was speeding 78 kilometres per hour as he drove along Dundas Street approaching Kathleen Street on June 21, 2009. This rate of speed is less than 50 kilometres per hour over the posted 50 kilometre per hour speed zone. As a result, I do not find the defendant guilty of performing a stunt under section 172 of the *HTA*.

(ii) Speeding under section 128 as an included offence:

[22] Section 55 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, reads:

55. Included offences – Where the offence as charged includes another offence, the defendant may be convicted of an offence so included that is proved, although the whole offence charged is not proved.

[23] I am guided by *R. v. Reiber*, [2007] O.J. No. 2921 (O.C.J. – Prov. Div.), at para. 14, *R. v. Richards*, [2009] O.J. No. 5776 (O.C.J. – Prov. Div.), at para. 20 and *R. v. Mejia*, [2008] O.C.J. No. 2893 (O.C.J.), at para. 10, which have determined that an included offence is not just a lesser offence, but is one which the defendant necessarily commits in committing the offence with which he or she is charged. In other words, the essential elements of the included offence must be contained within the original offence charged.

[24] I must now determine if “speeding” is an element of the offence of “performing a stunt”. *R. v. Benson*, [2009] O.J. No. 4956 (O.C.J. – Prov. Div.) is caselaw in which it was determined that speeding under section 128 was an included offence of “race” under section 172 of the *HTA*. Applying the analysis set out in that case, section 3, paragraph 7

of *Ont. Reg. 455/07*, defines “stunt” as one or more persons engaged in driving behaviour consisting of driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit. This offence contemplates a more serious contravention than speeding simpliciter. Nonetheless, it is premised on the fact that speeding is an essential element in the offence before this Court of “performing a stunt”. Moreover, the definition, itself, contains the words “rate of speed” and “over the speed limit”, from which a reasonable inference can be made that an essential element of this offence is driving conduct at a rate of speed over the speed limit.

[25] Specifically in relation to section 3, paragraph 7 of *Ont. Reg. 455/07*, it is very clear that, in accordance with the Ontario Court of Appeal decision in *R. v. Raham*, [2010] O.J. No. 1091, at paragraph 50, as Doherty J.A., writing for the court states:

“I would add that even where a due diligence defence is available to a charge of stunt driving contrary to s. 3, para. 7 of the Regulation, a conviction for speeding will often be imposed. Section 55 of the Provincial Offences Act, R.S.O. 1990, c. P.33 would permit, in most situations, a conviction on the lesser but included offence of speeding contrary to s. 128 of the Highway Traffic Act: see *R. v. Benson*, [2009] O.J. No. 4956, 2009 ONCJ 566, at paras. 29-34.”

[26] For these reasons, I find that the offence of speeding under section 128 of the *HTA* may be considered an included offence of the original count on the information of performing a stunt under section 172 of the *HTA*.

[27] In the circumstances before this Court, the defendant was very forthright when he admitted that he was speeding at a rate of speed of 78 kilometres per hour. I find this evidence to be credible and reliable. Moreover, although speeding is an absolute liability offence, and no *mens rea* need be proven, the defendant stopped for a short time right after turning off of Dundas Street into the parking lot, quite expecting the police officer to come over to him because he knew he was speeding – another admission that he knew he had contravened section 128 of the *HTA*. Therefore, I am satisfied beyond a reasonable doubt that under section 128 of the *HTA*, the defendant is guilty of speeding at a rate of speed of 78 kilometres per hour in a 50 kilometre per hour zone.

(b) Fail to stop in response to command of police officer, pursuant to section 216 of the *HTA*:

[28] The offence under subsection 216(1) is a strict liability offence in which the Crown does not have to prove the existence of *mens rea*. Consequently, if the Crown is able to prove all of the elements of this offence beyond a reasonable doubt, the defendant can avoid liability by proving on a balance of probabilities that he took all reasonable care. A strict liability offence also leaves open the defence of reasonable mistake.

[29] There is no dispute that Officer Chmelowsky was standing beside the roadway dressed in police uniform and readily identifiable as a police officer. However, there is no evidence that he activated the lights or sirens on his police vehicle. In fact, he did not

pursue the defendant's motorcycle along Dundas Street and into the parking lot via the entrance off of Dundas Street. Rather, he advised the Court that he drove the fully marked police cruiser north on Kathleen and entered a parking lot entrance off of that street. Nonetheless, Officer Chmelowsky was confident that the defendant saw him step onto the roadway and flag his motorcycle to stop by the side of the road.

[30] The defendant testified that the police officer did not signal to him to pull over and stop by the side of the road. Furthermore, because he knew he was speeding, the defendant pulled into the first entrance into the parking lot, stopped near this entrance and waited for the police officer to approach him. When the officer made no move to come towards him, after a few minutes the defendant continued through the lot and zigzagged his way to park by the LCBO.

[31] It would be putting an undue burden on the Crown to require it to prove beyond a reasonable doubt that a defendant knew or saw that the police officer was signalling him to stop by the roadside. Nonetheless, since I accept the defendant's testimony that he stopped for a few minutes at the entrance to the parking lot, anticipating that the police officer would be approaching him to charge him with an offence under the *HTA*, therefore, I am satisfied beyond a reasonable doubt that the defendant was aware that the officer was readily identifiable as a police officer and, furthermore, I can reasonably infer that, without evidence to conclude otherwise, his stopping by the entrance of the parking lot supports a finding that the defendant believed the police officer made some sort of indication for the defendant to come to a safe stop.

[32] I have relied upon the defendant's evidence that he stopped and waited as soon as he entered into the parking lot and I also accept that he waited approximately three minutes for the police officer to approach. Therefore, I find that after seeing the officer, the defendant did come to a stop immediately after pulling off the road into the first driveway a short distance ahead of where the officer had been standing. This finding is strengthened by the police officer's testimony that he saw the nose of the motorcycle dip as the driver braked relatively hard prior to turning into the entrance. A significant amount of time elapsed between the defendant pulling into the parking lot off of Dundas Street and the police officer approaching the defendant at the cashier in the LCBO. The reasons for the police officer's delay are not clear.

[33] Based on my findings, for the reasons given, I am satisfied that the defendant immediately came to a safe stop and waited for the officer to approach. As a result, and I am not satisfied that all of the elements of failing to immediately come to a safe stop when signalled to do so by a police officer, as provided in section 216(1) of the *HTA* have been made out beyond a reasonable doubt.

5. Conclusions:

[34] For the reasons provided, I find the defendant not guilty under section 172 of the *HTA*, but guilty of the included offence under section 128 of the *HTA* of speeding 78 kilometres per hour in a 50 kilometre per hour zone. Accordingly, a conviction will be

entered.

[35] The charge under section 216 of the *HTA* is dismissed.

Released: August 19, 2010

Signed: “Justice of the Peace M. Coopersmith”