

Case Name:
R. v. Wilkins

Between
Her Majesty the Queen, and
Mark Wilkins

[2006] O.J. No. 5366

2006 ONCJ 529

42 M.V.R. (5th) 316

2006 CarswellOnt 8656

File No. 71124931

Ontario Court of Justice
Parry Sound, Ontario

L. Klein J.

Oral judgment: December 12, 2006.

(16 paras.)

Transportation law -- Motor vehicles -- Offences -- Speeding -- Appeal by Wilkins from conviction for speeding allowed, as no evidence that police officer used instructions from manufacturer of laser radar to verify radar's accuracy -- Reasonable doubt raised about accuracy of radar.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 128

Charge: S. 128 Highway Traffic Act - speeding.

Counsel:

P. McHenry, Agent for M. Wilkins.

J. Anderson, counsel for Crown.

REASONS FOR JUDGMENT

1 L. KLEIN J. (orally):-- This matter came on for appeal on the last Provincial Offences court docket. It was an appeal from a decision of His Worship Justice of the Peace Michael Kitlar delivered on July 18th, 2006.

2 The facts of the matter are that on the 20th of May, 2006, on Highway 400 in Sequin Township, Constable Rod Roberts of the Northeast Traffic and Marine Unit was on traffic detail operating the Lidar machine monitoring northbound traffic on that stretch of Highway 400, which is posted 100 Kilometre per hour zone.

3 He indicated at the time he was trained and qualified as a Lidar operator, having been trained on April 3rd, 2003 and re-qualified on October 4, 2004 and that he was still so qualified on May 20th, 2006.

4 He testified that at 6:16 a.m. on that occasion he had conducted checks of the Lidar machine, and tests as approved by the manufacturer, and found it to be operating properly. At 6:07 p.m. he again checked that unit with the tests approved by the manufacturer.

5 His indication was that he had made a visual check on a motor vehicle, which was northbound on Highway 400. It appeared to be speeding at a high rate of speed and it closed very fast on a car proceeding in front of it. At that point he sighted the lights of the Lidar on the front of the vehicle, which was a blue Subaru. He activated the Lidar and obtained readings of 151 kilometres per hour when he locked it in at a distance of 513.8 metres.

6 He flagged down the vehicle and ultimately identified the appellant Mark Wilkins with a valid photo-type driver's license for Ontario.

7 In cross-examination Constable Roberts indicated that he had received training on the Lidar machine and that he had not viewed the original manual that was provided by the manufacturer of that machine.

8 The argument that was placed before me related to the issue of whether a Lidar machine can be considered accurate under the circumstances where the officer has not been trained with the original manual for that machine. The belief by the officer that the machine was operating properly has to be a belief that is grounded in fact and is grounded from training that he has received from the manufacturer.

9 The appellant argued that P.C. Roberts cannot say that he tested the unit in accordance with the manufacturer's specifications as he only saw a photocopy of the manual supplied by - and this is where the evidence became fairly murky - did not say it was supplied by the manufacturer. He did say it was supplied by the Ministry of Transportation, which was the unit he was using. I checked the evidence in the transcript very carefully to see if at any point he mentioned the name of the manufacturer or that it was supplied by the manufacturer and at no point was that mentioned by P.C. Roberts in examination in-chief, cross-examination, re-examination and examination by Justice of the Peace Kitlar.

10 Now photocopy technology is well accepted as producing accurate, reliable copies of written documents. It is acceptable for mass production purposes and mass reproduction purposes. It is a reliable and useful tool and would have been accepted by this court as a reasonable facsimile of the manufacturer's manual had the evidence been led to that effect. However, the law requires more than just a photocopy, it requires a demonstration that the operator is qualified, that the device has been tested properly both before and after its use, and that the test showed that the instrument was accurate - that would establish the prima facie evidence of that accuracy.

11 The case of R. v. Mukasa, [2001] O.J. No. 262, a 2000 decision of the Ontario Court of Justice, and the case of R. v. Le, [2002] O.J. No. 894, a 2002 decision of the Ontario Court of Justice, indicates: "Laser speed detection devices have been used in Ontario since 1993 and they are no longer new and novel technology. Uncontradicted scientific evidence has confirmed the accuracy and reliability of laser speed detection devices. Evidence of readings from laser speed detection devices is admissible." Again, admissible if properly qualified. The case of Niewiadomski, [2004] O.J. No. 478, a 2004 decision of the Ontario Court of Justice, indicates: "Cross-examination which elicits the admission of non-compliance with the manufacturer's specifications and directions as to testing and operations should raise a reasonable doubt."

12 The evidence that was before me, as indicated, on all levels of examination indicated that there was not compliance. There was no evidence of compliance with the manufacturer's specifications and directions. That raises the reasonable doubt that should have been in the mind of the justice of the peace on this occasion.

13 The case that was cited to me, the case of Gianna, a decision of the then Ontario Court (Provincial Division), with the justice of the Peace sitting at trial, stands for the proposition that the officer must have a reasonable belief that the qualification that he has received and the testing of the machine is one that comes from the manufacturer's specifications and from the manufacturer's manual.

14 There is no evidence in the transcript before me that indicates the training officers were using the manufacturer's manual, nor that the manual that was provided with the machine was one that came from the Manufacturer.

15 I am left then with the reasonable doubt as to the accuracy of the testing process, and

therefore, the accuracy of the Lidar machine on that particular occasion given the evidence from the officer himself.

16 On that basis the appeal will be allowed and the charge will be dismissed.

qp/s/qlafr/qlkjg/qlbdp