

Citation: *R. v. Puncher*, 2007 ONCJ 274

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty the Queen

— AND —

Allan Puncher

Before Justice of the Peace M A Cuthbertson
Heard on 4 January 2007
Reasons for Judgment released on 25 May 2007

Offence: s.128 HTA – Speeding

R Murray for the prosecution
R Burd for the defendant

Cases Considered:

R v Bigioni, Provincial Offences Court, Scarborough, September 17, 1986
R v Bigioni, Provincial Court (Crim Div), Scarborough, February 9, 1987
R v Bigioni, Supreme Court of Ontario, September 28, 1988
R v Hayes, Ontario Court of Justice, Newmarket, March 1, 2005
R v Hayes, Ontario Court of Justice, Newmarket, June 23, 2005
R v Koumoudouros, Ontario Court of Justice, Hamilton, May 17, 2005
R v Milelli, Ontario Court of Justice, Brampton, December 28, 1988
R v Niewiadomski, [2004] OJ No 478
R v Sim, Provincial Offences Court, Dryden, May 15, 1987
R v Sim, Provincial Court (Crim Div), Dryden, July 22, 1987
R v Sim, Supreme Court of Ontario, October 11, 1988
R v Vancrey, 147 CCC (3d) 546

Statutes considered: s. 128 Highway Traffic Act

JUSTICE OF THE PEACE CUTHBERTSON:

BACKGROUND

1. The defendant was observed by Officer Gray, on 17 Aug 2006, at 6:54 AM, travelling on County Rd 52, within Wellington County, in a posted 50 kilometre per hour zone, on a Harley Davidson motorcycle. The officer observed the motorcycle approaching from the rear of his unmarked police vehicle at what appeared to him to be a high rate of speed. The motorcycle was a motor vehicle as defined in the Highway Traffic Act. It was the only vehicle in the officer's radar beam when he activated the device.
2. The radar device indicated to the officer that his patrol speed was 50 kilometres per hour. He confirmed by visual observation that his speedometer was also registering 50 kilometres per hour.
3. The speed of the motorcycle was locked on the radar at 82 kilometres per hour. The vehicle passed the officer on the left and was subsequently stopped by the officer, having never lost sight of the vehicle. The officer used his discretion and laid the charge at 79 km per hour.
4. Mr Puncher who was driving the motorcycle, identified himself with a valid Ontario Driver's Licence.
5. Officer Gray was a qualified radar operator. In his evidence, he stated that he tested the unit at 5:37 AM and again at 7:01 AM, as per manufacturer's instructions and on both occasions it was found to be working correctly.

ISSUES BEFORE THE COURT

Issue #1: Can a reasonable doubt be created in cross examination?

6. No evidence was led by the defence. In cross examination of Officer Gray, Mr Burd enquired as to whether a certain speed must be obtained for the 'road test', which is part of the manufacturer's specified testing instructions. The officer stated that he always makes sure that he is travelling above 50 km per hour during this road test, as there is a minimum speed required by the manufacturer. When asked what that minimum speed is, he stated:

“I can’t recall. I believe it’s somewhere in the neighbourhood of 30 kilometres per hour.”

Mr Burd then asked if the required speed could be higher or lower and the officer replied:

“It could be.”

7. Mr Burd submitted that this evidence should raise a reasonable doubt in the court’s mind. Specifically, he took the view that if the officer was not sure what speed the manufacturer required the road test to be conducted, then the reliability of the device at the time of the alleged offence was in question.
8. Mr Murray submitted that the defence could not raise such a doubt in cross examination as no evidence had been led by defence as to what the manufacturer’s instructions stated in regards to the road test speed.
9. Respectfully, I disagree with the position taken by the prosecution. In *R v Branita Koumudouros*, a decision from 17 May 2005 of Mr Justice Zabel, sitting as an appellate court, the court held:

“ I further find that in light of the cross-examination of the officer that a reasonable doubt was established...”

In *R v Niewadomski* [2004] OJ No 478, Madam Justice Schnall also sitting as an appellate court, stated at paragraph 26:

“ A prima facie case can support a conviction unless the defence raises a reasonable doubt through independent evidence, or through cross-examination of the Crown witness.”

Also, in *R v Vancrey* 147 CCC (3d) 546, Justice Feldman of the Ontario Court of Appeal adopted the reasoning in *R v Bland* [1974] 20 CCC (2d) 332. At paragraph 16, Justice Feldman stated:

“Arnup J.A., speaking for the court, concluded: "In short, I would hold that where evidence is given that over a measured level distance the speedometer recorded steadily at 95 mph, this is prima facie evidence that the offence of driving at 90 mph was committed, in the absence of some evidence, elicited either on cross-examination or by defence witnesses, which would suggest that the speedometer on the police vehicle was inaccurate"

Therefore, I find that a reasonable doubt can be raised in cross-examination.

Issue #2: Was the radar device proven to have been operating accurately?

10. In *Vancrey, supra*, the Ontario Court of Appeal was dealing with a laser device. At paragraph 21, Justice Feldman stated:

“The Crown seeks to uphold the conviction on the basis that there was led at trial prima facie evidence of the accuracy and reliability of the particular laser unit, consisting of the performance of the manufacturer's tests for good working order both before and after the use of the device,...”

This ruling equally applies to radar devices, in my view.

11. The court then continued at paragraph 22:

“In my view, the position of the Crown is correct. The court received evidence that the officer who operated the laser device was trained and experienced and that he tested the device both before and after its use in accordance with the manufacturer's instructions to ensure that it was operating properly on the date in question.”

12. One of the keys to success for the Crown then, is that the radar device is tested in ‘accordance with the manufacturer’s instructions’. For an officer to test the device according to the manufacturer’s instructions, it is logical that the officer must know what those instructions are. However, as noted above, Officer Gray was not sure as to the speed the manufacturer required that the road test be done.

DECISION

13. I find that the officer’s lack of knowledge as to what testing speed is required to meet the manufacturer’s specifications for the road test is fatal to the prosecution’s case. The lack of specific evidence on the required speed raises a reasonable doubt as to whether the radar device was operating accurately when Officer Gray locked in the speed of the motorcycle.
14. Therefore, the prosecution has not proved the essential elements of this offence beyond a reasonable doubt.
15. Consequently, the charge is dismissed.

Released at Guelph: 25 May 2007

Signed: “Justice of the Peace M A Cuthbertson”