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R. v. Arseneau

Between
Her Majesty the Queen, and
Leo Arseneau

Ontario Judgments: [1988] O.J. No. 2525

Ontario Provincial Court - Criminal Division
Bracebridge, Ontario
Bice Prov. Ct. J.

April 12, 1988

Charge: Drive with radar warning device, s. 61 Highway Traffic Act.

B.N. Colvin, for the Crown Attorney.

P. Zylberberg, for the Defence.

BICE PROV. CT. J. (orally):— This is a trial, two counts under the Highway Traffic Act, charges laid on two separate certificates. One of speeding under s. 109 and a further driving with a radar warning device in a vehicle, contrary to s. 61 of the Highway Traffic Act. A trial proceeded on both charges at the same time pursuant to s. 39(1) of the Provincial Offences Act, both offences arose out of the same circumstances.

During the trial an issue arose as to the search and seizure of a piece of evidence from the defendant by Constable Dawson and the trial proceeded then by way of a voir dire.

The officer when clocking the motor vehicle on his radar became immediately suspicious that the defendant was driving his motor vehicle with a radar warning device. When the motor vehicle was stopped the defendant denied that there was such a device in his vehicle. The officer made a search of the vehicle as he was permitted to do under s. 61(3) of the Highway Traffic Act. He found a wire leading from a plug into the cigarette lighter of the motor vehicle and this wire led to an area on the dash where he found a clip that he recognized as a type of clip used to hold a radar warning device. There was no such device there. The defendant, when asked, offered to open the hood of the motor vehicle and at that point the officer observed an object in the defendant's pocket that looked like a radar warning device.

The defendant further denied having such a device. The officer then proceeded to place him under arrest under the Criminal Code, s. 118 for obstructing justice and at that point he retrieved a radar warning device from the pocket of the defendant (the object that the officer had seen). The officer recognized the device as a

type he had seen before and he later tested it further and found that it did give signals when operated in the area where there was a radar unit.

The defence argues that the search of the defendant was both unlawful and unreasonable and thereby contravened not only the principles of law, but was contrary to s. 8 of the Charter. The officer's procedure was in line with the procedure suggested in a memo from a Corporal R. Burton of the Ontario Provincial Police to cover this type of situation.

In the first place I am satisfied that the officer had reasonable and probable grounds to believe that the defendant had a radar warning device and was using it when he was driving his motor vehicle.

It is clear under s. 61 that the only powers to search for a radar warning device under the Highway Traffic Act involves a search of the motor vehicle only. Further the search for the radar warning device on the person of the defendant does not fall within the arrest provisions of s. 190 of the Highway Traffic Act.

The procedure suggested in the memo as followed by the officer is that the defendant be arrested for obstruction under s. 118 of the Criminal Code and then the officer could then proceed to search for the prohibited article. I note that the Corporal starts out at the top of p. 2 of his memo by begging for a legal opinion on the suggested procedure.

Defence counsel refers to the case of R. v. Balsdon, 1968, 2 C.C.C. 164. I agree that His Honour Judge Waisberg correctly set out the law in that case and that the law, even though it was pre-Charter, has not changed since 1967 when the case was decided and that is that no man can be compelled to incriminate himself. S. 8 of the Charter of Rights and Freedoms guarantees against unreasonable search and seizure as well. It would be a simple matter to put powers of arrest and search into the Highway Traffic Act to cover situations such as the officer was faced with here and the concerns set out in Corporal Burton's memorandum that was filed as an exhibit on the voir dire.

I agree there was nothing in law to compel the defendant to turn over the radar warning device to the officer from his possession. With no such compulsion the officer, albeit frustrated, had no reasonable and probable grounds to arrest the defendant for obstruction.

Having concluded that the search was both unlawful and unreasonable in the circumstances then any evidence flowing therefrom should not be accepted by the court and I will not accept that evidence.