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R. v. Bigioni

Between
Her Majesty the Queen, and
Denis Bigioni

[1986] O.J. No. 2753

Ontario Provincial Offences Court
Scarborough, Ontario
Sturch J.P.

September 17, 1986.
(102 paras.)

Charge: Speeding - Highway Traffic Act s. 109

Counsel:

R. Bigioni, for the defendant.
P.C. Ironside, agent for the Crown.

STURCH J.P.:—

¶ 1 CLERK OF THE COURT: Denis Bigioni, you are charged on June 21, 1986 at 1:01 a.m. in the Municipality of Scarborough, did commit the offence of speeding 94 kilometers per hour in a 60 kilometer per hour zone, contrary to the H.T.A. Section 109. How do you plead to this charge, sir, guilty or not guilty?

¶ 2 THE DEFENDANT: Not guilty.

¶ 3 **THE COURT**: Just have a seat there, please.

¶ 4 CLERK OF THE COURT: Name, number and division, officer.

P.C. ANTHONY IRONSIDE, #3020, SWORN

EVIDENCE IN-CHIEF BY P.C. IRONSIDE

¶ 5 THE WITNESS: Your Worship, the 21st day of June, 1986, at approximately 1:01 a.m. I was in an unmarked car parked on the east side of Warden Avenue just south of Bridletown Circle. At this time I was observing the traffic travelling north and southbound on Warden Avenue, with regards to the speeding.

¶ 6 At this time, approximately, I observed a Ford travelling southbound on Warden Avenue. It was the lone vehicle, it was in the second of two lanes. It passed by my location and appeared to be speeding.

¶ 7 At this time I had a hand held Muniquip radar speed device which I pointed.at the vehicle as it passed my location. It recorded a speed of 94 kilometers per hour, this being a posted 60 kilometer per hour zone.

¶ 8 I stopped this vehicle, licence ZPK 259. The driver identified himself with a class G licence as Denis A. Bigioni, the defendant before the court.

¶ 9 The weather was cool and clear, the roads were dry at this time, and I am qualified in the use of radar.

¶ 10 I tested this hand held radar set at the start of the shift, at the setup location and after I finished shift at 3:00 a.m., and it was found to be in accurate working order.

¶ 11 That's the evidence I have in this case.

¶ 12 **THE COURT**: Mr. Bigioni, any questions?

¶ 13 MR. BIGIONI: Thank you.

CROSS-EXAMINATION BY MR. BIGIONI

¶ 14 Q. Officer, you made notes with respect to this offence?

¶ 15 A. Yes, I have.

¶ 16 Q. May I see them, please? Can you indicate to me, sir, where they start and where they end?

¶ 17 A. It's all on the front page.

¶ 18 Q. Thank you.

¶ 19 MR. BIGIONI: Thank you, officer.

¶ 20 No questions, Your Worship.

¶ 21 **THE COURT**: Thank you, sir.

¶ 22 Do you wish to call a defence to the charge?

¶ 23 MR. BIGIONI: No, sir. I'll be calling no evidence and making submissions only.

¶ 24 **THE COURT**: Okay. What would you like to say, sir?

¶ 25 MR. BIGIONI: Your Worship, my position, my submission in this matter is that the Crown has failed to prove the speed of the accused's vehicle beyond a reasonable doubt.

¶ 26 I base that submission, Your Worship, on a number of cases I would like to submit to the court and to my friend.

¶ 27 I suppose the essence of the submission, Your Worship, is contained in the Regina and O'Reilly case, the first case that I've given you this evening, sir, and in a nutshell, I suppose, the submission is that where a

radar device is used to clock the speed of an accused's vehicle in an offence of this nature, it's incumbent on the Crown to prove beyond a reasonable doubt that the radar device is capable of accurately measuring speeds at the material time.

¶ 28 And I'd refer you, sir, to the relevant provisions of the O'Reilly case, which is a District Court of Alberta decision, specifically on the second page, Your Worship, the second column, summarizing a previous Alberta decision. I'm looking specifically at the numbered paragraphs at the bottom of the second column, Your Worship, and I'll quote:

> "Readings taken from radar instruments can be accepted as prima facie evidence in the following circumstances: ,
>
> (a) the instrument must be operated by someone trained in its operation, and
> (b) ..." and perhaps more to the point, Your Worship ..." the operator must give evidence that at the time in question he conducted an approved test of the instrument and that that test satisfied him that the instrument was operating properly and was capable of accurately measuring speeds".

¶ 29 That is the basis of the submission, Your Worship. Again, the officer has failed to give adequate evidence to establish even a prima facie case of speeding against the accused in this matter.

¶ 30 I have a number of cases, Your Worship, that I wish to rely upon that follow the O'Reilly decision. Before I come to those, Your Worship, let's briefly review the evidence in this matter.

¶ 31 With respect to training, sir, my submission is that the only evidence before the court is the officer's bald allegation that he is a qualified radar operator. No more, no less.

¶ 32 With respect to the issue of testing, Your Worship, the officer indicated that he tested the unit before and after, and at the radar location, and found it to be in good working order.

¶ 33 There was no evidence, Your Worship, as to the type of tests conducted, whether they were tuning fork or otherwise. There was no evidence, sir, as to whether those tests were approved in the operating manual governing the use of that particular device, and my submission is based on the O'Reilly decision, it is simply insufficient to warrant a conviction.

¶ 34 Now, a little closer to home, Your Worship, perhaps ... and I don't propose to go through the cases in detail, but the Schniffer and Seymour cases, Your Worship, the next two cases in the documentation I have given you, are both decisions of the provincial offences appeals court in the province of Ontario in, I think, the Middlesex and the Kitchener area.

¶ 35 Again, Your Worship, without referring to them specifically, those cases follow O'Reilly, rely upon O'Reilly, and result in a holding which I submit is good law in the province of Ontario, that the evidence before the court this evening is not sufficient to warrant a conviction.

¶ 36 I might indicate, Your Worship, that the Schniffer case, at page five, deals specifically with the training issue. Towards the bottom of that page, Your Worship, quoting again briefly:

> "It is clear from the line of cases, and it is a matter of logic, common sense, that there must

> be some evidence that the radar operator, be he police officer or someone else, has been trained and has experience presumably based on proper training, so that the evidence may be relied upon".

¶ 37 And again, over the page, Your Worship ... again, without quoting ... the evidence, I submit, in that decision went beyond what is before the court this evening, sir, and it was found to be insufficient.

¶ 38 Again, Your Worship, the Seymour case deals more specifically with the testing issue ... and I apologize for the poor qualities of the copies, Your Worship ... but at page 16, being the second-last page of that transcript ...

¶ 39 **THE COURT**: Which case is that?

¶ 40 MR. BIGIONI: This is Regina against Seymour decision, Your Worship.

¶ 41 **THE COURT**: Page 16?

¶ 42 MR. BIGIONI: Yes. The second-last page, Your Worship.

¶ 43 Again, towards the bottom of the page about seven lines up, sir, the judge, in his reasons for decision, indicated:

> "The tests were made, no definite result is given, no evidence they were approved tests. The evidence just certainly falls far short of what is required for a conviction, in my judgement."

¶ 44 Again, Your Worship, without taking you through the specific evidence outlined in that case, it is there, sir, and it goes considerably beyond what we have heard this evening, and again, Your worship, was found to be insufficient in a relatively recent provincial offences appeal court decision.

¶ 45 Again, sir, my submission is that that is good law in the province of Ontario.

¶ 46 Finally, Your Worship, and again closer both geographically and in time, is the decision in Regina against Michael Bigioni. That was a trial decision initially from the Region of Durham before His Worship Justice of the Peace Keith Lougheed. In that matter the accused represented himself, and if Your Worship has that transcript I refer Your Worship to page two where the evidence is succinctly stated at the bottom:

> "The radar I was operating"... this is a police officer's testimony ... "the radar I was operating was an MDR Muniquip unit number so-and-so, serial number such-and-such. This radar unit had been tested prior to the incident, at 10:30 p.m., and afterward at 10:55 p.m., and found to be working correctly. I am a qualified radar operator".

¶ 47 Your Worship, my submission is that there is no material difference between the evidence before the court this evening and the evidence before the honourable justice of the peace in that particular case.

¶ 48 Now, a conviction was entered in that matter, Your Worship, and on appeal to the provincial offences appeal court, or the provincial court (criminal division), I suppose, more accurately, His Honour Judge Murphy in the Oshawa court heard essentially the identical submissions that I'm making this evening, Your Worship, and on the basis of the case law that I refer to, and on the basis of the evidence that was before the

court in the trial in that matter, came to the conclusion which I'm asking Your Worship to reach this evening, summarized at page two of the appeal, the very brief appeal reasons for judgement, Your Worship.

¶ 49 Are those available, sir?

¶ 50 **THE COURT**: I'm trying to read here ... your case here.

¶ 51 MR. BIGIONI: Which would that be, Your Worship?

¶ 52 **THE COURT**: Michael Bigioni.

¶ 53 MR. BIGIONI: Oh, yes.

¶ 54 **THE COURT**: Go ahead.

¶ 55 MR. BIGIONI: I'm referring now the appeal decision, which is the last decision that I have left with Your Worship this evening.

¶ 56 **THE COURT**: I don't have that one.

¶ 57 MR. BIGIONI: I apologize, sir. I thought I had ...

¶ 58 **THE COURT**: I've got the proceedings before His Worship Mr. Lougheed on the 29th of January.

¶ 59 MR. BIGIONI: I believe it's clipped to that, Your Worship. It's the last ... it's very brief, it's two pages ...

¶ 60 **THE COURT**: Okay, I have it here now.

¶ 61 MR. BIGIONI: ... of the reasons for the decision on the appeal.

¶ 62 That was the appeal from the conviction entered at the trial, sir, before the Honourable Judge Murphy of the Provincial Court (criminal division) in the Region of Durham, and again, Your Worship, on the essentially identical submissions I have made before you this evening, His Honour agreed with my position and concluded:

> "The court agrees with the defence submission that there must be some evidence of the type of test, and from that the court can conclude that the radar was working properly".

¶ 63 Again, Your Worship, identical ... in my respectful submission ... identical evidence, and on the basis of the case law that I have submitted this evening, a provincial court (criminal division) ruling in favour of the accused in the particular case, sir, that, I submit, Your Worship, with respect, is a recent decision wherein all the relevant case law was canvassed. it, with great respect, is binding on this court and I submit that that accurately sets out the state of law in Ontario at this time.

¶ 64 In summary, sir, I submit that the evidence before the court this evening is insufficient to justify a conviction and that the charge ought to be dismissed.

¶ 65 I might add, Your Worship, we appear in provincial offences court, it's clear to all of us that

convictions are regularly entered on the basis of the evidence that we've heard this evening. It's a strange situation, Your Worship, but my submission is that that evidence simply is not sufficient according to the decided reported and unreported decisions.

¶ 66 I, therefore, request that the charge be dismissed.

¶ 67 Those are my submissions.

¶ 68 **THE COURT**: Thank you.

¶ 69 Mr. Ironside, do you wish to give any argument, sir?

¶ 70 P.C. IRONSIDE: Well, not being able to quite understand ... read this at this time, Your Worship ... it was a visual observation of the vehicle speeding and it was ... a reading was obtained on the radar. That's basically all I can say at this time.

¶ 71 I have got no arguments to give against any of these cases that counsel has put in.

¶ 72 MR. BIGIONI: Did Your Worship wish reply?

¶ 73 **THE COURT**: No, I'm just waiting for Mr. Ironside.

¶ 74 MR. BIGIONI: I apologize.

¶ 75 P.C. IRONSIDE: That's all I have to say.

¶ 76 **THE COURT**: Thank you.

¶ 77 I take it, then, you have nothing to say, sir.

¶ 78 Did you want to say something else?

¶ 79 MR. BIGIONI: Very briefly, Your Worship, with respect to my friend's comment that an observation was made, I don't quarrel with that, sir. My understanding of the law is that a police officer, or indeed any person, is entitled to give evidence as to matters within the realm of common knowledge.

¶ 80 However, my submission would be that notwithstanding that the officer made an observation of speed, he did not, I suppose, boil that down into a statement of his opinion as to the speed of the accused's vehicle, and I would submit that that in and of itself is insufficient on which to base a conviction.

¶ 81 **THE COURT**: Okay. Thank you.

¶ 82 Well, the fact that I've been supplied here with several cases on behalf of the defence, and obviously the officer, Ironside, obviously he is not equipped to argue these cases when it comes to citing case law. Obviously he can only relate to the facts before the court and point out, maybe, to the court, 'well, this is my observation', and obviously he can only give very limited argument in regards to these type of matters.

¶ 83 Obviously it's left really to the court's decision and its own opinion as to whether there is sufficient evidence to register a conviction or, if there's not, to dismiss the charge, obviously.

¶ 84 What I have to look at back here is Mr. Ironside's evidence, obviously, in-chief, and the fact that obviously ... he is obviously on radar duty, obviously, for a certain reason, and that's obviously to clock and stop speeding cars.

¶ 85 Obviously the facts that one of the points of these cases here is the radar, can it be determined that it can measure speeds accurately, and obviously there's been cases in the past from previous occasions where it has been upheld that radar does clock the vehicles and is ruled to be at an accurate speed.

¶ 86 So I base my opinion on that basis, and then I have to go back to the testing of the equipment. Now, the officer has indicated that he has tested the machine before, at the start of his shift, at the location, and he indicated that he tested at the end of his shift, and he said that the radar was found to be working correctly.

¶ 87 I don't think it's incumbent upon the officer to indicate as to how and what tests he performed each and every time. By the fact that the officer has testified that he tested the machine and he has given the results o f the tests, i.e. he did find it to be working accurately, is sufficient.

¶ 88 In my opinion, if anybody wants to challenge the officer as to how it was tested, if the method was done correctly, then that is their prerogative.

¶ 89 Then I go back to the officer's evidence, 'I have a visual observation of the vehicle', that he indicates was speeding, the radar confirms his opinion to the exact speed that the vehicle is travelling in that regard.

¶ 90 As I say, he indicates it starts as a visual observation.

¶ 91 In actual fact, I feel that there is a prima facie case made out by the officer in this matter, and I understand you have elected not to call any evidence, is that correct?

¶ 92 MR. BIGIONI: That's correct, Your Worship.

¶ 93 **THE COURT**: Okay. And obviously in view of the fact I have made a ruling there is a prima facie, then I have to register a conviction in the matter.

¶ 94 Did you wish to make any submissions in regards to penalty?

¶ 95 MR. BIGIONI: No, sir.

¶ 96 **THE COURT**: Mr. Ironside, did you wish to give any argument, sir?

¶ 97 P.C. IRONSIDE: None, Your Worship.

¶ 98 **THE COURT**: Okay.

¶ 99 There will be a fine here of forty dollars ($40.00), no costs. It will be marked 30 days to pay.

¶ 100 Can that fine be paid tonight?

¶ 101 MR. BIGIONI: I believe so, Your Worship.

¶ 102 **THE COURT**: Thank you.

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