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R. v. Boivin

Between
Her Majesty the Queen, respondent, and
Pierre Boivin, applicant

[1978] O.J. No. 1410

Ontario Supreme Court - High Court of Justice
R.E. Holland J.

Heard: November 20, 1978.
Judgment: November 24, 1978.
(8 pp.)

Counsel:

Barry B. Swadron, Q.C. and Gordon A. Fulton, for the applicant.
Murray D. Segal, for the respondent.

¶ 1 **R.E. HOLLAND J.**:— This is an application by way of stated case from a decision of Judge R.B. Baxter. The stated case is, in part, as follows:

1. On the 23rd day of December, 1977, at the Township of Hamilton, in the County of Northumberland, a Uniform Traffic Ticket charging that Pierre F. Boivin, on the 23rd day of December, 1977, at Highway 401, in the Township of Hamilton, did commit the offence of possessing a radar warning device, contrary to The Highway Traffic Act, Section 52a(2) was issued by A.J. Hulsman, a constable with the Ontario Provincial Police to the said Pierre F. Boivin.
2. ... I found the said Pierre F. Boivin guilty of the said offence, convicted him thereof and imposed a fine of $50.00 plus $3.00 costs.
3. At the request of the said Pierre F. Boivin, I stated the following case for the opinion of this Honourable Court:

It was shown before me that:

(a) Constable Hulsman of the Ontario Provincial Police, who was stationed on Highway 401 in his cruiser spotted Pierre Boivin, the Appellant, driving along the highway in a vehicle which had a black box on the dashboard. The police officer followed the vehicle and came across it on a ramp. He examined the interior of the vehicle and found a black box sitting on the dash covered with a newspaper or magazine. The black box had the word "Fuzzbuster" printed on it in two places, bore a serial number and was plugged into the cigarette lighter.
(b) Constable Hulsman, who had never seen the device before and was unfamiliar with its operation, removed the box from the Appellant's vehicle and issued a summons to the Appellant.
(c) The constable arranged with another police officer who was operating a radar unit nearby to test the device. The device was plugged into the cigarette lighter in the cruiser but the one dial on it was not touched. The device detected the

presence of radar when Constable Hulsman's cruiser was 3/10's to 4/10's of a kilometer away from the radar unit. The device indicated the presence of the radar by emitting a beep once and then a yellowish-orange light came on and remained on.

(d) Inspector Dowser of the Traffic Investigation Branch of the Ontario Provincial Police testified that he had conducted driving tests with the seized device and on a similar device earlier in time. He found that the device would beep or squeal for one or two seconds when it first picked up the presence of radar followed by a light that would remain on as long as it was picking up the signal from the radar unit. The effectiveness of the fuzzbuster would vary greatly depending on the make of the radar being tested against, the terrain and the way the radar was employed. At the maximum effectiveness he found the device would give a warning signal of up to 8/10's of one mile or 1.28 kilometers away.

(e) The thrust of various witnesses whom I accepted as experts in the field of radio communications, telecommunications, radar and the like, and a responsible official attached to the Federal Department of Communications was that:

(i) the seized device peaked within the spectrum band of 10.5 to 10.55 gigahertz and could not operate on any other frequency by external manipulation;

(ii) all radar equipment in Canada is licensed by the Federal Department of Communications to operate only on the frequency band 10.5 to 10.55 gigahertz. The vast majority of licensees on that particular band are police radar units, however the band includes a handful of licensees comprised of radar manufacturers and an industrial concern which uses a radar device to count the number of passing trains on a railway check point. There are many ham radio operators in Canada who are assigned frequencies, some of which border on the radar frequency, so that given the right conditions the devices of this latter group have the capability of detecting the presence of police radar. Given the right conditions, police radar or the seized device would detect the presence of a ham radio.

(iii) that the seized device is a radio receiver and as such requires a licence to operate from the Federal Department of Communications, and that before such a licence to receive is forthcoming the written permission of the transmitting body would have to be obtained;

(iv) that there was no evidence before me that the seized device was licensed or that the permission of the transmitting body, the police, had been given to the Appellant to receive their radar transmissions;

(v) that the seized device does not tangibly interfere with radar transmissions;

(vi) that the seized device operates purely to alert the driver of a vehicle equipped with such a device of the presence of radar;

(vii) that the seized device permits a driver of a vehicle equipped with such a device to slow down his vehicle when radar is detected and before the radar detects the presence of the vehicle;

(viii) that the seized device will alert the driver of the vehicle of the presence of a radar speed meter regardless of the speed at which the vehicle is travelling.

(f) Notwithstanding defence counsel's submissions that Section 52a(2) of The Highway Traffic Act was unconstitutional because a radar warning device is a radio and that it was therefore not within the competence of the Legislature for the Province of Ontario to enact legislation governing the use of radar warning devices, the field belonging to Parliament under Section 91 of the British North

America Act, and, in the alternative that the Section was unconstitutional because it was in pith and substance dealing with the obstruction of justice, and it was therefore encroaching on the exclusive right of Parliament under Section 91 of the British North America Act to enact legislation relating to criminal law, I held that Section 52a(2) of The Highway Traffic Act, R.S.O. 1970, c. 202 as amended was intra vires the Province of Ontario on the basis that the Section in pith and substance relates to highways and highway safety, the regulation and control of traffic, specifically speeding.

4. The said Pierre F. Boivin desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the question being submitted for the judgment of the Honourable Court being:

Did I err in law in holding that Section 52a(2) of The Highway Traffic Act, R.S.O. 1970, c. 202 as amended was intra vires the Province of Ontario?

¶ 2 In 1977 The Highway Traffic Act was amended, (S.O. 1977, Ch. 66) to add section 52a which reads as follows:

52a. (1) In this section, "radar warning device" means any device or equipment designed or intended for use in a motor vehicle to warn the driver of the presence of radar speed measuring equipment in the vicinity and includes any device or equipment designed or intended for use in a motor vehicle to interfere with the transmissions of radar speed measuring equipment.

(2). No person shall drive on a highway a motor vehicle that is equipped with or that carries or contains a radar warning device.

(3). A police officer may at any time, without a warrant, stop, enter and search a motor vehicle that he has reasonable grounds to believe is equipped with or carries or contains a radar warning device contrary to subsection 2 and may seize and take away any radar warning device found in or upon the motor vehicle.

(4). Where a person is convicted of an offence under this section, any device seized under subsection 3 by means of which the offence was committed is forfeited to the Crown.

(5). Every person who contravenes subsection 2 is guilty of an offence and on summary conviction is liable to a fine of not less than $50 and not more than $500.

(6). Subsection 2 does not apply to a person who is transporting radar warning devices in sealed packages in a motor vehicle from a manufacturer to a consignee.

¶ 3 It is of some interest that section 52 prohibits driving a motor vehicle that is equipped with a television receiving set any part of which is located forward of the back of the driver's seat. The stated case includes a finding that the device in question is a radio receiver and requires a licence to operate from the Federal Department of Communications and further that before such licence is forthcoming the written permission of the transmitting body would have to be obtained.

¶ 4 The burden is on Boivin, the applicant, to demonstrate that section 52a of The Highway Traffic Act is ultra vires the province: Walter et al., v. A.G. Alberta (1966) 1 60 D.L.R. (2d) 253.

¶ 5 It appears to me that the first step in the investigation is to decide what in pith and substance the Legislature was attempting to do in passing the section. It appears perfectly clear to me that the Legislature was purporting to legislate concerning highway traffic in the province. As was pointed out by Judson, J. in O'Grady v. Sparling, [1960] S.C.R. 804 at 810:

> The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted.

¶ 6 The legislation incidentally deals with radio communications but this does not make it unconstitutional.

¶ 7 I find support for my view in a decision of Dimos, Provincial Court Judge, in Regina v. Crosstown Motors Ltd. (1975), 22 C.C.C. (2d) 404, and in a decision of Mr. Justice Miller in Regina v. Olin, (1978) 6 Alta. L.R. (2d) 229.

¶ 8 It was also argued that section 52a of The Highway Traffic Act is in pith and substance in relation to criminal law, specifically in relation to the obstruction of a police officer in the execution of his duty, a field that is occupied by section 118 of the Criminal Code. It may well be that a person who uses a radar warning device to enable him to travel in excess of the speed limit with impunity is guilty of an offence under section 118. This does not change my view that the legislation in question is in pith and substance legislation for the control of traffic on provincial highways. Nor does it mean that the section necessarily conflicts with existing federal legislation. Rather a similar situation was dealt with in the Supreme Court of Canada in O'Grady v. Sparling, supra, where the careless driving provisions of the Manitoba Highway Traffic Act were challenged as being in relation to criminal law. Judson, J. gave the majority judgment and concluded at page 811 that the section of the Act in question had "for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation". He continued:

> Nor do I think that it can be said to be inoperative because it is in conflict with s. 221 of the Criminal Code. (Criminal negligence in the operation of a motor vehicle) There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject-matters and are for different purposes. Section 55(1) is highway legislation dealing with regulation and control of traffic on highways, and s. 221 is criminal law dealing with negligence of the character defined in the section. Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative; McColl v. Canadian Pacific Railway Company, [1923] A.C. 126 at 134, 135, per Duff J. There is no conflict or repugnancy between s. 55(1) of the Manitoba Highway Traffic Act and s. 221 of the Criminal Code. Both provisions can live together and operate concurrently.

¶ 9 In the result, therefore, the answer to the question is "No" and the appeal is dismissed.

R.E. HOLLAND J.

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