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R. v. Friedlan (Ont. Ct. (Prov. Div.))

Between
Philip Friedlan,Appellant, and
Her Majesty The Queen, Respondent

[1993] O.J. No. 720
DRS 94-05846

Ontario Court of Justice - Provincial Division
Provincial Offences Act Appeal Court - Barrie, Ontario
Main Prov. Div. J.

March 23, 1993.
(4 pp.)

Motor vehicles — Rules of the road — Speeding — Onus on Crown to prove that area was construction zone — Judicial notice of speed limit contained in Regulations.

This was an appeal from a conviction for speeding 129 kilometres per hour (km/h) in a 80 km/h zone. At issue was whether the Crown proved that the driving was done in a construction zone. The officer testified that the area in question was a construction zone, clearly posted with 80 km/h signs. The Crown did not tender any evidence that the area had been designated as a construction zone.

HELD: The conviction was upheld but the fine was reduced. The Crown did not prove that the area was a construction zone. The finding of the Justice of the Peace had to be set aside as it could not be supported by the evidence. However, the Justice of the Peace was bound to take judicial notice of the speed limited contained in the Regulations, namely 100 km/h.

STATUTES, REGULATIONS AND RULES CITED:

Highway Traffic Act, ss. 5(4), 128(1)(d), 128(8), 128(9), 128(10).
Philip Friedlan for himself.
Thomas Cleary, for the Crown.

MAIN PROV. DIV. J.:— The appellant was convicted of speeding 129 km/h in a 80 km/h zone. The main issue in the appeal is whether the Crown proved that the driving was in a construction zone.

The appellant, according to the evidence, was proceeding northbound on Highway 400. The radar operator clocked his motor vehicle at a speed of 131 km/h. That officer also testified that the area in question was a construction zone, clearly posted with 80 km/h signs. The intercepting police officer used his discretion, and reduced the speed when he charged the appellant with speeding 129 km/h in a 80 km/h zone.

Relying on subsections 128(1)d, (8), (9), and (10) of the Highway Traffic Act, the appellant argues that the Crown must prove that the area had been designated as a construction zone by the Minister. Here are the relevant provisions:

> 128. (1) No person shall drive a motor vehicle at a rate of speed greater than,... (d) the maximum rate of speed posted is a construction zone; designated under subsection (8).

(8) An official of the Ministry authorized by the Minister in writing may designate any part of the King's Highway as a construction zone, and every construction zone shall be so marked by signs in accordance with the regulations:

(9) A designation under subsection (8) is not a regulation within the meaning of the Regulations Act.

(10) Signs posting the maximum rate of speed at which motor vehicles may be driven in a construction zone may be erected in accordance with the regulations by an official of the Ministry.

At the trial the learned Justice of the Peace relied on the presumption of regularity, contained in the maxim omnia praesumuntur rite esse acta. The Crown did not tender any evidence that the area had been so designated.

I am persuaded that the onus is on the Crown to provide that the portion of the Highway is the subject of a designation under subsection (8). Further, pursuant to subsection (9), such designation is not a regulation within the meaning of the Regulations Act. Section 5(4) of that statute reads as follows:

5. (4) Publication of a regulation, (a) is, in the absence of evidence to the contrary, proof of its text and of its, making, its approval where required, and its filing; and

(b) shall be deemed to be notice of its contents to every person subject to it or affected by it, and judicial notice shall be taken of it, of its contents and of its publication.

Not having the benefit of that provision, the Crown is in the position of having, to prove the designation. Further, the Justice of the Peace may not take judicial notice of it. It appears to be a non sequitur to argue that the presence of 80 km/h signs is evidence of the designation having been made pursuant to subsection (8). If, for example, the Crown tendered proof of a construction zone designation by an official of the Ministry, the presumption of regularity could apply to the issue of whether he was authorized to do so by the Minister. However; in my mind, it is unreasonable to extend this rule of evidentiary construction so far as to allow the existence of these speed signs to stand for proof of a separate and distinct administrative act, namely the act of, designating a part of a highway as a construction zone. Thus it follows that the Crown has not proved that this area is a construction zone, and thus the finding of the Justice of the Peace must be set aside as it cannot be supported by the evidence.

The appellant's second argument is that he should be acquitted as the offence with which he was charged has not been proved. The decision of R. v. Amyot, [1968] 2 O.R. 626, [1968] 4 C.C.C. 16 (Ont. Co. Ct.), stands as authority for the proposition that the offence created by now section 128 of the Act is that of operating a motor vehicle at a greater speed than the speed limit. Here, the Crown having failed to prove this area of Highway 400 is a construction zone, the learned Justice of the Peace is bound to take judicial notice of the speed limit contained in the regulations. R. v. Bland (1974) 6 O.R. 2d 54, 20 C.C.C. 2d 232 (Ont. H.C.); Regulations Act, R.S.O. 1990, c. R.21 sec. 5(4.). This area of Highway 400 is the subject of Regulation 619 which sets the speed limit there at 100 km/h.

Thus, the Justice of the Peace was correct in convicting the appellant of speeding. However, for the above reasons, the defendant's penalty should have been based on a finding of 129 km/h in a 100 km/h zone. The fine should be reduced pursuant to section 128(14)(b) to $130.50 plus $3.75 costs, for a total of $134.25. The balance of the fine shall be returned to the appellant.

MAIN PROV. DIV. J.

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