*Case Name:*

# R. v. Martin

**IN THE MATTER OF an appeal under section 135 of the Provincial Offences Act, R.S.O. 1990 c. P.33, as amended**
**Between**
**Her Majesty the Queen, Respondent, and**
**Craig Martin, Appellant**

**[2008] O.J. No. 1803**

2008 ONCJ 217

Tannery Info No. 9990085321148-90

Ontario Court of Justice

**P.J. Wright J.**

May 1, 2008.

(34 paras.)

**Appeal From:**

On appeal from the conviction by Justice of the Peace, His Worship J. Oates on April 17, 2007.

**Counsel:**

**Ms. Lorinda Angus: for the Crown**.

**Mr. Matthew Riddell: for the accused**.

---

**1 P.J. WRIGHT J.**:-- The Appellant Craig Martin appeals from his conviction on a charge of speeding contrary to section 128 of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8.

**2** The Appellant's speed was measured by a "laser" device.

**3** This appeal raised the following issues:

1. Was the evidence presented by the Crown sufficient to support conclusions that the officer was trained and competent in the use of the "laser".
2. Was the evidence presented by the Crown as to the accuracy and reliability of "laser's" measurements of the Appellant's speed adequate.

**4** The Appellant submitted that the Justice of the Peace erred in concluding the evidence was sufficient. The Respondent submitted that the Justice the Peace concluded that the evidence was sufficient and adequate.

**5** Both parties relied on detailed *Facta*, transcripts of the trial proceedings for the Justice of the Peace, substantial books of authority and oral arguments.

**6** Following argument, consideration of materials filed and the law, I concluded that the appeal must succeed, set aside the conviction and enter an acquittal with written reasons to follow.

**7** There are those reasons.

**Facts**

**8** The state of the record is not in dispute. There was one witness called by the Crown, O.P.P. Officer Dan Zarrello, who identified the Appellant's vehicle as speeding, stopped the vehicle and issued a speeding ticket to the Appellant.

**9** Officer Zarrello was operating a "laser" which he described as an "instrument used to measure speed of moving motor vehicles" on Highway #400 in the City of Vaughan in York Region. He said he had "taken courses" with respect to the "laser" and as a result was a qualified operator of the instrument. On June 4, 2006, he tested the device, once at 8:45 p.m.. He said that test was based on the guidelines provided by the manufacturer of the "laser".

**10** On June 4, 2006 at 9:55 p.m. Officer Zarrello observed the Appellant's vehicle northbound on Highway #400. He took a reading with the laser which recorded the appellant's speed at 131 kilometres per hours in a posted 100 kilometres per hour zone. A few moments later Officer Zarrello took a second reading with the "laser" which recorded the appellant's speed at 134 kilometres per hour in the same posted 100 kilometres per hour zone. Officer Zarrello stopped the appellant and issued a ticket to him for speeding 115 kilometres per hour in a posted 100 kilometres per hour zone.

**11** The Appellant called no evidence at his trial.

**Reasons for Judgment Before the Justice of the Peace**

**12** The reasons for conviction by the Justice of the Peace were brief:

> "In this case we have the evidence of the officer who indicated he was operating this laser device on the 400. He indicated he observed the defendant's vehicle in lane one and he received, appeared to be speeding, which he is required to do, forms an opinion. He used the laser device and aimed it at the vehicle and received a reading of 131. Again he received a second reading of 134 when the vehicle was 288 metres away from his location. He eventually stopped the defendant and charged the defendant with 15 over rather than 34. I am satisfied in this case the accused is guilty. There will be conviction."

**Analysis**

**13** The Appellant's position on appeal was that the evidence before the Justice of the Peace was not sufficient to support the conclusion that Officer Zarrello was competent in the use of the "laser" device or that he used it properly. As well the Appellant's position was the evidence was not sufficient to support the conclusion that the "laser" device was in proper working order, that it had been properly tested, both before and after its use in accordance with the manufacturer's specifications and that the "laser" measurements of the Appellant's speed were inaccurate and unreliable as a result.

**14** The Appellant did not argue that the "laser" device - properly operated - was not a reliable device for use in speed detection of vehicles.

**15** The Respondent seeks to uphold the conviction on the basis that there was *prima facia* evidence at trial that Officer Zarrello was a qualified "laser" device operator, that the "laser" device was operated correctly and that the speed of the Appellant's vehicle as determined by the "laser" device was accurate and reliable.

**What was Officer Zarrello's training and experience in the operation of a "Laser" Device?**

**16** The court received little information from Officer Zarrello regarding his experience and operation of the "laser" device apart from the assertion that "at the time" he was "operating a laser which is an instrument used to measure the speed of moving motor vehicles" (Transcript February 17, 2007, page 3 lines 31 and 32).

**17** Officer Zarrello provided no evidence as to the description of the type of "laser" he claimed to have used, for example, the name of the manufacturer of the "laser" device, the model or serial number of the laser device. Neither were his notes nor was his recollection of any assistance to Officer Zarrello in this regard.

**18** While Officer Zarrello testified that he had "taken courses" with respect to "the laser" and was "a qualified operator", that testimony must be assessed in the context of his later evidence given at

trial on February 13, 2007 in which he spoke about being trained by a fellow officer:

"Q. And you indicated earlier that you were trained on this laser unit.

A. Yes.
Q. Okay. When were you trained?
A. I would have to say late 90's ... and then I was re-qualified again, I think it was last ...
Q. So you can't give me a date or a month then - a year or a month?
A. No. but it was - we do it every two years. I don't remember that last time I did it"
Q. So you don't remember when you were originally trained or when you were - had the refresher course, you can't give me a date or a month?
A. No.

(Transcript of evidence February 13, 2007, page 10 lines 12-19)

**19** No evidence was adduced that Officer Zarrello had ever received any training in the use of the "laser" device from, by or on behalf of the manufacturer of the very device he was using.

**20** By any objective assessment of the totality of Officer Zarrello's evidence it could not be said that Officer Zarrello was trained or experienced in the operation of the "laser" device.

**Was the laser device tested by Officer Zarrello before and after its use as required by the manufacturer?**

**21** Officer Zarrello testified that he "tested" the "laser" device at 8:45 p.m. on June 4, 2006, more than a hour before securing the readings on the "laser" device of the appellant's speed at 9:55 p.m. Officer Zarrello had no memory of when or whether he tested the "laser" device after the offence. His notes provided no assistance.

"Q. What time did you test the laser device after the alleged offence?

A. Sorry, I don't have it marked down in my book what time."

(Transcript February 13, 2007, page 24 lines 20-23)

**22** Did Officer Zarrello use the manufacturer's manual as a guide when conducting the test on the laser device?

"Q. So did you use the manual when testing this device?

A. If I have to, yes.
Q. In this particular occasion did you use the manual to test the device?
A. I did not mark it down if I used it or not.
Q. So you said you had an independent recollection. Do you recall using the manual when testing the device?
A. No I don't recall using it."

(Transcript February 13, 2007, page 16, lines 15-23)

**What was the evidentiary basis for Officer Zarrello to assert that he used the "laser" device properly?**

**23** Apart from stating that the device was set up correctly, Officer Zarrello provided no specific evidence to support that statement. He could not recall the manufacturer's specification in the manual, he agreed that he did not use the manufacturer's manual and only vaguely spoke of some elements of the testing he performed. In short, Officer Zarrello's evidence was more in the nature of his opinion, rather than any instructions that he followed from training or from a manual. It can be concluded that in the absence of full compliance with the testing and operation process of the "laser" device being complied with, the readings obtained by Officer Zarrello of the speed of the Appellant's vehicle are highly suspect.

> "There would be no reason for the device manufacturer to set out the specifications and directions if it mattered not whether they were complied with".
>
> (*R. v. Niewiadomski* [2004] O.J. No. 478 Schall J. para. 29.)

**24** The evidence of Officer Zarrello in totality should have raised a reasonable doubt in the mind of the learned Justice of the Peace. Officer Zarrello's lack of demonstrable training or qualifications, his faulty memory, his lack of notes or record keeping, his failure to refer to and use the manufacturer's manual, which he evidently had in the very box which contained the "laser" device that he used, his inability to recall the testing procedure, if any, that he performed on the "laser" device and his bald unsupported "opinion" that he simply would not have used the "laser" device if it were not working cause the court to conclude that it would be dangerous to rely upon the evidence of Officer Zarrello or to give his evidence any weight in these proceedings.

**Evidentiary Requirements - Application of *R. v. Vancrey***

**25** In *R. v. Vancrey* [2000] O.J. No. 3033 the Ontario Court of Appeal did an excellent and instructive overview of the evidentiary requirements to be met where speed is determined by the use of a "laser" device.

**26** First the court considered the facts in these terms:

> "... there was led at trial *prima facie* evidence of the accuracy and liability of the particular laser unit, consisting of the performance of the manufacturer's test for good working order before and after the use of the device, together with the earlier verification of the accuracy of the laser unit from entering the velocity of moving vehicles on a highway, when compared with an accurate radar unit by a qualified laser radar operator."
>
> (*R. v. Vancrey*, supra para. 21)

**27** Secondly the court expressed the ratio of it's decision as follows:

> "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 it was operating properly upon the date in question. The court also received evidence of the accuracy of the device for measuring the speed of vehicles on a highway by comparing its readings to those of an accurate radar unit. The radar test provides independent guarantee of the accuracy of the particular laser unit to measure the speed of a moving vehicle".
>
> (*R. v. Vancrey*, supra para. 22)

**28** In the case at bar there was little or no evidence called by the Crown to allow a trier of fact to support the conclusion that Officer Zarrello was trained and experienced in the use of the laser, that he tested the laser before and after its use, or to support the conclusion that the laser was operating correctly and that measurements of the appellant's speed by the laser device was accurate or reliable.

**29** Indeed, the facts in the case at bar confound the ability of the trier of fact to draw any conclusion other than that the evidence leaves the court in a state of confusion and with a reasonable doubt on these critical issues.

**30** During the trial the learned Justice of the Peace correctly set out the test in an exchange with counsel as follows:

> "There's case law that indicates that the officer doesn't have to know the technical - the technical workings of a device other than how to use it and - and that it's working properly at the time when he was using it and is able to give evidence in court that in fact he - it was working properly. That's as far as it goes. As far as any of the technical part of it, that is - there's case law that says that's not necessary, it's just that the court has to be satisfied that he is qualified and that he did use it, and he tested it, and it was working properly in his opinion. That's as far as it goes."
>
> (Transcript February 13, 2007, page 14 lines 8-19)

**31** However after carefully reviewing the trial testimony, I do not find that the evidence meets the tests required.

**Conduct of Appeal s. 136 *Provincial Offences Act* R.S.O. 1990, c. P. 33 as amended**

**32** The appeal process for a part I offence is governed by section 135 of the *Provincial Offences Act*. The conduct of the appeal, however is governed by section 136 of the *Provincial Offences Act*. The language which defines the conduct of the appeal speaks in terms of a broad based review with generous allowances to all parties to ensure that the issues are fully and effectively defined and fairly and completely considered.

**33** Pursuant to section 136, the appeal court is to provide the parties with an opportunity to be heard so as to determine the issues before it: when the circumstances warrant the court may make such inquiries as are required (section 136.(1)). An appeal under section 136 is to be conducted by way of a review, that is, a reconsideration of a trial proceedings: subsection section 136(2). This provision reflects the informal nature of appeals in respect of Part I and II proceedings. In determining a review, it is open to the court to hear or rehear the recorded evidence at trial as well as require a transcript of the evidence or production of any exhibit (clause 136(3)(a)); receive the evidence of any witness whether or not he or she testified at trial (clause 136(3)(b)); require the presiding justice at trial to furnish a written report (clause 136(3)(d); or receive and act upon any agreed statements of facts or admissions (clause 136(3)(d)).

**Ruling**

**34** On a careful review of the entire evidence tendered during the trial proceedings, law and submissions of counsel in accordance with section 136 of the *Provincial Offences Act* I conclude as follows:

1. The conviction is set aside;
2. Assessing the evidence on the record at trial at its highest and in a manner most favourable to the prosecution, it is clear that there exists no reasonable prospect

for conviction on a retrial.

3. Having set aside the conviction, I find the Appellant not guilty and I dismiss the charge of speeding against him.

cp/e/qlttm/qlprp/qlesm