Citation: *R. v. Schlesinger*, 2007 ONCJ 266

R v Schlesinger

Cases considered:

D'Astous v Baie-Comeau (Ville), 74 CCC (3d) 73
R v Amyot, [1968] 2 OR 626-634
R v Dagenais, [1911]OJ No 170
R v Henry, [2005] SCJ No 76
R v Lounsbury, [1993] MJ No 510
R v Morin [1988] SCJ No 80
R v Niewiadomski [2004] OJ No 478
R v Norton [1996] OJ No 860
R v Roshani-Kalkhoran [2005] OJ No 2387
R v Thompson 151 CCC (3d) 339
R v Vancrey, 147 CCC (3d) 546

Statutes considered:

s. 128, Highway Traffic Act

Charge

At 11:24 AM, on 4 August 2006, Mr David Schlesinger was charged with speeding at a rate of 129 kilometres per hour in a posted 80 KPH zone, contrary to section 128 of the Highway Traffic Act.

Background

On 4 August 2006, OPP Officer Brazier was conducting speed enforcement on highway 6 north, in Puslinch township. The officer was a qualified laser operator and instructor for the device he was operating. He observed a motor vehicle traveling at what he thought was a high rate of speed. He locked the laser on the motor vehicle at a distance of 404.8 metres and found it to be traveling at 132 kilometres per hour in a posted 80 kilometre per hour zone. He subsequently stopped the vehicle without losing sight of it and found that Mr Schlesinger was the driver. Using his discretion, he charged Mr Schlesinger at

2007 ONCJ 266 (CanLII)

only 129 kilometres per hour.

Under examination-in-chief by Mr Murray, the officer stated that he tested the device before and after he stopped the defendant's vehicle. Initially, the officer testified that he tested it first at 11:25 AM. That testing time was problematic as it was one minute after the time of 11:24 AM when the officer locked the laser on Mr Schlesinger's vehicle. The officer could not accurately read his notes as to testing times while giving his testimony. The officer then stated that it was his usual practice to test the device prior to all speed enforcement stops and therefore he must have done so on that day too. Subsequent testimony indicated that the officer tested the laser again at 7:55 PM. The tests were as per manufacturer's instructions. He found the laser device to be working correctly after each test.

Mr Schlesinger in his evidence stated that he was speeding but 'probably' at only 100 to 110 kilometres per hour. He did not look at his speedometer immediately prior to being stopped.

Mr Murray in his request for a conviction, relied on the officer's subsequent testing of the laser device at 7:55 PM as proof that it was operating correctly. He also asked me to accept that the officer had tested the laser before he stopped Mr Schlesinger, since this was his usual practice. As well, he asked the court to consider the defendant's admission as proof that the prosecution's case was made out.

Analysis

There are three issues that this court needs to consider in this matter.

Question 1) Is it necessary for a laser device to be tested by a police officer both before and after a speed enforcement stop?

In R v Vancrey 147 CCC (3d) 546, the Ontario Court of Appeal (OCA) ruled on this issue. The OCA considered an earlier ruling of the Quebec Court of Appeal in D'Astous v. Baie-Comeau (Ville) (1992), 74 C.C.C. (3d) 73.

In Vancrey, the court adopted from D'Astous that in order to provide an

2007 ONCJ 266 (CanLII)

> "evidentiary basis necessary for a conviction for speeding based on a radar reading"

that

> "the Crown must still prove that the particular radar device used was operated accurately at the time."

One of the tests established by the Quebec Court of Appeal to establish such proof was:

> "The device was tested before and after the operation".

The OCA having accepted this ruling then continued at para 21:

> "The Crown seeks to uphold the conviction on the basis that there was led at trial prima facie evidence of the accuracy and reliability of the particular laser unit, consisting of the performance of the manufacturer's tests for good working order both before and after the use of the device"

The court then held at para 22:

> "In my view, the position of the Crown is correct."

Therefore, I find that it is necessary for a laser device to be tested by a police officer both before and after a speed enforcement stop.

Question 2) Can this court accept the officer's statement that it is his usual practice to test a laser device before a speed enforcement stop, as proof that he did so?

In R v Lounsbury [1993] MJ No 510, Manitoba Court of Queen's Bench Justice Jewers commented on the issue of usual practices. At paragraph 2 the court, when referencing the practises of the police officer who conducted that speed enforcement stop, stated:

> "He did say that prior to operating any radar unit he conducts a test to see if it is in working order and after issuing of an offence notice he rechecks to make sure that the machine is still in working order. I take that to be evidence as to his usual practice. He also said that, in this case, he made a note in his notebook that he had performed a test or tests but he did not note the time of the test or tests."

The court continued:

2007 ONCJ 266 (CanLII)

3 “Evidence as to a particular practice or a standard practice is not proof beyond a reasonable doubt. See the decisions of Kroft J. (as he then was) in the cases of R. v. Jabs (November 19, 1991) (Man. Q.B.) (unreported) and R. v. Wolf (December 8, 1992) (Man. Q.B.) (unreported) and the decision of Beard J. in R. v. Kraemer (February 17, 1993) (Man. Q.B.) (unreported). In Wolf, Kroft J. stated in part:

- "Nonetheless, if we have a situation where testing is a prerequisite, and if the officer, and only witness, obviously cannot say any more than what his common practice is, I cannot take that as a proof of testing. ..."

4 In the instant case there is something more than the evidence of the operator's usual practice: There is an indication in his notes that he did, in fact, perform a test or tests, although the time or times of the tests were not noted and are not known.

5 In my opinion, all that can be safely inferred from the evidence is that the officer did test the radar device and found it to be in good working order at some point or points during the relevant shift. In my opinion that is not enough proof to demonstrate beyond a reasonable doubt that the device was working at the time of the alleged offence.”

In my view, these findings apply equally to laser devices, in Ontario.

In R v Niewiadomski [2004] OJ No 478, Madam Justice Schnall sitting as an appellate court considered a similar set of circumstances to those before this court. Specifically, that court considered the issue of whether it is sufficient for the court to rely on an officer’s assertions that the ‘usual’ tests were done to test a radar device. She stated at paragraph 8:

“Constable Arnett testified to the following:

- He had no notations of the tests he performed on the device prior to using it on that day, to ensure that it was working properly; he could only say that he did the usual' tests that he always performs.”

The court then held:

2007 ONCJ 266 (CanLII)

9 "Evidence that the usual' test was done, is not sufficient evidence to determine that the necessary test or tests were actually performed and thus enable the court to determine beyond a reasonable doubt that the device was working properly at the time of the offence. (R. v. Lounsbury [1993] M.J. No. 510, (Man. Q.B.)."

Justice Schnall's ruling indicates that notations of the tests done are required for proof beyond a reasonable doubt.

However, there is another line of cases that must be considered in the matter before this court. In R v Thompson, 151 CCC (3d) 339 the OCA considered whether an officer's evidence that since her standard practice is to check a breathalyzer mouthpiece for obstructions when she unwraps it, this statement can be accepted by a court as sufficient proof of the action.

Morden, JA stated for the court:

> [8] "In his reasons the trial judge said: Counsel for the accused argues that one of the necessary elements of the charge is that the machine be in good working order, free from obstruction and that the Crown has failed to satisfy that beyond a reasonable doubt. He points out [page346] that the police officer could not be sure -- in fact had no memory at all of having done that but was relying on her ordinary practice. My view of her evidence is that matters transpired as she related them, that she simply followed her usual practice in connection with unwrapping and certification of the mouthpieces and that there was no need to make a note to that effect. Notes are only made to assist the recollection. I find that on this occasion she did not depart from her usual practice, indeed there is nothing to suggest otherwise.
>
> [9] The trial judge did not misapprehend the evidence. If he accepted P.C. Shields' evidence that it was her standard practice to check the mouthpiece and that she must have done so on the occasion in question, it was reasonably open to him to find, as he did, that she had checked it on the occasion in question. I would not give effect to this ground of appeal."

2007 ONCJ 266 (CanLII)

In R v Roshani-Kalkhoran [2005] OJ No 2387, D M Stone J, sitting as an appellate court considered the OCA's decision in Thompson, supra, as it applied to laser testing. At trial, the justice of the peace had accepted the officer's statement that he had tested the laser device based on the officer's standard practice of doing so before a stop, despite his lack of notes as to time. That trial justice held that this was sufficient proof of the test having being done.

D M Stone, J in considering this position, stated:

> **17** "In my view then, this ground of appeal is without merit in that His Worship was entitled to - if he chose - find that the standard practice was given effect to on the occasion in question."

Therefore, I accept that it is within the purview of the trial justice to decide whether to accept 'standard or usual practices' as proof of a test being done.

While this option is open to this court, in my view I must approach it with some caution. An analysis of the issues is helpful.

The act of an officer unwrapping a mouthpiece to place it on a breathalyzer prior to use affords the officer an opportunity to peruse the mouthpiece for obstructions at the same time. It takes no extra effort, in my opinion. My understanding of a mouthpiece is that it is a decidedly uncomplicated and low tech device. The device's internal and external surfaces are visually evident to the officer unwrapping it from its sterile container and preparing it for use.

As noted in both Niewadomski and Roshani-Kalkhoran, supra, the testing of a high tech electronic laser device involves four separate tests. These tests require strict adherence to the manufacturer's instructions. They are decidely not trivial nor can they be done by way of cursory examination, in my view. It takes a conscious and explicit effort to follow the proper procedures. A laser's internal workings are not self-evident to an observer.

As a result, the standards which I believe that I need to apply in being satisfied that the tests have been properly done and the results of those tests verify the device's accuracy, must be correspondingly higher than those applied to a mouthpiece that is to be affixed to

2007 ONCJ 266 (CanLII)

a breathalyzer prior to its use.

The standards that would satisfy this court are:

> a) Evidence that the laser tests had been done by a qualified officer according to the manufacturer's specifications and that the device passed the tests and
> b) Evidence of a specific time when the tests were done both before and after a speed enforcement stop .

No time was provided in Officer Brazier's testimony for his testing of the laser device prior to the stop of Mr Schlesinger.

Therefore, this court declines to accept the officer's statement that it is his usual practice to test a laser device before a speed enforcement stop, as proof that he did so.

Question 3) Is Mr Schlesinger's admission of speeding sufficient to convict him?

Mr Murray provided three cases on this issue for my consideration.

In R v Henry [2005] SCJ No 76, the Supreme Court of Canada ruled on whether s.13 of the Charter of Rights and Freedoms was available to a defendant who had freely testified at this trial. It held that it did not. In my view, this case is not on point with the matter before me.

However, in R v Dagenais, [1911] OJ No 170 the Ontario High Court of Justice accepted that a defendant could be convicted on his own admission of guilt. In a more recent case, R v Norton, [1996] OJ No 860, The Ontario Court of Appeal held that a conviction necessarily followed an appellant's admissions.

The prosecution also provided R v Amyot [1968] 2 OR 626-634 to point out that the actual offence is 'exceeding the speed limit' and that there is no offence of 'exceeding the speed limit at the speed of 129 km per hour'. In other words, Mr Murray was asking me to apply the findings in Amyot and accept Mr Schlesinger's admission that he was speeding to convict him. I would then be required to make a determination of the speed for sentencing purposes.

2007 ONCJ 266 (CanLII)

However, I must consider the Supreme Court of Canada's decision in R v Morin [1988] SCJ No 80, as it is directly on point. Sopinka J considered the standard of proof that is required for evidence. At paragraph 40, he held:

> "…during the process of deliberation the jury or other trier of fact must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt."

As noted earlier, Mr Schlesinger stated that he was speeding 'probably' at 100 to 110 kilometres per hour but he did not look at his speedometer. At best, his statement as to his speed is an opinion that is brought further into question by his use of the word 'probably'.

The only possible evidence as to the actual speed Mr Schlesinger was traveling was from the laser. However, I have already found that the laser device was not proved to be accurate at the time the officer locked it on the defendant's vehicle.

While Mr Schlesinger may have been in a position to convict himself by an admission of guilt pursuant to Dagenais & Norton, supra, it did not relieve the prosecution of its obligation to meet the test set out in Morin, supra, to prove the essential element of the actual speed of Mr Schlesinger's vehicle. No proof provided by the prosecution of the speed exists.

It also follows then that the decision in Amyot, supra, is not applicable in this matter.

Decision

Therefore, I find that the prosecution has not proved the essential elements of this offence beyond a reasonable doubt. The charge is dismissed.

Ordered at Guelph this 4th of May 2007.

M A Cuthbertson
Justice of the Peace

2007 ONCJ 266 (CanLII)