

Ontario Court of Justice

Her Majesty The Queen

Against

Stephen Gondo

Reasons for Judgement

Before the Honourable Justice M. Agro
At Hamilton, Ontario, on September 18, 2012

Appearances:

L. Narozniak
M. Rombis

Counsel for the Crown
Counsel for the Accused

... Upon commencement of the matter:

MR ROMBIS: Mr. Gondo is before the court, Your Honour. Good morning again. Rombis, initial M., counsel for Mr. Gondo. Does Mr. Gondo have permission to sit at counsel table,...

THE COURT: Yes.

MR ROMBIS: ...Your Honour? Thank you.

THE COURT: Mr. Reporter.

M Agro, J (orally)

Stephen Gondo entered a plea of not guilty to the charge of operating a motor vehicle while his ability to do so was impaired by alcohol, contrary to section 253(1)(a) of the Criminal Code of Canada.

The court heard from one witness, the arresting officer, Police Constable Laura Bouwmeester.

While stopped in her marked cruiser in the southbound lane of Upper Wentworth Street at its intersection with Stone Church Road east in this city, PC Bouwmeester observed a 1994 Toyoto Camry make a left turn from the westbound lane of Stone Church into the southbound lanes of Upper Wentworth. It was 11:55 p.m. on the 25th of September 2011.

From a distance of 400 to 500 meters she observed the vehicle on Upper Wentworth and followed it as it made a right turn onto Rymal Road east traveling westbound. Due to what she characterized as the manner in which the vehicle was being driven she initiated a traffic stop on Rymal Road.

The identity of the accused as driver of the vehicle was proven.

PC Bouwmeester articulated her reasons for the traffic stop as these:

- The vehicle made a wide left turn onto the southbound lanes of Upper Wentworth, first entering the curb lane, then moving to the inside passing lane.
- While driving southbound the vehicle was between the two lanes and stopping, then moving for no apparent reason,
- While on Rymal Road, the Camry had trouble staying in its lane and stopped at one point for no apparent reason.

In cross-examination on this evidence she acknowledged that she made no observations of unusual driving as the vehicle travelled westbound on Stone Church before making the first turn southbound onto Upper Wentworth. She also

acknowledged that there was no traffic in the intersection and thus the Camry posed no impediment to other users of the road.

She modified her evidence somewhat stating that while on Upper Wentworth the Camry was straddling lanes, not moving completely from lane to lane.

In cross-examination, PC Bouwmeester conceded that there was nothing unusual about the right turn onto Rymal Road and that her notation of the manner of driving taken shortly after her observations was that the vehicle was “weaving” rather than not staying in its lane as she had testified in-chief.

She had no recollection of there being an intersection at the point on Rymal Road where the accused briefly stopped his vehicle nor could she recall if there were any driveways in the area. She did acknowledge that there are residences on both north and south sides of Rymal Road as well as a police station and YMCA on the south side.

She did acknowledge that the accused pulled over to the roadside in response to the traffic stop in the proper manner. There were two male occupants of the Camry, the accused driver and a front seat passenger.

Officer Bouwmeester testified as to these observations of the accused while at the roadside:

- He had some difficulty lowering the driver’s side window to speak to her.
- Once the window was down, there was a strong odour of alcohol coming from within the car.
- While he produced his wallet, he could not immediately find his licence, though she was able to observe it in the wallet.
- When walking some five feet to the rear of his vehicle at her request he was very unsteady on his feet.
- His eyes were glossy and his speech slurred, to the point that she could “just understand” him.
- There was a very strong odour of alcohol from his breath detected once he was outside of his vehicle.

At some point, Officer Bouwmeester asked the accused whether he had consumed alcohol, and he denied doing so.

During her search of the vehicle, PC Bouwmeester found two open 341 ML bottles of Coors beer that were half full and concealed under the driver’s seat.

Under cross-examination, Officer Bouwmeester tempered her evidence on these observations somewhat.

She acknowledged that she was unsure of the cause that led to the delay in opening the window and couldn't recall whether it was due to driver action or inaction or mechanical problem.

She had no recollection of the accused fumbling to retrieve his wallet, just that he had difficulty finding his licence. She was unable to say for certain that she had used her flashlight when looking into the vehicle but testified that that would be her usual practice; nor could she recall if the car's interior lights were on at the time. She did testify that there was artificial street lighting.

PC Bouwmeester acknowledged that the accused had no difficulty exiting his vehicle but was unsteady while walking to the rear of it where he did ultimately produce his driver's licence. She also testified that he seemed to understand her questions and there was nothing unusual about his responses. She described him as "comprehensive" and compliant with her instructions.

As for her physical observations of glossy eyes and slurred speech, Officer Bouwmeester conceded that she had never met the accused before and had no recollection of which words he slurred.

It is noteworthy that when walking from the police cruiser to the booking area at the police station, a distance of 10 to 15 feet, Officer Bouwmeester did not make any note nor did she have any recollection about any unsteadiness in the accused's gait. She also testified that while at the station the accused did not have any speech problems.

The seminal decision of *R v Stellato*, in 1993 by the Ontario Court of Appeal, and *R v Andrews* in 1996 by the Alberta Court of Appeal, set out the test for impaired driving. If the Crown is able to prove beyond a reasonable doubt that the accused's ability to drive is impaired, even slightly, by alcohol, that is sufficient proof of the offence. However, as was pointed out in *Andrews*, the conclusion of slight impairment does not mean that slight evidence will be sufficient proof of the offence.

Slight impairment to drive relates to the reduced ability to perform a complex motor function, operating a motor vehicle, whether it affects perception or field of vision, reaction or response time, judgement or regard for the rules of the road: *R v Censoni*.

The *Stellato* test addresses the degree of impairment in the ability to drive that must be proven to the requisite standard. The Crown must show that considering the totality of evidence, there can be no other reasonable conclusion than that the accused's ability to operate his motor vehicle was impaired by alcohol.

On this officer's evidence of the odour of alcohol on the accused's breath and the half full bottles of beer found in the vehicle under the driver's seat, I am able to find that

the accused had recently consumed alcohol. While that evidence confirms consumption, it does not address the effect of that consumption; R v Cooper.

However, a closer analysis of the evidence is required to determine whether that alcohol impaired the accused's ability to drive, even slightly.

There are two aspects to that analysis: an examination of the evidence relating to any physical indicia of impairment, and of the evidence of the accused's driving.

As this officer was not familiar with the accused's normal speech or gait and as she had no concerns about his speech or gait while at the police station, particularly as he was required to walk a further distance, I do not find that her roadside observations are particularly persuasive as indicia of impairment.

I note that the officer had no concerns about the accused's comprehension or level of cooperation at any point in her dealings with him.

I find the evidence about the delay in opening the driver's side window to be neutral as the officer was unable to testify whether the delay was due to any action or inaction by the accused or mechanical problems with the vehicle.

Nor is the officer's evidence about the accused being unable to find his driver's licence persuasive. There was no evidence that the vehicle's interior lights were on.

PC Bouwmeester was unable to recall whether she had used her flashlight that night to look into the vehicle which would have provided the accused some additional lighting while looking in his wallet. The officer had the benefit of artificial street lighting while standing outside the vehicle. It is reasonable for me to infer that the accused did not have the benefit of the lighting while seated in the driver's seat. The accused was able to produce his licence when outside of the car.

That the accused had concealed an open bottle of beer under the driver's seat and his denial of having consumed alcohol is circumstantial evidence of his culpability: R v White, a 1998 decision of the Supreme Court of Canada. However, that evidence is capable of being attributable to a consciousness of guilt or other charges including having open liquor in a motor vehicle contrary to provincial legislation. Hence the value of that evidence is a question of weight, R v White, and assessed with the totality of the evidence against the accused.

The evidence regarding the accused's driving discloses that he made an improper left turn from Stone Church Road to Upper Wentworth southbound. There was nothing improper about the right turn into Rymal Road.

In cross-examination the officer tempered her evidence about the manner of driving from weaving to changing lanes to weaving within a lane and straddling a lane marker. The two stops and starts, for no apparent reason, one on Upper Wentworth

and the other on Rymal Road, do support a finding of erratic driving. However, that evidence about driving is equally consistent with confusion or inattention. Rymal Road has residences on both the north and south sides. An equally reasonable inference can be drawn that the accused was looking for an address or driveway.

There is no evidence of the accused having interfered with other users of the road, or having disobeyed any traffic control signals while traveling on these two major thoroughfares. I do find that his manner of driving, while less than exemplary, was equally consistent with an inference that he was confused as to his whereabouts.

While I have found that Stephen Gondo has recently consumed alcohol before being stopped by Officer Bouwmeester, and might be liable to other charges, I am not satisfied that the requisite standard of certainty of the effect of that consumption on his ability to operate his motor vehicle.

For these reasons, Mr. Gondo is found not guilty as charged.

MR ROMBIS: Thank you very much, Your Honour.

THE COURT: Mr. Rombis.

MS NAROZNIAK: Thank you.

MR ROMBIS: Your Honour, that is my only matter. If I could please be excused?

THE COURT: Yes.

MR ROMBIS: Thank you.