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R. v. Zaharia

Between
Her Majesty the Queen, and
Brian J. Zaharia

[1999] O.J. No. 3460

Ontario Court of Justice
Haileybury, Ontario
Lajoie J.

Oral judgment: May 3, 1999.
(9 paras.)

Charge: Section 79 of the Highway Traffic Act - Drive with Radar Warning Device.

Counsel:

L. Muller, for the Crown.
B. Zaharia, appearing in person.

¶ 1 **LAJOIE J.** (orally):— In hearing such appeals it is always important to read very carefully the words that are spoken by the Justice of the Peace in rendering his decision. And it is quite clear that the judgment or the ruling of Justice of the Peace Kitlar was very succinct and did not go into very much detail. It would certainly have been preferable that he analyze the situation in greater detail than he did.

¶ 2 Regardless of that, the main issue here is whether or not Justice of the Peace Kitlar did err in law. Because that is the only basis upon which this matter can succeed. In arriving at whether or not he did err in law, I must look at all of the evidence that he did hear and certainly have a full transcript of the evidence.

¶ 3 And it is uncontradicted evidence that Mr. Zaharia was stopped and was informed that he was stopped for a radar violation offence. And that Mr. Zaharia quite openly invited the officers to search his vehicle, if they wished to do so, but did not permit searching of his person. The situation deteriorated from then on; deteriorated to the point that Mr. Zaharia, although not cautioned not to do so, did leave the scene and did attend at the Ontario Provincial station, which was a very short distance away from the scene where his vehicle had been stopped.

¶ 4 The fact that Constable Fillipov did testify that at the scene he did see a radar warning device sticking out of Mr. Zaharia's pocket. As I've stated, his uncontradicted evidence that was before the Justice of the Peace together with the fact that Constable Fillipov did testify that he was operating a radar detection unit in his cruiser. And that the unit had signalled the passage of a radar detection unit in the area. With that evidence certainly Constable Fillipov did have reasonable and probable grounds to search the vehicle driven by Mr. Zaharia.

¶ 5 Whether or not he had the right to search Mr. Zaharia is certainly not expressly clear in the Highway Traffic Act. But one must look at other case law dealing with driving offences and one must look at cases of care

and control of a motor vehicle under Section 253(a), or (b) of the Criminal Code of Canada, which cases very clearly indicate that the driver is an extension of the motor vehicle. And that the motor vehicle cannot be put into motion without the intervention of this driver. And that certainly the sections would not make any sense if the drivers were completely divorced from the motor vehicle, saying that they are two separate entities. They do become one entity when the motor vehicle is being driven by someone.

¶ 6 And certainly the analogy to which Justice of the Peace Kitlar referred to is exactly on this point. And I certainly cannot find that he did commit an error in law.

¶ 7 And certainly the assessment by Constable Fillipov whether or not he had the right to search a person is his opinion, but in a court of law his opinion does not count as the final decision. The Judges of the law are myself and Justice of the Peace Kitlar in this case. And the officers are there to present the evidence to us in order that we may make the decisions on the legal principles that we have been trained to apply.

¶ 8 And therefore, having found that Justice of the Peace Kitlar did not make any error in law and also as a further point I do find that the search by Constable Fillipov was totally lawful in the circumstances, as being incidental to a lawful arrest and also being fully within the ambit of the plain view doctrine.

¶ 9 For those reasons, Mr. Zaharia, your appeal will be dismissed.