

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Morillo, 2018 ONCA 582

DATE: 20180625

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Paciocco J.A. (Motion Judge)

BETWEEN

Her Majesty the Queen ex. rel.
The Regional Municipality of Durham

Responding Party

and

Lindsey Morillo

Moving Party

Lindsey Morillo, acting in person

Mark Wiffen, *amicus curiae*

Arend J. Wakeford, for the responding party

Heard: June 13, 2018

On appeal from the decision of the Provincial Offences Appeal Court dated December 20, 2017 by Justice John N. Olver of the Ontario Court of Justice, dismissing the appeal from the conviction entered on August 24, 2017 by Justice of the Peace Maxine Coopersmith of the Ontario Court of Justice.

ENDORSEMENT

OVERVIEW

[1] On August 19, 2015, Lindsey Morillo was charged with the offence of speeding on Highway 2 in the Region of Durham. A regional Traffic Services Unit

officer claims to have clocked Mr. Morillo's vehicle with his radar system, travelling at 107 kilometres per hour in what proved to be a 70 kilometre per hour zone. Mr. Morillo denies that he was speeding. He claims that he was travelling within the speed limit in the flow of traffic. He does not directly challenge the functioning of the radar system. In his view, however, it is not possible that he was travelling at 107 kilometres an hour because he was slowing to make a turn when the officer purportedly measured his speed.

[2] The officer and Mr. Morillo testified about their conflicting accounts of what happened at two separate trials. Mr. Morillo was convicted at both of those trials. His first conviction was overturned because the presiding Justice of the Peace erred in applying the rule in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. An appeal from his second conviction to a Provincial Offences Appeal Court Judge was unsuccessful. Mr. Morillo is now moving under *Provincial Offences Act*, R.S.O. 1990, c. P. 33 ("*POA*"), s. 139(1), for leave to appeal that decision to this court.

[3] Mr. Morillo has been self-represented in all proceedings, including this motion for leave to appeal.

[4] For the reasons that follow, I grant his motion for leave to appeal.

THE LEGAL TEST FOR LEAVE

[5] The relevant parts of s. 139 of the *POA* state:

Appeal to Court of Appeal

139(1) An appeal lies from the judgment of the Ontario Court of Justice in an appeal under section 135 to the Court of Appeal, with leave of a judge of the Court of Appeal, on special grounds, upon any question of law alone.

Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

[Emphasis in original.]

[6] The test for securing leave to appeal to the Court of Appeal under *POA*, s. 139(1) is “very high”: *R. v. El-Kasir*, 2017 ONCA 531, at para. 21, citing *Vaughan (City) v. Antorisa Investments Ltd.*, 2012 ONCA 586 1 M.P.L.R. (5th) 240, at para. 8. See also *R. v. Ul-Rashid*, 2013 ONCA 782, at para. 17; and *R. v. Farah*, 2013 ONCA 362, at para. 16.

[7] The text of s. 139(1) and the relevant jurisprudence of this court make clear that leave to appeal can be granted only on questions of law alone, and only where there are “special grounds”: *El-Kasir*, at para. 21; *Ul-Rashid*, at para. 17; and *Farah*, at para. 16.

[8] What constitutes “special grounds” is informed by the direction in s. 139(2) that leave to appeal shall not be granted under s. 139(1) unless the judge “considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted”: *Ul-Rashid*, at para. 17.

[9] In order to meet this standard, Trotter J.A. held in *Ontario (Ministry of Environment and Climate Change) v. Sunrise Propane Energy Group Inc.*, 2018 ONCA 461, at paras. 15-16 that, in respect of leave under s. 131 of the *POA*, the legal issue raised should be significant and have some broad importance. These same considerations equally apply to leave motions under s. 139 of the *POA*. Generally speaking, the implications of the legal issue should go beyond the case at hand. The strength of the proposed grounds of appeal is also a material consideration if there is a real risk that there may have been a miscarriage of justice or a denial of procedural fairness: *Ul-Rashid*, at paras. 25-27.

ANALYSIS

A. IS MR. MORILLO APPEALING ERRORS OF LAW?

[10] In my view, appellate courts ought not to take a rigid or technical approach when identifying the grounds of appeal that a self-represented litigant is raising when seeking leave to appeal under *POA*, s. 139.

[11] The Canadian Judicial Council's *Statement of Principles on Self-Represented Litigants and Accused Persons* has been endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4, and by this court in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, at paras. 42-45, and in *R. v. Tossounian*, 2017 ONCA 618, 354 C.C.C. (3d) 365, at paras. 36-39. According to these principles, self-represented persons are

expected to familiarize themselves with relevant legal practices and to prepare their own case. However, self-represented persons should not be denied relief on the basis of minor or easily rectified deficiencies in their case. Judges are to facilitate, to the extent possible, access to justice for self-represented persons.

[12] Appellate judges should therefore attempt to place the issues raised by a self-represented litigant in their proper legal context. In my view, when this is done it is evident that Mr. Morillo is appealing errors of law, and that there is a foundation in the record that those errors may have occurred.

B. THE *W.(D.)* ERROR

[13] In the draft notice of appeal filed in this matter, Mr. Morillo raised issues about the failure of the Provincial Offences Appeal Court Judge to recognize that the Justice of the Peace mishandled the credibility evaluation. Although Mr. Morillo has not explicitly pled a *W.(D.)* error, the responding party recognizes that this ground of appeal raises issues relating to the proper application of the *W.(D.)* rule. The responding party contends, in support of its position, that the Justice of the Peace properly applied the *W.(D.)* test. In my view, Mr. Morillo's appeal therefore embraces the claim that the Provincial Offences Appeal Court Judge erred by failing to review whether the Justice of the Peace's application of the rule in *W.(D.)* was legally sound.

[14] The rule in *W.(D.)* is intended to ensure that reasonable doubt is properly applied where the credibility or reliability of evidence inconsistent with guilt is in issue: *R. v. D.(B.)*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at paras. 102ff; and *R. v. Phillips*, [2001] O.J. No. 83 (C.A.), 139 O.A.C. 282, leave to appeal refused [2001] S.C.C.A. No. 32 and [2002] S.C.C.A. No. 609. The rule applies in this case because Mr. Morillo offered evidence at his trial inconsistent with his guilt, and the credibility and reliability of that evidence – and the competing evidence of the officer – was called into question.

[15] The Justice of the Peace recognized that the *W.(D.)* rule applied and cited it. In my view, however, there is strong reason to believe that she then misapplied it. She appears to have engaged in the very kind of credibility contest reasoning that the rule was intended to prevent, by deciding which competing version of events she preferred.

[16] After reciting the differences between the competing versions of events, the Justice of the Peace said:

So I have to look at, whose evidence can I rely on? Well, I'll tell you, the one who has used the device, the one who compared their visual observations, the one who is trained to use that device, made sure it was functioning properly. That's the evidence I am going to rely on, not your evidence when you saw a sign that said the speed limit was 70, that you had vehicles in front and behind you and you were keeping up with traffic. That is not as reliable as the officer's evidence.

For that reason, I am going to accept the evidence of the officer and I find you guilty of speeding 107 kilometres per hour in a 70 kilometre zone contrary to section 128 of the *Highway Traffic Act*.

[17] The genesis of the Justice of the Peace's apparent error may possibly be traced to a misconception of how credibility contests are to be adjudicated:

Now, I'm also very well aware not to turn this into a credibility contest between you and an officer and simply choose one side without properly and carefully giving the other side fair consideration of the evidence in the context of all of the evidence.

[18] In my view, this is not accurate. Credibility contests are not properly resolved by choosing one side after carefully giving the other side fair consideration in the context of all of the evidence. They are resolved by ensuring that, even if the evidence inconsistent with guilt is not believed or does not raise a reasonable doubt, no conviction will occur unless the evidence that is accepted proves the guilt of the accused beyond a reasonable doubt. The decision of the Justice of the Peace fails to make that determination. It appears that she found Mr. Morillo guilty because she judged that his evidence was not as reliable as the officer's evidence. This would be a legal error, indeed the very error made in *W.(D.)* itself.

[19] In my view, there is also strong reason to believe that the Provincial Offences Appeal Court Judge erred by not recognizing that the Justice of the Peace may have committed such a *W.(D.)* error. Instead, he supported the Justice of the Peace's analysis, and concluded, "[t]here's no error that I can see that the Justice

made that would allow me to grant your appeal and give you a third opportunity at trial.”

C. PREVENTING IMPEACHMENT ON PRIOR INCONSISTENT TESTIMONY

[20] When Mr. Morillo sought to confront the officer with inconsistencies between his testimony at the retrial and his testimony at the first trial, the Justice of the Peace refused to allow it. She apparently laboured under the misconception that since retrials are to be determined on their own evidence, no use should be made of testimony taken at the prior trial, even to demonstrate inconsistency. If this is so, she erred in law. It is trite law that prior inconsistent testimony from a first trial can be used to impeach a witness at a retrial.

[21] This apparent error showed itself early in Mr. Morillo’s cross-examination of the officer. Mr. Morillo was attempting to cross-examine the officer about an inconsistency that he believed existed between the officer’s testimony and evidence the officer gave at the first trial, about the age of the car Mr. Morillo was driving. His question was interrupted by the Justice of the Peace:

The Court: Okay. I’m not going to go to a previous hearing ...

Mr. Morillo: Okay

The Court: ... okay? This is a brand ...

Mr. Morillo: This is just

The Court: ... new trial, sir.

[22] Almost immediately after making this ruling, the Justice of the Peace invited Mr. Morillo to cross-examine the officer on anything he said differently before. Apparently, however, this invitation did not extend to the officer's testimony at the previous trial because, when Mr. Morillo attempted to impeach the officer's testimony about where Mr. Morillo's vehicle was when the officer first saw it, the Justice of the Peace again interjected: "Okay. Are we re-trying the old trial? Is that what we're doing?" This prompted the public prosecutor to add, "[e]xactly, if we could stick to the new evidence, please."

[23] I recognize that Mr. Morillo was able to get many of the perceived contradictions that troubled him before the Justice of the Peace, including through his own testimony. But the Justice of the Peace's apparent legal error in restricting Mr. Morillo from using inconsistencies between the officer's testimony and his previous evidence may well have mattered. For example, at the first trial, the officer testified that Mr. Morillo's vehicle was the only one in the westbound lanes when he first observed it. This testimony appears to be in significant contradiction to the officer's testimony at the retrial that he could tell that Mr. Morillo's vehicle was speeding because he was pulling away from other westbound traffic, most notably a van operated by a woman whose facial expression the officer recalled.

[24] In my view, Mr. Morillo raised this error as a ground of appeal. In the draft notice of appeal he questions the Justice of the Peace's admonition that he not re-try the old case. Mr. Morillo can fairly be taken to be asserting that the Justice of

the Peace erred in law by undermining his ability to confront the officer with his prior inconsistent statements.

[25] This issue was also before the Provincial Offences Appeal Court Judge, but he arguably failed to recognize the error. The Provincial Offences Appeal Court Judge found that Mr. Morillo's challenge to the officer's evidence was deficient because Mr. Morillo did not impeach the officer with transcripts from the first trial. In making that determination, the Provincial Offences Appeal Court Judge did not note that the Justice of the Peace considered testimony from the first trial to be unavailable for impeachment purposes. It is arguable that even if Mr. Morillo had transcripts, unless the Justice of the Peace changed her ruling, Mr. Morillo would not have been permitted to use them.

[26] The Provincial Offences Appeal Court Judge's ruling also appears to endorse the public prosecutor's protest at trial that if Mr. Morillo wanted to challenge the officer with prior testimony, he needed to have transcripts. In my view, this proposition is wrong in law. A party need not have a transcript to cross-examine a witness about their prior inconsistent testimony. Pursuant to s. 20 of the *Evidence Act*, R.S.O. 1990, c. E.23, "[a] witness may be cross-examined as to previous statements that have been [...] reduced to writing [...] without the writing being shown to the witness". If the witness agrees they made the prior inconsistent statement, the contradiction is established. The risk in not having a transcript is that if the witness denies making a prior inconsistent statement when asked, that

denial cannot be contradicted and hence the contradiction cannot be proved. Put otherwise, Mr. Morillo would have been well advised to have had the transcript of the first trial with him for use in cross-examination, but the absence of a transcript does not prevent him from cross-examining the officer about the contradictions he believes to exist.

D. FAILING TO PROVIDE ADEQUATE ASSISTANCE TO A SELF-REPRESENTED ACCUSED

[27] The Provincial Offences Appeal Court Judge did a commendable job in responding to Mr. Morillo's needs as a self-represented litigant. He worked to understand Mr. Morillo's bases for appeal. He listened carefully and patiently to Mr. Morillo, and was careful to explain to Mr. Morillo why his appeal had failed. The Provincial Offences Appeal Court Judge may nonetheless have erred in law in endorsing the fairness of the manner in which the trial was conducted, by not paying due regard to the fact that Mr. Morillo was unrepresented at trial.

[28] Specifically, issue can be taken with the following exchanges between the Provincial Offences Appeal Court Judge and Mr. Morillo:

So the Court, the Justice of the Peace on that occasion [...] was applying the evidence as she heard it from the officer to the facts as you testified to. And I think she acknowledged to some extent that there was some differences in the officer's evidence from trial one to trial two that you were trying to point out. The problem was you didn't have a transcript to properly cross-examine the officer and these are one of the short comings of running a case by yourself. I mean you're perfectly entitled to

represent yourself and run a case. The problem is where you're not sure of the evidentiary procedures and how to properly cross-examine an officer to test their credibility, particularly where you're trying to impeach their credibility because of something they may have testified to differently and I understand exactly what you're trying to say that the officer's evidence on some issues changed from one date to the next. The issue might well be whether those are material issues or not material issues and had you properly cross-examined the officer with a transcript okay, you may well have been able to establish some credibility misgivings that might've allowed [the] Justice of the Peace to favour your argument a little better, or at least to have a reasonable doubt as to the accuracy of the speed the officer was testifying to.

[29] The Provincial Offences Appeal Court Judge then went on to say:

Well let me just explain to you because as I say you've had two kicks at the can here and you're basically asking me to grant your appeal so you can have a third kick at the can and the issue is how many opportunities do we give you at the tax payer's expense to figure out how to properly present your case right. And this is why I say you would've been well-advised the first time around to have representation because you wouldn't be here now. One way or the other it would've been determined and it would've been definitive. But basically your grounds of appeal are that you just weren't able to get your points across in your mind.

[30] In my view, there are arguably several problems with these comments, including the suggestion, repeated elsewhere in the Provincial Offences Appeal Court Judge's reasons, that the fact that this was Mr. Morillo's second appeal was relevant to whether his appeal should be granted. Of course, it was not.

[31] The difficulty of immediate concern is with the Provincial Offences Appeal Court Judge's comments explaining to Mr. Morillo that his lack of success can be attributed, in part, to his lack of familiarity with procedures and the proper manner of presenting his case. These comments may fail to allow for the obligation the Justice of the Peace had to assist Mr. Morillo, as an unrepresented litigant, in achieving a functional understanding of proper procedures and the proper manner of presenting a case. In my view, a finding that Mr. Morillo demonstrated his incompetence with procedures and the manner of presenting arguably called for the Provincial Offences Appeal Court Judge to consider whether the Justice of the Peace did enough to assist Mr. Morillo in achieving the base level of understanding required.

[32] The first statement of principle in the *Statement of Principles on Self-Represented Litigants and Accused Persons* says:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of their representation.

[33] The principle on "Promoting Equal Justice" empowers the presiding judge to "inquire whether [the parties] understand the process and the procedure", "provide information about the law and evidentiary requirements", and "modify the traditional order of taking evidence".

[34] Long before the *Statement of Principles on Self-Represented Litigants and Accused Persons* was adopted in 2006, this court said in *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at p. 347:

Consistent with the duty to ensure a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect.

[35] It appears that, when evaluating Mr. Morillo's challenge to the fairness of his trial, the Provincial Offences Appeal Court Judge failed to consider whether the Justice of the Peace respected these principles. In my view, Mr. Morillo raised this issue in his draft notice of appeal by challenging the propriety of the Provincial Offences Appeal Court Judge's reliance on the shortcomings flowing from running a case without counsel, in dismissing his appeal. This ground of appeal, therefore, raises an issue of law that finds realistic support in the application record.

E. SPECIAL GROUNDS

[36] In my view, there are special grounds for granting leave to appeal the alleged errors of law that I have identified.

[37] Those special grounds do not relate to the unsettled state of the law. The legal rules that gird Mr. Morillo's grounds of appeal are entirely settled and are not in need of determination by this court. The special grounds that I recognize arise,

ironically, from the fact that these errors occurred in a provincial offences court, specifically, in traffic court.

[38] Traffic courts deal with a high volume of offences. This creates practical pressures to be efficient and economical. Given the low level offences that are prosecuted in these courts, these practical pressures can imperil the proper balance between efficiency and due process. In submissions before me, for example, the responding party raised concerns about the resources that have already been expended on Mr. Morillo's prosecution on a simple speeding ticket. The same preoccupation arguably shows itself in the comments of the Provincial Offences Appeal Court Judge about Mr. Morillo wanting a "third kick at the can". I am concerned that the resources pressures I describe, coupled with the low level offences prosecuted, can devalue the importance of the procedural and substantive protections that those charged, even with traffic offences, are entitled to.

[39] I would not begin to suggest that the fact that a *W.(D.)* error occurred in Mr. Morillo's first trial, and that the same error arguably occurred in his second trial, confirm a systemic problem. I do know, however, that the *W.(D.)* rule is central to the proper conduct of many prosecutions, and it is not without its complexity. This court has yet to affirm the importance of the rule in *W.(D.)*, in traffic court prosecutions, or to provide direct guidance to Justices of the Peace on its proper application. This case presents a strong record on which to do so, because this

ground of appeal is strong. I am satisfied that it is essential in the public interest and for the due administration of justice that leave be granted to accomplish this.

[40] Traffic court also sees a significant number of self-represented individuals. As the responding party agreed in oral submissions, this appeal raises issues about the appropriate balance between the Justice of the Peace's obligation to provide guidance and direction to self-represented litigants, and the demands of trial efficiency in busy traffic courts where the stakes for the accused tend not to be high. I am satisfied that it is essential in the public interest and for the due administration of justice that leave be granted to provide this guidance, should the presiding panel consider it appropriate to do so.

[41] I would not conclude that the Justice of the Peace's apparent error in restricting Mr. Morillo's ability to cross-examine the officer about his prior testimony presents special considerations in isolation. However, since leave is warranted on the other issues I have identified, and the treatment of this issue may enable this court to give guidance on the importance of compliance with basic rules of evidence in the conduct of traffic offences, I would grant leave to appeal this issue as well.

CONCLUSION

[42] I therefore grant Mr. Morillo leave to appeal the Provincial Offences Appeal Court decision of December 20, 2017 pursuant to *POA*, s. 139(1) on three issues, namely:

- Did the Provincial Offences Appeal Court Judge err in law in failing to find that the Justice of the Peace erred in law by misapplying the rule in *R. v. W.(D.)*?
- Did the Provincial Offences Appeal Court Judge err in law in failing to find that the Justice of the Peace erred in law by making an erroneous ruling relating to Mr. Morillo's entitlement to attempt to impeach the traffic enforcement officer with his testimony from the first trial?
- Did the Provincial Offences Appeal Court Judge err in law in determining that Mr. Morillo had a fair trial, without considering whether the Justice of the Peace gave appropriate and sufficient direction and guidance to Mr. Morillo as an unrepresented accused?

"David M. Paciocco J.A."