Court File No. 16-4020

PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

v.

PATTY CRAIG

****

R U L I N G

BEFORE HER WORSHIP JUSTICE OF THE PEACE D. FLORENCE
on March 27, 2017, at CALEDON EAST, Ontario

****

APPEARANCES:

T. Mason	Provincial Prosecutor
G. Burd	On behalf of Patty Craig
P. Craig	In Person

Table of Contents

PROVINCIAL OFFENCES COURT

T A B L E O F C O N T E N T S

W I T N E S S E S

****

Transcript Ordered: March 27, 2017
Transcript Completed: March 29, 2017
Ordering Party Notified: March 29, 2017

MARCH 27, 2017

R U L I N G

FLORENCE, J.P. (Orally)

This was a *Charter* 7 motion which was brought...*Charter* Section 7 motion that was brought and heard by this court February the 22nd, 2017, seeking a stay of proceedings.

The issue is the laying of a Part 3 Information for an absolute liability under Section 128 (speeding) for the reason given in evidence under oath was that an abuse of process under the *Charter of Rights and Freedoms*.

It is the defendant's onus to establish on a balance of probabilities, that the Crown has acted in an oppressive or vexatious manner or that the Prosecution is offensive to the principles of fundamental justice and fair play.

Abuse of process as defined by the dictionary of Canadian Law states, conduct on the part of government authorities that undermines the fundamental principles that underlie the community sense of decency and fair play. Frivolous or vexatious, or if the process, is in fact, being used for an ulterior or improper purpose, or if the process is being used in such a way as to

itself be an abuse.

The essence of abuse of process is the misuse or perversion of the court's process for an extraneous or ulterior purpose. There must be a purpose other than that which the process was designed to serve.

The philosophy and intent of the P.O.A. is stated in Section 2(1) in the P.O.A. is to preserve a distinction between Provincial offences and criminal offences.

The Provincial Offences Act is the procedural code that governs the enforcement and prosecution of offences created by Provincial Statutes and Municipal By-Laws. Charges are laid for offences under the Statute that create the offence but the procedures to be followed are in the P.O.A.

In this case, the offence of speeding is created under the Highway Traffic Act, but the charge is laid and proceeds through the court according to the P.O.A., the Regulations authorized under the Act and the Rules of Court made under the Court's of Justice Act.

Any offence except for parking infractions under the Provincial enactments, Regulations or Municipal By-Laws may be charged under Part 1 and all offences including parking infractions may be

enforced under Part 3 of the Act.

The Part 1 procedures, however, are intended to be used where the offence is minor or where the circumstances surrounding the commission of the offence are less serious.

The officer for a Part 1 must believe that an offence has been committed. This is a relatively low threshold to meet compared with the requirements for Part 3.

For a Part 3 to be laid, the officer must have reasonable and probable grounds.

The Part 1 lower threshold is consistent with the lower penalty structure and the shorter time limits available.

In *R. v. Thomas*, the Appeal Court Judge found that the Provincial Offences officers are not permitted under the Statutory regime to act on a subjective basis or a whim in the issuance of a Certificate of Offence.

A Provincial Offences officer is the only one authorized to issue a Certificate of Offence and his discretion to do so is not unlimited or absolute. Further, the defendant may challenge the officer's evidence at trial, which provides the defendant with an opportunity to test the

propriety and reasonableness of the officer's exercise of discretion to issue the Certificate of Offence and also allows the court to determine what motivated the officer's decision to charge.

R. v. Thomas, in its decision, states this, "The issuing officer is required to exercise his powers properly and not act based on a subjective belief based on whim or bias."

Issuing a Part 1 Certificate of Offence can be done in one of two ways.

The officer may serve the defendant with Offence Notice which gives the defendant options as to how the defendant will deal with the matter, there must be a set fine or, if none, a Part 1 summons is issued. If the summons is issued, evidence must be heard.

The officer may lay a Part 3 Information. Part 3 procedures more closely resemble those used for criminal charges in that an Information is sworn before a Justice and summons issued or warrant. Service of summons can be before the swearing of the Information as was the case in the matter before this court.

The Justice swearing the Information must be satisfied, not only that there is evidence of an offence, but that the process is not flawed. Any

P.O.A. matter can be prosecuted under Part 3 procedures, but Part 3 procedures must be resolved before a Justice with a disposition of finding of guilt or dismissal, or the withdrawal of the charge by the Prosecutor.

An officer may use a Part 3 process where the investigation of the matter continued after the commission of the offence or where the offence became known after the time limit for proceeding under Part 1 has expired.

More commonly, Part 3 is used for more serious circumstances where the public interest calls for a court appearance and possibly higher penalties upon conviction. It is not always the seriousness of the offence itself that determines whether proceedings will be commenced under Part 1 or Part 3, but the circumstances or consequences of the commission of the offence.

In order to issue a Part 3 summons, the officer must have reasonable and probable grounds that an offence has been committed and must have found the defendant at or near where the offence took place.

This is a process that provides the officer with a mechanism to serve a person found committing an offence under more aggravating circumstances that would not warrant proceeding

under Part 1 of the Act.

The issue: Is the consideration and decision of Officer Girouard to issue a Part 3 summons for the reasons he stated under oath an abuse of process?

Did the conduct, i.e., the decision making process undermine the fundamental principles that underlies the community's sense of decency and fair play?

Was the laying of a Part 3 frivolous and vexatious or the process itself for an ulterior or an improper purpose, or if the purpose is being used in such a way as to itself be an abuse?

And there must be a purpose other than that which the process was designed to serve.

Officer Girouard gave evidence under oath.

His testimony that for his years of service as a police officer, some 36 years, have mainly been focused on traffic enforcement and impaired drivers and in the course of his service given thousands of speeding tickets.

He agreed that he had given out tickets, i.e., Part 1s, for the exact rate of speed that forms the basis of this offence and the motion before

this court.

His last day in enforcement was January 21st, 2017.

The officer identified that near the end of September 2016 that he started to use Part 3 summons to bring people to court for 35 kilometres and above, stated another way, 49 over and less.

The officer gave testimony that laying a Part 3 Information is more labour intensive for the officer and that a brief must be prepared. Also, the defendant has no consideration in the court date given to them.

His testimony that he had no conversation with the Caledon Municipal Prosecutors with respect to laying a Part 3 instead of a Part 1 and no evidence that a Part 3 summons issued, it was in consultation with a Part 3 Ministry of the Attorney General Prosecutor either.

The officer gave evidence of his knowledge of the difference in fines once they come into the courtroom process, "it's usually a higher fine".

The officer was unaware if the language including the warning used on the summons used to issue to a defendant for a Part 3 offence, whether that is present on the notice given to a

defendant for a Part 1.

The officer's evidence was that he chose a Part 3 summons for the defendant that day because of, and I quote, "a high speed involved". There was no other evidence of circumstances surrounding the *actus reus* of the offence that were aggravating that precluded proceeding under Part 1.

No specific date was given by the officer as to when he changed from issuing Part 1 to Part 3 in September 2016, so the court makes reference to the month only to articulate that there was a decision made by the officer at that time that resulted in a change of choice by the officer.

The decision to change process for this and other defendants was not due to the circumstances of the individual's offence, which is the consideration, but the following, and I quote,

"What I was seeing in the court system, I believe that stuff wasn't being done. I believe things were being withdrawn. Speeds were being reduced down from 49 to 15 over in the Part 1 system and I don't believe justice was being done on a consistent basis. And that's why I decided at that point that I would bring that before the courts and have a Part 3 Prosecutor deal with it."

In response to the question, "You were going

to change the way the system worked?", "I was changing the way I was doing enforcement. I was using my discretion."

The dictionary of Canadian Law defines law enforcement as:

a) policing,

b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings and,

c) the conduct proceedings referred to in clause (b).

Proceedings is defined as meaning in a criminal case, all judicial steps taken upon one charge to resolve and reach a final conclusion of the issue therein raised between the same party and the Crown.

Steve Coughlan's book on Criminal Procedure makes this point:

The charge, i.e., the offence, is the focal point for various forms of compelling the appearance of an accused in court and determines issues of jurisdiction and many features of pretrial procedure.

In the criminal context and as Part 3s are sometimes referred to as 'quasi criminal', the compelling to attend is based on the offence and the circumstances surrounding the *actus reus* of the offence giving the officer discretion.

In the criminal context, the *Criminal Code* Section 495(2) makes the preference for less intrusive means of having the matter brought to court. The principle would also apply here.

The least intrusive way without surrounding circumstances warranting a compelling to court by way of Part 3 is by way of the set fine on a Part 1. There is a principle of restraint that is understood in the criminal context and by extension to the P.O.A.

The P.O.A. in this case, a regime of set fine, that applies only to Part 1 and does not compel the attendance of the defendant at all to deal with the matter.

The charge in this case is an absolute liability for which the P.O.A. does not require that the defendant be compelled to come to court unless the circumstances surrounding the offence warrant a different process.

The Highway Traffic Act does, at 50 kilometres and over, charge the offence in a different

Section of the H.T.A. It must be done by way of Part 3.

In *R. v. Thomas,* again, the court makes comment regarding sufficient safeguards to prevent arbitrary detention. This is not the circumstance here but the principle that is stated does apply. I quote, "including the fact that the issuing officer is required to exercise his or her powers properly and not to act based on a subjective belief based on a whim or bias".

This is the issue; was this decision to make sure that justice was done to this officer's satisfaction an abuse of process?

R. v. Regan makes this, a stay of proceedings for abuse of process will only be granted in the 'clearest of cases'. Two criteria must be met:

The prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial, or its outcome, and,

No other remedy is reasonably capable of removing that prejudice.

I do not see these two applying in this case.

However, under the *Charter of Rights and Freedoms,* there is a small residual category of

abusive action that does not affect trial fairness, but undermines the fundamental justice of the system. In this case, a stay of proceedings is, generally speaking, only appropriate when the abuse is likely to continue or be carried forward. The rarest of cases refers to offensive misconduct.

Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of the stay of proceedings are balanced against the interest that society has in having a final decision on the merits.

Did this decision by the officer to go by way of a process that gave to him a certainty of outcome, an abuse of process?

Certainly, it is a subjective decision, it was from his evidence of bias against Part 1 Prosecution in favour of Part 3 Prosecution. The decision was categorical, simply, "speed over 35 and over", were going to be by way of Part 3 to achieve the officer goal indicating that the process itself was used for improper use.

It was for a purpose other than that which the process was designed to serve. The process was designed to bring offences with or without a set

fine that had circumstances surrounding the offence which placed the offence into more serious circumstances and thereby justifying a quasi criminal process to address the issue, not to dictate which Prosecutors would deal with the matter.

This category of speed determined in September 2016 and thus applied to the defendant summonsed on October 9th, 2016 for the alleged offence of 48 kilometres over that brought this motion to court. It is clearly understood by the court that for the months from September 16th to the date the officer stopped traffic enforcement, January 21st, 2017, that this was followed.

Would knowledge of this decision by the officer to go by way of Part 3 for an absolute liability for a category of speed in the absence of circumstances that warrant the onerous, the more onerous, process of Part 3, cause the informed community member to have belief in the fundamental justice of this system, the P.O.A. process, undermined? I believe it would.

Decency and fair play. The P.O.A. system, the Legislative intent, was set up to move away from the summary conviction process of the *Criminal Code* and that system included the set fine regime.

The systems set up, the systems removing from it, the riggers of the summary conviction process of court attendance. The P.O.A., in essence, has defined decency and fair play for an absolute liability unless circumstances are aggravating and that is the Part 1 set fine.

The particular offence which forms the basis of this motion before the court deals with speeding. The H.T.A. in Section 128 defines the offence and it is an absolute liability with set fine. This is prosecuted by way of Municipal Prosecutor.

The H.T.A., Section 172, stunt driving, includes, as an expression of this strict liability, a speed 50 kilometres or greater and must come before the court by way of the quasi criminal process of Part 3. This is prosecuted by way of the Prosecution under the direction of the Attorney General's office.

In the absence of circumstances that would lead to a charge under Section 172 or a charge under Section 128, where the circumstances give the officer discretion to go by way of Part 3, then decency and fair play is gone, it is lost. The community could come to the conclusion that arbitrariness is an acceptable expression in our system of law enforcement.

Indeed, if this officer can arbitrarily determine categories that please him to bring Part 3 summonses, then what would stop another officer from setting up his own criteria for Part 3 summons?

The intention of the Legislature was to move from the more onerous process. They set up the set fine. They gave discretion with parameters, the circumstances of the offence. The intention of the Legislation was consciously and intentionally breached by the decision of the officer.

The principle of restraint identified in the *Criminal Code* by his decision was breached. His category arbitrarily changed the Legislative line in the sand from 50 kilometres over to 35 kilometres over. The process itself was for an ulterior motive.

The final consideration are the interests to be served by granting a stay of proceeding balanced against the interest that society has in having a final decision on the merits.

This is an absolute liability offence. There is a set fine and no circumstances surrounding the offence to warrant Part 3 identified by the Legislature as a minor offence.

The interest served by granting the stay is to confirm the fundamental justice of the system. The system set by the P.O.A. and its stated intention to have matters addressed in separate ways. Minor offences with set fines. Compelling, if necessary, by no set fine or by the circumstances surrounding the *actus reus* that would warrant a Part 3 quasi criminal process.

This is a system and each participant from policing to the court has their function. The reasoning process in the issuing of Part 3 summons was outside of reasoning that is acceptable. The decision made and followed for months is an abuse of process.

The motion for a stay of proceeding is granted.

MR. BURD: Thank you very much, Your Worship.

...PROCEEDINGS CONCLUDED

Certification

FORM 2

Certificate of Transcript

Evidence Act, Subsection 5(2)

I, Joyce Tuyp, certify that this document is a true and accurate transcript of the recording of R. v. Patty Craig, in the Provincial Offences Court, held at 6311 Old Church Road, Caledon East, Ontario, taken from Recording Dated March 27, 2017, which has been certified in Form 1.

7/7a/29/17

Date

Signature of Authorized Person