
CANADA / JUDGMENT

R. v. Friedinger

2017 BCSC 2026

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Friedinger,

2017 BCSC 2026

Date: 20170808

Docket: AH88826212

Registry: Victoria

Regina

v.

Christian Friedinger

Before: The Honourable Mr. Justice R. Johnston

Oral Reasons for Judgment

Counsel for Crown:

M. Feldthusen

Appearing on his own behalf:

C. Friedinger

Place and Date of Trial/Hearing:

Victoria, B.C.

July 11 and

August 8, 2017

Place and Date of Judgment:

Victoria, B.C.

August 8, 2017

- [1] THE COURT: This is an appeal from a finding made by a judicial justice of the peace that the defendant Mr. Friedinger had operated his motor vehicle in excess of the posted speed limit. That finding was on an included or reduced offence from that charged, the judicial justice being unable he found to find that Mr. Friedinger had been driving at the speed with which he was charged and found him instead guilty or to have committed a lesser and included offence of exceeding the speed limit by somewhat less than the amount with which he had been charged. The offence is alleged to have occurred on the 23rd of October, 2014. Mr. Friedinger was issued a violation ticket on that date. It alleged that he had been speeding on McKenzie Avenue in Saanich. The speed limit on McKenzie Avenue in the area where the offence is said to have occurred is 50 kilometres per hour.
- [2] Mr. Friedinger disputed the violation ticket. I will pause here to say that some at least of Mr. Friedinger's defence at the hearing related to what he said was the indecipherability of the reverse side of the violation ticket that was issued to him. That does not appear to have featured in the decision, and in any event since Mr. Friedinger did successfully register his dispute, I find that any defects in the form of the notice are of no consequence to this appeal.
- [3] Mr. Friedinger's hearing came on on the 28th of April, 2016. It did not complete that day and was put over to the 10th of June, 2016, when it resumed for final argument or the completion of final argument. The justice reserved decision at the conclusion of final argument and handed down his decision on October 28, 2016.
- [4] At the hearing two police officers testified, along with Mr. Friedinger. The first officer to testify was Constable Cain who also acted in the role of a prosecutor at the hearing. The second officer to testify was Constable Klear. Constable Klear had operated a handheld radar device on which he testified he recorded a speed of 75 kilometres an hour for the defendant motor vehicle. Mr. Friedinger represented himself throughout the hearing before the justice and on this appeal. Mr. Friedinger appears to have prepared for the hearing itself by assembling information from the Municipality of Saanich, and that information may have included either notes provided by Constable Klear as part of the initial Crown disclosure or Constable Klear's response by email to questions put by Mr. Friedinger before the hearing commenced.
- [5] The trial was quite fractured I will call it in the way in which it proceeded. Part of that is the result of Mr. Friedinger appearing to have treated the trial as if it were some form of academic discourse or discussion. The prosecuting officers lapsed into or at least Constable

Cain and to some lesser extent Constable Klear apparently took up whatever gauntlet they perceived to have been thrown down by Mr. Friedinger's approach to the trial process and have engaged him in much the same way he engaged them; that is, the trial rather than proceeding by question and answer with discrete segments for evidence in chief, cross-examination, and submissions, seems to have been more in the nature of a discussion in which all present, the two officers and the defendant Mr. Friedinger, engaged apparently at will, and as well the judicial justice of the peace appears to have entered the fray and engaged probably in order to try to develop at least some semblance of form to the evidence and to get a grasp of the evidence that was unfolding in the way in which it unfolded at the hearing.

- [6] Part of this can be explained by the fact that Mr. Friedinger was trained as an engineer. Not only had he been trained as an engineer, but he appears to have spent a great deal of his career as an engineer dealing directly with radar devices. Hence, he knew or thought he knew far more about the operation of a handheld radar device than either of the police officers who testified or the judicial justice who presided.
- [7] Looking at the transcript and hearing Mr. Friedinger on the appeal, there is no question in my mind that he does have a wealth of knowledge about the operation of radar devices. Unfortunately, that wealth of knowledge and the focus at the hearing before the justice on Mr. Friedinger's wealth of knowledge about radar appears to have confused and confounded not only the police officers who gave evidence but the judicial justice to the point where the justice who thought he knew something about radar following nine years of experience as a judicial justice, appears in his reasons for judgment to have thrown up his hands and entirely discounted or disregarded the evidence produced by the handheld radar in this case.
- [8] One of the difficulties with that approach -- and I should not say that that was as a result of the confusion and confoundment introduced necessarily or solely, but one of the difficulties is that the disregard of the laser results or the results testified to by Constable Klear particularly as having been obtained from the laser may well have masked what was Mr. Friedinger's defence which emerged only elliptically at the trial and has been fleshed out in more detail on this appeal, and that defence is or one of the defences is the police got the wrong guy.
- [9] Mr. Friedinger makes no bones about the fact that at the hearing he accepted that the radar device accurately recorded the speed. He simply took the position or takes the position that it recorded the speed of somebody else's car, not his, and indeed his argument that the police got the wrong car depends to some extent on the accuracy of the radar, that is 75 kilometres per hour.
- [10] Part of the difficulty at trial emerged because the police officers -- I should not say officers plural, at least it was Constable Klear got the direction from which the vehicle approached the radar gun wrong. He initially testified that the vehicle he observed and visually

estimated at a speed of 75 kilometres an hour was eastbound. Then he corrected himself to say that, no, it was westbound, that is heading west on McKenzie toward Blenkinsop Road. He then quickly again reversed direction and said that the vehicle that he observed and then hit with his radar gun was eastbound. Part of the difficulties raised by that is that it made it difficult for Mr. Friedinger at trial to develop his defence which is that you could not possibly have been getting my vehicle on this radar gun because an eastbound vehicle would have been obscured from both visual observation and from radar detection by intervening trees and other obstructions, that is obscured from where the officers were located, particularly Constable Klear.

- [11] This raises another question that arose during the trial, and that is as part of his preparation Mr. Friedinger had prepared from either a photograph or an aerial photograph a calculation showing the lines of sight and angles at which the police could have or apparently did register their laser reading, based upon his assumption of where the laser operator, Constable Klear, was situated when he operated the laser. This assumption was contrary to what Constable Klear testified at the hearing which is that he had positioned himself at the southwest corner of the church parking lot or the church, whereas Mr. Friedinger had assumed or developed for the purposes of his demonstrative evidence that Constable Klear was at the other corner of the church.
- [12] Some confusion arose during the final argument with respect to the location of the officer and the lines marked by Mr. Friedinger on one of the documents he submitted. The judicial justice said that that had to be cleared up and invited Constable Klear to mark on Mr. Friedinger's sketch or photograph, whatever it was, where he was when he was operating the radar. Mr. Friedinger says that that changed everything when Constable Klear put his position on that document because it was different than the position that Mr. Friedinger had assumed. Mr. Friedinger did ask a few questions and made a few more comments after Constable Klear had offered or had given that clarifying evidence at the invitation of the judicial justice.
- [13] Prosecutor says, well, nothing in the hearing record changed as a result of what Constable Klear did by way of putting new markings on the aerial photograph or the document because all he did was visually represent that which he had testified to in the first place. There is some merit to that suggestion. On the other hand, things appear to have changed quite significantly in the mind of Mr. Friedinger because when the final argument adjourned and between then and the resumption of the final argument Mr. Friedinger appears to have gone away and recast his submission, but in the process had apparently prepared a new aerial photograph showing new angles or lines of sight from what he now appreciated to have been Constable Klear's vantage point when he testified or made the observations he testified to. There was an objection or I take it an objection from Constable Cain when Mr. Friedinger attempted to introduce this new document into the process during final submissions and the judicial justice ruled that it was not admissible, saying to Mr. Friedinger, "It's too late."

- [14] I expressed some concern about the way that had developed when this matter first came before me and we stood down. Counsel for the Crown has done a very good job of analyzing my somewhat cryptic comments and responding to them. But I am left with some very grave concern that the trial at which Mr. Friedinger was found to have committed the violation was not a fair trial because the police officer was permitted to clarify his evidence at least graphically after he had appeared to have completed his evidence, that the ability afforded to Mr. Friedinger to respond to that clarification was somewhat limited, and he was refused an ability to respond in more complete form during final submissions.
- [15] I recognize that the judicial justice had every ability to control the process of the hearing. Section 15 I think it is of the Offence Act makes it quite clear that a justice dealing with such matters has very wide powers with respect to how the process develops and how the hearing is conducted and what forms the evidence can take, but those wide powers must be exercised fairly and cannot be exercised at the expense of a fair trial.
- [16] I have earlier said that Mr. Friedinger appears in a somewhat elliptic form to have raised at trial the prospect that the police got the wrong car. Identification was therefore put in issue. Constable Cain testified that he did not lose sight of Mr. Friedinger's vehicle between the time when he observed it at what he concluded or believed to have been 72 kilometres an hour and when he pulled it over. That evidence was evidence upon which the justice could have concluded, assuming the justice accepted it, that Mr. Friedinger had committed the violation with which he was charged. The justice does not appear to have made a direct finding in that regard. In the reasons given ought the best that can be said is that that finding appears to have been made, but one has to draw an inference from the reasons for judgment that have been released that the judicial justice considered the question of identification and concluded that identification had been proven by the Crown, in this case the prosecuting police force.
- [17] That is a second reason why I am not confident that the process employed here has been fair. That is, when identification is put in issue, if a presiding judge, the trier of fact, is going to conclude that identification has been established on the evidence, that should be stated clearly in the reasons and reasons for coming to that conclusion should be given. That was not done here.
- [18] I raise the W.(D.) question for the Crown, and I agree that this is not a classic W.(D.) situation, but it is not a classic W.(D.) situation for this simple reason, and that is Mr. Friedinger never denied at the hearing that he was exceeding the speed limit. His evidence at best is that he did not know how fast he was going, but he never said, "I was not exceeding the speed limit." So there was no direct controversy raised by Mr. Friedinger with respect to that essential element of the violation, that is his speed. Where W.(D.) does make a difference in my view is again with respect to the question of identification of the offending vehicle. So if one looks at the issue at trial or one of the issues as being did the police ticket the right driver, then the evidence of the accused person, the defendant, should be evaluated in the context of the W.(D.) criteria, and it is not clear to me that that occurred in this

hearing.

- [19] With respect to Constable Cain's testimony that he never lost sight of the vehicle that he estimated at 72 kilometres an hour, I note that that was not challenged on cross-examination, but I also note that the evidence appears to be that Mr. Friedinger was in the eastbound curb lane on McKenzie, that McKenzie is a four-lane road, and that according to Mr. Friedinger's evidence he was passing a bus that was in the inside or fast lane eastbound on McKenzie. So there was some reason to question Constable Cain's assertion that he never lost sight of Mr. Friedinger's vehicle because if Mr. Friedinger's vehicle was as he testified for some time behind the bus or the bus was between him and the officers who testified that they observed his vehicle, then Constable Cain who cannot see through a bus could not possibly have had Mr. Friedinger's vehicle in view at all times.
- [20] So the conclusion reached at paragraph 13 by the JJP that Constable Cain then pursued the vehicle, stopping it further along McKenzie Avenue and issuing the driver Mr. Friedinger a violation ticket should have been considered in the light of that tension between Mr. Friedinger's evidence that there was a bus between himself and the officers and the officer's evidence that he kept that vehicle, Mr. Friedinger's vehicle in sight at all times. I do note that there was also some support for the defendant's version of that particular sequence found in Constable Cain's evidence because Constable Cain did testify that the defendant or the vehicle he observed was passing vehicles in the centre lane.
- [21] A third problem or fourth problem - I should stop numbering them because I am losing track - is that the errors introduced perhaps by Constable Klear as to the direction of travel of the offending vehicle appear to have led to some confusion in the mind of the justice as to which direction Mr. Friedinger was travelling. For example, at paragraph 5 of his reasons the justice refers to the vantage enjoyed by the police from the parking lot of the church which he said gave them a raised vantage point of trafficking approaching from the west. That is contradicted in the next paragraph by the finding that significantly there are trees lining McKenzie Avenue to the immediate west of the driveway and shrubs lining the west side of the driveway which would block an officer's view of eastbound vehicles until they were approximately at 90 degrees to the straight spine which begins at this point.
- [22] I do not want to get into the radar evidence, but it would appear that a great deal of time was spent at the hearing debating the accuracy of a radar gun reading which depended upon the angle at which the radar gun impacted upon or targeted the target vehicle, and it would appear that the evidence was reasonably clear that a radar gun is next to useless at measuring the speed of a vehicle that it is targeting at 90 degrees which is the angle the JJP found at paragraph 6 that would have been available to the officers from that vantage point. That reference at paragraph 6 of the reasons also impacts upon the opportunity the police officers had to observe the offending vehicle.

[23] In my view, having reviewed the transcript of the proceedings at the hearing and the reasons for decision and having considered the very helpful submissions of the Crown, this hearing suffered from what I will call a congeries of defects that make it unsafe to uphold the finding of guilt or finding that the offence occurred, and I feel that because I am so concerned that the trial process was not fair and that the decision was unsafe, the only proper solution, and it is one that I regret having to direct, is that the matter be returned to the justice and a new trial ordered. So I overturn the conviction or the finding of offence and direct a new hearing.

"R. Johnston J."

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