

5 ONTARIO COURT OF JUSTICE

10 HER MAJESTY THE QUEEN

v.

15 MICHAEL JACK

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20 P R O C E E D I N G S A T T R I A L

BEFORE HIS WORSHIP JUSTICE OF THE PEACE C. YOUNG  
on APRIL 1, 2010  
at PETERBOROUGH, Ontario.

25 CHARGE: s. 136(1)(a) HTA - Fail to Yield to Traffic

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A P P E A R A N C E S:

30 N. HENRY, Ms.,

Prosecutor for the Crown

P. SUTTON

Agent for the accused

ONTARIO COURT OF JUSTICE

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WITNESS:	Exam. In-Ch.	Cr- Exam.	Re- Exam.
FLINDALL, Robert	4	15	-
PAYNE, Jennifer	22	29	-

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April 1, 2010.

MS. HENRY: Thank you, Your Worship. If we could please go to the 1:30 tier, line 1, Michael Jack?

MR. SUTTON: Thank you, Your Worship. For the record, surname Sutton, S-U-T-T-O-N, first initial "T" appearing on behalf of the defendant who is also present. Come forward, please, Mr. Jack. Thank you. Could you just state your name for the record, please, sir?

MR. JACK: Michael Jack.

MR. SUTTON: Thank you.

MS. HENRY: I understand you wish to enter a plea of not guilty; is that correct?

MR. JACK: That's correct.

THE COURT: Okay. First things first. You're an out-of-town prosecutor?

MS. HENRY: Yes.

THE COURT: Why are you here?

MS. HENRY: I'm here because there was a conflict between the current prosecutor for the municipality.

THE COURT: Okay. Was there an attempt made to procure an out-of-town justice?

MS. HENRY: It's my understanding that there was an attempt, but I'm not sure as to who would have been administratively responsible for that. It's my understanding that whoever was was on holidays at this time so we cannot find out what efforts were made.

THE COURT: All right. I don't know what time or

what -- when this event took place, alleged event. I'd like to hear from both of you as to whether or not you feel I should carry on and hear it.

5 MS. HENRY: Well, with respect to my position, Your Worship, it's my understanding that the gentleman is no longer employed in this jurisdiction.

THE COURT: Does that in any way alleviate the past?

10 MS. HENRY: Well, no, but I believe that it -- it kind of does alleviate the conflict if he's no longer employed by the municipality or the OPP.

THE COURT: Not in my mind.

15 MS. HENRY: On your part, I'm not -- I have no conflict -- or no -- no problem with you....

THE COURT: It doesn't alleviate it. Logic says that it doesn't alleviate it. Just because you are no longer what you were or whatever, it doesn't affect the totality of something. Your comments, sir?

20 MR. SUTTON: First and foremost, I have no -- no concerns with you hearing the trial. I respect your decisions in the past and that has never been an issue. My concern very candidly is the fact, that, yes, the officer -- my client was employed as an officer in this jurisdiction at the time of the incident. At that point in time you were presiding on the bench. You might have had occasion to actually be involved in some of the officer's -- former officer's matters, so I do have concerns on that end of the spectrum. On the other end of the

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spectrum, of course, as I indicated, I've run many a trial in front of you and never had a concern with respect to your fairness and impartiality.

THE COURT: Any other comment?

MS. HENRY: No.

THE COURT: One of my own considerations as I come into the room is do I recognize the officer? I don't, and to my knowledge, I never saw him before in my life, nothing against you, sir. So, has -- as for my knowledge of the individual, I have none. I guess in a perfect world, I suppose -- I can't answer as to why no justice was provided. There appears to be no record of a request that I'm aware of, or have been able to determine. We are in a relatively small community, and that means from time-to-time judicial officers are required to preside at trials or sentencings of individuals whom they have some knowledge of because that's just part of the job. I'm going to -- if neither of you have any objections, then I'm going to proceed with the trial. If you do, then we will adjourn it and we'll get another justice.

MS. HENRY: I have no objections, Your Worship.

MR. SUTTON: None whatsoever.

THE COURT: Carry on. Arraignment, please.

COURTROOM CLERK: Michael Jack, on or about the 15<sup>th</sup> day of August, 2009 on County Road 23 at 14<sup>th</sup> Line of Smith, Smith, Ennismore, Lakefield Township, did commit the offence of fail to yield to traffic on a through highway contrary to the *Highway Traffic Act*

s. 136(1)(b). How do you wish to plead, guilty or not guilty?

MR. SUTTON: Not guilty.

MR. JACK: Not guilty.

MR. SUTTON: Prior to proceeding, Your Worship, it's my understanding there's two prosecution witnesses. There is also two defence witnesses. At this time I'd seek an order of exclusion, please.

THE COURT: Thank you. That's granted.

MR. SUTTON: Thank you.

MS. HENRY: I'd like to call Sergeant Flindall, please.

ROBERT FLINDALL, sworn:

EXAMINATION IN-CHIEF BY MS. HENRY:

Q. I understand, Officer, that you have a problem with your sciatic nerve; is that correct?

A. I do.

Q. I understand that....

MS. HENRY: Your Worship, the officer is asking that perhaps he may be able to be seated during his evidence?

THE COURT: Certainly.

MS. HENRY: Thank you.

THE COURT: Certainly.

A. Thank you.

MS. HENRY: Q. Officer, are you, in fact, employed by the Ontario Provincial Police?

A. I am.

Q. And how long have you been employed as such?

A. I've been an officer for 11 and a half years.

Q. And can you tell me, since that time, August the 15<sup>th</sup> -- excuse me, yes, August the 15<sup>th</sup> of 2009, you were acting in a capacity as an officer that day?

A. I was.

Q. And what were your duties?

A. I was a Shift Sergeant at the Peterborough County OPP detachment supervising a platoon of officers.

Q. During the course of your investigation do you routinely take notes?

A. I do.

Q. Did you take notes with respect to this incident?

A. I did.

Q. And have those notes been in your possession since the date of the occurrence?

A. They have.

Q. And when were those notes made?

A. On the day of immediately following the occurrence when I arrived back at the detachment.

Q. And were those notes made in pen?

A. They were.

Q. And has there been any additions, deletions or alterations to those notes?

A. No, there have not.

Q. And do you have an independent recollection of the events?

A. I do.

Q. Do you wish to use your notes?

A. To refresh my memory, yes.

MS. HENRY: Your Worship, I would ask that the officer be allowed to use his notes in order to help refresh his memory.

THE COURT: Granted. Oh, do you have any comment, sir?

MR. SUTTON: Please. If I just may view the notes that the officer intends to rely upon to ensure they have been enclosed?

THE COURT: Thank you. Certainly.

MR. SUTTON: Thank you. Okay. Tell me where you are, the last page?

A. It would right to there.

MR. SUTTON: Okay. And is there a page 49 that you have as well, eventually?

A. Yes. From there onward.

MR. SUTTON: Okay. That's it?

A. That's it.

MR. SUTTON: Thank you. Officer, where did you make these notes?

A. Back at the OPP station.

MR. SUTTON: And were these notes made by yourself?

A. They were.

MR. SUTTON: Were you by yourself when you made those notes?

A. I was.

MR. SUTTON: All right. I take it you were in your office at the time?

A. Yes.

MR. SUTTON: Okay. Did anybody else have any



involvement into these notes whatsoever?

A. None.

MR. SUTTON: None? Thank you.

5 MS. HENRY: Q. Thank you. Officer, starting with the date and time, can you please -- I'm sorry.

MR. SUTTON: Any comments, Your Worship?

THE COURT: No.

MR. SUTTON: Thank you.

10 MS. HENRY: Q. Starting with the date and time, could you please outline your involvement with respect to these matters?

A. Sure. It was the 15<sup>th</sup> of August, 2009....

15 THE COURT: Now, speak slowly, because I can't write as fast as you can speak.

20 A. Certainly. It was the 15<sup>th</sup> of August, 2009. I was working a dayshift at that point in time supervising a platoon of officers. We had attended the 14<sup>th</sup> Line of Smith in Smith-Ennismore-Lakefield on another unrelated matter. At that time I was present at that call for service as was Constable Jennifer Payne as was Constable Michael Jack on that date. We....

25 THE COURT: One moment, please. Thank you.

30 A. We concluded our matter on the 14<sup>th</sup> Line of Smith and I left the property and proceeded westbound on the 14<sup>th</sup> Line of Smith. I was followed by Constable Jennifer Payne in her cruiser and I was also -- and the third officer in line after that was Constable Jack. He was in his own cruiser. So the three of us left the property and

R. v. Jack  
R. Flindall - In-Ch. by Ms. Henry

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proceeded westbound on the 14<sup>th</sup> Line of Smith. It was at approximately 10:56 in the morning when the three of us approached -- I approached the intersection of the 14<sup>th</sup> Line of Smith and County Road 23. County Road 23 is a north-south through highway, and County Road -- or, sorry, 14<sup>th</sup> Line of Smith intersects with that highway with a stop sign for traffic on the 14<sup>th</sup> Line of Smith. So I came to the stop sign and came to a stop. I looked north. The other officers had come to a stop behind me as well.

THE COURT: One moment. Yes?

A. So at the intersection at the stop sign was myself in my cruiser; Constable Payne in her own cruiser behind me, and behind her was Constable Jack in his car. I looked north and -- to see if anybody -- there was any oncoming traffic. It was safe for me to do so. There was traffic to the north. There's a crest of a hill or a knoll I would call it, not a hill....

MR. SUTTON: Objection. Can I ask where that was indicated in your notes, Officer?

A. It's not in my notes. The notes are from -- my recollection, but I have an independent recollection of the day in question.

THE COURT: It's up to me what weight I give it. Carry on.

MR. SUTTON: Thank you.

A. So, there was traffic coming southbound. There was a knoll in the road. It was safe for me

R. v. Jack  
R. Flindall - In-Ch. by Ms. Henry

to proceed, so I entered the intersection and proceeded southbound on County Road 23.

THE COURT: Which way did you turn?

A. I turned southbound, sir.

THE COURT: Right or left?

A. That would be a left. And proceeded southbound on County Road 23. I -- at that time, when I was southbound I looked in my rear view mirror and I saw that Constable Payne had also turned southbound.

THE COURT: One moment. Thank you.

A. Constable Payne had turned southbound as well. I observed that myself in my rear view mirror, and the traffic was approaching the intersection, but it was safe for her to do so, to pull out. I then also....

THE COURT: One moment, please. Thank you.

A. I also looked in my rear view mirror and at this point in time Constable Jack started to enter into the intersection. Unfortunately at this point in time the southbound traffic had approached that intersection. It was unsafe for Constable Jack to have done so, to have pulled out. When he pulled out into the intersection the southbound traffic....

THE COURT: One moment. One moment, please. I apologize.

A. My apologies. I should slow down.

THE COURT: Thank you.

A. Okay. There were three motor vehicles that

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were southbound at this time, and when Constable Jack turned left to follow myself and Constable Payne southbound, they were too close to the intersection and it constituted a hazard for him to pull out. What ended up happened and I witnessed in my rear view mirror was....

THE COURT: Okay. You make the statement that there were three vehicles southbound.

A. Correct.

THE COURT: What vehicles?

A. There were three motor vehicles that -- the ones that I initially witnessed coming southbound when I pulled out.

THE COURT: Okay. Not yours and Officer Payne's?

A. That's correct. There were three other southbound civilian....

THE COURT: So there were five southbound?

A. Correct. Between myself -- there were four to my north coming southbound. Constable Payne and three civilian motor vehicles coming southbound, and those were the motor vehicles that I had seen further up the highway coming southbound when I initially pulled out.

THE COURT: One moment, please. So then, Officer, you've said, as far as my notes are concerned, that you looked in your mirror and you saw four southbound vehicles?

A. Correct.

THE COURT: One of which was Payne's and three others.

A. Correct.

THE COURT: Thank you.

A. Constable Payne was south of the intersection. The other three were still to the north of that intersection.

THE COURT: Okay.

A. Constable Jack turned left into the intersection, but in doing so, the -- I observed that lead motor vehicle, which would have been the lead civilian motor vehicle, its nose dove into the -- dove forward indicating that there was braking action on the part of the driver. I also at that same time witnessed Michael Jack had to turn hard back into the -- he didn't proceed into the southbound lanes. If he had done so he would have collided with the other motor vehicle. He had to turn hard into the northbound lane, and he continued travelling southbound in the northbound lane.

THE COURT: One moment, please.

A. Sure.

THE COURT: Thank you.

A. So at this point the -- the three motor vehicles that -- the one that I saw its nose dove (sic), they didn't make any drastic manoeuvres left or right. They remained in their lane continuing southbound, so they didn't have to take the shoulder, they didn't have to take the ditch. Constable Jack was the one that turned to the left and avoided the collision and travelled southbound

in the northbound lane.

MS. HENRY: Q. For approximately what distance did he do so?

A. He accelerated -- from that point he had to accelerate southbound in the northbound lanes...

Q. M'hm (affirmative).

A. ...in order to get out around those southbound lanes (sic) and pull back in front of them. I would probably say maybe 200 to 300 metres.

Q. Thank you. Okay.

THE COURT: One moment, please. Thank you.

MS. HENRY: Q. Can you tell me, when you first approached the stop sign before you took your left-hand turn, can you explain approximately how far away the southbound traffic was from your position at that time?

A. To the north?

Q. Yes.

A. The -- it was approximately -- just about a half a kilometre or just slightly less than half a kilometre. About 450 to 500 metres to the north.

THE COURT: When you were at the intersection or when you pulled out?

A. When I was at the intersection, those vehicles travelling southbound, the three civilian vehicles, were approximately 450 to 500 metres to the north.

MS. HENRY: Q. Okay. Can you please continue on from when Officer Jack was in the northbound lane?

A. Well, as I had said, Constable Jack travelled southbound in the northbound lanes and was able to successfully

pull back into the southbound lanes and proceeded southbound behind Constable Payne.

5 Q. Okay. And what action did you take at that time?

A. At that point in time we proceeded back to the OPP station and I had some other issues that I had to deal with at that point in time, and for the record, Constable Jack was travelling -- operating a force OPP cruiser. It was a fully-marked cruiser. It was a black and white. OPP Number 01-10 168, licence plate BBBS393. We proceeded back to the station. I dealt with some other matters. It was -- I spoke with Constable Jack about the matter at 12:13, and I also served -- subsequently served him a Provincial Offences Notice number 2476854A for that s. 136(1)(b) of the *Highway Traffic Act*.

15 Q. Could you explain that section?

A. That section is for failing to yield to traffic on a through highway.

Q. And can you tell me specifically about the Certificate of Offence?

20 A. The Certificate of Offence was served directly on Constable Jack. It's a Part I Provincial Offences Notice. It was served by myself and signed afterwards as to the service.

25 Q. And can you tell me how you made identification of Officer Jack? Like, did you ask him to produce his driver's licence?

A. No. I knew Constable Jack. Constable Jack was actually one of my probationary constables that came to the detachment and I was under direct supervision of Constable Jack.

30 Q. Okay. And can you tell me what type of road

County Road 23 is?

5 A. It's a county road. It's a paved highway, two lanes; one northbound, one southbound. There are -- it's a double solid line to the south of the intersection, and a pass line to the north for northbound traffic.

Q. And what jurisdiction is that?

A. It's in Peterborough County.

10 Q. And can you tell me the driver's licence of the individual that you served the PON to?

A. Constable Jack's driver's licence is J00525440721216, a valid Ontario driver's licence, photo driver's licence. Constable Jack's birthday is the 16<sup>th</sup> of December, 1972.

15 Q. Thank you, Officer. You indicated to the court that you observed all of this through your rear view mirror; is that correct?

A. That is correct.

20 Q. And who was the -- who was directly behind you at the time of the incident?

A. Constable Payne was behind me, the first officer travelling southbound behind me. She wasn't immediately behind me. She was a distance behind.

25 Q. A great enough distance that you had a clear view?

A. I had a clear view of the intersection when Constable Jack pulled out and of the events that transpired, yes.

30 Q. Okay. And you indicated that you saw Officer Jack when he pulled out. Did you see him at the stop sign?

A. Yeah, he was behind -- I saw him behind



Constable Payne at the stop sign.

Q. Okay. Did you see him pull up and stop at the stop sign?

5 A. I didn't see him pull up. I recall seeing him stop behind Constable Payne.

THE COURT: One moment, please. Thank you.

MS. HENRY: Q. And you indicated to the court that he was driving a cruiser; is that correct?

10 A. That is correct.

Q. And can you tell me what type of vehicle that is?

A. It's a Ford Crown Vic.

Q. And....

15 A. Victoria, I should say, sorry. Ford Crown Victoria.

Q. And is it a motor vehicle?

A. It is a motor vehicle.

MR. SUTTON: Objection. Leading.

MS. HENRY: Thank you.

20 THE COURT: For sure.

MS. HENRY: I have no further questions. Thank you.

THE COURT: Sir?

25 MR. SUTTON: Thank you, Your Worship.

CROSS-EXAMINATION BY MR. SUTTON:

30 Q. Sergeant Flindall, thank you for your attendance today. You indicated you approached County Road 23 with Officer Payne and Officer Jack behind; is that correct?

A. Correct.

5 Q. I believe you indicated as well that the vehicles that were heading -- and correct me if I'm wrong, you were travelling southbound; is that correct? Were you travelling....

A. On which highway, sir?

Q. 23.

A. Yes.

10 Q. Okay. I believe you indicated in your previous evidence that the vehicles that were travelling -- the civilian vehicles...

A. Correct.

15 Q. ...that were travelling southbound were approximately 450 to 500 metres away from the intersection when you pulled out?

A. Approximately, yes.

20 Q. Approximately. And then you indicated, if I can just clarify this, Officer Payne also pulled out behind you?

A. That's correct.

25 Q. Okay. And what were you driving on that date?

A. I was driving a Ford Crown Victoria as well, black and white OPP cruiser.

30 Q. Did this vehicle have roof lights; did it have....

A. It was a fully-marked cruiser, yes.

Q. Is there a cage in this vehicle?

A. Mine, yes.

Q. Is there rear deck lights as well?

A. I believe so, yes, in the back.

Q. Would it be fair to say that this -- these

items would also interfere with your view?

A. No. I had a clear view to my rear.

Q. But then Officer Payne pulled out, correct?

A. Correct.

Q. How could you see through her vehicle?

A. I was far enough south on County Road 23.

There was distance between myself and Constable Payne that it was fairly easy actually for me to look at the intersection.

THE COURT: One moment, please. Thank you.

MR. SUTTON: Q. Let's just go back to pulling up from the 14<sup>th</sup> Line of Smith to the stop sign, if I may.

A. Okay.

Q. You hit the stop sign, correct?

A. Pardon me?

Q. You stop at that stop sign?

A. Yes. Yeah.

Q. Okay. You look to your right. You see traffic oncoming, correct?

A. Yes.

Q. Okay. And you make your turn?

A. Correct.

Q. Roughly how long was it before Officer Payne made her turn?

A. It wasn't very long. It wasn't very -- she had sufficient time to pull up to the stop sign, stop and proceed southbound, so....

Q. A few seconds behind you, four seconds?

A. No, I wouldn't say it was that long. It would be I'd say ten seconds. By the time she -- because she was stopped behind me. She'd have to roll forward to the stop

sign, come to a stop and then proceed into the intersection, so you're probably ten to fifteen seconds, give or take.

5 Q. So ten to fifteen seconds. That would also -- I would respectfully submit, wouldn't that get the southbound traffic in the civilian vehicles a much closer distance to the intersection?

A. Sure, it would have.

10 Q. Okay. For example, if the southbound vehicles were travelling at the posted speed limit...

A. M'hm (affirmative).

15 Q. ...how close would they have been to the intersection when Officer Payne pulled out?

A. They were probably -- I would -- about half a distance between myself and -- or sorry, half the distance between when I first observed them and the intersection itself.

20 Q. And were you able to determine how long it was between when Officer Payne made her turn to when Officer Jack made his turn? How long would that have been?

A. It would have been about the same. There was a -- he had to have enough time to roll to the intersection, come to a -- start from a stop, roll to the intersection, stop and then proceed southbound as well, so I would say that's likely in and around the same -- same time frame.

25 Q. When an average civilian driving on the highway, when they see a police vehicle pull out of another side road or a driveway or something like that, what's their general first reaction?

A. You'd have to talk to those individuals.

30 Q. You don't have any history or any recollection of anything like that before?

A. People -- when I pull out in front of them?

Q. No. For example, as I indicated, if the average civilian sees you pull out on a highway in a police cruiser....

MS. HENRY: Objection. He can't answer for what the civilian would be thinking.

THE COURT: He can answer what he thinks he might think. You're right. He can't answer, but he can answer from his own recollection of what he has seen. To say otherwise is to defy logic.

MR. SUTTON: Q. Would it be fair to say, Officer, that most civilians would react and slow down upon seeing a police cruiser?

A. If they were travelling faster than the posted speed limit.

Q. Okay. Do you have -- Officer, if I can ask, did you have any communication with Officer Payne during this alleged incident?

A. Yes, I did.

Q. How did that communication take place?

A. Constable Payne contacted me on my cell phone to inquire if I had seen what had just transpired behind her and I indicated to her that I had.

Q. Okay. Why did Constable Payne use her cell phone?

MS. HENRY: I'm going to object.

THE COURT: On what basis?

MS. HENRY: How is he to answer why the constable....

THE COURT: Maybe he knows. If that's the case, he

may say "I don't know why."

A. I have no idea.

THE COURT: There's the answer.

MS. HENRY: Thank you.

THE COURT: Nothing mysterious about it at all.

MR. SUTTON: Q. Was the police radio working that day?

A. It was.

Q. You didn't have any problems with it?

A. No.

Q. Okay. I just want to clarify. You're travelling southbound on County Road 23, correct?

A. Correct.

Q. You're watching this transpire in the rear view mirror, correct?

A. Correct.

Q. How were you watching cars in front of you? How are you watching for oncoming traffic?

A. Quite easily.

Q. Quite easily. So you're looking in your rear view mirror and watching what's transpiring behind you and answering your cell phone and talking to Officer Payne and still observing the traffic oncoming?

A. Yes.

Q. Okay. You indicated in your testimony....

THE COURT: One moment, please.

MR. SUTTON: Certainly.

THE COURT: Thank you.

MR. SUTTON: Q. You indicated you were driving a force vehicle, correct?

A. Yes.

Q. Okay. Now, did you make these observations out of your rear view mirror attached to your windshield, or did you make them out of the side rear view mirrors?

A. They would have been made out of both.

Q. Is there any markings on the rear view mirrors or the side view mirrors on the police force vehicle you were driving?

A. Not to my recollection. I use the left one, and not to my recollection.

Q. Have you ever looked at the right rear view mirror on the force vehicle you were driving that day?

A. Not in this specific instance, no.

Q. Now, you indicated that you went -- returned back to the detachment; is that correct?

A. Yes.

Q. What time roughly did you arrive?

A. It was about -- in and around 11:30, give or take.

Q. Where did Officer Payne go, do you know?

A. My recollection is she came -- she was back to the detachment as well. I don't know the timeframe, how long after. I don't have a recollection on that.

Q. What occurred from the time the incident allegedly took place to seven hours later when you served the defendant? Why did you choose to wait seven hours to serve him?

A. Well, I'm supervising a platoon of officers. Constable Jack had also responsibilities on the day. I was also involved with other affairs during the day, and it was a matter of -- more of a matter of timing. Constable Jack had to be

5 called back to the detachment. He was busy with calls for service, so, when he was -- I actually had to call him back to the detachment because of the calls for service level, and it was at that point in time, prior to the end of my call of duty that I served him with the paperwork. I spoke with Constable Jack in and around -- shortly after noon on that date, but -- he was served at 6:38 that evening.

10 MR. SUTTON: Thank you, Sergeant, I have nothing further.

15 MS. HENRY: I have no further questions. Thank you.

THE COURT: Officer, nothing turns on it, but did you say you were Officer Jack's supervisory officer?

15 A. Constable Jack has -- Constable Jack's was a probationary officer at that point in time. He had what's called a coach officer, but I was his sergeant. He was on my platoon.

20 THE COURT: Okay. Thank you. You may step down, sir.

A. Thank you.

MS. HENRY: If I could please call Constable Payne?

25 JENNIFER PAYNE, sworn:

EXAMINATION IN-CHIEF BY MS. HENRY:

Q. Constable Payne, are you, in fact, employed by the Ontario Provincial Police?

A. I am.

30 Q. And how long have you been employed as such?

A. Approximately 11 years, since 1998.



5 Q. Thank you. And can you tell me if, in fact, on the date of August the 15<sup>th</sup> of 2009 you were acting in your capacity as an officer on that day?

A. Yes, I was.

Q. Do you routinely take notes with respect to investigations?

A. I do.

10 Q. Did you take notes with respect to the matter before the court today?

A. Yes, I did.

Q. And did you -- when did you take those notes?

A. Shortly after the offence.

15 Q. And can you tell me if the notes have been in your possession since that time?

A. Yes, they have.

Q. Has there been any alterations, deletions or additions to those notes?

A. No, there has not.

20 Q. Were the notes made in ink?

A. Yes.

Q. And do you have an independent recollection of the events?

A. Yes, I do.

25 Q. Do you wish to use your notes?

A. Yes, I would like to, please.

Q. For what purpose?

A. To refresh my memory.

30 MS. HENRY: Your Worship, I would ask that the officer be allowed to use her notes in order to help refresh her memory?

THE COURT: Sure.

MR. SUTTON: If I just may review the notes to ensure that they were disclosed to the defence? Officer, just if I can ask, where did you make these notes?

A. At the detachment.

MR. SUTTON: What time did you make them?

A. Approximately 20 minutes after the incident, the driving time back to the office.

MR. SUTTON: And where at the detachment, if I can ask? Where were they made?

A. In the constable's office.

MR. SUTTON: Was there any other involvement from any other officers?

A. No, there was not.

MR. SUTTON: Thank you.

THE COURT: Thank you.

MS. HENRY: Q. Starting with the date and location, can you please outline your involvement with respect to this matter?

A. Yeah. On the 15<sup>th</sup> of August, 2009 I had just responded to a call on the 14<sup>th</sup> Line of Smith and I was leaving the 14<sup>th</sup> Line, the residence at the 14<sup>th</sup> Line of Smith, and at approximately -- that was at 10:54 a.m. that we left the residence. I proceeded westbound on the 14<sup>th</sup> Line of Smith headed towards County Road 23. At that time I was following Sergeant Flindall and I was followed by Michael Jack. We were all operating fully-marked police cruisers. We approached the stop sign.

THE COURT: One moment, please. Thank you.

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10  
A. We approached the stop sign at the intersection of County Road 23 and the 14<sup>th</sup> Line of Smith. Sergeant Flindall, I observed him stop in front of me and proceed to make a left-hand turn southbound onto County Road 23. At that time I proceeded to the stop sign. I made my stop and I checked for traffic and I proceeded -- there was traffic that was southbound. I was able to make my turn safely. I proceeded to make a left-hand turn into the southbound lane.

MS. HENRY: Q. Okay. If I can stop you there.

Can you tell me what distance approximately the southbound traffic was from your location at the stop sign?

15  
A. I estimate it to be approximately 210, 220.

Q. Okay. And you felt that you could make that turn in safety?

A. Yes.

Q. And you, in fact, did make that turn?

A. I did.

20  
Q. Okay.

THE COURT: One moment, please. Thank you.

MS. HENRY: Q. Okay. Could you tell me, the southbound traffic that you indicated was there, can you tell me how many vehicles you would have observed?

25  
A. Approximately three vehicles were southbound. There were no northbound vehicles at the time.

Q. Thank you. Please continue, Officer.

30  
A. Yeah. I proceeded to make my left-hand turn and when I was making my turn in my head I remember thinking that there was no way that Michael Jack was going to be able to

5  
make -- approach the stop sign, stop, make his judgment to make his turn left and proceed the three of us in a row down County Road 23. As I -- when I made my turn I was in the southbound lane. I looked in my rear view mirror and that's when I observed Constable Jack in the northbound lane travelling southbound. There were -- the southbound....

THE COURT: One moment, please. Thank you.

10  
A. The southbound traffic had -- was at the intersection at the time and they were -- they were very close to Constable Jack. They were pretty near beside him or right behind him at the time in the southbound lane. I observed Constable Jack travelling southbound in the northbound lane and I observed that the traffic had to slow in order to let him into the southbound lane.

15  
Q. You indicated that he was travelling beside the vehicles that were in the southbound lane, correct?

A. Yes.

20  
Q. So in your opinion was he then trying to overtake any vehicle?

A. No. I think he was -- I don't think he was trying to overtake -- overtake them per se. When he pulled out they were just -- they happened to be right beside him.

25  
Q. Can you tell me how you....

THE COURT: One moment, please. Thank you.

MS. HENRY: Q. Can you tell me how you were able to -- to view the occurrences?

A. Through my rear view mirror.

30  
Q. Was there any obstructions in your view between your rear view mirror and the incident behind you?

A. No, there was not.

5  
Q. And when you seen him enter back into the southbound lane, can you explain when he did that?

A. In a distance or....

Q. Yeah.

A. I'm going to estimate maybe 30 metres from the intersection.

Q. That's when he....

A. He was able to merge into the north -- or the southbound lane, sorry.

10  
Q. Did you visually observe him leave the stop sign?

A. No, I did not.

Q. So your first observation of him was when he was in the southbound -- or excuse me, northbound lane travelling southbound?

15  
A. That's correct.

Q. And were there any cars coming in that northbound lane?

A. No, there were not.

20  
Q. In your opinion, did his manoeuvre constitute a hazard?

A. Yes, it did.

25  
Q. And you indicated that you had -- you remember thinking that there was no way that he was going to make that, so can you explain to the court why your -- what your concern was, that all three of you may be in a row?

30  
A. We didn't have our emergency equipment activated. We weren't responding to a call at the time. We had just responded to kind of a high priority call, so we were 1-- it was like a cool down period. My concern to the public was

5 that three marked cruisers had pulled out in a row and the appearance was that this third car had to make it out to be with the other group. I believe when I -- when I was coming to the intersection I knew that they were close. I knew that I had enough time to make the turn in safety without affecting the flow of traffic...

Q. M'hm (affirmative).

10 A. ...but I just knew in my head that there was no way by the time he proceeded to the stop sign, made his stop, made his judgment and looked for traffic, that he wouldn't have been able to turn out properly into the southbound lane without there being a collision.

15 Q. And can you tell me, after your observations and what you seen, can you tell me what you did?

A. I contacted the supervisor?

Q. How did you do that?

A. I did that on the phone.

Q. And can you explain why you did that?

20 A. I did that to ask him to validate what I had seen. I wasn't -- I was kind of in shock and disbelief that that had kind of happened, and -- because I didn't honestly think that he would turn, and so I called the supervisor to see if he had seen what had happened.

25 Q. You indicate that you were in disbelief, that you couldn't believe that he had done this, but would you rely upon your independent recollection as being very accurate?

A. Oh, yes. Yes.

30 Q. And you're steadfast in your position that, in fact, it was an unsafe and hazardous manoeuvre?

A. Yes.

MS. HENRY: Thank you. I have no further questions.

THE COURT: Sir?

5  
CROSS-EXAMINATION BY MR. SUTTON:

Q. Just to clarify, so Sergeant Flindall pulls up to the stop sign, correct?

A. Yes.

Q. And makes his left-hand turn, correct?

10  
A. Correct.

Q. How far away from the intersection was the traffic at that point?

A. I'm not sure, because there's -- as a second car in line, there isn't good visibility until you approach the stop sign.

15  
Q. Okay. So Sergeant Flindall stops at the stop sign, correct?

A. M'hm (affirmative). Yeah.

Q. Makes his left-hand turn?

20  
A. Yes.

Q. How much time transpired between the time Sergeant Flindall makes his turn to the time you make your turn?

A. Probably ten or fifteen seconds.

25  
THE COURT: One moment, please.

MR. SUTTON: Q. So you make your turn?

A. M'hm (affirmative).

Q. Okay. You indicated you estimated the vehicles were approximately 210 to 220 metres away from the intersection when you make your turn, correct?

30  
A. That's correct.

Q. Did you estimate how fast those vehicles were travelling?

A. The posted speed limit is 80 and I estimated them to be travelling at at least 80 kilometres per hour.

Q. Okay. So if a vehicle was travelling at 80 kilometres per hour, how long would it take them to travel 210 metres?

A. I don't know that calculation off the top of my head.

Q. How long have you been an officer for?

A. Eleven years.

Q. Would it be fair to say it would be probably about a couple of seconds?

A. I don't know. I'd have to figure it out.

Q. So again, you indicated that you make your turn, correct?

A. Yeah.

Q. You're travelling southbound down County Road 23, correct?

A. Yes.

Q. And you're observing Officer Jack make a turn, correct?

A. No. I don't observe him make the turn.

Q. So you observe him when he actually is on the highway?

A. Yes.

Q. And you make this observation how?

A. Through my rear view mirror.

Q. And that's the one on the windshield?

A. Yes.



Q. How long did you observe this behaviour?

A. Seconds.

Q. And what were you driving that day?

A. I was driving a fully-marked Ford Crown

5 Victoria.

Q. Did it have roof lights? Do you recall?

A. Yes, it did.

Q. Okay. Did it have deck lights?

A. No, it would not.

Q. Did it have a cage?

A. Yes, it would have.

Q. Would that cage not have interfered or  
10 potentially interfered with your view?

A. No, it would not have.

Q. Okay. So you indicated there were three  
15 vehicles travelling southbound, correct?

A. Yes.

Q. Okay. And both you and Sergeant Flindall had  
20 already made the turn, correct?

A. Yes. M'hm (affirmative).

Q. You indicated in your earlier testimony that  
25 you -- excuse me, I might be paraphrasing, but you were  
extremely concerned about the motoring public; is that correct?

A. I didn't say that.

Q. No, I said I might be paraphrasing. I'm not  
30 sure exactly what you said. What was your initial concern with  
Officer Jack pulling out?

A. That he wasn't able to do so in safety.

Q. You indicated -- sorry, if I may, you  
indicated there was no way P.C. Jack would be able to make his

turn; is that correct?

A. In safety, yes.

Q. So you see these three vehicles and you had such a serious concern about making this turn not in safety, what did you do with those three vehicles?

A. I didn't do anything with them.

Q. Did you not think it might be appropriate to collect further evidence?

A. I advised the Sergeant of the incident and he's the one that can direct us as to what to do.

Q. So essentially, the best evidence that was out there on the date of this alleged incident, you let drive by?

THE COURT: One moment, please. Go ahead and answer the question.

A. Yeah. No. We're also the best evidence. We're police officers and we witnessed the incident.

THE COURT: One moment, please. Thank you.

MR. SUTTON: Q. Do you recall what these three vehicles were, Officer?

A. No I do not.

Q. You indicate you've been an officer for 11 years, correct?

A. That's correct.

Q. And yet the best witnesses that were there you let drive by? You indicated that the vehicles again that were travelling southbound....

THE COURT: Is that a question or a statement?

MR. SUTTON: I'm asking a question.

THE COURT: I was waiting to hear the answer.

MR. SUTTON: Q. Just to confirm, the vehicles that were heading southbound, you indicated they were approximately 200 metres away from the intersection when you made your turn; is that correct?

A. That's correct.

Q. Do you think 200 metres was an appropriate distance for you to make your turn?

A. Yes, I do.

Q. With vehicles travelling at at least 80 kilometres per hour?

A. I determined -- I believed I was able to make the turn in safety, and I did.

Q. Officer, if I can just refer you to your notes that were provided in disclosure, at approximately 10:56 I believe it is?

A. Yeah.

Q. You make a comment, "Southbound traffic had to brake and slow." Is that correct?

A. Yes.

Q. How did you determine that?

A. It would have had to have braked and slow because he had pulled out.

Q. But how did you determine that?

A. I witnessed them slowing.

Q. You saw their brake lights?

A. No, I couldn't see their brake lights.

THE COURT: One moment. Carry on.

MR. SUTTON: Q. Did you see Officer Jack make his turn to the south?

A. No, I did not.

Q. Did you see him physically turn into the southbound lane?

5 A. Yeah, he -- yes, he merged into the lane. I looked in my rear view mirror quite a few times.

Q. You indicated that this was "a cool down period." What did you mean by that?

10 A. We had been at an incident, a family dispute, and we weren't rushing to get anywhere. We weren't rushing to be anywhere, and we didn't have our lights activated or our emergency equipment activated, no sirens were on, so in essence, it was a non-emergency situation.

Q. Now, you also indicated you contacted Sergeant Flindall by telephone; is that correct?

15 A. That's correct.

Q. Why did you not use the police radio?

A. I can't give you an answer to that. I don't know.

Q. Was it functioning that day?

20 A. Yes, it was.

Q. Does the OPP not have a policy with respect to the use of cell phones?

A. No.

25 Q. What about the new law in the Province of Ontario; wasn't that being discussed at this point in time?

A. But it wasn't in effect, and a police officer is exempt from the law. Police officers in the execution of their duties are allowed to use their cell phones.

30 MR. SUTTON: Thank you, Officer. I have nothing further.

MS. HENRY: I have no further questions, thank you.

THE COURT: Nor do I.

MS. HENRY: That completes the case for the prosecution, Your Worship.

THE COURT: All set. Defence?

MR. SUTTON: Your Worship, prior to calling a defence, which I'd like to reserve the right to call that defence, I'd like to enter into a motion for non-suit at this time, directed verdict. In my respectful submission....

THE COURT: One moment. Yes, sir?

MR. SUTTON: It's my respectful submission that the essential elements of the offence, a prima facie case as not been put forth before the court. The evidence, first and foremost, of Sergeant Flindall dealing specifically with identification is very clear. He did not obtain any driver's licence from the defendant. How did he verify, in fact, identification? How did he obtain this information? There was none of that before the court. He did not verify a photo identification.

THE COURT: One moment, please.

MS. HENRY: Certainly.

THE COURT: Thank you. Carry on.

MR. SUTTON: Secondly, Your Worship, with the greatest of respect, there was no evidence that the defendant before the court was, in fact, operating a motor vehicle as defined by the *Highway Traffic Act*. One could certainly surmise that, but there's no direct evidence that, in fact, he was. I

respectfully submit that third and foremost, there was no evidence....

THE COURT: One moment.

MR. SUTTON: Certainly. Thank you.

THE COURT: Carry on.

MR. SUTTON: Thirdly, very candidly I'd like to respectfully submit, Your Worship, that there's no evidence before this court other than the subjective evidence of the officers, that, in fact, the defendant failed to yield to traffic on a highway. The best evidence was let go. It doesn't exist, nor can we challenge it.

In my respectful submission, sir, the Crown has not made out a prima facie case. I'd ask you to dismiss the charge at this time.

THE COURT: Ma'am?

MS. HENRY: With respect to the identification of the officer, the -- Sergeant Flindall indicated to the court that he had personal knowledge of the individual. He was the supervising Sergeant of the individual, and that I believe that he indicated to the court that he made a -- he believed it to be Michael Jack, and that it was consistent with his driver's licence number that was provided to the court, and that he was confident with his identification of the individual.

With respect to his motor vehicle as defined by the *Highway Traffic Act*, I was under the impression

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that he had given that evidence earlier in his  
evidence, but I had not checked it off on my  
checklist and that's why I went back over that, so  
I would say that it would be subject to a listening  
of the tape to indicate whether the officer did  
make that indication, that it was a motor vehicle.

10  
And with respect to the subjective evidence, these  
are both officers that are highly trained. Both of  
them have been on the force for 11 plus years. I  
believe it was longer for Sergeant Flindall, and  
they both have a professional opinion, which they  
gave, that they both observed him make that turn  
not in safety. And there's evidence of Officer  
15  
Payne -- or was specifically that she believed it  
to be a hazardous move, and I think that that is --  
that is more than enough evidence that the incident  
occurred and that they gave eye-witness statements  
that the incident occurred.

20  
THE COURT: All right.

25  
MR. SUTTON: Opinion, subjective opinion. That's  
all. More importantly, again, it goes back to the  
driver's licence. How did the officer, how did  
Sergeant Flindall obtain that? There's no  
indication before the court that that licence was  
obtained directly from the defendant. There's no  
indication that he verified identification.  
There's no indication that the driver's licence  
even matches that of Michael Jack, the defendant  
30  
before the court. None whatsoever. Where did the

officer obtain it? He didn't obtain it from the  
defendant. How did he verify it? He didn't obtain  
it and verify it with the defendant. It's an  
essential element. It must be there, and it's not.

5  
THE COURT: Well, there we go. The beauty of it  
all is, we get to go early. Madam Clerk, I'll want  
a transcript as soon as we possibly can so we can  
all re-convene. I was writing feverishly, but I  
want to be precise, and so what's an appropriate  
10  
time for us all to come together again?

MR. SUTTON: I will work it into my schedule.

MS. HENRY: As I will as well. Whenever you're  
available, Your Worship.

15  
THE COURT: I apologize. Do you know what I want  
you to do?

MS. HENRY: I am returnable to this court on April  
the 29<sup>th</sup>. I don't know that that's....

20  
THE COURT: Madam Clerk has to get my calendars. I  
just want to see my -- I'm not in this court in the  
month of April at all. Sit down everybody and  
relax.

MR. SUTTON: Thank you.

25  
THE COURT: Thank you, ma'am. Okay. In the month  
of -- first of all, Madam Clerk, how long will it  
take to get a transcript, approximately? A week,  
ten days, something like that? Excuse me. I am  
not here in the month of April. What are the court  
days during May?

30  
COURTROOM CLERK: You're seized on May 6<sup>th</sup>.

THE COURT: Which is fine if I have the transcript



prior to next Wednesday. If not, I'll be out of the country.

COURTROOM CLERK: Wednesday the....

5 THE COURT: Try Tuesday the 6<sup>th</sup>. Then the 6<sup>th</sup> would not be -- when's the next date after the 6<sup>th</sup> of May that's available?

COURTROOM CLERK: May 17<sup>th</sup>.

THE COURT: And after that?

10 COURTROOM CLERK: May 27<sup>th</sup>.

THE COURT: May 27<sup>th</sup>. The 17<sup>th</sup> is probably all right, but I'm just not sure.

MS. HENRY: I'm available for either of those days.

15 THE COURT: I don't want to be in a situation where I'm unable to get here on the 17th and everybody else is. That's not fair.

COURTROOM CLERK: Officer Hayes is available according to his availability, but I don't have the availability for Sergeant Flindall.

20 THE COURT: Sergeant, you're okay, the 27<sup>th</sup>. Can we do it the 27<sup>th</sup> then everybody? Sorry. I mean, that's almost two months.

MS. HENRY: And what time is that at, Madam Clerk?

25 COURTROOM CLERK: Do you know how much time is going to be needed?

THE COURT: No, because I don't know what we're going to do. It may be short, it may be long.

COURTROOM CLERK: We could say nine o'clock, and if we have to continue, in the afternoon.

30 THE COURT: Is there time in the afternoon if necessary?

COURTROOM CLERK: M'hm (affirmative).

MR. SUTTON: What's the afternoon look like?

COURTROOM CLERK: There's nothing right now. In the morning there's just parking matters.

MR. SUTTON: Would it not be safer to just put it on the afternoon tier?

THE COURT: Doesn't matter to me. It makes no difference. You know, if it's one way at nine o'clock in the morning, that's fine. Why don't we just do it first thing in the afternoon then everybody....

MS. HENRY: Okay. Is that 1:30 then?

THE COURT: You'll make sure, please that the -- so that's May 27<sup>th</sup>. Now, Madam Clerk, when will that -- I know you can't tell me down to the day, but when do you anticipate the transcript?

--- ADJOURNED.

FORM 2

Certificate of Transcript  
Evidence Act, subsection 5(2)

I, Patricia Anne Elizabeth Pimblott, certify  
that this document is a true and accurate  
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in the Ontario Court of Justice held at 70 Simcoe  
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No. 1, as certified in Form 1.

Oct 5/10

Date

P. Pimblott

Patricia Anne Elizabeth Pimblott, C.C.R.