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Cases and Comments

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Case Note - Driving and use of a handheld mobile phone device

Bendt v Crown Prosecution Service

Administrative Court: Davis LJ and Knowles J: 25 January 2022; [2022] EWHC 502 (Admin)

Driving—mobile phone—road policing.

☞ keywords to be inserted by the indexer

The defendant, B, was convicted under the Road Traffic Act 1988 s.41D and the Road Vehicles (Construction and Use) Regulations 1986 (SI 1986/1078) reg.110. B was witnessed by a police officer driving in an erratic manner and when stopped at a traffic light was seen holding a mobile phone. The officer asked B about his driving and he replied that he was changing music on his phone. The music was being broadcast via the phone's internal Bluetooth system to the car stereo. At the relevant time, reg.110 stated:

- “(1) No person shall drive a motor vehicle on a road if he is using—
 - (a) a hand-held mobile telephone; or
 - (b) a hand-held device of a kind specified in para.(4)....
- (4) A device referred to in [para.(1)(b)] is a device, other than a two-way radio, which performs an interactive communication function by transmitting and receiving data.
...
- (6) For the purposes of this regulation—
 - (a) a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point during the course of making or receiving a call or performing any other interactive communication function;
...
 - (c) ‘interactive communication function’ includes the following:
 - (i) sending or receiving oral or written messages;
 - (ii) sending or receiving facsimile documents”.

On appeal by way of case stated, the key question for the court was whether changing the song was performing an “interactive communication function” under reg.110(4) and (6).

It was held, dismissing the appeal, that using a mobile phone as a handheld music device, which then communicated with the car stereo via Bluetooth technology was using a handheld device to perform an interactive communication function.

B argued that “interactive communication function” had, by necessary implication, to involve a communication with another person. When using the phone for music, the user does not communicate: the phone transmits via its internal hardware to another device’s hardware receiver.

In response, the CPS argued that “communication” involved technological communication in which the device “communicates” with another device. Thus, all that was necessary was that the mobile phone was being held and, during that holding, the device was communicating with another device—in B’s case, the Bluetooth receiver in his car stereo. The court agreed, stating (at [11]):

“First, the normal meaning of the words in reg.110(6)(c) does not qualify the word ‘communication’ so as to require communication to be with another person.”

Secondly the court drew support from the fact that reg.110(6)(a)(iv) expressly mentions “providing access to the internet” as an interactive communication function. In such access, communication is with an internet server (a device) not another human.

On this point, B sought to argue that the information placed on the internet is placed there by a human and thus there is, albeit indirect, a human communication. The court rejected this as unsustainable and stated (at [12]):

“So far as the user of the mobile telephone is concerned, they are communicating simply with the database held on the server.”

Finally, the court also drew support from amendments to reg.110 in 2018, which added an exemption for use of a handheld device where a person uses the device for a “controlled parking function” (Road Vehicles (Construction and Use) (Amendment) Regulations 2018 (SI 2018/592) reg.2). The CPS argued, and the court agreed, this would not have been necessary if reg.110 required communication with another human.

Therefore, the combination of using the handheld device (by handling it) to change a music track being played through the car’s Bluetooth stereo amounted to using a handheld device to perform an interactive communication function.

Context

Mobile phone use whilst driving continues to be a problem for road safety. Mobile phones are a ubiquitous part of contemporary life and reflect the need to stay connected in the increasing acceleration of life (H.M. Wells and L. Savigar, “Keeping up, and keeping on: Roads policing, risk and the law-abiding driving offender” (2019) 19(2) *Criminology and Criminal Justice* 254). In 2020, the government ran a consultation on changing reg.110 to include all use of a hand-held

device whilst driving. The consultation was triggered specifically by the decision of the High Court in *DPP v Barreto* [2019] EWHC 2044 (Admin); [2019] Crim. L.R. 1068, in which the court held it was not an offence under reg.110 where a driver is holding their phone and using it as a camera to record an incident whilst driving—this did not constitute an interactive communication function. 81 per cent of the 423 respondents welcomed a new offence of using a mobile phone to perform standalone activities (i.e. no need to prove an interactive communication function, thus nullifying the decision in *Barreto*). Despite this support, in research commissioned by the Department for Transport as part of the post-*Barreto* proposals, 30 per cent of respondents admitted using a handheld mobile phone whilst driving (or stationary at a traffic lights); this rose to 64 per cent in those aged 16–24. The research also found that, despite this potential widespread use (30 per cent of drivers is equivalent to approximately 11 million drivers), 80 per cent of those in the study said that driving whilst using a mobile phone was not acceptable. It should be noted the Divisional Court in *R. (on the application of Planton) v DPP* [2001] EWHC Admin 450; (2002) 166 J.P. 324, held that driving includes sitting stationary in a motor vehicle with the engine running. As Snow (A. Snow, “Receiving an on the spot penalty: A tale of morality, common sense and law-abidance” (2019) 19(2) *Criminology and Criminal Justice* 141, <https://doi.org/10.1177/1748895817738556> [Accessed 28 March 2022]) found, this is a typical facet of road traffic law compliance, that intentions of law abidance do not match the reality of the situation.

Driving whilst using a mobile phone is one of the so-called “fatal four” causes of road crashes (House of Commons Transport Committee, *Road Traffic Law Enforcement* (London: TSO, 2016), HC 518 (Second Report of Session 2015–16). It constitutes distracted driving. In 2020, 17 people were killed as a result of a driver using a mobile phone, although that number is a reduction on previous years (from 33 at the peak in 2017). As regards serious injuries, 97 people suffered serious injury as a result of a driver using their mobile phone, again down from a high point of 118 in 2016. The effect of the Covid regulations and stay-at-home orders is likely to have impacted the latest figures (2020) in line with trends seen across all causes of road traffic accidents (Department for Transport, “The Impact of Lockdown on Reported Road Casualties Great Britain, Final Results: 2020”, <https://www.gov.uk/government/statistics/reported-road-casualties-great-britain-annual-report-2020/the-impact-of-lockdown-on-reported-road-casualties-great-britain-final-results-2020> [Accessed 28 March 2022]).

Although the locus of control through reg.110 is the *hand-held* use of a mobile phone, using a mobile phone whilst driving is distracting, regardless of whether the device in question is being operated hand-held or hands-free (J.E. Törnros and A.K. Bolling, Mobile phone use—effects of handheld and hands-free phones on driving performance (2005) 37(5) *Accident Analysis & Prevention* 902). There are no proposals at present to prevent *all* use of a mobile phone whilst driving.

Where does this leave the decision in *Barreto*?

In the first instance *Barreto* decision, the district judge was swayed by a Crown Court ruling in *Nader Eldarf*, unreported, that using a hand-held mobile to listen to music and change tracks did not come within reg.110. The reasoning in that

case was this did not amount to “using” the hand-held device to perform an interactive communication function. That reasoning cannot be sustained following the present decision, to the extent that using the device in such a way involves communication with another system.

When the communication is not with an external system but with another internal system of the hand-held device, it is unclear whether this amounts to “using for an interactive communication function”. In the present case, the court refused to answer this question, as to do so would have been a direct challenge to the decision in *Barreto*. An argument was put forward at trial in *Barreto* by the CPS, that any use of hand-held phone whilst driving involved an interactive communication between user and phone, but this was not put forward in the DPP’s appeal and the court in *Barreto* (at [17]) described this argument as “misconceived”. As Snow (2019) argued, the *Barreto* decision was at odds with the approach in road traffic jurisprudence of not allowing defence arguments on technicalities as a means of escaping liability (see *DPP v Kay* (1999) 163 J.P. 108; [1999] R.T.R. 109). The current decision is a welcome return to this approach, forgoing technical defences that look for loopholes in the legislation rather than focusing on the actual behaviour (and its attendant risk). This purposive approach to interpretation of the hand-held mobile phone regulation under the RTA is preferable, particular when technology is an object of regulation.

New emerging technologies challenge the ability of the legal system to keep up with regulation (G.E. Marchant, “The Growing Gap Between Emerging Technologies and the Law” in G. Marchant, B. Allenby and J. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight, The International Library of Ethics, Law and Technology* (2011), Vol.7). This is especially problematic in a system of law that attracts widespread challenges about its legitimacy (A. Snow, *Examining the meaning, messages and experience of on the spot penalties* (PhD Thesis, Keele, 2015)). Any new legal development is met with resistance, distrust and open challenge by a significant proportion of those regulated (see P. O’Malley, *The Currency of Justice* (London: Routledge-Cavendish, 2009) and C. Corbett, *Car Crime* (London: Routledge, 2003)). Thus, it is to be welcomed that the judges in the instant case focus on the purpose of the regulations rather than the narrow technical specifications of a particular technological advance.

Pre-empting legislative reform on mobile phone use whilst driving?

The court in this case was mindful of the government’s intentions to introduce legislation that would nullify the decision in *Barreto*. Nevertheless, they were not to be drawn on whether any potential new regulation would cover *any use* of a mobile whilst driving, rightly believing this was a matter for parliament (see [15]).

Whether such legislation is now necessary following this decision is an open question. The court refused to be drawn on the issue of whether using a hand-held mobile phone’s internal speaker would have likewise breached reg.110 (see [14]). Here the communication function would have been a communication with itself—or at least with a different part of the hardware. Until the Court of Appeal or Supreme Court are faced with an opportunity to revisit *Barreto*, since the court in the present

case felt bound by that decision (see [6]), it must be that such use is not an interactive communicative function. In *Barreto* the communication was between the defendant's camera and internal hard drive.

Given the government's consultation, legislation will still be necessary to rectify this. It is somewhat bizarre that this is the case considering the level of risk is no different as to whether music is played via a Bluetooth device or the internal speaker system of the phone. Likewise taking a video whilst driving is no less risky than taking such a video and simultaneously live streaming it. In the latter case, the behaviour would fall foul of reg.110, whereas in the former it would not. However, in the former case, if the video (or still pictures) had a system of automatic cloud back-up, then this would fall foul of reg.110. This would be the case even if there was no simultaneous transmission of this data (e.g. for lack of signal at the time of filming), since in *Barreto* the court said (without deciding the point), at [46]:

“there is an argument that sending and receiving messages includes ... not just the nanosecond of the transmitting or receipt of data ... In the digital sphere each aspect of the drafting, sending and reading/viewing/replying is an intrinsic part of using a device which performs interactive communication as defined.”

Filming for later automatic back-up would fall under this description—as the process of creation is an intrinsic part of uploading the media to a computer server.

Conclusion

This decision is to be welcomed as an important clarification of the extent of reg.110 as regards the functions of contemporary smart phones. The decision sits more in sync with the intentions of Parliament in drafting the regulation, focusing on the importance of driving safely rather than on the technical minutiae of regulations. The broad scope of the decision, bringing most contemporary use of a mobile phone whilst driving within the regulation, is to be commended. Hopefully the Divisional Court's decision in *Barreto* will soon be of historical interest only either through development of the court's jurisprudence arising from the present case or from legislative intervention.

As to the latter, reg.110 has been amended (with effect from 25 March 2022) by the Vehicles (Construction and Use) (Amendment) (No. 2) Regulations (SI 2022/81). The amendments remove the requirement that the driver is using the mobile telephone to perform an interactive communication function. Instead, reg.110(6) now defines “using” a mobile phone as including (for example): checking the time; checking notifications; making, receiving or rejecting calls; sending, uploading or receiving oral or written content; sending, uploading or receiving photos or videos; using the phone's camera or sound recorder; drafting text; accessing stored data (including documents, books, audio files, photos, videos, playlists and messages); accessing an application; and accessing the internet.

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