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R. v. O'Reilly

[1979] A.J. No. 554

Alberta District Court
Judicial District of Grande Prairie
McFadyen J.

May 28, 1979.

Counsel:

J.M. McPerson, for the respondent.
R.M. Lewis, for the appellant.

¶ 1 **McFADYEN J.**:— The appellant appeals against his conviction on a charge of exceeding the speed limit contrary to s. 53(1) of The Highway Traffic Act, S.A. 1975, c. 56.

¶ 2 The only witness called by the Crown was Cst. Wainwright, who was trained in the operation of radar equipment, particularly the Speed Gun 6. He received training in the use of this equipment in 1976 and has also had considerable experience since that time. Constable Wainwright testified that Speed Gun 6 may be operated while the police vehicle is moving or while it is stationary. He tested the radar set both before and after the reading which he obtained on the appellant's vehicle, and was satisfied that it was functioning properly. He used a turning fork, C11267, and obtained the appropriate readings which are set out in the certificate of the qualified tester. This certificate was entered in evidence pursuant to s. 152(2) of The Highway Traffic Act.

¶ 3 The tests conducted by Cst. Wainwright on the operation of the Speed Gun 6 for both moving mode and stationary mode, were conducted while the police vehicle was stationary. The reading was obtained on the appellant's vehicle while the police vehicle was moving.

¶ 4 Constable Wainwright was unable to give expert evidence as to the scientific principles involved in the operation of the Speed Gun 6. He is, however, familiar with the operation and testing of that particular radar set.

¶ 5 The defence called Stanley Crowshaw. He was formerly a radar technician with the Canadian Armed Forces. He had considerable experience in calibration, repairing and tuning of radar equipment used by the Canadian Armed Forces. He had no knowledge whatsoever of the Speed Gun 6 and no knowledge of any radar equipment commonly used by the police forces in the Province of Alberta. He stated that theoretically the Speed Gun 6 would have to include some form of device to measure the speed of the police vehicle. He testified that this could be a radar device. In addition the Speed Gun 6 would have to include a calculating device to deduct the speed of the police vehicle from the closing speed measured by the radar set to give the speed of the offending vehicle.

¶ 6 This witness was not asked any questions about the effectiveness of the tests conducted to test the Speed Gun 6. He has no knowledge of the operation of the Speed Gun 6 and has given no evidence as to its accuracy or effectiveness.

¶ 7 Constable Wainwright was not asked whether the radar set being used by him was capable of registering accurate speeds. He was not asked whether the tests conducted by him were approved tests for moving mode and stationary mode.

¶ 8 The leading case in Canada on the Admissibility of evidence of speed readings obtained by the use of radar sets is the Ontario Court of Appeal decision in R. v. Grainger (1958), 120 C.C.C. 321. In that case Roach, J.A. held that there was evidence upon which to base a conviction. He stated at page 322:

> The substance of Mr. Ross's argument in this Court was that the record supplied by the radar speedmeter amounted to nothing unless and until it was first established that such a machine, when properly used, was capable of registering the speed of a motor vehicle on a highway, that the machine at the relevant time was in good working condition and was properly used.
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> In my respectful opinion, it is implicit in the police officer's evidence as summarized in the case stated, that this particular radar speedmeter, when properly used, is capable of registering the speed of a motor vehicle and that, at the time in question, it was being properly used and in good working order. True, the officer admitted that he was not an electronics expert, and, therefore, could not explain all of the scientific mechanism that made up the machine and that resulted in it recording accurately the speed of a motor vehicle. He was, however, familiar with the manner in which the machine was intended to be used, and from his familiarity with it over a two-weeks' period he stated that the data furnished by it was extremely accurate.
>
> It is possible for any machine to get out of order. On the day in question, however, the officer calibrated this machine by the use of a tuning fork and testified that by the use of that device he ascertained that the machine was in good working order. Although he could not give a scientific explanation of the operation, he stated that when the vibrations of a given tuning fork set up certain results in the machine, that in the light of his experience the machine was in good working order and capable of recording the speed of a motor vehicle.

¶ 9 His Honour Judge D.E. Patterson, a judge of the Provincial Court of Alberta, in an unreported decision in R. v. Jacobs, reviewed the authorities and concluded as follows:

> Summarizing the foregoing cases, it would appear to me that the following conclusions can be reached:
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> (1) That the testimony of readings of less sophisticated devices, such as stop watches and speedometers, can be accepted by the Court of prima facie evidence, without proof of the accuracy of such devices. This rule would only apply in the absence of legislative intervention with which I will deal shortly.
> (2) That readings taken from radar instruments can be accepted as prima facie evidence in the following circumstances:
>
> (a) The instrument must be operated by someone trained in its operation. He need not have knowledge of the electronics or mechanism of the device but must be thoroughly familiar with its use.
> (b) The operator must give evidence that at the time in question he conducted an approved test of the instrument, and that test satisfied him that the instrument was operating properly and was capable of accurately registering speeds.It would be preferable, in my view, for the operator to state that, based on his knowledge of the instrument, such a test satisfied him that the instrument was capable of accurately registering speeds over the entire range of the instrument and what that range was; but the cases do not indicate that this is essential.
>
> (3) The readings from a stop watch, a speedometer or a radar instrument is prima facie evidence only. Like any evidence, it is susceptible to rebuttal or raising a reasonable doubt - either by matters elicited on examination or cross-examination or defence evidence.

¶ 10 I have reviewed the authorities and am satisfied that the law has been accurately stated by Patterson, Prov. Ct. J.

¶ 11 In this matter the Crown failed to establish that the Speed Gun 6 is an instrument which is capable of measuring speeds accurately. The Crown failed to establish that the tests actually conducted by the constable were approved tests for that particular radar set. This is evidence which could have been given by the operator from knowledge which he acquired in his training and experience.

¶ 12 On this basis the appeal is allowed and the conviction quashed. It is not necessary for me to consider the other issues which have been raised in this appeal.

¶ 13 The fine will be remitted to the accused.

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