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R. v. Sourlis

Between
Her Majesty the Queen, and
Michael Sourlis

[1998] O.J. No. 6274

Ontario Courtof Justice(Provincial Division)
Newmarket, Ontario
Leggate J.P.

Oral judgment: May 15, 1998.
(21 paras.)

Charge: S. 128, Highway Traffic Act - Speeding

Counsel:

P. Camposano, for the Crown.
M. McGregor, for the accused.

¶ 1 **LEGGATE J.P.** (orally):— I have done a lot of reading of case law on this, and my ruling is strictly oral. I have nothing written down, but I want to review a couple of cases that have been presented to me and one that I located on my own. I am not sure if someone presented it or not. But I am going to run through them.

¶ 2 Obviously, I am bound by the ruling of Judge Bogusky, but perhaps at the end of my ruling I may be able to clarify this situation a little bit, or at least narrow the grounds for an appeal.

¶ 3 The first case that I want to comment on is R. v. Sutherland from Alberta, [1993] A.J. No. 561, July 14th, 1993, and in the headnote it clearly says:

> "When new technology which is not generally understood or accepted is placed before the trier of fact, absent expert evidence, there should be some independent proof of the technology. If the operator of the Laser LTI 20-20 was able to say that he conducted an independent test by noting the indicated speed of a moving motor vehicle on a properly tested and functioning radar speedmeter and the readings were identical, it would be safe to conclude that there was independent proof of the technology. Such a comparison test only had to be done on one occasion. There is no evidence of such a comparison test in this case."

¶ 4 I think that is pretty clear. In Alberta they are indicating that there should be some sort of an independent test.

¶ 5 I would refer next to the case of Alladina which is also from Alberta, [1994] A.J. No. 1059, March of 1994, and what this one speaks to is the testing of the radar unit which is to be used in a comparison test, and they are going on saying things which we all have heard many times, that is that the officer has to be trained, qualified to use the device, and give evidence as to that, that essentially following the Ontario Court of Appeal case of Cotter, that there are several basic things that the officer has to say.

¶ 6 With regard to the case of Renouf which is also from Alberta, I believe December of 1994, the key point in this one, in my view, is the fact that, again, it is relating to the testing of the laser, and it says that from the evidence that was heard on this one the only time the laser unit had been tested by comparison to a radar device was some seven months prior to the date the appellant was ticketed. There was no evidence that it is tested subsequent to the charge being laid.

¶ 7 The officer did not state that the radar device itself had been tested for its accuracy before the comparison was done, so really there are two points there. One is that seven months prior to the event is not satisfactory, and the second point is that the officer involved must say something about having tested the radar for accuracy, as well as his qualifications. Again, we come back to the standard statement from Cotter.

¶ 8 Then we get to the case from Ontario, in Brampton, of Marshall, and that one, on page 21, I believe it is, of the decision - this is an appeal done by Mr. Burd, a Ms. Craig for the Crown, not our well-known Jeannie Craig from here, apparently, and this one was an issue of a charge of speeding laid with laser again.

¶ 9 And on page 21, it says, "It does indicate that testing it against the radar unit is a pivotal test; and because it says this must be done. And it also goes further and says it must be compared to a reading of a moving motor vehicle by that radar.", and I believe that that is an important point here.

¶ 10 In the ruling of Judge Bogusky, a ruling by which I am bound, several points come out in this, but I think the key point that must be considered here is Judge Bogusky's consideration of the Alberta cases wherein he concludes that some independent testing of the laser devise must be done, and he also concludes that the - or he suggests that perhaps testing it against a radar would be a good idea. Now clearly, he does not go so far as to set out time parameters as to when this must be done.

¶ 11 In the case before the court we have a charge that was laid on the 16th of October, 1997, and we have an independent test that was carried out, by coincidence I am sure, one day after the appeal was heard on March the 12th, that being March the 13th, 1998, and from having heard other cases, the comparison testing that was done for the most part was done in an acceptable manner. However, the key here is that it was done seven months roughly after the actual date of the offence.

¶ 12 I believe that the case of Cotter from the Court of Appeal in Ontario in 1991, I believe - I believe that not only is good law with regard to radar, but I believe that the principle that it sets out is equally good, and that is that there should be testing before and after a particular incident.

¶ 13 I believe that from Judge Bogusky's ruling, we can conclude that there must be testing by some independent device. With the radar, the manufacturers of the radar came up many years ago with a tuning fork to act as a test, and we can all remember the arguments about scratches, about nicks, about bends, about striking it on a steering wheel, or a gun butt, or the heel of a shoe. All of those arguments for practical purposes have gone by the boards, and it is now accepted law, I believe, that if the tuning fork is tied in a knot it is still acceptable for testing. That is a truly independent test for the radar.

¶ 14 What we have here with the laser is the laser essentially testing itself. There is no device that the officer can carry in his car, or in his pocket, or even have at the office that he can hold up in front of the device and get a true test as to the moving capability of the laser, and therein lies Judge Bogusky's point.

¶ 15 I believe, as does he, obviously, that some independent method of testing this technology is paramount to ensuring the accuracy of the device, and therefore it should not be tested internally by itself. There should be something else.

¶ 16 Frankly, it surprises me, since laser devices have been around now for I guess at least five years, use in Alberta, and likely a longer period of time in the U.S., that some manufacturer has not come out with something that the officer could carry in his pocket and test the device periodically, but at least in this jurisdiction we have not heard about any such device to this point. Therefore, the only available moving test would be to test it against a radar device.

¶ 17 Now I believe that Judge Bogusky addresses the practicality of the issue, and I would suggest that that is, while the law is on the defence side, the practicality must be considered from the Crown's point of view, as well. I do not think it is realistic to expect that every police officer who is using a laser device should carry in his pocket a hand-held radar device that he can aim with his left hand while he operates the laser with his right hand. I think that is totally impractical, and from the point of view of operational expediency, from a point of view of expense it is simply not practical.

¶ 18 So until the manufacturers come out with some independent device that the officer can carry with him for the testing of the laser I would suggest, and it is only a suggestion, that the laser device should in fact be tested against a radar device on some regular basis, and I am going to suggest, and again it is only a suggestion, that this testing should take place within 30 days prior to a charge being laid, and 30 days after a charge being laid. In an effort to set some parameters on it, that is what I am going to suggest.

¶ 19 I am going to suggest that the evidence that would be required in court would be exactly the same from a point of view of the radar device as is required now for a conviction for speeding using a radar device for that purpose, and I believe that the best law that I am personally aware of, most concisely stated, is in fact the Cotter decision from the Court of Appeal in February of 1991.

¶ 20 Once the officer has indicated that he has tested the radar, that he is qualified, et cetera, et cetera, then he can go on with the laser testing as we have heard many times here, and then he should take that third step to indicate that on a particular day within 30 days prior, or 30 days after the date of this offence, that he did in fact, or she did in fact test the radar against the laser and found them to be operating giving the same reading.

¶ 21 The essence, then, with regard to the case before the court, Sourlis, is that there was no comparison test done before and after the incident, and for that reason that charge will be dismissed.

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