

Case Name:

R. v. Niewiadowski

Between

**Her Majesty the Queen, (respondent), and
Andrzej Niewiadowski, (appellant)**

[2004] O.J. No. 478

4 M.V.R. (5th) 115

60 W.C.B. (2d) 393

Ontario Court of Justice
London, Ontario

Schnall J.

February 12, 2004.

(31 paras.)

*Criminal law -- Evidence -- Methods of proof -- Judicial notice -- Of facts -- Appeals -- Grounds --
Improper sentence -- Transportation law -- Motor vehicles -- Offences -- Speeding.*

Appeal by Niewiadowski from his conviction for speeding. Niewiadowski was charged on the basis of a radar reading that clocked him in excess of the legal limit. At trial, he cross-examined the police officer who testified that he had no recollection of whether the radar device completed internal tests. The officer had no notations related to whether the device was in proper working order that day.

HELD: Appeal allowed. The evidence in cross-examination of the police officer should have raised a reasonable doubt as to his qualifications and the training he received. It also raised doubts as to whether or not the device was in proper working order and whether it was being operated properly on the day in question. In such circumstances, judicial notice could not be taken of the reliability and accuracy of the readings. Thus, the Justice of the Peace should have had a reasonable doubt as to the reliability and accuracy of the reading obtained by the radar, and therefore should have acquitted Niewiadowski.

Counsel:

J. Charron, Provincial Prosecutor.

N. Miller, agent for the appellant.

1 SCHNALL J.:-- Mr. Niewiadomski appeals from his conviction on a charge of speeding.

2 The appeal as argued raises the following issues:

Can the court take judicial notice of the fact that a radar device, as used by police, is a device that is capable of accurately measuring the speed of a moving motor vehicle.

Was the evidence before the Justice of the Peace sufficient to support conclusions that the officer was competent in the use of the radar device; that the radar device was operated properly; and that the radar device was in proper working order, that is, had been properly tested, before and after its use.

Is it necessary for the police operator of the radar device to testify as to the relationship between the excessive rate of speed he visually observes and the reading ultimately recorded by the radar?

Did the Justice of the Peace err in finding that the prosecution had proved the case beyond a reasonable doubt?

Summary of the facts:

3 On September 11, 2001, Mr. Niewiadomski was operating a motor vehicle on Highway 401.

4 Constable Arnett was on speed enforcement patrol and observed that this motor vehicle appeared to be speeding.

5 Constable Arnett followed the target vehicle, operated the radar device and locked in' the speed of the vehicle at 128 k.p.h., in a 100 k.p.h. zone.

6 Mr. Niewiadomski was charged with the speeding offence; a trial was held; Mr. Niewiadomski was convicted.

7 At the trial, the defence called no evidence, but cross-examined the only prosecution witness, Constable Arnett.

The evidence at trial:

8 Constable Arnett testified to the following:

He had no notations of the tests he performed on the device prior to using it on that day, to ensure that it was working properly; he could only say that he did the usual' tests that he always performs.

He had no recollection that the device had completed its own internal tests and had passed those internal tests.

He was about 100 feet behind the subject vehicle when he locked in' on it with the radar device, while knowing that the specifications for the radar unit prescribe a minimum distance of 250 feet. He testified that a minimum distance is prescribed in order for the radar device to be effective'.

He testified that the manufacturer prescribes that there be a minimum speed differential between the patrol vehicle and the target vehicle, of between 5 and 7 k.p.h. when the radar device is used; if that minimum is not achieved, the radar blanks out'. He had no notation of his patrol speed; he gave but a superficial reference to the significance of the radar blanking out', as provided in the manufacturer's manual, testifying that "it probably says something to that effect in the manual".

He testified as to the importance of abiding by the testing and operational guidelines as set out in the manufacturer's manual; he admitted, however, on the whole of his evidence, that what he did on the day in question was not in accordance with these guidelines. For example: he tested the device at the side of the Highway 401, where, he said, "there is traffic all the time", instead of in a zero-traffic' zone, as prescribed in the manual; he was unclear about which antenna he used (front or rear) as opposed to which one he tested before using the radar device.

He acknowledged that other traffic could cause ground speed signals, but could not say that there was no traffic in the area, when he testified that the target

vehicle had just passed another vehicle.

His conclusion that ground signals from other traffic would not affect the reading was without basis when he was unable to testify what the ground speed distance actuation point was, and where other traffic was in relation to the target vehicle.

He testified that he received his training from two Ontario Provincial Police officers who were "known as qualified radar instructors", but his evidence was vague as to what qualifications those trainers possessed in order to properly train him in accordance with the manufacturer's specifications for this device. His evidence that he passed the training three times is therefore of no assistance to the court in determining his qualifications to operate the radar device or testify as to its proper working order.

Discussion:

9 Evidence that the usual' test was done, is not sufficient evidence to determine that the necessary test or tests were actually performed and thus enable the court to determine beyond a reasonable doubt that the device was working properly at the time of the offence. (R. v. Lounsbury [1993] M.J. No. 510, (Man. Q.B.).

10 I was provided with no authority to support the defence position that the evidence of visual observation of speeding must be related to the reading of speed on the radar. In my view, it is simply necessary for the officer to testify that the target vehicle was being operated at what he observed to be an excessive rate of speed in that zone.

11 A police officer operating the radar device is not required to articulate in his testimony the specific words that the device is accurately testing the speed of a moving motor vehicle.' Failure to articulate the words moving motor vehicle' should not necessarily be fatal to a prosecution for speeding, as suggested by the defence.

12 In circumstances where the entirety of the trial is focused on whether a particular motor vehicle operated by the accused was speeding, it is specious to suggest that the officer's reference to "speed" could refer to anything other than that of the moving motor vehicle.

13 The argument as to whether or not the court should take judicial notice of the fact that a radar device accurately measures the speed of a moving motor vehicle, is a different argument.

14 I adopt the reasoning of Justice Pockele in R. v. Mukasa (2000), [2001] O.J. No. 262 (Ont. C.J.) that laser radar devices had been in use for more than eight years (at the time of his decision) and thus the technology should no longer be considered new and innovative. The laser radar device

had been found to be reliable and accurate, and the court should no longer require evidence as to how it works, and its comparison to other more conventional radar devices through testing, to determine its reliability.

15 However, judicial notice of its reliability and accuracy should only be taken if there is uncontradicted evidence as to its use and the qualifications of the operator.

16 In *R. v. Le*, 27 M.V.R. (4th) 75, judgment released March 4, 2002, Justice Fairgrieve of the Ontario Court of Justice, also adopted the view taken by Pockele, J., that this is no longer new technology. Justice Fairgrieve reviewed the decisions in *R. v. Vancrey* (2000) 147 C.C.C. (3d) 546, (Ontario C.A.) as to the necessity of comparing a laser radar device with a conventional radar device to test reliability; *R. v. Koh* (1998), 131 C.C.C. (3d) 257 (Ont. C.A.) where Finlayson, J.A., at page 270, referred to general principles of when judicial notice may be taken; and *Delangis c. Joliette (Ville)* (1999), 141 C.C.C. (3d) 445 (Que. C.A.), where the court restored a conviction for speeding.

17 In this latter case, the Court of Appeal held that the offence had been made out where there was uncontradicted evidence that the device had been in good working order, that the operator was competent, and that the officer had made a visual assessment that the vehicle was speeding. The lower appellate court had held it could not take judicial notice of the reliability and accuracy of the laser radar device because that device relied on relatively recent technology'.

18 In over-turning the lower court's decision, the Court of Appeal in *Delangis* specifically confirmed the concept that judicial notice can be taken of the radar device's reliability and accuracy in measuring the speed of moving motor vehicles.

19 As stated by Gendreau, J.A. at page 447, however:

"... this does not mean that an automobile driver is deprived of any means of defence, quite the contrary, since he or she could still prove that the device was defective, that the operator was not competent, etc., ..."

20 In his conclusion in *Le*, Justice Fairgrieve noted that it would be an anomaly to have courts take judicial notice of the reliability and accuracy of the radar device in one province, but not in an adjacent province. He went on to state (at paragraph 14):

"In my opinion, regardless of whether the reliability of laser devices to measure the speed of motor vehicles is regarded as so "notorious" that it cannot be disputed by reasonable people, or whether one accepts the judgments in *Delangis* and *Mukasa* as demonstrating prior judicial acceptance of the device's reliability, it is now appropriate for other courts to take judicial notice of that fact. Laser devices have been used for this purpose by law enforcement agencies for almost a decade, the evidence obtained through their use has been routinely admitted as

reliable, and at least one provincial appellate court has held that their reliability is so well-known that it requires no evidence to establish it."

21 To that conclusion, I would hasten to add this qualifier:

"provided that the evidence before the court as to its use and working order, and the qualifications of the operator are uncontradicted."

22 In Delangis, as in Le, the defence presented no evidence and did not cross-examine the police officer operator of the radar unit.

23 Thus there was uncontradicted evidence before those courts.

24 Where, however, as in the case before me, the defence through cross-examination challenges the training and qualifications of the operator, and the operation of the device and whether it was in proper working order, judicial notice cannot be taken of the reliability and accuracy of the readings. The court must consider whether the cross-examination of the police officer and the admissions he made raise a reasonable doubt.

25 I was referred to a number of cases by Ms. Charron, for the prosecution (respondent). These include: R. v. Grainger [1958] O.J. No. 218; D'Astous v. Baie-Comeau (Ville) (1992), 74 C.C.C. (3d) 73; and R. v. Giffin, [1980] N.S.J. No. 17, CH33207.

26 These cases do not advance the respondent's case beyond the position which I already accept; that is, that where the prosecution presents evidence as to the qualifications of the operator, as to the device being in proper working order both before and after the incident, and as to its proper operation, the Crown will have established a prima facie case. A prima facie case can support a conviction unless the defence raises a reasonable doubt through independent evidence, or through cross-examination of the Crown witness.

27 Ms. Charron further submits, however, that cross-examination of the radar police operator which elicits the admissions of non-compliance with the manufacturer's specifications and directives as to testing and operation should be insufficient to raise a reasonable doubt, unless the officer is also asked what effect the non-compliance would have on the device and its reading.

28 I do not accept this argument. The officer testified that the radar device would not be effective if, for example, distance requirements were not met. It is not necessary for the officer to testify as to the consequence of each element of non-compliance, whether the readings would be high, or low, as a result of not following the specifications and directions of the manufacturer.

29 It can be assumed that the absence of full compliance with the testing and operational process should make the reading suspect. There would be no reason for the device manufacturer to set out specifications and directions if it mattered not whether these were complied with.

Conclusion:

30 The evidence in cross-examination of the police officer should have raised a reasonable doubt in the mind of the learned Justice of the Peace, as to his qualifications and the training he received, for him to be able to determine whether or not the device was in proper working order and whether it was being operated properly on the day in question. Thus the learned Justice of the Peace should have had a reasonable doubt as to the reliability and accuracy of the reading obtained by the radar, and therefore should have acquitted the accused.

Decision:

31 The Appeal is allowed. The charge is dismissed.

SCHNALL J.

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