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R. v. Tummillo

Between

**Her Majesty the Queen, (respondent) respondent, and
Sabino Tummillo (accused) (appellant) appellant**

[1998] M.J. No. 311

[1998] 9 W.W.R. 750

129 Man.R. (2d) 238

35 M.V.R. (3d) 249

39 W.C.B. (2d) 67

Docket No. AR 96-30-02854

Manitoba Court of Appeal

Philp, Twaddle and Helper JJ.A.

Heard: June 5, 1998.

Oral judgment: June 5, 1998.

Written reasons: June 17, 1998.

(4 pp.)

Motor vehicles -- Regulation of vehicles and drivers -- Rate of speed, evidence and proof -- By radar equipment or other speed detection device.

Appeal by Tummillo from a conviction for speeding. A police officer operated a speed-timing device called Laser Speed Meter LTI-20-20 to determine the speed of Tummillo's vehicle. When he aimed the device at Tummillo's vehicle, it recorded a speed in excess of the speed limit. At trial, the Crown attempted to prove that the device was in good working order by eliciting evidence from the officer that he conducted three tests of the device to satisfy himself that it was working properly. At issue was whether the trial judge could find that the speed-timing device used to determine the

speed of Tummillo's vehicle was in good working order.

HELD: Appeal allowed. Tummillo's conviction was set aside and an acquittal was entered. The officer was not qualified as an expert and the sufficiency of the tests to establish the device as being in good working order was not supported by admissible evidence. There was also no evidence presented to indicate that the tests were approved by the manufacturer.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 255(1), 255(4).

Counsel:

T.D. McCaffrey, for the appellant.

M.B.L. Prefontaine, for the respondent.

The judgment of the Court was delivered by

1 TWADDLE J.A. (orally):-- This appeal comes to us with leave from the confirmation by the Summary Conviction Appeal Court of a conviction for speeding. The issue is whether there was any evidence on which the trial judge could find that the speed-timing device used to determine the speed of the accused's vehicle was in good working order. This issue is somewhat important as the evidence relied on in this case is essentially the same as that regularly relied on in speeding cases.

2 The evidence given at the trial was that of the police officer who had operated the speed-timing device used to determine the speed of the accused's vehicle. The device, he said, was a Laser Speed Meter LTI-20-20. When he aimed at the accused's vehicle, it recorded a speed well in excess of the speed limit.

3 Section 255(1) of The Highway Traffic Act, S.M. 1985-86, c.3-Cap. H60, permits the evidence to be given by the operator of a speed-timing device of the speed recorded by that device and for the acceptance of this evidence by the court if two conditions are met:

- (i) that the device is one approved by the Minister of Justice; and
- (ii) the court is satisfied that the device was in good working order at the time the recording was made.

4 The device used in this case was one approved by the Minister of Justice. It was therefore unnecessary for the Crown to call expert evidence respecting "the function and operation of the speed-timing device or of its efficiency for the purpose of determining the speed at which motor

vehicles are being driven." The sole remaining burden on the Crown was to prove that the device was in good working order.

5 The Crown attempted to prove the device to have been in good working order by eliciting from the officer evidence that he conducted three tests of the device to satisfy himself that it was working properly; a fixed-distance zero-velocity test, a scope alignment test and a display test. The officer said that, respectively, these tests were meant to satisfy him that the device was accurately measuring the speed of a moving object, locking on to the object at which it was aimed and communicating its measurements to him.

6 The officer was not, however, qualified as an expert and the sufficiency of the tests to establish the device as being in good working order was not otherwise supported by admissible evidence. Nor is their sufficiency self-evident, as the following description of the fixed-distance zero-velocity test shows: The operator points the laser at a wall or other stationary object from a pre-measured distance. Distance and velocity readings are then taken. The theory is that, if the distance reading equals the pre-measured distance and the velocity reading is zero, the device is in proper order to record the velocity of a moving object.

7 The theory may be correct, but perhaps I, as a scientific layman, can be forgiven for wondering how a test of the device's ability to record a stationary object as one that is not moving proves it to be functioning properly when measuring the speed of a moving object. For the theory to be accepted, there must be, in my opinion, either evidence from an expert or admissible evidence that the tests are those approved by the manufacturer of the device for checking its condition.

8 The legislature itself recognized the need for independent verification that a device relied on in a prosecution was in good working order at the relevant time. By s. 255(4) of the Act, it provided for the appointment of qualified persons as testers and for the reception of a certificate of such a tester certifying as to the accuracy of the device as prima facie evidence that that was so. Apparently no such tester has been appointed. This does not entitle the Crown to prove the accuracy of the device by evidence that the police officer who operated it tested it for accuracy without separate proof that the tests carried out are sufficient to achieve their goal.

9 There being no evidence capable of satisfying the court that the speed-timing device was in good working order, we allowed the appeal, set aside the conviction and directed the entry of an acquittal.

TWADDLE J.A.

PHILP J.A.:-- I agree.

HELPER J.A.:-- I agree.

cp/t/lmt/DRS/DRS