IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS

BLANCA OCHOA,	)	
	)	
Appellant,	)	
vs.	)	No. 97-MCA-2429
	)	
STATE OF TEXAS,	)	
	)	
Appellee.	)	

OPINION

Appellant appeals her conviction in Municipal Court for a speeding offense. The Record before this Court, including the Statement of Facts, reflects that Appellant was clocked going 51 in a 35 m.p.h. zone with the use of a radar gun. Appellant contends the Trial Court erred by overruling Appellant's objection to the admission of the testimony of the police officer regarding the use of the "radar gun" in recording Appellant's speed.

Appellant contends that before the proffered evidence is admissible the proponent of the evidence must demonstrate, by clear and convincing evidence, that the evidence is 1) reliable, and 2) relevant to assist the jury in its fact-finding duty. In order to be reliable, the proponent must prove that 1) the underlying scientific theory is valid; 2) the technique applying the theory is valid; and 3) the technique was properly applied on the occasion in question. Kelly v. State, 824 S.W.2d 568 (Tex.Crim.App. 1992). Kelly involved the admissibility of DNA evidence, and in summary, held that the Frye "General Acceptance" test no longer governed the admissibility of scientific evidence in Texas. It held that Rule 702, Texas Rules of Criminal Evidence now governs the admissibility of scientific evidence. The Kelly Court ultimately held that the record reflected that the evidence offered met the criteria required under Rule 702 and therefore was admissible.

Subsequently, the Court of Criminal Appeals held in Emerson v. State, 880 S.W.2d 759 (Tex.Crim.App. 1994) that the Kelly standard and the requirements of Rule 702 applied to all scientific evidence, not just novel scientific evidence, in upholding the admissibility of HGN tests[1] in a DWI prosecution. The Court held that the Kelly standards were applicable to the admission of

[1] HGN test refers to the Horizontal Gaze Nystagmus test, which is a field sobriety test used in DWI cases.

that test because it was a scientific test, but then held, although there was no predicate laid for its admission meeting the Kelly standards at trial, that the Appellate Court could take judicial notice of the fact that the HGN test is both reliable and relevant. It further held that the evidence reflected that the third prong of the Kelly analysis was also met in that the HGN technique was applied properly on the occasion in question. Subsequently, in Hartman v. State, 946 S.W.2d 60 (Tex.Crim.App. 1997) the Court again applied the Kelly criteria and the requirements of Rule 702 to the results of a breathalyzer test in a DWI prosecution. Hartman again emphasized that the standard adopted in Kelly applied to all scientific evidence offered under Rule 702.

In Hartman v. State, 946 S.W.2d 60 (Tex.Crim.App. 1997) p. 63, the Court recognized that prongs one and two of the Kelly standards could be decided by Appellate Courts as a matter of law. Both Trial and Appellate Courts have the authority to take judicial notice of the validity of a particular scientific theory or technique, and that parties should not be required to relitigate its admissibility. The Court recognized that the Supreme Court of the United States itself recognized that some scientific principles are so well established that they may be subject to judicial notice. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 n.11, 113 S.Ct. 2786, 2796 n.11, 125 L.Ed.2d 469,482 n.11 (1993). Clearly, then, it would appear that the Trial Judge would have authority to take judicial notice of the first and second prongs of Kelly in radar cases, and then just determine whether or not the third prong of Kelly had been met from an evidentiary standpoint, that is, that the technique in using radar was properly applied on the occasion in question. That issue would be determined as to whether or not the operator of the radar devise was properly trained in its operation, and had properly tested the equipment for accuracy, and that on the occasion in question it was operated properly and produced an accurate result. Masquelette v. State, 579 SW2d 478 (Tex.Crim.App. 1979)

Appellant contends that the Kelly standard is applicable to the testimony that may be offered by the State in regard to the use of radar devices to clock and record the speed of a vehicle and to support prosecution of a citation for speeding. In Cromer v. State, 374 S.W.2d 884 (Tex.Crim.App. 1964) the Court acknowledged that it was the first case to reach that Court where the use and accuracy of a portable radar set installed in an automobile had been legally challenged as to its admissibility. The Court held that the testimony of the patrolman as to the speed shown by the radar set they were trained to operate and to test for accuracy, and which they did operate and test and found accurate, was sufficient to sustain a conviction for speeding. The Court recognized

that to sustain the contention of the Appellant in that case would require the State, in every prosecution involving the speed of a vehicle in which it relied upon radar, to call witnesses who would qualify as experts in the field of radar; who understood the principles by which speed was measured and registered on the set, and the repair of radar sets; and who were qualified to test as to the manner and means whereby the accuracy of a radar set may be tested by the use of a tuning fork, as well as the accuracy of the tuning fork furnished with the set.

Interesting enough, Appellant contends that the use of radar would require an expert to testify in the fields of spectrometry, physics, calculus and sonar. To produce an expert in each of those categories, or one that has knowledge as to the application of each of those scientific principals as to the use of radar, would likewise be subject to the same criticism quoted above.

The Court in Cromer eventually held that they were not prepared to hold that the State was required to call qualified experts to prove the underlying scientific principles of radar, and held the testimony introduced was sufficient evidence of the accuracy of the radar and to give probative value to its measurement of speed. Subsequently, the Court in Masquelette v. State, 579 S.W.2d 478 (Tex.Crim.App. 1979), again confirmed that the officer's testimony that he had been both trained to operate the radar set and tested it for accuracy was a sufficient predicate to support admission of radar evidence. Cromer v. State 374 S.W.2d 884 (Tex.Crim.App. 1964); Gano v. State, 466 S.W.2d 730 (Tex.Crim.App.1971).

But of more significance is the language of Masquelette, where the Court held that "the State is not required to call expert witnesses to establish the accuracy of radar."

It must be remembered that the police officer who is testifying has not been called to the stand as an expert as to the underlying scientific principles involved in the use of radar devices, and is not there to testify as to the underlying scientific basis or theory concerning their use.

In Wilson v. State, 328 S.W.2d 311 (Tex.Crim.App. 1959), the Court held in addressing the sufficiency of evidence to show the accuracy of the radar as a matter of first impression, reviewed the authority of many other states, and held that "expert testimony" is not necessary to show the construction, theory and accuracy of the radar device as a class of scientific instruments.

After all, the police officer is there to testify not as to how the radar operates, but how to operate the radar. This Court reviewed the admissibility of radar evidence in Steinmeier v. State, 85-MCA-1563 (Mun.Ct.App. 1985) which is attached hereto as an appendix to this Opinion, and which followed the rational of Masquelette, Cromer and Wilson.

Therefore, this Court holds that expert testimony is not necessary to be introduced concerning the use of a radar device, and that the only predicate necessary for its admission into evidence is to establish that the police officer is trained to operate and to test for the set's accuracy, and that they did operate and test it, finding it to be accurate at the time of its use. Masquelette supra. Steinmeier supra.

Therefore, the Trial Court did not err in overruling Appellant's objection to the admission of the radar gun evidence under Rule 702, and its Judgment is hereby affirmed.

SIGNED this 9 day of April, 1998.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

SIGNED this 9 day of April, 1998.

JUDGE

IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

HEINZ STEINMETER, Appellant

vs. NO. 85-MCA-1563

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction from Municipal Court for a speeding violation.

Appellant did not request a statement of facts and none is contained in this record. However, in a pro se brief, Appellant attacks the sufficiency of the evidence. This Court is unable to review the Trial Judge's findings relating to the sufficiency or admissibility of evidence when no statement of facts is contained in the record. As stated before, the function of the Trial Court is to judge the credibility of the witnesses and the weight to be given to their testimony, and this Court cannot substitute its judgment for that of the Trial Court in that regard.

The Appellate Court decides only questions of law and it is the Trial Court's duty to resolve disputed questions of fact. There continues to be an apparent misconception about the function of an appeal under the applicable Courts of Record Statute that an appeal involves a complete rehearing of the case on what was known formerly as a "de novo" basis. Since the enactment of the Court of Records Statute, the Appellate Court concerns itself only with resolution of questions of law. Irvin v. State, 84-MCA-1162 (Mun.Ct.App.) and Paoli v. State, 83-MCA-98 (Mun.Ct.App.)

Although Appellant's main thrust relates to the sufficiency of the evidence, a broader interpretation of his position as presented during oral argument could be construed to question the reliability of radar in general. Appellant contends that any movement within the transmitting

range of the radar gun would result in inaccurate readings. For instance, Appellant contends that the police officer, who evidently was holding a hand-held radar device at the time, was moving as he was reading the radar device, and that such movement would affect the accuracy of the radar unit. Also, Appellant contends that even the movement of "leaves blowing in the wind" would adversely affect the accuracy of the radar unit. In short, he contends that the radar device is only reliable when used in a vacuum. Needless to say, such conditions never exist in the field.

Although the trial court must require that a proper predicate be laid for the admission of such evidence, and give due consideration to the credibility of the witnesses and the weight to be given to their testimony relating to the radar device, the scientific principles underlying the use of radar devices for measuring the speed of vehicular traffic are well established and have been judicially accepted in Texas. In Gano v. State, 466 S.W.2d 730 (Tex.Cr.App. - 1971) the Court upheld a speed clocking by the use of radar after the patrolman had calibrated his instrument and was familiar with and experienced in the operation of the apparatus. Also, in Cromer v. State, 374 S.W.2d 884 (Tex.Cr.App.), the Court held that the testimony of a patrolman as to the speed shown by a radar set was admissible when the patrolman testified that they were trained to operate and to test for the set's accuracy, and that they did operate and test it, finding it to be accurate, was sufficient to allow the admission in evidence of the reading obtained by the use of such device. See also, Masquelette v. State, 579 S.W.2d 478 (Tex.Cr.App. - 1979). Further, in Wilson v. State, 328 S.W.2d 311 (Tex.Cr.App. - 1959), the Court lined Texas up with the majority of jurisdictions which now have eliminated the requirement of proving by expert testimony the applicability

of the basic radar principles to law enforcement. However, as indicated above, the accuracy of the individual radar set remains a vital element which the prosecution must prove. Thus, this Court holds that the underlying scientific principles used in radar devices need not be established by the evidence, and that radar units are reliable to determine the speed of vehicular traffic when they have been shown by appropriate testing to be accurate and are operated by trained and competent officers.

Finding no reversible error, the Judgment of the Trial Court is affirmed.

Signed this 21 day of Nov, 1985.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Signed this 21 day of Nov, 1985.

JUDGE