IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

ALFREDO GONZALEZ	§	
	§	
Appellant,	§	
	§	
vs.	§	**No. 03-MCA-2890**
	§	
STATE OF TEXAS,	§	
	§	
Appellee.	§	

OPINION

Appellant appeals his conviction in Municipal Court for a speeding offense. A fine of $90.00 was assessed.

Appellant first contends that he was denied his right to a speedy trial. Appellant was cited on December 9, 2002, and his first trial was held on March 31, 2003. Appellant appealed his conviction in that case to this court which affirmed the Trial Court's decision in an Opinion dated June 5, 2003, and denied Appellant's Motion For Rehearing on July 18, 2003. Thereafter, in an agreed Order, the city agreed with Appellant to have the case retried to provide Appellant an opportunity to have a court reporter present and to present this court with a Statement of Facts on the present appeal. A Statement of Facts is contained in the record before this court, and has been reviewed in regard to Appellant's points of error. It clearly appears that this case has been handled expeditiously, and there has been no prolonged periods of delay, and Appellant's right to speedy trial have not been violated. That point of error is thereby overruled.

Appellant then contests the use of radar evidence and whether a proper predicate has been made for it's introduction pursuant to the requirements of **Kelly v. State, 824 SW 2d 568 (Tex. Crim. App. 1992).**

Kelly requires the proponent of expert testimony or evidence based on a scientific theory to show, by clear and convincing evidence, that the evidence is both reliable and relevant to assist the jury (or

judge) in it's fact finding duty. To be reliable, evidence derived from a scientific theory must satisfy three (3) criteria:

1. The underlying scientific theory must be valid;
2. The technique applying the theory must be valid;
3. The technique must have been properly applied on the occasion in question.

Under Tex. R. of Evid. 702, the State has the burden of proving all three (3) criteria to the Trial Court, outside the presence of the jury, before the evidence may be admitted. In **Hartman v. State, 946 SW 2d 60 (Tex. Crim. App. 1997)**, the court made it clear that the **Kelly** test applies to all evidence based on a scientific theory not just evidence based on novel scientific theories.

As to the first two (2) prongs of **Kelly**, the Texas Court of Criminal Appeals in **Masquelette v. State, 579 SW 2d 478 (Tex. Crim. App. 1979)**, in a case that predated **Kelly**, dispensed with the requirement to establish the underlying reliability of radar.

Subsequently, and after the **Kelly** decision, the Texarkana Court of Appeals in **Maysonet v. State, 91 SW 3d 365**, held that, in light of societies widespread use of radar devices, and considering other court's acceptance of radar, that the underlying scientific principals of radar are indisputable and valid as a matter of law, but held that the State still must establish that the officers applied a valid technique and that it was correctly applied on the particular occasion in question.

However, the El Paso Court of Appeals in **Ochoa v. State of Texas, 994 SW 2d 283 (1999)**, a case involving a speeding violation and the use of radar evidence, held that all three (3) prongs of the **Kelly** criteria would be required to be proved, and because there had been no evidence in the record to satisfy the requirements of **Kelly**, the court held it was error to admit the radar evidence.

Nonetheless, the court suggested that it would be authorized to take judicial notice of any scientific fact which is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned as was done the Texas Court of Criminal Appeals in **Emerson v. State, 880 SW 2d 759 (Tex. Crim. App. 1994)**, (regarding the courts taking judicial notice of the reliability of the theory underlying the horizontal gaze nystagmus test for intoxication and its technique.) Although the El

Paso court strongly suggested that it would take judicial notice of the reliability of radar evidence, it found it unnecessary to do so in the case because it found that the admission of the radar evidence, despite the State's failure to establish the **Kelly** factors, was harmless. The court then went on to hold that since the admission of the radar evidence, although erroneous, did not have a substantial or injurious effect on the outcome of the case since there was other evidence that Appellant exceeded the speed limit in the record, and therefore, was sufficient to sustain the conviction even without the radar evidence.

This court believes, that given another chance, that the El Paso Court of Appeals would follow the reasoning of **Maysonet**, or alternatively, take judicial notice of the reliability of radar evidence, if such was necessary for it's determination of the issue in the future. This court, likewise, does so in this case, and holds that the requisite showing a reliability under Tex. R. Evid. 702 is established as a matter of law and need not be demonstrated, and this court takes judicial notice of the reliability of the underlying scientific principals of radar as being indisputable and valid as a matter of law.

That still leaves the question as to whether the second and third prongs of **Kelly** were satisfied in this case, and this court holds that they were. The officer who testified about the use of radar indicated that he was trained to use it, was certified in it's use, and that he had checked it's calibration at the beginning and ending of his shift by the use of a tuning fork and a manual test button on the radar unit, and that the machine was operating accurately. He further testified that his visual estimate of the speed of the Appellant was over the speed limit, which may well be sufficient evidence, even without the radar evidence, of an infraction. See **Ochoa**, supra, (holding that the officer's testimony alone that the defendant was driving at "a high rate of speed", and that in his opinion she was exceeding the speed limit, when introduced without objection, was sufficient evidence to sustain that the person was exceeding the speed limit without considering radar evidence).

Additionally, Appellant himself admitted to going 42 miles per hour in the 35 mile an hour zone which is also sufficient evidence to prove he was speeding, and sufficient to sustain the Trial Court's finding.

Therefore, the judgment of the Trial Court is affirmed.

SIGNED this 15 day of Sept, 2004.

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 15 day of Sept, 2004.

JUDGE