

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF CHRISTIANSTED, ST. CROIX

THE GOVERNMENT OF THE VIRGIN ISLANDS:)
) T.O. #1539/1981
Plaintiff,)
)
vs.) SPEEDING
)
JIM ANTOINE,)
)
Defendant.)
)

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PETERSEN, Judge

MEMORANDUM OPINION

December, 1981

January

Defendant has moved, pursuant to Rule 41 of the Federal Rules of Civil Procedure, to dismiss the speeding charge brought against him based on radar evidence. On March 11, 1981, defendant, driving a van on Centerline Road, was shown by radar equipment to be travelling 57 m.p.h in a 35 m.p.h. zone. He was thereafter stopped by a police officer and was issued a speeding ticket.

At the trial held on May 13, 1981, defendant contended that the radar results were inadmissible as there was no evidence that the tuning fork used to test the radar had itself been tested for accuracy on the day of the alleged speeding violation. This court finds that a showing of the tuning fork's accuracy is, in fact, necessary to sustain a speeding conviction and the Government's failure to make such a showing renders the speeding evidence inadmissible. Defendant's Motion to Dismiss must therefore be granted.

The issue of whether, as a prerequisite for the admission

of radar speed evidence, the speedometer must have been checked for accuracy by a testing device (in this instance a tuning fork), which itself has to have been recently tested, is one of first impression in this jurisdiction. For many years, and in the Virgin Islands since 1979, the courts have taken judicial notice of the general accuracy of radar speed measuring devices. Commissioner v. Whynaught, 384 N.E.2d 1212, 1215 (Mass. 1979); State v. Tomanelli, 216 A.2d 625, 629 (Conn. 1966); State v. Dantonio, 115 A.2d 35, 40 (N.J. 1955). Proof of the accuracy of the particular scientific measuring device has been required, however, before the introduction of the results of the device has been permitted. State v. Finkle, 319 A.2d 733, 737 (N.J. Super. Ct. App. Div.), aff'd, 329 A.2d 65 (N.J. 1974); State v. Gerdes, 191 N.W.2d 428, 430-31 (Minn. 1971).

The more difficult problem in a case where radar results are offered is ascertaining the accuracy of the particular speedometer at the time the speed measurement is made and deciding what tests are sufficient to prove such accuracy. The use of a calibrated tuning fork, as was employed in the present instance, has been generally accepted as an adequate foundation for the admission of radar evidence. See, e.g., State v. Bollinger, 550 S.W.2d 214 (Mo. Ct. App. 1977); State of New Jersey v. Cardone, 368 A.2d 952 (N.J. Super. Ct. App. Div. 1976). Yet, the question at bar, whether the tuning fork itself must be tested, has not been definitively answered.

After careful consideration, this court has chosen to adopt the conservative position taken by several states which requires verification of the testing device.^{1/} In Ballwin v.

^{1/} Contra, Farmer v. Commonwealth, 139 S.E.2d 40, 42-43 (Va. 1964), where the court, affirming the speeding conviction of defendant, found that the accuracy of the radar unit was established where the speedometer of the testing vehicle had previously been checked against a calibrated master speedometer even though the master speedometer was not proven accurate, reasoning that there had to be "a point of faith somewhere."

Collins, 534 S.W.2d 280 (Mo. Ct. App. 1976), for example, defendant's conviction for speeding was reversed because although the police officer had made three different tests of the radar's accuracy, not one of tests - internal calibration equipment, the tuning fork or the policeman's patrol car speedometer - was itself tested for accuracy.

The court, in City of St. Louis v. Martin, 548 S.W.2d 622 (Mo. Ct. App. 1977), held that the city had failed to meet its burden of proving that a VASCAR speed estimating device was accurate, even though the VASCAR equipment had been tested with a stopwatch and found accurate, because the stopwatch had not been tested on the morning of the speeding violation. Similarly, where VASCAR equipment had been tested by stopwatches whose accuracy had been checked that same day by radio time, New Jersey courts have admitted speeding evidence and have confirmed speeding convictions. State v. Finkle, 319 A.2d 733, 735 (N.J. 1974); State v. Schmiede, 289 A.2d 281, 284 (N.J. County Ct., 1972). See also, Tiffin v. Whitmer, 290 N.E.2d 198 (Ohio Mun. Ct. 1970) (VASCAR).

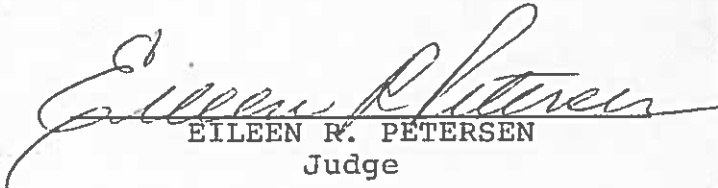
Having determined that a foundation for introducing radar evidence must be laid by proving that a testing device, such as a tuning fork, has itself been tested for accuracy, this court is called upon to set forth time requirements within which such a test must be made if it is to be considered acceptable. At least one court has accepted certifications of accuracy of a tuning fork made more than three years prior to the time the fork tested the radar machine which clocked a defendant's speed and specifically disagreed with defendant's contention that the certifications were not sufficiently current. State v. Cardone, 368 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1976). However, we consider the better reasoned approach to be that which requires the accuracy of the radar testing equipment to have been made within a reasonable time

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before the equipment was used to test the radar device in question. The results of a device which has not been tested within a reasonable period of time prior to the alleged speeding violation would not possess the accuracy required by this court and could not be admitted into evidence.^{2/} What constitutes a reasonable time period is best left to the discretion of the court in each individual case.

There has been no showing made by the Government when, if ever, the tuning fork used to test the radar device in this case was itself last tested for accuracy. Consequently, the court finds that the Government has failed to bear its burden of proving the accuracy of the tuning fork and therefore the results of the radar equipment cannot be admitted into evidence.

Defendant's Motion to Dismiss pursuant to Rule 41 is hereby GRANTED.


EILEEN R. PETERSEN
Judge

^{2/} Contra, State v. Cardone, 368 A.2d 952, 955 n. 1 (N.J. Super. Ct. App. Div. 1976), where the court stated that in the absence of contrary evidence, it could infer that a device used to test the accuracy of a radar machine, such as a tuning fork, did not need frequent testing.