

CANADA / JUDGMENT

R. v. Tschampa

2022 BCSC 2129

COURT

Supreme Court of British Columbia

DECIDED

29 November 2022

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2022 BCSC 2129 R. v. Tschampa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tschampa,

2022 BCSC 2129

Date: 20221129

Docket: 76413-1

Registry: Prince George

Rex

v.

Paige Tschampa

Before: The Honourable Madam Justice Church

On appeal from: Provincial Court of British Columbia, February 4, 2022

(R. v. Tschampa, Prince George Docket No. AJ19695280-1)

Oral Reasons for Judgment

Counsel for the Crown (Respondent):

B. Martin

Counsel for Accused (Appellant):

J.C. LeBlond

Place and Date of Hearing:

Prince George, B.C.

November 3, 2022

Place and Date of Judgment:

Prince George, B.C.

November 29, 2022

- [1] THE COURT: The appellant, Paige Tschampa appeals her conviction for speeding on February 4, 2022 by a Judicial Justice. She seeks the reversal of the conviction and entry of an acquittal. The respondent Crown is opposed and seeks dismissal of the appeal.
- [2] By way of background, on June 1, 2021, Officer Thorne, an active member of the CN Police Service, was on duty and in a marked CN Police vehicle monitoring traffic on First Avenue in Prince George, an area within 500 metres of the CN Railway yard. At approximately 9:12 am, he noted a westbound vehicle coming towards him and estimated the speed of the vehicle to be 65 kilometres per hour, in excess of the posted speed limit of 50 kilometres per hour.
- [3] Constable Thorne took a reading with the Genesis VP directional handheld radar unit, which showed a speed of 70 kilometres per hour. He activated his emergency equipment and pulled the vehicle over. The vehicle was operated by the appellant, Ms. Tschampa, and she produced her driver's licence confirming her identification. Constable Thorne issued Ms. Tschampa with a violation ticket, AJ19695280, charging the appellant with an offence pursuant to s. 146(1) of the Motor Vehicle Act.
- [4] On February 4, 2022, a hearing with respect to the violation ticket was heard before a Judicial Justice and, immediately following the hearing, he pronounced reasons for judgment, convicting the appellant of the single count on the violation ticket.
- [5] The appellant filed a notice of appeal on March 7, 2022, seeking reversal of the conviction and entry of an acquittal on the single count on the violation ticket.
- [6] The grounds for the appeal are fairly narrow. The appellant argues that the Judicial Justice misapprehended the standard of evidence required to prove the testing and accuracy of the speed-measuring device that was relied on by the Crown. The appellant further argues that the Judicial Justice misinterpreted the case of *R. v. Khadikin*, 1999 CanLII 5234, which resulted in the admission of the radar evidence without proper foundation. Finally, the appellant argues that the Judicial Justice chose not to apply relevant and binding case law, namely the decision of *R. v. Geraghty*, [1988] B.C.J. 2433, and thus erred in law.
- [7] At the hearing on February 4, 2022, Constable Thorne gave the following evidence in chief:

I have been an active qualified radar operator since 1987 and was updated in 2018. Prior to conducting enforcement that day, I tested the radar unit according to the manufacturer's specification internally and externally, and the unit was found to be in working order. This radar unit is capable of measuring speeds of -- of moving vehicles.

[8] Under cross-examination, Constable Thorne gave the following evidence:

Q Constable, you stated you were operating a Genesis VP Directional speed measuring device. Do I have that correct?

A That's correct.

Q You said that you conducted testing on that device that morning. Is that true?

A That's correct.

Q And are you aware of the appropriate testing that is required for that unit by explanation in the manual it's accompanied to -- accompanies that unit?

A That's correct.

Q What is the testing carried out?

A Pardon me?

Q What is the testing you carried out, specifically?

A I -- I test it internally and with the -- with the tuning fork, externally.

Q You're familiar with the manual for that unit?

A Yes.

Q What does that describe as far as the appropriate test to be carried out on the unit before it's deemed to be fit to measure speed?

A Pardon me?

Q What is the -- what does the manual say is the appropriate test to be carried out before that unit is fit to measure the speeds of the vehicles?

A To be tested internally and if the radar unit shows that it's a -- it's a pass internally and the externally with the -- with the K-band tuning fork and the reading will say, "100".

Q Is that -- are -- are you able to say what the manual says about the testing process?

A I'm just -- that's -- that's what I know.

[9] The appellant submits that the latter series of answers to the questions in cross-examination suggest that Constable Thorne is "unsure about the proper testing requirements needed to accurately confirm the operation of the radar unit."

- [10] The appellant further submits that the last question and answer demonstrates that Constable Thorne could not provide an explanation "when asked if he could state what the manual says about the testing process."
- [11] The appellant's counsel submitted that the officer's answers in response to these questions on cross-examination seemed to point to him being unsure about the test in general and he was not able to elaborate further about the testing process as stated in the manual.
- [12] The appellant argued that there must be a proper foundation for receiving radar evidence, including evidence of testing the radar unit's accuracy with a description of the tests undertaken by a qualified operator.
- [13] Counsel for the appellant submits that Constable Thorne did not provide a detailed explanation of the testing requirements set out in the radar unit's manual, and the Judicial Justice misapprehended the evidence, which counsel said fell short of the required foundation to establish the accuracy and reliability of such evidence. The appellant suggested that the equipment in question, namely the Genesis VP directional handheld radar unit, cannot be confirmed as properly being used without having an accurate description of the requirements stated in the radar unit's manual.
- [14] The respondent Crown opposes the order sought by the appellant. The respondent submits that extensive evidence about the details of radar testing are not required in order to admit radar readings into evidence and there is no reference to any such requirement in the decisions of *R. v. Geraghty* or *R. v. Khadikin*.
- [15] Counsel for the respondent referred me to the recent decision of this court in *R. v. Drewcock*, 2020 BCSC 2054, a decision of my brother Judge Tindale. In that case, the appellant made a similar argument, that the Judicial Justice did not have a proper foundation to admit radar evidence, because there was no evidence as to when or by whom the radar unit was tested and what tests were carried out.
- [16] In that case, the only evidence of the officer was the following:

The radar unit is a Stalker Dual DSR. I'm training qualified to operate this radar instrument and have been since the spring of 2003. It was tested according to manufacturers, before my shift, and I was satisfied it could accurately measure speeds of moving vehicles.

- [17] Justice Tindale reviewed the applicable case law, including the decisions of *Geraghty* and *Khadikin* that were referred to in this case, and concluded that:

... given the totality of the evidence, it was open to the Judicial Justice of the Peace to draw the inference that Constable Witwicki personally tested the radar unit prior to his shift. Constable Witwicki also said that he was satisfied that the radar unit "could accurately measure speeds of moving vehicles".

- [18] Justice Tindale said that he was not satisfied that the Judicial Justice misapprehended the evidence of the constable and dismissed the appeal.
- [19] The factual background of this appeal is not in dispute. The only issue on this appeal is did the judicial justice of the peace misapprehend the evidence of Constable Thorne in allowing the admission of the radar evidence without proper foundation to ensure accuracy and reliability of such evidence.
- [20] Essentially, as I understand his submission, the appellant argues that the Crown must adduce evidence of testing the radar unit's accuracy and that such evidence necessarily requires an accurate description of the requirements stated in the radar unit's manual. Counsel for the appellant submits that Constable Thorne's testimony lacks the specifics required to support an accurate description of the test stated in the manual.
- [21] The standard for appellate intervention in a finding of fact is that there must be a palpable and overriding error: *R. v. Swales*, 2014 BCCA 350 at paras. 46-50.
- [22] The appellant asserts that the Judicial Justice misapprehended the evidence and therefore erred in law and thus the standard of review in this case is whether a verdict may be set aside on the basis of unreasonableness or lack of evidence. The appeal court must determine on the whole of the evidence whether the verdict is one that the trial court could reasonably have rendered: *R. v. Krahn* 2014 BCSC 235 at para. 10.
- [23] The respondent submitted that this court must keep in mind that hearings pursuant to the Offence Act are meant to be simple, inexpensive, and balanced, as described in the decision of *R. v. Cooper*, 2005 BCCA 256, para. 27.
- [24] Both counsel directed me to the two key cases that set out the law in regard to the admission of radar evidence, the decisions of *Geraghty* and *Khadikin*.
- [25] At p. 210 of *Geraghty*, the court sets out the requirements in cases of radar monitoring for speed as follows:
- 1) that the particular equipment used was properly operated by a qualified person;
 - 2) that the equipment function and accuracy were tested with whatever tests were required or suggested for it;
 - 3) that the tests or procedures indicated the equipment was operating properly; and
 - 4) that those tests indicated that the equipment was capable of accurately registering the speed of an alleged offending vehicle.
- [26] In *Khadikin*, Mr. Justice McEwan reviewed the applicable case law with regard to the admission of radar evidence, including *Geraghty*, and said at paras. 13 to 15:

- [13] Having reviewed all the case law provided by the appellant and by the Crown, including that to which I have not specifically referred, I am of the view that it was open to the presiding Justice of the Peace to find that the Crown had made out its case. He had before him:
- (a) evidence that the officer was a qualified radar operator;
 - (b) evidence that he was operating a radar unit; and
 - (c) evidence that the unit was tested and found to be working correctly.
- [14] The Crown must establish that the operator was qualified as a foundation for any inference that he or she reliably performed tests verifying the accuracy of the equipment. There must be evidence of testing before such evidence will be received because radar units are not the sort of simple mechanical devices the court will presume to be accurate.
- [15] The assertion of qualification, together with a description of the tests undertaken, is a sufficient foundation for the reception of the evidence. I do not think the case law suggests that the court should necessarily presume that as between models of radar units there are distinctions requiring specific training or experience, such that training or experience on the very model employed becomes an element of the offence. Unchallenged, the assertion of qualification and experience on the type of device used (i.e. radar), coupled with evidence that the equipment was tested and working, will, if accepted, found a conviction. In this case there was, as well, the added corroboration of the witness' direct observation of speed.
- [27] Neither of these cases suggest that extensive evidence about the details of radar testing is required in order to provide the proper foundation for the admission of radar evidence. In Geraghty, the court said that evidence of testing of the radar unit with whatever tests were required or suggested for it, and Khadikin simply referred to the assertion of qualification together with a description of the tests undertaken as a sufficient foundation for the reception of evidence.
- [28] In his reasons in this case, the Judicial Justice, at para. 6, stated the following:
- [6] The officer estimated the speed at 65 kilometres an hour and therefore took a reading with the Genesis radar that he was working with and had tested and got a confirming or corroborating reading of 70 kilometres per hour. . . .
- [29] At para. 7, he went on to say:
- [7] In cross-examination, he confirmed that he had tested the device that morning, following what he understood to be the requirements in the manual, which is an internal test, which will then give a pass reading he said. And then using the external test, which is the -- he called it a K-band tuning fork, which I think he said is supposed to then read 100. It had done that and -- or he was satisfied that it was working and capable of measuring speeds of moving vehicles.

- [30] At para. 9 of his reasons, the Judicial Justice rejected the submission of defence counsel that the evidence of the testing of the radar unit was insufficient and referred to the decision in Khadikin, and specifically that it was open to him to accept the radar evidence, provided that he had evidence that:
- [9] . . . the officer was qualified to operate the radar . . . that the officer was operating the radar; and . . . that the unit had been tested and was working properly.
- [31] Unlike the facts in Drewcock, the appellant argued that the evidence of Constable Thorne regarding the testing was challenged on cross-examination during the hearing on February 4, 2022, and counsel invited me to infer from Constable Thorne's evidence that the officer was uncertain about the testing requirements for the radar unit as set out in the manual, and his failure to provide further details or explanation results in a lack of a proper foundation for the admission of the radar evidence.
- [32] I do not agree with the submission of appellant's counsel that this is a natural inference to be drawn from the evidence of Constable Thorne on cross-examination. When his evidence is taken as a whole, both in direct examination and cross-examination, it was open to the Judicial Justice to find that Constable Thorne had tested the radar unit "according to the manufacturer's specification internally and externally and the unit was found to be in working order."
- [33] When this evidence was challenged on cross-examination, Constable Thorne confirmed his familiarity with the appropriate testing required for that unit, and his familiarity with the manual for that unit. When asked, he described the specific testing that he undertook, namely the internal testing and the external testing with a tuning fork. When asked:
- Q . . . what does the manual say is the appropriate test to be carried out before that unit is fit to measure the speeds of the vehicles?

Constable Thorne replied

A To be tested internally and if the radar unit shows that it's a -- it's a pass internally and the externally with the -- with the K-band tuning fork and the reading will say, "100".

- [34] The appellant suggests that despite that evidence, Constable Thorne's evidence in response to the next question:

Q . . . are you able to say what the manual says about the testing process?

-- which was:

A I'm just -- that's -- that's what I know.

-- is a clear indication that he was unsure about the proper testing requirements needed to accurately confirm the operation of the radar unit. This submission ignores the other evidence of Constable Thorne about the proper testing requirements that was given in direct examination and his earlier answers to questions in cross-examination.

- [35] In my view, given the totality of the evidence, it was open to the Judicial Justice to accept the evidence of Constable Thorne and find that the officer was qualified to operate the radar, that the officer was operating the radar, and that the unit had been tested and was working properly.
- [36] Neither Geraghty nor Khadikin set out any requirement that the evidence include an accurate description of the requirements stated in the radar unit manual for the purpose of establishing whatever tests were required or suggested for it. Constable Thorne's evidence was that he tested the radar unit according to the manufacturer's specifications and found it to be working properly. That aspect of his evidence was not challenged on cross-examination. Under cross-examination, Constable Thorne gave a more detailed description of the testing that he undertook and also testified as to his familiarity with the radar unit's manual. Constable Thorne was not challenged with respect to whether he conducted the test incorrectly or in accordance with the unit's manual.
- [37] I find that this case is on all fours with the decision in Drewcock, and I am not persuaded that this case is distinguishable from Drewcock on the grounds that the evidence of the officer in that case was unchallenged. In Drewcock, the appellant advanced a similar argument that the Judicial Justice had misapprehended the evidence because the constable had not given evidence that he had personally tested the radar unit before his shift.
- [38] The court in Drewcock found that, on the totality of the evidence, it was open to the Judicial Justice to infer that the constable was the one who personally tested the radar unit prior to the start of his shift. In this case, the evidence of Constable Thorne at the hearing on February 4, 2022, was considerably more detailed than was the case in Drewcock, and it was open to the Judicial Justice to find that this evidence provided sufficient foundation for the admission of the radar evidence.
- [39] I am unable to find that the Judicial Justice misapprehended the evidence of Constable Thorne. I am also not persuaded that the Judicial Justice misinterpreted the case of Khadikin or chose not to apply binding case law in Geraghty. At no point in his reasons did the judicial justice decline to apply Geraghty, and I am unable to infer from his reasons that he did in fact do so. It is clear that he applied the law as set out in Khadikin, a later decision of the B.C. Supreme Court, and a correct statement of law. I am not persuaded that the Judicial Justice erred in doing so.
- [40] I am unable to conclude that the Judicial Justice erred in law by misapprehending the standard of evidence required to prove the testing and accuracy of the radar unit, resulting in the admission of radar evidence without proper foundation.

[41] I must therefore dismiss the appellant's appeal.

"The Honourable Madam Justice Church"

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