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# Evidence -- Hearsay -- Admissibility of Evidence of Speeding Violations Obtained by Use of Radar

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graphs of the crime if no purpose would be served other than to excite the emotions of the jury.<sup>27</sup> As a parallel to this commendable limitation on the use of photographs, it would be desirable to limit the permissible inference which can be drawn from the brutality of the killing to malice rather than premeditation and deliberation, with the exceptions stated previously. When the fact of brutality is brought to the attention of the jury without specific instructions concerning its consideration, the jury is left with absolute freedom to give whatever weight, emotional or otherwise, to the brutal manner of the killing. Thus, it is very possible that the brutality connected with the actual killing is affecting the juries of North Carolina, as well as other jurisdictions, in a very persuasive manner on the issue of the premeditation and deliberation of the accused. Such reasoning could be very injurious to justice in a particular case, and it would appear that the dicta of the North Carolina Supreme Court would tend to condone such a result, if reached.<sup>28</sup>

The law should deal with the shrewd, the calm, the butcher, and the madman in the same manner. By no other procedure can it truly adhere to those rules of reason which we call our law. The trial judge can, with more discriminatory instructions, better guide the jury in rendering a verdict which is not tainted with uncertainty as to the true state of the law, and that is more in accordance with legally sanctioned interpretations of premeditation and deliberation. By so doing he will aid in limiting the use by the jury of emotions which have arisen because of the brutal manner of the killing.

WILLIAM C. BREWER, JR.

#### **Evidence—Hearsay—Admissibility of Evidence of Speeding Violations Obtained by Use of Radar**

Increasing use of the electronic speed meter, or "whammy"<sup>1</sup> as it is more generally known, by law enforcing agencies in an effort to

<sup>27</sup> STANSBURY, NORTH CAROLINA EVIDENCE, § 118 (1947).

<sup>28</sup> State v. Stanley, 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947).

<sup>1</sup>The electronic radar speed meter, or "whammy" as it is generally known, is one of the latest mechanisms by which state and local officials are combating highway speed violations. The operation of the instrument requires the use of two automobiles placed approximately one-quarter of a mile apart along a highway. Each automobile is equipped with a radio so that the radar-patrol car team is able to communicate with one another. One automobile contains a radar transmitter, receiver, and recording dial. The transmitter casts an electronic beam across the highway and when a vehicle passes through the beam, energy is reflected to the receiver, converted into "miles per hour," recorded on a tape, and indicated on a dial. If the speed is excessive, the "interceptor car," or other member of the team, is contacted by radio, given the speed and description of the automobile, and the violator is arrested by the interceptor. See the discussion in *People v. Offerman*, 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).

control excessive highway speeds has raised the issue of admissibility in evidence of the findings of such devices. The primary objection to such evidence has been that the radar speed meter, as a scientific apparatus, has never been judicially recognized as being a reliable instrument for recording the speed of a vehicle on the highway.<sup>2</sup> Since it is a scientific apparatus which has not been so recognized, certain facts must be shown before the evidence can be admitted.<sup>3</sup> It must be shown (1) that the apparatus is scientifically sound as an instrument for measuring speed, (2) that the particular piece of equipment used is of a standard make and was in reliable condition when used, and (3) that the testifying witnesses who used it are qualified in its use.<sup>4</sup>

In one<sup>5</sup> of the four reported cases concerning the use of radar evidence, there was no objection to the introduction of evidence of the expert, the testing<sup>6</sup> of the device, or the qualifications of the operators, and a conviction was sustained based on radar evidence only. In another case,<sup>7</sup> the evidence of the expert and radar-patrol car team as to the testing of the instrument was admitted over objection, and the conviction of the lower court was sustained based on radar evidence only. Another case<sup>8</sup> held that the evidence of the testing of the speed meter by the radar-patrol car team was inadmissible as hearsay and reversed a conviction on that and other grounds. The fourth case<sup>9</sup> was decided on other grounds.

A careful comparison of *People v. Offerman*,<sup>10</sup> which held such evidence inadmissible as hearsay, with *State v. Dantonio*,<sup>11</sup> which admitted the evidence over a hearsay objection, would indicate that the reason for the variance in the holdings of the courts was due to the manner in which the evidence was presented.

<sup>2</sup> *State v. Moffitt*, 100 A. 2d 778 (Del. Super Ct. 1953).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> The testing of the apparatus each time it is set up consists of "zeroing," or calibrating the electrical and mechanical equipment so that each piece of equipment is set exactly alike and records the speed of oncoming cars alike. After the power supply is connected to the radar equipment and the tubes are heated the tests begin. Test cars are run through the operating area at varying speeds and on each run the operator of the test car notes the speed of the car as registered by his speedometer. At the same time the radar operator notes the speed of the test car as registered on his radar speed dial. Adjustments are made in the radar device until each instrument records exactly the same speed on several given runs. When all devices record the same speed, radar operations commence. See discussion in *State v. Dantonio*, 31 N. J. Super 105, 105 A. 2d 918, 920 (1954).

<sup>7</sup> *State v. Dantonio*, 31 N. J. Super. 105, 105 A. 2d 918 (1954).

<sup>8</sup> *People v. Offerman*, 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).

<sup>9</sup> *People of City of Buffalo v. Beck*, 130 N. Y. S. 2d 354 (Sup. Ct. 1954).

The trial court took judicial notice of the operation and accuracy of the radar device and was reversed for that reason.

<sup>10</sup> 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).

<sup>11</sup> 31 N. J. Super. 105, 105 A. 2d 918 (1954).

In the *Offerman* case, Officer *A* of the testing team testified that several times earlier, on the day of the arrest, the test car had been driven by him through the radar area and at these times he had reported by radio to Officer *B*, who was operating the radar set the speed of the test car as recorded by its speedometer. He also testified over objection that the speed of the test car agreed with the reading on the radar dial as radioed to him by Officer *B*. Then Officer *B* testified that he observed the radar dial and found that in each instance the reading of the dial agreed with the reading of the speedometer of the test car as reported by Officer *A*. Counsel for the defendant argued that the testimony of each was hearsay as Officer *B* could not have known the reading on the speedometer of the car except as told to him by Officer *A*, and that Officer *A* could not have known of the reading on the radar dial except as told to him by Officer *B*. The court stated that it seemed clear that each officer, in giving his testimony, relied upon what the other had told him by radio; therefore, it was hearsay.<sup>12</sup>

Deft handling of the witnesses in the *Dantonio* case permitted the court to reject the contention that the evidence was hearsay. The test car operator testified that he passed through the operating zone several times at certain varying speeds, and the radar operator testified that he observed the test car and recorded the speed on each run. The test car operator thereby established the fact that his car passed through the operating zone at various speeds, while the radar operator established the fact that at the same time and place a car, identified as the test car, passed through the operating area, the same speeds being indicated on the radar speed dial. Thus each has testified as to independent facts, and little reference, if any, need be made to the radio communication between the two witnesses. Any reference to the conversation would be incidental to the independently established facts.

Even as presented in the *Offerman* case the evidence could very well have been admitted, in spite of the hearsay objection, as the conversations were not necessary to prove the facts intended to be proved. The hearsay rule excludes extrajudicial utterances only when offered as evidence of the truth of the matter asserted.<sup>13</sup> Evidence of oral statements of others, which would otherwise be termed hearsay, can be used to explain or throw light on the subsequent actions or conduct of the person to whom they were made.<sup>14</sup> It could have been con-

<sup>12</sup> *People v. Offerman*, 204 Misc. 769, 125 N. Y. S. 2d 179, 182 (Sup. Ct. 1953).

<sup>13</sup> *State v. Black*, 230 N. C. 448, 43 S. E. 2d 443 (1949).

<sup>14</sup> *Terry v. United States*, 51 F. 2d 49 (4th Cir. 1931).

tended in the *Offerman* case that the evidence of the conversation between the two officers was necessary to show how the tests were performed, and not to prove that the same speeds were registered by each of the two devices. The witnesses' independent testimony as to what they actually observed could be used to prove the speeds as indicated by the speed meter and the speedometer.

North Carolina has still another basis upon which such evidence could be admitted. The peculiar rule in North Carolina which permits a corroborating witness to relate past conversations with the first testifying witness would allow this type of evidence, if used for corroboration only and not as evidence of the truth of the matter asserted.<sup>15</sup> Each officer could "corroborate" the other as to the conversation between the two. As this peculiar rule is already overworked and has been criticized,<sup>16</sup> this method of getting the evidence before the court is not recommended.

While there have been no reported decisions in North Carolina concerning the admissibility of evidence obtained by use of the "whammy," there is no reason why such evidence should not be admitted if it is properly presented. To prevent any possible contention that the evidence of the radar-patrol car team is hearsay, it is suggested that the procedure by which the evidence was presented in the *Dantonio* case be followed.

MICHAEL P. McLEOD.

### Federal Jurisdiction—The Sovereign Immunity Doctrine—Actions Against Federal Officials—Equitable Relief and Mandamus

The doctrine of the sovereign's immunity from suit has been a part of our jurisprudence at least since the days of Edward I of England.<sup>1</sup> It is elementary that the sovereign is not amenable to suit in his courts unless he has consented to be sued. Amendment XI of the Constitution of the United States expressly grants to states in the union immunity from suits brought in the federal courts by citizens of other states or by citizens or subjects of any foreign state;<sup>2</sup> however, the doctrine of the immunity of the federal government from suit is judge-made.<sup>3</sup>

<sup>15</sup> *Burnett v. Wilmington, New Bern and Norfolk Ry.*, 120 N. C. 517, 26 S. E. 819 (1896).

<sup>16</sup> *State v. Parrish*, 79 N. C. 610 (1878).

<sup>1</sup> *United States v. Lee*, 106 U. S. 196, 205 (1882).

<sup>2</sup> By judicial construction, the Amendment extends to suits against a state brought by a citizen of that state. *Hans v. Louisiana*, 134 U. S. 1 (1890). Furthermore, foreign states cannot sue one of the United States without its consent. *Principality of Monaco v. Mississippi*, 292 U. S. 313 (1934).

<sup>3</sup> Justice Frankfurter has said, "As to the states, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United