

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 10/17/2019 8:59 AM

2 Opinion Number: _____

3 Filing Date: October 17, 2019



Mark Reynolds

4 **NO. A-1-CA-36856**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JUAN M. GARCIA, JR.,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

11 **Drew D. Tatum, District Judge**

12 Hector H. Balderas, Attorney General
13 Maris Veidemanis, Assistant Attorney General
14 Santa Fe, NM

15 for Appellee

16 Lindsey Law Firm, LLC
17 Daniel R. Lindsey
18 Clovis, NM

19 for Appellant

OPINION

DUFFY, Judge.

{1} Defendant appeals his conviction for speeding, contrary to NMSA 1978, Section 66-7-301 (2015), arguing that the State failed to present an adequate scientific foundation to establish the reliability of the radar technology used to determine his speed. We conclude that the district court did not abuse its discretion by admitting evidence of Defendant's speed because radar technology has generally been accepted as reliable and the State established a proper foundation for the accuracy of the particular radar unit used in this case. We therefore affirm.

BACKGROUND

{2} Officer Michael Smith with the New Mexico State Police was on patrol in his police vehicle when he observed Defendant's vehicle traveling at "a great rate of speed." Officer Smith measured Defendant's speed twice using a radar device, and both readings showed that Defendant was traveling at seventy-eight miles per hour in a posted sixty-five mile-per-hour speed zone. Officer Smith stopped and cited Defendant for speeding. Following his trial and conviction in magistrate court, Defendant appealed to the district court for a bench trial de novo. During that trial, Defendant objected to Officer Smith's testimony about the radar device, arguing that "radar has not been determined to be reliable or valid in New Mexico" and that the State is required to present a scientific foundation to prove it as such. Defendant

1 contended Officer Smith was not qualified as an expert and therefore could not lay
2 the proper foundation for the radar evidence. The district court overruled
3 Defendant's objection and admitted the radar speed evidence. Despite the
4 opportunity, Defendant declined to cross-examine Officer Smith on his use of the
5 radar device and did not present evidence of the device's unreliability. The district
6 court found Defendant guilty of speeding. Defendant appeals.

7 **DISCUSSION**

8 {3} We are asked to decide whether the district court erred in admitting radar
9 evidence of the speed of Defendant's vehicle without expert testimony. *See*
10 *generally State v. Torres*, 1999-NMSC-010, ¶ 26, 127 N.M. 20, 976 P.2d 20 (stating
11 that "in New Mexico, evidentiary reliability is the hallmark for the admissibility of
12 scientific knowledge"). Defendant argues that radar speed measurements are
13 scientific evidence and that an expert is necessary to establish the reliability of radar
14 technology before evidence of speed obtained by the use of a radar may be admitted
15 at trial.¹ The State responds that expert testimony is unnecessary, given that radar

¹Defendant argues on appeal that the device used to measure his speed was "unknown." However, both parties referred to the device as a radar to the district court, as did Officer Smith, and Officer Smith explained that he calibrated the radar using a tuning fork. *See, e.g., State v. Kramer*, 299 N.W.2d 882, 885 (Wis. 1981) (acknowledging that the use of tuning forks is a well-recognized method for determining the accuracy of the radar device). We therefore reject Defendant's argument that the record failed to identify the speed detection device used in this case.

1 technology is simple, commonly understood, and has long been recognized in many
2 jurisdictions as reliable to accurately measure speed.

3 {4} “[T]he rule in this [s]tate has consistently been that the admission of expert
4 testimony or other scientific evidence is peculiarly within the sound discretion of the
5 trial court and will not be reversed absent a showing of abuse of that discretion.”
6 *State v. Fuentes*, 2010-NMCA-027, ¶ 22, 147 N.M. 761, 228 P.3d 1181 (internal
7 quotation marks and citation omitted). When scientific evidence is presented at trial,
8 New Mexico trial courts act as gatekeepers to ensure “that any and all scientific
9 testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell*
10 *Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *State v. Alberico*, 1993-NMSC-047,
11 ¶ 51, 116 N.M. 156, 861 P.2d 192 (adopting *Daubert* factors as a non-exclusive
12 means to assess the validity and reliability of scientific testimony). New Mexico
13 courts traditionally evaluate reliability by considering the factors set forth in *Daubert*
14 and adopted in New Mexico by *Alberico*. See *Torres*, 1999-NMSC-010, ¶ 25. While
15 the “*Alberico-Daubert* standard is not limited to novel scientific theories[,]” *id.* ¶ 29,
16 we have affirmed district courts’ discretionary authority to avoid unnecessary
17 reliability proceedings in limited circumstances where the type of science has
18 generally been accepted. *Fuentes*, 2010-NMCA-027, ¶¶ 25-26 (affirming the district
19 court’s ruling that “the science underlying the firearm forensic and tool mark

1 analysis techniques . . . was reliable based solely on its finding that this type of
2 science has generally been accepted”).

3 {5} In the case of radar technology, courts across the United States have for over
4 six decades recognized “the general reliability of the radar speedometer as a device
5 for measuring the speed of a moving vehicle, [such] that it will no longer be
6 necessary to require expert testimony in each case as to the nature, function or
7 scientific principles underlying it[.]” *People v. Magri*, 147 N.E.2d 728, 730 (N.Y.
8 1958); *see, e.g., Everight v. City of Little Rock*, 326 S.W.2d 796, 797 (Ark. 1959)
9 (“We are of the opinion that the usefulness of radar equipment for testing speed of
10 vehicles has now become so well established that the testimony of an expert to prove
11 the reliability of radar in this respect is not necessary.”); *Robles v. State*, 705 N.E.2d
12 183, 186 (Ind. Ct. App. 1998) (“It is unnecessary for the [s]tate to present expert
13 testimony to explain the proper operation, reliability or maintenance of the [radar]
14 unit.”); *State v. Dantonio*, 115 A.2d 35, 39-40 (N.J. 1955) (commenting that “[s]ince
15 World War II members of the public have become generally aware of the widespread
16 use of radar methods in detecting the presence of objects and their distance and
17 speed; and while they may not fully understand their intricacies they do not question
18 their general accuracy and effectiveness”); *see also* Thomas J. Goger, Annotation,
19 *Proof, by Radar or Other Mechanical or Electronic Devices, of Violation of Speed*
20 *Regulations*, 47 A.L.R.3d 822 § 2[a] (1973) (providing a compilation of reported

1 cases relating to the admissibility and sufficiency of evidence obtained by speed
2 radar devices and stating, “[a]lthough the early cases involving radar evidence
3 required expert testimony as to the nature and function of a radar speedmeter and the
4 scientific principles upon which it was based, it is now generally agreed that the
5 reliability of radar is a proper subject for judicial notice” (footnote omitted)).

6 {6} We have said that when the reliability of the science in question has long been
7 accepted, the burden is on the defendant to make an “affirmative showing that there
8 is some reason to doubt the reliability of that science before a district court is
9 obligated to require a reliability hearing.” *Fuentes*, 2010-NMCA-027, ¶ 28; *see State*
10 *v. Montoya*, 2016-NMCA-079, ¶ 16, 382 P.3d 948 (“Given the abundance of
11 appellate case law endorsing the reliability of breath alcohol testing generally, a trial
12 court is justified in presuming such reliability in the absence of an articulated
13 challenge.”). Defendant does not dispute that radar technology has generally been
14 accepted as reliable, nor does he argue that there is any reason to doubt its reliability
15 here. Because Defendant articulated no challenge, and given the longstanding,
16 widely recognized general acceptance and understanding of radar technology, we
17 conclude that the district court did not abuse its discretion in finding that radar
18 evidence was admissible without requiring expert testimony explaining the
19 principles on which it is founded. *See Fuentes*, 2010-NMCA-027, ¶ 26 (holding that
20 “the district court appropriately exercised its discretionary authority in finding that

1 the reliability of the science in question could properly be taken for granted [because
2 t]he science underlying the firearm forensics and tool mark analysis
3 techniques . . . has long been held reliable in New Mexico”).


4 {7} Though radar is generally accepted as reliable, the State is still required to lay
5 a proper foundation regarding the accuracy of the particular radar unit before
6 evidence of its measurements may be admitted at trial. *See State v. Martinez*, 2007-
7 NMSC-025, ¶ 9, 141 N.M. 713, 160 P.3d 894 (holding that the state, to satisfy the
8 foundational requirements for the admission of a breath test, must make a “threshold
9 showing that, at the time of the test, the machine was properly calibrated and that it
10 was functioning properly”). The state may introduce testimony from the operating
11 law enforcement officer to show that the radar unit was calibrated and functioning
12 properly at the time it measured the speed of a defendant’s vehicle. *See id.*; *see also*
13 *Robles*, 705 N.E.2d at 186 (“Before the results of a radar test may be admitted into
14 evidence, the [s]tate must prove that the equipment was properly operated and
15 regularly tested.”); *State v. Calvert*, 682 S.W.2d 474, 477 (Mo. 1984) (en banc)
16 (“The proponent of radar evidence must prove the unit was operating accurately at
17 the time of its use relative to the violation to sustain a speeding conviction.”);
18 *Cromer v. State*, 374 S.W.2d 884, 887 (Tex. Crim. App. 1964) (holding that the
19 testimony of the patrolmen who were trained to operate and test the device was
20 sufficient for the jury to find the appellant was speeding).

1 {8} In this case, the State satisfied the foundational requirements through Officer
2 Smith's testimony. Officer Smith testified that he had sixteen years of experience
3 with the New Mexico State Police and that he was knowledgeable regarding the use
4 and proper functioning of the radar equipment. He testified extensively about the
5 radar system used to determine that Defendant was speeding, including the setup of
6 the radar system, the dual antennas for sensing speed in front of and behind the police
7 car, and how the system can be used in moving or stationary mode. Officer Smith
8 described how he used a tuning fork to make sure the equipment was working
9 properly and stated that he conducts tests before, during, and after every shift to
10 ensure the "speed measuring device is operational as required by our department
11 policies." Officer Smith further stated that on the day of the incident, when he
12 observed Defendant's vehicle, he placed the radar device in moving mode and used
13 the front antenna to determine that Defendant was driving at about seventy-eight
14 miles per hour. After Defendant passed him, Officer Smith activated the rear
15 antenna, also in moving mode, and confirmed Defendant was driving seventy-eight
16 miles per hour. He also explained there were no other vehicles around at the time,
17 and as such, he was able to ensure he was testing the correct vehicle. This testimony
18 was sufficient to establish a proper foundation for the admission of the radar's speed
19 measurement. For the reasons set forth above, we perceive no abuse of discretion by
20 the district court in allowing the State's evidence of Defendant's speed.

1 **CONCLUSION**

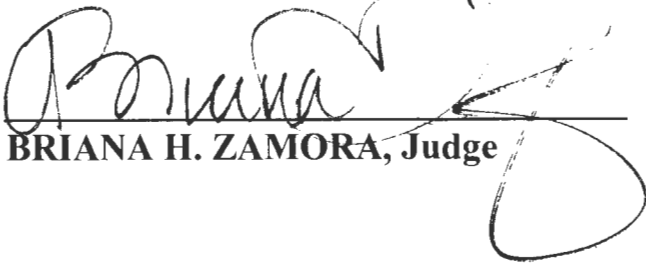
2 {9} For the foregoing reasons, we affirm Defendant's speeding conviction.

3 {10} **IT IS SO ORDERED.**

4 
5 **MEGAN P. DUFFY, Judge**

6 **WE CONCUR:**

7 
8 **JENNIFER L. ATTREP, Judge**

9 
10 **BRIANA H. ZAMORA, Judge**