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Richmond, Va.

Record No. 7435

In the Supreme Court of Appeals of Virginia at Richmond

HENRY ARTHUR SWEENY

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF GREENE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7435

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of March, 1970.

HENRY ARTHUR SWEENY, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Greene County
Lyttelton Waddell, Judge

Upon the petition of Henry Arthur Sweeny a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Greene County on the 5th day of June, 1969, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

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CERTIFICATE OF RADAR ACCURACY TEST

Date 12/17/68

County—Greene; Route No. 29; Location—2 mi. S. R-ville Direction—N; Time Started—7:40 p.; Time Ended—9:45 p. Speed Limit—60; Radar No.— Meter No.— Above Pavement—4 Ft.; Distance From Pavement—6 Ft. Set up by—709 & 776

Certification of Radar Accuracy Test by Calibrated Speedometer

Time—7:40; Car No. 67-215; Speedometer Reading—75 Test Conducted By—L. R. Mayhew; Badge No.—776 Radar Reading—75; Test Conducted By—R. C. Byram Badge No. 709
Time—7:42; Car No. 67-215; Speedometer Reading—65 Test Conducted By—L. R. Mayhew; Badge No. 776 Radar Reading—65; Test Conducted By—R. C. Byram; Badge No. 709
Time—7:45; Car No. 67-215; Speedometer Reading—55 Test Conducted By—L. R. Mayhew; Badge No. 776; Radar Reading—55; Test Conducted By—R. C. Byram; Badge No. 709
Time—9:40; Car No. 67-215; Speedometer Reading—75; Test Conducted By—L. R. Mayhew; Badge No. 776; Radar Reading—75; Test Conducted By—R. C. Byram; Badge No. 709
Time—9:42; Car No. 67-215; Speedometer Reading—65; Test Conducted By—L. R. Mayhew; Badge No. 776; Radar Reading—65 Test Conducted By—R. C. Byram; Badge No. 709
Time—9:45; Car No. 67-215; Speedometer Reading—55; Test Conducted By—L. R. Mayhew; Badge No. 776; Radar Reading—55; Test Conducted By—R. C. Byram; Badge No. 709

We, the undersigned, certify that we conducted the accuracy test by calibrated speedometer of the radio microwave

(radar) device shown above and the information herein is a complete and accurate record of the results of said test.

Larry R. Mayhew; Date 4/16/69
R. C. Byram; Date 4/16/69

Attest:
I certify that the above is an accurate record of the tests conducted.
Given under my hand this 16 day of April, 1969.
Tpr. L. R. Mayhew Badge No. 776
State of Virginia
County of Greene
Subscribed and sworn to before me this 16th day of April, 1969.
Mory F. Melone Notary Public
My commission expires Mar. 25, 1972

page 6 } Virginia: In the Circuit Court of Greene County

* * * * *

June 5, 1969

* * * * *

This day came the Attorney for the Commonwealth and the accused appeared in Court with his Attorney Paul Lee Sweeny and plead not guilty to the warrant, and with consent of the accused and the concurrence of the Attorney for the Commonwealth and the Court *enetered* of record, the Court proceeded to hear and determine this cause without the intervention of a jury and the evidence being fully *hear,* the Court doth find the accused Henry Arthur Sweeny, guilty of speeding 75/60 zone, as charged in the warrant and fix his fine at $25.00 and costs.

A stay of execution of the sentence is hereby granted for 60 days, for the *pruose* of the defendant to petition the Supreme Court of Appeals for a writ.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Comes now the defendant, Henry A. Sweeny, and gives notice pursuant to Rule 5:1, subparagraph 4, of the Rules of the Supreme Court of Appeals of Virginia, that he will appeal the judgment of conviction and fine entered herein against him on June 5, 1969, and apply to the Supreme Court of Appeals of Virginia for a Writ of Error.

ASSIGNMENT OF ERRORS

Pursuant to the said Rule 5:1, subparagraph 4, of the Supreme Court of Appeals of Virginia, the defendant Henry A. Sweeny assigns the following errors of the Trial Court:

1. The finding and judgment of the Trial Court convicting the defendant of operating a motor vehicle at 75 miles per hour in a 60 mile zone, and fining the defendant $25.00 and costs, is contrary to the evidence and is without evidence to support it.

2. The finding and judgment of the Trial Court convicting defendant as aforesaid is without support in law and is contrary to law.

3. The Trial Court erred in admitting the Department of State Police Certificate of Radar Accuracy Test signed by Troopers Byram and Mayhew in evidence over the objections and exception of defendant.

4. The Trial Court erred in refusing to allow defendant's counsel to cross-examine Trooper Byram as to the time, type and manner of the tests allegedly conducted to determine the accuracy of the radar speedmeter, beyond permitting the witness to testify that he made no test of the accuracy of the automobile speedometer used to test the radar speedmeter, and that he had no personal knowledge of the accuracy of the speedometer, and that the witness did not communicate in any way with the other Trooper during the course of the radar speedmeter test.

page 8 } 5. The Trial Court erred in refusing to grant defendant's motion to strike the Commonwealth's evidence, made at the close of all the evidence, on the grounds that as a matter of law the evidence was insufficient to support a conviction of the defendant for the reasons the ac-

curacy of the radar speedmeter had not been proved; the accuracy of the automobile speedometer used in the test of the radar speedmeter had not been proved; the certificate improperly received in evidence was not conclusive of the recitals contained therein, and did not prove the alleged offense involved herein for the reason it was dated April 16, 1969, nearly four months after the alleged offense occurred, was not properly executed and did not comply with the statute in that it did not state the time of the test, the type or manner of testing nor the results of the test; no evidence of any kind was adduced to prove the accuracy of the automobile speedometer used in the radar speedmeter test; and the evidence adduced was insufficient to establish speed or to identify adduced was insufficient to establish speed or to identify defendant's automobile as the one observed by Trooper Byram when he read the radar speedmeter in the dark of night from the side of the highway.

Henry A. Sweeny

Henry A. Sweeny, By Counsel

* * * * *

Filed July 21, 1969

R. W. Bickens, Clerk.

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NARRATIVE STATEMENT OF THE EVIDENCE

Commonwealth's Evidence:

The testimony of Trooper R. C. Byram, only witness for the Commonwealth, showed that on the night of December 17, 1968, at or about 8:15 P.M., well after dark, he was sitting in his cruiser between the north and south bound lanes of Route 29, in Greene County, about two miles south of Ruckersville, when an automobile proceeding north passed through his radar beam causing the speedmeter to register 75 miles per hour. The radar apparatus was set up on a tripod about six feet to the west of the north bound pavement. Although the witness and Trooper Mayhew were working together that night, the witness did not recall whether he was alone at the scene at the time or not. The witness further testified that he proceeded alone into the highway in his cruiser, leaving his radar equipment unattended at the scene, and some dis-

tance north on Route 29, he pulled into the parking lot of a roadside place known as the corner store. The Trooper further testified that when he pulled out from the radar location behind the defendant no one was between him and the defendant's car, and that if it went out of sight it was only momentarily. After pulling into the corner store parking lot, the Trooper came upon the defendant and issued a summons to him.

The Trooper did not testify to any estimated speed of the defendant and the only evidence as to speed of the automobile which he observed passing through the radar zone was that shown by the radar speedmeter.

The Commonwealth offered in evidence a Department of State Police Certificate of Radar Accuracy Test signed by Trooper Byram and Trooper Mayhew. The said certificate was objected to on behalf of the defendant because opposite the signature of the two Troopers it bore the date "4-16-69", whereas the alleged offense occurred on December 17, 1968; subsequent testimony by the Trooper revealed page 10 } that the date 4-16-69 was the date on which the Troopers acknowledged their signature before a Notary Public and that the actual test was made on 12-17-68 as shown on the certificate (upper right corner); and the said certificate was further objected to in behalf of the defendant because it did not show in what manner the speedometer of the test car was "calibrated" nor the results of such "calibration". On cross examination Trooper Byram testified that he made no test of the accuracy of the speedometer used to test the radar speedmeter, and had no personal knowledge of the accuracy of the speedometer, and he further testified on cross examination that during the testing of the radar speedmeter he did not communicate with Trooper Mayhew by two way radio or in any other way during the course of the test. After the Trooper testified extensively on cross examination as to the time, type and manner of the test conducted, and the evidence as to the admissibility of the certificate had been fully investigated, the Trial Judge declined to hear further evidence as to the admissibility of the certificate, and the same was received in evidence by the Court over the objections and exception of defendant.

Trooper Byram, on cross examination, would not deny that when this case was tried before in the County Court he had testified on that occasion that the defendant was some two miles north of the place where the radar was set up when he issued him the summons; and the witness further stated on cross examination that he would not deny testifying on the

earlier occasion that he was able to identify the defendant's car as being the one driven through the radar zone by the fact that it was a Pontiac with Virginia license plates.

Photographs of the scene where the radar was set up and of the parking lot where the Trooper issued the summons to the defendant were shown to the Trooper on cross examination and he acknowledged the photographs were accurate representations of the sites in question and that it was not possible to see the place where the radar was set up from the parking lot where the summons was issued because there was a hill between the two sites which obstructed the view.

No further evidence was offered by the Commonwealth.

Defendant's Evidence:

The defendant testified in his own behalf. He testified that he was a second year engineering student at the University of Virginia and was on his way home to northern Virginia on the night of December 16, 1968. While proceeding
page 11 } north on Route 29 he had observed a State Police cruiser between the north and south bound lanes of Route 29, about 20 or 25 feet west of the north bound lane, back against a bank. He did not see any radar equipment. A second or two after he saw the cruiser he glanced at his speedometer and it was registering 55 miles per hour. Shortly thereafter defendant stopped at a grocery store along Route 29 and had gotten out of his car and was about half way towards the store where he intended to get a soft drink when Trooper Byram pulled into the store parking lot and called to defendant who then went over to his cruiser. The Trooper told him to get into the cruiser and then asked for his driver's license which the defendant exhibited to the Trooper. The latter then told defendant he timed him by radar going 75 miles per hour, which statement the defendant questioned. Trooper Byram was alone in his cruiser at the time and there was no radar equipment visible in the cruiser. The parking lot in question is nine-tenths of a mile north of the place where the radar was allegedly set up. Photographs of both the parking lot and the place where the radar was set up were introduced in evidence, and the defendant testified from the photographs that it was impossible to see the parking lot of the corner store from the place where he had observed the Trooper's cruiser because you go over a hill and the hill cuts off visibility. Defendant further testified that there were no cars to be seen behind him when he pulled into the parking lot, and that at no time on the trip north that night did he drive in excess of the posted speed limits. At the place where the cruiser was observed by de-

fendant, defendant was proceeding north in the east side, or outside lane, of the north bound strip.

Keith Curtin testified as a witness called by the defendant. He said he was also a second year student in engineering at the University of Virginia and was riding in the right rear seat of defendant's car on the night in question; That he could see the speedometer of defendant's car from where he was sitting, and that he drives a car; that he observed the State Police cruiser and it appeared to be completely off the south bound lane of Route 29, not between the lanes; that the witness saw no radar equipment of any kind at the scene where he noticed the Police cruiser; that after passing the cruiser he observed defendant's speedometer and page 12 } it was reading approximately 60 miles per hour from where he sat; that there were other cars on the highway at the time in the area in question; that the defendant stopped a short time later at the corner store, and when he did so no cars could be seen to the south because of the hill which cuts off visibility; that the Police cruiser was about 70 feet away from defendant's car when he noticed it sitting along the highway.

At the conclusion of all the evidence the defendant moved to strike the Commonwealth's evidence on the grounds that as a matter of law it was insufficient to support a conviction for the reason that the accuracy of the radar speedmeter had not been proved; nor had the accuracy of the speedometer of the automobile used in the test of the radar speedmeter been proved; that the certificate received in evidence was not conclusive of any of these things and did not prove the offense in question because it was dated April 16, 1969, or four months after the alleged offense occurred, it was not properly executed and did not comply with the statute in that it did not state the time of the test, the type or manner of testing, nor the results of the test of the accuracy of the radar speedmeter; and no evidence of any kind was introduced to prove the accuracy of the automobile speedometer used in the radar test, the word "calibrated" signifying nothing; and in behalf of the defendant it was further pointed out that the evidence of the Commonwealth should be stricken because of insufficient evidence to *indentify* defendant's automobile as being the automobile observed by the Trooper when he read the radar speedmeter.

The Trial Court overruled all motions of the defendant, found the defendant guilty, and imposed a fine of $25.00 and costs.

E. C. Wingfield

Paul Lee Sweeney,
Attorneys for the Defendant

Copy received and notice of tender to the court waived.

T. B. P. Davis,
Commonwealth Attorney for Greene County, Virginia

Tendered to me this 22 day of July, 1969.

Lyttelton Waddell, Judge
Circuit Court of Greene County

Signed this 28 day of July, 1969.

Lyttelton Waddell, Judge
Circuit Court of Greene County

Filed July 29, 1969.

R. W. Bickens, Clerk.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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