

EXHIBIT F

STATE OF NEW YORK COUNTY OF JEFFERSON
TOWN COURT TOWN OF LERAY

THE PEOPLE OF THE STATE OF NEW YORK,

-v-

DECISION

RICHARD C. LALONE, II,

Defendant.

APPEARANCES OF COUNSEL

Cindy F. Intschert, District Attorney of Jefferson County (Dylan Tester of Counsel); Susan F. Terry P.O. Box 902 Williamsville, New York for defendant.

OPINION OF THE COURT

Hallett, John, J. The defendant, a licensed amateur radio operator, was arrested and charged with violating Section 397 of the Vehicle and Traffic Law, a misdemeanor. Counsel for defendant moves to dismiss raising three separate and distinct arguments. Initially she moves to dismiss pursuant to Criminal Procedure Law Section 170.45 arguing that no crime has been committed within the meaning of the statute. Secondly she moves to dismiss in the interest of justice pursuant to Criminal Procedure Law Section 170.40. Finally, dismissal is sought pursuant to Criminal Procedure Law Section 170.35(b) alleging that this court lacks subject matter jurisdiction as all matters relating to the regulation of amateur radio communications are reserved to the federal government and its regulatory agencies.

This is an apparent case of first impression. The court is called upon to interpret what is probably the most poorly drafted section of the Vehicle and Traffic Law. Section 397, in its entirety reads as follows:

A person, not a police officer or peace officer, acting pursuant to his special duties, who equips a motor vehicle with a radio receiving set capable of receiving signals on the frequencies allocated for police use or knowingly uses a motor vehicle equipped or who in any way knowingly interferes with the transmission of radio messages by the police without having first secured a permit so to do from the person authorized to issue such a permit by the local governing body or board of the city, town or village in which such person resides, or where such

person resides outside of a city or village in a county having a county police department by the board of supervisors of such county, is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both. Nothing in this section contained shall be construed to apply to any person who holds a valid amateur radio operator's license issued by the federal communications commission and who operates a duly licensed portable mobile transmitter and in connection therewith a receiver or receiving set on frequencies exclusively allocated by the federal communications commission to duly licensed radio amateurs.

Initially, the court is not persuaded that it lacks subject matter jurisdiction in this case. The doctrine of federal pre-emption finds its roots in Article 6, Clause 2, of the United States Constitution which states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land, and the Judges in every state shall be bound thereby, anything in the Constitution or law of any state to the contrary notwithstanding.

The supremacy clause only applies where there is an actual conflict between two sets of regulations. At least one court has ruled that Section 397 does not encroach upon federal legislation.

The legislature did not intend to encroach upon the authority of Congress or the F.C.C. as manifested by the last sentence of the statute which clearly states that nothing in this section should be construed to apply to any person who holds a valid operators license issued by the F.C.C. - who operates a duly licensed portable mobile transmitter and in connection therewith a receiver or receiving set on frequencies exclusively allocated by the F.C.C. to duly licensed radio amateurs. *People v. McGee* 97 Misc 2d 360 at 362 (1978). That portion of defendant's motion is therefore denied.

Nor is the court persuaded that the matter should be dismissed in the interest of justice. Criminal Procedure Law §170.40 notes, in pertinent part, that the court may dismiss an information when "such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstances clearly demonstrating that conviction or prosecution...would result in an injustice". As the defendant has failed to allege any elements outlined in paragraphs (a) through (j) of Criminal Procedure Law §170.40, that portion of defendant's motion is also denied.

Finally, the court turns its attention to defendant's motion to dismiss pursuant to Criminal Procedure Law §170.45. The court presumes that by making reference to that statute, the defendant is asking that the court address dismissal pursuant to §170.30(1)(f) which notes:

After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that

(f) there exists some...legal impediment to conviction of the defendant for the crime charged.

It is here that the court must consider the two delineated exceptions to §397. The first applies to a person who has obtained a permit to possess such a radio in their vehicle from a local governing board. See generally,; Op. Atty.Gen (Inf.) 104 (1975), Op.Atty.Gen (Inf.) 311 (1975). There is no contention that the defendant held such permit.

The second exception is contained in the last sentence of §397 "[n]othing in this section contained shall be construed to apply to any person who holds a valid amateur radio operator's license...and who operates a duly licensed portable mobile transmitter and in connection therewith a receiver or receiving set on frequencies exclusively allocated by the Federal Communication Commission to duly licensed radio amateurs." In order to qualify for this exemption an individual must pass a three-pronged test. Initially, he must be a licensed amateur radio operator. This point is not contested. Secondly, he must operate a receiver or be receiving signals, and third, such receiver must be set on frequencies exclusively allocated by the F.C.C. to duly licensed radio amateurs.

It is the third prong of this test which causes the court concern. A review of New York's common law provides little guidance in this area. Although not controlling, at least one authority has noted that "[l]icensed amateur radio operators who operate duly licensed portable mobile radio transmitters and in connection therewith receives or receiving sets on frequencies allocated by the F.C.C. to duly licensed radio amateurs are not subject to the prohibition against equipping motor vehicles with receivers capable of receiving police broadcasts, using such a vehicle, or interfering with police broadcasts" 58 NY JUR2d 103 §155.

Clearly "[t]he rationale behind the statute was to prevent criminals from listening to public broadcasts in their automobiles, either prior to or after the commission of a crime; and to prevent the jamming of the airways during the police broadcasts." See McGee supra at 360. The court can and does take judicial notice of the exemplary service amateur radio operators have provided to the citizens of Jefferson County, notably during the microburst of 1995, the ice storm of 1998, and the terrorists attacks of 2001.

Providing additional guidance are the federal regulations which were in effect at the time of the McGee decision. The McGee court succinctly noted:

The F.C.C. controls the operating frequencies of police radio systems and Has allocated certain frequencies to police use (47CFR 89.101[h].)

These frequencies may be used for amateur radio operations. (47CFR 97.61[a].) Id.

As the New York legislature must have been cognizant of these federal regulations and never sought to amend Section 397, one can only conclude that the legislature allowed them to co-exist. Hence, it becomes clear that the

legislature never intended the provisions of Section 397 to apply to licensed amateur radio operators.

The charge against the defendant is dismissed.

ENTER August 5, 2003

_____ Hon. John W. Hallett