

1 of 195 DOCUMENTS

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLAYTON HENRY  
FENT, Defendant-Appellant.**

**No. 05-7100**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

*2006 U.S. App. LEXIS 29609*

**November 30, 2006, Filed**

**NOTICE:** [\*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** (D.C. No. CR-05-07-01-P). (E.D. Okla.).

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was charged with being a felon in possession of a firearm, in violation of *18 U.S.C.S. § 922(g)*, and possessing a firearm with an obliterated serial number, in violation of *18 U.S.C.S. § 922(k)*, and he filed a motion to suppress evidence. The U.S. District Court for the Eastern District of Oklahoma denied the motion and convicted defendant of both offenses after a jury found that defendant was guilty. Defendant appealed.

**OVERVIEW:** A deputy sheriff stopped defendant after a radar device he was using showed that defendant was driving 61 miles per hour in a 45 mile-per-hour zone. When the deputy checked a computer database, he discovered that defendant's driver's license was suspended, and he placed defendant under arrest. The deputy conducted an inventory search of defendant's vehicle and found a small amount of methamphetamine, ammunition, and a firearm with a defaced serial number. Defendant filed a motion to suppress evidence, but the district court denied the motion, convicted defendant of violating *18 U.S.C.S. § 922(g)* and (k), and sentenced him to 168 months' imprisonment. The court of appeals found that the district court did not err when it denied defendant's motion. The deputy had a reasonable basis for stopping defendant because he saw him violate the law by speeding, and he had the right to conduct an inventory search of defendant's vehicle after he arrested him for driving with a suspended license. The court of appeals also found that the district court did not violate defendant's rights when it enhanced his sentence because he possessed the weapon in connection with felony possession of drugs.

**OUTCOME:** The court of appeals affirmed the district court's judgment.

**CORE TERMS:** firearm, gun, radar, methamphetamine, inventory search, motion to suppress, possessed, sentence, felony offense, preponderance, enhancement, ammunition, truck, reasonable suspicion, traffic, motion to suppress evidence, traffic violation, close proximity, opening brief, serial number, small amount, reply brief, fact-finding, sentencing, guidelines, defaced, waived, suppression hearing, traffic stop, training

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Appeals > Briefs***

[HN1] Arguments not set forth fully in an opening brief are waived, and the United States Court of Appeals for the Tenth Circuit will not address issues raised for the first time in a reply brief.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > General Overview******Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches > General Overview***

[HN2] A traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Penalties******Criminal Law & Procedure > Sentencing > Adjustments******Criminal Law & Procedure > Sentencing > Guidelines***

[HN3] *U.S. Sentencing Guidelines Manual § 2K2.1(b)(5)* provides a four-level enhancement to a defendant's base offense level if the defendant used or possessed any firearm or ammunition in connection with another felony offense.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial******Criminal Law & Procedure > Sentencing > Guidelines***

[HN4] Even after the United States Supreme Court's decision in *United States v. Booker*, facts relevant to sentencing still need only be proved by a preponderance of the evidence, as long as the U.S. Sentencing Guidelines are considered advisory. *Booker*, therefore, does not render judicial factfinding by a preponderance of the evidence per se unconstitutional. The remedial portion of *Booker* demonstrates that such factfinding is unconstitutional only when it operates to increase a defendant's sentence mandatorily.

**COUNSEL:** For UNITED STATES OF AMERICA, Plaintiff-Appellee: Gordon B. Cecil, Jeffrey A. Gallant, Office of the United States Attorney, Eastern District of Oklahoma, Muskogee, OK.

For CLAYTON HENRY FENT, Defendant-Appellant: Janice Walters Purcell, Tahlequah, OK.

**JUDGES:** Before BRISCOE, BALDOCK, and BRORBY, Circuit Judges.

**OPINION BY:** Bobby R. Baldock

**OPINION:**

**ORDER AND JUDGMENT \***

\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

Deputy Randy Hass of the Pittsburgh County Sheriff's Office discovered a small amount of methamphetamine, ammunition, [\*2] and a firearm with a defaced serial number in Defendant's truck during the course of an inventory search. The Government charged Defendant in a two-count Indictment with Felon in Possession of a Firearm, *18 U.S.C.*

§ 922(g), and Possession of a Firearm with an Obliterated Serial Number, 18 U.S.C. § 922(k). Following the district court's denial of Defendant's motion to suppress, a jury convicted Defendant on both counts. On appeal, Defendant claims the district court erred in denying his motion to suppress evidence found during the search of his vehicle. Defendant also appeals his sentence, claiming it violates his *Sixth Amendment* rights as discussed in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). We review both the district court's denial of Defendant's motion to suppress and its sentencing determination de novo and affirm. See *United States v. Dennison*, 410 F.3d 1203, 1207 (10th Cir. 2005); *United States v. Stiger*, 413 F.3d 1185, 1191 (10th Cir. 2005).

## I.

During routine traffic patrol, Deputy Hass "clocked" Defendant's truck going 61 mph in a 45 mph zone. Deputy Hass [\*3] testified at the suppression hearing that in addition to his radar reading, his observation of the vehicle led him to conclude Defendant was traveling at a rate of speed between 60 and 70 miles per hour. During the traffic stop, Defendant was unable to produce a driver's license or proof of insurance. Using Defendant's date of birth and social security number to search the database, Deputy Hass discovered Defendant's driver's license was suspended. Deputy Hass arrested Defendant for driving with a suspended license.

Pursuant to department policy, Deputy Hass impounded Defendant's truck and conducted an inventory search. n1 During the course of the inventory search, Deputy Hass located a black bag containing a small amount of methamphetamine, ammunition and a firearm with a defaced serial number. Faced with firearm charges, Defendant filed a motion to suppress evidence found during the inventory search of his vehicle. The district court referred the matter to a magistrate judge who issued a written Report and Recommendation (R&R) recommending denial of Defendant's motion. Defendant objected to the R&R, and the district court overruled his objections and adopted the R&R. The case proceeded [\*4] to trial where a jury found Defendant guilty on both counts.

n1 Defendant's attempt to challenge the inventory search in his reply brief is waived because he failed to raise the issue in his opening brief. *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998). ([HN1] "[A]rguments not set forth fully in the opening brief are waived."); *Codner v. United States*, 17 F.3d 1331, 1332 n.2 (10th Cir. 1994). ("[W]e will not address issues raised for the first time in a reply brief.")

The court sentenced Defendant to 168 months in prison. In calculating his sentence, the court increased Defendant's base offense level by four points in accordance with *U.S.S.G. § 2K2.1(b)(5)*. That section provides for an enhancement when a defendant possesses a firearm in connection with another "felony offense."

## II.

Defendant claims Deputy Hass did not have reasonable suspicion to stop his vehicle, and therefore the district court erred in denying [\*5] his motion to suppress. Defendant argues Deputy Hass lacked training and experience in handling his radar gun and thus, reliance on the radar gun's reading could not create the requisite reasonable suspicion necessary to stop Defendant. Defendant further argues Deputy Hass had not calibrated the radar gun in several months, resulting in an unreliable reading.

[HN2] A traffic stop is valid under the *Fourth Amendment*, "if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995) (en banc). "Our sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." *Id.* (citation and quotation marks omitted). We have no doubt this standard was satisfied here. Regardless of the amount of training Deputy Hass received in operating the radar gun, he was able to conclude, just by observing the vehicle, Defendant was speeding and thus committing a traffic [\*6] violation. Such observation is the only requirement for a valid stop under the *Fourth Amendment*. See *id.*, 71 F.3d at

787. Furthermore, Defendant offered no testimony at the suppression hearing concerning how often radar gun calibration is required or that the radar gun was malfunctioning. Accordingly, Deputy Hass's stop of Defendant's vehicle complied with the *Fourth Amendment*, and the district court properly denied his motion to suppress.

### III.

Defendant also challenges his sentence claiming the addition of four points to his base offense level contravenes the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). [HN3] *Sentencing Guideline* § 2K2.1(b)(5) provides a four level enhancement to a defendant's base offense level "if the defendant used or possessed any firearm or ammunition in connection with another felony offense." *U.S.S.G.* § 2K2.1(b)(5). The district court applied this enhancement, finding Defendant possessed the firearm in connection with the uncharged felony of possessing methamphetamine. On appeal, Defendant argues because the methamphetamine offense was not submitted [\*7] to the jury, application of *U.S.S.G.* § 2K2.1(b)(5) was unconstitutional. Defendant's argument is foreclosed by our precedent.

In *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005), we held [HN4] even after *Booker*, facts relevant to sentencing still need only be proved by a preponderance, as long as the guidelines are considered advisory. See also *United States v. Dalton*, 409 F.3d 1247, 1252 (10th Cir. 2005) ("*Booker* therefore does not render judicial fact-finding by a preponderance of the evidence per se unconstitutional. The remedial portion of *Booker* demonstrates that such fact-finding is unconstitutional only when it operates to increase a defendant's sentence mandatorily."). The record supports the district court's conclusion Defendant possessed methamphetamine, and the close proximity of the drugs and the gun established Defendant possessed the firearm "in connection with" the felonious possession of drugs. *U.S.S.G.* § 2K2.1(b)(5). As noted by the district court, "the availability of the gun in such close proximity to the methamphetamine was sufficient evidence [\*8] of a connection between the firearm and the possession of methamphetamine, which is a felony offense in the state of Oklahoma." The court made this finding by a preponderance of the evidence. Most importantly for *Booker* purposes, the sentencing transcript clearly establishes the court applied the Guidelines in a discretionary fashion. Thus, no *Booker* error occurred.

AFFIRMED.

Entered for the Court,

Bobby R. Baldock

Circuit Judge

2 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**United States of America, Plaintiff-Appellee, v. Heriberto Navarro-Camacho,  
Defendant-Appellant.**

**No. 97-3584**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

*186 F.3d 701; 1999 U.S. App. LEXIS 18287; 1999 FED App. 0290P (6th Cir.)*

**December 8, 1998, Argued**

**August 6, 1999, Decided**

**August 6, 1999, Filed**

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 95-00766. John W. Potter, District Judge.

**DISPOSITION:** AFFIRMED denial of Navarro's motion to suppress and, AFFIRMED his conviction.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant sought review of the decision of the United States District Court for the Northern District of Ohio at Toledo, which denied his motion to suppress and convicted him of drug trafficking.

**OVERVIEW:** Appellant was convicted of drug trafficking and sought review of his conviction contending that the trial court erred in denying his motion to suppress, which alleged that officers of the state highway patrol rubbed "pseudo-cocaine" on his vehicle in order to induce a drug detection dog to alert, and thus, provided the officers with phony probable cause to search the vehicle. On appeal, the court held that the trial court did not err in denying appellant's motion to suppress upon the recommendation of a magistrate and affirmed appellant's conviction. The court concluded that the trial court and magistrate did not err in determining that one of the officers had probable cause to stop appellant's vehicle and that the trial court's determination that the narcotics dog was reliable was not clearly erroneous. The court further concluded that the magistrate's and trial court's factual determination that the officers did not apply pseudo-cocaine on appellant's vehicle was not clearly erroneous. Finally, the court concluded that appellant's claim that the trial court's review was not meaningful and, thus, violated his right to due process was meritless.

**OUTCOME:** The appellate court affirmed the denial of appellant's motion to suppress and his conviction for drug trafficking. The appellate court concluded that the trial court did not err in finding that probable cause existed to stop appellant's vehicle, that the narcotics dog that searched appellant's vehicle was reliable, and that the state highway patrol officers did not rub pseudo-cocaine on appellant's vehicle.

**CORE TERMS:** trooper, dog, pseudo-cocaine, videotape, motion to suppress, alerted, alert, reliable, narcotics,

186 F.3d 701, \*, 1999 U.S. App. LEXIS 18287, \*\*1;  
1999 FED App. 0290P (6th Cir.), \*\*\*

selective, probable cause, driver, door, credibility, reliability, rubbed, training, canine, tip, detection, driving, miles, Fourth Amendment, traffic, odor, video camera, recertification, trained, clear error, contraband

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress***

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress***

[HN1] Factual findings made in consideration of a motion to suppress are reviewed for clear error, while conclusions of law are reviewed de novo. A factual finding will only be clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The evidence is reviewed in the light most likely to support a district court's decision.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches***

[HN2] The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Dog Sniff Searches***

***Evidence > Testimony > Examination > General Overview***

***Governments > Agriculture & Food > Animal Protection***

[HN3] A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance. When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability. As with the admissibility of evidence generally, the admissibility of evidence regarding a dog's training and reliability is committed to the trial court's sound discretion.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress***

[HN4] When reviewing the denial of a motion to suppress evidence, an appellate court reviews a district court's findings of fact only for clear error.

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN5] Where factual findings rest in large part on credibility determinations, an appellate court affords district courts even greater deference.

**COUNSEL:** ARGUED: Ralph E. Meczyk, Chicago, Illinois, for Appellant.

Thomas O. Secor, OFFICE OF THE U.S. ATTORNEY, WESTERN DIVISION, Toledo, Ohio, for Appellee.

ON BRIEF: Ralph E. Meczyk, Chicago, Illinois, for Appellant.

Thomas O. Secor, OFFICE OF THE U.S. ATTORNEY, WESTERN DIVISION, Toledo, Ohio, for Appellee.

**JUDGES:** Before: WELLFORD, BOGGS, and MOORE, Circuit Judges. BOGGS, J., delivered the opinion of the court. WELLFORD, J., delivered a separate concurring opinion. MOORE, J., delivered a separate opinion concurring in the result.

**OPINION BY: BOGGS**

**OPINION:** [\*\*\*2]

[\*702] **OPINION**

BOGGS, Circuit Judge. Heriberto Navarro-Camacho appeals his conviction for drug trafficking, contending that the trial court erred in denying his [\*703] motion to suppress. Navarro-Camacho alleges, *inter alia*, that members of the Ohio Highway Patrol rubbed "pseudo-cocaine" on his vehicle in order to induce a drug detection dog to alert and, thus, provide the officers with phony probable [\*\*2] cause to search the vehicle. We hold that the district court did not err in denying the motion to suppress and thus affirm defendant's conviction.

**I**

On September 29, 1995, the Ohio Highway Patrol ("OHP") received an tip indicating that defendant-appellant Heriberto Navarro-Camacho ("Navarro"), possibly in the company of others, would be transporting five or more kilograms of cocaine to the Toledo area. Navarro was said to be driving [\*\*\*3] either a blue or silver Chevrolet Suburban or a Ford Contour. The suspect vehicle was to have Illinois license plates.

Based on this information, OHP troopers Robert Stevens and Kevin Kiefer (in separate vehicles) staked out the eastbound stretch of the Ohio Turnpike just east of the Ohio-Indiana border beginning at 6 a.m. on September 30, 1995. Stevens had a narcotics dog with him in his vehicle. After nearly seven hours of unfruitful surveillance, the troopers began to drive back towards OHP headquarters in Toledo.

Shortly after 1 p.m., while driving eastbound in the direction of Toledo, Kiefer was informed by OHP trooper Robert Baranowski that a blue Chevy Suburban matching the description in the tip was driving eastbound on the Turnpike. [\*\*3] Baranowski began to follow the Suburban, then turned into a crossover and proceeded in the other direction, because he "wanted the vehicle to not think [he was] following him anymore . . . ."

Kiefer, who had turned around and was now driving westbound, pulled off the Turnpike approximately sixteen miles before the Ohio-Indiana border in a 65 mile-per-hour speed limit zone. He spotted the suspect vehicle, activated his radar, and clocked the vehicle's speed at 68 miles per hour. Upon getting the reading, Kiefer activated his overhead lights, which also turned on his in-car video camera. n1 He followed the suspect vehicle, which contained Navarro (who was the driver) and two passengers. Kiefer pulled the vehicle over and approached the car on its passenger side. Baranowski and Stevens quickly arrived on the scene in their separate cars as Kiefer began conversing with the vehicle's occupants.

n1 All of the subsequent events on September 30, 1995 are recorded on videotape.

As Kiefer was engaging the vehicle's [\*\*4] occupants in conversation, Stevens and Baranowski were near the rear of the car. Stevens then moved away from defendant's car and towards the cruiser with the mounted video camera. While [\*\*\*4] moving, Stevens, with his back turned to Baranowski, made a sort of backwards hand gesture to Baranowski. The government claims that this was a "low-five" hand slap between the troopers. Navarro suspects that this may have been an exchange of "pseudo-cocaine" between the troopers. Pseudo-cocaine is a special cocaine isomer that the police apparently sometimes use to train drug dogs. *See People v. Hollingsead*, 210 Ill. App. 3d 750, 569 N.E.2d 216, 219, 155 Ill. Dec. 216 (Ill. App. 1991); *United States v. Bockius*, 564 F.2d 1193, 1195 n.2 (5th Cir. 1977).

After making this gesture, Stevens went to his cruiser to retrieve Dingo, his narcotics dog, while Baranowski stood next to the driver's door of the Suburban, conversing with Navarro. Stevens then brought Dingo around the vehicle; the dog alerted to the presence of narcotics near the driver's door of the Suburban, at approximately where Baranowski had been standing. The officers then executed a search [\*\*5] of the vehicle, recovering five kilograms of cocaine in a duffel bag on the back seat.

Navarro filed a motion to suppress the evidence, arguing in his motion that there was no probable cause to search the vehicle [\*704] because Dingo, the narcotics dog, was not reliable. A hearing on the motion to suppress was held before a magistrate judge on March 27-28 and June 18-20, 1996, during which the magistrate judge heard from thirteen witnesses who generated 742 transcript pages of testimony. At the hearing, Navarro attempted to establish not only that Dingo was not a reliable narcotics dog, but also that (1) he was illegally stopped because he was not exceeding the speed limit, and (2) the videotape made of the stop showed Stevens passing an object to Baranowski, which may have been "pseudo-cocaine" that Baranowski may have smeared on the car in order to get Dingo to alert.

Navarro testified that he was driving "a little under 65 miles-an-hour before [he] was stopped, because [he] set the cruise control" at 62 miles per hour soon after crossing the Ohio-Indiana border. Trooper Kiefer testified, however, that he clocked Navarro at 68 miles per hour, and that he had the [\*\*\*5] calibration [\*\*6] of his radar gun checked the morning of Navarro's arrest.

Navarro called Daniel Craig, an experimental psychiatrist and veterinarian who specializes in studying the behavior of narcotics dogs, as a witness at the hearing. Craig testified that Dingo was not a reliable drug-detecting canine. He based this assertion on his finding that there were "very severe gaps in [Dingo's] training records, and in [Dingo's] utilization records, the animal [was] responding to items that [he] has not been trained on." Craig, however, admitted that Dingo's certification records were incomplete, and his opinion was based on the incomplete records. He also testified that, under the protocol for training narcotics detection dogs for the Air Force developed by Craig, a dog "is functional at certification standards" of "90 percent."

Stevens testified that Dingo was certified in 1990; that Dingo has passed his recertification every two years; and that he had trained with Dingo for between 1500 and 2000 hours. He also indicated that, although Dingo occasionally alerted falsely, his rate of reliability was between 90 and 97 percent.

Navarro also called Dr. Bobby Hunt, an expert witness in the field [\*\*7] of optics and applied mathematics, who testified that the videotape showed that an object was indeed passed from Stevens to Baranowski. FBI Agent Thomas Forgas, a photographic specialist, testified for the government that the videotape did not show the passing of an object but, rather, was simply the reflection of sunlight off of Stevens's hand. Troopers Baranowski and Stevens testified that the videotape simply depicted Stevens giving Baranowski a "low five."

The magistrate judge denied the motion to suppress, finding that:

Kiefer's testimony about Navarro's speeding was credible and Navarro's claim that he was driving at 62 miles per hour was "unpersuasive," and, thus, the initial stop was justified. [\*\*\*6]

Dingo was a reliable canine detection dog in light of, *inter alia*, "the testimony of Dr. Craig that canine detection dogs are not infallible and Trooper Stevens's testimony that Dingo's accuracy rate was between 90% and 97% . . . ."

Though he was "unable to resolve the dispute based upon the expert testimony presented," and gave equal weight to the testimony of the two experts, the officers' testimony about the "low-five" was credible and, thus, Navarro's [\*\*8] argument about police misconduct was unconvincing.

The district court reviewed the magistrate judge's report and (1) made a de novo determination that Trooper Kiefer

had probable cause for the stop; (2) adopted the magistrate's findings of fact as they related to Dingo and ruled de novo that Dingo was a reliable narcotics dog; and (3) found that the troopers did not transfer or plant a substance on Navarro's vehicle. After making a de novo determination that the search of the vehicle was [\*705] legal, the district court adopted the magistrate judge's report in all respects. It then denied the motion to suppress.

Navarro subsequently entered a conditional guilty plea pursuant to *Fed. R. Crim P. 11(a)(2)*. He now appeals.

## II

### A. The motion to suppress

[HN1] Factual findings made in consideration of a motion to suppress are reviewed for clear error, while the conclusions of law are reviewed de novo. *United States v. Ursery*, 109 F.3d 1129, 1132 (6th Cir. 1997). A factual finding will only be clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake [\*9] has been committed. *United States v. Ayen*, 997 F.2d 1150, 1152 (6th Cir. 1993). The evidence is reviewed "in the light most likely to support the district court's decision." *United States v. [\*\*\*7] Braggs*, 23 F.3d 1047, 1049 (6th Cir.), cert. denied, 513 U.S. 907, 130 L. Ed. 2d 191, 115 S. Ct. 274 (1994).

#### 1. Initial stop of Navarro's vehicle

Navarro first contends that Kiefer did not have probable cause to stop his vehicle. Kiefer testified that he clocked Navarro with his radar at a speed of 68 miles per hour. The magistrate judge found Kiefer's testimony credible, the district court adopted the magistrate judge's report, and this court accords great deference to such credibility determinations. See *United States v. Cooke*, 915 F.2d 250, 252 (6th Cir. 1990). Navarro points to nothing to persuade this court that the district court and magistrate judge erred in crediting Kiefer's testimony over his testimony, notwithstanding his suggestion that it would have defied common sense for him to speed while carrying cocaine. Navarro's suggestion appears to somewhat echo Circuit Judge Edgerton in *Higgins v. United States*, 93 U.S. App. D.C. 340, 209 F.2d 819, 820 (D.C. Cir. 1954), [\*10] where Judge Edgerton questioned whether there could ever be consent to a search that actually finds contraband, contending that "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." However, as the government notes in its brief, "Case law in this circuit . . . is replete with instances of drug couriers disobeying traffic laws while transporting illegal substances."

Moreover, the Supreme Court recently ruled in *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996), that prior Court precedent

forecloses any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

[\*\*\*8]

*Id.* at 813. [\*11] Therefore, since generally "[HN2] the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred," *id.* at 810, the stop of Navarro's vehicle was proper.

n2

n2 Navarro has attempted to introduce evidence from an unrelated civil suit to establish that Kiefer targeted Navarro because of his race. Not only did the district court properly find this evidence to be inadmissible, but **Whren** clearly indicates that the evidence would be irrelevant for the purpose of determining whether Kiefer's stop of the vehicle violated Navarro's Fourth Amendment rights.

Navarro called three witnesses at the hearing in an attempt to establish "that Stevens used Dingo as a device to get into and search any vehicle he chose to stop, [\*706] usually those operated by Hispanics." However, Trooper Kiefer (who stopped Navarro) was not involved in any of the stops described by these witnesses and, moreover, there is no properly-admitted evidence in the record [\*\*12] that would indicate that there is any degree of selective enforcement of speeding laws by the OHP based on racial considerations.

## 2. Reliability of Dingo

Navarro next claims that the troopers did not have probable cause to search his vehicle because Dingo, the narcotics dog that alerted to the presence of cocaine, was unreliable. [HN3] A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance. *United States v. Diaz*, 25 F.3d 392, 393-94 (6th Cir. 1994). The **Diaz** court further explained:

When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. Lack of additional evidence, such as documentation of the exact course of training, [\*\*\*9] similarly would affect the dog's reliability. As with the admissibility of evidence generally, the admissibility of evidence regarding a dog's training and [\*\*13] reliability is committed to the trial court's sound discretion.

*Id.* at 394.

The **Diaz** court noted that "courts have not definitively addressed the issue of the quality or quantity of evidence necessary to establish a drug detection dog's training and reliability." **Id.** The magistrate and district court found that Dingo, as a factual matter, was reliable. [HN4] When reviewing the denial of a motion to suppress evidence, this court reviews the district court's findings of fact only for clear error. *See United States v. Bradshaw*, 102 F.3d 204, 209 (6th Cir. 1996), **cert. denied**, 520 U.S. 1178, 117 S. Ct. 1453, 137 L. Ed. 2d 558 (1997).

The district court's determination that Dingo was reliable was not clearly erroneous. Trooper Stevens testified that Dingo was certified in 1990; that Dingo has passed his recertification every two years; and that he had trained with Dingo for between 1500 and 2000 hours. Stevens also stated that, although Dingo occasionally alerted falsely, his rate of reliability was between 90 and 97 percent. Navarro's own expert indicated that, under the training protocol the expert had designed, a dog [\*\*14] "is functional at certification standards" of "90 percent." On these facts, the district court's finding of reliability was not clearly erroneous.

## 3. The videotape and alleged "pseudo-cocaine"

Navarro claims that shortly after the stop of his Suburban, Trooper Stevens passed a package containing "pseudo-cocaine" to Trooper Baranowski, who smeared the the package near the driver's door so that when Stevens walked Dingo around the vehicle, the dog would alert on the odor. The district court found that the troopers did not transfer or plant a pseudo-cocaine substance on Navarro's vehicle. This finding was "based on the totality of the evidence," including testimony from expert witnesses and the troopers (who claimed they did no such thing). When reviewing the [\*\*\*10] denial of a motion to suppress evidence, this court reviews the district court's findings of fact only for clear error. *See Bradshaw*, 102 F.3d at 209.

186 F.3d 701, \*706; 1999 U.S. App. LEXIS 18287, \*\*14;  
1999 FED App. 0290P (6th Cir.), \*\*\*10

The magistrate judge and district court weighed the testimony of the experts and troopers, along with the admitted videotape, and came to the conclusion that the troopers did not behave as Navarro alleges. This finding of fact was not clearly [\*\*15] erroneous. Admittedly, the encounter between Stevens and Baranowski, as depicted on the videotape, looks unnatural and [\*707] may be subject to conflicting interpretations. However, the district court conducted a full and complete evidentiary hearing to determine whether "pseudo-cocaine" was exchanged between Troopers Stevens and Baranowski and whether Baranowski rubbed that substance on Navarro's vehicle to get Dingo to falsely alert.

This court has been able to review the videotape made of the stop of Navarro's vehicle. However, the simple fact that we have been able to evaluate this key piece of evidence on direct review does not change the fact that we review the district court's findings of fact for **clear error**. The magistrate judge was able not only to view the videotape, but also to hear from an array of witnesses who testified about either (1) the videotape itself or (2) the events depicted on it. The magistrate judge did not render her decision simply by viewing the videotape; in fact, she made it clear that her factual finding that none of the alleged wrongdoing took place was based in large part on the testimony of the officers, **whom she found credible**. n3 [HN5] Where, as [\*\*16] here, factual findings rest in [\*\*\*11] large part on credibility determinations, we afford district courts even greater deference. *See Cooke, 915 F.2d at 252*.

n3 Navarro attempts to call the officers' credibility into question by claiming that Kiefer and Baranowski testified that the tip came from the DEA (it in fact came from the Michigan State Police). However, neither Baranowski nor Kiefer testified to this effect. In fact, Stevens was the only person who testified that his informational source was the DEA. During cross-examination, Stevens was asked, "You didn't know who the source of the tip was except the DEA, correct?" Stevens responded, "Yes."

This response by Stevens, however, in no way stands for the proposition that the **ultimate source** for the tip was the DEA. At best, it only stands for the proposition that **Stevens obtained** the information from the DEA. In fact, the head of the DEA task force operating in northwestern Ohio testified that he could not rule out the possibility that someone from his agency may have independently contacted officers with information about Navarro. This seems a very real possibility, considering the fact that the stakeout by Kiefer and Baranowski was an OHP-DEA "joint operation." Needless to say, Navarro's implication that this is a contradiction in testimony that calls into question the officers' credibility is very weak.

[\*\*17]

We simply do not believe that the magistrate judge's finding of fact (adopted by the district court) that the troopers did not transfer or plant a pseudo-cocaine substance on Navarro's vehicle was clearly erroneous. At the outset, Navarro's contention that, if the troopers indeed intended to illegally "find" probable cause, that they would do so by waiting until they were **in front of a video camera**, seems strained. Moreover, an independent review of the videotape does not give us a settled feeling that the fleeting interaction between Stevens and Baranowski was the transfer of any object, yet alone a package of pseudo-cocaine. We also note that, even assuming **arguendo** that he could establish that an object was passed between the troopers, Navarro does not even attempt to show that (1) the object had an odor that would cause Dingo to alert, or (2) that the object was smeared on the car.

In his briefs and at oral argument, Navarro's able counsel has constructed a narrative that has at least a possibility of being true. Navarro believes that criminal police officers repeatedly follow a policy in which they deliberately stop Hispanic motorists on trumped-up charges, exchange [\*\*18] in full view of a police video camera a substance designed to cause a drug dog to alert, apply the substance to a motorist's car, and then either allow a drug dog to alert to the substance, or simply invade the interior of the car so that the dog can more easily alert to the multi-kilogram quantities of drugs suspected to be therein. However, we must emphasize that the [\*\*\*12] alternative scenario also could be true. Drug runners speed; police stop them for speeding; and a drug dog alerts to large quantities of drugs.

In such a circumstance, as an appellate court, we do not reweigh the evidence [\*708] presented below for the

purpose of determining which scenario has the greater possibility of being true. The job of weighing the evidence belongs to the trial court, which in this case exhaustively carried out its proper function. The magistrate judge heard from thirteen witnesses during the course of a five-day-long hearing. These thirteen witnesses generated 742 transcript pages of testimony. In denying the motion to suppress, the magistrate judge took into account the credibility determinations she was entitled to make, as well as the testimony of expert witnesses. Our only role is to [\*\*19] determine if the magistrate judge's ultimate conclusions, as reviewed and confirmed by the district court, were clearly erroneous. We see no basis for overturning a decision of the factfinders in this case, whichever way they decided. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 369, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)).

Moreover, Occam's Razor also supports the magistrate judge's decision. The conspiratorial theory offered by Navarro simply does not make much sense. Navarro would have us believe that Stevens passed pseudo-cocaine to Baranowski (which Baranowski then rubbed on the car), went back to his vehicle to get Dingo, and walked Dingo around the car. According to Navarro's theory, Dingo then alerted to the exact spot where the pseudo-cocaine was applied by Baranowski. This theory begs a simple question: **why would Stevens have risked passing the pseudo-cocaine on to [\*\*\*13] Baranowski when he simply could have applied the [\*\*20] substance to the car himself?** n4

n4 For that matter, Stevens could also more easily have passed Baranowski any pseudo-cocaine when the two were out of sight of the video camera, or could have instead conspired with Kiefer, during the seven hours they were together, to do the deed.

Navarro offers us two potential answers to this question, neither of which is particularly convincing. He first contends that if Stevens had applied the substance to the vehicle himself, Stevens would not have been able to control the location and timing of Dingo's alert because Dingo may have mistakenly alerted to Stevens (who would have been exposed to the odor of the substance). This explanation makes no sense, because Stevens would have obviously had the substance on his person **before** the alleged exchange with Baranowski. The videotape shows that Stevens walked around for approximately one minute (with, if Navarro is correct, pseudo-cocaine in his possession) before allegedly passing something on to his fellow trooper. [\*\*21] If Navarro's explanation for the passage were correct, Stevens would have become "coated" with the odor of pseudo-cocaine, **whether he passed the substance on to Baranowski or not.**

Navarro's second explanation is that the exchange was necessary because, if Stevens applied the pseudo-cocaine himself, the odor of the substance would dissipate in the time it took Stevens to go back to get his dog and walk it around the car. However, the videotape shows that approximately forty seconds took place between the moment when Baranowski would have allegedly rubbed the substance on the car and the instant Dingo alerted. n5 [\*\*709] Indeed, Stevens walked [\*\*\*14] Dingo around two-thirds of the car's perimeter before he arrived at the spot where Baranowski had allegedly rubbed the pseudo-cocaine. If Stevens had been so concerned about the substance's rate of dissipation, one wonders why he wouldn't have taken Dingo **directly** to the spot where Baranowski had rubbed the pseudo-cocaine. We also note that Navarro has not introduced one shred of evidence about the dissipation rate of pseudo-cocaine.

n5 Baranowski only left the side of Navarro's car a few seconds before Dingo alerted. However, Baranowski **was talking to Navarro** for much of the time he was standing beside the driver's door. In fact, Baranowski appears to have been engaging Navarro in conversation right up until the time he moved away from the vehicle to allow Dingo to sniff the door. Since Baranowski obviously would not have rubbed pseudo-cocaine on Navarro's driver's door during a time he had commanded Navarro's undivided attention by engaging him in conversation, Baranowski could have only rubbed a substance on the door in the few seconds before he had

started talking to Navarro. Approximately forty seconds passed between this window of opportunity and the time Dingo alerted.

The fact that Baranowski was standing next to the driver's door of the Suburban also calls Navarro's theory into question in another way: would a police officer really have taken the risk of rubbing pseudo-cocaine near the driver's door of a vehicle when the driver was sitting in the front seat? After all, if Baranowski had somehow inadvertently attracted Navarro's attention while he was allegedly smearing pseudo-cocaine on the car, he likely would have been "caught" by Navarro! One would think that a dishonest police officer would apply pseudo-cocaine to the portion of a vehicle where the officer would be least likely to be "caught" applying the substance.

[\*\*22]

Navarro also asserts in his brief that "too many objective factors recommend that, not only did the officers fabricate the basis for the stop, but they manufactured the probable cause necessary to subsequently search the vehicle, all to retroactively justify seizing a significant quantity of narcotics." In other words, Navarro is implying that if he alleges that numerous findings of fact made by the court were in error, the cumulative impact of these asserted errors may somehow constitute reversible error, even if each individual questioned finding does not. This is not the case, for Navarro's assertion ignores the fact that many of the alleged errant findings he cites are mutually exclusive. For example, if the officers did smear pseudo-cocaine on Navarro's vehicle, that would imply that, at least in this case, Dingo alerted properly. Moreover, if Trooper Stevens indeed had a practice of shoving Dingo into vehicles in order to get the dog to provide a "false" alert and, therefore, probable cause (as one [\*\*\*15] of Navarro's witnesses claimed), this would imply that the pseudo-cocaine theory is untrue (why would Stevens and Baranowski have gone to all this trouble when Stevens [\*\*23] could have just shoved Dingo into Navarro's car?).

In sum, the district court's denial of the motion to suppress was proper.

#### **B. "Meaningful review"**

Although the district judge made it explicitly clear that he was conducting a de novo review of the portions of the magistrate's report to which Navarro had objected, Navarro nonetheless makes the claim that the district court's review was not "meaningful" and, thus, violated his right to due process. Without citing any relevant case law, Navarro opines that "the district court exerted no effort to actually give the case the attention it required."

Navarro's argument is meritless. He presents absolutely no evidence showing that the district court exerted "no effort," yet still makes the outlandish accusation that "the district court dismissed the spirit of the notion [of de novo review] by resolving all factual disputes in favor of the government . . . ."

### **III**

For the foregoing reasons, we AFFIRM the denial of Navarro's motion to suppress and, therefore, AFFIRM his conviction. [\*\*\*16]

**CONCUR BY: HARRY W. WELLFORD; KAREN NELSON MOORE**

#### **CONCUR:**

HARRY W. WELLFORD, Circuit Judge, concurring. I am persuaded by [\*\*24] our standard of review in this kind of case, which is heavily dependent on factual and credibility findings by the magistrate judge and the district court, that we should affirm.

This case is troubling--necessarily so by reason of defendant's challenges to the integrity and good faith of the state

186 F.3d 701, \*709; 1999 U.S. App. LEXIS 18287, \*\*24;  
1999 FED App. 0290P (6th Cir.), \*\*\*16

troopers in effectuating the stop of the vehicle, and the subsequent search and seizure of a substantial quantity of contraband found in [\*710] defendant's vehicle. Like the other judges who have been involved in the trial and in this appeal, I have read the record carefully, and I have reviewed the tape of the happenings during the traffic stop.

It is well-settled that when reviewing the district court's factual findings, we must "consider the evidence in the light most favorable to the government." *United States v. Caicedo*, 85 F.3d 1184, 1188 (6th Cir. 1996); see also *United States v. Buchanan*, 72 F.3d 1217, 1223 (6th Cir. 1995). If one were to ignore this standard in this difficult case, there would be a temptation to arrive at the different result urged upon us by defendant. We, however, must follow the law.

The defendant and his witnesses took issue [\*\*25] with the testimony of the trooper who clocked the vehicle in question as exceeding the lawful speed limit, as well as the alleged tip which alerted the troopers to the particular type of vehicle that purportedly was transporting drugs. Furthermore, the defendant contested the circumstances described by the troopers prior to the stop, and, most vehemently, the circumstances involved in the use of the trained drug-sniffing canine, Dingo. Moreover, there was some controversy about what happened between troopers Stevens and Baranowski as portrayed on the video tape, and whether they singled out [\*\*\*17] Latinos like the defendant for traffic stops and drug searches. A trier of fact might sincerely and honestly reach different conclusions based on divergent factual determinations in respect to these (and other) controversies mentioned in this case.

Viewing the evidence in a light most favorable to the government's proof as determined by the factual findings of the magistrate judge and the district judge, I conclude that we should affirm. Expert proof was developed in this case which was conflicting as to both the capabilities of Dingo, the canine, which alerted to the contraband in the [\*\*26] vehicle, and what transpired on the video tape between the troopers as they approached the type of vehicle they had purportedly been looking for over a several hour stretch. Once again, it was for the trial judge to make the necessary credibility findings on the defendant's motion to suppress.

Judge Boggs, I believe, properly devoted some attention to the circumstances of the initial stop. It is important to point out, however, that the defendant in his appellate brief at p. 29, concedes that "[he] never challenged the pretextual nature of the stop." In any event, Trooper Kiefer testified that his radar unit had been calibrated earlier that day and was, in fact, accurate and working properly. There was inadequate proof that Trooper Kiefer was involved in any improper stops of Latinos. The Supreme Court has stated, unanimously, that "subjective motivations play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996). Thus, we do not probe into the officer's state of mind in making the traffic stop, but rather whether probable cause for the stop was demonstrated.

Despite [\*\*27] the defendant's assertions to the contrary, there was substantial evidence admitted to support the proposition that Dingo was a reliable drug-detecting canine. First, Stevens and Dingo were certified in 1990. Thereafter, every two years, Dingo passed his recertification. During that time period, Stevens trained with his dog between 1500 and 2000 hours. Additionally, Stevens produced for the court [\*\*\*18] numerous certificates, recertifications, and commendations which had been earned by Dingo for his reliability. The most recent recertification, prior to the sniff which occurred in this case, was approximately forty days before the event. Moreover, Stevens testified that since 1990, Dingo had alerted accurately between ninety and ninety-three percent of the time. Even Dr. Craig, the defendant's expert, agreed that a drug-detecting canine with a ninety percent accuracy rate should be considered [\*711] reliable. See *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996). The district court's finding that Dingo was reliable was not clearly erroneous.

For all of the reasons stated by Judge Boggs and under the appropriate standard of review, I concur in the opinion that [\*\*28] we shall AFFIRM. [\*\*\*19]

KAREN NELSON MOORE, Circuit Judge, concurring in the result. I am troubled by several aspects of this difficult case. First, I find the actions of Troopers Stevens and Baranowski, as recorded on video tape, to be very suspicious. However, because I cannot conclude that the district court clearly erred in denying Navarro's motion to

186 F.3d 701, \*711; 1999 U.S. App. LEXIS 18287, \*\*28;  
1999 FED App. 0290P (6th Cir.), \*\*\*19

suppress, I am compelled to concur in the result.

My second concern, and the reason for my separate writing, relates to the allegations of race and ethnicity targeting by the Ohio Highway Patrol ("OHP") and the handling of evidence of such targeting in this and similar cases. Navarro attempted to introduce evidence from an unrelated civil rights suit which alleges that Trooper Kiefer and other OHP officers have singled out Hispanic motorists for investigatory stops on the basis of minor or nonexistent traffic violations. The district court refused to consider this evidence, and, as Judge Boggs correctly points out, evidence of racial or ethnic targeting is not relevant to the determination of whether the troopers had probable cause to stop Navarro's vehicle. *See Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996). [\*\*29]

Although under *Whren* an officer's motive in stopping a speeder is irrelevant for Fourth Amendment analysis, the selective enforcement of traffic laws based solely on race or ethnicity would violate the Equal Protection Clause of the Fourteenth Amendment. *See United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997). In a proper case, I believe that a defendant in Navarro's position could achieve suppression of the evidence or dismissal of the prosecution by demonstrating that the investigatory practice had a discriminatory purpose and a discriminatory effect. *See United States v. Armstrong*, 517 U.S. 456, 465, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996) (discussing selective prosecution elements); *United States v. Jennings*, 1993 U.S. App. LEXIS 926, No. 91-5942, 1993 WL 5927, at \*4 (6th Cir. Jan. 13, 1993) (unpublished disposition) [\*\*\*20] (suggesting suppression as remedy for seizure of evidence in violation of Equal Protection Clause); *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.) (noting that a "court should dismiss a case, or take other appropriate action" if defendant proves selective enforcement), *cert. denied*, 519 U.S. 928 (1996). n1

n1 Alternatively, a victim of selective enforcement could file a § 1983 action. *See Futernick*, 78 F.3d at 1056-57.

In the instant case Navarro sought to introduce the complaint from an unrelated civil rights suit as evidence in support of his Fourth Amendment claims, not to demonstrate that he had been the victim of selective law enforcement in violation of the Equal Protection Clause. The complaint does not provide evidence of disparate treatment of Hispanic motorists, moreover, and thus would not be sufficient to establish an equal protection claim. *See Armstrong*, 517 U.S. at 465. A selective enforcement claim in Navarro's case would be weakened further by the undisputed evidence that the investigation of him resulted from a tip -- a fact that undermines any assertion that he was stopped solely on the basis of his ethnicity. *See Avery*, 137 F.3d at 354 n.5. For these reasons I conclude that the district [\*\*31] court did not err in refusing to consider this evidence. The district courts should remain open, however, to the possibility of Fourteenth Amendment selective enforcement [\*712] challenges in future criminal prosecutions.

3 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BARRY L. DARAS,  
Defendant-Appellant.**

**No. 98-4286**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

*1998 U.S. App. LEXIS 26552*

**September 29, 1998, Submitted  
October 16, 1998, Decided**

**NOTICE:** [\*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *1998 U.S. App. LEXIS 35588*.

**PRIOR HISTORY:** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CR-98-79).

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment from the United States District Court for the Eastern District of Virginia, which found him guilty of driving under the influence of alcohol and speeding. Defendant asserted that the breath test, the field sobriety tests, and the evidence offered to prove the accuracy of the radar unit were inadmissible.

**OVERVIEW:** Defendant was stopped for speeding after being clocked by a radar gun. He failed several field sobriety tests and ultimately a breathalyzer test. The trial court convicted him of speeding and driving under the influence of alcohol. He challenged the decision and the admissibility of the evidence. On appeal the court affirmed. The evidence of the breathalyzer was properly admitted because the reliability of the specific machine used to perform the test was proved in prior cases and the evidence was relevant. Any procedural defects went only to the weigh of the evidence, not its admissibility, because the Assimilative Crimes Act assimilated only state substantive law pertaining to the elements of an offense and its punishment and not state procedure or rules of evidence. Further, the officer presented evidence that he was certified to use the machine and that it was working properly. The field sobriety tests were generally not scientific and required no expert testimony for them to be admissible. The accuracy of the radar unit was proved by two different calibrations, only one of which was challenged. Further, the officer's visual estimate was sufficient to support a

conviction.

**OUTCOME:** The court affirmed defendant's conviction for speeding and driving under the influence of alcohol.

**CORE TERMS:** breathalyser, breath, sobriety, machine, radar, alcohol content, reliability, reliable, scientific evidence, breath test, methodology, scientific, accuracy, mph, scientifically, admissibility, speeding, influence of alcohol, tuning fork, assimilating, calibrate, attesting, detection, admitting, untested, novel, grams, administered, horizontal, noticed

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Scientific Evidence > Sobriety Tests*

[HN1] The court reviews the magistrate judge's evidentiary rulings for an abuse of discretion. The court must affirm the convictions if, viewing the evidence and inferences in the light most favorable to the government, substantial evidence supports them.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Military & Veterans Law > Military Justice > Jurisdiction > Assimilation*

[HN2] A federal prosecution under the Assimilative Crimes Act assimilates state substantive law pertaining to the elements of an offense and its punishment. It does not generally adopt state procedure or rules of evidence. Accordingly, the failure to follow state procedures relating to the proper administration of breathalyzers goes to the weight, and not the admissibility, of the test.

**COUNSEL:** Richard E. Gardiner, Fairfax, Virginia, for Appellant.

Helen F. Fahey, United States Attorney, Jonathan R. Barr, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

**JUDGES:** Before ERVIN and WILLIAMS, Circuit Judges, and HALL, Senior Circuit Judge.

**OPINION: OPINION**

PER CURIAM:

Barry Daras appeals from a district court order affirming a magistrate judge's judgment order finding Daras guilty, following a bench trial, of driving under the influence of alcohol and with a breath alcohol content of .08 grams or above, in violation of 18 U.S.C. § 13 (1994) (assimilating *Virginia Code* § 18.2-266), and of speeding, in violation of 32 C.F.R. § 634.25(f) (1998), (assimilating *Virginia Code* [\*2] § 46.2-870). The infractions occurred on August 24, 1997, around 2:50 a.m., at Ft. Belvoir, a military installation in Virginia. On that date, Military Police Officer Sean Grier observed Daras drive his vehicle through a posted 35 mph zone of the military base. Grier used a radar detection device to measure Daras' speed at 56 mph, and subsequently stopped him for speeding.

When Grier approached Daras, he noticed that Daras' eyes were bloodshot and that he appeared to be confused. He smelled the odor of alcohol on Daras' breath and noticed an open container of beer in the vehicle. Grier testified that Daras had difficulty getting his driver's license out of his wallet and that his speech was somewhat slurred. Daras told

Grier that he had "had a few drinks at the club."

Grier then administered three pre-exit field sobriety tests: the finger count, the alphabet test, and the counting test. Daras was unable to perform two of the three tests accurately. Grier then asked Daras to exit his vehicle. He conducted three post-exit field sobriety tests: the walk and turn test, stand on one leg test, and the horizontal gaze nystagmus test of involuntary eye movement. Grier testified that Daras [\*3] did poorly on these tests and that the results convinced him that Daras was under the influence of alcohol. Accordingly, he arrested Daras and took him to the military police station, where he used a breathalyser machine called the "Intoxilyzer 5000" to take a sample of Daras' breath. The machine reflected that Daras' breath alcohol content was .10 grams per 210 liters of breath.

On appeal, Daras challenges the admissibility of the breath test, the field sobriety tests, and the evidence offered by the Government to prove that Grier's radar detection unit was properly calibrated. He alleges that without such evidence, the evidence is insufficient to support his convictions. [HN1] We review the magistrate judge's evidentiary rulings for an abuse of discretion. See *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995). We must affirm the convictions if, viewing the evidence and inferences in the light most favorable to the government, substantial evidence supports them. See *United States v. Singh*, 54 F.3d 1182, 1186 (4th Cir. 1995).

Daras contends that the breath test should not have been admitted because the Government failed to present any [\*4] evidence that the Intoxilyzer 5000 was a scientifically reliable device. He avers that the trial court should have required the Government to prove the scientific validity of the methodology by which the device measures blood alcohol content, using the standards for assessing the reliability of scientific evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). But *Daubert* merely requires that the proffered scientific evidence be relevant and reliable. *Benedi*, 66 F.3d at 1384. Daras does not dispute that the evidence is relevant. Moreover, the reliability of the methodology, that is, the scientific technique by which breathalysers measure breath alcohol content, is well established. See *California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984) (recognizing that accuracy of Intoxilyzers has been certified by the National Highway Traffic Safety Administration (NHTSA) since 1973); *United States v. Brannon*, 146 F.3d 1194, 1196 (9th Cir. 1998) (same); *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) [\*5] (stating that breathalyser is the "best means of obtaining evidence of the breath alcohol content"). We note Daras' contention that our comment in *Reid* has no bearing on this case because it related to breathalysers in general and not specifically to the Intoxilyzer 5000. While Daras presents no reason to conclude that different breathalyser machines use a different scientific methodology, we note that the device used in *Brannon* was the same type of breathalyser used in this case, the Intoxilyzer 5000. See *Brannon*, 146 F.3d at 1195. n1 Daras further avers that the breathalyser results were inadmissible because the Government failed to comply with an allegedly assimilated Virginia statutory provision requiring proof that any breath test used by the prosecution be conducted by a person with proper training using equipment approved by the Virginia Division of Forensic Science. See Va. Code Ann. § 18.268.9. [HN2] A federal prosecution under the Assimilative Crimes Act "assimilates state substantive law pertaining to the elements of an offense and its punishment. It does not generally adopt state procedure or rules of evidence." See *United States v. Price*, 812 F.2d 174, 175 (4th Cir. 1987). [\*6] Accordingly, courts have held that the failure to follow state procedures relating to the proper administration of breathalysers goes to the weight, and not the admissibility, of the test. See *Brannon*, 146 F.3d at 1196; *United States v. Sauls*, 981 F. Supp. 909, 911 (D. Md. 1997).

n1 Many federal courts hold that *Daubert* is limited to cases involving novel, unique, or untested scientific evidence. See *Thornton v. Caterpillar, Inc.*, 951 F. Supp. 575, 578 (D.S.C. 1997); *Waitek v. Dalkon Shield Claimants Trust Fund*, 934 F. Supp. 1068, 1087-89 n.10 (N.D. Iowa 1996). We need not decide in this case whether *Daubert's* application is so limited, or whether breathalysers are novel, unique, or untested scientific evidence because we find that the breathalyser used in this case was both relevant and reliable.

We note alternatively, that the record in this case indicates that the Government demonstrated the reliability of the

equipment and the [\*7] proper administration of the test. It has already been established that the Intoxilyzer 5000 is a scientifically reliable device for measuring breath alcohol content. Further, the Government submitted into evidence a printout by the machine itself which stated that the machine had been tested and found to be accurate by the Division of Forensic Science on May 23, 1997, approximately three months prior to the date the test was conducted. Officer Grier also testified that he was a certified operator of the machine and that he tested it immediately before Daras' breath test to ensure that it was working properly at the time he administered it. Finally, Daras concedes that Grier has been properly trained to operate the machine, and identifies no error committed in the performance of the test. Accordingly, we find that the magistrate judge properly admitted and relied on the results of the breathalyser test.

Daras next challenges the admissibility of the field sobriety tests, arguing that the Government again failed to show the scientific reliability of such tests under Daubert. With the exception, however, of the horizontal gaze nystagmus (HGN) test, the field sobriety tests were [\*8] not scientific, as they involved no methodology but rather objective observations of an individual's performance on simple psychomotor tests. There was no need for any expert testimony regarding these tests. See *Hulse v. State*, 1998 MT 108, 961 P.2d 75, 93 (Mont. 1998) (recognizing that the HGN is distinguishable from other field sobriety tests because it is a scientific test). As for the HGN, we need not decide whether such tests are scientifically reliable, n2 because the results of the breathalyser, the remaining field sobriety tests, and Officer Grier's testimony were more than adequate to support Daras' conviction.

n2 For a survey of the case law discussing the reliability of such tests, see *State v. O'Key*, 321 Ore. 285, 899 P.2d 663 (Or. 1995).

Finally, Daras contends that the trial court erred by admitting a Certificate of Calibration attesting to the accuracy of the radar unit used by Officer Grier, and by admitting a Certificate of Accuracy attesting to the accuracy [\*9] of the 35 mph tuning fork used to calibrate the radar unit. The Government also presented, however, a Certificate of Accuracy for a 65 mph tuning fork which was also used to calibrate the radar unit. Daras raises no objection to the admission of this evidence which, by itself, was sufficient to establish the accuracy of the radar unit and support his speeding conviction. See *United States v. O'Shea*, 952 F. Supp. 700, 703 (D. Colo. 1997). Moreover, the Government correctly points out that the officer's visual estimate is also sufficient, by itself, to support a conviction. See *United States v. Wornom*, 754 F. Supp. 517, 519 (W.D. Va. 1991). We therefore affirm the order of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

4 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CECIL R. FERGUSON,  
Defendant-Appellant.**

**No. 91-6316**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

*989 F.2d 202; 1993 U.S. App. LEXIS 5002*

**October 1, 1992, Argued**

**March 19, 1993, Decided**

**March 19, 1993, Filed**

**SUBSEQUENT HISTORY:** [\*\*1] Vacated on Grant of Rehearing En Banc April 26, 1993, Reported at: *1993 U.S. App. LEXIS 27861*.

**PRIOR HISTORY:** On Appeal from the United States District Court for the Western District of Tennessee. District No. 91-20024. Jerome Turner, District Judge.

**DISPOSITION:** REVERSED and VACATED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the United States District Court for the Western District of Tennessee, which denied his motion to suppress and convicted him of possession with intent to distribute cocaine in violation of *21 U.S.C.S. § 851(a)(1)*.

**OVERVIEW:** An officer became suspicious of the activities of defendant and his companion at a motel. The officer positioned himself across the street so that he could observe the two as they drove to a room, drove to another car to retrieve a briefcase, and returned to the room. The officer noticed that their car had no visible license plate and pulled them over. The officer observed a pistol and envelopes containing cocaine in the car and arrested defendant. The officer then found plastic bags, scales, and drug notes in the briefcase. Defendant appealed his conviction for possession with intent to distribute cocaine in violation of § 851(a)(1). The court held that the denial of a motion to suppress the weapons and drugs seized during the arrest was clearly erroneous. A reasonable officer would not have stopped defendant because his vehicle had no visible plate, absent some additional invalid purpose. The court found that the officer sought to conduct an investigatory drug stop based on his testimony that one of the reasons he stopped the vehicle was what he observed at the motel and that he made no inquiry into the absence of the plate, which he did not notice until he followed the vehicle.

**OUTCOME:** The court reversed defendant's possession conviction and vacated his sentence.

**CORE TERMS:** license plate, visible, pretextual, reasonable officer, suspicion, motel, suspicious, driving, mile, police officer, motivation, briefcase, drove, motion to suppress, illegitimate, license, pulled, driver, probable cause, drug activity, investigatory, cocaine, traffic, front seat, stopping, noticed, guard, objective test, invalid, mph

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN1] In determining when an investigatory stop is unreasonably pretextual, the proper inquiry is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose. The "reasonable officer" standard is the controlling standard regarding pretextual stops.

**COUNSEL:**

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Christopher E. Cotten, Asst., U.S. Attorney, Argued & Briefed, 901-544-4013, Office of the U.S. Attorney, 167 N. Main Street, Suite 1026 Federal Office Building, Memphis, TN 38103.

For CECIL RAYMOND FERGUSON, Defendant - Appellant: Eugene A. Laurenzi, Argued & Briefed, 901-528-1702, Agee, Allen, Godwin, Morris & Laurenzi, 263 Court Street, Second Floor, Memphis, TN 38103.

**JUDGES:** Before: KEITH, JONES, and BOGGS, Circuit Judges. KEITH, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. BOGGS, Circuit Judge, delivered a separate dissenting opinion.

**OPINION BY: KEITH**

**OPINION:**

[\*202] KEITH, Circuit Judge. Appellant, Cecil R. Ferguson, appeals his conviction and sentence for possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). For the foregoing reasons, we REVERSE appellant's conviction and VACATE his sentence.

I.

At approximately 1:30 a.m. on October 18, 1990, Officer Ernie Writesman was on routine patrol at the Royal Oaks Motel parking lot in Memphis, Tennessee. While [\*203] talking with the motel's security guard and conducting a security check, Writesman observed Ferguson drive into the parking lot in a 1977 Lincoln. Ferguson was followed by Leonard Lester, who was driving a 1977 Ford.

Writesman observed Ferguson and Lester park their cars opposite one another near room 203. Ferguson then got out of his car and walked towards Writesman and the guard. The guard asked Ferguson if [\*\*2] he could help him. Ferguson replied that he was looking for room 212 to return the Lincoln which he had borrowed earlier. After getting directions from the guard, Ferguson proceeded back towards his vehicle. Having overheard the conversation between Ferguson and the guard, Writesman drove towards the front of the motel where he saw Lester lay down across the front seat of the Ford. Suspicious of Ferguson and Lester, Writesman drove across the street where he could observe them undetected.

Writesman observed Ferguson get into the Ford with Lester. Lester drove to a position near room 410. Ferguson entered the room and in a few minutes came out and got back in the Ford. The two men then drove to the Lincoln,

where Ferguson retrieved a grey briefcase. Ferguson got back into the Ford, and he and Lester again drove to room 410. Ferguson entered the room with the briefcase and in a few minutes returned, still carrying the briefcase. Ferguson then got back into the Ford with Lester and they left the motel parking lot heading east on Summer avenue. Having observed this activity, Writesman followed the men and pulled them over when he noticed, for the first time, that Lester's Ford had no visible [\*\*3] license plate.

Upon stopping the Ford, Lester got out of the vehicle and walked over to Writesman, who asked Lester for his driver's license. Writesman asked Lester "what he was up to" and Lester stated that he had been at the motel with a woman. Writesman then placed Lester in the back seat of the police car and called for assistance. As Writesman was waiting for backup, Ferguson remained in the front seat of the Ford. Once his backup arrived, Writesman approached the Ford and observed a .22 caliber pistol laying on the front seat. Writesman also noticed a plastic bag in the vehicle containing several envelopes, the contents of which were later identified as cocaine. Ferguson, who was sitting in the front seat holding a briefcase, was then placed under arrest. A search of the briefcase revealed zip-lock plastic bags, scales, and what are apparently drug notes.

The government contends that Writesman stopped Lester's vehicle because it had no visible license plate, which is a violation of Memphis City Ordinance 21- 269. When asked at the suppression hearing why he stopped the vehicle, Writesman stated: "There were a couple of reasons why I stopped it. Number one was the activity that [\*\*4] I just observed at the Royal Oak Motel. And then the fact that it had no license plate on it that could be seen." (App. at 66). Although Writesman stated that one of the reasons he stopped the vehicle was because it had no visible license plate, while on the scene of the stop, he made no inquiry or investigation concerning the absence of a visible license plate on the Ford, nor did he give Lester a citation for having no visible license plate. It was not until Writesman reviewed photographs from the scene of the stop that he learned that there was a drive out tag lying on the shelf of the rear window of the Ford.

Ferguson and Lester were charged with possession of cocaine with intent to distribute, in violation of *21 U.S.C. § 841(a)(1)* and *18 U.S.C. § 2*. They were also charged with carrying and using a firearm during and in relation to a drug trafficking crime, in violation of *18 U.S.C. § 924(c)*. Ferguson filed a motion to suppress the evidence seized during his arrest, alleging that the stop and search of the Ford was "pretextual, unreasonable and illegal," in that no probable [\*\*5] cause existed for the stop. (App. at 6). This motion was heard by a magistrate who concluded that the stop and search was based on a reasonable suspicion and was not pretextual. The magistrate's recommendation was adopted by the district court.

[\*204] Pursuant to a negotiated plea agreement, Ferguson pled guilty to the drug offense and the government dismissed the weapons charge. Ferguson reserved the right to appeal the denial of his motion to suppress. At sentencing, the court refused to consider Ferguson's challenge to the validity of two prior state felony convictions used to categorize him as a career offender under the Sentencing Guidelines. On appeal, Ferguson argues that the court erred in denying his motion to suppress and in categorizing him as a career offender. Each of these issues are discussed below.

## II.

Ferguson contends that his Fourth Amendment right against unreasonable searches and seizures was violated because Officer Writesman's stop and search of Lester's vehicle was unreasonably pretextual. Specifically, Ferguson argues that the absence of a visible license plate on the Ford served as a pretext to stop and search the vehicle for drugs. The district court, however, [\*\*6] found that the stop was based on probable cause and was not pretextual. We must review the district court's findings of fact as to Ferguson's motion to suppress under the clearly erroneous standard. *United States v. Duncan*, 918 F.2d 647, 650 (6th Cir. 1990), cert. denied, 114 L. Ed. 2d 461, 111 S. Ct. 2055 (1991).

Ferguson argues that the weapon and drugs seized as a result of the stop should not have been admitted into evidence against him. See *Wong Sun v. United States*, 371 U.S. 471, 486-87, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) (Court suppressed the use of narcotics discovered as a result of illegal police activity as "fruit of the poisonous tree").

This Circuit's standard for determining when a police investigatory stop is illegally pretextual is explained in *United States v. Pino*, 855 F.2d 357, 361 (6th Cir. 1988), **cert. denied**, 493 U.S. 1090, 110 S. Ct. 1160, 107 L. Ed. 2d 1063 (1990). In *Pino*, we adopted the Eleventh Circuit's analysis regarding pretextual stops, applying the reasoning of *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), **cert. denied**, U.S. , 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991). [\*\*7] In *Smith*, the Eleventh Circuit wrote:

That [HN1] in determining when an investigatory stop is unreasonably pretextual, the proper inquiry . . . is not whether the officer **could** validly have made the stop but whether under the same circumstances a reasonable officer **would** have made the stop in the absence of the invalid purpose.

799 F.2d at 709 (emphasis in original). We note that the "reasonable officer" standard articulated in *Smith* and adopted by this Court in *Pino* is the controlling standard in this Circuit regarding pretextual stops. *Pino*, 855 F.2d at 361; **see also** *United States v. Crotinger*, 928 F.2d 203, 206 (6th Cir. 1991).

In *Smith*, a Florida Highway Trooper and a Drug Enforcement Agent followed two men traveling on Interstate 95 in a 1985 Mercury. The Trooper testified that they followed the vehicle because the men matched a drug courier profile. According to the Trooper, they followed the vehicle for about a mile and a half and pulled the vehicle over when they noticed the vehicle start to weave. After stopping the men, the Trooper questioned the driver about the ownership [\*\*8] of the vehicle and also called for a drug dog to sniff the vehicle for drugs. With the assistance of the dog, the officers discovered cocaine in the trunk of the vehicle. The two men were arrested and charged with cocaine possession and conspiracy to distribute. They filed motions to suppress the cocaine found in their trunk, alleging that the stop of their vehicle was unreasonable. The trial court ruled that the stop was legal.

On appeal, the Eleventh Circuit wrote that "the stop was unreasonable not because the officer secretly hoped to find evidence of a greater offense, but because it was clear that an officer would have been uninterested in pursuing the lesser offense absent that hope." 799 F.2d at 710. In analyzing the objective evidence in the case, the court noted that:

What turns this case is the overwhelming objective evidence that [Agent] Vogel had no interest in investigating possible [\*\*205] drunk driving charges: he began pursuit before he observed any "weaving" and, even after he stopped the car, he made no investigation of the possibility of intoxication. . . . Based on this objective evidence, we conclude that a reasonable officer would not have [\*\*9] stopped the car absent an additional, invalid purpose.

799 F.2d at 710-11. We think that the investigatory stop at issue in the instant case is disturbingly similar to the stop that was found to be pretextual in *Smith*.

In this case, Officer Writesman began his pursuit of Ferguson and Lester before he noticed that Lester's vehicle had no visible license plate. Writesman became suspicious of the two men when he saw Lester lay down across the front seat of the Ford, shortly after overhearing Ferguson's conversation with the guard. Writesman positioned himself across the street from the motel so that he could observe Ferguson and Lester's activity from a position of concealment. He observed Ferguson get out of his vehicle and then into the vehicle with Lester. He observed them drive to room 410, where Ferguson entered the room and came out a few minutes later. He continued to observe the men drive back to the Lincoln to retrieve a briefcase and then back to room 410, where Ferguson entered the room with the briefcase. When the two men finally left the motel parking lot, heading east on Summer avenue, Writesman followed them. According to Writesman's testimony, [\*\*10] he did not notice that Lester's vehicle did not have a visible license plate until he began following the vehicle. Furthermore, Writesman stated that one of the reasons he stopped the vehicle was because of what he observed at the motel. We also think it is significant that Writesman made no inquiry or investigation whatsoever concerning the absence of a visible license plate on the Ford, nor did he give Lester a citation for not having a visible license plate.

Based on our review of the evidence in this case, we do not believe that a "reasonable officer" would have stopped Lester because his vehicle had no visible license plate, absent some additional, invalid purpose. The objective evidence,

which includes Writesman own testimony, shows that Writesman was not interested in giving Lester a warning or a citation for driving a vehicle with no visible license plate. Although Writesman testified that he routinely stops vehicles that do not display a visible license plate, there is overwhelming evidence that Writesman stopped the vehicle because he wanted to conduct an investigatory drug stop, suspicious of the activity he observed at the motel. Accordingly, we find that the district [\*11] court's denial of Ferguson's motion to suppress the weapon and drugs seized during his arrest is clearly erroneous.

This case is distinguishable from **Pino** and **Crotinger**, where this Court applied the **Smith** analysis and found that the challenged police stops were not illegally pretextual in either case. In **Pino**, an officer observed a vehicle swerving on and off the freeway, nearly hitting the guardrail. The officer pulled the vehicle over, questioned the driver, and decided to give the driver a citation and to arrest the driver for illegal lane changing. **Pino**, 855 F.2d at 358-59. Applying the "reasonable officer" analysis from **Smith**, we held that the stop of the vehicle was not pretextual, noting that the officer's "observation of the swerving vehicle gave him probable cause to believe that Pino had violated one or more . . . Tennessee motor vehicle statutes." *Id.* at 361.

In **Crotinger**, an officer using a speed radar detector pulled over a vehicle for going 66 mph in a 55 mph zone. Upon approaching the car, the officer observed white pills on the floor and detected the smell of marijuana. The officer [\*12] obtained written consent from the owner of the vehicle to conduct a search of containers and compartments within the vehicle. A search was conducted and marijuana was found. The defendant, however, challenged the introduction of the marijuana as evidence against him, on the ground that it was illegally obtained as the result of a pretextual traffic stop. We rejected this argument and held that probable cause existed for stopping the vehicle and that "objectively, it is reasonable for a police officer operating a speed trap to stop and ticket [\*206] vehicles going 66 mph in a 55 mph zone." **Crotinger**, 928 F.2d at 206.

Based on clearly established precedent in this Circuit, we think the district court committed reversible error by denying Ferguson's motion to suppress. Therefore, we reverse Ferguson's conviction. Accordingly, we need not address Ferguson's argument that the district court erred by refusing to consider his challenge to the validity of two prior convictions used to categorize him as a career offender.

III.

For the foregoing reasons, we **REVERSE** appellant's conviction and **VACATE** his sentence.

**DISSENT BY: BOGGS**

**DISSENT:**

BOGGS, Circuit Judge, dissenting. There [\*13] is only one question posed by this case: would "the reasonable police officer," an objective construct, stop a car driving at 1 a.m. with no visible license plate? The district court found as a fact that the reasonable officer **would** have made such a stop. There is no basis in the record, and no basis in common sense, for holding that finding clearly erroneous. Therefore, the district court's ruling and the defendant's conviction must stand, and I respectfully dissent.

Although the court professes allegiance to the objective test, it buttresses its conclusion with subjective evidence and concentrates primarily on Officer Writesman's actions after the stop was made. The court displays its reliance on a subjective test in this summary of its reasoning: "Although Writesman testified that he routinely stops vehicles that do not display a visible license plate, there is overwhelming evidence that Writesman stopped the vehicle because he wanted to conduct an investigatory drug stop, suspicious of the activity he observed at the motel." (slip op. at 7) This confuses the analysis. There is no question that Writesman was partially motivated by his suspicion of drug activity. He admitted [\*14] his suspicion on the stand. However, the existence of an illegitimate motivation does not render a concurrent legitimate motivation pretextual. To the contrary, it is irrelevant. The proper inquiry is whether a reasonable

officer would have stopped Ferguson and Lester "in the **absence** of an illegitimate motivation." *Smith*, 799 F.2d at 708 (emphasis added). By focusing entirely on the illegitimate motivation and whether it was the true or dominant reason for the stop, the court, despite ostensibly adhering to the objective test, has applied a subjective test.

This holding has several undesirable consequences. First, the court appears to be reserving the right to declare any stop unreasonable when it believes that the ostensible reason -- no matter how reasonable and justified by the circumstances -- is not the true or dominant motivation for the stop. Second, the court's holding apparently presumes a constitutional right to be free from public observation based on suspicious conduct that does not amount to probable cause. No such right exists. See, e.g., *United States v. Knotts*, 460 U.S. 276, 281, 75 L. Ed. 2d 55, 103 S. Ct. 1081 (1983). The essence [\*15] of good police work is to notice what appears to be out of the ordinary, the possible precursors or indicia of unlawful conduct, to take appropriate steps to confirm or deny those suspicions, within constitutional limits, and then to take appropriate action when violations are observed or probable cause appears. That is exactly what happened here.

Officer Writesman made no bones about the fact that his observation led him to believe that unlawful conduct might be afoot. In fact, Officer Writesman admitted that he did not notice the missing license until, prompted by the suspicious activity at the motel, he began following the Ford. Therefore, Officer Writesman probably would not have noticed the license violation if he had not followed up on his suspicions. However, these circumstances do not alter our analysis. Conduct arousing suspicion of criminal activity does not immunize a citizen from being stopped for a different, though significant, violation of the law. On the contrary, suspicious conduct is likely to attract police scrutiny and increase the probability of being stopped for traffic violations or other offenses. Increased [\*207] scrutiny alone is not a constitutional violation. [\*16] A citizen's constitutional rights are violated only if the stated motivation for the stop is not objectively reasonable and is thus an **unreasonable** pretext for an illegitimate motivation.

*Smith*, *Pino*, and *United States v. French*, 974 F.2d 687 (6th Cir. 1992), all involve this same situation -- an officer observing suspicious conduct, following a vehicle, and making a traffic stop based on alleged violation of traffic regulations. In each of these cases, the traffic violation is, in some sense, a "pretext" to the end of obtaining information about the suspected crime, and the suspicion is a "but-for" cause of the stop, because the officer would not have been in a position to observe the violation had it not been for the suspicion.

Of course, not every minor violation of traffic regulations justifies a stop. As the Eleventh Circuit stressed, the question is not whether a reasonable officer **could** legally have stopped the defendant, but whether a reasonable officer **would** have stopped the defendant. *Smith*, 799 F.2d at 708. The appropriate inquiry under the objective test is whether the traffic violation is [\*17] one that is so minor (e.g., failing to signal before changing lanes on an open road; going one mile an hour over the speed limit; or failing to come to an absolutely complete stop before turning right at a stop sign) that a reasonable officer would not have stopped an unsuspecting car, or whether the stop was for a reason that would have led a reasonable officer to make the stop under any circumstances.

The cases give us some considerable guidance in assessing where this line should be drawn. *Crotinger* is particularly instructive, as it provides a calibration with which we are all familiar. *Crotinger* was driving 66 miles an hour in a 55 mile an hour zone. It is quite likely that many readers of this opinion have done so, and quite likely that most would have felt somewhat aggrieved at being stopped, though such a stop would be close to the line. At 20 miles an hour over the limit, most of us, I believe, would feel that the officer was quite justified, and at 3 miles an hour over the limit, virtually everyone would feel that a reasonable officer would not have made the stop. *Crotinger*, 928 F.2d at 206.

The other two Sixth Circuit cases are even more [\*18] problematic than *Crotinger*. In *Pino*, an officer pulled alongside a rental car that he suspected was driven by a drug courier. When the driver saw the officer passing, he panicked, abruptly braked and swerved onto the shoulder. The officer, now highly suspicious, played a cat-and-mouse game with the defendant. He drove more and more slowly in an attempt to force the defendant to pass him again, but only succeeded when he pulled to a complete stop on the shoulder. A subsequent search confirmed the officer's

suspicion of drug activity. Not surprisingly, the officer did not claim that he stopped the defendant because his driving raised suspicion of drug activity. Instead, the officer claimed there was probable cause that the defendant violated several traffic regulations, such as those prohibiting passing a vehicle on the right, weaving, endangering pedestrians, and not using blinkers. We accepted the officer's explanation and upheld the stop. *Pino*, 855 F.2d at 361. Of course, the same activity -- erratic driving -- heightened the officer's suspicion of the drug activity and provided the grounds for the minor traffic offenses. In essence, the stop [\*\*19] was not pretextual because the defendant's panicked response to the sight of a police officer was so pronounced that the officer could classify it as a traffic offense. n1

n1 However, the difficulty with *Pino* is not that the officer's dominant motive for the stop was undoubtedly suspicion of drug activity. The problem is that the two motives are inseparable; they are really one motive with two characterizations -- one legitimate and one illegitimate. But the legitimate reason for the stop, the traffic offense, would have never materialized had the officer not zealously followed up on the illegitimate motive. The officer's suspicion and investigation, in effect, precipitated the erratic driving. In contrast, Officer Writesman's actions in no way provided the grounds for the stop; he did not cause or contribute to the license violation. His suspicion and subsequent observation only provided the opportunity to notice the lack of a license. Thus, it is difficult to understand how a judge could uphold *Pino* and yet vote to reverse this case.

[\*\*20]

[\*208] In *French*, police officers followed a vehicle for nearly 50 miles before stopping it for speeding. Applying the objectively reasonable analysis, we found that the stop for speeding was valid even though one officer admitted, not surprisingly, that he was partially motivated by the suspicion of drug trafficking. *French*, 974 F.2d at 691-92. We stated that the officers "acted in an objectively reasonable manner because the Mercedes was, in fact, speeding" -- even though the car was clocked at only seven miles an hour over the limit. *Id.* at 692.

Finally, in *Smith* itself, the only case in which a stop was ruled invalid, the relevant conduct was "weaving" by 6 inches onto the shoulder and not looking at the nearby patrol car. The *Smith* court properly held that a reasonable officer would not have made the stop.

The conduct here, in my view, was clearly more egregious than that in *Crotinger*, *Pino*, and *French*. Driving with no visible vehicle registration is a violation of Memphis City Ordinance § 21-269. It is a significant offense, certainly comparable to the offenses that justified the stops in *Pino* [\*\*21] , *French* and *Crotinger*, and Writesman, a police officer with sixteen years of experience, testified that he routinely stops cars that do not display a license. Ferguson failed to present, and the court does not provide, any evidence or argument that Writesman's conduct is not consistent with that of a reasonable police officer or that Memphis police officers routinely choose not to enforce this ordinance.

If I drove around town for any length of time with no visible license plate, I would not be surprised at all to be stopped as soon as I was observed by an officer going in the same direction who was not otherwise engaged. Having in fact been stopped by a reasonable police officer for the lesser and more difficult-to-detect offense of not displaying an auto inspection decal, it strikes me very forcefully that Officer Writesman's action in stopping a car with no visible license plate does not clearly brand him as an unreasonable police officer. The court's opinion today is impossible to square with the objective test that is the law in this circuit, and I therefore dissent.

5 of 195 DOCUMENTS

**UNITED STATES OF AMERICA vs. JERRY E. JACKSON**

**CRIMINAL NO. 3:06cr94-WHB-JCS**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
MISSISSIPPI, JACKSON DIVISION**

*2007 U.S. Dist. LEXIS 4868*

**January 23, 2007, Decided**

**CORE TERMS:** intoxilyzer, influence of alcohol, breath, machine, accuracy, breathalyzer, administered, driving, alcohol, motor vehicle, reliability, testing, alcohol content, tested, self-calibration, proven, blood, standard operating procedure, field sobriety test, chemical analysis, federal law, regulations, twice, conducting, scientific, seatbelt, driver, miles, odor of alcohol, certifying

**COUNSEL:** [\*1] For Jerry E. Jackson (1), Defendant: Omodare B. Jupiter, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER, Jackson, MS.

**JUDGES:** William H. Barbour, Jr., United States District Judge.

**OPINION BY:** William H. Barbour, Jr.

**OPINION:**

**OPINION AND ORDER**

Jerry E. Jackson appeals his conviction for driving under the influence of alcohol in violation of 36 C.F.R. § 4.23 by challenging the sufficiency of the evidence underlying that conviction. Upon finding that there is sufficient evidence to support the conviction, this Court affirms.

**I. Background Facts**

On November 5, 2005, while conducting stationary radar on the Natchez Trace Parkway, United States Park Ranger Jerome Timmons, Jr. ("Timmons") observed a motor vehicle traveling at an excessive rate of speed. After radar confirmed that the vehicle was traveling at fifty-seven miles per hour, which is seven miles greater than the posted speed limit of fifty miles per hour, Timmons initiated a traffic stop. Upon approaching the vehicle, Timmons observed that Appellant was the driver of the vehicle, and that none of the occupants of the vehicle - which included three adults and four children - were restrained with seatbelts. [\*2]

Upon questioning Appellant, Timmons detected the odor of alcohol. Appellant admitted that he had consumed a quart of "King Cobra" approximately five hours earlier, and that his wife may have had an open container of "King Cobra" in the vehicle from which he had taken a few sips. Based on these statements and his observations, Timmons suspected that Appellant was under the influence of alcohol and, therefore, conducted a field sobriety test. The test results, as reported by Timmons, were that Appellant had nystagmus with maximum deviation in both eyes, was unable to heel-to-toe walk, was unable to follow instructions as to the manner in which the tests were to be performed (Appellant having taken twenty-three steps after Timmons requested that he take nine), was unable to pivot turn on one

foot, and miscounted when performing a one-leg stand test. Results of a portable breathalyzer test administered at the scene were positive for alcohol. After conducting the field sobriety test, Timmons escorted Appellant to the Claiborne County Sheriff's Department and administered a breathalyzer test using the "Intoxilyzer 8000" ("Intoxilyzer"). Consistent with standard operating procedure, Appellant [\*3] was tested twice and his breath alcohol content level registered 0.099 and 0.084, respectively. Thereafter, Appellant was cited for speeding, failure to wear a seatbelt, and driving under the influence of alcohol in violation of 36 C.F.R. § 4.23.

On May 6, 2006, Appellant appeared before United States Magistrate Judge James C. Sumner at which time he pleaded guilty to the charges of speeding and failure to wear a seatbelt. Judge Sumner also heard testimony on the charge of driving while under the influence of alcohol. At the hearing, the Intoxilyzer results were admitted into evidence without objection from Appellant. Judge Sumner found that Timmons's observations during the field sobriety test established probable cause for conducting the breathalyzer test, and that the Intoxilyzer results supported a finding that Appellant was guilty of operating a motor vehicle while under the influence of alcohol. Appellant now challenges of the sufficiency of the evidence underlying his DUI conviction.

## II. Standard of Review

Pursuant to *Rule 58(g)(2)(D) of the Federal Rules of Criminal Procedure*, when reviewing a conviction [\*4] by a magistrate judge the "scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge." In this circuit, "[t]he standard of review for sufficiency of the evidence is 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Bellew*, 369 F.3d 450, 452 (5th Cir. 2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). See also *United States v. Mitchell*, 777 F.2d 248, 260-61 (5th Cir. 1985).

## III. Discussion

Appellant was convicted under 36 C.F.R. § 4.23, which provides, in relevant part:

- (a) Operating or being in actual physical control of a motor vehicle is prohibited while:
  - (1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or
  - (2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 millimeters of blood or 0.08 grams of [\*5] alcohol per 210 liters of breath . . . .

Judge Sumner found Appellant guilty of operating a motor vehicle while under the influence of alcohol solely on the Intoxilyzer results, which indicted that Appellant had a breath alcohol content of 0.099 and 0.084. n1

n1 Under 36 C.F.R. § 4.23(d), results of quantitative tests "are intended to supplement the elements of probable cause used as the basis for the arrest of an operator" charged with operating a motor vehicle under the influence of alcohol and "are not intended to limit the introduction of any other competent evidence bearing upon the question of whether the operator, at the time of the alleged violation, was under the influence of alcohol . . ." In several unpublished opinions of the United States Court of Appeals for the Fifth Circuit, which may be considered persuasive authority under the local rules of that court, convictions for driving under the influence of alcohol have been upheld on appeal based only on the observations of law enforcement personnel. See e.g. *United States v. Smith*, No. 05-50890, 171 Fed. Appx. 438 (5th Cir. Mar. 16, 2006) (affirming DUI conviction based on evidence that defendant had been drinking, driving, and officers at the scene testified that her breath smelled of alcohol, her eyes were glossy, she did not speak in a normal volume, and she failed three

field sobriety tests); *United States v. Vaillancourt*, No. 04-50279, 108 Fed. Appx. 977 (5th Cir. Sept. 21, 2004) (affirming conviction of DUI based on evidence that defendant had been drinking, had a strong odor of alcohol on her breath, had bloodshot and glassy eyes, was unable to perform a dexterity test, and was unable to complete an intoxilyzer test).

[\*6]

Under 36 C.F.R. § 4.23(c):

(3) Any test or tests for the presence of alcohol and drugs shall be determined by and administered at the direction of an authorized person.

(4) Any test shall be conducted by using accepted scientific methods and equipment of proven accuracy and reliability operated by personnel certified in its use.

During the hearing before Judge Sumner, Timmons testified that he received formal training regarding the use of the "Intoxilyzer 8000", that he was certified to use this type of machine, and that he had been administering breathalyzer tests using this type of machine for approximately eight months. Based on this testimony, the Court finds that Timmons was "authorized" and "certified" to use the subject Intoxilyzer as required under 36 C.F.R. § 4.23(c)(3) & (4).

Timmons further testified that Appellant was tested twice using the Intoxilyzer in accordance with the standard operating procedure for that machine. The standard operating procedure includes testing a suspected driver twice, and complying with a pre-programmed twenty-five minute waiting period before each test is administered during [\*7] which time the driver is observed and the machine performs a self-diagnostic test to determine whether it is properly calibrated. Although Timmons did not know the margin of error or the date on which the subject Intoxilyzer was manually calibrated, he testified that a Mississippi State Trooper checks the machine on a monthly basis. Timmons also testified that the Intoxilyzer performs a self-calibration check before and after each breathalyzer test is administered. As explained by Timmons, during the self-calibration check, the Intoxilyzer analyzes the content of a canister attached to the machine, which registers .078 when tested. If the Intoxilyzer detects an error during the self-calibration check, the machine will not work. Timmons testified that the subject Intoxilyzer performed the self-calibration checks and was functioning properly on the date Appellant was tested.

Based on this testimony, the Court finds that the Intoxilyzer tests administered to Appellant were conducted "using accepted scientific methods and equipment of proven accuracy and reliability" for the purposes of 36 C.F.R. § 4.23(c)(4). See *California v. Trombetta*, 467 U.S. 479, 489 n.9, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) [\*8] (recognizing that the Intoxilyzer has passed the accuracy requirements established by the National Highway Traffic Safety Administration of the Department of Transportation); *United States v. Brannon*, 146 F.3d 1194, 1196 (9th Cir. 1998) (finding that the methodology of breathalyzer testing "is well known and unchallenged"); *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (finding that the "best means of obtaining evidence of the breath alcohol content, and the least intrusive way of testing, is the breathalyzer test."); *Volk v. United States*, 57 F. Supp. 2d 888, 897 (N.D. Cal. 1999) ("The admissibility and general reliability of Intoxilyzer test results is well-established.").

Appellant also challenges the sufficiency of the evidence by arguing the Government failed to produce a document certifying that the subject Intoxilyzer was accurate, as required under Mississippi law. In support of this argument, Appellant cites *Mississippi Code Annotated Section 63-11-19*, which provides, in relevant part:

A chemical analysis of the person's breath, blood or urine, to be considered valid under the [\*9] provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to *Section 45-1-17* and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis. The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve

satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory . . . .

The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same.

*MISS. CODE ANN. § 63-11-19* (1972 & Supp. 1999). In accordance with this statute, the Mississippi Supreme Court has held:

[I]ntoxilyzer results may be admitted into evidence if a proper foundation [\*10] has been laid.

A chemical analysis of a person's breath, blood, or urine is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate.

*Fisher v. City of Eupora*, 587 So. 2d 878, 888 (Miss. 1991) (quoting *Gibson v. Mississippi*, 458 So. 2d 1046, 1047 (Miss. 1985)). Thus, under Mississippi law, the prosecutor must submit documentation certifying the accuracy of an intoxilyzer before the test results obtained by that device may be admitted as evidence at trial. See *Johnston v. Mississippi*, 567 So. 2d 237, 239 (Miss. 1990).

In the case *sub judice*, however, Appellant was convicted of driving under the influence of alcohol under federal law - not Mississippi law. In this regard, the Code of Federal Regulations provides: "Unless specifically addressed by regulations in this chapter, traffic and the use of vehicles within a [national] park area are governed by State law." 36 C.F.R. § 4.2(a). The Regulations, specifically 36 C.F.R. § 4.23, address both driving while under the influence [\*11] of alcohol and applicable testing procedures. Additionally, while the Regulations require that tests used for the purpose of determining alcohol content be conducted using "equipment of proven accuracy and reliability", there is no requirement that the equipment be certified by a third party before the results of those tests can be admitted as evidence. Accordingly, the Court finds that Appellant's argument that the Government was required to comply with the certification requirement of *Mississippi Code Annotated Section 63-11-19* is without merit. See *United States v. Berry*, 866 F.2d 887, 890 (6th Cir. 1989) (finding that the Code of Federal Regulations "does not contemplate or call for the incorporation of state DUI statutes into a federal DUI charge."); *United States v. Farmer*, 820 F. Supp. 259, 263 (W.D. Va. 1993) (finding that as the offense of DUI and related testing procedures are specifically addressed by 36 C.F.R. § 4.23, the court is not required to consider the evidentiary or procedural requirements of state DUI law when reviewing a defendant's DUI conviction under federal law); *United States v. Coleman*, 750 F. Supp. 191, 193 (W.D. Va. 1990) [\*12] (finding, consistent with 36 C.F.R. § 4.2, that "federal law preempts state law on the issue of intoxicated motor-vehicle operators within national park areas, and this Court is not bound to follow [state court] precedent" when interpreting 36 C.F.R. § 4.23).

#### IV. Conclusion

The Court finds that the Government presented sufficient evidence to show that Timmons was "authorized" and "certified" to use the subject Intoxilyzer as required under 36 C.F.R. § 4.23(c)(3) & (4); the Intoxilyzer tests administered to Appellant were conducted "using accepted scientific methods and equipment of proven accuracy and reliability" thus satisfying 36 C.F.R. § 4.23(c)(4); and the Intoxilyzer test results showed Appellant had a blood alcohol content of 0.099 and 0.084, both of which are greater than the legal limit of 0.08. The evidence, viewed in the light most favorable to the Government, was sufficient to convict Appellant of driving while under the influence of alcohol on the Natchez Trace Parkway in violation of 36 C.F.R. § 4.23. Accordingly, the ruling of United States [\*13] Magistrate Judge James C. Sumner is AFFIRMED.

For the foregoing reasons:

IT IS THEREFORE ORDERED that the ruling of United States Magistrate Judge James C. Sumner is AFFIRMED.

IT IS FURTHER ORDERED that the Stay of Execution of Sentence, which was entered on August 15, 2006, is hereby vacated. Appellant shall report to the United States Probation Officer assigned to this case on or before January 30, 2007.

SO ORDERED this the 23rd day of January, 2007.

s/ William H. Barbour, Jr.

UNITED STATES DISTRICT JUDGE

6 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant. SHERRY HERTLEIN, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.**

**CIVIL ACTION NO. 93-2771 CONSOLIDATED ACTIONS**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

*960 F. Supp. 844; 1997 U.S. Dist. LEXIS 2772*

**March 11, 1997, Decided**

**March 11, 1997, FILED and ENTERED ON THE DOCKET**

**SUBSEQUENT HISTORY:** [\*\*1] As Amended March 12, 1997.

**DISPOSITION:** Motion of Plaintiff Robert T. Hulmes to Alter or Amend Judgment entered pursuant to *Fed. R. Civ. P. 59(e)* and Plaintiff's alternative motion for new trial pursuant to *Fed. R. Civ. P. 59(a)* DENIED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff injured party sought relief from judgment on his suit against defendant manufacturers for products liability related to an all-terrain vehicle (ATV). The jury found no design defect, but found the ATV defective by reason of a failure to warn and found that plaintiff was 66 percent at fault for his injuries. The court entered judgment in favor of defendants on all counts pursuant to *N.J. Stat. Ann. §§ 2A:15-5.1* and *15-5.2* (1987).

**OVERVIEW:** Plaintiff, riding an ATV manufactured by defendants, crashed into his brother's ATV while intoxicated and while exceeding the speed limit. The court denied plaintiff's motion to amend the judgment, finding that the jury was properly allowed to consider plaintiff's fault in causing the accident even though it also found that defendant failed to warn plaintiff of the ATV's possible dangers. The court further found that judgment for the defendants was proper under *N.J. Stat. Ann. § 2A:15-5.1* (1987) because the jury found that plaintiff's fault exceeded the combined fault of defendants. The court also denied plaintiff's motion for a new trial, finding that (1) the evidence of alcohol consumption was properly admitted under *Fed. R. Evid. 803(6)* and was relevant to plaintiff's tendency to heed warnings, (2) the jury instructions on comparative fault were proper where plaintiff voluntarily encountered the "known danger" of an accident, although not from the specific design flaw of tipping over, of which plaintiff complained, and (3) the lay testimony of the investigating police officer was properly admitted due to his experience in investigating accidents.

**OUTCOME:** The court denied plaintiff's motions to amend the judgment or obtain a new trial.

**CORE TERMS:** comparative fault, failure to warn, new trial, warning, fault, design defect, collision, product liability, known danger, heeding, amend, omission, rebut, alcohol consumption, proximate cause, tanaka, comparative negligence, notice, lab, video, encountered, causative, brochure, testing, riding, motion in limine, admitting, wheel, special verdict, legal effect

#### **LexisNexis(R) Headnotes**

##### ***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

##### ***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN1] The decision whether to grant a new trial pursuant to *Fed. R. Civ. P. 59(a)* lies within the district court's sound discretion. Errors in judicial rulings or in the conduct of the court warrant a new trial where the error or conduct was prejudicial. However, even if the court determines that an error was made, it should not grant a new trial unless it also determines that the error was so prejudicial that refusal to take such action appears to the court inconsistent with substantial justice. *Fed. R. Civ. P. 61*.

##### ***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN2] Under *Fed. R. Civ. P. 59(e)*, a district court may alter or amend a judgment: (1) when there has been an intervening change in the law; (2) when new evidence becomes available only after trial; (3) if the court has committed clear legal error; or (4) if the judgment without amendment would create a manifest injustice.

##### ***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

##### ***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN3] Courts should not lightly disturb jury verdicts. In reviewing the propriety of a jury verdict, the court's obligation is to uphold the jury's award if there exists a reasonable basis to do so. The court must defer to the jury whenever its findings are reasonably supported by the record, and must draw all reasonable inferences in favor of the verdict winner.

##### ***Torts > Negligence > Defenses > Assumption of Risk > Elements & Nature > Voluntariness***

##### ***Torts > Negligence > Defenses > Comparative Negligence > Common Law Concepts > Assumption of Risk***

##### ***Torts > Products Liability > Strict Liability***

[HN4] The product liability law of New Jersey recognizes that accidental injuries are often the result of a combination of causes. However, the doctrine of strict liability strikes a balance in favor of plaintiffs by requiring a defendant to produce evidence that the plaintiff voluntarily encountered a known danger, before the jury is allowed to compare the plaintiff's conduct with the alleged product defect on the question of causation. When the evidence points to a voluntary assumption of a known risk, it is proper to instruct the jury on comparative fault.

##### ***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

##### ***Torts > Negligence > Defenses > Comparative Negligence > Multiple Parties > General Overview***

##### ***Torts > Products Liability > Duty to Warn***

[HN5] The failure to rebut the "heeding presumption," meaning that the plaintiff would have heeded a proper warning, may constitute proof that a defendant's failure to warn contributed to the plaintiff's injuries.

##### ***Torts > Negligence > Defenses > Comparative Negligence > General Overview***

##### ***Torts > Products Liability > Plaintiff's Conduct***

***Torts > Products Liability > Strict Liability***

[HN6] In strict product liability cases, as a general rule, once the jury has found that the defect was a substantial causative factor, the proximate cause inquiry is at an end and the defendant is liable. However, where the evidence supports a charge on comparative fault, that is, where there is competent evidence that the plaintiff voluntarily encountered a known danger, the proximate cause inquiry must continue.

***Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview******Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend******Torts > Negligence > Defenses > Comparative Negligence > General Overview***

[HN7] Where a plaintiff fails to demonstrate that the jury's assignment of 66 percent of the causative fault to the plaintiff was inconsistent with its finding that a failure to warn was a proximate cause of the accident, plaintiff's motion to alter or amend the judgment will be denied.

***Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview******Civil Procedure > Trials > Judgment as Matter of Law > General Overview******Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN8] Judgment as a matter of law is an extraordinary remedy when urged by an unsuccessful plaintiff who bore the burden of proof at trial.

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials******Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview******Evidence > Procedural Considerations > Rulings on Evidence***

[HN9] Where a contention for a new trial is based on the admissibility of evidence, the trial court has great discretion which will not be disturbed on appeal absent a finding of abuse.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview******Civil Procedure > Appeals > Standards of Review > General Overview***

[HN10] On a claim that the trial court erroneously instructed the jury, the court must review the charge as a whole, in light of the evidence, to determine whether it adequately conveyed the controlling legal principles.

***Evidence > Procedural Considerations > Rulings on Evidence******Evidence > Relevance > Relevant Evidence***

[HN11] A .10 percent blood alcohol content, when considered with independent evidence that alcohol has been consumed, can constitute supplementary evidence of unfitness to drive, at least as competent as traditional eyewitness testimony of drunken behavior.

***Torts > Negligence > Causation > General Overview******Torts > Products Liability > Design Defects******Torts > Products Liability > Plaintiff's Conduct***

[HN12] Evidence of alcohol consumption may be relevant in a product liability action on the issues of misuse and proximate cause.

***Torts > Negligence > Causation > Proximate Cause > General Overview******Torts > Negligence > Defenses > Comparative Negligence > General Overview******Torts > Products Liability > Duty to Warn***

[HN13] Evidence of alcohol consumption is relevant in a failure to warn case to rebut the "heeding presumption" that

inures to the plaintiff's benefit. Clearly, evidence that a plaintiff who has been warned about consuming alcohol prior to riding his all-terrain vehicle, and nevertheless, does so, is relevant to rebut the "heeding presumption," in that it portrays an individual who is unlikely to heed warnings.

***Evidence > Hearsay > Exceptions > Business Records > General Overview***

***Evidence > Hearsay > Rule Components > Nonverbal Conduct***

[HN14] Blood tests conducted as a routine matter in a hospital are admissible under *Fed. R. Evid. 803(6)*, which does not require the proponent to establish a chain of custody.

***Evidence > Hearsay > Exceptions > Business Records > General Overview***

[HN15] It is the opponent's burden to show that the source of information or the method or circumstances of preparation of otherwise admissible business records indicate lack of trustworthiness. The opponent must point to deficiencies in the manner in which specific records are kept.

***Evidence > Hearsay > Exceptions > Business Records > General Overview***

[HN16] A party seeking to introduce evidence under *Fed. R. Evid. 803(6)* need not be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

***Torts > Negligence > Defenses > Comparative Negligence > Procedure***

***Torts > Products Liability > Design Defects***

[HN17] A comparative fault charge in a products liability action is only permissible when the evidence supports a finding that the plaintiff voluntarily and knowingly encountered a risk of injury from a defective product.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

[HN18] As a threshold matter, a party challenging a jury instruction on a particular matter must establish that the jury in fact reached that matter. A motion for a new trial on issues that a jury did not reach will not be granted.

***Torts > Negligence > Defenses > Assumption of Risk > Elements & Nature > Knowledge of Danger***

***Torts > Negligence > Defenses > Comparative Negligence > General Overview***

***Torts > Products Liability > Plaintiff's Conduct***

[HN19] The precise nature of the "known danger" which the plaintiff is said to voluntarily encounter in a products liability action must be defined by the facts of the individual case. It should not be defined so broadly that mere negligence by the plaintiff can be equated with voluntarily encountering a "known danger." Neither can the term be defined so narrowly that the jury is prevented from considering a plaintiff's comparative fault unless it can be shown that the plaintiff was aware of the precise defect which is alleged to have caused her injuries. The cases speak of a "known danger" not a "known defect."

***Evidence > Procedural Considerations > Rulings on Evidence***

***Torts > Products Liability > Duty to Warn***

[HN20] A plaintiff cannot demonstrate any prejudice from the exclusion of documents, much less any impact on his substantial rights, where the jury found in his favor on a failure to warn theory, and it was on notice of the adequacy of the warning that plaintiff sought to introduce this evidence.

***Evidence > Testimony > Lay Witnesses > General Overview***

[HN21] Lay opinions of a technical nature may only be admitted when the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion. The proponent of lay opinion testimony must demonstrate some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview  
Torts > Negligence > Defenses > Comparative Negligence > General Overview***

[HN22] In New Jersey, trial courts should instruct the jury as to the legal effect of the application of the comparative negligence statute to the jury's findings.

***Torts > Negligence > Defenses > Comparative Negligence > General Overview***

[HN23] In New Jersey, a plaintiff will recover as long as his or her comparative fault is not greater than the combined fault of the defendants. *N.J. Stat. Ann. § 2A:15-5.1* (1987).

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview******Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule***

[HN24] New Jersey recognizes that the omission of the "ultimate outcome" charge can sometimes be harmless error.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview******Torts > Negligence > Defenses > Comparative Negligence > Procedure***

[HN25] In a complex case involving multiple issues and numerous parties, the trial court, in the exercise of sound discretion, can withhold the instruction if it would tend to mislead or confuse the jury.

***Civil Procedure > Federal & State Interrelationships > Erie Doctrine******Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview******Civil Procedure > Trials > Jury Trials > Verdicts > Special Verdicts***

[HN26] The phrasing of a special verdict in a federal district court is a matter of procedure governed by the federal rules and not by state practice.

***Evidence > Scientific Evidence > Daubert Standard******Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Daubert Standard***

[HN27] The Daubert test requires the district court to determine whether novel or untested methodologies are sufficiently reliable that expert witness conclusions based upon them can be of some use to the jury.

**COUNSEL:** Appearances:

For Robert T. Hulmes, Plaintiff: Lewis M. Levin, Esq., Joseph Viola, Esq., Lewis M. Levin & Associates, Philadelphia, PA. For Sherry Hertlein, Plaintiff: David Bross, Esq., Cherry Hill, NJ.

For Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc., Defendants: Robert St.L. Goggin, Esq., Brian C. Darreff, Esq., Marshall, Dennehy, Warner, Coleman & Goggin, Marlton, N.J. Paul G. Cereghini, Esq., Bowman & Brooke, Phoenix, AZ.

**JUDGES:** STEPHEN M. ORLOFSKY, United States District Judge

**OPINION BY: STEPHEN M. ORLOFSKY****OPINION:**

[\*849] OPINION

**ORLOFSKY**, District Judge:

This product liability lawsuit against defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc. (collectively referred to as "Honda") was tried before this court and a jury from September 24, [\*\*2] 1996, through October 31, 1996. The jury returned a special verdict in which it found no design defect in the subject All Terrain Vehicle ("ATV"). However, the jury found the ATV defective by reason of a failure to warn. In response to special interrogatories requesting an allocation of comparative fault, the jury found the plaintiff, Robert Hulmes ("Hulmes" or the "plaintiff"), sixty-six (66) percent at fault for his injuries. On October 31, 1996, the court entered judgment in favor of defendants on all counts pursuant to *N.J. Stat. Ann. §§ 2A:15-5.1* and 15-5.2. Judgment was also entered against Sherry Hertlein, Hulmes's former spouse, on her derivative per quod action.

Plaintiff now moves to alter or amend the judgment pursuant to *Fed. R. Civ. P. 59(e)*, or, alternatively, for a new trial pursuant to *Fed. R. Civ. P. 59(a)*. n1 Plaintiff's motions require this court to revisit and plumb once again the murky depths of New Jersey's Product Liability Law. For the reasons set forth below, plaintiff's motions will be denied.

n1 Rule 59 provides, in pertinent part:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

....

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

*Fed. R. Civ. P. 59.*

[\*\*3]

**I. Standards Governing Rule 59 Motions**

[HN1] The decision whether to grant a new trial pursuant to *Federal Rule of Civil Procedure 59(a)* lies within the district court's sound discretion. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980); *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1017 (3d Cir. 1995). Errors in judicial [\*850] rulings or in the conduct of the court warrant a new trial where the error or conduct was prejudicial. 6A James Wm. Moore, Moore's Federal Practice § 59.08(2) (2d ed. 1996). However, even if the court determines that an error was made, it

should not grant a new trial unless it also determines that the error was so prejudicial that "refusal to take such action appears to the court inconsistent with substantial justice." *Fed. R. Civ. P. 61*. See also *Bhaya v. Westinghouse Elec. Corp.*, 709 F. Supp. 600, 601 (E.D. Pa. 1989), aff'd, 922 F.2d 184 (3d Cir. 1990).

[HN2] Under *Federal Rule of Civil Procedure 59(e)*, a district court may alter or amend a judgment: (1) when there has been an intervening change in the law; (2) when new evidence becomes available only after trial; (3) if the court has [\*\*4] committed clear legal error; or (4) if the judgment without amendment would create a manifest injustice. *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). Hulmes offers no new evidence, nor does he claim that there has been a change in the controlling law. Rather, plaintiff contends that this court has committed clear legal error.

[HN3] Courts should not lightly disturb jury verdicts. "In reviewing the propriety of a jury verdict, [this Court's] obligation is to uphold the jury's award if there exists a reasonable basis to do so." *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3d Cir. 1989). See also *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2, 21 (3d Cir. 1963). This court must defer to the jury whenever its findings are reasonably supported by the record, and must draw all reasonable inferences in favor of the verdict winner. *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 372 (3d Cir. 1987) (citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir. 1983)).

## II. Discussion

Because plaintiff's motion to alter or amend the judgment and his motion for a new trial are both, [\*\*5] in part, based on his assertion that this court misapplied the comparative fault provisions of New Jersey's product liability law, I will briefly discuss this issue before turning to plaintiff's other contentions.

[HN4] The product liability law of New Jersey recognizes that accidental injuries are often the result of a combination of causes. However, the doctrine of strict liability strikes a balance in favor of plaintiffs by requiring a defendant to produce evidence that the plaintiff voluntarily encountered a known danger, before the jury is allowed to compare the plaintiff's conduct with the alleged product defect on the question of causation. *Cartel Capital Corp. v. Fireco of N.J.*, 81 N.J. 548, 562-63, 410 A.2d 674 (1980). This balance advances the overall purpose of New Jersey's product liability law by stressing the manufacturer's primary responsibility to design and market safe products. Nevertheless, when the evidence points to a voluntary assumption of a known risk, it is proper to instruct the jury on comparative fault. *Ladner v. Mercedes-Benz*, 266 N.J. Super. 481, 495, 630 A.2d 308 (App. Div. 1993), certif. denied, 135 N.J. 302, 639 A.2d 301 (1994).

Hulmes asks [\*\*6] this court to amend the judgment so as to award him damages based upon the jury's finding that the ATV was defective by reason of a failure to warn, notwithstanding the jury's finding as to his comparative fault, which Hulmes argues is "irrelevant" to his failure to warn claim. Alternatively, plaintiff seeks a new trial based upon his contention that his is not a case to which comparative fault properly applies.

### A. Plaintiff's Motion to Alter or Amend the Judgment

Hulmes first contends that he is entitled to judgment in his favor based upon the jury's finding of a failure to warn, and asks this court to enter judgment in the full amount of the jury's verdict. Plaintiff argues that the jury's assignment of comparative fault is irrelevant on the question of defendants' failure to warn. n2

n2 Elsewhere, Hulmes contends that it was error to give the charge on comparative fault, even as to his claim of design defect. This contention is addressed, and refuted, in part II.B.4, infra.

[\*851] At trial, Hulmes [\*\*7] claimed not to have received certain warnings which were distributed by Honda some years after he had purchased his ATV. Hulmes testified that, had he received these warnings concerning the

ATV's safety, he "would have got rid of it." Tr. of Oct. 1, 1996, part A, at 42. The jury found that the ATV was defective by reason of Honda's failure to warn of the danger of severe injury which could result from roll-over or tip-over accidents in which the rider is jettisoned. Plaintiff argues that comparative fault is inapplicable "where the harm incurred is the very risk about which defendant had a duty to warn." *Crispin v. Volkswagenwerk AG*, 248 N.J. Super. 540, 565, 591 A.2d 966 (App. Div.), certif. denied, 126 N.J. 385, 599 A.2d 162 (1991).

In *Crispin*, the trial court declined to reduce the jury's award by the 25 percent by which the jury had found the plaintiff at fault. *Id.* at 549. The trial court based its decision upon the fact that the jury had found the defendant liable on a failure to warn theory. *Id.* The Appellate Division affirmed, while stressing that the case was "unique" because it presented a pure "second collision" scenario. *Id.* at 564, 567. In a "crashworthiness," [\*\*8] or "second collision" case, the jury is only concerned with the incremental injuries suffered as the result of the defect. In *Crispin*, the jury found that Volkswagen failed to warn the plaintiff that the use of a seat belt was especially necessary "in light of the collapsing seat, a feature built into the automobile by design." *Id.* at 565. The Appellate Division concluded that, because the only damages at issue were those that resulted from the "second collision," the plaintiff's contributory fault "in causing the original accident was not at issue." *Id.* at 568 (emphasis added).

In the singular context of "second collision" injuries, a defendant's failure to warn a user of its product of a "special requirement," without which the product will be unsafe, may well preclude consideration of comparative fault. In *Crispin*, the Appellate Division concluded that the plaintiff should not be penalized for failure to use a seat belt when the special importance of using a seat belt in view of the automobile's peculiar seat design was not conveyed to him. By contrast, the warning which Honda failed to deliver to Hulmes, Exhibit P-524, did not outline any specific action [\*\*9] or steps that Hulmes should have taken to avoid the accident in question. It merely warned, albeit in some detail, that roll-over or ejection accidents were a possible result of even a minor collision. This is simply not a case in which application of comparative fault principles would, in effect, blame the plaintiff for not doing something which he was not told he should do. On the contrary, plaintiff's testimony that he would have "gotten rid" of the ATV had he been warned of its instability, belies his assertion that this case is controlled by *Crispin*. Hulmes's accident was not "caused" by his failure to "get rid" of the ATV, except in the most tenuous sense, nor was it shown at trial that the absent warning would have urged ATV owners to dispose of their ATVs.

Moreover, the plaintiff's failure to use a seat belt was the only contributing cause on the plaintiff's part which was asserted in *Crispin*. Here, evidence was presented that Hulmes was riding his ATV while intoxicated, that he was exceeding the speed limit on a paved road, and that he collided with his brother's all terrain vehicle.

*Crispin* was further vindicated by the jury's finding that the seat design was [\*\*10] defective. The jury in this case found no design defect in the Honda ATV. Plaintiff's failure to warn theory, on which the jury held the defendants liable, did not encompass warnings against riding while intoxicated, which warnings were certainly given, or warnings against driving at excessive speed. In sum, there is an insufficient nexus between the defendants' failure to warn Hulmes of the need to exercise caution when riding his ATV, and Hulmes's comparative fault in causing the accident to sustain the comparison with *Crispin*.

Plaintiff also argues that the "heeding presumption" enunciated in *Coffman v. Keene Corp.*, 133 N.J. 581, 628 A.2d 710 (1993), sets [\*\*852] forth an independent comparative fault analysis, which displaces traditional comparative fault and renders any instruction on comparative fault erroneous. Plaintiff's Brief at 12-13. In essence, plaintiff suggests that when a jury finds a failure to warn defect and, in addition, finds that the defendant has failed to rebut the "heeding presumption," a directed verdict in plaintiff's favor is mandated. The "heeding presumption," however, does not sweep so broadly.

*Coffman* held that [HN5] the failure to rebut the "heeding [\*\*11] presumption" "may constitute proof that a defendant's failure to warn contributed to the plaintiff's injuries." *Coffman*, 133 N.J. at 591. *Coffman* was a multiple defendant asbestos case. The jury was instructed to apportion liability among the nine defendants. n3 It is not clear that the jury in *Coffman* apportioned any fault to the plaintiff.

n3 Keene Corp., the only defendant to appeal, was assigned fifteen (15) percent of the causative fault. *Coffman*, 133 N.J. at 593.

On appeal, Keene Corp. argued that the burden should be upon the plaintiff to prove that he would have heeded a proper warning and thereby avoided the inhalation of asbestos fibers. The Supreme Court of New Jersey rejected this argument, deciding as a matter of public policy to place the burden on the manufacturer to rebut a presumption that the plaintiff would have heeded a proper warning. *Id.* at 603. In dicta, the *Coffman* court seems to equate evidence of the comparative fault of the plaintiff with evidence which would [\*\*12] rebut the "heeding presumption." *Id.* This is unsurprising, in that a defendant will normally produce evidence of the plaintiff's comparative fault on all issues relating to causation, including the "heeding presumption." *Coffman* simply did not address a plaintiff's comparative fault in the context of multiple causative factors.

In this case, the jury was charged that unless Honda succeeded in rebutting the heeding presumption, it must find that the "plaintiff has demonstrated that the inadequate warning was a proximate cause of his injuries." Tr. of Oct. 23, 1996 at 78. Even after giving Hulmes the benefit of the "heeding presumption," the jury was not required to find that the failure to warn was the sole proximate cause of Hulmes's injuries.

In this case, the jury heard evidence that Hulmes made modifications to his ATV to increase its performance, that Hulmes was riding at an excessive speed, and that Hulmes had consumed alcohol shortly before his tragic accident. In light of all the evidence, the jury could have concluded that the failure to warn, even though it was one proximate cause of the plaintiff's injuries, was not the sole, or even the major contributing [\*\*13] factor in causing the accident.

In his reply brief, plaintiff restates his arguments, again suggesting that to sustain the jury's verdict for the defendants in this case would allow "mere negligence" on the plaintiff's part to support the defense of comparative fault. Reply Brief at 6-7. This is not so.

Plaintiff is correct that [HN6] in strict product liability cases, as a general rule, once the jury has found that the defect was a substantial causative factor, the proximate cause inquiry is at an end and the defendant is liable. However, where the evidence supports a charge on comparative fault, that is, where there is competent evidence that the plaintiff voluntarily encountered a known danger, the proximate cause inquiry must continue. In this case, the jury proceeded to compare the fault of the plaintiff with that of the defendants in causing the accident. It was required to do so because there was evidence from which it could have concluded that Hulmes, an experienced ATV rider, knew of the danger from riding while intoxicated, that he knew of the risk of injury from a collision, and that he proceeded in spite of these "known dangers." That there may have been some other danger highlighted [\*\*14] in P-524 n4 which was not then known to plaintiff does not mean that Hulmes did not voluntarily encounter a known danger. It merely proves that he did not voluntarily encounter [\*853] the danger described in P-524. Based upon the evidence presented, the jury allocated to Honda thirty-four (34) percent of the fault for causing the accident, the amount which the jury found was related to Honda's failure to warn.

n4 P-524 is a warning issued to ATV owners by Honda through its dealers pursuant to a consent decree with the Consumer Products Safety Commission. Hulmes apparently never received this warning at the time it was issued.

It is telling that plaintiff maintains that the jury's finding of liability for a failure to warn and its allocation of fault are not "inconsistent" verdicts. See Reply Brief at 5 n.3. Rather, plaintiff insists that the allocation of fault is simply "irrelevant" in a failure to warn case. *Id.*; see also Plaintiff's Brief at 2. This argument proves too much. Several New Jersey cases support [\*\*15] the application of comparative fault principles to a failure to warn case. See *Ladner*, 266 N.J. Super. 481, 630 A.2d 308; *Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super. 569, 592, 637 A.2d 915 (App. Div. 1994);

*Butler v. PPG Indus.*, 201 N.J. Super. 558, 564-65, 493 A.2d 619 (App. Div. 1985). If Hulmes were correct that a comparison of a plaintiff's and defendant's degrees of causative fault is always irrelevant once the jury has found a failure to warn, these cases would presumably say so. They do not so hold.

[HN7] Because the plaintiff has failed to demonstrate that the jury's assignment of sixty-six (66) percent of the causative fault to the plaintiff was inconsistent with its finding that a failure to warn was a proximate cause of the accident, plaintiff's motion to alter or amend the judgment will be denied. n5

n5 Plaintiff also renews his motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*, relying on the same arguments presented in his motion to alter or amend the judgment. Plaintiff's Brief at 14-15. [HN8] Judgment as a matter of law "is an extraordinary remedy when urged by an unsuccessful plaintiff who bore the burden of proof at trial." *Link v. Mercedes-Benz*, 788 F.2d 918, 921 (3d Cir. 1986). Because there was ample evidence introduced at trial to support the jury's verdict, judgment as a matter of law must be denied.

[\*\*16]

### ***B. Plaintiff's Motion for a New Trial***

In support of his motion for a new trial, plaintiff claims that this court erred in ruling on several evidentiary issues, and in its instructions to the jury. Plaintiff also contends that the verdict was against the weight of the evidence and that the trial was fundamentally unfair.

[HN9] "Where a contention for a new trial is based on the admissibility of evidence, the trial court has great discretion . . . which will not be disturbed on appeal absent a finding of abuse." *Link v. Mercedes-Benz*, 788 F.2d 918, 921 (3d Cir. 1986). [HN10] On a claim that the trial court erroneously instructed the jury, the court must review the charge as a whole, in light of the evidence, to determine whether it adequately conveyed the controlling legal principles. *Id.* at 922.

#### ***1. The Admission of Evidence of Alcohol Consumption***

Hulmes contends that this court erred in admitting evidence that he had consumed alcohol shortly before the accident which led to this lawsuit. The court first ruled on this issue on plaintiff's motion in limine seeking to exclude all such evidence. *Hulmes v. Honda Motor Co.*, 936 F. Supp. 195 (D.N.J. 1996). The court [\*\*17] revisited this issue on plaintiff's motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 207-12. Despite these earlier rulings, plaintiff's counsel once again attempted to "reargue" the admissibility of this evidence when other pre-trial motions were decided immediately following jury selection. Tr. of Sept. 24, 1996 at 7-20.

Plaintiff's motion for a new trial based upon this court's denial of his motion in limine to exclude all evidence of alcohol consumption presents no new arguments. There is nothing this court can add to what it has previously written on this subject. It is sufficient to note that plaintiff argues for a per se rule against the admission of evidence of alcohol consumption by a plaintiff in a civil trial in the "absence of traditional forms of 'supplemental evidence.'" Plaintiff's Brief at 18. By "traditional forms," plaintiff presumably means eyewitness testimony that the plaintiff was visibly affected either in motor coordination, or speech by alcohol. For obvious reasons no such evidence was presented at this trial. However, the cases do not support the per se rule for which the plaintiff contends. [\*\*18] Indeed, in *Guzzi v. Clarke*, 252 N.J. Super. 361, 599 A.2d 956 (L. Div. 1991), the Law Division admitted evidence of alcohol consumption absent any evidence of "drunken behavior." *Id.* at 366. Plaintiff makes no effort to distinguish *Guzzi*. Instead, plaintiff again mischaracterizes this court's holding. This court did not proclaim that a .10 percent blood alcohol content itself rendered alcohol evidence admissible. Rather, this court ruled that [HN11] a .10 percent BAC, when considered with independent evidence that alcohol had been consumed, n6 could constitute supplementary evidence of unfitness to drive, at least as competent as "traditional" eyewitness testimony of "drunken behavior." *Hulmes*, 936 F. Supp. at 205-06.

n6 For example, in this case there was testimony from the flight nurse on the medivac helicopter that an amber fluid smelling of alcohol was suctioned from the plaintiff's stomach shortly after the accident. Tr. of Oct. 8, 1996 at 204-07.

## 2. Specific Evidence of Alcohol Consumption [\*\*19]

Plaintiff contends that, notwithstanding this court's decision to admit such evidence, the evidence of alcohol consumption which was admitted in this case was irrelevant, and therefore should have been excluded under *Fed. R. Evid. 401*.

Hulmes contends that the evidence of alcohol consumption was irrelevant to his design defect claim because that claim was based upon a theory that the ATV's instability caused it to flip over and eject the rider after the wheel of Hulmes's ATV impacted the wheel of his brother's ATV. Hulmes argues that it was at this moment that the alleged design defect came into play, and therefore, that nothing that occurred before the wheels of the two ATVs touched is relevant, and once the collision occurred, there was nothing that Hulmes could have done to prevent the unfortunate results of the accident.

In deciding plaintiff's motion in limine on this subject, this court opined that [HN12] evidence of alcohol consumption may be relevant in a product liability action on the issues of misuse and proximate cause. *Hulmes*, 936 F. Supp. at 201. Plaintiff now seeks to focus the design defect inquiry entirely on the events that took place after the collision of [\*\*20] the two ATVs. Plaintiff cannot now contend that Hulmes's behavior before the wheels of the two ATVs touched is irrelevant to the proximate cause inquiry, without also requiring this court to engage in a "crashworthiness" or "second collision" analysis. Plaintiff, however, never pursued a "crashworthiness" theory at trial. n7 Accordingly, the jury had to determine the cause or causes of this accident from the totality of the circumstances. The plaintiff's fitness to drive bears directly upon that determination.

n7 Counsel for plaintiff did argue that his client's behavior prior to the touching of the tires was irrelevant, see Tr. of Sept. 24, 1996 at 14, but he never presented a "second collision" scenario either to this court or to the jury. Notably, in a "crashworthiness" case, it is the plaintiff who must demonstrate what percentage of his or her injuries are directly attributable to the "second collision" and what percentage would have occurred as a result of the "first collision," even if an alternative safer design had been used in the product in question. See *Huddell v. Levin*, 537 F.2d 726, 737-38 (3d Cir. 1976). In other words, the burden rests upon the plaintiff in such cases to prove the extent of enhanced injuries attributable to the defective design.

[\*\*21]

Hulmes similarly takes issue with this court's conclusion that evidence of alcohol consumption was relevant to his failure to warn theory. *Id.* Plaintiff contends that the rationale for this court's conclusion "must be that a [blood alcohol content] between .09% and .11% could theoretically make the needed warning incoherent." Plaintiff's Brief at 21. Hulmes then argues that such evidence is irrelevant because "the needed warning should have been given to him years prior to the day of the accident." *Id.* This argument is disingenuous. As this court has previously explained, [HN13] evidence of alcohol consumption is relevant in a failure to warn case to rebut the "heeding presumption." *Hulmes*, 936 F. Supp. at 201. Clearly, evidence that a plaintiff who has been warned about consuming alcohol prior to riding his ATV, and nevertheless, does so, is relevant to rebut the "heeding presumption," in that it portrays an individual who is unlikely to heed warnings. Accordingly, plaintiff's challenge to the evidence [\*855] of alcohol consumption based upon relevance is without merit.

More specifically, Hulmes criticizes the admission of a Cooper Hospital Lab Report reflecting plaintiff's serum [\*\*22] blood alcohol level at or around the time of his admission. Plaintiff contends that the lab report is inadmissible

hearsay. Hulmes further contends that this court never specifically addressed his objection to the lab report on hearsay grounds, but only addressed the authentication issue. See *Hulmes*, 936 F. Supp. at 206-07. Plaintiff suggests that this court "misconstrued" his arguments on the in limine motion. Plaintiff's Brief at 27. If so, plaintiff had numerous opportunities to disabuse the court of its "misconstruction."

On October 15, 1996, before defendants' expert, Dr. Herbert Moskowitz, testified, the following exchange occurred between plaintiff's counsel and the court regarding the admissibility of the Cooper Hospital Lab Report.

THE COURT: Your objection is the admissibility of the Cooper Hospital records?

MR. LEVIN: That's correct.

THE COURT: And reliability of the information contained therein?

MR. LEVIN: Our objection is specifically focused on the lab report.

THE COURT: Well whatever, it's the Cooper Hospital record and particularly the lab report which is reflected in the Cooper Hospital records.

MR. LEVIN: Yes.

THE [\*\*23] COURT: And I have ruled on that already in that opinion.

MR. LEVIN: My concern was that the record as it was reflected in the motion in limine does not show in terms of close particularity the basis of our concerns with the accuracy of that record.

THE COURT: Well, your concern is with a specific entry on that record, is it not?

MR. LEVIN: Yes, sir.

THE COURT: Well this dealt with the admissibility of the Cooper Hospital records. And obviously, you'll have a chance to contest on cross-examination and through your own rebuttal expert the reliability of the entry. So I think if your concern is have you preserved the objection --

MR. LEVIN: That's one of my concerns.

THE COURT: You have.

MR. LEVIN: Thank you.

Tr. of Oct. 15, 1996 at 147-48. Hulmes now contends that Honda failed to establish through the testimony of a "qualified witness" that the lab report at issue was trustworthy under the business records exception to the hearsay rule. *Fed. R. Evid. 803(6)*. Honda insists that Hulmes waived this objection by not raising it at trial. Plaintiff's counsel cryptically observed on October 15th that the record might not "show in terms of close [\*\*24] particularity the basis of our concerns with the accuracy of that record," referring to the lab report. Nowhere in the course of this colloquy did plaintiff's counsel utter the word "hearsay" or refer to *Fed. R. Evid. 803(6)*.

On September 24, 1996, before the jury was selected, counsel addressed the admissibility of the alcohol-related evidence. Again, plaintiff's counsel objected to this evidence, including the Cooper Hospital lab report, about which the following exchange occurred:

THE COURT: Let's be specific so that I and [defendants' counsel] know what you're talking about.

MR. LEVIN: Okay.

THE COURT: There is evidence of a blood alcohol test?

MR. LEVIN: Yes. And, your Honor has allowed that subject to --

THE COURT: I'll allow that.

MR. LEVIN: Subject to cross-examination.

Tr. of Sept. 24, 1996 at 21. Once again, this court's ruling on the plaintiff's in limine motion to exclude this evidence was alluded to by plaintiff's counsel and nowhere was an objection made based on hearsay grounds, or a reference made to *Fed. R. Evid 803(6)*.

Plaintiff's omission of any reference to the hearsay rule is especially glaring when this court [\*\*25] pointed to Rule 803(6) in its Opinion on the motion in limine, noting that "some courts have ruled that [HN14] blood tests conducted [\*856] as a routine matter in a hospital are admissible under *Fed. R. Evid. 803(6)*, which does not require the proponent to establish a 'chain of custody.'" *Hulmes, 936 F. Supp. at 207 n.9* (citations omitted). Moreover, on the motion in limine, Honda submitted a lengthy deposition of a senior technologist in the Cooper Hospital chemistry laboratory, Ms. Barbara Snyder, recounting the procedures which are followed to safeguard blood samples. Plaintiff protests, as he did in arguing the in limine motions, that the identity of the technician who drew the blood for the test is unknown, as is the identity of the technician who performed the tests or entered the results into the computer. As noted, the records of the exact time of the blood test and of the most recent calibration of the test equipment were unavailable as a result of Cooper Hospital's document retention policy. See *Hulmes, 936 F. Supp. at 206-07*. Plaintiff recognizes that [HN15] it is his burden to show that "the source of information or the method or circumstances of preparation [\*\*26] indicate lack of trustworthiness." Plaintiff's Brief at 29 (citing *In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 289 (3d Cir. 1983)*). Plaintiff must point to "deficiencies in the manner in which specific records are kept." *In re Japanese Electronic Products, 723 F.2d at 289*. The absence of information due to the expiration of the hospital's standard document retention period simply does nothing to support an assertion of lack of trustworthiness.

Furthermore, it is clear that Ms. Snyder was a "qualified person," within the meaning of Rule 803(6), who could have testified to the regular business practices of the Cooper Hospital chemistry laboratory. n8 Plaintiff cannot now be heard to complain that she did not testify, especially in light of plaintiff's repeated opportunities to state his hearsay objection to this report, and his repeated failure to make this objection plain. For these reasons, plaintiff's motion for a new trial based upon his belated hearsay objection to the Cooper Hospital lab report must be denied.

n8 [HN16] A party seeking to introduce evidence under Rule 803(6) need not "be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based." Federal Rules of Evidence, Note to Paragraph (6), 1974 Enactment, Federal Civil Judicial Procedure and Rules 393 (West 1996).

[\*\*27]

### 3. Violation of Statute

Plaintiff contends that it was error for the court to instruct the jury on New Jersey's Motor Vehicle law on operating a motor vehicle with a blood alcohol concentration of 0.10 percent or more by weight and on exceeding the legal speed

limit of twenty-five (25) miles per hour.

Plaintiff's sole support for this assertion of error is *Ladner v. Mercedes-Benz*, 266 N.J. Super. 481, 630 A.2d 308, in which the Appellate Division held that it was error to instruct the jury on the statutory requirement that vehicle operators set the parking brake because it invited the jury to consider the plaintiff's negligence on the fifth prong of the risk/utility analysis. n9 See *Ladner*, 266 N.J. Super. at 492-93. The Appellate Division's recommendation was a limiting instruction. *Id.* at 493-94. In this case, the jury received just such a limiting instruction. The jury was specifically charged that it could only consider a violation of either statute "on the question whether plaintiff would have heeded an adequate warning had one been given." Tr. of Oct. 23, 1996 at 78.

n9 This prong is generally stated as: The ability of foreseeable users to avoid danger by the exercise of care in the use of the product. See *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 174, 386 A.2d 816 (1978).

[\*\*28]

If, as plaintiff goes on to suggest, it was error to give these instructions because they were only marginally relevant to the "heeding presumption," it was surely harmless error. The jury found that Honda was liable for its failure to warn the plaintiff. Implicit in that finding is the jury's conclusion that Honda failed to rebut the "heeding presumption." Accordingly, the instructions on statutory violations, even if error, cannot support a motion for a new trial.

[\*857] 4. *The Comparative Fault Instruction*

Hulmes contends that it was error to instruct the jury on comparative fault, and that he is therefore entitled to a new trial. Plaintiff correctly notes that [HN17] a comparative fault charge in a products liability action is only permissible when the evidence supports a finding that the plaintiff voluntarily and knowingly encountered a risk of injury from a defective product. *Johansen v. Makita USA, Inc.*, 128 N.J. 86, 94, 607 A.2d 637 (1992). Hulmes contends that the court's charge on comparative fault was not tailored to the specific design defect alleged in this case, i.e., the instability of the ATV and its lack of bumpers on the rear wheels. Plaintiff essentially contends [\*\*29] that the charge on comparative fault allowed the jury to define the "known danger" which plaintiff voluntarily encountered at too high a level of generality. There is no merit to this contention.

In keeping with New Jersey's Model Jury Charges - Civil §§ 5.34H and 5.34I, the jury was instructed that, only if it found that "Robert Hulmes was at fault by voluntarily and unreasonably proceeding to encounter a known danger and that action was a proximate cause of the accident," should it proceed to "compare the fault of each party." Tr. of Oct. 23, 1996 at 79-80. As to the alleged design defect, the instability and lack of a bumper system, the jury found, in response to special interrogatory number 1-A, that there was no design defect in the Honda ATC250R. Clearly, the jury was not asked to compare, and it must be assumed that it did not compare, the fault of Honda in defectively designing the ATV with the fault of Hulmes in voluntarily encountering a "known danger." Indeed, the jury need not even have considered the questions of design defect and nature of the "known danger" together. Had it done so, the jury must necessarily have set the fault of Honda at 0%, since it found no design [\*\*30] defect. Accordingly, even if it was error to instruct the jury on comparative fault as it related to the issue of "design defect," the error was harmless.

[HN18] "As a threshold matter, a party challenging a jury instruction on a particular matter must establish that the jury in fact reached that matter. A motion for a new trial on issues that a jury did not reach will not be granted." *Farra v. Stanley-Bostitch, Inc.*, 838 F. Supp. 1021, 1027 (E.D. Pa. 1993) (citing *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1241 (E.D. Pa.), aff'd, 977 F.2d 568 (3d Cir. 1992); *Field v. Omaha Standard, Inc.*, 582 F. Supp. 323, 332 (E.D. Pa. 1983), aff'd, 732 F.2d 145 (3d Cir. 1984)), aff'd, 31 F.3d 1171 (3d Cir. 1994). The conclusion that the jury need not have reached the comparative fault issue on the question of design defect is inescapable. This alone is sufficient to deny plaintiff the relief he requests in this portion of his motion.

More importantly, however, this case properly raised an issue of plaintiff's comparative fault. Plaintiff seeks to

define the "known danger" element as the danger presented by an allegedly unstable design and the absence of rear [\*\*31] wheel bumpers. Plaintiff characterizes defendants' definition of the same element as mere knowledge that one can be injured in an accident, which plaintiff claims would erase the threshold requirement of a knowing assumption of risk. Neither of these end points properly defines the test of a known risk. [HN19] The precise nature of the "known danger" which the plaintiff is said to voluntarily encounter must be defined by the facts of the individual case. It should not be defined so broadly that mere negligence by the plaintiff can be equated with voluntarily encountering a "known danger." Neither can the term be defined so narrowly that the jury is prevented from considering a plaintiff's comparative fault unless it can be shown that the plaintiff was aware of the precise defect which is alleged to have caused her injuries. The cases speak of a "known danger" not a "known defect." See *Ladner*, 266 N.J. Super. at 495 ("It is not knowledge of the defect . . . that is required to be proven, but, rather, evidence that plaintiff voluntarily and unreasonably encountered a known danger.").

*Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 682 A.2d 724 (App. Div. 1996), is instructive [\*\*32] on this important distinction. In *Lewis*, the plaintiff was injured when an aerosol insecticide which he was using in his [\*\*858] kitchen caught fire. The Appellate Division discussed, in considerable detail, the New Jersey rule on comparative fault in product liability actions, before remanding the case for reconsideration, inter alia, of whether the plaintiff had actual knowledge of the particular risk of fire as opposed to a mere generalized knowledge of the risk of injury, possibly from the toxicity of the insecticide. n10

n10 It must be noted that the Appellate Division criticized the trial court's jury charge, which apparently did not track the language of § 5.34H of the Model Jury Charges-Civil. *Lewis*, 294 N.J. Super. at 79. In *Hulmes*'s case, the jury was charged in accordance with § 5.34H.

*Hulmes* argued at trial that the ATV was defectively designed because it was unreasonably unstable and could easily roll over in the event of an accident, throwing the rider. The "danger" he must knowingly have [\*\*33] encountered, therefore, is the danger of injury from a similar accident. There was evidence that *Hulmes* was aware of this danger, even if he was unaware of the exact center of gravity of his ATV. Plaintiff testified that he was aware of the danger presented by a collision. Tr. of Oct. 1, 1996, part B, at 55. *Hulmes* also testified that his brother punctured his lung after being thrown from a four-wheeled ATV. *Id.* at 61-63.

In *Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super. 569, 592, 637 A.2d 915 (App. Div. 1994), the plaintiff testified that he was unaware that a rotating impeller blade was located in a snowthrower's discharge chute, therefore, he could not be contributorily at fault for the accident which severed some of his fingers. The Appellate Division held that the testimony created a jury question on contributory fault, because the jury could have inferred a knowledge of the relevant danger from the plaintiff's testimony. Here, *Hulmes* testified that he did not know and had never asked about the details of his brother's ATV accident. Tr. of Oct. 1, 1996, part B, at 62. *Hulmes*'s brother, Nicholas, testified that *Hulmes* may have been there at the time of his own ATV accident [\*\*34] and that he and his brother may have witnessed other riders involved in ATV accidents. Tr. of Oct. 3, 1996, part A, at 49-51. These testimonial inconsistencies presented a jury question as to whether *Hulmes* was aware of the danger of an accident similar to the one in which he was involved, and yet voluntarily encountered that danger. Accordingly, there was ample justification for a jury charge on comparative fault in this case.

##### 5. The "U-Haul Documents"

Plaintiff contends that this court erred in excluding certain warning labels produced by U-Haul for a fleet of Honda ATVs which it maintained for the rental market. These labels were attached to the U-Haul ATVs and were more detailed and extensive than the warning labels that appeared on *Hulmes*'s Honda ATC250R.

At the July 1, 1996 hearing on the motions in limine, and again on October 3, 1996, the court expressed concern

that U-Haul might not have been qualified to design an appropriate warning label for an ATV, and the record was devoid of any testimony from a representative of U-Haul regarding these warnings. Tr. of July 1, 1996 at 161-72; Tr. of Oct. 3, 1996, part B, at 54. This, concern, however, largely preceded [\*\*35] plaintiff's counsel's suggestion that he sought to introduce the U-Haul warnings only for notice. Id. at 55. On this motion, Hulmes repeats his assertion that these documents constituted "vivid evidence" of notice. Plaintiff's Brief at 38. Plaintiff contends that this court "misconstrued the vividness of the evidence to prove just what it was offered for as undue prejudice to Honda." Id.

As the court understands plaintiff's argument, these documents were offered as evidence of notice that U-Haul considered the warnings Honda provided with its vehicles inadequate in view of the purposes for which U-Haul had purchased these ATVs. This court's conclusion that plaintiff did not lay a sufficient foundation as to U-Haul's purpose and experience with these vehicles goes directly to plaintiff's notice argument. Thus, this court's concern with the "content" of the U-Haul warnings was not the result of some mistaken notion that plaintiff sought to introduce [\*\*859] these documents for their truth. n11 Rather, that concern addressed the nature of the notice these documents purportedly gave to Honda. Plaintiff simply never established what this notice contained, other than notice that U-Haul [\*\*36] put additional warning labels on its ATVs. This fact is, at best, of marginal relevance in a case of a purchaser of an ATV, not of the same model as those in the U-Haul fleet, who admitted to having read the owner's manual that accompanied his ATV "cover to cover." Tr. of Oct. 1, 1996, part B, at 4.

n11 Exhibit P-594, for example, warned that the vehicle could "flip every which way."

Moreover, insofar as these documents provided any notice of the insufficiencies of Honda's warnings, the U-Haul documents were cumulative of much of the plaintiff's evidence, as the court pointed out at the time. Tr. of Oct. 3, 1996 at 60. Ultimately, this court excluded these documents because they were potentially inflammatory and confusing to the jury, as well as cumulative of other evidence. Id. at 64-65. Plaintiff has not demonstrated that, in so doing, this court misapplied *Fed. R. Evid. 403*.

Indeed, [HN20] plaintiff cannot demonstrate any prejudice from the exclusion of these documents, much less any impact on his substantial [\*\*37] rights, because the jury found in his favor on the failure to warn theory, and it was on notice of the adequacy of the warning that plaintiff sought to introduce this evidence. For all these reasons, a new trial on this basis must be denied.

#### 6. Lay Opinion Testimony

Plaintiff contends that this court erred in admitting the opinion of Officer James Mikulski under *Fed. R. Evid. 701*. Rule 701 allows opinions of non-experts to be heard when those opinions or inferences are "rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Fed. R. Evid. 701*.

Based upon his post-accident investigation, Officer Mikulski testified that Hulmes was traveling over the posted speed limit of twenty-five (25) miles per hour at the time of the accident. Tr. of Oct. 8, 1996 at 174. Officer Mikulski also offered his opinion that the accident resulted from "driver inattention" because he could find no "debris" or other impediments which might have caused the accident. Id. at 177-78. Plaintiff's counsel cross-examined Officer Mikulski at some length about the measurements upon which he based his conclusions [\*\*38] regarding the speed of Hulmes's ATV, concluding:

Q. You are not saying here today that you have any real scientific technical accurate focused determination that this is the precise spot where the event occurred; is that right?

A. That's correct, sir.

Id. at 193.

This issue was explored during the consideration of the parties' numerous motions in limine. At that time, this court noted that [HN21] lay opinions of a technical nature may only be admitted when "the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion." *Asplundh Mfg. Div. v. Benton Harbor Engineering*, 57 F.3d 1190, 1202 (3d Cir. 1995). Asplundh further requires the proponent of lay opinion testimony to demonstrate "some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion." Id.

In keeping with the Asplundh standard, this court determined that Officer Mikulski had been a Mantua Township police officer for approximately five years at the time of the accident, before which he had worked in the Gloucester County sheriff's department for six years. Officer Mikulski is a graduate [\*\*39] of the Camden City Police Academy. Although "particular educational training is of course not necessary," id., Officer Mikulski testified that, since graduation from the police academy, he had completed three additional courses related to motor vehicle accident investigation. Tr. of Oct. 8, 1996 at 135. Officer Mikulski also testified that he had investigated from fifty to one hundred motor vehicle accidents prior to Hulmes's accident. Id. at 136.

[\*860] Plaintiff's sole ground for attacking Officer Mikulski's testimony is that Officer Mikulski is not competent to offer an opinion on a "technical" matter such as the speed of the ATV or the cause of the accident. Plaintiff does not suggest that Officer Mikulski's opinion is based on other opinions or reports or on anything other than the facts as they appeared to him at the scene of the accident. Rather, plaintiff claims that Officer Mikulski's testimony, because it did not demonstrate his "familiarity with the influences of the vehicle's design on flipping," should have been excluded. Plaintiff urges upon this court a singularly broad reading of Asplundh.

In Asplundh, a maintenance supervisor, who "[did] not seem to have [\*\*40] anything to do with designing or evaluating the design of machinery," testified that a piece of machinery had failed due to metal fatigue which he attributed to faulty design. *Asplundh*, 57 F.3d at 1205. The correlative would exist in this case had Officer Mikulski, lacking any experience in ATV design, testified that Hulmes's accident was caused by design flaws in the Honda ATC250R. The proposition that a lay witness cannot give an opinion which must necessarily be based upon expertise which he lacks, does not lead to the conclusion that a lay witness may never testify unless he has technical expertise in all aspects of the case. To read Asplundh for this proposition would completely eliminate lay opinion testimony from any case involving a "technical" issue. This cannot have been the Third Circuit's intention.

Officer Mikulski's duty in investigating Hulmes's accident required him to form an opinion as to the cause of the accident and to note that opinion on the accident investigation form. See *Ernst v. Ace Motor Sales, Inc.*, 550 F. Supp. 1220, 1223-24 (E.D. Pa. 1982), aff'd, 720 F.2d 661 (3d Cir. 1983) (police officer who arrived at the scene of an automobile [\*\*41] accident was permitted to testify to the point of impact as a lay witness based on his experience and his perception of physical evidence at the scene). Officer Mikulski testified at trial to no more than he was required to observe in his professional capacity. Plaintiff was given ample opportunity to cross-examine Officer Mikulski and to challenge his testimony before the jury. Accordingly, plaintiff's motion for a new trial on this ground will be denied.

#### 7. The "Ultimate Outcome" Charge

Plaintiff contends that this court erred in failing to instruct the jury on the "ultimate outcome" of its deliberations on the comparative fault of the parties, that is, that a finding of fifty-one (51) percent or greater causative fault on the part of Hulmes would bar his recovery. Although plaintiff's counsel now stresses the importance of an "ultimate outcome" charge to his case, he was slow to assert this argument at trial.

Neither plaintiff's original requested points for charge, nor his amended requests, contained an "ultimate outcome" charge. This omission might be interpreted merely to reflect plaintiff's belief, which is vigorously pressed in this

motion, that a comparative fault charge [\*\*42] was never appropriate in this case. Notably, however, plaintiff opposed the comparative fault charge immediately after seeing a first draft of the court's instructions to the jury without mentioning the "ultimate outcome" charge. Tr. of Oct. 22, 1996 at 229-44. The following morning, the court returned to the draft jury instructions and special interrogatories. Tr. of Oct. 23, 1996 at 2. At that time, plaintiff pressed a distinct request, based on New Jersey's Model Jury Charge § 5.34G, for a limiting instruction on proximate cause "where comparative negligence is not applicable." See Plaintiff's Requested Point for Charge No. 22, subsection 2. The court ultimately refused to give this charge based upon its conclusion that the doctrine of comparative fault was applicable to this case. Tr. of Oct. 23, 1996 at 17. Plaintiff's counsel concluded:

THE COURT: Is there anything else you wish to place on the record, Mr. Levin? You want to consult with your counsel?

MR. LEVIN: Yes, sir.

(short pause)

MR. LEVIN: Thank you, your Honor, nothing else on the points for charge or the jury verdicts.

THE COURT: Pardon?

[\*861] MR. LEVIN: Nothing else on the points for [\*\*43] charge or the jury verdict.

Tr. of Oct. 23, 1996 at 22. Following some discussion of the exhibit list, the jury was brought in and the charge read. *Id.* at 46-98. Not until the court asked for any "additional objections" to the charge did plaintiff's counsel first address the omission of an "ultimate outcome" charge. *Id.* at 100. Even then, counsel was unable to cite any New Jersey caselaw in support of such an instruction in a product liability case. *Id.* at 101. Plaintiff now asserts that the omission of an "ultimate outcome" charge in this case adversely affected his substantial rights, necessitating a new trial. I disagree.

In *Roman v. Mitchell*, 82 N.J. 336, 413 A.2d 322 (1980), the Supreme Court of New Jersey held that [HN22] trial courts should instruct the jury as to the legal effect of the application of the comparative negligence statute to the jury's findings. That court also observed, "there is nothing in the statute which specifically requires that the jury be instructed" on the ultimate outcome. *Id.* at 345. The rule in New Jersey is thus a judge-made rule. n12

n12 As such, it is a response to the judge-made rule against informing the jury of the effect of its conclusions. This rule, also called the "blindfold" rule, probably was first announced by the Wisconsin Supreme Court in 1890. *Ryan v. Rockford Ins. Co.*, 77 Wis. 611, 46 N.W. 885 (Wis. 1890). See Stuart F. Schaffer, Comment, Informing the Jury of the Legal effect of Special Verdict Answers in Comparative Negligence Actions, 1981 *Duke L.J.* 824, 830 (1981).

[\*\*44]

The Roman court reasoned that a jury would be "better able to fulfill its fact-finding function" if informed of the legal effect of its findings. *Id.* at 346. The court did not elaborate on its rationale, but instead, relied primarily on *Seppi v. Betty*, 99 Idaho 186, 579 P.2d 683 (Idaho 1978), in which the Idaho Supreme Court discussed the then emerging trend toward allowing the trial judge to instruct the jury on the effect of its allocation of fault. See *id.* at 686-92.

Two observations about *Seppi* must be noted. First, the Idaho Supreme Court held that it was not reversible error to inform the jury of the ultimate outcome of the apportionment of comparative fault. *Id.* at 692. In contrast to *Seppi*, and without further discussion, the New Jersey Supreme Court fashioned an affirmative rule that the jury should be so

informed, except in complex cases "involving multiple issues and numerous parties . . . if it would tend to mislead or confuse the jury." *Roman*, at 346-47. Second, the court in *Seppi* based its conclusion, at least in part, on the concern that a fifty-fifty division of fault would be "singularly attractive to a jury," and that such [\*\*45] a division would bar the plaintiff's recovery in Idaho. *Seppi*, 579 P.2d at 690.

[HN23] In New Jersey, a plaintiff will recover as long as his or her comparative fault is "not greater than" the combined fault of the defendants. *N.J. Stat. Ann. § 2A:15-5.1* (West 1987). Indeed, the *Seppi* court noted that "Wisconsin, though not changing its rules to permit informing the jury of the legal effect of their answers, did adopt a 'no greater than' comparative negligence statute," and that such a statute "gives the plaintiff the benefit of the attractive 50-50 apportionment of negligence." *Seppi*, 579 P.2d at 691. See also *Roman*, 82 N.J. at 355-56 (Clifford, J., dissenting) (noting that New Jersey's Comparative Negligence Act was patterned on Wisconsin's act, and arguing that it should, therefore, be interpreted in accordance with the constructions placed upon it by Wisconsin courts, absent any contrary direction from the New Jersey Legislature).

The rationale for the "blindfold rule" was succinctly stated by the Wisconsin Supreme Court.

Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the [\*\*46] facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.

*McGowan v. Story*, 70 Wis. 2d 189, 234 N.W.2d 325, 329 (Wis. 1975).

[\*862] Where the giving or withholding of an instruction on the legal effect of the jury's comparative negligence findings is discretionary, one court approved such an instruction following "an inquiry from the jury that strongly implied confusion and speculation." *Schabe v. Hampton Bays Union Free School Dist.*, 103 A.D.2d 418, 480 N.Y.S.2d 328, 337 (N.Y. App. Div. 1984). However, it seems equally probable that an "ultimate outcome" instruction following such an inquiry could have a pernicious effect. This was amply illustrated in *Riley v. K Mart Corp.*, 864 F.2d 1049 (3d Cir. 1988). In *Riley*, an "ultimate outcome" instruction was given along with the initial charge. However, in answering a communication from the jury, the district court failed to repeat the "ultimate [\*\*47] outcome" instruction. The jury returned a verdict assigning thirty (30) percent of the comparative fault to the defendant and seventy (70) percent to the plaintiff, and set the plaintiff's damages at \$ 250,000.00. *Riley*, 864 F.2d at 1051. Presumably, based upon its "ultimate outcome" instruction, which was intended to inform the jury that no damages were to be awarded if the plaintiff's negligence exceeded fifty (50) percent, the district court faced what it considered an inconsistent verdict. *Id.* at 1052. Accordingly, the district court again explained the effect of the comparative negligence findings and the jury returned to deliberations. *Id.* The jury revised the special verdict to reflect 49.9% negligence on the plaintiff's part and 50.1% on K Mart's part, and damages in the amount of \$ 150,000.00. *Id.* The district court entered judgment in favor of the plaintiff for \$ 75,150.00. *Id.*

The Third Circuit vacated and remanded, pointedly noting that "after being reminded of Pennsylvania's rule on comparative negligence, the jury revised its still warm factual findings to reach the damage award it desired. In a matter of minutes, the plaintiff's damages dropped by [\*\*48] \$ 100,000.00 and the defendant's negligence increased by 20%." *Id.* at 1054. The Third Circuit further opined that, in view of the jury's original apportionment of negligence, the judgment for the plaintiff "seems to fly in the face of the Commonwealth of Pennsylvania's clearly expressed policy of denying recovery to a plaintiff whose negligence exceeds that of the defendant. To uphold the judgment entered below would be to sanction a verdict disrespectful of the applicable substantive law." *Id.* at 1055.

Moreover, it is not clear that the omission of an "ultimate outcome" charge in this case, even if it was error, adversely affected any substantial right of the plaintiff. [HN24] New Jersey recognizes that the omission of the

"ultimate outcome" charge can sometimes be harmless error.

In *Vartenissian v. Food Haulers, Inc.*, 193 N.J. Super. 603, 475 A.2d 626 (App. Div. 1984), the Appellate Division of the New Jersey Superior Court found "substantial deficiencies" in the trial court's charge to the jury. *Id.* at 609. Among these was the omission of an "ultimate outcome" charge. *Id.* 610. The appellate court noted that plaintiff's counsel failed to object to the omission of the [\*\*49] charge. *Id.* However, the Vartenissian court did not rest its decision on counsel's failure to object. Instead, the court held that, by resolving the case through its assignment of eighty (80) percent of the negligence to the plaintiff and only twenty (20) percent to the defendant truck driver, "the jury could not have found that [the defendant truck driver] was more negligent than the plaintiff." *Id.* Accordingly, the Vartenissian court ruled that the omission of the "ultimate outcome" charge was harmless error. *Id.*

The reasoning of Vartenissian is compelling. In Hulmes's case, the jury assigned sixty-six (66) percent of the causative fault to the plaintiff and only thirty-four (34) percent to the defendants. This result is not suggestive of a jury entranced by the "singularly attractive" alternative of a roughly fifty-fifty split. Nor was there any communication from the jury hinting that the jurors were hampered in any way in their deliberations by the absence of an "ultimate outcome" instruction. In view of the jury's assignment of roughly twice as much causal fault to Hulmes, it is difficult to believe that any substantial right of the plaintiff's has [\*\*50] been infringed. Given the jury's allocation of sixty-six (66) percent comparative fault to Hulmes, I conclude that the omission of the [\*\*863] "ultimate outcome" charge in this case, even if error, was harmless error.

Moreover, the New Jersey Supreme Court's holding in Roman that an "ultimate outcome" instruction should be given in a comparative negligence case was not absolute. As the court noted: [HN25] "In a complex case involving multiple issues and numerous parties, the trial court, in the exercise of sound discretion, could withhold the instruction if it would tend to mislead or confuse the jury." *Roman*, 82 N.J. at 346-47.

This product liability case required the jury to consider two sophisticated and doctrinally distinct theories of liability and to weigh considerable expert testimony on difficult issues such as dynamic stability. New Jersey's Product Liability law, which employs presumptions and multiple part tests of risk versus utility, is highly nuanced. Indeed, there is no reported New Jersey case which has considered whether an "ultimate outcome" charge should be given in a product liability case. n13 Given the complexity of the task the jury was asked to undertake, in my view, [\*\*51] to have given the "ultimate outcome" charge in this case would have misled or confused the jury.

n13 The New Jersey Model Jury Charges suggest that an "ultimate outcome" charge may be given in a product liability case if the language of the charge is tailored to the circumstances. Model Jury Charges - Civil § 8.21(A) n.1. The only case cited in the Model Jury Charges, however, is not a product liability case. See *Williams v. Town of Phillipsburg*, 171 N.J. Super. 278, 408 A.2d 827 (App. Div. 1979).

Defendants maintain that *Roman v. Mitchell* is not controlling in this case in any event because this court's instruction to the jury upon submission of special interrogatories is a matter of federal procedure, rather than state substantive law. See *Fed. R. Civ. P. 49(a)*. See also *Theodorv v. Lipsey*, 237 F.2d 190, 193 (7th Cir. 1956). Plaintiff, without citation to caselaw or other authority, characterizes this contention as "ludicrous." Reply Brief at 8.

Plaintiff has pointed to no published [\*\*52] case from any Circuit Court of Appeals reversing a district court for failure to give an "ultimate outcome" instruction in even the simplest of comparative negligence cases. Nor has this court's research revealed such a case. On the other hand, there are federal appellate cases standing for the proposition that the scope and content of a district court's special verdict is controlled by *Fed. R. Civ. P. 49(a)* and not by state law.

In *Lowery v. Clouse*, 348 F.2d 252 (8th Cir. 1965), a diversity action, then-Circuit Judge Blackmun confronted the mirror image of the argument which plaintiff presses on this motion. At the time, Minnesota courts held that, when a special verdict was used, it was reversible error if the jury was "advised, expressly or by implication, of the result of its

findings." *Id. at 260* (citations omitted). It was argued that the district court's charge "impliedly" informed the jury of the legal effect of its answers. *Id. at 259*. The Eighth Circuit nevertheless affirmed, holding that [HN26] the phrasing of the special verdict in a federal district court "is a matter of procedure governed by the federal rules and not by state practice." *Id. at 260*. This holding [\*\*53] was subsequently reaffirmed by a different panel of that court. See *Davis v. Oberholtzer*, 588 F.2d 243, 246 (8th Cir. 1978).

The conclusion that giving or withholding an "ultimate outcome" charge is procedural finds further support in those states which have accomplished uniformity on this issue through amendments to their Rules of Civil Procedure. See, e.g., Texas R. Civ. P. 277 ("The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured."); Minn. R. Civ. P. 49.01(b) ("The court shall inform the jury of the effect of its answers to the comparative fault question . . . , unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury.").

Because the omission of an "ultimate outcome" charge in this case, if it was error, was harmless error, and, as noted, even under New Jersey law, it was within the court's [\*\*864] discretion to refuse to give such a charge, plaintiff's motion for a new trial on this [\*\*54] basis will be denied. Accordingly, it is unnecessary to determine whether the decision to give or withhold an "ultimate outcome" charge upon the submission of special verdicts is governed by federal procedural law or state substantive law in a diversity action in this court.

#### 8. Comparative Risk Analysis

Plaintiff argues that this court erred in admitting testimony based upon comparative risk analysis. In deciding plaintiff's motions in limine, this court ruled that, as a general matter, the comparative risk of ATV riding, snow mobiling or bungee jumping was irrelevant in a product liability case. As was pointed out then, "there is some degree of risk of an unhappy outcome associated with almost every human endeavor." Tr. of July 1, 1996 at 7. However, it was then understood that testimony concerning comparative risk analysis might be admissible to rebut certain documentary evidence relating to the Consumer Products Safety Commission's investigation into ATVs, were such evidence admitted. *Id. at 8-9*.

Prior to trial, plaintiff again sought to admit evidence drawn from the Consumer Products Safety Commission's ATV investigation. Some of this material was admitted, thereby [\*\*55] opening the door to rebuttal evidence in the form of comparative risk analysis. The danger that the jury would accord undue authority to an investigation conducted by an official arm of the government required the admission of some evidence which would tend to rebut the CPSC data. It was for this purpose alone that the comparative risk analysis testimony was admitted. Plaintiff was aware that the court would allow this evidence for that purpose. At the charging conference, plaintiff failed to request a limiting instruction confining the jury's consideration of this evidence to its value in rebutting the CPSC material. In view of all these factors, plaintiff's motion for a new trial on this basis must be denied.

#### 9. The "Super Trike" Brochure

Plaintiff maintains that this court erred in excluding from evidence an advertising brochure prepared by Honda for a small segment of Japanese consumers. Plaintiff characterizes this document as an admission by a party opponent going to the issue of design defect. It is nothing of the kind. This document contains nothing which could be termed an admission of "defect."

As to plaintiff's claims that the "Super Trike" brochure was crucial evidence [\*\*56] on his failure to warn theory, plaintiff presented no evidence that the brochure was ever intended as a warning of any kind. Apparently, the brochure was advertising material which was sold in Japan to a limited number of off-road motorcycle enthusiasts. Therefore, plaintiff's characterization of this brochure as a "warning" that was delivered to the Japanese consumer, but withheld from the American consumer is unsupported by the record and highlights the potential for prejudice arising from this

brochure had it been admitted into evidence. See Tr. of Oct. 3, 1996, part B, at 79. Moreover, I am again constrained to observe that, as to plaintiff's failure to warn theory, the exclusion of this document could not have prejudiced the plaintiff, since the jury found in his favor.

#### *10. The Honda Advertising "Outtakes"*

Masayuki Tanaka testified as an expert on behalf of Honda concerning the testing of ATVs. As part of his testimony, Mr. Tanaka showed videos of ATVs performing under test conditions. Plaintiff contends that, in cross-examining Mr. Tanaka, he should have been allowed to play "outtakes" from a Honda promotional video which showed ATVs flipping over. The court concluded [\*\*57] that plaintiff had laid no foundation for screening the "outtakes" in rebuttal, because there was no evidence that the test conditions about which Mr. Tanaka testified were in way similar to the conditions under which the promotional video was filmed. Tr. of Oct. 17, 1996 at 18-19. It remains entirely unclear how Mr. Tanaka could usefully have commented on these "outtakes" without some knowledge of the conditions under which the filming took place. Accordingly, plaintiff's motion for a new trial on this ground will be denied.

#### [\*865] *11. Evidence of Modifications*

Plaintiff asserts that a new trial is warranted because the evidence of modifications which he made to his ATV created the impression in the minds of the jurors that Hulmes's Honda ATC250R was, at the time of the accident, "no longer the same product" which he purchased. Plaintiff's Brief at 49. This topic was exhaustively discussed during argument on pre-trial issues. Tr. of Sept. 25, 1996 at 204-09. Honda stipulated that it would not seek to show substantial modification or misuse of the ATV. *Id.* Honda offered the evidence in question solely to show that Hulmes was an experienced ATV enthusiast. There is no reason to believe [\*\*58] that the jury used this information for any other purpose. Hulmes's experience, *vel non*, goes to his knowledge of the danger presented by the vehicle and the likelihood that he would have heeded additional warnings. The jury found in Hulmes's favor on the failure to warn issue. Accordingly, this evidence could not have prejudiced Hulmes's substantial rights and his motion based on this ground must be denied.

#### *12. The Aftermath of the Accident*

Plaintiff claims that this court erred in admitting testimony that Nick Hulmes, plaintiff's brother, pulled him from underneath the pickup truck where he came to rest after that accident. Plaintiff argued that the evidence allowed the jury to conclude incorrectly that some or all of plaintiff's injuries resulted from the conduct of Nicholas Hulmes. There is no merit to this argument.

Honda stipulated that the evidence of Nicholas Hulmes's post-accident conduct was not being offered to show that Nicholas Hulmes exacerbated the injuries suffered by the plaintiff. Tr. of Sept. 25, 1996 at 132. Honda offered the evidence to establish that Nicholas Hulmes had removed a beer bottle from his brother's waistband before the paramedics arrived [\*\*59] on the scene. The court allowed this testimony as relevant to the issue of alcohol consumption. This issue has been addressed above and need not be reconsidered now. Plaintiff's motion based on the post-accident conduct of Nicholas Hulmes will be denied.

#### *13. Dr. Mercaldi's Testimony*

David W. Mercaldi, Honda's engineering expert, offered an opinion of the speed of Hulmes's ATV at the time of the accident based upon certain tests he performed. Tr. of Oct. 21, 1996 at 50. Plaintiff contends that these tests were unreliable and that Mercaldi's evidence inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). These tests were extensively described by Dr. Mercaldi, out of the presence of the jury. Tr. of Oct. 21, 1996 at 46-105. At this Rule 104 hearing, Honda successfully demonstrated by a preponderance of the evidence that Dr. Mercaldi's test methodologies were reliable. The burden of proving by a preponderance that expert testimony is reliable is not meant to be an onerous one. *In re Paoli R.R. Yard PCB*

*Litigation*, 35 F.3d 717, 743-45 (3d Cir. 1994). Indeed, Honda filed an in limine motion seeking to [\*\*60] bar the testimony of plaintiff's engineering expert, also based upon an appeal to Daubert, which was denied. Tr. of July 1, 1996 at 159. In denying Honda's motion this court adopted the view that whether the alternative designs suggested by plaintiff's expert were feasible, or whether the testing methods employed were state-of-the art, were not proper issues for a threshold determination under Daubert. See *In re Paoli*, 35 F.3d at 744 ("The grounds for the expert's opinion merely have to be good, they do not have to be perfect."). Rather, [HN27] Daubert requires the district court to determine whether novel or untested methodologies are sufficiently reliable that conclusions based upon them can be of some use to the jury. *Id.*

In this spirit, the court admitted the testimony of plaintiff's expert, Dr. Huston, and the jury heard his opinions regarding what he considered to be flaws in the designs of various Honda ATVs. On cross-examination, Honda vigorously attacked the sufficiency of the testing upon which Dr. Huston based his opinions. In its case, Honda put on Dr. Mercaldi, in part, to refute Dr. Huston's conclusions regarding Honda ATV designs. The court applied [\*\*61] the same rationale [\*\*866] in admitting Dr. Mercaldi's testimony that it applied in admitting Dr. Huston's testimony. There was no error in so doing.

Plaintiff also objects to the timing of the disclosure of photographs and videotapes of Dr. Mercaldi's testing procedures. When this objection was raised at the Rule 104 hearing, the court limited his testimony and video presentation to tests of which plaintiff's counsel received timely submissions in still picture or video format. Tr. of Oct. 21, 1996 at 105-13.

The tests which Dr. Mercaldi performed were intended to rebut assertions made by plaintiff's engineering expert, Dr. Jeffrey Huston, at his deposition. The still photographs of these tests were presented to plaintiff's counsel at Dr. Mercaldi's deposition on August 12, 1996, only a few weeks after the tests were completed. It is difficult to imagine how plaintiff was prejudiced by this production, even if it was not as timely as humanly possible. This is especially so in that Dr. Mercaldi was not allowed to testify about, or describe any tests which were not presented in some form to plaintiff's counsel at his deposition. Plaintiff's assertion of surprise, therefore, is unfounded. [\*\*62]

#### *14. Testimony of Glynn and Tanaka*

Plaintiff objects to the admission of the testimony of Edward F. Glynn, Assistant to the Executive Vice-President of American Honda Motor Company, Inc., and Masayuki Tanaka, an expert for Honda who supervised product testing of ATVs. It is difficult to determine the basis for this objection. Plaintiff appears to argue that this testimony was more prejudicial than probative. However, plaintiff fails to cite particular testimony and describe how it prejudiced his case. Instead, plaintiff paints with a broad brush, faulting the court for allowing the witnesses "to present lengthy multimedia presentations to the jury as if the trial were a shareholders' meeting." Plaintiff's Brief at 55.

To place this argument in perspective, plaintiff called Mr. Glynn during his case-in-chief to testify regarding the CPSC's ATV investigation and specifically Honda's efforts to disseminate a safety letter as part of its consent decree with the CPSC. Tr. of Oct. 7, 1996 at 33-107. Honda recalled Mr. Glynn during its case to develop further Honda's response to the CPSC investigation and its product warning procedures. Honda was under an ongoing duty, even after the [\*\*63] ATV in question left its control, to take reasonable steps to warn the user of any newly discovered defects. The question of the reasonableness of Honda's actions in light of the CPSC investigation was for the jury to decide. Mr. Glynn's testimony addressed this issue.

Similarly, Mr. Tanaka's testimony concerning Honda ATV design and product testing was relevant to rebut testimony from plaintiff's expert regarding purported "design flaws." Mr. Tanaka was identified as an expert in ATV design who could testify to the design choices made by Honda. This was appropriate in view of the testimony of Dr. Huston, who made a broad attack on three-wheeled ATVs, preferring a four-wheeled design including a roll cage. Accordingly, there was no error in admitting this testimony.

In connection with this argument, plaintiff maintains that tanaka should not have been permitted to "illustrate" his testimony relating to Honda's testing procedures with laser videos. Plaintiff maintains that these videos were irrelevant to any issue in the case. As noted above, Mr. Tanaka was called, in part, to rebut testimony from plaintiff's design expert, Dr. Huston, and the use of videos in support of mr. Tanaka's [\*\*64] testimony was entirely permissible. Accordingly, no substantial right of the plaintiff's was infringed.

*15. Weight of the Evidence and Fundamental Fairness*

Finally, plaintiff argues that the jury's verdict was against the weight of the evidence and that the trial was fundamentally unfair. These arguments merely summarize the issues plaintiff has presented in these motions. As set forth above, plaintiff fails to meet the standard which would allow this court to set aside the jury's verdict. Plaintiff's argument that the trial lacked fundamental fairness is entirely unpersuasive. Accordingly, plaintiff's motion for a new trial based on the [\*\*867] weight of the evidence and fundamental fairness will be denied.

### **III. Conclusion**

For all the reasons set forth above, plaintiff's motion to alter or amend the judgment pursuant to *Fed. R. Civ. P. 59(e)*, and his alternative motion for a new trial pursuant to *Fed. R. Civ. P. 59(a)*, will be denied. The court will enter an appropriate order.

STEPHEN M. ORLOFSKY

United States District Judge

Dated: March 11, 1997

#### **ORDER**

This matter having come before the Court on March 7, 1997, on the Motion of Plaintiff, Robert T. Hulmes, to Alter [\*\*65] or Amend the Judgment entered in this case on October 31, 1996, and Plaintiff's alternative Motion for a New Trial, and Plaintiff, Sherry Hertlein having joined the motion, Lewis M. Levin, Esq., Joseph Viola, Esq., and Robert Murphy, Esq., of Lewis M. Levin & Associates, appearing on behalf of Plaintiff, Robert T. Hulmes, David S. Bross, Esq., appearing on behalf of Plaintiff, Sherry Hertlein, and Robert St.L. Goggin, Esq. and Brian C. Darreff, Esq., of Marshall, Dennehy, Warner, Coleman & Goggin, and Paul G. Cereghini, Esq., of Bowman & Brooke, appearing on behalf of the Defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc.; and,

The Court having considered the briefs, the trial transcripts and trial exhibits, for the reasons set forth in this Court's OPINION, filed concurrently with this ORDER,

It is on this 11th day of March, 1997, ORDERED that the Motion of Plaintiff, Robert T. Hulmes, to Alter or Amend the Judgment entered in this case on October 31, 1996, pursuant to *Fed. R. Civ. P. 59(e)*, and Plaintiff's alternative motion for a new trial pursuant to *Fed. R. Civ. P. 59(a)*, are [\*\*66] DENIED.

STEPHEN M. ORLOFSKY

United States District Judge

7 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**Ray ADKINS, et al. v. Donald DIRICKSON, et al. Donald DIRICKSON, et al. v.  
Ray ADKINS, et al.**

**Civ. A. Nos. 78-3911, 79-0241**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

*523 F. Supp. 1281; 1981 U.S. Dist. LEXIS 15073; 9 Fed. R. Evid. Serv.  
(Callaghan) 630*

**October 13, 1981**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff driver and plaintiff passengers filed an action against defendant corporation and defendant employee seeking to recover for damages resulting from a collision involving two trucks. The court entered judgment on a jury verdict in favor of plaintiffs, and defendants filed a motion for a new trial.

**OVERVIEW:** The trucks operated by the driver and the corporation's employee collided on a two-lane section of a highway under construction. One of the trucks crossed into the other truck's lane, but neither operator could remember the accident. Defendants claimed that evidence of tachograph readings from their truck was improperly admitted without a foundation. They also claimed that the trial judge improperly refused to charge the jury regarding the driver's violation of Interstate Commerce Commission regulations and that the verdict was against the weight of the evidence. The court held that defendants were not entitled to a new trial. The court ruled that (1) no foundation regarding the accuracy of the tachograph was required prior to admission of the evidence because the tachograph was a relatively unsophisticated device and the jury could therefore comprehend the impeachment of its accuracy; (2) the jury charge requested by defendants would have usurped the jury's role as fact finder by stating that the evidence showed a violation; and (3) the verdict was not against the weight of the evidence.

**OUTCOME:** The court denied defendants' motion for a new trial of the action of the driver and passenger which arose out of a truck collision.

**CORE TERMS:** tachograph, accuracy, speed, speedometer, scientific, chart, regulation, lane, recording, driver, inaccuracy, cable, watch, measurement, impeachment, new trial, driving, traffic, output, truck, wrong side, proponent, harmless, reconstruction, manufacturer, calibration, rotor, prejudicial, novel, reasonable accuracy

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

[HN1] To prevail on a motion for a new trial, a party must show not only that there was error, but also that any error was not harmless.

***Evidence > Competency > General Overview******Evidence > Testimony > Credibility > General Overview******Evidence > Testimony > Lay Witnesses > Personal Knowledge***

[HN2] A witness is deemed competent to testify unless it is nearly impossible that he had first-hand observation. Fed. R. Evid. 601, 602. The quality of a witness's observations is not an issue for foundations; it is a matter for impeachment.

***Torts > Negligence > Proof > Violations of Law > General Overview******Torts > Transportation Torts > Motor Vehicles***

[HN3] Under Pennsylvania law, driving on the wrong side of the road without an excuse is per se negligent.

***Torts > Negligence > Causation > General Overview******Torts > Negligence > Proof > Violations of Law > General Overview******Torts > Transportation Torts > Motor Vehicles***

[HN4] In Pennsylvania, driving faster than the speed limit is not negligent unless speed is also a proximate cause of the accident.

**COUNSEL: [\*\*1]**

Christopher C. Fallon, Jr., Cozen, Begier & O'Connor, Philadelphia, Pa., for Ray Adkins, et al.

Edward L. McCandless, Jr., Steinberg & Girsh, Philadelphia, Pa., for Donald Dirickson, et al.

**OPINION BY:**

GILES

**OPINION:**

[\*1282]

**MEMORANDUM**

Before me is defendants' motion for a new trial. For the reasons which follow the motion will be denied.

**I. BACKGROUND**

Oncoming tractor trailers sideswiped in the dark of night. Neither driver recalled the impact. Nobody else witnessed the accident. The collision occurred on a portion of Interstate Route 78 ("I-78") which, because of construction, was a two-lane undivided highway. All traffic was routed onto the westbound section of the road, with westbound traffic restricted to what usually would be the outside driving lane, and eastbound traffic in the usual inside passing lane. Plaintiff n1 had been driving a box-type tractor-trailer westward in the outside lane. Defendant, who was driving east in a tanker tractor-trailer, loaded with a liquid, had been traveling in a four-lane section of I-78 and then went through a cross-over onto the two-lane section. The accident occurred approximately two-tenths of a mile after defendant made the [\*\*2] cross-over. After trial, the jury found for plaintiffs. Defendants moved for a new trial.

n1. "Plaintiff(s)" refers to the plaintiff(s) in Civil Action No. 78-3911: Ray Adkins, Charles Fletcher, and Lori Fletcher. "Defendant(s)" refers to the plaintiff(s) in Civil Action No. 79-0241: Donald Dirickson, Robert Coffman, and Union Carbide Corporation. The claims of Dirickson and Union Carbide in 79-0241 should have been raised in 78-3911 as mandatory counterclaims. (Plaintiffs, however, raised no objection to bringing these claims in a separate action.) Coffman, who was a passenger at the time of the accident, was not a defendant in 78-3911. Thus, he properly brought his claims in a separate action.

## [\*1283] II. NEW TRIAL MOTION

Defendants raise four grounds for a new trial: (A) admission of evidence derived from a tachograph as partial proof of the speed of defendants' truck; (B) preclusion of defense counsel's proposed method of attempting to recall or incorporate trial and deposition testimony [\*\*3] by other witnesses; (C) refusal of a point for charge on Interstate Commerce Regulations, which were not introduced at trial; and (D) a verdict allegedly against the weight of the evidence.

[HN1] To prevail on their motion, defendants must show not only that there was error, but also that any error was not harmless. See *Fed.R.Civ.Pro.* 61.

### A. Tachograph Evidence

The tachograph in question in this suit is a speed measuring and recording device. In essence, it is a recording speedometer. It consists of an ordinary speedometer connected to a recording device which charts on a circular graph, speed, distance travelled, and engine use. n2 As part of plaintiffs' case-in-chief, a tachograph chart was introduced, and an expert interpreted the chart as recording the speed of defendants' truck at impact as 41-42 miles per hour. Notes of Testimony, 3.80 (hereinafter cited as N.T.). That expert, however, could not vouch that the tachograph had recorded accurately. *Id.* 3.98, 3.108-.110. Defendant timely objected to this testimony and asked that it be stricken. *Id.* 3.73, 3.98. The objection was overruled. Defendants now raise this ruling as ground for a new trial.

n2. Descriptions and photographs of tachographs may be found in Conrad, *The Tachograph As Evidence of Speed*, 8 *Wayne L.Rev.* 287, 288-91 (1962). On admission of tachograph evidence, see generally E. Fisher, *Legal Aspects of Speed Measurement Devices* 9-11 (1967); 3 S. Gard, *Jones on Evidence* § 15:16 (1972) (hereinafter cited as Jones); McCormick on Evidence § 210, at 516 (E. Cleary ed. 1972) (hereinafter cited as McCormick); 2 Wigmore on Evidence § 665a (Chadbourn rev. ed. 1970) (hereinafter cited as Wigmore); Annot., 73 *A.L.R.2d* 1025 (1960). See also J. Richardson, *Modern Scientific Evidence* §§ 9.1-14 (1974); A. Moenssens & F. Inbau, *Scientific Evidence in Criminal Cases*, § 13.01-12 (2d ed. 1978); J. Wigmore, *The Science of Judicial Proof* §§ 220-232 (3d ed. 1937); Annot., 47 *A.L.R.3d* 822 (1973); Annot., 49 *A.L.R.2d* 469 (1956); Annot., 21 *A.L.R.2d* 1200 (1952).

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Citing *Villegas v. Bryson*, 16 *Ariz.App.* 456, 494 *P.2d* 61 (1972), they argue that the proponent of tachograph evidence must lay a foundation by showing the accuracy of the particular tachograph.

At trial, defendants, characterizing the tachograph evidence as "scientific," argued that the proponent must show (1) general scientific acceptance, and (2) accuracy of the particular device. See J. Wigmore, *supra* note 2, at 450. See generally J. Richardson, *supra* note 2, § 9.2. In connection with this argument, it is important to note two points. First, the general scientific acceptance of the tachograph is not at issue in this case. If it were, I would take judicial notice of its acceptance. Second, if one accepts the rule proffered by defendants concerning the foundation required for "scientific" proof, then characterizing evidence as "scientific" puts the rabbit into the hat. Thus, the question whether evidence is "scientific" can be thought of as a different aspect of the question what foundation is required. n3

n3. See note 9 infra. In the post-trial motion papers, defendants have dropped this characterization.

Furthermore, both parties have obscured the issues by sometimes treating the issue as an expert-evidence problem under *Fed.R.Evid. 702-703*. This incorrectly describes the problem here. Plaintiff not only introduced expert testimony, but also the original tachograph chart, exhibit P-17, and two enlargements, one approximately four times larger than the original, P-21, the other approximately nine times larger. P-22. Also, if the expert's only role was interpretation of the chart (rather than an independent opinion of speed), see Plaintiffs' Memorandum 3-4, then it follows that if the chart was inadmissible, then expert interpretation was incompetent or irrelevant.

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Not only do plaintiffs challenge the proposition that the proponent of the use of the device must lay a foundation for its accuracy, but they also submit that there was indeed evidence of accuracy presented at the trial. These arguments, therefore, raise three questions for the court: (1) whether [\*1284] accuracy was a necessary foundation in this case; (2) if so, whether the foundation was laid; and (3) if a proper foundation did not exist, whether the error was harmless.

#### 1. Accuracy As Part of Foundation

Is a showing of accuracy a prerequisite to introducing tachograph evidence, or does accuracy vel non merely go to the weight of the evidence? See, e.g., McCormick, supra note 2, § 210, at 515; J. Wigmore, supra note 2, § 220, at 450. The few jurisdictions which have reached this question directly have held that the foundation for introduction of tachograph testimony must include a showing of "the accuracy of the particular tachograph which made the chart." *Villegas v. Bryson*, 16 *Ariz.App.* 456, 458, 494 *P.2d* 61, 63 (1972); see *Bell v. Kroger*, 230 *Ark.* 384, 386-87, 323 *S.W.2d* 424, 426 (1959); *Great Coastal Express, Inc. v. Schrufer*, 34 *Md.App.* 706, 714-16, 369 *A.2d* 118, [\*\*6] 124-25 (1977) (quoting trial judge n4); *Thompson v. Chicago & Eastern Illinois Railroad*, 32 *Ill.App.2d* 397, 405, 178 *N.E.2d* 151, 155 (1961); Jones, supra note 2, § 15:16, at 46; McCormick, supra note 2, § 210, at 516; Conrad, supra note 2, at 297. Contra, Wigmore, supra note 2, § 665a, at 917; but see *Hall v. Dexter Gas Co.*, 277 *Ala.* 360, 365, 170 *So.2d* 796, 800-01 (1964) (admissible on showing that it was ordinary business record); but cf. *NLRB v. Pacific Intermountain Express Co.*, 228 *F.2d* 170, 172 (8th Cir. 1955) (NLRB proceeding), cert. denied, 351 *U.S.* 952, 76 *S. Ct.* 850, 100 *L. Ed.* 1476 (1956); *People v. Dusing*, 5 *N.Y.2d* 126, 128, 155 *N.E.2d* 393, 394, 181 *N.Y.S.2d* 493, 495 (1959); *Nicholas v. Penny*, (1950) 2 *KB* 466, 473-74, (accuracy goes to weight of speedometer evidence), quoted in *People v. Dantonio*, 18 *N.J.* 570, 581, 115 *A.2d* 35, 41 (1955). See also *Bourn v. Department of Employment Security*, 134 *Vt.* 490, 365 *A.2d* 253 (1974) (in unemployment insurance case, employer carries risk of non-persuasion of accuracy of its tachographs).

n4. The appellate decision consists almost entirely of a reproduction of the trial judge's opinion.

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None of these decisions, however, is controlling as to Pennsylvania law. Their precedential value depends on the persuasiveness of their logic. Examination of the cases does not disclose an explanation or rationale for their respective holdings. See, e.g., *Villegas*, 16 *Ariz.App.* at 458, 494 *P.2d* at 63 ("the law and common sense require"); *Great Coastal Express*, 34 *Md.App.* at 716, 369 *A.2d* at 124 (no reason given but quoted the trial judge who relied entirely on precedent from other jurisdictions); *Thompson*, 32 *Ill.App.2d* at 405, 178 *N.E.2d* at 155 (no reason); Jones, supra note 2, § 15:16, at 46 (no reason); McCormick, supra note 2, § 210 at 516 (merely relates majority rule; does not take independent view); Conrad, supra note 2, at 296 (unless showing of accuracy required "scientific proof of this nature becomes meaningless"; "common sense requires"). But see *Bell*, 323 *S.W.2d* at 426 ("because we are here dealing with a novel concept of evidence"); *Nicholas*, (1950) 2 *K.B.* at 473 (if very slight inaccuracy would make substantial difference in outcome, court may demand strict showing of accuracy); *id.* 474 (accuracy may be attacked effectively on

cross-examination); Wigmore, supra [\*\*8] note 2, § 665a at 917 (scientists customarily rely on statements of others whose accuracy is unchecked; unfeasible for professional to test every instrument himself). Thus, not finding the precedent from other jurisdictions enlightening or persuasive, I shall start my analysis from scratch.

The competence of possibly inaccurate tachograph recordings seems most analogous to the competence of possibly inaccurate witness observations. See J. Wigmore, supra note 2, § 220. Wigmore refers to this problem as "(perception) by scientific process." Id. at 448. [HN2] A witness is deemed competent to testify unless it is nearly impossible that he had first-hand observation. 3 J. Weinstein & M. Berger, Weinstein's Evidence, P 602(02), at 602-5 (1978); see *Fed.R.Evid.* 601, 602. The quality of a witness's observations is not an issue for foundations; it is a matter for impeachment. See, e.g., Wigmore, supra note 2, § 658(b). By analogy, it would appear that the accuracy of a first-hand [\*1285] speed measurement is also a matter for impeachment.

Evidence based on scientific measurement may pose difficulties not presented by eyewitness testimony. In particular, a court must contemplate [\*\*9] the possibility that the mere introduction of "scientific" or other metric evidence may create an impact upon the jury such that the evidence cannot be effectively impeached.

First, the measurement technique may be highly sophisticated in contrast to the simplified output of the device. Examples of such techniques might be neutron activation analysis or radar. The jury may readily understand the output, e.g., speed, but impeachment based on the measuring technique itself, e.g., the Doppler effect, may be disproportionately difficult to comprehend.

Second, the device may be used so infrequently that the range of accuracy may be totally outside a layman's experience. For instance, a juror may accept a radar speed-gun reading of 50 m. p. h. as absolutely accurate, rather than accurate to plus or minus 5 m. p. h. Conversely, a normal fact trier reasonably may be expected to know that watches or commonly used instruments, like speedometers, are subject to some inaccuracy. Thus, even if a juror does not understand the inner workings of a watch, he will be receptive to evidence of inaccuracy. See J. Wigmore, supra note 2, § 220, at 450 (instruments such as telephone, thermometer, [\*\*10] and theodolite, used commonly "without controversy or doubt" require no foundation).

Third, although based upon established techniques, the device may be so novel that its manufacturers have not yet ironed out all the wrinkles or its operators have not yet acquired the experience necessary for routinely accurate calibration. Thus, it would be unfair to accord any presumption that the device was accurate. In contrast, a watch manufacturer may be fairly presumed to make a reasonably accurate watch and to adjust it with reasonable accuracy before placing it on the market. Likewise, the average watch user may be presumed to set or reset the watch with reasonable accuracy. See id.

A fourth, related reason is that the measurement device may be delicate, subject to environmental influences, or otherwise require adjustment each time it is used. Examples might be a scientific balance, an electronic device which must constantly be recalibrated because of temperature or humidity changes, or a Prather Speed Device. See J. Richardson, supra note 2, § 9.3.

Fifth, a small degree of inaccuracy over a continuous range of calibration might make a vast, quantum difference in the quality of [\*\*11] evidence. See J. Wigmore, supra note 2, § 220, at 450 (no foundation needed for certain instruments, especially "where no issue turns on minute accuracy.") For example, a miniscule difference in alignment of a voice spectrograph or neutron activation analyzer could change an expert's testimony on the identity of a voice or batch of chemicals. See generally A. Moenssens & F. Inbau, supra note 2, §§ 9.01-.10, 12.01-.09.

Sixth, evidence which may be sufficiently reliable in a civil case may be suspect when introduced as proof beyond a reasonable doubt in a criminal case. See, e.g., *People v. Dusing*, 5 N.Y.2d 126, 128, 155 N.E.2d 393, 394, 181 N.Y.S.2d 493, 495 (1959) (untested radar or speedometer evidence is admissible, but insufficient to sustain speeding conviction); 75 Pa.Cons.Stat. Ann. § 3368 (evidence from untested speed-timing device is inadmissible in traffic

prosecution).

Seventh, if the particular device is an official, government device and the authenticating testimony is from a government official, then the jury may be swayed disproportionately. This may be one reason that many jurisdictions have passed laws restricting evidence of speed-timing devices in criminal [\*\*12] prosecutions. See, e.g., 75 *Pa.Cons.Stat. Ann.* § 3368 (Purdon 1975).

Eighth, the proponent of the measurement may have better control of evidence [\*1286] of accuracy vel non. n5 (But federal discovery rules tend to eliminate any advantage on his part.) Finally, in every case, the court should be alert for any peculiarities of the device or technique involved.

n5. Note that the seventh and eighth factors vary from case to case. Thus they seem poor candidates for setting a general rule about tachographs. They may, however, justify an exception to the general rule.

Almost all of these factors weigh in favor of the general admission of tachograph evidence. First, a tachograph is a relatively unsophisticated device, working on the same mechanical principles as a speedometer. See Conrad, *supra* note 2, at 288; N.T. 4.120 (defendants' expert's testimony that "the tachograph is based upon simple concepts of velocity, time and distance"). Thus, a jury could comprehend impeachment of accuracy. For instance, [\*\*13] in this case, defendants introduced comprehensible impeachment evidence relative to: resolution of problems due to thickness of the stylus blade, N.T. 3.87-.89; possibly incorrect calibration of the cable which drives the tachometer, id. 3.87-.89, .97-.98, .102-.103; driver tampering, id. 3.90-. 92; incorrect zeroing of the speed recordings, id. 3.92-.93; and other alleged inaccuracies. See, e.g., id. 4.140-.143.

Second, although ordinary fact finders may be unfamiliar with the record portion of a tachograph, it is reasonable to expect them to be familiar with the speedometer portion, and to be receptive to evidence of inaccuracy. This expectation is especially reasonable when, as here, the evidence is that a tachograph works in the same way as a speedometer, see id. 3.66, and that the recording disk's accuracy correlates with that of the tachograph speedometer. See id. 3.75.

Third, even assuming that tachograph evidence was novel in 1959, see *Bell*, 323 *S.W.2d* at 426, it is by now old hat. In addition to the cases cited above, tachograph evidence has been accepted (without comment) in dozens of cases. n6 The principles used in the Sangamo tachograph in this case are exactly the [\*\*14] same as those described for the Sangamo tachograph pictured in Conrad's 1953 article. See Conrad, *supra* note 2.

n6. See, e.g., *Edwards v. Mayes*, 385 *F.2d* 369 (4th Cir. 1967); *Grooms v. Minute-Maid*, 267 *F.2d* 541 (4th Cir. 1959); *Warren v. Pacific Intermountain Express Co.*, 183 *Cal.App.2d* 155, 6 *Cal.Rptr.* 824 (1960); *Smith v. American Mut. Liab. Ins. Co.*, 125 *Ga.App.* 273, 187 *S.E.2d* 299 (1972); *People v. Pittman*, 55 *Ill.2d* 39, 302 *N.E.2d* 7 (1973); *Kenney v. Churchill Truck Lines*, 6 *Ill.App.3d* 983, 286 *N.E.2d* 619 (1972); *Weishaar v. Canestrone*, 241 *Md.* 676, 217 *A.2d* 525 (1966); *Heiserman v. Baltimore & A. R.R.*, 15 *Md.App.* 657, 292 *A.2d* 140 (1972); *Hodges v. American Bakeries Co.*, 412 *S.W.2d* 157 (Mo.1967); *Dixon v. Campbell Sixty-Six Express, Inc.*, 321 *S.W.2d* 473 (Mo.1959); *State v. Dantonio*, 18 *N.J.* 570, 115 *A.2d* 35 (1955); *Tetreault v. State*, 50 *Misc.2d* 170, 269 *N.Y.S.2d* 812 (Ct.Cl.1966); *People v. Williams*, 23 *Misc.2d* 581, 196 *N.Y.S.2d* 790 (Sup.Ct.1960); *Benner v. Weaver*, 394 *Pa.* 503, 147 *A.2d* 388 (1959); *Tennessee Trailways, Inc. v. Ervin*, 222 *Tenn.* 523, 438 *S.W.2d* 733 (1969); *Sanchez v. Billings*, 481 *S.W.2d* 911 (Tex.Civ.App.1972); *Bourn v. Department of Employment Security*, 134 *Vt.* 490, 365 *A.2d* 253 (1976); *Western Packing Co. v. Visser*, 11 *Wash.App.* 149, 521 *P.2d* 939 (1974). See also *People v. Barbic*, 105 *Ill.App.2d* 360, 244 *N.E.2d* 626 (1969).

Tachograph evidence seems also routinely admitted in NLRB proceedings. See, e.g., *Buckley v. NLRB*, 432 *F.2d* 409 (9th Cir. 1970), cert. denied, 401 *U.S.* 1002, 91 *S. Ct.* 1246, 28 *L. Ed. 2d* 535 (1971); *Illinois Ruan Transp. Co. v. NLRB*, 404 *F.2d* 274, 281-82 (8th Cir. 1968) (dissent); *NLRB v. Stafford Trucking, Inc.*, 371 *F.2d*

523 F. Supp. 1281, \*1286; 1981 U.S. Dist. LEXIS 15073, \*\*14;  
9 Fed. R. Evid. Serv. (Callaghan) 630

244 (7th Cir. 1966); *NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170 (8th Cir. 1955), cert. denied, 351 U.S. 952, 76 S. Ct. 850, 100 L. Ed. 1476 (1956).

[\*\*15]

Fourth, the tachograph is a sturdy mechanical device which need not be recalibrated for each use. Fifth, both the tachograph's output and the expert's opinion embraced a continuous scale of speed. A small error in adjustment would result in a proportionate, rather than quantum, change in output. In fact, defendant's own expert used this principle in calculating a correction factor, see N.T. 4.146, which enabled him to use the tachograph to check his opinion.

All but one of the remaining factors weigh in favor of admissibility without foundation. The tachograph here was a private instrument, not backed by police [\*1287] testimony. This is a civil case, rather than a prosecution for a traffic violation. n7 Here, the opponent of the tachograph had control of the evidence.

n7. The proposition that 75 *Pa.Cons.Stat.Ann.* § 3368 applies to civil cases is demonstrably absurd. The result would be that a civil witness would be precluded from stating his speedometer reading unless he had tested speedometer 60 days before the reading.

[\*\*16]

One peculiarity of tachographs, however, weighs in favor of a foundation. The tachograph generally is not a piece of original equipment made by the truck manufacturer. The tachograph (of which Sangamo is the only major American manufacturer, N.T. 3.70), is installed separately, and replaces the normal speedometer. N.T. 3.66. Although Sangamo calibrates the instrument internally, Id. 3.89, accurate operation depends on receipt of proper input from the truck rotor cable. Id. 3.74-.75. If the rotor cable does not turn at the correct rate (1,000 turns per mile), a ratio adapter must be installed. Id. 3.90. There was no direct evidence that the rotor cable revolved at the proper rate. n8

n8. But the tachograph expert testified a record of speed is important to truck owners, and that "(s)peed is (an) ... integral part of ... maintenance." N.T. 3.101.

On balance, however, this peculiarity is not enough to outweigh the other factors. The most important of those are the first four: a tachograph operates [\*\*17] on simple, understandable principles, removed from the frontiers of science; the range of accuracy of the key portion the speedometer is within the experience of most jurors; there is great experience in its manufacture, operation, and use as evidence; and by its nature, it does not require frequent adjustment. I therefore hold that, in this case, accuracy of the particular tachograph was a matter of impeachment going to the weight of the evidence, rather than a matter of foundation. n9 See, e.g., *NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 172 (8th Cir. 1955), cert. denied, 351 U.S. 952, 76 S. Ct. 850, 100 L. Ed. 1476 (1956); *People v. Dusing*, 5 N.Y.2d 126, 128, 155 N.E.2d 393, 394, 181 N.Y.S.2d 493, 495 (1959); *State v. Dantonio*, 18 N.J. 570, 580-81, 115 A.2d 35, 40-41 (1955); *Nicholas v. Penny*, (1950) 2 KB 466, 473-74 .

n9. This holding alternatively may be viewed as stating that a tachograph, like a speedometer, is insufficiently "scientific" to require the foundation usually needed for scientific evidence. See note 3 supra.

[\*\*18]

## 2. Foundation in This Case

Because of the split of authority on the question whether a foundation is necessary, I shall also decide whether, if a

foundation was required, it was laid in this case. I hold that it was not.

The substantial question as to accuracy of defendants' tachograph is that discussed above was the rotor cable properly calibrated at 1000 r. p.m.? See text preceding note 8 supra. Plaintiffs had evidence showing reasonable accuracy on all other significant points. For instance, the tachograph was internally calibrated, N.T. 3.89; it had not been tampered with, id. 3.90-.92; and errors due to wear of the stylus blade or its moving off zero were resolved in defendants' favor. Id. 3.108. There was no testimony as to the calibration, no independent test of the tachograph, and no "proof line" test as in *Villegas*. See *16 Ariz.App. at 458, 494 P.2d at 63*. Because accuracy depended on the correct alignment of the cable, and no significant competent evidence supported correct alignment, no foundation was laid for the accuracy of the particular instrument.

### 3. Harmless Error

Even if the tachograph testimony was admitted erroneously, it was harmless for three reasons. [\*\*19] First, the impact speed measured by the tachograph is compatible with the impact speed propounded by defendants. Compare N.T. 3.80 (41-42 m.p.h. measured by tachograph), with id. 4.150 (32-45 m.p.h. estimated by defendants' expert). Second, plaintiff's expert, independent of the tachograph, reconstructed the speed at impact as 43-49 m.p.h. Id. 3.146. Thus, the tachograph output roughly corroborated independent evidence of speed [\*1288] from two other sources. Finally, and most importantly, the impact speed was only tangentially relevant to the ultimate factual question who was in the wrong lane. See id. 5.136.

This accident occurred only because one driver strayed out of his lane of traffic and onto the other side of the road. [HN3] Under Pennsylvania law, driving on the wrong side of the road without an "excuse" is per se negligent. *Mihalic v. Texaco, Inc.*, 377 F.2d 978, 981 (3d Cir. 1967); *Matkevich v. Robertson*, 403 Pa. 200, 202-03, 169 A.2d 91, 93 (1961); see *Kenworthy v. Burghart*, 241 Pa.Super. 267, 277-82, 361 A.2d 335, 340-43 (1976), appeal dismissed, 478 Pa. 20, 385 A.2d 975 (1978). n10 In this case, each driver claimed the other was on the wrong side, and neither [\*\*20] offered an "excuse." Thus, whoever was on the wrong side was negligent. At the request of both parties, I so instructed the jury, N.T. 6.25, without objection.

n10. *Kenworthy* also states that *Matkevich* was overruled in part on other grounds. 241 Pa.Super. at 281 n.8, 361 A.2d at 342 n.8.

The significance of defendants' speed was secondary. It provided plaintiff with a theory of how defendants got to the wrong lane. n11 As defendants' counsel stated in conference, this is not "really a speed case. It's more a control of vehicle case." Id. 5.142. Thus, the theory is secondary, because as noted above, on the evidence in this case, negligence was established merely by showing that one driver was on the wrong side. n12 The tachograph evidence therefore had only tertiary significance. It reinforced plaintiffs' expert's independent reconstruction of defendants' speed.

n11. The speed limit at the cross-over was 30-35 m.p.h. N.T. 2.33. The tachograph chart recorded the speed as over the limit, N.T. 3.80 (41-42 m.p.h.), while defendant's expert's estimate overlapped the limit. N.T. 4.150 (32-45 m.p.h.).

[\*\*21]

n12. [HN4] In Pennsylvania, driving faster than the speed limit is not negligent unless speed is also a proximate cause of the accident. *Rhoads v. Ford Motor Co.*, 514 F.2d 931, 935 (3d Cir. 1975). Thus speed was not negligent unless it caused defendant to be in the wrong lane, which was negligent anyway. Had speed been the primary underlying negligence, the tachograph evidence might have had greater impact.

Because the parties had at best a dim recollection of the accident, and because there were no eyewitnesses, each side called an expert to try to reconstruct the accident. Defendants' expert, Dr. Batterman, opined that the accident happened in defendants' lane. N.T. 4.182. His opinion was based on examination and photographs of the damaged vehicles and the accident scene, especially gouge marks in the road. Based on the same kind of information, plaintiff's expert, Dr. Treitterer, reached the opposite conclusion. Id. 3.140, 3.140-.154. Thus, the case boiled down to which expert the jury believed. n13 Because neither expert relied on the tachograph chart, its effect on the ultimate factual [\*\*22] issue was, at most, insignificant. Thus, if admission of the tachograph evidence was error, it was harmless.

n13. There are many reasons why the jury properly could credit plaintiffs' expert. There were differences in the quality of the information the experts relied on, as well as different demeanors during testimony. Three other items stood out at trial. First, the experts' qualifications differed significantly. Second, the qualifications of plaintiffs' expert were unquestioned, N.T. 3.136, while defendants' expert was subject to serious cross-examination on his qualifications. Id. 4.124-.133. Third, by testifying that defendants' tanker-trailer "definitely should be" baffled to control stability, id. 4.209, defendants' expert supported plaintiffs' argument that lack of baffling was negligent and a cause of lack of control preceding the accident.

#### B. Exclusion of Evidence

Defendants also assign as error two refusals to permit questions and answers attempting to recall prior testimony. Defendants [\*\*23] claim that it was erroneous to prevent their accident reconstruction expert from reading aloud six pages of plaintiff's deposition. Defendants' Memorandum of Law, at 2-3; see N.T. 4.178-.181. This was not error. First, *Fed.R.Civ.Pro. 32(a)(4)* precluded defendants from reading in only pages 20-26 (where plaintiff said the road was straight,) without also reading in page [\*1289] 37, (where plaintiff said the road curved slightly and was "practically straight to a professional driver"). See N.T. 4.220. It was within the court's discretion to insist that the deposition be as though the witness were then present and testifying. See *Fed.R.Civ.Pro. 32(a); Fed.R.Evid. 611(a)*. Finally, I cannot understand how the ruling could have been prejudicial; defendant could have, but did not choose to, interrupt the expert's testimony in order to read in the deposition. N.T. 4.181. In any event, the six pages were admitted and read to the jury. Id. 4.214-.220.

Second, defendants claim that the court erroneously refused to permit questioning of defendants' expert concerning the percentage error in the tachograph recording of mileage. n14 Defendants' Memorandum of Law, at 3-4; see N.T. [\*\*24] 4.141-.146. Objections to the questions were sustained because they attempted to recall testimony, id. 4.141-.142, .145. The court's eventual ruling, however, allowed defendants to pose assumptions "without stating or suggesting that those assumptions are founded in testimony." Id. 4.145. Defendants never did so. It was not error to require that questions be posed without introduction of hearsay in the form of attempted recollection of testimony of a non-party. Furthermore, even if erroneous, I cannot perceive, and defendants do not explain, n15 why such a restriction in the form of question was prejudicial.

n14. Because mileage error is proportional to speed error, see N.T. 3.100, the expert then would have applied that percentage to calculate the alleged error in the speed recording.

n15. Indeed, Defendants' Memorandum contains no citation of the transcribed record. This has made all of the motion more difficult to deal with.

#### C. Point for Charge

Defendant argues that the court erroneously refused [\*\*25] their point for charge number four. Defendants' Memorandum of Law, at 4; see N.T. 5.146. This charge consisted of large portions of ICC regulations, 49 C.F.R. §§ 392.3, 395.2, 395.3 (1980); a statement that the evidence showed that plaintiff had violated the regulations and an instruction that if the jury found that violation of regulations was the proximate cause, the jury must find plaintiff negligent. n16 This instruction was refused. It usurped the jury's role as fact finder by stating that the evidence showed a violation. Also, it is not clear to me that the evidence would allow the jury to find that plaintiff had been "on duty" for fifteen hours. See 49 C.F.R. §§ 395.2(a), 395.3(a)(2). Furthermore, I viewed the subject matter of the regulation (limiting the number of hours a driver may be on duty) as more properly a matter for argument to the jury. N.T. 5.146. Defendants' contention, which they were permitted to argue, was that as a result of being on duty so long, plaintiff fell asleep at the wheel.

n16. The proposed charge is contained in the record only in plaintiffs' answer to the new-trial motion. (Plaintiffs have accurately reproduced the proposed charge submitted to me.) Defendants' quotation of 49 C.F.R. § 395.2 erroneously omitted paragraph (a)(4). This would have been noted if defendants had asked me to take notice of the regulation. They never did so. See *Fed.R.Evid. 201*.

[\*\*26]

It was not error to refuse this instruction. Pennsylvania law does not support the contention that such a charge is mandatory. In the only case involving this instruction, *Ridley v. Boyer*, 426 Pa. 28, 31-32, 231 A.2d 307, 308-09 (1967), the Pennsylvania Supreme Court held merely that such a charge was not erroneous. *Id. at 32, 231 A.2d at 309* ("The court was on the highway of proper instruction, when it spoke thus.") (Musmanno, J.). In any event, refusal was not prejudicial. Defendants were allowed to argue this issue to the jury as a matter of fact. Indeed, defendants were not precluded from introducing and explaining the regulation in the trial or thereafter, arguing the regulation to the jury. n17 Most important, the issue whether [\*\*1290] the regulations were violated is only tangentially related to the ultimate issue of where the accident occurred. See part II.A.3. *supra*.

n17. The transcript filed by defendants omits both opening and closing argument. Counsel, however, is required to file a transcript of the entire trial, see E.D.Pa.R.Civ.Pro. 20(e). I therefore deem the omission to be a waiver of any argument in support of the motion based on remarks that counsel made or failed to make at opening or closing.

[\*\*27]

#### D. Verdict Against Weight of Evidence

Finally, defendants argue that the verdict was against the weight of the evidence because plaintiffs' expert's reconstruction of the accident conflicted directly with plaintiff's version. I perceive no such conflict. For the reasons given in plaintiffs' memorandum, the expert's reconstruction of the accident is compatible with plaintiff's testimony.

For the above reasons, defendants' motion for a new trial must be denied.

8 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**Federal Sign And Signal Corp., Plaintiff v. Bangor Punta Operations, Inc.,  
Defendant**

**No. 70 Civ. 2971**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

*357 F. Supp. 1222; 1973 U.S. Dist. LEXIS 14317; 177 U.S.P.Q. (BNA) 737; 1973-1  
Trade Cas. (CCH) P74,452*

**March 27, 1973**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff brought a patent infringement action against defendant in regard to two of its patents and defendant counterclaimed unfair competition and antitrust violations.

**OVERVIEW:** Plaintiff sued defendant for infringement of two patents and defendant counterclaimed for antitrust violations and unfair competition. This court held that defendant infringed plaintiff's patents, but plaintiff's second patent was invalid for obviousness, and not entitled to protection against defendant's infringement. Finally, the court held that defendant did not prove any of its counterclaims. This court held that defendant could be guilty of contributory infringement, even though it sold only to purchasers who could not be accused of directly infringing the first patent. Although defendant's device differed from the specifications in the second patent, it was sufficiently covered by the claims in the second patent. Defendant failed to prove that the first patent was lacking in novelty or obvious or that its two inventions were in public use on sale at the time of patent application. However, the invention in the second patent was already patented and obvious.

**OUTCOME:** Judgment was entered for plaintiff on the first patent and defendant's counterclaims and for defendant on the second patent.

**CORE TERMS:** distance, patent, speed, pulse, invention, counter, apparatus, checking, register, generating, switch, connected, target, divide, measuring, measurement, time switch, stopping, computation, electrical, operable, starting, turning, time measurement, infringement, binary, electronic, proportional, specifications, manually

**LexisNexis(R) Headnotes**

***Patent Law > Infringement Actions > Infringing Acts > Contributory, Indirect & Induced Infringement******Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge******Patent Law > Ownership > Conveyances > Licenses***

[HN1] Under 35 U.S.C.S. §§ 271(c) and (d), the fact that the infringing device's purchasers have been previously licensed to use the patented device does not establish that subsequent purchasers will be so licensed, or that the infringer did not sell its devices knowing the same to be especially made or especially adapted for use in an infringement.

***Patent Law > Subject Matter > Products > Compositions of Matter******Patent Law > Subject Matter > Products > Machines******Patent Law > Subject Matter > Products > Manufactures***

[HN2] 35 U.S.C.S. § 101 provides for the patentability of the invention or discovery of any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. "Process" is defined by 35 U.S.C.S. § 100(b) as process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

***Patent Law > Anticipation & Novelty > General Overview***

[HN3] Certain conditions are imposed for patentability of an invention as defined; among these is the requirement that the invention not have been patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

***Patent Law > Anticipation & Novelty > General Overview******Patent Law > Claims & Specifications > Enablement Requirement > General Overview******Patent Law > U.S. Patent & Trademark Office Proceedings > Continuation Applications > General Overview***

[HN4] 35 U.S.C.S. § 102 imposes a condition that a patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

***Patent Law > Nonobviousness > Elements & Tests > General Overview***

[HN5] Under 35 U.S.C.S. § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.

***Patent Law > Date of Invention & Priority > General Overview******Patent Law > Subject Matter > Processes > General Overview***

[HN6] For a process to be patentable, at least one mode of reducing it to practical use must be disclosed.

***Patent Law > Infringement Actions > Defenses > Patent Invalidity > Validity Presumption******Patent Law > Infringement Actions > Infringing Acts > General Overview******Patent Law > Nonobviousness > Evidence & Procedure > Presumptions & Proof***

[HN7] 35 U.S.C.S. § 282 invests in every patent a presumption of validity.

***Patent Law > Statutory Bars > Experimental Use > Elements******Patent Law > Statutory Bars > Public Use Bar > General Overview***

[HN8] The kind of public use contemplated by 35 U.S.C.S. § 102(b) seems to be that of public disclosure or of

357 F. Supp. 1222, \*; 1973 U.S. Dist. LEXIS 14317, \*\*;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

commercial exploitation. Experimental use of the invention, however, is not to be considered public use.

***Patent Law > Claims & Specifications > Description Requirement > General Overview***

***Patent Law > Date of Invention & Priority > General Overview***

[HN9] 35 U.S.C.S. § 120 refers only to the application for patent, which must contain the required reference; the invention in the original application, however, must be disclosed in accordance with 35 U.S.C.S. § 112.

***Patent Law > Anticipation & Novelty > General Overview***

[HN10] A combination of old elements is patentable only when the whole in some way exceeds the sum of its parts. The fact that the old elements had not previously been so combined does not itself resolve the issue, nor is commercial success pertinent, absent the required showing of invention.

**JUDGES: [\*\*1]**

Tyler, D.J.

**OPINION BY:**

TYLER

**OPINION:**

[\*1224] TYLER, D.J.:

This action for patent infringement, with counter-claims for antitrust violations and unfair competition, was commenced in July of 1970. Thereafter, the case was tried before the undersigned, sitting without a jury, over a period of nine days in late April and early May, 1972. After a careful review of the entire record -- including the more than 1300 pages of trial transcript, the voluminous documentary evidence and the briefs submitted by the parties--and the relevant law, I have made the following findings of fact, and drawn the following conclusions of law.

Plaintiff is a corporation organized under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. Defendant is a New York corporation, with its principal place of business in Greenwich, Connecticut; it manufactures the allegedly infringing product, an electronic speed computer called the "TDS". Plaintiff is the owner by assignment of the two patents which form the basis of this suit. The earlier of the two is U.S. Patent No. 3,182,331, issued May 4, 1965 to Arthur N. Marshall, for a "Method of Speed Indication" (hereinafter [\*\*2] the "Marshall method patent"); the second is U.S. Patent No. 3,530,382, issued September 22, 1970 to John W. Liston, Gordon E. Gee, and William K. Oliver, for a "System for Speed Indication Utilizing Digital Distance and Digital Time Measuring Apparatus" (hereinafter the "Liston patent"). As perhaps suggested by the titles of the two patents, the Liston patent is an electronic digital device designed to practice the methods included in the Marshall method patent for measuring and recording the speed of one moving vehicle from a second vehicle.

More specifically, the nine claims to invention contained in the Marshall method patent and set out in the appendix n1 describe various methods of "determining [\*1225] and identifying the speed of a checked vehicle from a checking vehicle wherein said checking vehicle has a distance measuring unit which can measure and identify a selected distance traveled by said checking vehicle and a time measuring unit which can measure time and a directly readable speed measuring means which can combine said selected distance and time to identify the speed of said checked vehicle. . . ." Marshall method patent at p. 11. The specifications and drawings [\*\*3] of the patent disclose an electro-mechanical computer whereby the methods can be reduced to practical application; although the patent itself is not limited to any particular device, but refers to the methods generally, it is clear that the only means of practicing the methods at the time the patent was granted was via this electro-mechanical computer. Indeed, this particular device is the subject of

U.S. Patent No. 3,276,029, issued September 27, 1966 to Arthur Marshall for an "Apparatus for Speed Indication" (hereinafter "Marshall apparatus patent"). Originally, both methods and apparatus claims were included in the same application, but the Patent Office on December 16, 1963 required restriction of the application for purposes of examination, and Marshall chose to prosecute the methods claims first. The Marshall apparatus patent is not at issue in this suit, since the Liston patent represents a substantial improvement in function and performance of the methods, and replaced the more primitive mechanical computer shortly after its development for commercial production.

n1 See Appendix A.

Although the Marshall apparatus patent is not an issue in this suit, it would be helpful in understanding the [\*\*4] application of the Marshall methods and Liston refinements to describe it here. Put briefly, the apparatus is designed to fit compactly into a police car or other "checking vehicle". A rigid base plate serves as mounting for all of the moving component parts. The device has two lead screws, set perpendicular to each other in overlying planes: the "distance" lead screw is driven by a flexible shaft which is connected to the automobile transmission in which the device is mounted; the "time" lead screw is driven by an accurate constant speed electric motor. A solenoid clutch provides the means for engaging the flexible shaft and distance lead screw; this clutch in turn is controlled by a manually operable "distance" switch. The electric motor is similarly controlled by a manually operable "time" switch, which is placed next to the distance switch. Each of the two lead screws are connected to internally threaded nuts, which in turn are connected to a single movable carriage plate. When the distance lead screw is engaged, it drives the threaded nut, which consequently causes the carriage plate to move in one direction in proportion to the distance traveled by the vehicle; when the [\*\*5] time lead screw is engaged, it drives its connecting nut, thereby causing the carriage plate to move in a direction at right angles to the movement caused by the distance lead screw when operated alone, and proportional to the time elapsed. Operated together, or consecutively without resetting to zero, the lead screws cause the carriage to move to a position dependent upon the ratio of time to distance (i.e., speed). An indicator rod and an indicator scale graduated in miles per hour and attached to the carriage provide a directly readable indication of the speed of the target vehicle. Means are also provided for resetting the apparatus to "zero" after a reading has been taken.

As the second introductory paragraph of the Marshall method patent asserts, "the invention is intended to be used with the vehicles of law enforcement officers, enabling them to quickly and accurately check the vehicle speeds of potential violators of highway speed laws including the speed laws of urban localities and highway or turnpike speed laws." The various claims of the patent describe methods of using the specified apparatus for determining the speed of one car from another moving vehicle, [\*1226] [\*\*6] whereby the time switch of the apparatus is closed when the checked target or vehicle passes a first reference point and stopped after the vehicle passes a second selected reference point; the distance switch is closed when the checking or police vehicle passes the first reference point, and stopped when it passes the second reference point. The resultant speed indication reports the average speed of the checked vehicle between the two points selected.

It should be noted that the apparatus in effect measures the distance traveled by the target vehicle and the time in which it takes to travel the distance, and combines the two to yield the resultant average speed. The distance measurement can be made either before, during, or after the time measurement, and the speed of the target vehicle need bear no relation to the average speed of the police car between the two selected reference points. The checking vehicle can proceed either over a path "substantially equivalent" to that traveled by the target vehicle (claim 1), or over an "equal path" (claim 2). Claims 3 and 4 refer to methods for recording the speed of the target vehicle when measured in the manner described in claims 1 and [\*\*7] 2, respectively. Claim 5 describes a method of determining the speed of a checked vehicle where the distance measurement is taken first, so that the checking vehicle remains stationary while timing the checked vehicle. Claim 6 describes a method of speed determination whereby the distance measurement step occurs after the starting of the time measurement. Claim 7 describes a speed determination method whereby both time and distance measurement steps are commenced simultaneously; claim 8 describes another method of simultaneously commencing time and distance measurement as the checking vehicle passes the target vehicle. Claim 9 describes a

method whereby the speed of a checked vehicle is determined as it travels toward the checking vehicle.

Plaintiff also complains that 19 claims of the Liston patent n2 are infringed; all of these are directed to various combinations of circuits and circuit elements of an electronic computer, which is designed to be mounted in one vehicle for determining the speed of another vehicle as described in the Marshall method patent. For present purposes, the Liston patent is sufficiently described in the abstract to the patent:

"An improved speed measuring [\*\*8] and indicating apparatus which can be mounted in a first vehicle and operated therefrom to determine the speed of a second vehicle, the apparatus including first means coupled to the driving mechanism of the first vehicle for generating a number of electrical pulses proportional to the distance traveled by the first vehicle, second means for generating a number of electrical pulses proportional to the time required for the second vehicle to travel the same distance, and means for dividing the distance pulses by the time pulses to indicate the average speed of the vehicle over the foregoing distance, the apparatus also including readout means for indicating such speed and time and distance switches for manual actuation by an operator."

n2 See Appendix B.

Plaintiff is also the owner by assignment of the registered trademark "VASCAR", an acronym for Visual Average Speed Computer And Recorder. The trademark was registered by Arthur Marshall in 1966 and originally applied by him to his electro-mechanical apparatus. Plaintiff currently utilizes the trademark to designate its speed computer produced under the Liston patent.

As of the date of trial, plaintiff had sold over 5,000 VASCAR speed computers, [\*\*9] and paid approximately \$390,000 in royalties under the Marshall patent. Most of these sales were of the electronic computer type as specified in the Liston patent, the commercial production of [\*1227] which began in 1968. Since that time, plaintiff has widely advertised its speed computers, and they have been widely accepted -- to the extent that nearly 40 different states have purchased the devices for use in traffic control.

Defendant has been producing for commercial sale since 1969 an electronic speed computer known as a "TDS" computer (for Time, Distance, Speed). The TDS is a computer module designed to be utilized in speed enforcement programs of law enforcement agencies, and it is undisputed that it can practice, and has been utilized to practice, the methods of the Marshall method patent. Since 1969, defendant has sold approximately 250 of its TDS speed computers, principally to the states of North Carolina, Wisconsin and Florida. It is the production and sale of the TDS computers which plaintiff alleges to constitute infringement of its two patents in this suit.

In addition to denying that the sale of its TDS computers infringes in any way the patents of plaintiff, [\*\*10] defendant has unleashed a veritable broadside of affirmative defenses and counterclaims. The affirmative defenses attack the validity of the patents in suit, on the grounds, *inter alia*, that they do not promote the progress of science; that they lack novelty; that they are obvious and wholly anticipated in the prior art; that the subject matter was in public use or on sale for more than one year prior to the filing of the applications; that the subject matter was abandoned; that the specifications are ambiguous and overbroad, and fail to adequately disclose the subject matter to permit application or use of the invention. In addition, defendant has counterclaimed: (1) for declaratory judgment that plaintiff's patents are invalid; (2) for damages under the antitrust statutes, 15 U.S.C. §§ 1 et seq., alleging that plaintiff monopolized the market through its fraudulent procurement and use of the patents; and (3) for damages for unfair competition under 28 U.S.C. § 1338(b).

### *I. Infringement of Plaintiff's Patents.*

Defendant did not seriously contest at trial the charge that the manufacture, sale, and demonstration usage of its TDS speed computers directly and contributorily infringe, and actively induce infringement of, the nine claims of the plaintiff's Marshall method patent and claims 1 through 6, 9 through 15, and 17 through 21 of the Liston patent, within the meaning of 35 U.S.C. §§ 271(a), (b) and (c). Indeed, the record is relatively clear on this initial issue.

Defendant sells its devices through approximately 60 independent law enforcement equipment distributors and through several manufacturers' representative operations. It also distributes all over the country and at trade shows a significant volume of sales material, included within which are descriptions of use of the TDS computer to measure the speed of target vehicles. There are also frequent visitations to defendant's factory by police agencies, during which demonstrations are given of various modes of using the TDS for measuring the speed of target vehicles. Finally, a training manual is included with the purchase of each TDS unit. These materials and demonstrations make clear beyond peradventure that the TDS computer is designed principally to practice the methods described in the Marshall method patent, and that it is so utilized. Nor is there much merit to defendant's contention that there are other substantial non-infringing uses for the TDS computer -- the chief such use cited being to measure the speed of the vehicle in which the device is mounted. As defendant's own sales material candidly asserts, "the Smith and Wesson TDS Computer is an electronic time and distance speed measuring device used in a patrol car to determine the vehicle speed of potential traffic violators." Plaintiff's Exhibit 146.

Defendant seeks to rebut this conclusion that it has infringed the Marshall method patent by asserting that virtually all of the 250 TDS devices it sold were [\*1228] purchased by governmental agencies for police use in the states of North Carolina, Wisconsin, and Florida -- which agencies had previously purchased plaintiff's VASCAR devices and applied the Marshall methods. Since plaintiff's practice was not to charge a purchaser for a license under the Marshall method patent independently of the price for the VASCAR device, it is argued that these purchasers received an implied license to practice the methods, which persisted even after the purchasers decided not to utilize the VASCAR devices any longer. It is further contended that plaintiff could not enforce the restriction of practice of the methods to use with the VASCAR device, since this would constitute an illegal tie-in. Thus, defendant concluded that it cannot be guilty of contributory infringement, since it sold only to purchasers who could not be accused of directly infringing the Marshall method patent.

This argument ignores the fact that plaintiff never refused to grant any prospective purchaser a license under the Marshall method patent; indeed, as the evidence indicated, plaintiff was never asked for such a license. Secondly, the record established that plaintiff was proceeding in good faith to rely upon the validity of its Liston patent, which covers the VASCAR device. These facts are sufficient to distinguish this situation from those where a patentee seeks to extend the coverage of its patent monopoly by tying in sales of unpatented goods with its patented products or processes. See, e.g., *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co., Inc.*, 365 U.S. 336 (1961). [HN1] Finally, the contentions of defendant cannot escape the thrust of §§ 271(c) and (d): the fact that VASCAR purchasers have been previously licensed to use the Marshall methods does not establish that subsequent purchasers will be so licensed, or that defendant did not sell its devices "knowing the same to be especially made or especially adapted for use in an infringement. . . ."

As for the Liston patent, the situation is similar, although somewhat more complicated due to the complexity of the apparatus. Claim 1 is essentially the lynchpin of the Liston patent, upon which the remaining claims are dependent. It is directed to a combination of various circuits and elements of an electronic computer, including the following: distance pulse generating means which generates a plurality of electrical pulses proportional to the distance traveled by the vehicle in which the computer is located; time pulse generating means which generates electrical time pulses proportional to elapsed time, manually operable distance switch and time switch means; electrical distance counter means and electrical time counter means, operatively connected to the distance and time switches, to count the distance and time pulses; divide circuit means for "in effect" dividing the number of distance pulses contained in the distance counter by the number of time pulses in the time counter, such that the quotient will be indicative of the speed of the

target vehicle; speed readout means for visual display of this speed.

The TDS speed computers contain virtually all of the elements and circuits described above. The one principal difference is that the TDS does not use divide circuit means for combining distance and time pulses to obtain the resultant speed of the target vehicle. Rather, the TDS utilizes a different circuit, which includes a repetitive strobe of complements and a scale circuit, and operates as follows: When the time and distance switches are closed, distance and time pulse generators feed pulses respectively of 1000 per mile and 10 per second into distance and time counters. When the time and distance switches are opened, the computation commences. The complement of the number of these pulses in the primary counters is then fed into secondary registers (the complement being the difference between the capacity of the register and the number of pulses in the primary counter). A [\*1229] computer clock sends pulses simultaneously to both secondary register for each one pulse to the secondary time register, at a ratio of 360 pulses to the secondary register for each one pulse sent to the secondary distance register. Every time the secondary time register is filled to capacity by these clock pulses, an output pulse is sent to the readout circuit. The time register is reset to the complement of the number of pulses in the primary time register repeatedly until the secondary distance register is filled once to capacity. At this time the computation is completed: the number of times the secondary time register is filled is equal to the number of pulses in the time counter divided into the number of pulses in the distance counter, multiplied by 360; this 360 multiplier is a conversion factor which produces the resultant speed indication measured in tenths of a mile per hour. Although this process is seemingly complex, it can be seen that it effectively divides distance into time; this is sufficient to bring the function within the language of the first claim of the Liston patent, which requires only divide means "ineffect" divides distance pulses into time pulses.

The similarities between the remaining claims and the TDS computer will only briefly be described here. The TDS is adapted to be connected to the odometer drive connector in the automobile transmission (claim 2). The TDS also has distance register means whereby distance information in the distance counter can be retained in a non-destruct basis to permit several speed computations with the same distance input as described in the "park and wait" method of the Marshall method patent (claim 3 or the Liston patent). Both the Liston patent and the TDS have "compute start means" (claim 4). Although claim 5 specifies a four-element "and" gate means, and the TDS has two conventional (two-element): "and" gates, they both perform the equivalent functions. The divide circuit means specified in claim 6 includes means of repetitive subtraction; the TDS provides for the substantial equivalent by entering the complements of time and distance pulses in secondary registers and adding clock pulses to these registers until filled -- effectively adding counts to a negative number until it reaches zero. The TDS also has binary coded decimal counters and a digital speed readout, consisting of tubes lighted by decoder/drivers (claim 9). Claim 10 describes reset means selectively operable to reset the entire device or to reset just the time component and readout; the TDS contains an erase switch which clears time and distance circuits, and a distance lock, which provides for the retention of the distance information upon actuation of the erase switch. The TDS has a time pulse generating means which is an oscillator means producing a predetermined number of time pulses per second, and which is actuated by the manually operable time switch (claim 11). The TDS distance and time counter means are binary counters (claim 12). The current production models of the TDS (Models 5 and 5-1) have means responsive to overflow pulses from the distance counter means to indicate to the operator that the capacity of the distance counter had been exceeded (claim 13). The TDS distance pulse generating means is comprised of a light source, a photosensitive element, and an interrupter, which consist of a cylindrical rotor with four equally spaced openings allowing light to strike the photosensitive element four times for each revolution of the rotor. This is within the description of claim 15. Claim 17 specifies that the interrupting means is connected to the odometer cable; the TDS distance pulse generator is adapted to be so connected. The TDS contains the error indicating means specified in claim 18, as well as the combinations of the foregoing claims which are described in claims 19, 20 and 21.

In sum, although the TDS speed computer may differ in some details from the specifications in the Liston patent, I find that it is sufficiently covered by the claims to invention heretofore cited [\*1230] such that its production, sale and use by defendant constitute infringement of those claims within 35 U.S.C. § 271.

Thus, I find that plaintiff's two patents are infringed directly and indirectly as charged. The next step, of course, is

to determine whether, given the infringement, they can be enforced in the face of defendant's attack on their validity.

## II. Validity of the Marshall Method Patent

[HN2] Section 101 of 35 U.S.C. provides for the patentability of the invention or discovery of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. . . ." "Process" is defined by 35 U.S.C. § 100(b) as "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." [HN3] Certain conditions are then imposed for patentability of an invention as defined; among these is the requirement that the invention not have been "patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. . . ." 35 U.S.C. § 102(b). [HN4] Section 102 then imposes a further condition:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made."

Defendant attacks the validity of the Marshall method patent principally on the ground that it is obvious, and that it was in public use or on sale more than one year prior to the filing of the patent application in 1963. The issue of obviousness will be resolved first; as will become apparent, the novelty of the invention is not seriously in dispute, since the standard is to be liberally construed, and the prior art contains no identical disclosure of the method claims. *Shaw v. E.B. & A.C. Whiting Company*, 417 F.2d 1097 (2d Cir.), cert. den. 397 U.S. 1076, reh. den. 398 U.S. 954 (1969); *Rich Products v. Mitchell Foods, Inc.*, 357 F.2d 176 (2d Cir. 1966).

### a. Obviousness of Marshall Method Patent

As the Supreme Court has observed:

". . . the § 103 condition . . . lends itself to several basic factual inquiries. [HN5] Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined." *Graham v. John Deere Co.*, 484 U.S. 1, 17 (1966).

There were several methods utilized by police to measure the speed of potential traffic violators prior to the development of the Marshall and Liston patents. Three of these methods involve premeasuring a selected distance along a highway, and timing the vehicles as they traverse the distance: the average speed of the target vehicle is then computed by dividing distance by time. The Enoscope method entails the positioning of two mirrors on opposite sides of the road, with one mirror at a 45 degree angle to reflect light along the road so that it is visible to an observer with a stopwatch at the end point; as the vehicle passes the mirrors, the person timing it starts a stopwatch when he sees the flash of light, and stops the watch when the vehicle passes his own terminal [\*1231] position. A variation of this technique is the "speed watch", where two hoses are laid parallel to each other across the road, and connected to a timing device, which is actuated when the vehicle crosses the first and stopped when it crosses the second. Both of these methods require the use of equipment which is readily visible to the motorist; in addition, several police personnel are necessary to man the stationary equipment and the chase vehicle. A third variation, the "aerial survey", involves visual observation of vehicles by airplanes, timing them by stopwatch as they traverse painted markings on the roadway, and then radioing ahead to the "chase" car to apprehend violators.

Another method of measuring the speed of traffic vehicles, and one in use throughout the country, is by radar. Radios signals are beamed down a roadway by an electronic unit; the difference between the frequency of the transmitted signals and the frequency of the signals reflected by oncoming vehicles is proportional to the speed of the vehicle. Speed detection by radar has its difficulties, however; the radar unit must be set up and recalibrated every time a new position is selected. The radar unit is also visible to motorists. In addition, police personnel must be stationed at a particular point and perform only that function. Finally, there are a variety of factors involved in the measurement of frequency differentials which render radar unreliable under certain conditions.

It should be noted that none of these prior methods of speed detection could be performed by one policeman in the course of discharging other regular patrol duties: all of the methods involve the pre-positioning of observer, timing device, and pursuing vehicle, in addition to the demarcation of the segment of the roadway over which the vehicle is to be timed. Indeed, the only technique for measuring the speed of a moving vehicle from another vehicle which is contained in the prior art is that of "speedometer pacing", whereby the police vehicle trails the target vehicle at a fixed distance for a certain length of time, so that the police vehicle is proceeding at the same speed as that of the target vehicle. Again, an alert motorist might easily detect such trailing; since the speed of the police vehicle must be the same as that of the target, moreover, an accurate speed indication may be difficult if the traffic is heavy or the path of travel uneven. Finally, there is no means of recording the speed so "clocked", other than in the memory of the policeman.

Given this background, it can be seen that the Marshall method patent represents a substantial advance over the prior "art" of speed detection. A police car equipped with an apparatus capable of performing the steps described in the patent need not be positioned in any predetermined spot; the vehicle need not trail the target vehicle at a constant speed or distance -- or even, for that matter, "trail" the target vehicle at all. The measuring devices are not visible to the motorist, and the measurements themselves can be made virtually anywhere. The actual measurement and recording of speed, and the apprehension of violators, can be performed by a single policeman in a single vehicle; since the speed measurement can be made from a moving vehicle, the police car can proceed with other patrol duties as well. In sum, the Marshall methods permit a much more efficient utilization of limited police resources while increasing the likelihood of apprehension of speeders.

Whether this advance over the prior art of speed detection would have been obvious to a person having ordinary skill in the art at the time of invention is another matter. Defendant contends that it would be "inconscionable" to monopolize the well-known principle of measuring the distance traveled by a vehicle, measuring the time elapsed in traveling the distance, and dividing the distance by time to derive the speed or velocity of the vehicle. On this basis, [\*1232] it is argued that the Marshall methods are not substantially distinguishable from the Enoscope, Sky Watch, and Speedometer Pacing methods discussed above. But surely this misses the mark: the Marshall method patent claims as invention a particular *method* of measuring time and distance, and of combining the two to determine the speed of another vehicle; none of these other techniques teaches the utilization of a speed detector within the car for performing the methods as specified, nor can it be said that the Marshall methods represent an obvious derivation or extension of the principles taught in these techniques.

But the resolution of this contention casts into even sharper focus the second horn of this particular obviousness dilemma. Arthur N. Marshall was perhaps not the first to think of the "concept" of measuring the speed of a moving vehicle from another vehicle with the use of a speed computer or apparatus -- but he was the first to reduce this concept to practical application. [HN6] And it has been the rule for some time that for a process to be patentable, at least one mode of reducing it to practical use must be disclosed. See, e.g., *Tilghman v. Proctor*, 102 U.S. 707 (1880); *Expanded Metal Company v. Bradford*, 214 U.S. 366 (1909). Put differently, Marshall invented both a method and an apparatus to practice the method. Given the invention of the apparatus, the method might indeed seem obvious; yet at the time of the filing of the application for the method patent the only apparatus which could practice the method was that disclosed in the specifications of the application.

Defendant sought to rebut at trial the conclusion that the prior art contained no such apparatus that could practice the Marshall methods, by introducing a number of patents which are set out in the margin. n3 At trial, however,

defendant's expert witness Craig Garretson, an associate professor of physics and engineering at C.W. Post College, only identified two of these (Eaton and Pellerin) as capable of performing any of the Marshall methods, namely those indicated in figures 13 and 14 of the specifications. On cross examination, however, Dr. Garretson was led to admit that both patents disclosed devices which were intended to measure the speed of the vehicle in which they were set, and over relatively long periods of time. Indeed, all five patents relied on by defendant disclose mechanical computers which are principally designed for this purpose; none contain separate time and distance switches. moreover, which are capable of independent operation to permit separate measurement and storing of the time and distance information necessary for the computation of speed of another vehicle. Finally, it should be noted that Dr. Garretson had not seen the mechanical embodiment of any of these patents - including the Marshall apparatus - and based his testimony on his reading of the patents alone. No evidence was provided which indicated that nay of these computers were capable of performing the Marshall methods as specified in an efficient manner without substantial redesign, nor does it appear that any of these devices was so redesigned to perform these methods.

n3 U.S. Patent No. 1,450,410, dated 4/3/23, for an "indicator" (Cox); French Patent No. 668,791, dated 7/22/29, for an "Appartus for Indicating the Ratio of Two Variables" (Palme); U.S. patent No. 3,172,722, dated 3/9/65, for a "Photographic Speed Measuring Apparatus" (Brown); U.S. Patent No. 1,407,134, dated 2/21/22, for a "Calculating Instrument" (Eaton); U.S. Patent No. 2,903,322, dated 9/8/59, for a "Vehicle Maximum Speed Indicator" (Webster); U.S. Patent No. 2,341,118, dated 2/8/44, for a "Vehicle Speed Recorder" (Rodanet); U.S. Patent No. 1,907,549, dated 5/9/33, for a "Method of Measuring Speeds Photographically" (Kahrs); U.S. Patent No. 2,871,008, dated 1/27/59, for a "Method of Obtaining Evidence of Traffic Signal Violations" (Abell); U.S. Patent No. 3,306,762, dated 5/29/62, for a "Trip Speed Averager" (McDonough).

[\*1233] The analysis of the prior art, and its comparison with the patent insuit, as directed by the Supreme Court in *Graham v. John Deer Co.*, *supra*, by no means disposes of the issue of obviousness. In a frequently cited passage, Judge Learned Hand described the plight of the court when confronted with such a situation:

"The test laid down is indeed misty enough. It directs us to surmise what was the range of ingenuity of a person 'having ordianry skill' in an 'art' with which we are totally unfamiliar. . . . To judge on our own that this or that new assemblage of old factors was, or was not, 'obvious' it to substitute our ignorance for the acquaintance with the subject of those who were familiar with it. There are indeed some sign posts: e.g. how long did the need exist; how many tried to find the way; how long did the surrounding and accessory arts disclose the means; how immediately was the invention recognized as an answer by those who used the new variant?" *Reiner v. I. Leon Co., Inc.*, 285 F.2d 501, 503-4 (2d Cir. 1960).

Since no direct evidence was introduced at trail as to what an individual familiar with the "art" would have considered obvious at the time of the invention, this court is basically left with its own judgment, to be guided by the "sign posts" suggested by Judge Hand, and which received favorable comment by the Supreme court in *Graham*.

In this case, all of the signposts point to an indication of nonobviousness. The evidence at trial establishes that Arthur Marshall conceived his idea and reduced it to a rough prototype in 1958; on November 3 of that year he filed his first patent application for a "Speed Indicator", which also coantained at least the broad outlines of the method claims which were to become the subject matter of his second application filed in 1963. Not until December of 1965 was the first mechanical speed detection device sold -- to the Indiana State Police. Over this period of time, Marshall logged over four thousand hours of travel and consultation with state and local police, and spent over \$ 150,000 in developing his VASCAR computer and winning over the public before it was sold. Since assigning his rights to his two patents to the plaintiff in March of 1967, Marshall and his group, as stated heretofore, have received from plaintiff over \$ 390,000

357 F. Supp. 1222, \*1233; 1973 U.S. Dist. LEXIS 14317, \*\*10;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

in royalties.

The evidence also indicates that the initial resistance of potential purchasers was finally overcome only after significant efforts; but at present VASCAR is enjoying great commercial success and is rapidly supplanting older methods and devices for speed detection. The need for such an invention existed since the development of the automobile; the long existence of the means necessary to bring about the invention, and its very simplicity, suggest that the invention was by no means "obvious" to those familiar with the art or the problem.

[HN7] The conclusion that the Marshall method patent is not invalid for obviousness is strengthened by the presumption of validity which 35 U.S.C. § 282 invests in every patent. It has been observed that this is

". . . a presumption which is perhaps too often minimized in the courts. . . . Expertness and experience in passing upon patents lie primarily in the Patent Office and these important factors are only partially offset by the greater concentration and the additional relevant evidence which can be brought to bear in any particular patent litigation in the courts. The presumption of validity is entitled to particular weight when, as here, the file wrapper discloses a careful consideration in the Patent Office before issue."

*Georgia-Pacific Corporation v. United States Plywood Corporation*, 258 F.2d 124 (2d Cir.), cert. den. 358 U.S. 884 (1958).

The file wrappers of the several Marshall applications reveal that the [\*1234] Patent Office indeed paid careful attention to the patentability of the claimed inventions. The original application for a patent for a "Speed Indicator" was filed on November 3, 1958; on May 27, 1959, the claims were rejected in light of *Palme*, among others. On November 24, 1959, Marshall amended his second claim, and added two new claims, one of which was for a method of determining the speed of a motor vehicle. These two new claims were again rejected in April of 1960 as indefinite and unpatentable over *Palme* in view of *Gordon*. A new (apparatus) claim 5 was added by Marshall in October, 1960; this was finally rejected. On November 22, 1960, Marshall filed a Rule 116 amendment, adding a new method claim 6, which he alleged was omitted from his prior amendment through inadvertence, to replace rejected method claim 4. This amendment was not permitted by the Patent Office, however; thus, Marshall took his appeal from the final rejection of his remaining apparatus claim in April of 1961, and additionally requested that claim 6 be entered. On appeal, only the apparatus claim was considered, since it was held that the method claim was not properly within the appeal. On March 29, 1963, the Examiner's decision rejecting this claim was upheld on the basis that ". . . the claim presented . . . does not distinguish appellant's arrangement with sufficient particularity from the device shown by *Palme*."

Shortly before this final rejection of his original application, on February 11, 1963, Marshall filed a second application, asserting that this was "a continuation-in-part of my prior copending application Serial Number 771,276, filed Nov. 3, 1958. . . ." Both apparatus and methods claims were described in much greater detail than in the original application. On December 16, 1963, the Examiner required Marshall to restrict his application for examination, and provisionally to elect to pursue either his apparatus or his method claims, since the Examiner had determined that "the two inventions as grouped above are distinct each from the other because the methods as claimed are not the exclusive process of using the apparatus." Consequently, on June 17, 1964 Marshall amended his application and elected to pursue his methods claims; by way of a supplemental amendment dated September 2, 1964, he cancelled his apparatus claims and asserted that they would be included "in a continuation-type case to be filed." Certain statements in this supplemental amendment indicate, however, that the Examiner requested Marshall to cancel his reference to his original 1958 application. Marshall complied with this request, but added the following: "In cancelling this paragraph, applicant does not, of course, sacrifice or abandon its legal right to rely on its earlier filing date of its abandoned application for any *invention* common to the two cases." On May 4, 1965, the amendment was allowed and a patent issued; the references cited by the Examiner were *Kahrs*, *Rodanet*, *Abell*, *Webster*.

Marshall's other division of his application, that for an apparatus patent, was allowed in part on September 27, 1966, certain of the claims having been rejected as substantially met by *Cox*. The references cited by the Examiner were *Cox*,

357 F. Supp. 1222, \*1234; 1973 U.S. Dist. LEXIS 14317, \*\*10;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

Webster, and and English patent, unnamed in the file wrapper.

Thus, the Patent Office considered virtually all of the prior art cited by defendant as indicating the obviousness of the Marshall method patent. The only two patents which were introduced by defendant and not cited by the patent Office were those of Eaton and of McDonough. The Eaton patent, U.S. Patent No. 1,407,134, dated February 21, 1922, is for a "calculating instrument", designed for "giving a direct reading of the quotient of two factors one of which increases or decreases at a variable rate". As previously noted, this invention was intended to relate specifically to measuring the speed of the vehicle in which it was placed; it cannot be [\*1235] said to teach the methods claimed as invention in the Marshall method patent. The second patent, to McDonough, U.S. Patent No. 3,036,762, was issued on May 29, 1962 for a "Trip Speed Averager", which is "a device capable of continuously indicating the average speed over the distance which has been traversed". Again, the relevance of this invention to the Marshall method patents is elusive, and defendant did not pursue the matter at trial its introduction.

It has been clear at least since the case of *Cochrane v. Deener*, 94 U.S. 780 (1876) that a process itself is patentable, independent of the means utilized to practice it. Defendant seems to argue in a post-trial letter dated January 8, 1973 that the absence of alternative means of performing the methods make them somehow functional and unpatentable. But the recent relevant law is to the contrary, *Application of Traczy-Hornoch*, 397 F.2d 856 (C.C.P.A. 1968). The policy underpinnings for this position are persuasively stated in the *Traczy-Hornoch* decision, 397 F.2d at 868:

"The essential difficulty is in the fact that, although at the time of the application only one apparatus may be known which is capable of carrying out the process, others may become available later. In which case of course, the inventor may be cheated of his invention. It is peculiarly our responsibility to see that the decisional law does not require this kind of inequity."

Although courts are not to permit excessive extension of the monopoly power inherent in the grant of a patent, they must also recognize that the patent represents one of the most significant spurs to inventive activity in a mixed, capitalist economy. On the basis of all of the evidence, defendant has failed to establish that the Marshall method patent is lacking in novelty or that it would have been obvious to one ordinarily skilled in the art.

#### *b. Public Use or Sale of Marshall Method Patent*

Defendant also contends that the method claims covered in the Marshall method patent were "on sale" or in "public use" more than one year prior to the filing of the application on February 11, 1963. 35 U.S.C. § 102(b). Although the issue is rather close, I find that the patent is not invalid for these reasons.

The first disclosure of his invention was made by Marshall to his patent attorney in 1958, prior to the filing of his original application. At approximately the same time, Marshall approached the Superintendent of the Virginia State Police to explore the possibility of there being any practical application of his invention for policeman. According to Marshall, the Superintendent voiced doubts about the problem of depth perception, and the matter was dropped.

After the filing of the application, Marshall sought a manufacturer to develop his device and to get onto the market. In early 1959, he demonstrated the original apparatus to the President of a company called Robertshaw-Fulton; after some consideration, the company decided not to pursue the matter, but sent Marshall a check for \$ 1000 for his time. Then on March 18, 1959, Marshall assigned his rights under his pending patent application to Southern Steel & Stove Corp., under a contract to improve the apparatus. Southern was unsuccessful, being largely bothered by the problem of timing and depth perception in the use of the apparatus; in July of 1959 they notified Marshall of their decision not to continue, but did not "return" his patent rights until January 23, 1961. This formality apparently not being considered necessary by Marshall until that time. There is no indication in the record, however, that Southern ever made any sales effort to market VASCAR.

In June, 1960 Marshall and a local firm, Progressive Engineering Corporation, developed a second version of the [\*1236] apparatus, which represented a significant improvement: time and distance planes were superimposed; new speed indication means with more accurate gradations were introduced; two switches were added, placed close to each other for easy manipulation; a new means of easily and precisely zeroing the equipment was also included. After this development, the Franklin Institute in Philadelphia was engaged to test the device on a confidential basis. Following a successful analysis, Marshall, in October, went to the convention of the International Association of Chiefs of Police (IACP) in Washington, for the "dual purpose" of learning more about police operations, and identifying the organizations which sold to police units. While there, he talked to the sales manager of a company called Federal Laboratories.

Approximately one month later, Marshall went to the Federal Laboratories factory and demonstrated his machine. He left it there for their examination; they in turn employed a retired police lieutenant, Lieutenant Venia, to use the apparatus and to evaluate it. In April, 1961, Federal Laboratories determined that it was not interested in the Marshall device.

Similarly, in May of 1961, following the Federal Laboratories rejection, Marshall demonstrated his machine to Kent-Moore Organization, Inc., in Detroit, leaving it with them for analysis. They in turn dropped the matter in July, 1961.

This was essentially the last "promotional" activity undertaken by Marshall prior to February 11, 1962 -- the critical date for § 102(b) purposes. In early 1962, Marshall and Progressive Engineering rebuilt the machine again, this time coming up with a slightly smaller, somewhat improved version. Following this came a period over a year's inactivity of his. Then, in September, 1963, he took the improved machine to the executive offices of the IACP, and consulted with its research division. Finally, in February-March of 1964, Marshall launched a concerted campaign to police organizations across the country, in which he demonstrated his invention, and distributed a prepared brochure. Defendant contends that this activity prior to February, 1962 proves that Marshall had in effect put his methods into public use, and that his efforts were directed towards determining the salability of his invention, rather than its workability.

[HN8] The kind of "public use" contemplated by 35 U.S.C. § 102(b) seems to be that of public disclosure or of commercial exploitation. Experimental use of the invention, however, is not to be considered public use. *Robine v. Apco, Inc.*, 386 F.3d 267 (2d Cir. 1967); *Shaw v. E.B. & A.C. Whiting Company, supra*.

Although defendant asserts that Marshall made no attempt at secrecy in his dealings, the evidence presented at trial leads to the contrary conclusion. Marshall testified specifically that he discussed the confidentiality of his invention with everyone with whom he consulted. This is reinforced by certain correspondence between Marshall and several of the organizations with whom he had contact in this period of time. The fact that Lt. Venia, an employee of Federal Laboratories, demonstrated the apparatus to several former associates, does not amount to the kind of disclosure which would invalidate the patent in question: these demonstrations were merely part of Venia's assigned task of evaluating the performance of the *device*, and there is no indication in the record that the specific methods involved in this suit were actually disclosed. Moreover, no proof was adduced that any of the companies with whom Marshall dealt in this critical period actually made any sales effort.

The rule prohibiting commercial exploitation of an invention for more than a year before the application for a patent is designed to insure that an inventor will not be able to extend the patent monopoly for more than the statutory period by delaying the filing of [\*1237] his application. But here Marshall had filed a patent application in 1958; although the claims contained therein are directed principally to the apparatus, the specifications also reveal the outline of the methods subsequently patented under his "continuation in part" application. There is no evidence that Marshall in fact delayed his application; rather, the initial application was somewhat artlessly phrased, so that its terms were too ambiguous to qualify for patent, and required consequent reapplication.

357 F. Supp. 1222, \*1237; 1973 U.S. Dist. LEXIS 14317, \*\*10;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

Marshall was essentially submitting his *apparatus* to various companies for testing and evaluation with the purpose of developing the device for manufacture and production. It was not "on sale" in the traditional sense. See, e.g., *Amphenol Corporation v. General Time Corporation*, 397 F.2d 431 (7th Cir. 1968); *Chemithon Corporation v. Procter & Gamble Company*, 287 F. Supp. 291 (D. Md. 1968), *aff'd. per curiam*, 427 F.2d 893 (4th Cir.), *cert. den.* 400 U.S. 925 (1970). Rather, Marshall had but one model of his apparatus invention, which he was in the process of developing over the period. This was not a submission by sample to a prospective purchaser; instead, Marshall was looking for a company to acquire the rights *under his patent application*, to produce and distribute his apparatus which could practice his methods. Aside from the difficulty with the concept of these particular methods ever being "on sale" in such a situation, I find that Marshall's disclosure of the methods in his pursuit of a manufacturer for his *apparatus* did not constitute public use or sale such as to invalidate his patent.

One final point should be addressed here. Plaintiff contends that it is entitled to the benefit of the earlier filing date, conferred by 35 U.S.C. § 120, of Marshall's original (1958) patent application. The 1963 application did in fact refer to the original application, but the Patent Office required that the reference and the characterization of the application as a "continuation-in-part" of the earlier one be stricken. Marshall did this, but purported to reserve all rights to any inventions disclosed in the original application. [HN9] In this respect, it should be noted that § 120 refers only to the *application* for patent, which must contain the required reference; the invention in the original application, however, must be disclosed in accordance with § 112. Although the specifications of the original application do contain certain directions as to the practice of the methods, these are not disclosed with the particularity required by § 112; moreover, the original application does not "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.." In other words, the claims of the original application are not readable onto the claims of the subsequent application, nor are the specifications sufficiently precise, to entitle the 1963 application to claim a filing date of 1958. See *Carter-Wallace, Inc. v. Otte*, F.2d (2d Cir. 1972). This was the basis, presumably, for the Patent Office's requirement that reference to the prior application be stricken.

### *c. Inadequate Disclosure of Mode of Utilizing Methods*

Defendant also argues that the Marshall method patent contains no disclosure of how to visually determine when the target vehicle passes certain checking points, given problems in depth perception, and that this failure renders the patent invalid because of inadequate disclosure. 35 U.S.C. § 112. More specifically, defendant asserts that the use of shadows is essential to successful practice of the Marshall methods, that Marshall knew of this "shadow technique" for a long time, and that his failure to reveal this in his patent renders it invalid. But at trial, defendant's own witness, Trooper Aldin Asp, testified that shadows were really only one means of overcoming the parallax problem, and [\*1238] that he himself utilized other means as well -- such as a bumper flash going over a hill, triangulation, crossing railroad tracks or other lines or patches on a road. I find that the patent sufficiently discloses the mode of utilizing the methods to comply with § 112, and that the shadow technique in particular would be obvious to one acquainted with the teachings of the Marshall method patent, and is only one means of correcting the problem of depth perception.

In sum, I conclude that the Marshall method patent is valid, and that the claims to invention included therein are entitled to protection against infringement by defendant.

### *III. Validity of the Liston Patent*

As in its attack on the Marshall method patent, defendant challenges the validity of the Liston patent on the grounds, *inter alia*, of obviousness and of public use or sale more than one year prior to the filing of the application for a patent.

#### *a. Obviousness of the Liston Patent*

Plaintiff admits that "most if not all of the individual electronic circuits and circuit components used in the device described and claimed in the Liston et al patent . . . are all separately old and have been used before in different

357 F. Supp. 1222, \*1238; 1973 U.S. Dist. LEXIS 14317, \*\*10;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

combinations to perform different computer functions." Plaintiff's Post-Trial Proposed finding of Fact No. 64. Plaintiff claims, however, that the Liston patent described a combination of these old elements, which itself represents a unique configuration, and that this development of a "fool-proof" in-car speed computer is by no means obvious.

[HN10] A combination of old elements is patentable "only when the whole in some way exceeds the sum of its parts. . . ." *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 152 (1950). The fact that the old elements had not previously been so combined does not itself resolve the issue, *Lemelson v. Topper Corporation*, 450 F.2d 845 (2d Cir. 1971), cert. den. 405 U.S. 989 (1972), nor is commercial success pertinent, absent the required showing of invention. *Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc.*, 396 U.S. 57 (1969).

The problem is thus to determine whether the combination of old elements represented by the Liston patent would have been as a whole "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. . . ." 35 U.S.C. § 103. Here the relevant date is February 27, 1969, the filing date of the Liston patent. On the basis of the evidence presented at trial. It is my conclusion that the Liston patent is invalid as failing to meet the stringent standards for invention for combination patents in this circuit.

Defendant's principal witness at the trial on this issue on this issue was Dr. Craig Garretson, an associate professor of physics and engineering at C.W. Post College. Dr. Garretson only received his Ph.D. in electrical engineering in 1969, but had received his bachelor's degree in electrical engineering in 1949 and his master's in 1953. Although his testimony is to be considered in light of the fact that he had never had any industrial experience in the *design* of digital computers in 1967-68, when the Liston device was developed, it was evident at trial that he was familiar with their operation, and had subsequently acquired more experience through his work at C.W. Post. Put briefly, Dr. Garretson testified persuasively that the elements and their combinations as embodied in the Liston patent would have been obvious to one familiar with the art in 1967-68. Indeed, as it appeared at trial, the novelty of the Liston device lies in the fact that it is a combination to practice the methods of the Marshall method patent, and that it is the first electronic digital computer which could successfully replace Marshall's patented apparatus [\*1239] But this "novelty" cannot be said to be invention within the contemplation of § 103: Dr. Garretson provided convincing proof, unrebutted by plaintiff, that the combination as a whole, with perhaps minor variations in particular elements, would have been apparent to one familiar with the art.

None of the extrinsic aids previously discussed with reference to the Marshall method patent require a contrary conclusion. The only reference cited by the Examiner in granting the Liston patent were the three Marshall patents; the file wrapper for the Liston patent itself is not in evidence, but there is no indication that the Patent Office gave careful consideration to the problem of finding invention in a combination of old elements.

The "signpost" pointing to validity for the Marshall method patent do not point in the same direction for the Liston patent. Plaintiff acquired Marshall's patent rights in the spring of 1967, and contracted very shortly thereafter with Nicordyne, Inc., to develop an electronic speed computer to supplant the Marshall electro-mechanical apparatus. An initial "breadboard" device was delivered in September, 1967; due to a number of inadequacies, this was redesigned in November, 1967. Field tests were then run on 25 of these redesigned modules from January through April of 1968, with a series of improvements being made as the results of the tests came in. Finally, on March 20, 1968, Microdyne was given approval to commence assembly of the first 250 production units; these units were first shipped to customers at the end of May, 1968.

Thus, it cannot be said that the Liston device was a response to a long-felt need, since the Marshall method patent had only been issued two years earlier. No evidence appears that there were many unsuccessful attempts to solve the problem of converting the Marshall apparatus into a fully integrated electronic digital computer. Rather, the history of the Liston patent reveals a concerted engineering effort to create a workable electronic prototype, proceeding in stages to remove the "bugs" from the model as it developed, with little real impediment. The real "invention" embodied in the Liston patent, as it turns out, was already patented -- by Marshall. It is therefore my conclusion that the Liston patent is invalid for obviousness, as defined by 35 U.S.C. § 103.

*b. Liston Patent On Sale or In Public Use*

Although the foregoing would dispose of the issue of the Liston patent's validity, mention might be made of defendant's contention that the Liston device was on sale or in public use more than one year before the filing date of February 27, 1969. This is based on the fact that plaintiff had received, in late 1967 and early 1968, several orders for electronic VASCAR devices from potential customers who had become aware that plaintiff was in the process of developing an electronic speed computer. Plaintiff also in this same period sent out a list of tentative performance specifications for its electronic VASCAR, in response to a request from the State of Ohio. In addition, the vice-president of plaintiff's Signal Division responded to a similar order from the State of North Carolina (which did not specify whether the VASCAR devices would be of an electrical type; enclosed in the letter also were photographs of dummy mockups of the tentative modules.

This is insufficient to demonstrate that the new electronic VASCAR units were "on sale" at this period. At the time of this correspondence, plaintiff had not yet developed for commercial production the device which would be described in the Liston patent; nor had [\*1240] it any workable units of the electronic VASCAR for sale. Indeed, defendant has not met its burden of establishing that plaintiff ever offered for sale on an unsolicited basis, even for future delivery, its electronic VASCAR. See *Hobbs v. United States Atomic Energy Commission*, 451 F.2d 849 (5th Cir. 1971).

*IV. Defendant's Counterclaims*

As for defendant's affirmative defense of patent misuse, and its counterclaims for unfair competition, antitrust violations, and trademark abuse, [\*\*11] a brief discussion of the record should suffice to demonstrate that defendant has failed to make out its contentions.

Defendant basically relies on two arguments in support of its claims. First, it presses the fact that plaintiff has never licensed anyone other than purchasers of its VASCAR computer to practice the Marshall methods; indeed, plaintiff has apparently never set a price on such a license, but instead includes the "implied license" in the purchase price of the computer. This practice, it is argued, amounts to an illegal tying arrangement, whereby plaintiff is able to increase its monopoly power beyond the normal bounds of its patents.

The evidence in the case reveals, however, that plaintiff has never been requested to grant a license under the Marshall method patent, independent of its VASCAR device, nor has it ever, consequently, refused a license to any applicant. Arthur Marshall, indeed, testified at trial that he offered a license to defendant in the fall of 1971, after the commencement of this suit. As noted *supra*, page 13, plaintiff had the right to rely upon the validity of its Liston patent: since it owned the method patent, it could legitimately proceed [\*\*12] to sell a device to practice those methods. On this state of the record, it cannot be said that plaintiff's sales practices and failure to grant a separate license under the Marshall method patent constitute patent misuse or any conceivable violation of the antitrust statutes.

Secondly, it is asserted that plaintiff has locked defendant out of certain competitive bids, by causing various state purchasing agencies to utilize specifications prepared by the plaintiff for inviting these bids; allegedly, the specifications are not functionally required for efficient speed detection, but serve rather to exclude defendant's TDS computer from consideration, since it does not conform to the requirements of such bid invitations. The evidence at trial established that it was indeed standard practice in the bidding process for a manufacturer of speed computers to submit proposed "specifications" which in effect amounted to a description of the capabilities and operation of its own device. Defendant engaged in this practice as well, and succeeded in changing several proposed specifications to conform to its own device. It is also clear that the governmental agencies were free to select among [\*\*13] the proposals, and even to change their specifications -- which they did in three instances to defendant's advantage. At the same time, there were indications at trial that the specifications attacked by defendant as nonfunctional -- e.g., the storage capacity and unit of measure for the distance and time registers -- might produce a more efficient computer. In sum, I cannot find in these practices either an intent or an attempt to monopolize the sale of electronic speed computers.

357 F. Supp. 1222, \*1240; 1973 U.S. Dist. LEXIS 14317, \*\*13;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

Defendant also purports to find in various actions by plaintiff further "evidence" of unfair competition, patent misuse, and antitrust violations. It cites the fact that plaintiff informed several prospective customers that it owned the patents in suit and had brought an infringement action against defendant. Plaintiff likewise wrote the Community College of Raleigh, North Carolina, that it would be a violation of its Marshall [\*1241] method patent if the college were to utilize a TDS computer in demonstrating the Marshall methods to police officers. It is true also that plaintiff brought suit for infringement in July, 1969 against the American Data Company and others. Unlike defendant, however, [\*\*14] I am unable to find any untoward significance in these activities: plaintiff in these actions was understandably proceeding to protect its rights as provided by law, and there is no indication that the suits were a sham.

Defendant also finds fault in the March 16, 1967 agreement, as supplemented by the August 12, 1968 agreement, whereby the Marshall group assigned its rights in the Marshall patents and the trademark VASCAR to the plaintiff. This set of agreements is alleged to constitute a conspiracy between the parties to divide the market for electronic speed computers, with the intent to monopolize the same. By the agreements, plaintiff received all interests in the Marshall patents, and rights in the Western Hemisphere to use the registered trademark VASCAR. The significance of this "market division" is almost totally undercut by the uncontested fact that neither Marshall nor plaintiff has ever attempted to market speed computers of any kind in the Eastern Hemisphere; nor is there any evidence that significance was ever intended to be placed by the parties on this passage. Also under the agreement, the plaintiff covenanted it would not contest the validity of the Marshall [\*\*15] patents, and that it would prosecute suits for their infringement -- surely typical and proper provisions in this general context.

Although the issue is not addressed in the pleadings, defendant next charges that plaintiff has induced purchasers to publicly display and use the term VASCAR in certain uncontrolled fashions, similar to the "radar" it replaces; this, it is argued, justifies stripping plaintiff of its trademark protection for the word VASCAR. Moreover, it is urged that such use of the name creates yet another barrier to the successful marketing of defendant's TDS device. Again, defendant produced no evidence that plaintiff had actively sought to induce such "uncontrolled" usages of its trademark; nor, for that matter, do such usages actually appear in the record. Finally, defendant asserts that plaintiff had unfairly disparaged the quality of its TDS computers, and that plaintiff obtained its patents illegally and fraudulently. But no evidence was introduced to support these bare allegations.

#### *V. Conclusion*

In conclusion, I find that defendant's manufacture, sale and use of the TDS electronic speed computer infringes plaintiff's Marshall method patent directly [\*\*16] and indirectly as alleged. I find further that plaintiff's Liston patent is invalid for obviousness, and therefore not entitled to protection against defendant's infringement. Finally, defendant has not made out satisfactorily at trial any of its counterclaims sounding in unfair competition, trademark or patent misuse, or antitrust.

On the basis of the foregoing conclusions, the parties and their counsel should settle an order and judgment disposing of the issues in this case. In this regard, plaintiff has requested an injunction restraining defendant and all of its privies from further infringement of the patents. From what has been said, it is clear that plaintiff is entitled to an injunction only in respect to the Marshall method patent. 35 U.S.C. § 283. Also, of course, plaintiff has sought damages for defendant's infringement. 35 U.S.C. § 284. From the record heretofore made, it might be surmised that the damages for infringement of the Marshall patent will not amount to any substantial sum, if for no other reason because the defendant has sold only 250 of its units which embrace the method invented by Mr. Marshall. If [\*1242] plaintiff still seriously presses the [\*\*17] issue of damages, it is theoretically entitled to an accounting. Counsel, therefore, are advised that this court will refer for hearing and report on any accounting issues to a magistrate of this court upon specific request of plaintiff's counsel. Finally, all other issues have been plainly enough resolved heretofore in this opinion to enable counsel to settle an appropriate order and judgment on those matters.

#### APPENDIX A

(Marshall method patent claims) 3,182,331 in the shape, size and arrangement of parts may be resorted to, without departing from the spirit of the invention or scope of the subjoined claims.

Having thus described my invention, I claim:

1. A method of determining and identifying the speed of a checked vehicle from a checking vehicle has a distance measuring unit which can measure and identify a selected distance traveled by said checking vehicle and a time measuring unit which can measure time and a directly readable speed measuring means which can combine said selected distance and time to identify the speed of said checked vehicle comprising the steps of

starting the time measurement when the checked vehicle passes a first selected point,

stopping [\*\*18] the time measurement when the checked vehicle passes a second selected point, said time starting and stopping steps being accomplished by starting and stopping said time measuring unit,

moving said checking vehicle from said first to said second selected point over substantially the same path traveled by said checked vehicle,

starting the distance measurement when the checking vehicle passes said first selected point,

stopping said distance measurement when the checking vehicle passes said second selected point, said distance starting and stopping steps being accomplished by starting and stopping said distance measuring unit, combining the resultant identified time measurement and distance measurement in said directly readable speed measuring means in a predetermined manner to produce a speed identification, the distance measurement steps being independent as to time of execution whereby the selected distance may be measured before, during and/or after the time measurement steps.

2. A method of determining and identifying the speed of a checked vehicle from a checking vehicle wherein said checking vehicle has a distance measuring unit which can measure and identify [\*\*19] a selected distance traveled by said checking vehicle and a time and a directly readable speed measuring means which can combine said selected distance and time to identify the speed of said checked vehicle comprising the steps of

starting the time measurement when the checked vehicle passes a first selected point,

stopping the time measurement when the checked vehicle passes a second selected point, said time starting and stopping steps being accomplished by starting and stopping said time measurement unit,

moving said checking vehicle from a first to a second reference point over a path equal to the path traveled by said checked vehicle,

starting the distance measurement when the checking vehicle passes said first reference point equivalently related to said first selected point,

stopping said distance measurement when the checking vehicle passes said second reference point equivalently related to said second selected point, said distance starting and [\*\*20] stopping steps being accomplished by starting and stopping said distance measuring unit,

combining the resultant identified time measurement and distance measurement in said directly readable [\*\*20] speed measuring means in a predetermined manner to produce a speed identification, the distance measurement steps being independent as to time of execution whereby the selected distance may be

measured before, during and/or after the time measurement steps.

3. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 1 and including the step of recording the speed by making a permanent record on a recording material conforming with the speed identification produced by said directly readable speed measuring means.

4. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 2 and including the step of recording the speed by making a permanent record on a recording material conforming with the speed identification produced by said directly readable speed measuring means.

5. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 2 and wherein the distance measurement steps occur prior to the time measurement steps to enable the checking vehicle to be at a fixed position when timing the checked vehicle. [\*\*21]

6. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 2 and wherein the distance measurement step occurs after the starting of the time measurement step whereby the checking vehicle may be distant from said first reference point at the time of starting the time measurement.

7. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 2 and wherein the time measurement steps and the distance measurement steps occur simultaneously with the checking vehicle traveling substantially the same path traveled by said checked vehicle.

8. A method of determining and identifying the speed of a checked vehicle from a checking vehicle as defined in claim 2 and wherein the starting of the time measurement step and the distance measurement step occurs simultaneously as the checked vehicle passes the checking vehicle and the stopping of the distance measurement step occurs at said second reference point to enable determination of the speed of a passing checked vehicle without traveling at the same speed as the checked vehicle.

9. A method of determining and identifying [\*\*22] the speed of a checked vehicle from a checking vehicle as defined in claim 2 and wherein the checked vehicle is traveling toward said checking vehicle and wherein the starting of the time measurement step occurs when the checked vehicle passes a first selected point, the stopping of the time measurement step and the starting of the distance measurement step occurs when the vehicles pass each other in opposite directions, and stopping of the distance measurement step occurs at the second reference point.

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LEO SMILOW, Primary Examiner.

#### APPENDIX B

(Liston patent claims) 3,530,382

While we have described our invention in certain preferred forms, we do not intend to be limited to such forms, except insofar as the appended claims [\*1244] are so limited, since modifications coming within the scope of our invention will readily occur to those skilled in the art, particularly with out disclosure before them.

We claim:

1. Apparatus intended [\*\*23] to be mounted in one motor vehicle and operated by a driver thereof for measuring the average speed of another motor vehicle or target vehicle being observed by the driver of the one vehicle, the improvement comprising, in combination, distance pulse generating means connected to the one vehicle for generating a plurality of electrical distance pulses the number of which is proportional to distance travelled by said one vehicle, manually operable distance switch means, time pulse generating means for generating a plurality of electrical time pulses the number of which is proportional to elapsed time, manually operable time switch means, electrical distance counter means for counting said distance pulses, said distance switch means serving to operatively connect said distance counter means with said distance pulse generating means, electrical time counter means for counting said time pulses, said time switch mean serving to operatively connect said time counter means with said time opulse generating means, divide circuit means for in effect dividing the number of distance pulses in said distance counter means by the number of time pulses in said time counter means whereby the resulting [\*\*24] quotient will indicate the speed of the target vehicle, and speed readout menas for visibly displaying said speed.

2. The invention of claim 1 where said distance pulse generating maens is connected mechanically to a mechanical drive component of the one vehicle so as to be driven therefrom an amount proportional to the distance travelled by the one vehicle.

3. The invention of claim 1 including distance register menas connected between said distance counter means and said divide circuit means, and means for transferring the distance uinformation in the distance counter means to the distance register means on a non-destruct basis so as to permit repeated us of the same distance inforamtion in subsequent speed computations.

4. The invention of claim 1 including compute start means for initiating a speed start means for initiating a speed computation by said divide circuit means, said compute start means being automatically operable in response to four conditions comprising the turning on of said distance switch means, the turning off of said distance switch means, the turning on of said time switch means and the turning off of said time switch means.

5. The invention of claim [\*\*25] 4 where said compute start means includes four element: and" gate means having four inputs, a first gate element being enabled when said distance switch is turned on, a second gate element being enabled when said distance switch is turned off, a third gate element being enabled when said time switch is turned on, and a fourth gate element being enabled when said time switch is turned off, said gate means being responsive to the foregoing four enables to produce an output signal which is utilized to initiate a speed computation by said divide circuit means.

6. The invention of claim 1 where said divide circuit means includes subtractor means which repeatedly subtracts the number of said time pulses form the number of said distance pulses, means for stopping the computation process when the number of remaining distance pulses is reduced to zero or becomes negative, and speed counter means for counting the number of suggessful subtractions prior to the stopping of the computation process, said speed counter means being connected with said speed readout means.

[\*1245] 7. The invention of claim 6 including distance shift register means conected between said distance counter means. [\*\*26] and said subtractor means. means for transferring the distance information in the distance counter means to said distance shift register means on a nondestruct basis so as to permit repeated use of the same distance information in subsequent speed computations, control counter means pulsed by computer clock means for controlling the feeding of the distance information in said distance shift register mmeans and the time information in said subtractor means simultaneously and in serial fashion, the distance remainder inforamtion being fed back to said distance shift register means after each subtraction.

8. The invention of claim 7 where binary multiplier means is added to the least significant side of said distance shift

register means, and sign-sensing means is added to the most significant side of said distance shift register means, said sign-sensing means being utilized to stop the computation process when the distance remainder in the distance shift register means goes through zero and becomes negative.

9. The invention of claim 6 where said speed counter means comprises a binary coded decimal counter, means for transmitting one pulse to said speed counter means each time a successful [\*\*27] subtraction is performed, and lamp segment decoder/driver means connected with said speed counter means, said speed readout means comprising a lamp segment display connected with said lamp segment decoder means for displaying a lighted digital speed reading corresponding to the number of pulses transmitted to said speed counter means.

10. The invention of claim 1 including reset means selectively operable to reset the entire apparatus or to reset all of the time components and readout means without resetting the distance counter means.

11. The invention of claim 1 where said time pulse generating means comprises oscillator means which produces a predetermined number of electrical time pulses per second, said oscillator means being connected to said time counter means by said manually operable time switch means whereby said time counter means will count said time pulses only when said time switch means is turned on.

12. The invention of claim 1 where said distance counter means and said time counter means each comprises a binary counter.

13. The invention of claim 1 including means responsive to overflow pulses from said distance counter means or said time counter means to [\*\*28] indicate to an operator that the capacity thereof has been exceeded.

14. The invention of claim 1 including computer clock means and control counter means for controlling the feeding of the distance information in the distance counter and the time information in the time counter to said divide circuit means. said time and distance information being fed to said divide circuit means simultaneously in serial fashion.

15. The invention of claim 1 where said distance pulse generating means comprises a light source in combination with photo-sensitive means, and rotatable light interrupting means interposed between said light source and said photo-sensitive means, interrupting means having a plurality of circumferentially spaced openings which permit light from said light source to strike said photosensitive means a predetermined number of times for each revolution of said interrupting means, and means connecting said interrupting means with a mechanical drive component for said one vehicle whereby said interrupting means will be driven from said drive component an amount proportioned to the distance travelled by said one vehicle.

16. The invention of claim 1 where said time pulse [\*\*29] generating means is manually [\*1246] adjustable to permit variation of the frequency thereof for calibration purposes.

17. The invention of claim 4 where said interrupting means is connected to the odometer cable of said vehicle so as to be rotated thereby.

18. The invention of claim 1 including error indicating means for indicating to an operator that an error has been made in the manual operation of the apparatus, said error indicating means being responsive to any of the following conditions comprising turning on the distance switch for a distance in excess of the capacity of the distance counter, turning on the time switch for a time in excess of the capacity of the time counter, turning on the distance switch a second time without clearing the distance counter of information previously stored therein, and turning on the time switch a second time without clearing the time counter of information previously stored therein.

19. Apparatus intended to be mounted in one motor vehicle and operated by a driver thereof for measuring the average speed of another motor vehicle or target vehicle being observed by the driver of the one vehicle, the improvement comprising, in combination, [\*\*30] distance pulse generating means connected to the one vehicle for

generating a plurality of electrical distance pulses the number of which is proportional to distance travelled by said one vehicle, said distance pulse generating means being connected mechanically to a mechanical drive component of the one vehicle so as to be driven therefrom an amount proportional to the distance travelled by the one vehicle, manually operable distance switch means, time pulse generating means for generating a plurality of electrical time pulses the number of which is proportional to elapsed time, manually operable time switch means, electrical distance counter means for counting said distance pulses, said distance switch means serving to operatively connect said distance counter means with said distance pulse generating means, electrical time counter means for counting said time pulses, said time switch means serving to operatively connect said time counter means with said time pulse generating means, divide circuit means for in effect dividing the number of distance pulses in said distance counter means by the number of time pulses in said time counter means whereby the resulting quotient will indicate [\*\*31] the speed of the target vehicle, distance register means connected between said distance counter means and said divide circuit means, means for transferring the distance information in the distance counter means to the distance register means on a non-destruct basis so as to permit repeated use of the same distance information in subsequent speed computations, compute start means for initiating a speed computation by said divide circuit means, said compute start means being automatically operable in response to four conditions comprising the turning on of said distance switch means, the turning off of said distance switch means, the turning on of said time switch means and the turning off of said time switch means, and speed readout means for visibly displaying the speed as determined by said divide circuit means.

20. The invention of claim 19 where said divide circuit means includes subtractor means which repeatedly subtracts the number of said time pulses from the number of said distance pulses, means for stopping the computation process when the number of remaining distance pulses is reduced to zero or becomes negative, and speed counter means for counting the number of successful [\*\*32] subtractions prior to the stopping of the computation process, said speed counter means being connected with said speed readout means.

21. Apparatus intended to be mounted in one motor vehicle and operated by a driver thereof for measuring the average speed of another motor vehicle or target vehicle being observed by the driver of the one vehicle, the improvement [\*1247] comprising in combination, distance pulse generating means connected to the one vehicle for generating a plurality of electrical distance pulses the number of which is proportional to distance travelled by said one vehicle, said distance pulse generating means being connected mechanically to a mechanical drive component of the one vehicle so as to be driven therefrom an amount proportional to the distance travelled by the one vehicle, manually operable distance switch means, time pulse generating means comprising oscillator means which produces a predetermined number of electrical time pulses per second, manually operable time switch means, binary distance counter means for counting said distance pulses said distance switch means serving to operatively connect said binary distance counter means with said [\*\*33] distance pulse generating means, binary time counter means for counting said time pulses, said oscillator means being connected to said time counter means by said manually operable time switch means whereby said binary time counter means will count said time pulses only when said time switch means is turned on, divide circuit means for dividing the number of distance pulses in said binary distance counter means by the number of time pulses in said binary time counter means whereby the resulting quotient will indicate the speed of target vehicle, said divide circuit means including subtractor means which repeatedly subtracts the number of said time pulses from the number of said distance pulses, means for stopping the computation process when the number of remaining distance pulses is reduced to zero or becomes negative, speed counter means for counting the number of successful subtractions prior to the stopping of the computation process, speed readout means connected to said counter means, distance register means connected between said binary distance counter means and said divide circuit means, means for transferring the distance information in the binary distance counter means [\*\*34] to the distance register means on a nondestruct basis so as to permit repeated use of the same distance information in subsequent speed computations, compute start means for initiating a speed computation by said divide circuit means, said compute start means being automatically operable in response to four conditions comprising the turning off of said distance switch means, the turning off of said distance switch means, the turning on of said time switch means, and the turning off of said time switch means, reset means selectively operable to reset the entire apparatus of to reset all of the time components and readout means without resetting the binary distance counter means, and computer clock means and control counter

357 F. Supp. 1222, \*1247; 1973 U.S. Dist. LEXIS 14317, \*\*34;  
177 U.S.P.Q. (BNA) 737; 1973-1 Trade Cas. (CCH) P74,452

means for controlling the feeding of the distance information in the distance register means and the time information in the binary time counter means to said divide circuit means.

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MICHAEL J, LYNCH, Primary Examiner

9 of 195 DOCUMENTS



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As of: Jan 31, 2007

**UNITED STATES of America v. George C. DREOS****Crim. No. 23812****UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,  
CRIMINAL DIVISION***156 F. Supp. 200; 1957 U.S. Dist. LEXIS 2760***October 11, 1957****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff United States prosecuted defendant for operating a motor vehicle at an excessive speed. Defendant raised the issues of jurisdiction, use of radar equipment, and proof of criminal intent.

**OVERVIEW:** The United States brought an action against defendant for speeding on a parkway on which the United States had concurrent jurisdiction with the state. Defendant raised the issues of jurisdiction, use of radar equipment, and proof of criminal intent. The court dismissed defendant's arguments and held that the United States had proven defendant's guilt beyond a reasonable doubt. The court held that the United States had concurrent jurisdiction and that concurrent jurisdiction was sufficient to justify the enforcement of the law under which defendant was prosecuted. The court found that the United States had shown that the radar equipment had been properly tested and that a competent operator that used proper procedure and kept proper records manned it. The court ruled that criminal intent was not a required element for prosecution under the statute that the United States had applied in his prosecution.

**OUTCOME:** The court dismissed defendant's issues and held that the United States had established guilt beyond a reasonable doubt in the prosecution of defendant for operating a vehicle at excessive rates.

**CORE TERMS:** parkway, federal government, concurrent, radar, concurrent jurisdiction, speed, regulation, condemnation, needful, highway, built, notice, exclusive jurisdiction, acquisition, acquire, criminal jurisdiction, territory, speedometer, ceded, judicial process, condemned, purview, criminal intent, motor vehicle, police power, public use, designated, situated, traffic, arsenal

**LexisNexis(R) Headnotes***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**Civil Rights Law > Section 1983 Actions > Elements > Color of State Law > General Overview*

***Constitutional Law > The Judiciary > Jurisdiction > Concurrent Jurisdiction***

[HN1] 40 U.S.C.S. § 255 reads as follows: Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the government may, in such cases and at such times as he may deem desirable, accept or secure from the state in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the governor of such state or in such other manner as may be prescribed by the laws of the state where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

***Civil Rights Law > Section 1983 Actions > Elements > Color of State Law > General Overview***

[HN2] The court construes the phrase "other needful buildings" as embracing whatever structures are found to be necessary in the performance of the functions of the federal government.

***Civil Rights Law > Section 1983 Actions > Elements > Color of State Law > General Overview***

[HN3] The United States upon land of which it is the proprietor has complete power to exclude all persons therefrom, to issue special permits to certain persons to go thereon, to construct roads and prescribe the manner in which they shall be used, and who shall use them.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] The use of radar equipment in determining the speed of a motor vehicle has been approved in a number of cases. The use of this apparatus, like the use of speedmeters, cameras, and x-rays, has now reached such general acceptance by state legislatures, executive departments of state and federal governments, the courts, and the public, that it is no longer necessary for the prosecution to offer expert testimony to explain the theory and operation of the radar equipment, at least where there is a statute similar to art. 35, § 99 of the Maryland Code or a valid regulation such as the one we have in this case. 36 C.F.R. 3.28(d). It is sufficient to show that the equipment has been properly tested and checked, that it was manned by a competent operator, that proper operative procedures were followed, and that proper records were kept.

***Admiralty Law > Practice & Procedure > Jurisdiction******Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview******Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview***

[HN5] 18 U.S.C.S. § 7 provides: Special maritime and territorial jurisdiction of the United States defined. The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview***

[HN6] 18 U.S.C.S. § 13 provides: Laws of states adopted for areas within federal jurisdiction. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided § 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] Maryland Code, art. 66 1/2, § 176, as in force in August, 1956 provides: No motor vehicle shall be operated upon any highway of this state at a rate of speed greater than fifty miles per hour, or fifty-five miles per hour on dual lane through highways, under any circumstances or conditions. Violation of Paragraph (d) shall be deemed to be a misdemeanor and any person upon conviction shall be fined not less than ten dollars nor more than one hundred dollars.

**COUNSEL:** [\*\*1]

Leon H. A. Pierson, U.S. Atty., and William J. Evans, Asst. U.S. Atty., Baltimore, Md., for plaintiff.

George C. Dreos, pro se.

**JUDGES:**

Before 1943 the Maryland Code contained the three sections quoted below, which were enacted by chap. 743 of the Acts of 1906. They are now codified as secs. 31, 35 and 36 of Art. 96 of the Annotated Code of Maryland, 1951 ed.

**OPINION BY:**

THOMSEN

**OPINION:**

[\*201]

The information in this case charges that: 'On or about the 15th day of August, 1956, in Prince George's County, in the State and District of Maryland, George C. Dreos did, on lands reserved or defined for use of the United States and under the concurrent jurisdiction of the United States and the State of Maryland, to wit, the Baltimore-Washington Parkway, operate a motor vehicle \* \* \* at a rate of speed exceeding fifty-five (55) miles per hour. U.S.C. Title 18, Sections 7(3) and 13, Annotated Code of Maryland, (1951), Art. 66 1/2, Sec. 176.' n1

[\*202] Defendant, a lawyer, raises three issues: (1) jurisdiction, (2) use of radar equipment in determining the speed of the car, and (3) proof of criminal intent.

(1) Defendant states the first issue as follows:

'Whether this Court has [\*\*2] jurisdiction of this case in view of the provision of the U.S. Constitution, to wit: Article I, Section 8, Clause 17, which provides that 'the Federal Government shall exercise exclusive legislation \* \* \* over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings' and Article 4 of the Bill of Rights of the Constitution of Maryland which provides, "That the people of this State have the sole and exclusive right of regulating the internal government and police thereof, as a free sovereign and independent State"?'

He concedes that the Government properly acquired legal title to the land upon which the Washington half of the Baltimore-Washington Parkway was built, over which he is charged with speeding, and concedes that the term 'building' in Art. I, sec. 8, clause 17 includes 'whatever structures are found to be necessary in the performance of the functions of the federal government'. *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 213, 82 L.Ed. 155. He contends, however, that highway roadbeds are not structures and that the Federal Government [\*\*3] did not acquire either exclusive or concurrent jurisdiction over the land condemned for the construction of the parkway.

Defendant's statement of the issue is too narrow. For the reasons set out below, concurrent legislative jurisdiction in the United States sufficient to justify the enactment and enforcement of the law under which defendant is prosecuted

in this case may be sustained either under Art. I, sec. 8, clause 17, quoted above, or under Art. IV, sec. 3, clause 2 of the Constitution of the United States, which reads as follows:

'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.'

The problem of jurisdiction over federal areas within the states is difficult and complicated. It is the subject of a recent two volume report entitled 'Jurisdiction over Federal Areas within the States', prepared by an Interdepartmental Committee and published by the Government Printing Office, vol. 1 in 1956 and vol. 2 in 1957. This report considers at [\*\*4] great length the legislative, administrative and judicial history of the problem over the years, and analyzes the present situation in the several states with respect to land acquired and held by the Federal Government for various purposes. I will not repeat that historical discussion, but will refer only to the Federal and State statutes which affect this case.

[\*203] The Baltimore-Washington Parkway is divided into two roughly equal parts. The Baltimore half was built by the State of Maryland on land owned by the State; the Washington half was built by the Federal Government on land owned by the United States.

The Washington half, comprising a small portion within the District of Columbia and a much larger portion within the territorial boundaries of the State of Maryland, is regarded as an extension of the park system of the District of Columbia and its environs; it was constructed and developed and is administered and maintained by the Secretary of the Interior, through the National Park Service, subject to the provisions of the Act of Congress of Aug. 25, 1916, 39 Stat. 535, 5 U.S.C.A. § 485, the provisions of which were extended over and made applicable to the parkway [\*\*5] by the Act of Aug. 3, 1950, 64 Stat. 400. See also 16 U.S.C.A. §§ 1c, 2, 3, and 40 U.S.C.A. §§ 70 to 74, together with notes and annotations thereto.

The parkway passes through areas acquired by the Federal Government at different times and for different purposes, so the several areas do not have the same legislative jurisdictional status. Portions of the land on which the parkway was built were acquired originally by the War Department (where the road passes through Fort George G. Meade), by the Department of Agriculture (near Beltsville), and by the Resettlement Division (near Greenbelt). The portion on which the offense charged in this case occurred was acquired in 1944 through condemnation proceedings in the United States District Court for the District of Maryland, Civil No. 2272. n2

'31. The consent of the State of Maryland is hereby given in accordance with the seventeenth [\*204] clause, eighth section of the first article of the constitution of the United States, to the acquisition by the United States by purchase, condemnation or otherwise of any land in this State required for sites for custom houses, courthouses, post-offices, arsenals or other public buildings [\*\*6] whatever, or for any other purposes of the government.'

'35. Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State, but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.'

'36. The jurisdiction ceded shall not vest until the United States shall have acquired the title to said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state.'

In 1943 the Maryland Legislature passed two acts, chap. 644, now codified as sec. 32 of Art. 96, and chap. 687, now codified as sec. 46. They provide:

'32. The consent of the State of Maryland is hereby given, in accordance with the Seventeenth Clause, Eighth Section of the First Article of the Constitution [\*\*7] of the United States, to the acquisition by the United States by purchase, condemnation, gift or otherwise of any land, rights of way, easements, etc., in this State required or needed by the United States for the construction of a parkway, highway, motorway or freeway between the City of Washington, D.C., and the City of Baltimore, Maryland, the consent hereby given to apply particularly to all parklands acquired or to be acquired in the name of the State of Maryland by the Maryland-National Capital Park and Planning Commission pursuant to the authority of Chapter 448 of the Acts of 1927, as amended. \* \* \*

'46. Notwithstanding anything contained in any of the sections of this Article to the contrary the State of Maryland hereby reserves as to all lands within the State hereafter acquired by the United States or any agency thereof, whether by purchase, lease, condemnation or otherwise, and as to all property, persons and transactions on any such lands, jurisdiction and authority to the fullest extent permitted by the Constitution of the United States and not inconsistent with the Governmental uses, purposes, and functions for which the land was acquired or is used. Nothing in this [\*\*8] section shall be deemed or construed to restrict the jurisdiction and authority of the State over any lands heretofore acquired by the United States, or any agency thereof, or over property, persons or transactions on any such lands.'

Sec. 46 (chap. 687 of the Acts of 1943) was probably inspired (a) by the decision of the Supreme Court in *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, which clearly recognized the possibility of concurrent legislative jurisdiction under Art. 1, sec. 8, cl. 17 of the Constitution, and (b) by the amendments of R.S. 355 effected by the Act of Feb. 1, 1940, 54 Stat. 19, and the Act of Oct. 9, 1940, 54 Stat. 1083, 40 U.S.C.A. § 255. In 1943 and 1944 the relevant portion of what is now [HN1] 40 U.S.C.A. § 255 read as follows:

'Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be [\*205] acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept [\*\*9] or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.'

Pursuant to those statutes, on November 3, 1953, the Assistant Secretary of the Interior, on behalf of the United States, accepted concurrent jurisdiction over the Federal half of the Washington-Baltimore Parkway by filing a notice of such acceptance with the Governor of Maryland. n3

A. Jurisdiction under Art. 1, sec. 8, cl. 17. Defendant argues in effect that since the United States Constitution has now been held not to require the acquisition by the United States of any [\*\*10] jurisdiction in lands purchased by it with the consent of the Legislature of the State, the Maryland Act of 1943, ch. 687, quoted above, indicates that it was the intent of the Maryland Legislature to retain full jurisdiction in the State, and that the United States can acquire only a proprietary interest over lands in Maryland. On the other hand, the Government notes that before the passage of the Act of 1943 the State had frequently ceded exclusive jurisdiction to the United States, and argues that by the passage of the Act of 1943 the Legislature only intended to reserve concurrent jurisdiction to the State, and now offers to cede concurrent jurisdiction to the United States, to be accepted or rejected by the United States in accordance with 40 U.S.C.A. § 255.

The Government's contention is supported not only (1) by the notice of November 3, 1953, set out in note 3 above, but also (2) by an opinion of the Attorney General of Maryland dated July 8, 1955, unreported, n4 and (3) by [\*\*206] the report of the Interdepartmental Committee for the Study of Jurisdiction of Federal Areas within the States, which found, vol. 1, p. 98, note 2, that a part of the Federal half of the [\*\*11] Baltimore-Washington Parkway located within

the territorial boundaries of the State of Maryland is under the exclusive criminal jurisdiction of the United States, and a part under concurrent criminal jurisdiction.

Construing the phrase 'other needful buildings' in Art. 1, sec. 8, cl. 17, the Supreme Court, in *James v. Dravo Contracting Company*, said: [HN2] 'We construe the phrase 'other needful buildings' as embracing whatever structures are found to be necessary in the performance of the functions of the federal government.' 302 U.S. at page 143, 58 S.Ct. at page 213. That case dealt with land acquired by the United States for locks and dams. No case involving land acquired for the construction of a road has been cited or found, but an aqueduct carrying water to the *District of Columbia*, *Reddall v. Bryan*, 14 Md. 444, 478, appeal dismissed 24 How. 420, national cemeteries, *Wills v. State*, 50 Tenn. 141; steamship piers, *United States v. Mayor and Council of City of Hoboken, D.C.*, 29 F.2d 932; aeroplane stations, *United States v. City of Buffalo*, 2 Cir., 54 F.2d 471, certiorari denied 285 U.S. 550, 52 S.Ct. 406, 76 L.Ed. 940, have been held to be within the purview of Art. 1, sec. 8, cl. [\*\*12] 17. I hold that the land condemned for the construction of the parkway comes within the purview of Art. 1, sec. 8, cl. 17.

I also agree with the Attorney General of Maryland that the United States acquired concurrent legislative jurisdiction over the lands condemned in 1944 in Civil Action #2272 in this Court. It is not necessary in this case to determine whether the jurisdiction of the United States over other parts of the parkway, built on land acquired before 1940, is exclusive or concurrent. I agree with the Attorney General of Maryland that the Federal Government has at least concurrent criminal jurisdiction over all of that portion of the parkway built on lands owned by the United States however acquired.

Defendant contends that the police power of a state cannot be delegated to a private person, that the Federal Government stands in that category in this instance, and that the State Legislature cannot alienate, surrender, or abridge the right to exercise the police power of the State by any grant, contract, or delegation. This argument is answered by the fact that the Federal Government acquired the lands in question for a valid public use, within the purview of Art. [\*\*13] 1, sec. 8, cl. 17 of the Constitution of the United States, which takes precedence over any state constitution or statute. The grant of concurrent legislative jurisdiction to the Federal Government by the Maryland [\*207] Legislature does not violate Art. 4 of the Declaration of Rights of the Constitution of Maryland. It preserves to the people of the State the right to exercise full civil and criminal jurisdiction over the land, consistent with the governmental purposes for which the property was acquired by the United States. The governmental purpose of maintaining a parkway carries with it the power to regulate traffic on that parkway.

B. Jurisdiction under Art. 4, sec. 3, cl. 2. The power to make and enforce the necessary rules and regulations for the management of federal property need not depend, constitutionally, on the acquisition by the Federal Government of legislative jurisdiction under Art. 1, sec. 8, cl. 17. Art. 4, sec. 3, cl. 2, provides: 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as [\*\*14] to Prejudice any Claims of the United States, or of any particular State.'

In *Robbins v. United States*, 8 Cir., 284 F. 39, at page 45, the court said: '\* \* \* we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, art. 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property.'

In *King v. Edward Hines Lumber Co., D.C.D.Ore.* 68 F.Supp. 1019, 1022, the court held: [HN3] 'The United States upon land of which it is the proprietor has complete power to exclude all persons therefrom, to issue special permits to certain persons to go thereon, to construct roads and prescribe the manner in which they shall be used, and who shall use them.'

As we have seen, the Federal half of the Baltimore-Washington Parkway is a part of the National Park System. 39

Stat. 535, 64 Stat. 400; 16 U.S.C.A. §§ 1c, 2, 3. Congress therefore [\*\*15] has the power to regulate the use of the parkway or to delegate that authority to the executive branch. The Assimilative Crimes Act, 18 U.S.C.A. § 13, is valid and applicable in this case.

(2) Defendant's second issue is 'whether, as a matter of law, the standards used by the police on the day and date in question were sufficiently definite to establish guilt beyond a reasonable doubt'. He questions 'the reliability of the radar instruments that were being used, and the qualifications of the police personnel using it'. The facts on this point are as follows:

On August 15, 1956, at 8:52 a.m., defendant was operating his automobile in the northbound lane of the Baltimore-Washington Parkway, near the Laurel-Bowie interchange in Prince George's County, Maryland. Beside a straight level stretch of that lane, Officer Andrus, of the United States Park Police, had set up his radar transmitter-receiver apparatus about 3 feet from the pavement facing the oncoming traffic at an angle of 10 to 15 degrees. Officer Andrus was sitting in an automobile parked about 60 feet away with the speedometer and recording graph in the car and with a good view of traffic on the road. He had been adequately [\*\*16] trained in the operation of this radar equipment. He had tested the accuracy of the equipment immediately after he set it up in that location, and tested it again before he removed it, about two hours later, with satisfactory results both times. An electrical engineer at the Aeronca Research Laboratories, which makes periodic calibration checks of radar devices for the State of Maryland and the Commonwealth of Virginia, as well as for the United States Park Police, had checked the equipment on December 13, 1955. He checked the transmitter-receiver and [\*208] speedometer again on September 15, 1956. On both occasions the equipment was recording accurately, with less than 1% of error at any speed.

On the morning of August 15, 1956, Officer Hawkins, operating the catch car, was stationed about 300 yards north of Officer Andrus. The police cars were in radio communication with each other. When defendant's automobile passed through the radar beam, the speedometer and the chart registered a speed of 66 m.p.h. Officer Andrus noted the speed and the license number, called to Officer Hawkins to stop the car with that number and charge the driver with speeding, followed defendant's [\*\*17] car with his eye until it was stopped, and wrote the speed and the license number on the chart. Officer Hawkins obtained defendant's name, address, etc., and gave him a notice of traffic violation. He identified defendant in court. The posted speed on the highway at that point was 55 m.p.h., the maximum permitted by the Maryland statute at that time. Signs reading 'Speed Checked by Radar' were also posted along the Parkway, as required by sec. 3.28(d) of the National Capital Parks Regulations, 36 C.F.R. 3.28(d), 20 F.R. 8637, November 15, 1955. See also Maryland Code, Art. 35, sec. 99. One such sign was located well within the four mile limit.

Dr. John M. Kopper of the Johns Hopkins University, a recognized authority in the field of electronics, who has testified in radar cases in several states, explained the theory and operation of the radar device and showed that properly checked and set up such equipment records speed accurately, with any deviation tending to record a lower than actual speed.

Defendant cross-examined all the government witnesses but offered no evidence himself.

[HN4] The use of radar equipment in determining the speed of a motor vehicle has been approved in [\*\*18] a number of cases; e.g. *Dooley v. Commonwealth*, 198 Va. 32, 92 S.E.2d 348, appeal dismissed 354 U.S. 915, 77 S.Ct. 1377, 1 L.Ed.2d 1432; *State v. Dantonio*, 18 N.J. 570, 115 A.2d 35, 39, 40, 49 A.L.R.2d 460. See also 16 Md.L.Rev. 1, 17; 33 N.C.L.Rev. 343.

The use of this apparatus, like the use of speedometers, cameras, and x-rays, has now reached such general acceptance by state legislatures, executive departments of state and federal governments, the courts, and the public, that it is no longer necessary for the prosecution to offer expert testimony, as it did in this case, to explain the theory and operation of the radar equipment, at least where there is a statute similar to Art. 35, sec. 99 of the Maryland Code or a valid regulation such as the one we have in this case, 36 C.F.R. 3.28(d). It is sufficient to show that the equipment has been properly tested and checked, that it was manned by a competent operator, that proper operative procedures were

followed, and that proper records were kept.

The evidence in the instant case shows that all of these requirements were complied with. It also shows beyond a reasonable doubt that defendant was driving at least 65 m.p.h. where [\*\*19] the maximum speed permitted was 55 m.p.h.

(3) Defendant's third issue -- that the government failed to prove criminal intent on his part to violate the statute -- is frivolous. It is similar to the plea of Ko-Ko in the ever popular operetta, n5 and the Mikado's denial of that plea is in accord with Wharton's Criminal Law, 12th ed., Vol. 1, sec. 143, and other American authorities. The statute involved in the instant case does not require proof of any criminal intent.

Defendant's guilt has been established beyond a reasonable doubt.

n1. Title [HN5] *18 U.S.C. § 7*: 'Special maritime and territorial jurisdiction of the United States defined. The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes: \* \* \* (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.'

Title [HN6] *18 U.S.C. § 13*: 'Laws of states adopted for areas within federal jurisdiction. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.'

[HN7] Maryland Code, Art. 66 1/2, sec. 176, as in force in August, 1956: '(Speed Restrictions.) \* \* \* (d) No motor vehicle shall be operated upon any highway of this State at a rate of speed greater than fifty miles per hour, or fifty-five miles per hour on dual lane through highways, under any circumstances or conditions. \* \* \* (f) (Penalties.) \* \* \* Violation of Paragraph (d) shall be deemed to be a misdemeanor and any person upon conviction shall be fined not less than Ten (\$ 10.00) Dollars nor more than One Hundred (\$ 100.00) Dollars.'

[\*\*20]

n2. The petition for condemnation alleged:

'1. That under and by virtue of the provisions of the National Recovery Act, approved June 16, 1933 (48 Stat. 195), the Fourth Deficiency Act, Fiscal Year 1933, approved June 16, 1933 (48 Stat. 274, *43 U.S.C.A. § 256a*); the Emergency Appropriation Act, Fiscal Year 1935, approved June 19, 1934 (48 Stat. 1055); the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); The Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258a to 258(e)); and the Reorganization Act of 1939, 53 Stat. 561, in accordance with the provisions of which Plan Numbered I was submitted to the Congress on April 25, 1939, and was made effective on July 1, 1939, by Joint Resolution of June 7, 1939 (Public Resolution No. 20 -- 76th Congress); and all other acts or parts of acts supplementary to or amendatory of the said acts, the Administrator of the Federal Works Agency is authorized to acquire on behalf of the United States of America by condemnation under judicial process such lands or interest therein in the State of Maryland as may be necessary in his discretion for military purposes and for other public uses; \* \* \*

'2. That under the authority in him vested by the said Acts of Congress, the Administrator of the Federal

Works Agency has found and determined that it is necessary and advantageous to the interests of the United States of America to acquire the hereinafter described lands for the said public use by condemnation under judicial process, and the Administrator of the Federal Works Agency has selected and designated the hereinafter described lands for use in the construction, repair and improvement of a public highway and parkways in the State of Maryland designated as the Washington-Baltimore Parkway in Prince George's and Anne Arundel Counties, Maryland, and for other public uses. \* \* \*'

The declaration of taking stated that 'the public use for which said lands are taken is to provide for the construction of a public highway and parkways for a project designated as the Washington-Baltimore Parkway'. The judgment on the declaration of taking, entered by Judge Chesnut, found 'that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes set forth and prayed in said petition'.

[\*\*21]

n3. The relevant portions of the notice are as follows: 'The Department of the Interior, under authority of the act of Congress approved August 3, 1950 (64 Stat. 400), has jurisdiction over land acquired for the Baltimore-Washington Parkway through acquisition, or by transfer from other Federal agencies, as provided in the aforementioned act. \* \* \* The laws of the State of Maryland (Sections 28, 32 and 46, Article 96, Maryland Code, Annotated, 1951) permit the assumption of concurrent Federal jurisdiction over lands within the State acquired by the United States for public purposes. \* \* \* Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction in respect of all lands which have been acquired by the Federal Government for the Baltimore-Washington Parkway within the State of Maryland. It is understood that the United States has exclusive jurisdiction over that portion of the Parkway which occupies lands within the Fort Meade Military Reservation.'

n4. After discussing the relevant statutes and cases, Attorney General Sybert concluded: 'It is our opinion that exclusive jurisdiction of the lands in the Parkway acquired by the Department of Interior from the Federal agencies was and still is in the Federal Government. Jurisdiction over the other lands specifically acquired for the Parkway by the United States from the State of Maryland and from citizens of the State who owned them, in view of the express intention that concurrent rather than exclusive jurisdiction be taken by the United States, is in both the United States and the State of Maryland. We realize that the effect of what has been said is that on the Federal portion of the parkway, areas where Federal jurisdiction is exclusive will be interspersed with areas where the State has jurisdiction concurrent with the Federal Government. We point out, however, that as to the entire Federal portion of the Parkway, Federal jurisdiction will be clear, so that no hazard to the public safety will result. The proper delineation of areas of concurrent State authority will doubtless pose substantial problems in the administration of State law, but in view of the situation, and in the absence of any specific action by the United States to revest concurrent jurisdiction in the State of Maryland, we are obliged to recognize and apply the law as we understand it. The State of Maryland may exercise full criminal and civil jurisdiction over the lands over which it has concurrent jurisdiction with the United States, provided it does not interfere with the purpose and functions of the *Federal Government*. *Atkinson v. State Tax Commission of Oregon*, 303 U.S. 20, 58 S.Ct. 419, 82 L.Ed. 621. \* \* \* If the Maryland laws and regulations conflict with the Federal laws and regulations, then the Maryland laws and regulations must give way to the Federal laws and regulations. The courts of Maryland, of course, do not have jurisdiction of crimes which are violations of the Federal law, but one act may be an offense against the law of both the State and the Federal Government, and in such case the courts of both have jurisdiction over the offense. *Saxton v. People of State of California*, 189 U.S. 319, 23 S.Ct. 543, 47 L.Ed. 833.'

[\*\*22]

n5. Gilbert & Sullivan, *The Mikado*, Act 2.

10 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STEPHEN C. COLLIER, Appellant, v. MUNICIPALITY OF ANCHORAGE,  
Appellee.**

**Court of Appeals No. A-9404, No. 2054**

**COURT OF APPEALS OF ALASKA**

*138 P.3d 719; 2006 Alas. App. LEXIS 112*

**July 14, 2006, Decided**

**NOTICE:** [\*1] THIS OPINION IS SUBJECT TO CORRECTION BEFORE PUBLICATION IN THE PACIFIC REPORTER. READERS ARE REQUESTED TO BRING ERRORS TO THE ATTENTION OF THE CLERK OF THE APPELLATE COURTS.

**SUBSEQUENT HISTORY:** Rehearing denied by *Collier v. Municipality of Anchorage, 2006 Alas. App. LEXIS 131 (Alaska Ct. App., July 28, 2006)*

**PRIOR HISTORY:** Appeal from the District Court, Third Judicial District, Anchorage, Suzanne Cole, Magistrate. Trial Court No. 3AN-05-10882 MO.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted, before the District Court, Third Judicial District, Anchorage, Alaska, of speeding. Defendant appealed.

**OVERVIEW:** Defendant was clocked doing 78 miles per hour in a 65 mile per hour zone, in violation of Anchorage, Alaska, Municipal Code 09.26.030(C). On appeal, he contended that the officer improperly obtained evidence against him, which was his driver's license and proof of registration and insurance, after he invoked his Fifth Amendment right to the assistance of counsel. He also argued that he was denied necessary discovery at trial. And, finally, he argued that Alaska R. Crim. P. 16(a) was unconstitutional. The appellate court first noted that there was no Fifth Amendment right to counsel in this instance because there was no evidence that this was anything but a routine traffic stop. There was no Sixth Amendment right to counsel because criminal proceeding had not yet commenced. In addition, defendant's right against self-incrimination was not violated when the officer asked for defendant's driver's license. As to the discovery issue, defendant claimed that all the information he requested should have been disclosed; however, the magistrate had the discretion to limit to discovery which was relevant. Defendant received all relevant discovery.

**OUTCOME:** Defendant's conviction was affirmed.

**CORE TERMS:** discovery, license, Criminal Rule, driver's, right to counsel, traffic stop, self-incrimination, speeding,

prosecutor, laser, registration, recording, dispatch, custody, certificate, miles, assistance of counsel, disclosure, effective law enforcement, adversary system, items requested, obligatory, compulsory, chartering, demanded, training, motorists, traffic, ticket, video

### **LexisNexis(R) Headnotes**

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview*  
*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning*  
 [HN1] The right to counsel under the Fifth Amendment only arises during custodial interrogation.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning*  
*Criminal Law & Procedure > Counsel > General Overview*  
*Criminal Law & Procedure > Counsel > Right to Counsel > General Overview*  
 [HN2] The Sixth Amendment right to counsel attaches only upon the commencement of adversary criminal proceedings, not during purely investigative stages of a case.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege*  
 [HN3] The Fifth Amendment of the United States Constitution and Alaska Const. art. 1, § 9 provide that no person shall be compelled in any criminal proceeding to be a witness against himself.

*Transportation Law > Private Motor Vehicles > Operator Licenses*  
 [HN4] Alaska law requires motorists to have in their possession a valid driver's license and to present that license for inspection upon demand by a peace officer.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege*  
*Governments > State & Territorial Governments > Licenses*  
*Transportation Law > Private Motor Vehicles > Operator Licenses*  
 [HN5] The Fifth Amendment privilege against compulsory self-incrimination does not extend to the requirement that motorists produce a driver's license--and thereby identify themselves for purposes of prosecution.

*Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview*  
 [HN6] Alaska R. Crim. P. 16(a) mandates that discovery prior to trial shall be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system. Alaska R. Crim. P. 16(b)(1)(A) requires the prosecuting attorney to disclose the names, addresses, and statements of persons known by the government to have knowledge of relevant facts, written or recorded statements made by the accused or a co-defendant, documents or objects obtained from the accused or intended to be used at trial, and records of prior convictions of the defendant and any witnesses the prosecutor intends to call. Alaska R. Crim. P. 16(b)(3) requires the prosecution to disclose material or information within its possession or control that tends to negate the guilt or reduce the punishment of the accused. Alaska R. Crim. P. 16(b)(7) allows the court in its discretion to require disclosure of other relevant material and

information. And, finally, Alaska R. Crim. P. 16(b)(8) states that the prosecution is not required to disclose legal research or attorney work product.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***

***Criminal Law & Procedure > Trials > Judicial Discretion***

[HN7] A magistrate has discretion under Alaska R. Crim. P. 16(b)(7) to order the disclosure of relevant material and information.

**COUNSEL:** Stephen C. Collier, Pro se, Anchorage.

Rachel Plumlee, Assistant Municipal Prosecutor, and Frederick H. Boness, Municipal Attorney, Anchorage, for the Appellee.

**JUDGES:** Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**OPINION BY:** STEWART

**OPINION:**

STEWART, Judge.

Stephen C. Collier was convicted of speeding. n1 On appeal, he contends that the officer improperly obtained evidence against him -- his driver's license and proof of registration and insurance -- after he invoked his *Fifth Amendment* right to the assistance of counsel. He also argues that he was denied necessary discovery at trial. And, finally, he argues that Alaska Criminal Rule 16(a) is unconstitutional. We affirm.

n1 Anchorage Municipal Code (AMC) 09.26.030(C).

[\*2]

*Facts and proceedings*

On May 12, 2005, Anchorage Police Officer James Conley stopped Collier on the Glenn Highway near the South Birchwood exit for driving seventy-eight miles per hour in a sixty-five mile-per-hour zone. Officer Conley cited Collier under Anchorage Municipal Code 09.26.030(C) for speeding.

On June 1, 2005, Collier filed an eleven-page discovery request, seeking information on the creation of the courts, the chartering of Anchorage, "the true name of the 'government' accuser," IRS documents, and police operating procedures. On July 26, 2005, the court granted the motion in part, noting that the city is responsible for providing discovery materials to Collier, "e.g., officer's notes of traffic stop."

At the trial on August 29, 2005, the Municipality stated that it had provided Collier with the following discovery:

copies of the ticket, the certificate of calibration for the radar instrument the officer used, Officer Conley's certificate of training for laser speed detection, and a compact disk with the video recording of the traffic stop ... . The only thing left that we could find to be discovered to the defendant is the recording of ... the police [\*3] dispatch calls. Sent defendant the notice that is available.

Collier said he did not request or want the dispatch communications. The court then reviewed the remaining discovery requests and found that "none of the other items requested are either relevant, within the agency and control of the

prosecutor's office, nor required as obligatory discovery under Rule 16."

In its case in chief, the Municipality called Officer Conley, who testified that on the morning of May 12, 2005, he was parked on the Glenn Highway watching traffic. He saw a white General Communication, Inc. van traveling at what appeared to be eighty miles per hour. His laser indicated that the van was actually going seventy-eight miles per hour. He pulled the van over for speeding. Collier produced his driver's license and told the officer that he thought he was going seventy to seventy-two miles per hour. Collier apparently then asked if he was under arrest and demanded an attorney. At trial, Collier argued that he was denied discovery and that Officer Conley illegally asked for his driver's license and proof of registration and insurance after he had requested an attorney. The court held that the Municipality [\*4] had provided all relevant discovery and that Collier did not have a right to counsel because he was "neither being interrogated, nor was he in custody." The court found Collier guilty of violating AMC 09.26.030. This appeal followed.

#### *Discussion*

*Collier's claim that his right to counsel and privilege against self-incrimination were violated during the traffic stop*

Collier claims that the traffic stop was a "constitutional seizure" that entitled him to invoke his *Fifth Amendment* right to assistance of counsel. He asserts that, after he told the police he was invoking his right to counsel, the police could not require him to produce his driver's license until his counsel arrived on the scene. n2

n2 Collier also claims that his rights to counsel and his privilege against self-incrimination were violated when the officers demanded his registration and proof of insurance. We have not addressed this claim because we do not see how proof of registration or insurance could be used against Collier as evidence of speeding.

[\*5]

We find no merit to this claim. [HN1] The right to counsel under the *Fifth Amendment* only arises during custodial interrogation, and Collier concedes he was not in custody for purposes of *Miranda v. Arizona*. n3 We agree that Collier was not in *Miranda* custody. Routine traffic stops generally do not constitute *Miranda* custody and thus do not trigger the right to counsel. n4 Here, Officer Conley stopped Collier, asked for his license and proof of registration and insurance, and then cited him for speeding. There is no evidence that this was anything other than a routine traffic stop. Because Collier was not in custody, Officer Conley did not violate Collier's *Fifth Amendment* right to counsel when he asked for Collier's driver's license. n5

n3 *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966); *see also Berkemer v. McCarty*, 468 U.S. 420, 439-43, 104 S. Ct. 3138, 3150-52, 82 L. Ed. 2d 317 (1984); *Clark v. Anchorage*, 112 P.3d 676, 678-79 & n.4 (Alaska App. 2005).

n4 *Berkemer*, 468 U.S. at 439-43, 104 S. Ct. at 3150-52; *Blake v. State*, 763 P.2d 511, 515 (Alaska App. 1988).

[\*6]

n5 *See id.*

To the extent that Collier may be asserting that his *Sixth Amendment* right to assistance of counsel was violated, we recognized in *Thiel v. State* n6 that [HN2] the *Sixth Amendment* right to counsel attaches "only upon the commencement

of adversary criminal proceedings," not during "purely investigative stages of a case." n7 When Officer Conley stopped Collier for speeding, adversary criminal proceedings had not commenced. Accordingly, Officer Conley did not violate Collier's *Sixth Amendment* right to an attorney.

n6 762 P.2d 478 (Alaska App. 1988).

n7 *Id.* at 481 (citing *Moran v. Burbine*, 475 U.S. 412, 429-30, 106 S. Ct. 1135, 1145-46, 89 L. Ed. 2d 410 (1986); *Maine v. Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481 (1985); *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 1881, 32 L. Ed. 2d 411 (1972)).

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Finally, Collier appears to claim that Officer Conley violated his privilege against self-incrimination by demanding his driver's license. [HN3] The *Fifth Amendment of the United States Constitution* and *article 1, section 9 of the Alaska Constitution* provide that no person shall be compelled in any criminal proceeding to be a witness against himself.

[HN4] Alaska law requires motorists to have in their possession a valid driver's license and to present that license for inspection upon demand by a peace officer. n8 Collier argues that requiring him to present his license violated his privilege against compulsory self-incrimination because it identified him for the purpose of prosecution.

n8 AS 28.15.011(b); AS 28.15.131.

In *Byers v. California*, n9 the United States Supreme Court addressed the closely related issue of whether it violates the privilege against compulsory self-incrimination to require motorists to produce identification at the scene of an accident. [\*8] n10 The Court noted that "[e]ven if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the 'extravagant' extension of the privilege Justice Holmes warned against to hold that it is testimonial in the *Fifth Amendment* sense." n11 The disclosure of the driver's name and address is "an essentially neutral act" and "[w]hatever the collateral consequences ... the statutory purpose is to implement the state police power to regulate use of motor vehicles." n12 Moreover, "[a] name, linked with a motor vehicle, is no more incriminating than the tax return, linked with the disclosure of income ... . It identifies but does not by itself implicate anyone in criminal conduct." n13

N9 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).

n10 *Id.* at 427, 91 S. Ct. at 1537.

n11 *Id.* at 431, 91 S. Ct. at 1539.

n12 *Id.* at 432, 91 S. Ct. at 1540.

n13 *Id.* at 433-34, 91 S. Ct. at 1540.

[\*9]

We have also held that [HN5] the Fifth Amendment privilege against compulsory self-incrimination does not extend to the requirement that motorists produce a driver's license -- and thereby identify themselves for purposes of prosecution. n14 Officer Conley, therefore, did not violate Collier's privilege against self-incrimination when he demanded that Collier produce his driver's license.

n14 *Winterrowd v. State*, 139 P.3d 590, 2006 Alas. App. LEXIS 97, P.2d , Alaska App. Opinion No. 2050 (June 23, 2006).

*Collier's request for additional discovery*

On June 1, 2005, Collier filed an eleven-page discovery request, seeking information on the creation of the courts, the chartering of Anchorage, "the true name of the 'government' accuser," IRS documents, and police operating procedures. The Municipality provided Collier with a copy of the ticket, the certification of the laser used in this case, Officer Conley's training certificate for operating the laser, and the video recording of the traffic stop. The prosecutor [\*10] also offered to provide Collier with the recording of the radio traffic between the officer and dispatch, but Collier said he did not want the dispatch communications. Magistrate Cole found that "none of the other items requested are either relevant, within the agency and control of the prosecutor's office, nor required as obligatory discovery under Rule 16."

Collier argues that all the information he requested should have been disclosed because it would have had a direct bearing on the trial. We overturn discovery orders only for abuse of discretion. n15

n15 See *R.E. v. State*, 878 P.2d 1341, 1345 (Alaska 1994); *Linne v. State*, 674 P.2d 1345, 1354-55 (Alaska App. 1983).

Several sections of Criminal Rule 16 are relevant to this appeal. [HN6] Criminal Rule 16(a) mandates that "discovery prior to trial shall be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system." Criminal Rule 16(b)(1)(A) requires the prosecuting attorney [\*11] to disclose the names, addresses, and statements of persons known by the government to have knowledge of relevant facts, written or recorded statements made by the accused or a co-defendant, documents or objects obtained from the accused or intended to be used at trial, and records of prior convictions of the defendant and any witnesses the prosecutor intends to call. Criminal Rule 16(b)(3) requires the prosecution to disclose material or information within its possession or control that tends to negate the guilt or reduce the punishment of the accused. Criminal Rule 16(b)(7) allows the court in its discretion to require disclosure of other relevant material and information. And, finally, Criminal Rule 16(b)(8) states that the prosecution is not required to disclose legal research or attorney work product. None of these sections requires the prosecution to disclose information on the creation of the courts, the chartering of Anchorage, or any of the other documents Collier requested.

[HN7] Magistrate Cole had discretion under Criminal Rule 16(b)(7) to order the disclosure of "other relevant material and information." But she correctly found that "none of the other items requested are either [\*12] relevant, within the agency and control of the prosecutor's office, nor required as obligatory discovery under Rule 16." The only relevant information within the Municipality's control (the ticket, the laser certification, Officer Conley's training certificate for operating the laser, the video recording of the traffic stop, and the dispatch communications) was provided or made available to Collier. The rest was either nonexistent, irrelevant, or publicly available. None had a tendency to negate his guilt. n16 Magistrate Cole therefore did not abuse her discretion in refusing to order additional discovery. n17

n16 See *Scott v. State*, 519 P.2d 774, 778 (Alaska 1974).

n17 See *R.E.*, 878 P.2d at 1345; *Linne*, 674 P.2d at 1354-55.

*Collier's claim that Criminal Rule 16 is unconstitutional*

In passing, Collier argues that Criminal Rule 16 is unconstitutional. His entire argument, raised only in his conclusion, is as follows:

[T]his court should hold [\*13] that Criminal Rule 16(a) is unconstitutional, as the withholding of any inculpatory or exculpatory evidence material from the Accused must be disclosed and under no circumstance can evidence be withheld to protect persons (the State of Alaska), protect effective law enforcement (Alaska State Troopers, Anchorage Police Department and other Police Departments and Police) and the adversary system (Judges, Attorneys, Prosecutors and other court personnel) or any other entity.

Collier appears to be arguing that Criminal Rule 16(a) unconstitutionally limits discovery by providing that discovery should be as full and free as possible "consistent with protection of persons, effective law enforcement, and the adversary system." But he does not cite any legal authority for this position. He also does not show how he was prejudiced. As noted above, Collier received all relevant discovery. n18

n18 *See Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991).

#### *Conclusion*

Collier's [\*14] conviction is AFFIRMED.

11 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STEPHEN C. COLLIER, Appellant, v. MUNICIPALITY OF ANCHORAGE,  
Appellee.**

**Court of Appeals No. A-9404, No. 2054**

**COURT OF APPEALS OF ALASKA**

*138 P.3d 719; 2006 Alas. App. LEXIS 112*

**July 14, 2006, Decided**

**NOTICE:** [\*1] THIS OPINION IS SUBJECT TO CORRECTION BEFORE PUBLICATION IN THE PACIFIC REPORTER. READERS ARE REQUESTED TO BRING ERRORS TO THE ATTENTION OF THE CLERK OF THE APPELLATE COURTS.

**SUBSEQUENT HISTORY:** Rehearing denied by *Collier v. Municipality of Anchorage, 2006 Alas. App. LEXIS 131 (Alaska Ct. App., July 28, 2006)*

**PRIOR HISTORY:** Appeal from the District Court, Third Judicial District, Anchorage, Suzanne Cole, Magistrate. Trial Court No. 3AN-05-10882 MO.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted, before the District Court, Third Judicial District, Anchorage, Alaska, of speeding. Defendant appealed.

**OVERVIEW:** Defendant was clocked doing 78 miles per hour in a 65 mile per hour zone, in violation of Anchorage, Alaska, Municipal Code 09.26.030(C). On appeal, he contended that the officer improperly obtained evidence against him, which was his driver's license and proof of registration and insurance, after he invoked his Fifth Amendment right to the assistance of counsel. He also argued that he was denied necessary discovery at trial. And, finally, he argued that Alaska R. Crim. P. 16(a) was unconstitutional. The appellate court first noted that there was no Fifth Amendment right to counsel in this instance because there was no evidence that this was anything but a routine traffic stop. There was no Sixth Amendment right to counsel because criminal proceeding had not yet commenced. In addition, defendant's right against self-incrimination was not violated when the officer asked for defendant's driver's license. As to the discovery issue, defendant claimed that all the information he requested should have been disclosed; however, the magistrate had the discretion to limit to discovery which was relevant. Defendant received all relevant discovery.

**OUTCOME:** Defendant's conviction was affirmed.

**CORE TERMS:** discovery, license, Criminal Rule, driver's, right to counsel, traffic stop, self-incrimination, speeding,

prosecutor, laser, registration, recording, dispatch, custody, certificate, miles, assistance of counsel, disclosure, effective law enforcement, adversary system, items requested, obligatory, compulsory, chartering, demanded, training, motorists, traffic, ticket, video

### **LexisNexis(R) Headnotes**

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview*  
*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning*  
 [HN1] The right to counsel under the Fifth Amendment only arises during custodial interrogation.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning*  
*Criminal Law & Procedure > Counsel > General Overview*  
*Criminal Law & Procedure > Counsel > Right to Counsel > General Overview*  
 [HN2] The Sixth Amendment right to counsel attaches only upon the commencement of adversary criminal proceedings, not during purely investigative stages of a case.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege*  
 [HN3] The Fifth Amendment of the United States Constitution and Alaska Const. art. 1, § 9 provide that no person shall be compelled in any criminal proceeding to be a witness against himself.

*Transportation Law > Private Motor Vehicles > Operator Licenses*  
 [HN4] Alaska law requires motorists to have in their possession a valid driver's license and to present that license for inspection upon demand by a peace officer.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*  
*Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege*  
*Governments > State & Territorial Governments > Licenses*  
*Transportation Law > Private Motor Vehicles > Operator Licenses*  
 [HN5] The Fifth Amendment privilege against compulsory self-incrimination does not extend to the requirement that motorists produce a driver's license--and thereby identify themselves for purposes of prosecution.

*Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview*  
 [HN6] Alaska R. Crim. P. 16(a) mandates that discovery prior to trial shall be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system. Alaska R. Crim. P. 16(b)(1)(A) requires the prosecuting attorney to disclose the names, addresses, and statements of persons known by the government to have knowledge of relevant facts, written or recorded statements made by the accused or a co-defendant, documents or objects obtained from the accused or intended to be used at trial, and records of prior convictions of the defendant and any witnesses the prosecutor intends to call. Alaska R. Crim. P. 16(b)(3) requires the prosecution to disclose material or information within its possession or control that tends to negate the guilt or reduce the punishment of the accused. Alaska R. Crim. P. 16(b)(7) allows the court in its discretion to require disclosure of other relevant material and

information. And, finally, Alaska R. Crim. P. 16(b)(8) states that the prosecution is not required to disclose legal research or attorney work product.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***

***Criminal Law & Procedure > Trials > Judicial Discretion***

[HN7] A magistrate has discretion under Alaska R. Crim. P. 16(b)(7) to order the disclosure of relevant material and information.

**COUNSEL:** Stephen C. Collier, Pro se, Anchorage.

Rachel Plumlee, Assistant Municipal Prosecutor, and Frederick H. Boness, Municipal Attorney, Anchorage, for the Appellee.

**JUDGES:** Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**OPINION BY:** STEWART

**OPINION:**

STEWART, Judge.

Stephen C. Collier was convicted of speeding. n1 On appeal, he contends that the officer improperly obtained evidence against him -- his driver's license and proof of registration and insurance -- after he invoked his *Fifth Amendment* right to the assistance of counsel. He also argues that he was denied necessary discovery at trial. And, finally, he argues that Alaska Criminal Rule 16(a) is unconstitutional. We affirm.

n1 Anchorage Municipal Code (AMC) 09.26.030(C).

[\*2]

*Facts and proceedings*

On May 12, 2005, Anchorage Police Officer James Conley stopped Collier on the Glenn Highway near the South Birchwood exit for driving seventy-eight miles per hour in a sixty-five mile-per-hour zone. Officer Conley cited Collier under Anchorage Municipal Code 09.26.030(C) for speeding.

On June 1, 2005, Collier filed an eleven-page discovery request, seeking information on the creation of the courts, the chartering of Anchorage, "the true name of the 'government' accuser," IRS documents, and police operating procedures. On July 26, 2005, the court granted the motion in part, noting that the city is responsible for providing discovery materials to Collier, "e.g., officer's notes of traffic stop."

At the trial on August 29, 2005, the Municipality stated that it had provided Collier with the following discovery:

copies of the ticket, the certificate of calibration for the radar instrument the officer used, Officer Conley's certificate of training for laser speed detection, and a compact disk with the video recording of the traffic stop ... . The only thing left that we could find to be discovered to the defendant is the recording of ... the police [\*3] dispatch calls. Sent defendant the notice that is available.

Collier said he did not request or want the dispatch communications. The court then reviewed the remaining discovery requests and found that "none of the other items requested are either relevant, within the agency and control of the

prosecutor's office, nor required as obligatory discovery under Rule 16."

In its case in chief, the Municipality called Officer Conley, who testified that on the morning of May 12, 2005, he was parked on the Glenn Highway watching traffic. He saw a white General Communication, Inc. van traveling at what appeared to be eighty miles per hour. His laser indicated that the van was actually going seventy-eight miles per hour. He pulled the van over for speeding. Collier produced his driver's license and told the officer that he thought he was going seventy to seventy-two miles per hour. Collier apparently then asked if he was under arrest and demanded an attorney. At trial, Collier argued that he was denied discovery and that Officer Conley illegally asked for his driver's license and proof of registration and insurance after he had requested an attorney. The court held that the Municipality [\*4] had provided all relevant discovery and that Collier did not have a right to counsel because he was "neither being interrogated, nor was he in custody." The court found Collier guilty of violating AMC 09.26.030. This appeal followed.

#### *Discussion*

*Collier's claim that his right to counsel and privilege against self-incrimination were violated during the traffic stop*

Collier claims that the traffic stop was a "constitutional seizure" that entitled him to invoke his *Fifth Amendment* right to assistance of counsel. He asserts that, after he told the police he was invoking his right to counsel, the police could not require him to produce his driver's license until his counsel arrived on the scene. n2

n2 Collier also claims that his rights to counsel and his privilege against self-incrimination were violated when the officers demanded his registration and proof of insurance. We have not addressed this claim because we do not see how proof of registration or insurance could be used against Collier as evidence of speeding.

[\*5]

We find no merit to this claim. [HN1] The right to counsel under the *Fifth Amendment* only arises during custodial interrogation, and Collier concedes he was not in custody for purposes of *Miranda v. Arizona*. n3 We agree that Collier was not in *Miranda* custody. Routine traffic stops generally do not constitute *Miranda* custody and thus do not trigger the right to counsel. n4 Here, Officer Conley stopped Collier, asked for his license and proof of registration and insurance, and then cited him for speeding. There is no evidence that this was anything other than a routine traffic stop. Because Collier was not in custody, Officer Conley did not violate Collier's *Fifth Amendment* right to counsel when he asked for Collier's driver's license. n5

n3 *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966); *see also Berkemer v. McCarty*, 468 U.S. 420, 439-43, 104 S. Ct. 3138, 3150-52, 82 L. Ed. 2d 317 (1984); *Clark v. Anchorage*, 112 P.3d 676, 678-79 & n.4 (Alaska App. 2005).

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To the extent that Collier may be asserting that his *Sixth Amendment* right to assistance of counsel was violated, we recognized in *Thiel v. State* n6 that [HN2] the *Sixth Amendment* right to counsel attaches "only upon the commencement

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Finally, Collier appears to claim that Officer Conley violated his privilege against self-incrimination by demanding his driver's license. [HN3] The *Fifth Amendment of the United States Constitution* and *article 1, section 9 of the Alaska Constitution* provide that no person shall be compelled in any criminal proceeding to be a witness against himself.

[HN4] Alaska law requires motorists to have in their possession a valid driver's license and to present that license for inspection upon demand by a peace officer. n8 Collier argues that requiring him to present his license violated his privilege against compulsory self-incrimination because it identified him for the purpose of prosecution.

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We have also held that [HN5] the Fifth Amendment privilege against compulsory self-incrimination does not extend to the requirement that motorists produce a driver's license -- and thereby identify themselves for purposes of prosecution. n14 Officer Conley, therefore, did not violate Collier's privilege against self-incrimination when he demanded that Collier produce his driver's license.

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Collier argues that all the information he requested should have been disclosed because it would have had a direct bearing on the trial. We overturn discovery orders only for abuse of discretion. n15

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[HN7] Magistrate Cole had discretion under Criminal Rule 16(b)(7) to order the disclosure of "other relevant material and information." But she correctly found that "none of the other items requested are either [\*12] relevant, within the agency and control of the prosecutor's office, nor required as obligatory discovery under Rule 16." The only relevant information within the Municipality's control (the ticket, the laser certification, Officer Conley's training certificate for operating the laser, the video recording of the traffic stop, and the dispatch communications) was provided or made available to Collier. The rest was either nonexistent, irrelevant, or publicly available. None had a tendency to negate his guilt. n16 Magistrate Cole therefore did not abuse her discretion in refusing to order additional discovery. n17

n16 See *Scott v. State*, 519 P.2d 774, 778 (Alaska 1974).

n17 See *R.E.*, 878 P.2d at 1345; *Linne*, 674 P.2d at 1354-55.

*Collier's claim that Criminal Rule 16 is unconstitutional*

In passing, Collier argues that Criminal Rule 16 is unconstitutional. His entire argument, raised only in his conclusion, is as follows:

[T]his court should hold [\*13] that Criminal Rule 16(a) is unconstitutional, as the withholding of any inculpatory or exculpatory evidence material from the Accused must be disclosed and under no circumstance can evidence be withheld to protect persons (the State of Alaska), protect effective law enforcement (Alaska State Troopers, Anchorage Police Department and other Police Departments and Police) and the adversary system (Judges, Attorneys, Prosecutors and other court personnel) or any other entity.

Collier appears to be arguing that Criminal Rule 16(a) unconstitutionally limits discovery by providing that discovery should be as full and free as possible "consistent with protection of persons, effective law enforcement, and the adversary system." But he does not cite any legal authority for this position. He also does not show how he was prejudiced. As noted above, Collier received all relevant discovery. n18

n18 *See Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991).

*Conclusion*

Collier's [\*14] conviction is AFFIRMED.

12 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**THE PEOPLE, Plaintiff and Respondent, v. MICHAEL F. ODOM, Defendant and Appellant.**

**A098627**

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,  
DIVISION ONE**

***2003 Cal. App. Unpub. LEXIS 5541***

**June 6, 2003, Filed**

**NOTICE:** [\*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

**PRIOR HISTORY:** Napa County. Super. Ct. No. 101214.

**DISPOSITION:** Affirmed.

**CORE TERMS:** blood-alcohol, detention center, alcohol, probative value, breath sample, breath, sobriety, driving, testing, mouth, admissibility, noncompliance, prejudicial, regulations, misleading, abused, concentration, inaccuracy, invalid, beer, substantially outweighed, prejudicial impact, motion to exclude, motion in limine, exclude evidence, undue prejudice, et seq, alcohol-screening, foundational, prerequisites

**JUDGES:** Swager, J. We concur: Marchiano, P. J., Stein, J.

**OPINION BY:** Swager

**OPINION:**

Michael F. Odom appeals a judgment sentencing him to probation for a period of five years, with a condition of one year in county jail, following convictions for driving under the influence of alcohol. We affirm.

**PROCEDURAL BACKGROUND**

An information filed on June 28, 2000, in Napa County charged appellant with two counts of driving under the influence of alcohol in violation of *Vehicle Code section 23152*, subdivision (a) and subdivision (b). It alleged that the offenses were punishable as a felony by reason of a prior conviction described in *Vehicle Code section 23550.5*.

Appellant pled not guilty.

Prior to trial, appellant filed a motion in limine to exclude evidence of a preliminary [\*2] alcohol-screening (PAS) test and requested a hearing under *Evidence Code section 402*, subdivision (b). The trial court denied the motion to exclude the evidence after conducting the requested hearing on the first day of trial.

Following two days of testimony, the jury found appellant guilty as charged. In a separate bifurcated proceeding, the trial court found the allegation pursuant to *Vehicle Code section 23550.5* to be true. On March 22, 2002, the trial court suspended imposition of sentence and granted probation for a period of five years on the condition, among others, that appellant spend one year in county jail.

## FACTUAL BACKGROUND

A California Highway Patrol officer, Brian Compton, testified that at 5:35 p.m. on April 11, 2000, he was driving south on a two-lane road in Napa County and saw a red Jeep traveling at an excessive rate of speed in the opposite direction. When he obtained a radar reading showing that the vehicle was traveling 78 miles per hour in a 55-miles-per-hour zone, he made a U-turn and activated his overhead lights. The vehicle stopped by turning into a driveway. Officer Compton identified appellant as [\*3] the driver of the vehicle.

As he approached the window of the driver's seat, officer Compton smelled the odor of alcohol and saw an open 24-ounce bottle of beer on the floor. He asked appellant if he had anything alcoholic to drink. Appellant replied that he drank a 24-ounce can of beer approximately an hour earlier at 4:30 p.m. Officer Compton observed that appellant's speech was low and slurred and his eyes red and watery and that he was unsteady on his feet as he left the vehicle. He asked appellant a standard series of questions to assess his physical condition and then administered five field sobriety tests intended to measure motor control and mental concentration. Appellant did poorly on all the tests.

Following the field sobriety tests, officer Compton asked appellant to perform two preliminary alcohol screening device tests. The first test, performed at 5:47 p.m. indicated a blood-alcohol content of 0.101; the second test performed at 5:49 indicated a blood-alcohol content of 0.102. Officer Compton then arrested appellant and took him to the Napa County Detention Center. Upon being told he was required to take a blood-alcohol test, appellant chose to take a breath test using [\*4] an Intoxilyzer 5000. Before administering the test, officer Compton observed appellant for 15 minutes. Appellant provided his first breath sample at 6:33, which showed a blood-alcohol content of 0.09. A second breath sample registered as invalid on the machine. A third breath sample given at 6:35 again indicated a blood-alcohol content of 0.09.

Two other witnesses presented testimony supporting the reliability of the two breath tests. Officer Warren Bullis testified that he was responsible for maintenance and calibration of PAS devices in the Napa area. He had tested the PAS device used in appellant's test on April 7, 2000, and again on April 14, 2000, and found that it was working properly. A criminalist, Michael Potts, testified concerning the accuracy and significance of blood-alcohol testing. In his opinion, the blood-alcohol test results at the county detention center confirmed the field observations and PAS test taken an hour earlier.

In his defense, appellant presented the testimony of a forensic toxicologist, Jeffrey Zehnder, who explored possible inaccuracies and uncertainties in the two breath tests and the field sobriety tests.

## DISCUSSION

In his only assignment of [\*5] error, appellant maintains that the trial court erred in denying his motion to exclude the results of the PAS tests. The motion in limine objected to the admission of this evidence on multiple grounds, including noncompliance with *California Code of Regulations, title 17, section 1215* et seq., lack of foundation under *People v. Adams (1976) 59 Cal. App. 3d 559, 131 Cal. Rptr. 190*, and the discretionary authority under *Evidence Code*

*section 352* to exclude time-consuming, prejudicial, confusing, and misleading evidence. In this appeal, appellant now argues only that the trial court abused its discretion in failing to exclude the evidence under *Evidence Code section 352*.

### 1. Standard of Review

*Evidence Code section 352* confers on the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Evidence is substantially more prejudicial than probative [\*6] [within the meaning of section 352] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal. 4th 690, 724, 996 P.2d 46.)

"Under *Evidence Code section 352*, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1124-1125, 885 P.2d 1.) n1

n1 In his opening brief, appellant complains that the trial court did not "formally balance" the probative and prejudicial effects of the evidence, apparently suggesting that the court must make a formal statement on the record balancing the probative value of the evidence against its prejudicial impact. Though language in certain early cases can be read as supporting appellant's position, it is now established that the trial court is not required "to place on the record the process by which it concluded that the probative value of the evidence outweighed its prejudicial impact, . . ." (*People v. Catlin* (2001) 26 Cal. 4th 81, 122; *People v. Waidla*, *supra*, 22 Cal. 4th 690, 724, fn. 6; *People v. Mickey* (1991) 54 Cal. 3d 612, 656, 286 Cal. Rptr. 801, 818 P.2d 84.)

[\*7]

### 2. Legal Background

Under *Vehicle Code section 23612*, subdivision (a), any person who drives a motor vehicle is deemed to have given consent to chemical testing of his blood or breath for the purpose of determining his blood-alcohol content, if lawfully arrested for violation of *Vehicle Code section 23152*. In addition, section 23612, subdivision (h), authorizes an officer at the scene of the investigation to use a preliminary alcohol-screening test, or PAS test, which will indicate the "concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of Section . . . 23152 . . . . [The PAS test is to be used as] a field sobriety test and . . . as a further investigative tool." It does not satisfy a person's obligation to submit to a chemical or blood test under the implied consent law, and before administering the PAS test, an officer "shall advise the person [under investigation] of that fact and of the person's right to refuse to take the [test]." (*Veh. Code*, § 23612, subd. (i).)

As explained in *People v. Bury* (1996) 41 Cal. App. 4th 1194, 1201, [\*8] a PAS test is not a new scientific procedure that would require a *Kelly/Frye* hearing to establish the admissibility of the test results. In fact, "breath tests to determine blood-alcohol concentration have long been recognized by decisional law in California as scientifically valid." (*Id.* at p. 1201.) For more than 25 years, the administration of breath-alcohol tests has been regulated by *California Code of Regulations, title 17, section 1221 et seq.*

The leading decision on the admission of breath test evidence, *People v. Adams* (1976) 59 Cal. App. 3d 559, 131 Cal. Rptr. 190, authorized the admission of test results upon a showing of compliance with the title 17 regulations (*People v. Adams*, *supra*, at p. 567) or, alternatively, upon proof of three foundational prerequisites: "(1) the particular

apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified." (*Id.* at p. 561.) In *People v. Williams* (2002) 28 Cal. 4th 408, the court followed the *Adams* decision in upholding the admission of [\*9] test results from use of a PAS device. Though there was evidence of noncompliance with certain title 17 regulations, the court held that the trial court acted within its discretion in admitting the test results in view of evidence supporting a finding that the alternative foundational prerequisites for admission of the test were satisfied. (*People v. Williams, supra*, at p. 417.) Noncompliance with the regulations affected "the weight of the evidence, not its admissibility." (*Id.* at p. 414.)

In this appeal, appellant does not contest the admissibility of the PAS test results under the *Adams-Bury-Williams* line of decisions. He maintains only that the trial court abused its discretion in refusing to exclude the evidence under *Evidence Code section 352* on the ground that its probative value was substantially outweighed by the probability of prejudice. He notes that the *Williams* decision did not present an issue under section 352 since the defendant refused the implied-consent tests and the PAS test was therefore the only evidence of blood-alcohol content. In contrast, the PAS test here was duplicative and subject to a proper [\*10] objection in appellant's in limine motion.

Appellant argues that the admission of the PAS test results was highly prejudicial because it appeared to confirm the testing at the county detention center, which indicated a marginal level of intoxication. He maintains that the test results in fact were cumulative evidence that had minimal corroborative value because the results were subject to a much higher range of inaccuracy than the later testing of appellant's breath sample at the detention center. The defense expert testified that the PAS device was routinely subject to a 0.02 range of inaccuracy and could be still more inaccurate where the breath sample was contaminated with mouth alcohol. Unlike the Intoxilyzer 5000 used at the detention center, the PAS device lacked a function known as a "slope detector" designed to identify misleading test results due to mouth alcohol. The presence of an open beer can raised the possibility of such contamination, despite appellant's denial of having consumed alcohol in the previous hour, as did the invalid test at the detention center. On the arresting officer's own admission, the PAS test was administered in a more informal manner than the later [\*11] Intoxilyzer 5000 test.

The prosecution, however, presented other evidence tending to support the probative value of the PAS test result. An expert witness, Michael Potts, testified that the two breath tests indicated a declining level of blood alcohol, reflecting the liver's ability to eliminate alcohol from the blood, which was consistent with appellant's own account that he had consumed alcohol an hour earlier in San Francisco. In his opinion, the PAS test tended to corroborate the other evidence of intoxication -- the field sobriety tests and the laboratory testing at the detention center. The invalid test at the detention center could not have been the result of mouth alcohol because a further test, performed within a minute, confirmed the first test result.

On this record, we see no basis for finding that the trial court abused its discretion in overruling appellant's objection based on *Evidence Code section 352*. The objection was essentially based on the supposition that the test results may have been contaminated by mouth alcohol. The trial court could reasonably accept evidence rebutting this claim. In the exercise of its discretion, the court was free [\*12] to give credence to the prosecution's expert testimony, particularly in light of the fact that this testimony was consistent with appellant's own statements at the time of the field investigation.

The judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Stein, J.

13 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**THE PEOPLE, Plaintiff and Respondent, v. MICHAEL F. ODOM, Defendant and Appellant.**

**A098627**

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,  
DIVISION ONE**

***2003 Cal. App. Unpub. LEXIS 5541***

**June 6, 2003, Filed**

**NOTICE:** [\*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

**PRIOR HISTORY:** Napa County. Super. Ct. No. 101214.

**DISPOSITION:** Affirmed.

**CORE TERMS:** blood-alcohol, detention center, alcohol, probative value, breath sample, breath, sobriety, driving, testing, mouth, admissibility, noncompliance, prejudicial, regulations, misleading, abused, concentration, inaccuracy, invalid, beer, substantially outweighed, prejudicial impact, motion to exclude, motion in limine, exclude evidence, undue prejudice, et seq, alcohol-screening, foundational, prerequisites

**JUDGES:** Swager, J. We concur: Marchiano, P. J., Stein, J.

**OPINION BY:** Swager

**OPINION:**

Michael F. Odom appeals a judgment sentencing him to probation for a period of five years, with a condition of one year in county jail, following convictions for driving under the influence of alcohol. We affirm.

**PROCEDURAL BACKGROUND**

An information filed on June 28, 2000, in Napa County charged appellant with two counts of driving under the influence of alcohol in violation of *Vehicle Code section 23152*, subdivision (a) and subdivision (b). It alleged that the offenses were punishable as a felony by reason of a prior conviction described in *Vehicle Code section 23550.5*.

Appellant pled not guilty.

Prior to trial, appellant filed a motion in limine to exclude evidence of a preliminary [\*2] alcohol-screening (PAS) test and requested a hearing under *Evidence Code section 402*, subdivision (b). The trial court denied the motion to exclude the evidence after conducting the requested hearing on the first day of trial.

Following two days of testimony, the jury found appellant guilty as charged. In a separate bifurcated proceeding, the trial court found the allegation pursuant to *Vehicle Code section 23550.5* to be true. On March 22, 2002, the trial court suspended imposition of sentence and granted probation for a period of five years on the condition, among others, that appellant spend one year in county jail.

## FACTUAL BACKGROUND

A California Highway Patrol officer, Brian Compton, testified that at 5:35 p.m. on April 11, 2000, he was driving south on a two-lane road in Napa County and saw a red Jeep traveling at an excessive rate of speed in the opposite direction. When he obtained a radar reading showing that the vehicle was traveling 78 miles per hour in a 55-miles-per-hour zone, he made a U-turn and activated his overhead lights. The vehicle stopped by turning into a driveway. Officer Compton identified appellant as [\*3] the driver of the vehicle.

As he approached the window of the driver's seat, officer Compton smelled the odor of alcohol and saw an open 24-ounce bottle of beer on the floor. He asked appellant if he had anything alcoholic to drink. Appellant replied that he drank a 24-ounce can of beer approximately an hour earlier at 4:30 p.m. Officer Compton observed that appellant's speech was low and slurred and his eyes red and watery and that he was unsteady on his feet as he left the vehicle. He asked appellant a standard series of questions to assess his physical condition and then administered five field sobriety tests intended to measure motor control and mental concentration. Appellant did poorly on all the tests.

Following the field sobriety tests, officer Compton asked appellant to perform two preliminary alcohol screening device tests. The first test, performed at 5:47 p.m. indicated a blood-alcohol content of 0.101; the second test performed at 5:49 indicated a blood-alcohol content of 0.102. Officer Compton then arrested appellant and took him to the Napa County Detention Center. Upon being told he was required to take a blood-alcohol test, appellant chose to take a breath test using [\*4] an Intoxilyzer 5000. Before administering the test, officer Compton observed appellant for 15 minutes. Appellant provided his first breath sample at 6:33, which showed a blood-alcohol content of 0.09. A second breath sample registered as invalid on the machine. A third breath sample given at 6:35 again indicated a blood-alcohol content of 0.09.

Two other witnesses presented testimony supporting the reliability of the two breath tests. Officer Warren Bullis testified that he was responsible for maintenance and calibration of PAS devices in the Napa area. He had tested the PAS device used in appellant's test on April 7, 2000, and again on April 14, 2000, and found that it was working properly. A criminalist, Michael Potts, testified concerning the accuracy and significance of blood-alcohol testing. In his opinion, the blood-alcohol test results at the county detention center confirmed the field observations and PAS test taken an hour earlier.

In his defense, appellant presented the testimony of a forensic toxicologist, Jeffrey Zehnder, who explored possible inaccuracies and uncertainties in the two breath tests and the field sobriety tests.

## DISCUSSION

In his only assignment of [\*5] error, appellant maintains that the trial court erred in denying his motion to exclude the results of the PAS tests. The motion in limine objected to the admission of this evidence on multiple grounds, including noncompliance with *California Code of Regulations, title 17, section 1215* et seq., lack of foundation under *People v. Adams (1976) 59 Cal. App. 3d 559, 131 Cal. Rptr. 190*, and the discretionary authority under *Evidence Code*

*section 352* to exclude time-consuming, prejudicial, confusing, and misleading evidence. In this appeal, appellant now argues only that the trial court abused its discretion in failing to exclude the evidence under *Evidence Code section 352*.

### 1. Standard of Review

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As explained in *People v. Bury* (1996) 41 Cal. App. 4th 1194, 1201, [\*8] a PAS test is not a new scientific procedure that would require a *Kelly/Frye* hearing to establish the admissibility of the test results. In fact, "breath tests to determine blood-alcohol concentration have long been recognized by decisional law in California as scientifically valid." (*Id.* at p. 1201.) For more than 25 years, the administration of breath-alcohol tests has been regulated by *California Code of Regulations, title 17, section 1221 et seq.*

The leading decision on the admission of breath test evidence, *People v. Adams* (1976) 59 Cal. App. 3d 559, 131 Cal. Rptr. 190, authorized the admission of test results upon a showing of compliance with the title 17 regulations (*People v. Adams*, *supra*, at p. 567) or, alternatively, upon proof of three foundational prerequisites: "(1) the particular

apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified." (*Id.* at p. 561.) In *People v. Williams* (2002) 28 Cal. 4th 408, the court followed the *Adams* decision in upholding the admission of [\*9] test results from use of a PAS device. Though there was evidence of noncompliance with certain title 17 regulations, the court held that the trial court acted within its discretion in admitting the test results in view of evidence supporting a finding that the alternative foundational prerequisites for admission of the test were satisfied. (*People v. Williams, supra*, at p. 417.) Noncompliance with the regulations affected "the weight of the evidence, not its admissibility." (*Id.* at p. 414.)

In this appeal, appellant does not contest the admissibility of the PAS test results under the *Adams-Bury-Williams* line of decisions. He maintains only that the trial court abused its discretion in refusing to exclude the evidence under *Evidence Code section 352* on the ground that its probative value was substantially outweighed by the probability of prejudice. He notes that the *Williams* decision did not present an issue under section 352 since the defendant refused the implied-consent tests and the PAS test was therefore the only evidence of blood-alcohol content. In contrast, the PAS test here was duplicative and subject to a proper [\*10] objection in appellant's in limine motion.

Appellant argues that the admission of the PAS test results was highly prejudicial because it appeared to confirm the testing at the county detention center, which indicated a marginal level of intoxication. He maintains that the test results in fact were cumulative evidence that had minimal corroborative value because the results were subject to a much higher range of inaccuracy than the later testing of appellant's breath sample at the detention center. The defense expert testified that the PAS device was routinely subject to a 0.02 range of inaccuracy and could be still more inaccurate where the breath sample was contaminated with mouth alcohol. Unlike the Intoxilyzer 5000 used at the detention center, the PAS device lacked a function known as a "slope detector" designed to identify misleading test results due to mouth alcohol. The presence of an open beer can raised the possibility of such contamination, despite appellant's denial of having consumed alcohol in the previous hour, as did the invalid test at the detention center. On the arresting officer's own admission, the PAS test was administered in a more informal manner than the later [\*11] Intoxilyzer 5000 test.

The prosecution, however, presented other evidence tending to support the probative value of the PAS test result. An expert witness, Michael Potts, testified that the two breath tests indicated a declining level of blood alcohol, reflecting the liver's ability to eliminate alcohol from the blood, which was consistent with appellant's own account that he had consumed alcohol an hour earlier in San Francisco. In his opinion, the PAS test tended to corroborate the other evidence of intoxication -- the field sobriety tests and the laboratory testing at the detention center. The invalid test at the detention center could not have been the result of mouth alcohol because a further test, performed within a minute, confirmed the first test result.

On this record, we see no basis for finding that the trial court abused its discretion in overruling appellant's objection based on *Evidence Code section 352*. The objection was essentially based on the supposition that the test results may have been contaminated by mouth alcohol. The trial court could reasonably accept evidence rebutting this claim. In the exercise of its discretion, the court was free [\*12] to give credence to the prosecution's expert testimony, particularly in light of the fact that this testimony was consistent with appellant's own statements at the time of the field investigation.

The judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Stein, J.

14 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**Theodore BEST, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff  
Below, Appellee**

[NO NUMBER IN ORIGINAL]

**Supreme Court of Delaware**

*328 A.2d 141; 1974 Del. LEXIS 317*

**October 31, 1974**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a decision of a Superior Court (Delaware), which affirmed his conviction before a justice of the peace for driving a motor vehicle while under the influence of intoxicating liquor in violation of *Del. Code Ann. tit. 21, § 4176*.

**OVERVIEW:** Defendant contested his conviction for drunk driving by arguing that evidence of his alcohol level, as taken by the Omicron Intoxilizer, should not have been admitted into evidence without a sufficient foundation being laid regarding the reliability of this relatively new device. Defendant argued that it was error to admit the evidence based on the testimony of only the police officer in charge of the records of the device, without any evidence from the state chemist. The court affirmed the conviction. The court found that in prior case law the superior court had heard evidence concerning the function and reliability of the device from the state chemist and upon such evidence had ruled that the device was sufficiently reliable to permit the admission of its results. The court considered this unappealed decision *stare decisis* on the issue of the reliability of the device.

**OUTCOME:** The court affirmed the ruling admitting evidence of defendant's alcohol level and the judgment against defendant for driving a motor vehicle while under the influence of intoxicating liquor.

**CORE TERMS:** breath, testing, motor vehicle, reliable, intoxication, influence of intoxicating liquor, trial de novo, authorize, percentage of alcohol, police officer, omicron, reliability, so-called, accuracy, arrest, blood

**LexisNexis(R) Headnotes**

***Evidence > Scientific Evidence > Blood Alcohol***

[HN1] The Omicron Intoxilizer device is a reliable and trustworthy method of testing the percentage of alcohol present in an accused's system at the time of his submission to such a test.

**COUNSEL:** [\*\*1]

Karl Haller, Asst. Public Defendant, Georgetown, for defendant below, appellant.

Lawrence Steele, II, Deputy Atty. Gen., Georgetown, for plaintiff below, appellee.

**JUDGES:**

Herrmann, C.J., Duffy, J., and Marvel, Vice Chancellor.

**OPINION BY:**

MARVEL

**OPINION:**

[\*142] Following his conviction before a Justice of the Peace on a charge of driving a motor vehicle while under the influence of intoxicating liquor, 21 Del.C. § 4176, the appellant took an appeal to the Superior Court, where, after a trial de novo, he was again convicted of the same offense. The sentence imposed was sixty days in jail and a fine of \$500.00. The present appeal ensued.

Introduced at the trial de novo in the Superior Court under the so-called Business Records Statute n1 was evidence of alcoholic intoxication on the part of the appellant at the time of his arrest deemed sufficient to warrant conviction. Such evidence was derived from a test of his breath through its analysis by means of a device known as an Omicron Intoxilizer. Prior to its testing of appellant's breath the device in question has been allegedly cleared and checked for accuracy by the State Chemist. The device purports to calculate the percentage [\*\*2] of alcohol present in a person's breath.

n1 10 Del.C. § 4310.

The State also introduced so-called calibration tests to the effect that the device in issue was operating properly both before and after samples of appellant's breath had been taken. And while the State Chemist was not present at appellant's trial, the police officer in charge of the records of the Omicron Intoxilizer, whereby appellant's breath was tested, testified as to its proper operation and condition at the time of appellant's arrest and testing. In addition, the arresting officer testified that while on patrol he saw an over-turned motor vehicle at the side of the road in which he found appellant in an apparently intoxicated condition. Appellant was thereupon arrested and taken to police headquarters where the Omicron Intoxilizer test was administered.

Appellant now contends that unlike the analysis of blood samples or the use of a [\*143] drunkometer for the detection of intoxication, the device in question represents a relatively [\*\*3] recent technique, that it has not been established as acceptable in this jurisdiction, and that in submitting the findings of such device as to appellant's alleged intoxication the State failed to introduce expert testimony concerning the reliability of the device, particularly that of the State Chemist explaining the theory of the test and vouching for the accuracy of the device. The evidence of the test and its results was introduced by the police officer in charge of the records of the device over appellant's objection.

In the recent case of *State v. Moore, Del.Super., 307 A.2d 548*, the Superior Court, following the presentation by the State of testimony concerning the theory and workings of the Omicron Intoxilizer device by experts in the fields of chemistry, n2 physics and electronics, concluded that the process was reliable, stating:

". . . I cannot hold under any of the theories advanced by the defendant that it has been shown that

the device is so unreliable so that results obtained by its use are inadmissible as a matter of law. Indeed, there is uncontroverted testimony in the record that the result of the use of the device in question is at least as reliable, and probably [\*\*4] more so, than the method previously used in this State for the same purpose."

n2 The State Chemist was among those who testified at such trial as to the workings and reliability of the omicron intoxilizer.

No appeal was taken in the *Moore* case. We therefore conclude that such ruling constitutes for the Superior Court, at least, a precedent in this State to the effect that [HN1] the Omicron Intoxilizer device is a reliable and trustworthy method of testing the percentage of alcohol n3 present in an accused's system at the time of his submission to such a test. The decision in *Moore* is not attacked by appellant and we express no opinion thereon.

n3 11 Del.C. § 3507 and 21 Del.C. § 4176 both authorize medical or chemical analysis of breath, blood or urine to determine whether or not the driver of a motor vehicle was under the influence of intoxicating liquor. In addition the former statute authorizes a testing of saliva.

[\*\*5]

Accordingly, there being no other Delaware decision on the subject, the trial judge in the instant case was entitled to rely upon the ruling of the Superior Court in *Moore* under the principle of stare decisis. Compare *State v. Moffitt*, 48 Del. 210, 9 Terry 210, 100 A.2d 778, in which the trustworthiness of radar for testing the speed of a motor vehicle was held to have been established.

Finally, we hold that the Business Records Act is applicable in this case, *Johnson v. State*, Del.Sup., 253 A.2d 206. Accordingly, it was not error to admit in evidence thereunder documents showing that the Omicron machine had been checked by the State Chemist although he was not present at the trial.

The judgment below is affirmed.

15 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**Theodore BEST, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff  
Below, Appellee**

[NO NUMBER IN ORIGINAL]

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**OPINION:**

[\*142] Following his conviction before a Justice of the Peace on a charge of driving a motor vehicle while under the influence of intoxicating liquor, 21 Del.C. § 4176, the appellant took an appeal to the Superior Court, where, after a trial de novo, he was again convicted of the same offense. The sentence imposed was sixty days in jail and a fine of \$500.00. The present appeal ensued.

Introduced at the trial de novo in the Superior Court under the so-called Business Records Statute n1 was evidence of alcoholic intoxication on the part of the appellant at the time of his arrest deemed sufficient to warrant conviction. Such evidence was derived from a test of his breath through its analysis by means of a device known as an Omicron Intoxilizer. Prior to its testing of appellant's breath the device in question has been allegedly cleared and checked for accuracy by the State Chemist. The device purports to calculate the percentage [\*\*2] of alcohol present in a person's breath.

n1 10 Del.C. § 4310.

The State also introduced so-called calibration tests to the effect that the device in issue was operating properly both before and after samples of appellant's breath had been taken. And while the State Chemist was not present at appellant's trial, the police officer in charge of the records of the Omicron Intoxilizer, whereby appellant's breath was tested, testified as to its proper operation and condition at the time of appellant's arrest and testing. In addition, the arresting officer testified that while on patrol he saw an over-turned motor vehicle at the side of the road in which he found appellant in an apparently intoxicated condition. Appellant was thereupon arrested and taken to police headquarters where the Omicron Intoxilizer test was administered.

Appellant now contends that unlike the analysis of blood samples or the use of a [\*143] drunkometer for the detection of intoxication, the device in question represents a relatively [\*\*3] recent technique, that it has not been established as acceptable in this jurisdiction, and that in submitting the findings of such device as to appellant's alleged intoxication the State failed to introduce expert testimony concerning the reliability of the device, particularly that of the State Chemist explaining the theory of the test and vouching for the accuracy of the device. The evidence of the test and its results was introduced by the police officer in charge of the records of the device over appellant's objection.

In the recent case of *State v. Moore, Del.Super., 307 A.2d 548*, the Superior Court, following the presentation by the State of testimony concerning the theory and workings of the Omicron Intoxilizer device by experts in the fields of chemistry, n2 physics and electronics, concluded that the process was reliable, stating:

". . . I cannot hold under any of the theories advanced by the defendant that it has been shown that

the device is so unreliable so that results obtained by its use are inadmissible as a matter of law. Indeed, there is uncontroverted testimony in the record that the result of the use of the device in question is at least as reliable, and probably [\*\*4] more so, than the method previously used in this State for the same purpose."

n2 The State Chemist was among those who testified at such trial as to the workings and reliability of the omicron intoxilizer.

No appeal was taken in the *Moore* case. We therefore conclude that such ruling constitutes for the Superior Court, at least, a precedent in this State to the effect that [HN1] the Omicron Intoxilizer device is a reliable and trustworthy method of testing the percentage of alcohol n3 present in an accused's system at the time of his submission to such a test. The decision in *Moore* is not attacked by appellant and we express no opinion thereon.

n3 11 Del.C. § 3507 and 21 Del.C. § 4176 both authorize medical or chemical analysis of breath, blood or urine to determine whether or not the driver of a motor vehicle was under the influence of intoxicating liquor. In addition the former statute authorizes a testing of saliva.

[\*\*5]

Accordingly, there being no other Delaware decision on the subject, the trial judge in the instant case was entitled to rely upon the ruling of the Superior Court in *Moore* under the principle of stare decisis. Compare *State v. Moffitt*, 48 Del. 210, 9 Terry 210, 100 A.2d 778, in which the trustworthiness of radar for testing the speed of a motor vehicle was held to have been established.

Finally, we hold that the Business Records Act is applicable in this case, *Johnson v. State*, Del.Sup., 253 A.2d 206. Accordingly, it was not error to admit in evidence thereunder documents showing that the Omicron machine had been checked by the State Chemist although he was not present at the trial.

The judgment below is affirmed.

16 of 195 DOCUMENTS

**STATE OF DELAWARE v. RICHARD SABOL****Cr. A. No.: 9902001043****COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE***1999 Del. C.P. LEXIS 31***September 19, 1999, Submitted****September 23, 1999, Decided****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant brought a motion to suppress arguing that a police officer did not have probable cause to believe that defendant was operating his motor vehicle in violation of *Del. Code Ann. tit. 21, § 4177(a)*.

**OVERVIEW:** Defendant brought a motion to suppress. Defendant argued that police officer did not have probable cause to believe that defendant was operating his motor vehicle in violation of *Del. Code Ann. tit. 21, § 4177(a)*. The court concluded that the record supported a finding of probable cause. Defendant had failed several field sobriety tests administered to him by the police officer. Thus, the court held that the totality of the circumstances gave the police officer probable cause to suspect that defendant was driving under the influence of alcohol or drugs.

**OUTCOME:** The court denied defendant's motion to suppress, holding that the record supported the police officer's belief that probable cause existed to conclude that defendant was driving under the influence of alcohol or drugs.

**CORE TERMS:** probable cause, alcohol, breath, blood, walk, driving, odor of alcohol, motor vehicle, finger, nose, lane, alcohol concentration, bloodshot, correctly, driver, clues, heel, toe, police officer, concentration, performing, swayed, missed, administered, influence of alcohol, amount of alcohol, alphabet, alcoholic, demeanor, moderate

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Arrests > Probable Cause*

*Criminal Law & Procedure > Arrests > Warrantless Arrest*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview*

[HN1] A police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Arrests > Probable Cause*

[HN2] Probable cause is an elusive concept which is not subject to precise definition. It lies, somewhere between

suspicion and sufficient evidence to convict and exists when the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Specifically, when there is probable cause that an offense which involves driving under the influence has been committed, a police officer may take all of the steps which the officer took in this case.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN3] A police officer has probable cause to believe a defendant has violated *Del. Code Ann. tit. 21, § 4177* when the officer possesses information which would warrant a reasonable man in believing that such a crime has been committed.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN4] A finding of probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not.

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN5] The possibility there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Particularity***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN6] Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

**COUNSEL:** [\*1] R. David Favata, Esquire, Deputy Attorney General, Department of Justice, Wilmington, DE, Attorney for State.

Louis B. Ferrara, Esquire, Louis B. Ferrara, P. A., Wilmington, DE, Attorney for Defendant.

**JUDGES:** JOHN K. WELCH, ASSOCIATE JUDGE.

**OPINION BY:** JOHN K. WELCH

**OPINION:**

**ORDER AND DECISION ON DEFENDANT'S MOTION TO SUPPRESS**

On Monday, September 19, 1999, the Court heard defendant's Motion to Suppress which was previously filed and docketed with the Court Clerk on April 26, 1999. After carefully reviewing the evidence presented and testimony received, the Court finds the following facts to be supported by the trial record.

**The Facts**

Corporal Lawrence T. Coyle ("Officer" or "Trooper Coyle") is employed by the Delaware State Police and was so employed on January 30, 1999 at 1:40 a.m. on patrol in the vicinity of Route 202 in New Castle County, Delaware. At

that location, Trooper Coyle testified he observed a 1998 Olds Caravan, gold in color, traveling northbound on Route 202. Officer Coyle testified the vehicle appeared to be travelling at a "high rate of speed." Officer Coyle testified he had been stopped in the left turn lane at Foulk Road southbound on Route 202 when [\*2] he observed the defendant's vehicle and therefore activated his Stalker Radar in a stationery mode and received a reading. Officer Coyle testified that he is trained and certified in the use of the Stalker Radar device in 1989 at Police Headquarters and has received an 8-hour class at the Academy on the Stalker unit.

At this point, through direct examination of Office Coyle, the State attempted to lay a foundation to lay the necessary foundation to establish that the Stalker radar unit in question used. Defendant's counsel requested voir dire of the witness.

It was established in the record that Mr. Willie Thomas of the Division of Communications was the author of the calibration log. No actual logs were presented to the Court for review. Nor were the originals of the certification logs produced in Court. Officer Coyle testified that he had never met Mr. Thomas of the Division of Communications. Officer Coyle testified he never observed Mr. Thomas make any contemporaneous entries into the actual log book and had not spoken with Mr. Thomas. He could not state with factual specificity any details of Mr. Thomas' training and expertise in order to certify that the calibration of [\*3] the Stalker unit or the certificate of accuracy was correct. D.R.E. 803(6). After further argument on the issue, the Court made a, evidentiary ruling that pursuant to D.R.E. 803(6) that the records were not admissible under the Business Records Rule.

Officer Coyle testified that the posted speed limit on Route 202 at the subject location was 45 miles per hour. He testified based upon his training and experience the defendant was exceeding the speed limit by a "large degree."

Officer Coyle testified that he made a U-turn and proceeded northbound and got behind the defendant's vehicle and observed erratic driving. Officer Coyle testified the defendant could not keep his motor vehicle within the lane and Officer Coyle therefore activated his emergency equipment. Officer Coyle testified the defendant made an abrupt turn into the Fairfax Shopping Center. At all times, Officer Coyle testified he was approximately fifty (50) feet from the defendant's vehicle.

Officer Coyle testified that the defendant "moved into the center lane" and "back in the right lane with his wheels crossing the dotted line, approximately two to three times." Officer Coyle identified the defendant in the Courtroom. [\*4]

Officer Coyle testified that there was "very light" traffic conditions as far as traffic flow. He testified that possibly "one or two cars" were driving on Route 202 at the time of the traffic stop of the defendant. Officer Coyle testified that he has had no previously maintenance problems with his speedometer in his 1998 Ford Crown Victoria patrol car.

Next, Officer Coyle testified that he contacted the defendant in his driver's seat of his motor vehicle and could detect a "strong to moderate" odor of alcoholic beverages. Officer Coyle testified the defendant's eyes were "very blood shot" and his speech was "slurred." Officer Coyle testified he advised defendant he was stopped for speeding. The defendant produced his driver's license, insurance and registration card "with no difficulty." Officer Coyle testified at that time defendant's eyes were also "glassy" and that the defendant informed him when questioned that he said "I had two beers."

#### A. The Alphabet Test

Officer Coyle testified he advised the defendant he was going to give him a standard field sobriety test. First, Officer Coyle testified that he fully explained the alphabet test and instructed the defendant to [\*5] state, "A to Z" in a clear concise voice. Officer Coyle testified while he started to write the numbers on his hand that the defendant missed, the defendant "missed and transposed too numerous letters to write down." Based upon this performance Officer Coyle testified the defendant failed the alphabet test.

#### B. The HGN Test

Next, Officer Coyle testified he administered the HGN test to the defendant. After a proper foundation was laid by the State, the Court ruled that the prosecutor had met the foundation requirements required in *Zimmerman v. State, Del. Supr.*, 693 A.2d 311 (1997). n1

n1 Footnote no. 8 in *Zimmerman* sets forth the requirements that must be laid by the investigating officer that the HDN test was performed in accordance with the National Highway Traffic Safety Administration ("NHTSA") standards which inter alia include a correlation between alcohol ingestion and nysgatmus; how other possible causes might be marked; what margin of error has been shown in statistical surveys; and cause of observed symptoms of staginess. Without going into the factual record following legal argument, the Court was satisfied that the State laid such a proper foundation in the trial record.

[\*6]

Officer Coyle testified that the defendant had four (4) or more "clues" and that the HGN test was 65% reliable with a 35% error that the defendant may be impaired or under the influence.

#### C. Walk and Turn Test

Next, Officer Coyle administered the walk and turn test to the defendant. Officer Coyle testified he instructed the defendant to stand facing him, and walk heel to toe for nine (9) steps; make a pivot turn and walk nine (9) steps backward. He explained to the defendant that he was instructed to keep his "arms down at all times," and the defendant indicated he understood that test.

Officer Coyle testified the first nine (9) steps, the defendant "wobbled, swayed, and had poor balance." On the third step Officer Coyle testified the defendant stepped off the line, and there was "no heel to toe" on the second step.

Officer Coyle testified that the defendant correctly took a pivot step and turned "okay," although the turn was "slow and hesitant." Officer Coyle testified that on the second nine (9) steps backward the defendant also "wobbled and swayed" and stepped off the line on the tenth step, and took eleven (11) steps instead of nine (9) steps. Based upon this performance, [\*7] Officer Coyle testified the defendant failed the walk and turn test.

#### D. One-Legged Stand Test

Next, defendant was asked to perform the one-legged stand. At this point, Officer Coyle testified the defendant stated, "I can't do it because I have a hernia." Officer Coyle testified that prior to the administration of all field tests at the scene he asked the defendant whether he had "any injuries" or "disabilities" that would prevent him from performing the field tests and the defendant had previously indicated he "did not."

#### E. Finger to Nose Test

Next, Officer Coyle administered the finger-to-nose test. He advised the defendant through instructions to stand with his feet together, eyes closed, with his palms upward and instructed to touch the tip of the finger on the tip of his nose that he touches. Officer Coyle testified the defendant's body swayed "in the beginning of the test" but the defendant completed the right and left index finger correctly.

Officer Coyle testified that in his eleven (11) years of experience he has dealt with "300 D.U.I.s and approximately thousands of individuals under the influence." He testified he looks at such factors that include demeanor, [\*8] ability to communicate, ability to follow instructions and breath, speech, condition of the eyes, and moderate to strong odors of

alcohol. Based upon his experience Officer Coyle concluded that he believed the defendant was under the influence and his ability to drive a motor vehicle was impaired. Officer Coyle testified he based this conclusion on the odor of alcoholic beverages on the defendant, the field test results, defendant's demeanor, and his bloodshot, glassy eyes.

On cross-examination Officer Coyle testified that he believed the finger to nose test results were a "draw" because defendant swayed. Officer Coyle conceded that the defendant performed the test and listened to the instructions correctly and touched the tip of his nose with the proper fingers correctly. Officer Coyle testified that the order of the test was alphabet; HGN; walk and turn; and finger to nose. Officer Coyle testified he would have administered the PBT and usually does but could not have the necessary PBT brought to the scene.

Officer Coyle testified that he intended to turn left at Foulk Road and he believed the defendant had a green light because he had a green light. He testified the next light [\*9] on Route 202 would have been Independence Mall and Route 41 respectively. Officer Coyle testified that he put on his emergency equipment after the Route 141 intersection green light at Route 202 and then noticed the defendant move out of lane. Officer Coyle testified the defendant crossed the lane and "the tires went over the lane on each side two to three times." Officer Coyle testified that when he put the emergency equipment on his vehicle he had a basis to stop the defendant who pulled in the "big parking lot at the Acme" at a 45-degree angle. Officer Coyle testified that this was not "a safe place to park" although there was no other traffic around.

Officer Coyle testified he noticed the defendant had a "moderate to strong" odor of alcohol and that his AIR report indicate the eyes were "bloodshot" and "glassy." Officer Coyle testified his AIR report indicated the defendant's speech was "fair, sometimes slurred."

Officer Coyle testified the defendant made a "normal exit" from his motor vehicle. He testified that the field tests were performed in an area some distance away from his motor vehicle and that the defendant had "no trouble when walking normally." n2

n2 This was further explained in the record that the "normal walking" was when defendant was not performing the subject field tests.

[\*10]

Officer Coyle testified that the most "number of clues" a defendant can display when given HGN test is six (6) and that the choices for results of the HGN are zero (0), two (2), four (4), or six (6). He testified that the percent of reliability for HGN test for four is 65% chance the defendant is under the influence or alternatively, 35% not under the influence when four (4) clues are indicated. Officer Coyle testified that the more clues indicated the more accurate the test. Officer Coyle could not testify from his training and experience at the Police Academy what the percentage of accuracy was when six (6) clues are indicated but agreed with defense counsel that it was probably 77%. Officer Coyle testified that he is comfortable in concluding that he followed the NHTSA guidelines in instructing this defendant and performing the HGN test.

Officer Coyle testified that the defendant's clothing was "orderly, blue jeans and white sneakers" and that defendant's face was "normal" and that the attitude was "polite and cooperative" and the defendant's demeanor was "fine."

With regards to the heel to toe test, Officer Coyle testified he could not remember whether the defendant performed [\*11] the test on an imaginary line or on a white line in the parking lot. Officer Coyle reiterated his testimony that the defendant took steps and missed heel to toe on the second step and stepped off the line on the third step and performed the test eight (8) of the nine (9) steps on the line and never raised his arms on the first nine (9) steps. Officer Coyle testified the defendant missed the heel to toe once and stepped off the line on the tenth step.

With regards to the finger-to-nose, Officer Coyle testified the defendant's performance was "even" even though the defendant touched his nose correctly on both tests on his right and left hands.

### The Law

As provided in *Spinks v. State, Del. Supr., 571 A.2d 788 (1990)*, probable cause is defined as follows:

Under Delaware law, [HN1] a police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed. *21 Del. C. § 701; Garner v. State, Del. Supr., 314 A.2d 908, 910 (1973)*. [HN2] Probable cause is an elusive concept which is not subject to precise definition. It lies, 'somewhere between [\*12] suspicion and sufficient evidence to convict' and 'exists when the facts and circumstances within . . . [the officer's] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *State v. Cochran, Del. Supr., 372 A.2d 193, 195 (1977)* (internal quotations omitted); *Thompson v. State, Del. Supr., 539 A.2d 1052, 1055 (1988)*. Specifically, when there is probable cause that an offense which involves driving under the influence has been committed, a police officer may take all of the steps which the officer took in this case. See, *State v. Cooliey, Del. Supr., 457 A.2d 352, 354 (1983)*. (emphasis supplied)

Under *State v. Maxwell, Del. Supr., 624 926, 929-30 (1993)*, probable cause is defined further:[HN3]

[A] police officer has probable cause to believe a defendant has violated *21 Del. C. § 4177* . . . 'when the officer possesses' information which would warrant a reasonable man in believing that [such] a crime has been committed. *Clendeniel v. Voshell, Del. Supr., 562 A.2d 1167, 1170 (1989)* . . . [HN4] A finding of [\*13] probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not. (citation omitted). . . [HN5] the possibility there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. (citation omitted) . . . [HN6] 'probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.' (citation omitted)

See, also *Delaware v. Prouse, 440 U.S. 663 (1979)*; *Coleman v. State, Del. Supr., 562 A.2d 1171, 1174 (1989)*.

### Sec. 4177. Driving a vehicle while under the influence; evidence; arrests; and penalties.

(a) No person shall drive a vehicle:

- (1) When the person is under the influence of alcohol;
- (2) When the person is under the influence of any drug;
- (3) When the person is [\*14] under the influence of a combination of alcohol and any drug;
- (4) When the person's alcohol concentration is .10 or more; or
- (5) When the person's alcohol concentration is, within 4 hours after the time of driving, .10 or more.

(b) In a prosecution for a violation of subsection (a) of this section:

- (1) the fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.
- (2) Repealed.

(3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (1) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

(c) For purposes of subchapter III of Chapter 27 of this title, this section and § 4177B of this title, the following definitions shall apply:

(1) "Alcohol concentration of .10 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .10 or more grams of alcohol per hundred milliliters of blood; or

b. An amount of alcohol in a sample of a person's breath equivalent of .10 or more grams per two hundred ten liters of breath.

(2) "Chemical test" or [\*15] "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

(3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.

(4) "Vehicle" shall include any vehicle as defined in § 101(48) of this title, any off-highway vehicle as defined in § 101(54) of this title and any moped as defined in § 101(53) of this title.

(5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of [\*16] a vehicle.

(6) "Alcohol concentration of .20 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .20 ore more grams of alcohol per hundred milliliters of blood; or

b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.

...

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests. [\*17]

(1) Evidence of an alcohol concentration of .05 or less in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section is prima facie evidence that the person was not under the influence of alcohol within the meaning of this statute. Evidence of an alcohol concentration of more than .05 but less than .10 in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact

may be considered with other competent evidence in determining whether the person was under the influence of alcohol.  
(emphasis supplied)

### Opinion and Order

The Court of Common Pleas must make a determination in this trial record under the "totality of the circumstances" as viewed by reasonable police officer in light of his training and experience whether Officer Coyle had, in fact, probable cause to conclude that the defendant was driving under the influence of alcoholic liquor or drugs. *21 Del. C. § 4177(a), State v. Quinn*, Del. [\*18] Super., Cr. A. No. N94-08-1657AC, Gebelein, J. (March 8, 1995).

With regard to evidence that exists in the record to support a finding of probable cause, the record indicates that the defendant was speeding at the time he was stopped by Officer Coyle. The record indicates the defendant crossed the center and right traffic dotted lines approximately two to three (2-3) times. The defendant had a "strong to moderate odor" of alcoholic beverages on his person. The defendant's eyes were "very bloodshot" and his speech was "fair, sometimes slurred." There was an admission by the defendant that he had been drinking alcoholic beverages on the night in question. The evidence indicates the defendant clearly failed the alphabet test, failed the HGN test with four or more clues with a reliability rate of 65% that the defendant may be impaired or under the influence.

With regards to the walk and turn test, the defendant "wobbled, swayed, and had poor balance" but missed only the third step on the front nine (9) steps and the heel to toe step. The defendant performed adequately on the pivot step and took two (2) additional steps on the back nine (9) steps in the walk and turn test. The Court considers [\*19] these facts an adequate performance, or "pass" on the walk and turn test.

With regard to the one-legged stand, the defendant refused that test, even though earlier he had indicated he no injuries or disabilities that would prevent him from performing the standard field tests.

With regards to the finger to nose test, the defendant passed the test with both right and left index finger correctly.

With regards to evidence that exists in the defendant's favor, Officer Coyle's AIR report and testimony at trial indicated the defendant's speech was "fair, sometimes slurred." n3 Defendant had a "normal exit" from his motor vehicle and walked "normally" when not performing the field tests. The defendant produced his driver's license, registration card and insurance card without difficulty to Officer Coyle. Defendant's clothing was "orderly" and the defendant's face was "normal" and the defendant's attitude was "polite and cooperative." The defendant's demeanor was listed on the AIR report as "fine." The Court believes the defendant passed the walk and turn test sufficiently. The defendant also passed the finger to nose test successfully.

n3 This is a "mixed" factor which the Court weighs in part for the defendant, and in part, against the defendant.

[\*20]

As stated in *Higgins v. Shahan*, Del. Super., Civ. A. No. 94A-06-006, Lee, J. (January 18, 1995) these "facts support a determination of probable cause to have arrested [defendant] for violating *21 Del. C. § 4177(a)*. Other similar cases are in accord. See, *State v. Maxwell*, 624 A.2d at 931 (accident, strong odor of alcohol, defendant driver's admission of drinking and defendant's dazed appearance provided probable cause); *Glass v. State*, Del. Supr., No. 5, 1988, Walsh, J. (June 13, 1988) (accident, odor of alcohol on defendant's breath, and defendant's confused and disoriented state were sufficient to establish probable cause); *Spinks v. State*, Del. Supr., No. 481, 1988, Christie, C.J. (January 17, 1990) (accident, defendant's deliberate, unnatural movements, defendant's smell of alcohol, and his wandering into the roadway twice were sufficient to establish probable cause); *State v. Otto*, Del. Super., C.A. No. IK-93-04-0109, Steele, R.J. (November 12, 1993) (accident, defendant's smelling of alcohol, defendant's slurred speech

and bloodshot eyes, and his admission of having visited a bar established probable cause); *State v. Gunter*, Del. [\*21] Super., Cr. A. No. S93-02-0485A, Lee, J. (May 28, 1993) (accident, defendant's admission he was the driver, the odor of alcohol emanating from defendant, an open beer container in the disabled car, defendant's glassy, bloodshot eyes, and defendant's unsteady walk were sufficient to establish probable cause).

As stated in *Price v. Voshell*, Del. Super., C.A. No. 90A-12-1, AP, Barron, J. (May 10, 1991):

While a combination of odor of alcohol plus bloodshot and watery eyes and mumbled or slurred speech without more could arguably not constitute probable cause to believe a violation of § 4177(a) had occurred, see: *Esham v. Voshell*, Del. Super., C.A. No. 86A-SE-1, Chandler, J., slip op. (March 2, 1987) (speed and odor of alcohol, standing alone, do not constitute probable cause to believe the driver was driving in violation of 21 Del. C. § 4177(a); *State v. Silva*, CCP Cr. A. No. 90-03-0678, Bradley, J. (Aug. 28, 1990) (accident and odor of alcohol does not constitute probable cause for drawing the offender's blood), I conclude that the addition of a PBT test failure to that combination clearly passes the probable cause threshold.

Under the facts of the case, the [\*22] Court concludes the record supports a finding of probable cause to believe the defendant was operating his motor vehicle in violation of 21 Del. C. § 4177(a). The Court requests that the matter be docketed for trial at the Court's earliest convenience with notice to counsel of record.

**IT IS SO ORDERED THIS 23rd day of September, 1999.**

JOHN K. WELCH

ASSOCIATE JUDGE

17 of 195 DOCUMENTS

**STATE OF DELAWARE v. RICHARD SABOL****Cr. A. No.: 9902001043****COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE***1999 Del. C.P. LEXIS 31***September 19, 1999, Submitted****September 23, 1999, Decided****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant brought a motion to suppress arguing that a police officer did not have probable cause to believe that defendant was operating his motor vehicle in violation of *Del. Code Ann. tit. 21, § 4177(a)*.

**OVERVIEW:** Defendant brought a motion to suppress. Defendant argued that police officer did not have probable cause to believe that defendant was operating his motor vehicle in violation of *Del. Code Ann. tit. 21, § 4177(a)*. The court concluded that the record supported a finding of probable cause. Defendant had failed several field sobriety tests administered to him by the police officer. Thus, the court held that the totality of the circumstances gave the police officer probable cause to suspect that defendant was driving under the influence of alcohol or drugs.

**OUTCOME:** The court denied defendant's motion to suppress, holding that the record supported the police officer's belief that probable cause existed to conclude that defendant was driving under the influence of alcohol or drugs.

**CORE TERMS:** probable cause, alcohol, breath, blood, walk, driving, odor of alcohol, motor vehicle, finger, nose, lane, alcohol concentration, bloodshot, correctly, driver, clues, heel, toe, police officer, concentration, performing, swayed, missed, administered, influence of alcohol, amount of alcohol, alphabet, alcoholic, demeanor, moderate

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Arrests > Probable Cause*

*Criminal Law & Procedure > Arrests > Warrantless Arrest*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview*

[HN1] A police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Arrests > Probable Cause*

[HN2] Probable cause is an elusive concept which is not subject to precise definition. It lies, somewhere between

suspicion and sufficient evidence to convict and exists when the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Specifically, when there is probable cause that an offense which involves driving under the influence has been committed, a police officer may take all of the steps which the officer took in this case.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN3] A police officer has probable cause to believe a defendant has violated *Del. Code Ann. tit. 21, § 4177* when the officer possesses information which would warrant a reasonable man in believing that such a crime has been committed.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN4] A finding of probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not.

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN5] The possibility there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest.

***Criminal Law & Procedure > Arrests > Probable Cause***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Particularity***

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN6] Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

**COUNSEL:** [\*1] R. David Favata, Esquire, Deputy Attorney General, Department of Justice, Wilmington, DE, Attorney for State.

Louis B. Ferrara, Esquire, Louis B. Ferrara, P. A., Wilmington, DE, Attorney for Defendant.

**JUDGES:** JOHN K. WELCH, ASSOCIATE JUDGE.

**OPINION BY:** JOHN K. WELCH

**OPINION:**

**ORDER AND DECISION ON DEFENDANT'S MOTION TO SUPPRESS**

On Monday, September 19, 1999, the Court heard defendant's Motion to Suppress which was previously filed and docketed with the Court Clerk on April 26, 1999. After carefully reviewing the evidence presented and testimony received, the Court finds the following facts to be supported by the trial record.

**The Facts**

Corporal Lawrence T. Coyle ("Officer" or "Trooper Coyle") is employed by the Delaware State Police and was so employed on January 30, 1999 at 1:40 a.m. on patrol in the vicinity of Route 202 in New Castle County, Delaware. At

that location, Trooper Coyle testified he observed a 1998 Olds Caravan, gold in color, traveling northbound on Route 202. Officer Coyle testified the vehicle appeared to be travelling at a "high rate of speed." Officer Coyle testified he had been stopped in the left turn lane at Foulk Road southbound on Route 202 when [\*2] he observed the defendant's vehicle and therefore activated his Stalker Radar in a stationery mode and received a reading. Officer Coyle testified that he is trained and certified in the use of the Stalker Radar device in 1989 at Police Headquarters and has received an 8-hour class at the Academy on the Stalker unit.

At this point, through direct examination of Office Coyle, the State attempted to lay a foundation to lay the necessary foundation to establish that the Stalker radar unit in question used. Defendant's counsel requested voir dire of the witness.

It was established in the record that Mr. Willie Thomas of the Division of Communications was the author of the calibration log. No actual logs were presented to the Court for review. Nor were the originals of the certification logs produced in Court. Officer Coyle testified that he had never met Mr. Thomas of the Division of Communications. Officer Coyle testified he never observed Mr. Thomas make any contemporaneous entries into the actual log book and had not spoken with Mr. Thomas. He could not state with factual specificity any details of Mr. Thomas' training and expertise in order to certify that the calibration of [\*3] the Stalker unit or the certificate of accuracy was correct. D.R.E. 803(6). After further argument on the issue, the Court made a, evidentiary ruling that pursuant to D.R.E. 803(6) that the records were not admissible under the Business Records Rule.

Officer Coyle testified that the posted speed limit on Route 202 at the subject location was 45 miles per hour. He testified based upon his training and experience the defendant was exceeding the speed limit by a "large degree."

Officer Coyle testified that he made a U-turn and proceeded northbound and got behind the defendant's vehicle and observed erratic driving. Officer Coyle testified the defendant could not keep his motor vehicle within the lane and Officer Coyle therefore activated his emergency equipment. Officer Coyle testified the defendant made an abrupt turn into the Fairfax Shopping Center. At all times, Officer Coyle testified he was approximately fifty (50) feet from the defendant's vehicle.

Officer Coyle testified that the defendant "moved into the center lane" and "back in the right lane with his wheels crossing the dotted line, approximately two to three times." Officer Coyle identified the defendant in the Courtroom. [\*4]

Officer Coyle testified that there was "very light" traffic conditions as far as traffic flow. He testified that possibly "one or two cars" were driving on Route 202 at the time of the traffic stop of the defendant. Officer Coyle testified that he has had no previously maintenance problems with his speedometer in his 1998 Ford Crown Victoria patrol car.

Next, Officer Coyle testified that he contacted the defendant in his driver's seat of his motor vehicle and could detect a "strong to moderate" odor of alcoholic beverages. Officer Coyle testified the defendant's eyes were "very blood shot" and his speech was "slurred." Officer Coyle testified he advised defendant he was stopped for speeding. The defendant produced his driver's license, insurance and registration card "with no difficulty." Officer Coyle testified at that time defendant's eyes were also "glassy" and that the defendant informed him when questioned that he said "I had two beers."

#### A. The Alphabet Test

Officer Coyle testified he advised the defendant he was going to give him a standard field sobriety test. First, Officer Coyle testified that he fully explained the alphabet test and instructed the defendant to [\*5] state, "A to Z" in a clear concise voice. Officer Coyle testified while he started to write the numbers on his hand that the defendant missed, the defendant "missed and transposed too numerous letters to write down." Based upon this performance Officer Coyle testified the defendant failed the alphabet test.

#### B. The HGN Test

Next, Officer Coyle testified he administered the HGN test to the defendant. After a proper foundation was laid by the State, the Court ruled that the prosecutor had met the foundation requirements required in *Zimmerman v. State, Del. Supr.*, 693 A.2d 311 (1997). n1

n1 Footnote no. 8 in *Zimmerman* sets forth the requirements that must be laid by the investigating officer that the HDN test was performed in accordance with the National Highway Traffic Safety Administration ("NHTSA") standards which inter alia include a correlation between alcohol ingestion and nysgatmus; how other possible causes might be marked; what margin of error has been shown in statistical surveys; and cause of observed symptoms of staginess. Without going into the factual record following legal argument, the Court was satisfied that the State laid such a proper foundation in the trial record.

[\*6]

Officer Coyle testified that the defendant had four (4) or more "clues" and that the HGN test was 65% reliable with a 35% error that the defendant may be impaired or under the influence.

#### C. Walk and Turn Test

Next, Officer Coyle administered the walk and turn test to the defendant. Officer Coyle testified he instructed the defendant to stand facing him, and walk heel to toe for nine (9) steps; make a pivot turn and walk nine (9) steps backward. He explained to the defendant that he was instructed to keep his "arms down at all times," and the defendant indicated he understood that test.

Officer Coyle testified the first nine (9) steps, the defendant "wobbled, swayed, and had poor balance." On the third step Officer Coyle testified the defendant stepped off the line, and there was "no heel to toe" on the second step.

Officer Coyle testified that the defendant correctly took a pivot step and turned "okay," although the turn was "slow and hesitant." Officer Coyle testified that on the second nine (9) steps backward the defendant also "wobbled and swayed" and stepped off the line on the tenth step, and took eleven (11) steps instead of nine (9) steps. Based upon this performance, [\*7] Officer Coyle testified the defendant failed the walk and turn test.

#### D. One-Legged Stand Test

Next, defendant was asked to perform the one-legged stand. At this point, Officer Coyle testified the defendant stated, "I can't do it because I have a hernia." Officer Coyle testified that prior to the administration of all field tests at the scene he asked the defendant whether he had "any injuries" or "disabilities" that would prevent him from performing the field tests and the defendant had previously indicated he "did not."

#### E. Finger to Nose Test

Next, Officer Coyle administered the finger-to-nose test. He advised the defendant through instructions to stand with his feet together, eyes closed, with his palms upward and instructed to touch the tip of the finger on the tip of his nose that he touches. Officer Coyle testified the defendant's body swayed "in the beginning of the test" but the defendant completed the right and left index finger correctly.

Officer Coyle testified that in his eleven (11) years of experience he has dealt with "300 D.U.I.s and approximately thousands of individuals under the influence." He testified he looks at such factors that include demeanor, [\*8] ability to communicate, ability to follow instructions and breath, speech, condition of the eyes, and moderate to strong odors of

alcohol. Based upon his experience Officer Coyle concluded that he believed the defendant was under the influence and his ability to drive a motor vehicle was impaired. Officer Coyle testified he based this conclusion on the odor of alcoholic beverages on the defendant, the field test results, defendant's demeanor, and his bloodshot, glassy eyes.

On cross-examination Officer Coyle testified that he believed the finger to nose test results were a "draw" because defendant swayed. Officer Coyle conceded that the defendant performed the test and listened to the instructions correctly and touched the tip of his nose with the proper fingers correctly. Officer Coyle testified that the order of the test was alphabet; HGN; walk and turn; and finger to nose. Officer Coyle testified he would have administered the PBT and usually does but could not have the necessary PBT brought to the scene.

Officer Coyle testified that he intended to turn left at Foulk Road and he believed the defendant had a green light because he had a green light. He testified the next light [\*9] on Route 202 would have been Independence Mall and Route 41 respectively. Officer Coyle testified that he put on his emergency equipment after the Route 141 intersection green light at Route 202 and then noticed the defendant move out of lane. Officer Coyle testified the defendant crossed the lane and "the tires went over the lane on each side two to three times." Officer Coyle testified that when he put the emergency equipment on his vehicle he had a basis to stop the defendant who pulled in the "big parking lot at the Acme" at a 45-degree angle. Officer Coyle testified that this was not "a safe place to park" although there was no other traffic around.

Officer Coyle testified he noticed the defendant had a "moderate to strong" odor of alcohol and that his AIR report indicate the eyes were "bloodshot" and "glassy." Officer Coyle testified his AIR report indicated the defendant's speech was "fair, sometimes slurred."

Officer Coyle testified the defendant made a "normal exit" from his motor vehicle. He testified that the field tests were performed in an area some distance away from his motor vehicle and that the defendant had "no trouble when walking normally." n2

n2 This was further explained in the record that the "normal walking" was when defendant was not performing the subject field tests.

[\*10]

Officer Coyle testified that the most "number of clues" a defendant can display when given HGN test is six (6) and that the choices for results of the HGN are zero (0), two (2), four (4), or six (6). He testified that the percent of reliability for HGN test for four is 65% chance the defendant is under the influence or alternatively, 35% not under the influence when four (4) clues are indicated. Officer Coyle testified that the more clues indicated the more accurate the test. Officer Coyle could not testify from his training and experience at the Police Academy what the percentage of accuracy was when six (6) clues are indicated but agreed with defense counsel that it was probably 77%. Officer Coyle testified that he is comfortable in concluding that he followed the NHTSA guidelines in instructing this defendant and performing the HGN test.

Officer Coyle testified that the defendant's clothing was "orderly, blue jeans and white sneakers" and that defendant's face was "normal" and that the attitude was "polite and cooperative" and the defendant's demeanor was "fine."

With regards to the heel to toe test, Officer Coyle testified he could not remember whether the defendant performed [\*11] the test on an imaginary line or on a white line in the parking lot. Officer Coyle reiterated his testimony that the defendant took steps and missed heel to toe on the second step and stepped off the line on the third step and performed the test eight (8) of the nine (9) steps on the line and never raised his arms on the first nine (9) steps. Officer Coyle testified the defendant missed the heel to toe once and stepped off the line on the tenth step.

With regards to the finger-to-nose, Officer Coyle testified the defendant's performance was "even" even though the defendant touched his nose correctly on both tests on his right and left hands.

### **The Law**

As provided in *Spinks v. State, Del. Supr., 571 A.2d 788 (1990)*, probable cause is defined as follows:

Under Delaware law, [HN1] a police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed. *21 Del. C. § 701; Garner v. State, Del. Supr., 314 A.2d 908, 910 (1973)*. [HN2] Probable cause is an elusive concept which is not subject to precise definition. It lies, 'somewhere between [\*12] suspicion and sufficient evidence to convict' and 'exists when the facts and circumstances within . . . [the officer's] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *State v. Cochran, Del. Supr., 372 A.2d 193, 195 (1977)* (internal quotations omitted); *Thompson v. State, Del. Supr., 539 A.2d 1052, 1055 (1988)*. Specifically, when there is probable cause that an offense which involves driving under the influence has been committed, a police officer may take all of the steps which the officer took in this case. See, *State v. Cooliey, Del. Supr., 457 A.2d 352, 354 (1983)*. (emphasis supplied)

Under *State v. Maxwell, Del. Supr., 624 926, 929-30 (1993)*, probable cause is defined further:[HN3]

[A] police officer has probable cause to believe a defendant has violated *21 Del. C. § 4177* . . . 'when the officer possesses' information which would warrant a reasonable man in believing that [such] a crime has been committed. *Clendeniel v. Voshell, Del. Supr., 562 A.2d 1167, 1170 (1989)* . . . [HN4] A finding of [\*13] probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not. (citation omitted). . . [HN5] the possibility there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. (citation omitted) . . . [HN6] 'probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.' (citation omitted)

See, also *Delaware v. Prouse, 440 U.S. 663 (1979)*; *Coleman v. State, Del. Supr., 562 A.2d 1171, 1174 (1989)*.

### **Sec. 4177. Driving a vehicle while under the influence; evidence; arrests; and penalties.**

(a) No person shall drive a vehicle:

- (1) When the person is under the influence of alcohol;
- (2) When the person is under the influence of any drug;
- (3) When the person is [\*14] under the influence of a combination of alcohol and any drug;
- (4) When the person's alcohol concentration is .10 or more; or
- (5) When the person's alcohol concentration is, within 4 hours after the time of driving, .10 or more.

(b) In a prosecution for a violation of subsection (a) of this section:

- (1) the fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.
- (2) Repealed.

(3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (1) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

(c) For purposes of subchapter III of Chapter 27 of this title, this section and § 4177B of this title, the following definitions shall apply:

(1) "Alcohol concentration of .10 or more" shall mean:

- a. An amount of alcohol in a sample of a person's blood equivalent to .10 or more grams of alcohol per hundred milliliters of blood; or
- b. An amount of alcohol in a sample of a person's breath equivalent of .10 or more grams per two hundred ten liters of breath.

(2) "Chemical test" or [\*15] "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

(3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.

(4) "Vehicle" shall include any vehicle as defined in § 101(48) of this title, any off-highway vehicle as defined in § 101(54) of this title and any moped as defined in § 101(53) of this title.

(5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of [\*16] a vehicle.

(6) "Alcohol concentration of .20 or more" shall mean:

- a. An amount of alcohol in a sample of a person's blood equivalent to .20 ore more grams of alcohol per hundred milliliters of blood; or
- b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.

...

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests. [\*17]

(1) Evidence of an alcohol concentration of .05 or less in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section is prima facie evidence that the person was not under the influence of alcohol within the meaning of this statute. Evidence of an alcohol concentration of more than .05 but less than .10 in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact

may be considered with other competent evidence in determining whether the person was under the influence of alcohol.  
(emphasis supplied)

### Opinion and Order

The Court of Common Pleas must make a determination in this trial record under the "totality of the circumstances" as viewed by reasonable police officer in light of his training and experience whether Officer Coyle had, in fact, probable cause to conclude that the defendant was driving under the influence of alcoholic liquor or drugs. *21 Del. C. § 4177(a), State v. Quinn*, Del. [\*18] Super., Cr. A. No. N94-08-1657AC, Gebelein, J. (March 8, 1995).

With regard to evidence that exists in the record to support a finding of probable cause, the record indicates that the defendant was speeding at the time he was stopped by Officer Coyle. The record indicates the defendant crossed the center and right traffic dotted lines approximately two to three (2-3) times. The defendant had a "strong to moderate odor" of alcoholic beverages on his person. The defendant's eyes were "very bloodshot" and his speech was "fair, sometimes slurred." There was an admission by the defendant that he had been drinking alcoholic beverages on the night in question. The evidence indicates the defendant clearly failed the alphabet test, failed the HGN test with four or more clues with a reliability rate of 65% that the defendant may be impaired or under the influence.

With regards to the walk and turn test, the defendant "wobbled, swayed, and had poor balance" but missed only the third step on the front nine (9) steps and the heel to toe step. The defendant performed adequately on the pivot step and took two (2) additional steps on the back nine (9) steps in the walk and turn test. The Court considers [\*19] these facts an adequate performance, or "pass" on the walk and turn test.

With regard to the one-legged stand, the defendant refused that test, even though earlier he had indicated he no injuries or disabilities that would prevent him from performing the standard field tests.

With regards to the finger to nose test, the defendant passed the test with both right and left index finger correctly.

With regards to evidence that exists in the defendant's favor, Officer Coyle's AIR report and testimony at trial indicated the defendant's speech was "fair, sometimes slurred." n3 Defendant had a "normal exit" from his motor vehicle and walked "normally" when not performing the field tests. The defendant produced his driver's license, registration card and insurance card without difficulty to Officer Coyle. Defendant's clothing was "orderly" and the defendant's face was "normal" and the defendant's attitude was "polite and cooperative." The defendant's demeanor was listed on the AIR report as "fine." The Court believes the defendant passed the walk and turn test sufficiently. The defendant also passed the finger to nose test successfully.

n3 This is a "mixed" factor which the Court weighs in part for the defendant, and in part, against the defendant.

[\*20]

As stated in *Higgins v. Shahan*, Del. Super., Civ. A. No. 94A-06-006, Lee, J. (January 18, 1995) these "facts support a determination of probable cause to have arrested [defendant] for violating *21 Del. C. § 4177(a)*. Other similar cases are in accord. See, *State v. Maxwell*, 624 A.2d at 931 (accident, strong odor of alcohol, defendant driver's admission of drinking and defendant's dazed appearance provided probable cause); *Glass v. State*, Del. Supr., No. 5, 1988, Walsh, J. (June 13, 1988) (accident, odor of alcohol on defendant's breath, and defendant's confused and disoriented state were sufficient to establish probable cause); *Spinks v. State*, Del. Supr., No. 481, 1988, Christie, C.J. (January 17, 1990) (accident, defendant's deliberate, unnatural movements, defendant's smell of alcohol, and his wandering into the roadway twice were sufficient to establish probable cause); *State v. Otto*, Del. Super., C.A. No. IK-93-04-0109, Steele, R.J. (November 12, 1993) (accident, defendant's smelling of alcohol, defendant's slurred speech

and bloodshot eyes, and his admission of having visited a bar established probable cause); *State v. Gunter*, Del. [\*21] Super., Cr. A. No. S93-02-0485A, Lee, J. (May 28, 1993) (accident, defendant's admission he was the driver, the odor of alcohol emanating from defendant, an open beer container in the disabled car, defendant's glassy, bloodshot eyes, and defendant's unsteady walk were sufficient to establish probable cause).

As stated in *Price v. Voshell*, Del. Super., C.A. No. 90A-12-1, AP, Barron, J. (May 10, 1991):

While a combination of odor of alcohol plus bloodshot and watery eyes and mumbled or slurred speech without more could arguably not constitute probable cause to believe a violation of § 4177(a) had occurred, see: *Esham v. Voshell*, Del. Super., C.A. No. 86A-SE-1, Chandler, J., slip op. (March 2, 1987) (speed and odor of alcohol, standing alone, do not constitute probable cause to believe the driver was driving in violation of 21 Del. C. § 4177(a); *State v. Silva*, CCP Cr. A. No. 90-03-0678, Bradley, J. (Aug. 28, 1990) (accident and odor of alcohol does not constitute probable cause for drawing the offender's blood), I conclude that the addition of a PBT test failure to that combination clearly passes the probable cause threshold.

Under the facts of the case, the [\*22] Court concludes the record supports a finding of probable cause to believe the defendant was operating his motor vehicle in violation of 21 Del. C. § 4177(a). The Court requests that the matter be docketed for trial at the Court's earliest convenience with notice to counsel of record.

**IT IS SO ORDERED THIS 23rd day of September, 1999.**

JOHN K. WELCH

ASSOCIATE JUDGE

18 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**HOUSE v. THE STATE****No. 75172****Court of Appeals of Georgia***184 Ga. App. 724; 362 S.E.2d 429; 1987 Ga. App. LEXIS 2828***October 21, 1987, Decided****SUBSEQUENT HISTORY:** [\*\*\*1]

Rehearing Denied November 3, 1987. Certiorari Applied For.

**PRIOR HISTORY:**

D.U.I., etc. Gwinnett State Court. Before Judge Winegarden.

**DISPOSITION:***Judgment affirmed.***CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the Gwinnett State Court (Georgia), which entered a jury verdict convicting defendant of driving under the influence of alcohol and speeding. Defendant argued that the trial court erred in overruling his motion for a directed verdict as to both counts.

**OVERVIEW:** Defendant also argued that trial court erred in allowing a trooper to repeatedly comment on his opinion as to defendant's state of sobriety. On appeal, the court disagreed. The court first determined that ample evidence existed from which any rational trier of fact could conclude beyond a reasonable doubt that defendant was guilty of the charged offenses. Thus, the motion for directed verdict was properly denied. Likewise, the State was properly permitted to recall the trooper before its case had rested, and the trooper was properly permitted to express his opinion on defendant's sobriety. Any cumulative error that may have occurred was harmless because it was highly probable that such error did not contribute to the judgment. Further, the trial court did not err in refusing to charge the jury that driving after consuming small amounts of alcohol was not illegal because the requested language did not contain a complete and true exposition and was not adequately adjusted to the case. Moreover, the trial judge's refusal to give the charge was based on a proper implicit determination that the requested language would not have assisted and might even have confused the jury.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** trooper, enumerated, motor vehicle, enumeration, adjusted, consume, alcoholic beverage, state trooper, cumulative, alcoholic, harmless, sobriety, beverage, driving, alcohol, radar

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview Evidence > Testimony > Examination > General Overview*

[HN1] In the context of a trial on charges of driving under the influence of alcohol and speeding, a trial judge does not abuse his discretion in allowing the prosecution to recall a state trooper to the stand before the prosecution rests its case.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Cumulative Errors Evidence > Relevance > Confusion, Prejudice & Waste of Time*

[HN2] In the context of a trial on charges of driving under the influence of alcohol and speeding, cumulative error is harmless where it is highly probable that such error does not contribute to the judgment.

*Civil Procedure > Judicial Officers > Judges > General Overview*

*Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions*

*Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense*

[HN3] A written request to charge which is legal and adjusted to a distinct matter in issue, and which may materially aid the jury, should be given in the language requested, although covered by other instructions of the charge in more general and abstract terms. A trial judge does not err in refusing to give a requested charge if it does not contain a complete and true exposition of the law and is not sufficiently adjusted to the case.

**COUNSEL:**

*G. Hughel Harrison, Michael White*, for appellant.

*Gerald N. Blaney, Jr., Solicitor*, for appellee.

**JUDGES:**

Birdsong, Chief Judge. Deen, P. J., and Pope, J., concur.

**OPINION BY:**

BIRDSONG

**OPINION:**

[\*724] [\*\*430] Appellant David W. House appeals his conviction of driving under the influence of alcohol ( *O.C.G.A. § 40-6-391 (a) (1)*) and speeding ( *O.C.G.A. § 40-6-181*). A Georgia State Patrol trooper, using a radar detection device, determined that appellant was driving his motor vehicle upon a state highway at a speed of 71 miles per hour. Upon stopping appellant and observing his physical condition, which included glassy eyes, slightly slurred

184 Ga. App. 724, \*724; 362 S.E.2d 429, \*\*430;  
1987 Ga. App. LEXIS 2828, \*\*\*1

speech, strong smell of alcoholic beverage on the breath, and a slight unsteadiness of foot, the trooper elected to subject appellant to certain tests for intoxication. Appellant submitted to a state administered chemical test, and the test results reflected appellant's blood-alcohol content as being .10 percent by weight of alcohol. *Held*:

1. Appellant's first enumerated [\*\*\*2] error is that the trial court erred in overruling the motion for directed verdict as to both counts. Our review of the transcript convinces us that ample evidence exists "from which any rational trier of fact could conclude beyond a reasonable doubt that appellant was guilty of [the offenses] charged." *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct.2781, 61 L. Ed. 2d 560).

Further, we are satisfied that the prosecution substantially complied with the requisite evidentiary requirements in the admission of State Exhibits 7 and 8 (certificate of radar calibration and Federal Communication Commission's station license, respectively). *O.C.G.A. § 24-3-14; Wiggins v. State*, 249 Ga. 302 (290 SE2d 427). Appellant's objection at trial to the admission of State Exhibits 7 and 8, in large measure, was predicated upon the basis that it constituted error for the trial judge to allow the prosecution to *recall* the state trooper to give testimony which would lay the foundation for the admission of these two exhibits. Appellant has failed to list specifically this issue as an enumerated error, although he refers to it as "Enumeration of Error No. 2" in his brief. Nevertheless, in the interests [\*\*\*3] of judicial economy, we will resolve this issue. We find that [HN1] the trial judge did not abuse his discretion in allowing the prosecution to recall the state trooper to the stand before the prosecution had rested its case. See [\*725] generally *Britten* [\*\*431] *v. State*, 221 Ga. 97 (143 SE2d 176); *Traylor v. State*, 163 Ga. App. 473 (294 SE2d 707).

2. Appellant's second enumerated error is that the trial court erred in allowing the trooper, over appellant's objection, to state repeatedly his opinion as to appellant's state of sobriety. The trial transcript reveals that the trooper was asked his opinion as to two matters: first, as to whether appellant was under the influence of alcoholic beverages and, secondly, whether appellant would have been a less safe driver if he had not been in that impaired condition. As to the latter question, the trooper expressed his opinion at least twice. We are satisfied that the trooper could so express his opinion as to appellant's sobriety. See generally *O.C.G.A. §§ 24-9-65 and 24-9-67; Fisher v. State*, 177 Ga. App. 465 (339 SE2d 744). Further, our examination of the transcript satisfies us that the trooper's testimony as to [\*\*\*4] these issues was not cumulative; however, assuming without deciding that [HN2] cumulative error occurred, such error was harmless as it is "highly probable that [any such] error did not contribute to the judgment." *Johnson v. State*, 238 Ga. 59, 61 (230 SE2d 869).

3. Appellant's third enumeration of error is that the trial judge erred by stating in the presence of the jury, during a colloquy with appellant's counsel regarding the wording of a question, that "It is similar to the old question, do you still beat your wife?" This comment is not within the range of comments prohibited by *O.C.G.A. § 17-8-57*. See *Pratt v. State*, 167 Ga. App. 819 (307 SE2d 714) and cases cited therein. We note that appellant neither objected to this remark nor made a timely motion for a mistrial based thereon. *Miller v. State*, 180 Ga. App. 525 (349 SE2d 495). Moreover, the trial judge charged the jury that he had not expressed or intimated any opinions, while making rulings during trial regarding the case facts, witness credibility, weight of the evidence, or defendant's guilt or innocence. Thus, we are satisfied that the comment in issue was rendered harmless in any event.

4. Appellant's fourth [\*\*\*5] enumeration of error contends the trial judge erred in refusing to give a charge which appellant had requested in writing. Specifically, appellant requested the following charge: "I charge you that it is not a violation of the laws of the State of Georgia to consume small amounts of an alcoholic beverage and drive a motor vehicle. It is a violation of the laws to consume such amounts of alcohol affecting the ability to drive a motor vehicle safely."

The Georgia Supreme Court has held that [HN3] "[a] written request to charge which is legal and adjusted to a distinct matter in issue, and which may materially aid the jury, should be given in the language requested, although covered by other instructions of the charge in more general and abstract terms." *Redding v. State*, 214 Ga. 524 (106 SE2d 5), citing *Randall v. State*, 210 Ga. 435 (80 SE2d 695). The [\*726] trial judge concluded that the matters addressed in the requested charge could be argued to the jury, but that the charge would not be given. Implicit in the

184 Ga. App. 724, \*726; 362 S.E.2d 429, \*\*431;  
1987 Ga. App. LEXIS 2828, \*\*\*5

judge's ruling was his determination that the requested charge would not assist and might even confuse the jury. Further, the trial judge observed that "there [\*\*\*6] are some people that could consume small amounts of alcoholic beverages, whatever that means, and still be unsafe." We agree with the express and implied conclusions of the trial judge, and conclude that the requested charge was potentially misleading as to the correct rule of law applicable in appellant's case. Accordingly, the trial judge did not err in refusing to give the requested charge, as it did not contain a complete and true exposition of the law and was not sufficiently adjusted to the case. *Bassett v. State*, 119 Ga. App. 639 (168 SE2d 343). The enumerated error is without merit.

5. Appellant's final enumeration of error is that the trial judge erred by failing to charge, and by deliberately omitting from the charge relating to the provisions of *O.C.G.A. § 40-6-392 (b) (1)*, the language contained in subparts (b) (2) and (b) (3) thereof. We find that appellant's proposed charge was not adequately adjusted to the [\*\*432] facts of this case. Accordingly, we find this enumerated error to be without merit. *Hill v. State*, 211 Ga. 683, 685 (88 SE2d 145); *Anderson v. State*, 163 Ga. App. 603, 604 (4) (295 SE2d 564); *Bassett v. State*, *supra*.

*Judgment affirmed [\*\*\*7] .*

19 of 195 DOCUMENTS



Analysis  
As of: Jan 31, 2007

**HOUSE v. THE STATE**

**No. 75172**

**Court of Appeals of Georgia**

*184 Ga. App. 724; 362 S.E.2d 429; 1987 Ga. App. LEXIS 2828*

**October 21, 1987, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Rehearing Denied November 3, 1987. Certiorari Applied For.

**PRIOR HISTORY:**

D.U.I., etc. Gwinnett State Court. Before Judge Winegarden.

**DISPOSITION:**

*Judgment affirmed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the Gwinnett State Court (Georgia), which entered a jury verdict convicting defendant of driving under the influence of alcohol and speeding. Defendant argued that the trial court erred in overruling his motion for a directed verdict as to both counts.

**OVERVIEW:** Defendant also argued that trial court erred in allowing a trooper to repeatedly comment on his opinion as to defendant's state of sobriety. On appeal, the court disagreed. The court first determined that ample evidence existed from which any rational trier of fact could conclude beyond a reasonable doubt that defendant was guilty of the charged offenses. Thus, the motion for directed verdict was properly denied. Likewise, the State was properly permitted to recall the trooper before its case had rested, and the trooper was properly permitted to express his opinion on defendant's sobriety. Any cumulative error that may have occurred was harmless because it was highly probable that such error did not contribute to the judgment. Further, the trial court did not err in refusing to charge the jury that driving after consuming small amounts of alcohol was not illegal because the requested language did not contain a complete and true exposition and was not adequately adjusted to the case. Moreover, the trial judge's refusal to give the charge was based on a proper implicit determination that the requested language would not have assisted and might even have confused the jury.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** trooper, enumerated, motor vehicle, enumeration, adjusted, consume, alcoholic beverage, state trooper, cumulative, alcoholic, harmless, sobriety, beverage, driving, alcohol, radar

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview Evidence > Testimony > Examination > General Overview*

[HN1] In the context of a trial on charges of driving under the influence of alcohol and speeding, a trial judge does not abuse his discretion in allowing the prosecution to recall a state trooper to the stand before the prosecution rests its case.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Cumulative Errors Evidence > Relevance > Confusion, Prejudice & Waste of Time*

[HN2] In the context of a trial on charges of driving under the influence of alcohol and speeding, cumulative error is harmless where it is highly probable that such error does not contribute to the judgment.

*Civil Procedure > Judicial Officers > Judges > General Overview*

*Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions*

*Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense*

[HN3] A written request to charge which is legal and adjusted to a distinct matter in issue, and which may materially aid the jury, should be given in the language requested, although covered by other instructions of the charge in more general and abstract terms. A trial judge does not err in refusing to give a requested charge if it does not contain a complete and true exposition of the law and is not sufficiently adjusted to the case.

**COUNSEL:**

*G. Hughel Harrison, Michael White*, for appellant.

*Gerald N. Blaney, Jr., Solicitor*, for appellee.

**JUDGES:**

Birdsong, Chief Judge. Deen, P. J., and Pope, J., concur.

**OPINION BY:**

BIRDSONG

**OPINION:**

[\*724] [\*\*430] Appellant David W. House appeals his conviction of driving under the influence of alcohol ( *O.C.G.A. § 40-6-391 (a) (1)* ) and speeding ( *O.C.G.A. § 40-6-181* ). A Georgia State Patrol trooper, using a radar detection device, determined that appellant was driving his motor vehicle upon a state highway at a speed of 71 miles per hour. Upon stopping appellant and observing his physical condition, which included glassy eyes, slightly slurred

184 Ga. App. 724, \*724; 362 S.E.2d 429, \*\*430;  
1987 Ga. App. LEXIS 2828, \*\*\*1

speech, strong smell of alcoholic beverage on the breath, and a slight unsteadiness of foot, the trooper elected to subject appellant to certain tests for intoxication. Appellant submitted to a state administered chemical test, and the test results reflected appellant's blood-alcohol content as being .10 percent by weight of alcohol. *Held*:

1. Appellant's first enumerated [\*\*\*2] error is that the trial court erred in overruling the motion for directed verdict as to both counts. Our review of the transcript convinces us that ample evidence exists "from which any rational trier of fact could conclude beyond a reasonable doubt that appellant was guilty of [the offenses] charged." *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct.2781, 61 L. Ed. 2d 560).

Further, we are satisfied that the prosecution substantially complied with the requisite evidentiary requirements in the admission of State Exhibits 7 and 8 (certificate of radar calibration and Federal Communication Commission's station license, respectively). *O.C.G.A. § 24-3-14; Wiggins v. State*, 249 Ga. 302 (290 SE2d 427). Appellant's objection at trial to the admission of State Exhibits 7 and 8, in large measure, was predicated upon the basis that it constituted error for the trial judge to allow the prosecution to *recall* the state trooper to give testimony which would lay the foundation for the admission of these two exhibits. Appellant has failed to list specifically this issue as an enumerated error, although he refers to it as "Enumeration of Error No. 2" in his brief. Nevertheless, in the interests [\*\*\*3] of judicial economy, we will resolve this issue. We find that [HN1] the trial judge did not abuse his discretion in allowing the prosecution to recall the state trooper to the stand before the prosecution had rested its case. See [\*725] generally *Britten* [\*\*431] *v. State*, 221 Ga. 97 (143 SE2d 176); *Traylor v. State*, 163 Ga. App. 473 (294 SE2d 707).

2. Appellant's second enumerated error is that the trial court erred in allowing the trooper, over appellant's objection, to state repeatedly his opinion as to appellant's state of sobriety. The trial transcript reveals that the trooper was asked his opinion as to two matters: first, as to whether appellant was under the influence of alcoholic beverages and, secondly, whether appellant would have been a less safe driver if he had not been in that impaired condition. As to the latter question, the trooper expressed his opinion at least twice. We are satisfied that the trooper could so express his opinion as to appellant's sobriety. See generally *O.C.G.A. §§ 24-9-65 and 24-9-67; Fisher v. State*, 177 Ga. App. 465 (339 SE2d 744). Further, our examination of the transcript satisfies us that the trooper's testimony as to [\*\*\*4] these issues was not cumulative; however, assuming without deciding that [HN2] cumulative error occurred, such error was harmless as it is "highly probable that [any such] error did not contribute to the judgment." *Johnson v. State*, 238 Ga. 59, 61 (230 SE2d 869).

3. Appellant's third enumeration of error is that the trial judge erred by stating in the presence of the jury, during a colloquy with appellant's counsel regarding the wording of a question, that "It is similar to the old question, do you still beat your wife?" This comment is not within the range of comments prohibited by *O.C.G.A. § 17-8-57*. See *Pratt v. State*, 167 Ga. App. 819 (307 SE2d 714) and cases cited therein. We note that appellant neither objected to this remark nor made a timely motion for a mistrial based thereon. *Miller v. State*, 180 Ga. App. 525 (349 SE2d 495). Moreover, the trial judge charged the jury that he had not expressed or intimated any opinions, while making rulings during trial regarding the case facts, witness credibility, weight of the evidence, or defendant's guilt or innocence. Thus, we are satisfied that the comment in issue was rendered harmless in any event.

4. Appellant's fourth [\*\*\*5] enumeration of error contends the trial judge erred in refusing to give a charge which appellant had requested in writing. Specifically, appellant requested the following charge: "I charge you that it is not a violation of the laws of the State of Georgia to consume small amounts of an alcoholic beverage and drive a motor vehicle. It is a violation of the laws to consume such amounts of alcohol affecting the ability to drive a motor vehicle safely."

The Georgia Supreme Court has held that [HN3] "[a] written request to charge which is legal and adjusted to a distinct matter in issue, and which may materially aid the jury, should be given in the language requested, although covered by other instructions of the charge in more general and abstract terms." *Redding v. State*, 214 Ga. 524 (106 SE2d 5), citing *Randall v. State*, 210 Ga. 435 (80 SE2d 695). The [\*726] trial judge concluded that the matters addressed in the requested charge could be argued to the jury, but that the charge would not be given. Implicit in the

184 Ga. App. 724, \*726; 362 S.E.2d 429, \*\*431;  
1987 Ga. App. LEXIS 2828, \*\*\*5

judge's ruling was his determination that the requested charge would not assist and might even confuse the jury. Further, the trial judge observed that "there [\*\*\*6] are some people that could consume small amounts of alcoholic beverages, whatever that means, and still be unsafe." We agree with the express and implied conclusions of the trial judge, and conclude that the requested charge was potentially misleading as to the correct rule of law applicable in appellant's case. Accordingly, the trial judge did not err in refusing to give the requested charge, as it did not contain a complete and true exposition of the law and was not sufficiently adjusted to the case. *Bassett v. State*, 119 Ga. App. 639 (168 SE2d 343). The enumerated error is without merit.

5. Appellant's final enumeration of error is that the trial judge erred by failing to charge, and by deliberately omitting from the charge relating to the provisions of *O.C.G.A. § 40-6-392 (b) (1)*, the language contained in subparts (b) (2) and (b) (3) thereof. We find that appellant's proposed charge was not adequately adjusted to the [\*\*432] facts of this case. Accordingly, we find this enumerated error to be without merit. *Hill v. State*, 211 Ga. 683, 685 (88 SE2d 145); *Anderson v. State*, 163 Ga. App. 603, 604 (4) (295 SE2d 564); *Bassett v. State*, *supra*.

*Judgment affirmed [\*\*\*7] .*

20 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF HAWAII, Plaintiff-Appellee, v. CHERYL L. STOA,  
Defendant-Appellant**

**NO. 26272**

**INTERMEDIATE COURT OF APPEALS OF HAWAII**

*112 Haw. 260; 145 P.3d 803; 2006 Haw. App. LEXIS 397*

**August 7, 2006, Decided**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT. HPD Traffic No. 5587958MO.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was found to have committed the traffic infraction of noncompliance with speed limit prohibited by the District Court of the First Circuit (Hawai'i). Defendant appealed.

**OVERVIEW:** Defendant argued that the trial court erred by admitting the evidence of her speed based on the laser speed measuring device used by the officer because no expert testimony was presented. The court of appeals disagreed. In light of the officer's testimony regarding his testing of the functionality of his laser gun unit, his qualifications and experience, the posted speed limit in the area where he was performing traffic enforcement duties, the circumstances within which he used the laser gun in measuring defendant's speed, and the forty-two-mile-per-hour reading on the laser gun, sufficient evidence was provided to sustain the denial of defendant's motion for judgment of acquittal. The officer testified that he performed the required functionality tests on the laser gun prior to his patrol, and the readings indicated that the device was functioning properly. He testified that he had a valid certification for operating the laser gun and he had twenty years' experience in performing traffic enforcement duties. Therefore, Hawai'i joined the other states that had taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

**OUTCOME:** The determination that defendant committed the offense was affirmed. However, because the district court erroneously found defendant "guilty" of the offense, which was a civil traffic infraction rather than a crime, the judgment was vacated and the case was remanded for entry of a replacement judgment in favor of the State that complied with the applicable statutes governing traffic infractions.

**CORE TERMS:** laser, speed, gun, radar, scientific, judicial notice, target, accuracy, reliability, detector, pulse, measurement, distance, speed limit, traffic, mile, technology, speeding, runner, beam, speed-measuring, admissible, measuring, meter, wave, frequency, reliable, functioning, tested, expert testimony

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] See *Haw. Rev. Stat. § 291C-102* (1993 and Supp. 2003).

***Evidence > Judicial Notice > Scientific & Technical Facts******Evidence > Testimony > Experts > Admissibility***

[HN2] Generally, where the admission of testimony on a scientific technique presents an issue of first impression, the technique's reliability is not a proper subject of judicial notice. To be admissible, expert testimony as to the scientific validity and reliability of the new or novel technique is required or the technique must be recognized as scientifically valid at least once by an appellate court within the trial court's jurisdiction.

***Criminal Law & Procedure > Counsel > General Overview******Evidence > Judicial Notice > Scientific & Technical Facts***

[HN3] Once a scientific principle is sufficiently established, a court may take judicial notice of the validity of that principle. Similarly, a court may take judicial notice of the validity of the technique applying that principle. In either case the effect is the same: judicial notice relieves the offering party of the burden of producing evidence on these issues. The scientific principle involved need not be commonly known in order to be judicially noticed; it suffices if the principle is accepted as a valid one in the appropriate scientific community. In determining the intellectual viability of the proposition, of course, the judge is free to consult any sources that he thinks are reliable, but the extent to which judges are willing to take the initiative in looking up the authoritative sources will usually be limited. Therefore, it is the task of counsel to find and to present in argument and briefs such references, excerpts and explanations as will convince the judge that the fact is certain and demonstrable. After a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Scientific Evidence > General Overview***

[HN4] Evidence of the accuracy of a particular radar unit is necessary to sustain a conviction for speeding obtained solely by radar. The accuracy of a particular radar unit can be established by showing that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Judicial Notice > Scientific & Technical Facts***

[HN5] Hawai'i joins the other states that have taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence******Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

[HN6] "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

**COUNSEL:** On the briefs:

Cheryl L. Stoa, defendant-appellant, Pro se.

Loren J. Thomas, deputy prosecuting attorney, City and County of Honolulu, for plaintiff-appellee.

**JUDGES:** WATANABE, PRESIDING J., FOLEY, AND NAKAMURA, JJ.

**OPINION BY:** WATANABE

**OPINION:**

[\*261] OPINION OF THE COURT BY WATANABE, PRESIDING J.

This appeal concerns the admissibility of the readings from a laser device used to measure the speed of a motor vehicle.

Defendant-Appellant Cheryl L. Stoa (Stoa) contends that the District Court of the First Circuit (the district court) n1 erred in finding her "guilty" of Noncompliance with Speed Limit Prohibited, in violation of *Hawaii Revised Statutes (HRS) § 291C-102* (Supp. 2003), n2 because the district court's judgment was based solely on evidence obtained from a laser speed-measuring device and no foundational evidence of the universal acceptance of the scientific accuracy and reliability of the device was ever adduced by Plaintiff-Appellee State of Hawai'i (the State).

n1 The Honorable Peter Van Name Esser presided.

[\*\*2]

n2 *Hawaii Revised Statutes § 291C-102* (1993 and Supp. 2003) provides:

**Noncompliance with speed limit prohibited.** (a) [HN1] No person shall drive a vehicle at a speed greater than a maximum speed limit and no person shall drive a motor vehicle at a speed less than a minimum speed limit established by county ordinance.

(b) The director of transportation with respect to highways under the director's jurisdiction may place signs establishing maximum speed limits or minimum speed limits. Such signs shall be official signs and no person shall drive a vehicle at a speed greater than a maximum speed limit and no person shall drive a motor vehicle at a speed less than a minimum speed limit stated on such signs.

(c) If the maximum speed limit is exceeded by more than ten miles per hour, a surcharge of \$ 10 shall be imposed, in addition to any other penalties, and shall be deposited into the neurotrauma special fund.

We conclude that the scientific accuracy and reliability of the laser device used to clock the speed of Stoa's vehicle can be judicially [\*\*3] noticed. Accordingly, we affirm the district court's determination that Stoa was traveling in excess of the speed limit on the day in question. However, because the offense that Stoa was "found guilty" of committing is a civil traffic infraction and not a crime, we vacate the judgment and remand this case to the district court for entry of a replacement judgment in favor of the State that complies with the applicable statutes governing traffic infractions. See

*State v. Rees*, 107 Hawai'i 508, 115 P.3d 687 (App.), reconsideration denied, 108 Hawai'i 76, 116 P.3d 718, cert. denied, 108 Hawai'i 59, 116 P.3d 701 (2005).

#### FACTUAL BACKGROUND

At the November 25, 2003 trial below, Honolulu Police Department (HPD) Sergeant Milton Yamada (Sergeant Yamada), the State's only witness, testified that on August 15, 2003, he was assigned to perform traffic enforcement patrol duties in the Kailua area. Equipped with an LTI n3 20-20 laser gun (laser gun), he set up operations at 1225 Keolu Drive and faced traffic going in the makai n4 direction towards the shopping center.

n3 Although the transcript of the November 25, 2003 proceedings indicate that Honolulu Police Department Sergeant Milton Yamada stated that he was equipped with an "LT1 20-20" laser gun, the reference should have been to an "LTI 20-20" laser gun.

[\*\*4]

n4 The Hawaiian word "makai" means "on the seaside, toward the sea, in the direction of the sea." M.K. Pukui & S.H. Elbert, *Hawaiian Dictionary* 225, 114 (1986).

At approximately 9:30 a.m., he observed a vehicle going faster than the posted speed limit of twenty-five miles per hour. Aiming [\*262] his laser gun at the license plate of the vehicle from a distance of 757 feet, he locked in a reading for the vehicle's speed of forty-two miles per hour. He thereafter stopped the vehicle and cited Stoa, the vehicle's driver, for speeding.

Sergeant Yamada testified that at the time of Stoa's offense, the weather was clear, traffic was moderate, the road conditions were good, and no other vehicles were near Stoa's vehicle. There was also a clearly visible twenty-five-mile-per-hour speed limit sign posted by the City and County of Honolulu at the 1300 block, which Stoa passed as she approached Sergeant Yamada's position. At the deputy prosecutor's request and with no objection from Stoa, the district court took judicial notice that the speed limit sign was posted in accordance with the speed schedule [\*\*5] on file in the City and County of Honolulu.

Sergeant Yamada further stated that on the day he issued the citation to Stoa, he was certified to use the laser gun, having completed four hours of classroom work and four hours of road instruction on its use. He had been performing traffic enforcement duties for the entire twenty years of his HPD service. Prior to beginning his patrol that day, Sergeant Yamada performed the required series of functionality tests on the laser gun, which included the "self-test," the "display test," the "scope alignment test," and the "calibration test." The results of these tests indicated that the laser gun was working properly.

Objecting to Sergeant Yamada's testimony about the readout of the laser gun, Stoa argued that "the laser speed measurement has not been universally accepted as accurate and reliable." She also requested that the district court review some materials critical of the reliability of the LTI 20-20 laser gun that she had downloaded from the internet. However, because Stoa could not identify the specific website or publication from which the materials were gathered and thereby produce foundational evidence sufficient to assure [\*\*6] the district court that the materials came from a reputable source, the district court would not accept the materials into evidence.

At the close of Sergeant Yamada's direct examination, the district court instructed Stoa to begin her cross-examination

of Sergeant Yamada. The entire cross-examination was as follows:

Q Did you measure my speed by any other means other than laser?

A Just the laser gun.

MS. STOA: Okay. That's all I have to ask, Your Honor.

Stoa declined to testify. In open court, however, she filed a Hawai'i Rules of Penal Procedure (HRPP) Rule 29 Motion for Judgment of Acquittal and a memorandum in support of the motion. She argued therein that acquittal was warranted because the only evidence of the speed of her vehicle was obtained through the use of a laser speed-measuring device and the State "did not offer any expert testimony as to the accuracy of laser speed measurement in general or the device used by the officer in this case in particular[.]" Stoa also argued that

[t]he use of laser technology to measure the speed of an automobile constitutes "new" or "novel" evidence and has not been universally accepted as accurate [\*\*7] and reliable. Only a handful of jurisdictions have upheld judicial notice of laser speed-measuring technology at the appellate level.

In denying Stoa's Motion for Judgment of Acquittal, the district court expressed its belief that laser devices are fair to defendants because they are more accurate than pacing or police guesswork, and more scientific. The district court also stated that it was taking judicial notice of the laser gun:

So this machine helps people. It keeps officers from making mistakes. I believe--I've been handling laser trials for eight years. I'm gonna take judicial notice of that fact. I'm gonna take judicial notice of the fact that there have been literally thousands of convictions under this machine.

I'm gonna take judicial notice of the fact that a lot of officers have been trained to use the machine; and that if we have many trials on--with expert witness[es] every time we have a speeding trial in the Kaneohe [\*263] Court or the other courts, we're gonna spend all our time in speeding trials.

....

So I'm gonna take judicial notice of--this is somewhat strange--but of the number of speeding trials I've heard, the observations of the [\*\*8] officers I've heard; and I also believe there is [Intermediate Court of Appeals] authority addressing these cases. I wish I had it in front of me to quote to you, but I don't.

The court then found that the prosecution had proved, beyond a reasonable doubt, that Stoa had driven forty-two miles per hour in a twenty-five-mile-per-hour zone, or seventeen miles per hour over the speed limit, and ordered Stoa to pay an \$ 85 fine, plus \$ 37 in court costs, which the court stayed for thirty days pending notice of appeal. The district court's Notice of Entry of Judgment and/or Order and Plea/Judgment, finding Stoa "guilty" of violating *HRS* § 291C-102, was filed on December 15, 2003 and this appeal followed.

## DISCUSSION

### A. The Admissibility of Readings from a Laser Speed-Measuring Device

[HN2] Generally, "where the admission of testimony on a scientific technique presents an issue of first impression, the technique's reliability is not a proper subject of judicial notice." *State v. Ito*, 90 Hawai'i 225, 242, 978 P.2d 191, 208

112 Haw. 260, \*263; 145 P.3d 803;  
2006 Haw. App. LEXIS 397, \*\*8

(*App. 1999*) (quoting *29 Am. Jur. 2d Evidence* § 94, at 137 (1994)). [\*\*9] To be admissible, expert testimony as to the scientific validity and reliability of the new or novel technique is required or the technique must be recognized as scientifically valid at least once by an appellate court within the trial court's jurisdiction. *Ito, 90 Hawaii at 242, 978 P.2d at 208*. However,

[HN3] [o]nce a scientific principle is sufficiently established, a court may take judicial notice of the validity of that principle. Similarly, a court may take judicial notice of the validity of the technique applying that principle. In either case the effect is the same: judicial notice relieves the offering party of the burden of producing evidence on these issues.

1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1-2, at 2 (2d ed.1993) (footnotes omitted). An eminent treatise on evidence further points out that

the [scientific] principle involved need not be commonly known in order to be judicially noticed; it suffices if the principle is accepted as a valid one in the appropriate scientific community. In determining the intellectual viability of the proposition, of course, the judge is free to consult any sources that he [or [\*\*10] she] thinks are reliable, but the extent to which judges are willing to take the initiative in looking up the authoritative sources will usually be limited. By and large, therefore, it is the task of counsel to find and to present in argument and briefs such references, excerpts and explanations as will convince the judge that the fact is certain and demonstrable. Puzzling enough in this regard, it has been noted that "nowhere can there be found a definition of what constitutes competent or authoritative sources for purposes of verifying judicially noticed facts." *And it should be noted, after a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent.*

2 *McCormick on Evidence* § 330, at 395 (footnotes omitted, emphasis added).

Id. (brackets and emphasis in original).

Stoa argues that "[n]o Appellate Court in Hawai'i has recognized widespread acceptance of the reliability or accuracy of laser technology as a means of measuring speed." She also notes that courts in several other jurisdictions have [\*\*11] held that the technique of using laser-based devices to measure vehicle speed has not reached the scientific stage of verifiable certainty so as to allow evidence from such devices to be admissible without expert testimony. She cites, for example, *Izer v. State, 236 Ga. App. 282, 511 S.E.2d 625, 627 (Ga. Ct. App. 1999)* (holding that although some courts have accepted laser evidence, "it cannot be said that a *substantial* number of courts have recognized the technique" and "[c]onsidering [\*264] the dearth of authority showing the scientific certainty of the technique, as well as the absence of expert testimony on the subject, the trial court erred in admitting the evidence"); *People v. Canulli, 341 Ill. App. 3d 361, 792 N.E.2d 438, 445, 275 Ill. Dec. 207 (Ill. App. Ct. 2003)* (holding that "the use of Lidar laser technology to measure the speed of an automobile constitutes 'new' or 'novel' evidence" and therefore, an evidentiary hearing conducted pursuant to *Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)* "was necessary to determine whether these instruments were admissible as a matter of law"); and *State v. Sapphire, 2000 Ohio App. LEXIS 5767, 2000 WL 1803852, [\*\*12] \*4 (Ohio Ct. App. 2000)* (an unpublished opinion, n5 holding that the trial court committed prejudicial error by admitting the evidence of the reading of an Ultralite 20/20 laser unit because there was "nothing in the record to show that the trial court has ever received expert evidence on and determined that the laser device used in this case is dependable and accurate, and because it appears that no court of binding authority upon the Xenia Municipal Court has ever taken judicial notice of this laser device").

112 Haw. 260, \*264; 145 P.3d 803;  
2006 Haw. App. LEXIS 397, \*\*12

n5 We note that pursuant to Hawai'i Rules of Appellate Procedure Rule 35(c), "[a] memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent."

Although the Hawai'i appellate courts have not had occasion to consider the admissibility of readings from [\*\*13] a laser speed-measuring device, the Hawai'i Supreme Court has upheld a speeding conviction based on the "testimony of a single police officer who relied upon a reading from a K-15 radar speed detection device (K-15 gun) which clocked the speed of [the appellant's] vehicle at seventy miles per hour in a fifty-five mile per hour zone." *State v. Tailo*, 70 Haw. 580, 580, 779 P.2d 11, 12 (1989). n6 The issue on appeal in Tailo was "whether the State must prove the accuracy of a tuning fork used in verifying the accuracy of the K-15 gun before results of that device are admissible as evidence of a speeding violation." *Id.* at 580-81, 779 P.2d at 12. However, the supreme court took the opportunity to address the question of the admissibility of radar gun evidence as proof of a speeding violation and held:

The scientific principles upon which the radar gun is based are well established. The radar gun is a system which transmits a continuous flow of microwaves on a constant frequency which are reflected back whenever they strike a target. When the target is an approaching vehicle, the speed of the vehicle causes the deflected waves to return on [\*\*14] a different and higher frequency than those sent out. A phenomena known as the Doppler effect posits that the faster the vehicle is moving into the radar transmissions, the higher the frequency of the reflected waves received by the radar gun. The radar gun measures the difference in the frequencies of the transmitted wave and the received wave, which enables it to use the Doppler effect to calculate the speed of the approaching vehicle. *See Kopper, The Scientific Reliability of Radar Speedmeters*, 16 Md. L. Rev. 1 (1956).

Because of the strength of the scientific principles on which the radar gun is based, every recent court which has dealt with the question has taken judicial notice of the scientific reliability of radar speedmeters as recorders of speed. *See State v. Gerdes*, 291 Minn. 353, 191 N.W.2d 428 (1971); *People v. MacLaird*, 264 Cal. App. 2d 972, 71 Cal. Rptr. 191 (1968); *State v. Tomanelli*, 153 Conn. 365, 216 A.2d 625 (1966); and Annotation, *Proof, by Radar [\*\*265] or Other Mechanical or Electronic Devices, of Violation of Speed Regulations*, 47 A.L.R.3d 822, 831-35 (1973). [\*\*15] These courts have also consistently held that [HN4] evidence of the accuracy of the particular radar unit is necessary to sustain a conviction for speeding obtained solely by radar. *State v. Primm*, 4 Kan. App. 2d 314, 606 P.2d 112 (1980); Annotation, *Proof, by Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations*, 47 A.L.R.3d 822, 837-39 (1973). "The accuracy of a particular radar unit can be established by showing that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit." *State v. Spence*, 418 So. 2d 583, 588 (La. 1982); *Gerdes, supra*; *Primm, supra*.

*Id.* at 582, 779 P.2d at 13.

n6 Although the Hawai'i Supreme Court did not explicitly say that it was "taking judicial notice" of the accuracy of the radar technology, it noted that other courts had taken judicial notice of its accuracy when it held that a properly tested radar unit creates a presumption that the particular unit's reading is accurate. *State v. Tailo*, 70 Haw. 580, 582-83, 779 P.2d 11, 13-14 (1989).

[\*\*16]

In concluding that the reading from a radar gun was admissible as prima facie evidence of speed, the supreme court thus relied on three factors: (1) the well-established scientific principles upon which the radar gun was premised; (2) the fact that other courts had taken judicial notice of the scientific reliability of radar guns as recorders of speed; and (3) the proven accuracy of the particular radar gun used, established by evidence that (a) the device was tested according to accepted procedures and was determined to be functioning properly, and (b) the operator of the device was qualified by training and experience to operate the device. *Id.*

Applying the criteria used by the supreme court in *Tailo* to justify admission of the reading of a radar gun into evidence, we conclude that the district court properly admitted into evidence the reading of the laser gun used by Officer Yamada to measure the speed of Stoa's vehicle.

First, the laser gun is technologically premised on well-understood scientific principles.

In *Goldstein v. State*, 339 Md. 563, 664 A.2d 375 (Md. 1995), the Court of Appeals of Maryland was called upon to determine whether [\*\*17] measurements taken with an LTI 20-20 laser gun were properly admitted into evidence. At trial, each side had called a scientific expert to testify about the reliability and acceptance of the LTI 20-20 in the particular scientific community. The State's expert testified that the particular laser gun was generally accepted as reliable and capable of accurately measuring speed of a vehicle within one mile per hour. The defense expert testified that the LTI 20-20 was not generally accepted, due primarily to flaws in the particular device. However, both experts had agreed that "in theory laser technology could be used to measure the speed of a motor vehicle." *Id.* at 376.

In concluding that the results were admissible, the court provided the following explanation of the scientific reliability of laser speed-detection technology generally:

Our analysis begins by examining the operation of the LTI 20-20. The theory underlying the LTI 20-20 would be familiar to any student of high school physics. In fact, laser speed devices operate on the same principles as military radar (police radar works somewhat differently). See 1 *McCormick on Evidence* § 204, at 880 (J. Strong 4th [\*\*18] ed. 1992). McCormick explains military radar as follows:

The radar antenna transmits microwave radiation in pulses. The equipment measures the time it takes for a pulse to reach the target and for its echo to return. Since the radiation travels at a known speed (the speed of light), this fixes the distance to the target. The changes in the distances as determined from the travel times of later pulses permit the target's velocity to be computed.

*Id.* § 204, at 880 n.17.

Laser speed measurements work exactly the same way, except that the device relies on lasers rather than microwave radiation. Laser is an acronym for "light amplification by stimulated emission of radiation." 15 *Funk & Wagnalls New Encyclopedia* 410 (R. Phillips ed., 1983).

Lasers are devices that amplify light and produce coherent light beams, ranging from infrared to ultraviolet. A light beam is coherent when its waves, or photons, propagate in step with one another. Laser light, therefore, can be made extremely intense, highly directional, and very pure in color (frequency).

*Id.*

[\*266] Light and microwaves, the building blocks of lasers and radar, respectively, occupy different [\*\*19] points on the electromagnetic spectrum but are otherwise similar. P. Tipler, *Physics* 852-54 (2d ed. 1982). According to the State's expert, the main advantage that lasers offer over radio-micro waves is that the beam is narrower and therefore easier to keep focused on the target vehicle.

A hypothetical might clarify this discussion. Our example involves a runner in a 200-meter dash. For purposes of our example, we assume that light travels at 200 meters per second. The actual speed of light is approximately 300 million meters per second, or 186,000 miles per second; our use of a different figure, however, is consistent with the relevant scientific principles and makes the calculations in our example easier.

An instant before the race begins, an observer standing at the finish line sends a laser beam toward the runner in the starting blocks. The beam reaches the runner and returns in two seconds. Thus, the distance for the round trip was 400 meters, so the runner must have been 200 meters away when the laser reached her. Five seconds later, the observer's laser device emits another light pulse, which returns in 1.5 seconds; thus, when the beam reached the runner, she [\*\*20] was 150 meters away. We can then calculate that the runner traveled fifty meters in the five-second interval between the two measurements; accordingly, she is running at an average speed of ten meters per second. 2

2 If the observer is not standing directly in front of the runner (or directly behind, if our hypothetical had placed the observer at the beginning of the track), then his measurements will understate the runner's speed. This phenomenon, known as the cosine effect, creates a potential source of error in the LTI 20-20's measurements. Because this error always favors the motorist, however, it is not at issue in this case.

*Goldstein*, 664 A.2d at 379. The Maryland court also concluded that it was not necessary for a trial court to conduct an evidentiary hearing on the scientific acceptance and reliability of a particular brand of a laser speed-detection device:

There are important considerations of judicial economy underlying the practice of limiting *Frye-Reed* to general processes, rather than brand-name products. If every brand of every instrument were subject to a discrete *Frye-Reed* evaluation, trial courts would be mired in hearings [\*\*21] concerning devices incorporating scientific principles, possibly including calculators and magnifying glasses. *See People v. Mendibles*, 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553, 563 (1988) (stating that a *Frye* hearing is not required with respect to a colposcope, which the court characterized as "a weak microscope").

Moreover, the scientific consensus that forms a prerequisite for the admission of evidence would ordinarily be elusive, because, while scientists may be familiar with the general principles underlying a particular device, they may have no occasion to use the device itself. In the instant case, for example, the LTI 20-20 has little use other than for law enforcement purposes. Consequently, neither of the experts who testified at trial actually used the device in his work. . . .

We believe that the ordinary truth-seeking methods of the adversarial process will suffice to expose design flaws in the devices used to gather evidence, without requiring the courts to place a "*Frye-Reed* Seal of Approval" on individual brands. . . .

*Id.* at 381.

In *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System*, 314 N.J. Super. 233, 714 A.2d 381 (N.J. Super. Ct. Law Div. 1998), [\*\*22] n7 the New Jersey Superior [\*\*267] Court, Law Division, similarly concluded that performance tests conducted by the New Jersey Department of Transportation of the LTI Marksman 20-20 Laser Speed Detection System manufactured by Laser Technology, Inc. demonstrated sufficient reliability of the laser speed detector to allow speed readings produced by such detectors to be received into evidence without the need for expert testimony in individual prosecutions. *Id.* at 391. In its opinion, the court described the way a laser speed detector is supposed to work, as follows:

A laser is an artificially generated and amplified light which is in the infrared light section of the electromagnetic wave spectrum. It is not visible to the naked eye. It is very concentrated. The laser speed detector fires a series of laser pulses at a selected remote target. When the laser light strikes the target, a portion of the light is reflected back to the detector. Since the speed of light is a known constant, by measuring the time it takes for the laser pulse to travel to the target and back, the detector is able to calculate the distance between the detector and the target. Each laser pulse [\*\*23] which is fired and reflected back establishes one distance reading. The laser speed detector fires 43 laser pulses every time the trigger on the detector is squeezed. These 43 pulses are fired in a total period of approximately one-third of a second. If the target at which the laser pulses are fired is a stationary target, each of the 43 pulses will give the same distance reading to the target, and distance will be the only thing that the detector can tell us about the target. However, if the target is moving, each of the 43 pulses will give a slightly different distance reading and the detector can then compute the velocity or speed of the target from the changes in distance divided by the known elapsed time between the firing of each of the laser pulses. In simplest terms, this is the basic theory underlying the use of lasers to calculate speed, and there can be no dispute about its fundamental validity.

714 A.2d at 383-84 (block quotation format altered).

n7 In *re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System* is a case that provides a detailed positive evaluation of the performance of LTI 20-20 laser guns in comparison to other speed measuring devices. The court describes the results of tests, conducted by the New Jersey Department of Transportation, of the laser gun in comparison to various alternative speed measuring devices. The tests were conducted under a variety of normal driving conditions. Several local defense attorneys served as amici curiae adversaries during the proceedings.

[\*\*24]

Daniel Y. Gezari, Ph.D, who works for NASA/Goddard Space Flight Center, Infrared Astrophysics Branch, has noted that while laser and radar speed-measuring devices have several common features, they are different in several respects:

- (1) The laser gun has a very narrow beam (about three feet wide at a distance of 1000 feet), so that it can pick out a single car for measurement, while the radar beam is roughly 100 times wider (about 300 feet wide at 1000 feet) and can easily have a dozen cars in its beam simultaneously.
- (2) Laser speed guns make a direct measurement of how the position of the target changes in time . . . , while radar infers the speed from the Doppler-shifted frequency of the reflected waves.
- (3) The laser results are calculated and error-checked by a microprocessor, which verifies

the individual measurements and the final speed result. . . .

(4) Radar has the advantage of being better in poor visibility weather conditions (fog, rain, snow, etc.). However, the value of radar's bad-weather capability is questionable, since traffic stops are less likely to be made under bad weather conditions for other reasons, primarily safety concerns. [\*\*25]

(5) Radar speed guns can be set up to continuously monitor oncoming traffic without active operator attention, while the laser gun must be carefully aimed and triggered by the operator for each individual measurement.

(6) Laser speed guns are more immune to interference from natural and artificial environmental sources than radar guns. . . .

1 Campbell, Fisher & Mansfield, Defense of Speeding, Reckless Driving and Vehicular Homicide § 9a.02[6], at 9a-9 (2005).

[\*268] The foregoing explanations convince us that the laser speed detection device is technologically premised on well-accepted and reliable scientific principles.

Second, the accuracy and reliability of laser speed-detection devices for purposes of traffic speed monitoring have been explicitly affirmed by appellate courts in Maryland, Minnesota, and New Jersey, by a municipal court in Ohio, and by a superior court in New Jersey. See *Goldstein*, 664 A.2d at 381; *State v. Ali*, 679 N.W.2d 359, 364 (Minn. Ct. App. 2004) (holding that "so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy [\*\*26] and that officers using the device have been trained in its use, a district court does not abuse its discretion in taking judicial notice of the device's general reliability of laser technology"); *State v. Abeskaron*, 326 N.J. Super. 110, 740 A.2d 690, 694 (N.J. Super. Ct. App. Div. 1999) (affirming the lower court's determination in *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System* that "subject to the listed restrictions, the subject laser detector was an appropriate tool in measuring speed"); *City of Columbus v. Barton*, 106 Ohio Misc. 2d 17, 733 N.E.2d 326, 327 (Ohio Mun. Ct. 1994) (holding that the "laser speed detector is reliable and accurate as a scientific measure of the speed of a moving object, which can be used by law enforcement personnel to measure vehicle speed, provided that the device is used in accordance with certain procedures delineated by the manufacturer"); *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System*, 714 A.2d at 391-92 (N.J. Super. 1998).

Finally, we conclude that the [\*\*27] laser device used by Sergeant Yamada to clock Stoa's speed satisfied all of the Hawai'i Supreme Court's requirements for accuracy. In *Tailo*, the supreme court required the accuracy of a particular radar unit to be established by proof "that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit." *Tailo*, 70 Haw. at 582, 779 P.2d at 13 (citations and quotation marks omitted).

Sergeant Yamada testified that he performed the required functionality tests on the laser gun prior to beginning his patrol, and that the readings indicated that the device was functioning properly. He also testified that he possessed a valid certification for operating the laser gun and that he had twenty years' experience in performing traffic enforcement duties.

In light of the foregoing discussion, [HN5] we join the other states that have taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

We further hold that the prosecution presented evidence sufficient to establish [\*\*28] that the particular laser device

used by Sergeant Yamada was functioning properly and that Sergeant Yamada was qualified by training and experience to operate the device. We therefore reject Stoa's challenge to the admissibility of Sergeant Yamada's testimony on grounds of insufficient foundational evidence.

#### B. The Sufficiency of the Evidence Adduced Below

Stoa claims that the district court improperly denied her HRPP Rule 29 Motion for Judgment of Acquittal because, without the evidence of the laser reading, there was insufficient evidence to prove that she traveled in excess of the speed limit. Under Hawai'i case law,

[HN6] "[s]ubstantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

*State v. Pone*, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (some brackets in original, block quotation format altered) (quoting *State v. Batson*, 73 Haw. 236, 248-49, 831 P.2d 924, 931, [\*29] reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992)).

[\*269] Based on our conclusion that the laser reading was admissible and in light of Sergeant Yamada's testimony regarding his testing of the functionality of his laser gun unit, his qualifications and experience, the posted speed limit in the area where he was performing traffic enforcement duties, the circumstances within which he used the laser gun in measuring Stoa's speed, and the forty-two-mile-per-hour reading on the laser gun, we hold that "credible evidence" of "sufficient quality and probative value" was provided to sustain the court's denial of Stoa's motion.

#### CONCLUSION

We therefore affirm the district court's determination that Stoa committed the offense of Noncompliance with Speed Limit Prohibited, in violation of *HRS* § 291C-102. However, because the district court erroneously found Stoa "guilty" of the offense, which is a civil traffic infraction rather than a crime, we vacate the judgment and remand for entry of a replacement judgment in favor of the State that complies with the applicable statutes governing traffic infractions.

21 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF HAWAII, Plaintiff-Appellee, v. CHERYL L. STOA,  
Defendant-Appellant**

**NO. 26272**

**INTERMEDIATE COURT OF APPEALS OF HAWAII**

*112 Haw. 260; 145 P.3d 803; 2006 Haw. App. LEXIS 397*

**August 7, 2006, Decided**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT. HPD Traffic No. 5587958MO.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was found to have committed the traffic infraction of noncompliance with speed limit prohibited by the District Court of the First Circuit (Hawai'i). Defendant appealed.

**OVERVIEW:** Defendant argued that the trial court erred by admitting the evidence of her speed based on the laser speed measuring device used by the officer because no expert testimony was presented. The court of appeals disagreed. In light of the officer's testimony regarding his testing of the functionality of his laser gun unit, his qualifications and experience, the posted speed limit in the area where he was performing traffic enforcement duties, the circumstances within which he used the laser gun in measuring defendant's speed, and the forty-two-mile-per-hour reading on the laser gun, sufficient evidence was provided to sustain the denial of defendant's motion for judgment of acquittal. The officer testified that he performed the required functionality tests on the laser gun prior to his patrol, and the readings indicated that the device was functioning properly. He testified that he had a valid certification for operating the laser gun and he had twenty years' experience in performing traffic enforcement duties. Therefore, Hawai'i joined the other states that had taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

**OUTCOME:** The determination that defendant committed the offense was affirmed. However, because the district court erroneously found defendant "guilty" of the offense, which was a civil traffic infraction rather than a crime, the judgment was vacated and the case was remanded for entry of a replacement judgment in favor of the State that complied with the applicable statutes governing traffic infractions.

**CORE TERMS:** laser, speed, gun, radar, scientific, judicial notice, target, accuracy, reliability, detector, pulse, measurement, distance, speed limit, traffic, mile, technology, speeding, runner, beam, speed-measuring, admissible, measuring, meter, wave, frequency, reliable, functioning, tested, expert testimony

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] See *Haw. Rev. Stat. § 291C-102* (1993 and Supp. 2003).

***Evidence > Judicial Notice > Scientific & Technical Facts***

***Evidence > Testimony > Experts > Admissibility***

[HN2] Generally, where the admission of testimony on a scientific technique presents an issue of first impression, the technique's reliability is not a proper subject of judicial notice. To be admissible, expert testimony as to the scientific validity and reliability of the new or novel technique is required or the technique must be recognized as scientifically valid at least once by an appellate court within the trial court's jurisdiction.

***Criminal Law & Procedure > Counsel > General Overview***

***Evidence > Judicial Notice > Scientific & Technical Facts***

[HN3] Once a scientific principle is sufficiently established, a court may take judicial notice of the validity of that principle. Similarly, a court may take judicial notice of the validity of the technique applying that principle. In either case the effect is the same: judicial notice relieves the offering party of the burden of producing evidence on these issues. The scientific principle involved need not be commonly known in order to be judicially noticed; it suffices if the principle is accepted as a valid one in the appropriate scientific community. In determining the intellectual viability of the proposition, of course, the judge is free to consult any sources that he thinks are reliable, but the extent to which judges are willing to take the initiative in looking up the authoritative sources will usually be limited. Therefore, it is the task of counsel to find and to present in argument and briefs such references, excerpts and explanations as will convince the judge that the fact is certain and demonstrable. After a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Scientific Evidence > General Overview***

[HN4] Evidence of the accuracy of a particular radar unit is necessary to sustain a conviction for speeding obtained solely by radar. The accuracy of a particular radar unit can be established by showing that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Judicial Notice > Scientific & Technical Facts***

[HN5] Hawai'i joins the other states that have taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

[HN6] "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

**COUNSEL:** On the briefs:

Cheryl L. Stoa, defendant-appellant, Pro se.

Loren J. Thomas, deputy prosecuting attorney, City and County of Honolulu, for plaintiff-appellee.

**JUDGES:** WATANABE, PRESIDING J., FOLEY, AND NAKAMURA, JJ.

**OPINION BY:** WATANABE

**OPINION:**

[\*261] OPINION OF THE COURT BY WATANABE, PRESIDING J.

This appeal concerns the admissibility of the readings from a laser device used to measure the speed of a motor vehicle.

Defendant-Appellant Cheryl L. Stoa (Stoa) contends that the District Court of the First Circuit (the district court) n1 erred in finding her "guilty" of Noncompliance with Speed Limit Prohibited, in violation of *Hawaii Revised Statutes (HRS) § 291C-102* (Supp. 2003), n2 because the district court's judgment was based solely on evidence obtained from a laser speed-measuring device and no foundational evidence of the universal acceptance of the scientific accuracy and reliability of the device was ever adduced by Plaintiff-Appellee State of Hawai'i (the State).

n1 The Honorable Peter Van Name Esser presided.

[\*\*2]

n2 *Hawaii Revised Statutes § 291C-102* (1993 and Supp. 2003) provides:

**Noncompliance with speed limit prohibited.** (a) [HN1] No person shall drive a vehicle at a speed greater than a maximum speed limit and no person shall drive a motor vehicle at a speed less than a minimum speed limit established by county ordinance.

(b) The director of transportation with respect to highways under the director's jurisdiction may place signs establishing maximum speed limits or minimum speed limits. Such signs shall be official signs and no person shall drive a vehicle at a speed greater than a maximum speed limit and no person shall drive a motor vehicle at a speed less than a minimum speed limit stated on such signs.

(c) If the maximum speed limit is exceeded by more than ten miles per hour, a surcharge of \$ 10 shall be imposed, in addition to any other penalties, and shall be deposited into the neurotrauma special fund.

We conclude that the scientific accuracy and reliability of the laser device used to clock the speed of Stoa's vehicle can be judicially [\*\*3] noticed. Accordingly, we affirm the district court's determination that Stoa was traveling in excess of the speed limit on the day in question. However, because the offense that Stoa was "found guilty" of committing is a civil traffic infraction and not a crime, we vacate the judgment and remand this case to the district court for entry of a replacement judgment in favor of the State that complies with the applicable statutes governing traffic infractions. See

*State v. Rees*, 107 Hawai'i 508, 115 P.3d 687 (App.), reconsideration denied, 108 Hawai'i 76, 116 P.3d 718, cert. denied, 108 Hawai'i 59, 116 P.3d 701 (2005).

#### FACTUAL BACKGROUND

At the November 25, 2003 trial below, Honolulu Police Department (HPD) Sergeant Milton Yamada (Sergeant Yamada), the State's only witness, testified that on August 15, 2003, he was assigned to perform traffic enforcement patrol duties in the Kailua area. Equipped with an LTI n3 20-20 laser gun (laser gun), he set up operations at 1225 Keolu Drive and faced traffic going in the makai n4 direction towards the shopping center.

n3 Although the transcript of the November 25, 2003 proceedings indicate that Honolulu Police Department Sergeant Milton Yamada stated that he was equipped with an "LT1 20-20" laser gun, the reference should have been to an "LTI 20-20" laser gun.

[\*\*4]

n4 The Hawaiian word "makai" means "on the seaside, toward the sea, in the direction of the sea." M.K. Pukui & S.H. Elbert, *Hawaiian Dictionary* 225, 114 (1986).

At approximately 9:30 a.m., he observed a vehicle going faster than the posted speed limit of twenty-five miles per hour. Aiming [\*262] his laser gun at the license plate of the vehicle from a distance of 757 feet, he locked in a reading for the vehicle's speed of forty-two miles per hour. He thereafter stopped the vehicle and cited Stoa, the vehicle's driver, for speeding.

Sergeant Yamada testified that at the time of Stoa's offense, the weather was clear, traffic was moderate, the road conditions were good, and no other vehicles were near Stoa's vehicle. There was also a clearly visible twenty-five-mile-per-hour speed limit sign posted by the City and County of Honolulu at the 1300 block, which Stoa passed as she approached Sergeant Yamada's position. At the deputy prosecutor's request and with no objection from Stoa, the district court took judicial notice that the speed limit sign was posted in accordance with the speed schedule [\*\*5] on file in the City and County of Honolulu.

Sergeant Yamada further stated that on the day he issued the citation to Stoa, he was certified to use the laser gun, having completed four hours of classroom work and four hours of road instruction on its use. He had been performing traffic enforcement duties for the entire twenty years of his HPD service. Prior to beginning his patrol that day, Sergeant Yamada performed the required series of functionality tests on the laser gun, which included the "self-test," the "display test," the "scope alignment test," and the "calibration test." The results of these tests indicated that the laser gun was working properly.

Objecting to Sergeant Yamada's testimony about the readout of the laser gun, Stoa argued that "the laser speed measurement has not been universally accepted as accurate and reliable." She also requested that the district court review some materials critical of the reliability of the LTI 20-20 laser gun that she had downloaded from the internet. However, because Stoa could not identify the specific website or publication from which the materials were gathered and thereby produce foundational evidence sufficient to assure [\*\*6] the district court that the materials came from a reputable source, the district court would not accept the materials into evidence.

At the close of Sergeant Yamada's direct examination, the district court instructed Stoa to begin her cross-examination

of Sergeant Yamada. The entire cross-examination was as follows:

Q Did you measure my speed by any other means other than laser?

A Just the laser gun.

MS. STOA: Okay. That's all I have to ask, Your Honor.

Stoa declined to testify. In open court, however, she filed a Hawai'i Rules of Penal Procedure (HRPP) Rule 29 Motion for Judgment of Acquittal and a memorandum in support of the motion. She argued therein that acquittal was warranted because the only evidence of the speed of her vehicle was obtained through the use of a laser speed-measuring device and the State "did not offer any expert testimony as to the accuracy of laser speed measurement in general or the device used by the officer in this case in particular[.]" Stoa also argued that

[t]he use of laser technology to measure the speed of an automobile constitutes "new" or "novel" evidence and has not been universally accepted as accurate [\*\*7] and reliable. Only a handful of jurisdictions have upheld judicial notice of laser speed-measuring technology at the appellate level.

In denying Stoa's Motion for Judgment of Acquittal, the district court expressed its belief that laser devices are fair to defendants because they are more accurate than pacing or police guesswork, and more scientific. The district court also stated that it was taking judicial notice of the laser gun:

So this machine helps people. It keeps officers from making mistakes. I believe--I've been handling laser trials for eight years. I'm gonna take judicial notice of that fact. I'm gonna take judicial notice of the fact that there have been literally thousands of convictions under this machine.

I'm gonna take judicial notice of the fact that a lot of officers have been trained to use the machine; and that if we have many trials on--with expert witness[es] every time we have a speeding trial in the Kaneohe [\*263] Court or the other courts, we're gonna spend all our time in speeding trials.

....

So I'm gonna take judicial notice of--this is somewhat strange--but of the number of speeding trials I've heard, the observations of the [\*\*8] officers I've heard; and I also believe there is [Intermediate Court of Appeals] authority addressing these cases. I wish I had it in front of me to quote to you, but I don't.

The court then found that the prosecution had proved, beyond a reasonable doubt, that Stoa had driven forty-two miles per hour in a twenty-five-mile-per-hour zone, or seventeen miles per hour over the speed limit, and ordered Stoa to pay an \$ 85 fine, plus \$ 37 in court costs, which the court stayed for thirty days pending notice of appeal. The district court's Notice of Entry of Judgment and/or Order and Plea/Judgment, finding Stoa "guilty" of violating *HRS* § 291C-102, was filed on December 15, 2003 and this appeal followed.

## DISCUSSION

### A. The Admissibility of Readings from a Laser Speed-Measuring Device

[HN2] Generally, "where the admission of testimony on a scientific technique presents an issue of first impression, the technique's reliability is not a proper subject of judicial notice." *State v. Ito*, 90 Hawai'i 225, 242, 978 P.2d 191, 208

112 Haw. 260, \*263; 145 P.3d 803;  
2006 Haw. App. LEXIS 397, \*\*8

(*App. 1999*) (quoting *29 Am. Jur. 2d Evidence* § 94, at 137 (1994)). [\*\*9] To be admissible, expert testimony as to the scientific validity and reliability of the new or novel technique is required or the technique must be recognized as scientifically valid at least once by an appellate court within the trial court's jurisdiction. *Ito, 90 Hawaii at 242, 978 P.2d at 208*. However,

[HN3] [o]nce a scientific principle is sufficiently established, a court may take judicial notice of the validity of that principle. Similarly, a court may take judicial notice of the validity of the technique applying that principle. In either case the effect is the same: judicial notice relieves the offering party of the burden of producing evidence on these issues.

1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1-2, at 2 (2d ed.1993) (footnotes omitted). An eminent treatise on evidence further points out that

the [scientific] principle involved need not be commonly known in order to be judicially noticed; it suffices if the principle is accepted as a valid one in the appropriate scientific community. In determining the intellectual viability of the proposition, of course, the judge is free to consult any sources that he [or [\*\*10] she] thinks are reliable, but the extent to which judges are willing to take the initiative in looking up the authoritative sources will usually be limited. By and large, therefore, it is the task of counsel to find and to present in argument and briefs such references, excerpts and explanations as will convince the judge that the fact is certain and demonstrable. Puzzling enough in this regard, it has been noted that "nowhere can there be found a definition of what constitutes competent or authoritative sources for purposes of verifying judicially noticed facts." *And it should be noted, after a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent.*

2 *McCormick on Evidence* § 330, at 395 (footnotes omitted, emphasis added).

Id. (brackets and emphasis in original).

Stoa argues that "[n]o Appellate Court in Hawai'i has recognized widespread acceptance of the reliability or accuracy of laser technology as a means of measuring speed." She also notes that courts in several other jurisdictions have [\*\*11] held that the technique of using laser-based devices to measure vehicle speed has not reached the scientific stage of verifiable certainty so as to allow evidence from such devices to be admissible without expert testimony. She cites, for example, *Izer v. State, 236 Ga. App. 282, 511 S.E.2d 625, 627 (Ga. Ct. App. 1999)* (holding that although some courts have accepted laser evidence, "it cannot be said that a *substantial* number of courts have recognized the technique" and "[c]onsidering [\*264] the dearth of authority showing the scientific certainty of the technique, as well as the absence of expert testimony on the subject, the trial court erred in admitting the evidence"); *People v. Canulli, 341 Ill. App. 3d 361, 792 N.E.2d 438, 445, 275 Ill. Dec. 207 (Ill. App. Ct. 2003)* (holding that "the use of Lidar laser technology to measure the speed of an automobile constitutes 'new' or 'novel' evidence" and therefore, an evidentiary hearing conducted pursuant to *Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)* "was necessary to determine whether these instruments were admissible as a matter of law"); and *State v. Sapphire, 2000 Ohio App. LEXIS 5767, 2000 WL 1803852, [\*\*12] \*4 (Ohio Ct. App. 2000)* (an unpublished opinion, n5 holding that the trial court committed prejudicial error by admitting the evidence of the reading of an Ultralite 20/20 laser unit because there was "nothing in the record to show that the trial court has ever received expert evidence on and determined that the laser device used in this case is dependable and accurate, and because it appears that no court of binding authority upon the Xenia Municipal Court has ever taken judicial notice of this laser device").

112 Haw. 260, \*264; 145 P.3d 803;  
2006 Haw. App. LEXIS 397, \*\*12

n5 We note that pursuant to Hawai'i Rules of Appellate Procedure Rule 35(c), "[a] memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent."

Although the Hawai'i appellate courts have not had occasion to consider the admissibility of readings from [\*\*13] a laser speed-measuring device, the Hawai'i Supreme Court has upheld a speeding conviction based on the "testimony of a single police officer who relied upon a reading from a K-15 radar speed detection device (K-15 gun) which clocked the speed of [the appellant's] vehicle at seventy miles per hour in a fifty-five mile per hour zone." *State v. Tailo*, 70 Haw. 580, 580, 779 P.2d 11, 12 (1989). n6 The issue on appeal in Tailo was "whether the State must prove the accuracy of a tuning fork used in verifying the accuracy of the K-15 gun before results of that device are admissible as evidence of a speeding violation." *Id.* at 580-81, 779 P.2d at 12. However, the supreme court took the opportunity to address the question of the admissibility of radar gun evidence as proof of a speeding violation and held:

The scientific principles upon which the radar gun is based are well established. The radar gun is a system which transmits a continuous flow of microwaves on a constant frequency which are reflected back whenever they strike a target. When the target is an approaching vehicle, the speed of the vehicle causes the deflected waves to return on [\*\*14] a different and higher frequency than those sent out. A phenomena known as the Doppler effect posits that the faster the vehicle is moving into the radar transmissions, the higher the frequency of the reflected waves received by the radar gun. The radar gun measures the difference in the frequencies of the transmitted wave and the received wave, which enables it to use the Doppler effect to calculate the speed of the approaching vehicle. *See Kopper, The Scientific Reliability of Radar Speedmeters*, 16 Md. L. Rev. 1 (1956).

Because of the strength of the scientific principles on which the radar gun is based, every recent court which has dealt with the question has taken judicial notice of the scientific reliability of radar speedmeters as recorders of speed. *See State v. Gerdes*, 291 Minn. 353, 191 N.W.2d 428 (1971); *People v. MacLaird*, 264 Cal. App. 2d 972, 71 Cal. Rptr. 191 (1968); *State v. Tomanelli*, 153 Conn. 365, 216 A.2d 625 (1966); and Annotation, *Proof, by Radar [\*\*265] or Other Mechanical or Electronic Devices, of Violation of Speed Regulations*, 47 A.L.R.3d 822, 831-35 (1973). [\*\*15] These courts have also consistently held that [HN4] evidence of the accuracy of the particular radar unit is necessary to sustain a conviction for speeding obtained solely by radar. *State v. Primm*, 4 Kan. App. 2d 314, 606 P.2d 112 (1980); Annotation, *Proof, by Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations*, 47 A.L.R.3d 822, 837-39 (1973). "The accuracy of a particular radar unit can be established by showing that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit." *State v. Spence*, 418 So. 2d 583, 588 (La. 1982); *Gerdes, supra*; *Primm, supra*.

*Id.* at 582, 779 P.2d at 13.

n6 Although the Hawai'i Supreme Court did not explicitly say that it was "taking judicial notice" of the accuracy of the radar technology, it noted that other courts had taken judicial notice of its accuracy when it held that a properly tested radar unit creates a presumption that the particular unit's reading is accurate. *State v. Tailo*, 70 Haw. 580, 582-83, 779 P.2d 11, 13-14 (1989).

[\*\*16]

In concluding that the reading from a radar gun was admissible as prima facie evidence of speed, the supreme court thus relied on three factors: (1) the well-established scientific principles upon which the radar gun was premised; (2) the fact that other courts had taken judicial notice of the scientific reliability of radar guns as recorders of speed; and (3) the proven accuracy of the particular radar gun used, established by evidence that (a) the device was tested according to accepted procedures and was determined to be functioning properly, and (b) the operator of the device was qualified by training and experience to operate the device. *Id.*

Applying the criteria used by the supreme court in *Tailo* to justify admission of the reading of a radar gun into evidence, we conclude that the district court properly admitted into evidence the reading of the laser gun used by Officer Yamada to measure the speed of Stoa's vehicle.

First, the laser gun is technologically premised on well-understood scientific principles.

In *Goldstein v. State*, 339 Md. 563, 664 A.2d 375 (Md. 1995), the Court of Appeals of Maryland was called upon to determine whether [\*\*17] measurements taken with an LTI 20-20 laser gun were properly admitted into evidence. At trial, each side had called a scientific expert to testify about the reliability and acceptance of the LTI 20-20 in the particular scientific community. The State's expert testified that the particular laser gun was generally accepted as reliable and capable of accurately measuring speed of a vehicle within one mile per hour. The defense expert testified that the LTI 20-20 was not generally accepted, due primarily to flaws in the particular device. However, both experts had agreed that "in theory laser technology could be used to measure the speed of a motor vehicle." *Id.* at 376.

In concluding that the results were admissible, the court provided the following explanation of the scientific reliability of laser speed-detection technology generally:

Our analysis begins by examining the operation of the LTI 20-20. The theory underlying the LTI 20-20 would be familiar to any student of high school physics. In fact, laser speed devices operate on the same principles as military radar (police radar works somewhat differently). See 1 *McCormick on Evidence* § 204, at 880 (J. Strong 4th [\*\*18] ed. 1992). McCormick explains military radar as follows:

The radar antenna transmits microwave radiation in pulses. The equipment measures the time it takes for a pulse to reach the target and for its echo to return. Since the radiation travels at a known speed (the speed of light), this fixes the distance to the target. The changes in the distances as determined from the travel times of later pulses permit the target's velocity to be computed.

*Id.* § 204, at 880 n.17.

Laser speed measurements work exactly the same way, except that the device relies on lasers rather than microwave radiation. Laser is an acronym for "light amplification by stimulated emission of radiation." 15 *Funk & Wagnalls New Encyclopedia* 410 (R. Phillips ed., 1983).

Lasers are devices that amplify light and produce coherent light beams, ranging from infrared to ultraviolet. A light beam is coherent when its waves, or photons, propagate in step with one another. Laser light, therefore, can be made extremely intense, highly directional, and very pure in color (frequency).

*Id.*

[\*266] Light and microwaves, the building blocks of lasers and radar, respectively, occupy different [\*\*19] points on the electromagnetic spectrum but are otherwise similar. P. Tipler, *Physics* 852-54 (2d ed. 1982). According to the State's expert, the main advantage that lasers offer over radio-micro waves is that the beam is narrower and therefore easier to keep focused on the target vehicle.

A hypothetical might clarify this discussion. Our example involves a runner in a 200-meter dash. For purposes of our example, we assume that light travels at 200 meters per second. The actual speed of light is approximately 300 million meters per second, or 186,000 miles per second; our use of a different figure, however, is consistent with the relevant scientific principles and makes the calculations in our example easier.

An instant before the race begins, an observer standing at the finish line sends a laser beam toward the runner in the starting blocks. The beam reaches the runner and returns in two seconds. Thus, the distance for the round trip was 400 meters, so the runner must have been 200 meters away when the laser reached her. Five seconds later, the observer's laser device emits another light pulse, which returns in 1.5 seconds; thus, when the beam reached the runner, she [\*\*20] was 150 meters away. We can then calculate that the runner traveled fifty meters in the five-second interval between the two measurements; accordingly, she is running at an average speed of ten meters per second. 2

2 If the observer is not standing directly in front of the runner (or directly behind, if our hypothetical had placed the observer at the beginning of the track), then his measurements will understate the runner's speed. This phenomenon, known as the cosine effect, creates a potential source of error in the LTI 20-20's measurements. Because this error always favors the motorist, however, it is not at issue in this case.

*Goldstein*, 664 A.2d at 379. The Maryland court also concluded that it was not necessary for a trial court to conduct an evidentiary hearing on the scientific acceptance and reliability of a particular brand of a laser speed-detection device:

There are important considerations of judicial economy underlying the practice of limiting *Frye-Reed* to general processes, rather than brand-name products. If every brand of every instrument were subject to a discrete *Frye-Reed* evaluation, trial courts would be mired in hearings [\*\*21] concerning devices incorporating scientific principles, possibly including calculators and magnifying glasses. *See People v. Mendibles*, 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553, 563 (1988) (stating that a *Frye* hearing is not required with respect to a colposcope, which the court characterized as "a weak microscope").

Moreover, the scientific consensus that forms a prerequisite for the admission of evidence would ordinarily be elusive, because, while scientists may be familiar with the general principles underlying a particular device, they may have no occasion to use the device itself. In the instant case, for example, the LTI 20-20 has little use other than for law enforcement purposes. Consequently, neither of the experts who testified at trial actually used the device in his work. . . .

We believe that the ordinary truth-seeking methods of the adversarial process will suffice to expose design flaws in the devices used to gather evidence, without requiring the courts to place a "*Frye-Reed* Seal of Approval" on individual brands. . . .

*Id.* at 381.

In *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System*, 314 N.J. Super. 233, 714 A.2d 381 (N.J. Super. Ct. Law Div. 1998), [\*\*22] n7 the New Jersey Superior [\*\*267] Court, Law Division, similarly concluded that performance tests conducted by the New Jersey Department of Transportation of the LTI Marksman 20-20 Laser Speed Detection System manufactured by Laser Technology, Inc. demonstrated sufficient reliability of the laser speed detector to allow speed readings produced by such detectors to be received into evidence without the need for expert testimony in individual prosecutions. *Id.* at 391. In its opinion, the court described the way a laser speed detector is supposed to work, as follows:

A laser is an artificially generated and amplified light which is in the infrared light section of the electromagnetic wave spectrum. It is not visible to the naked eye. It is very concentrated. The laser speed detector fires a series of laser pulses at a selected remote target. When the laser light strikes the target, a portion of the light is reflected back to the detector. Since the speed of light is a known constant, by measuring the time it takes for the laser pulse to travel to the target and back, the detector is able to calculate the distance between the detector and the target. Each laser pulse [\*\*23] which is fired and reflected back establishes one distance reading. The laser speed detector fires 43 laser pulses every time the trigger on the detector is squeezed. These 43 pulses are fired in a total period of approximately one-third of a second. If the target at which the laser pulses are fired is a stationary target, each of the 43 pulses will give the same distance reading to the target, and distance will be the only thing that the detector can tell us about the target. However, if the target is moving, each of the 43 pulses will give a slightly different distance reading and the detector can then compute the velocity or speed of the target from the changes in distance divided by the known elapsed time between the firing of each of the laser pulses. In simplest terms, this is the basic theory underlying the use of lasers to calculate speed, and there can be no dispute about its fundamental validity.

714 A.2d at 383-84 (block quotation format altered).

n7 In *re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System* is a case that provides a detailed positive evaluation of the performance of LTI 20-20 laser guns in comparison to other speed measuring devices. The court describes the results of tests, conducted by the New Jersey Department of Transportation, of the laser gun in comparison to various alternative speed measuring devices. The tests were conducted under a variety of normal driving conditions. Several local defense attorneys served as amici curiae adversaries during the proceedings.

[\*\*24]

Daniel Y. Gezari, Ph.D, who works for NASA/Goddard Space Flight Center, Infrared Astrophysics Branch, has noted that while laser and radar speed-measuring devices have several common features, they are different in several respects:

- (1) The laser gun has a very narrow beam (about three feet wide at a distance of 1000 feet), so that it can pick out a single car for measurement, while the radar beam is roughly 100 times wider (about 300 feet wide at 1000 feet) and can easily have a dozen cars in its beam simultaneously.
- (2) Laser speed guns make a direct measurement of how the position of the target changes in time . . . , while radar infers the speed from the Doppler-shifted frequency of the reflected waves.
- (3) The laser results are calculated and error-checked by a microprocessor, which verifies

the individual measurements and the final speed result. . . .

(4) Radar has the advantage of being better in poor visibility weather conditions (fog, rain, snow, etc.). However, the value of radar's bad-weather capability is questionable, since traffic stops are less likely to be made under bad weather conditions for other reasons, primarily safety concerns. [\*\*25]

(5) Radar speed guns can be set up to continuously monitor oncoming traffic without active operator attention, while the laser gun must be carefully aimed and triggered by the operator for each individual measurement.

(6) Laser speed guns are more immune to interference from natural and artificial environmental sources than radar guns. . . .

1 Campbell, Fisher & Mansfield, Defense of Speeding, Reckless Driving and Vehicular Homicide § 9a.02[6], at 9a-9 (2005).

[\*268] The foregoing explanations convince us that the laser speed detection device is technologically premised on well-accepted and reliable scientific principles.

Second, the accuracy and reliability of laser speed-detection devices for purposes of traffic speed monitoring have been explicitly affirmed by appellate courts in Maryland, Minnesota, and New Jersey, by a municipal court in Ohio, and by a superior court in New Jersey. See *Goldstein*, 664 A.2d at 381; *State v. Ali*, 679 N.W.2d 359, 364 (Minn. Ct. App. 2004) (holding that "so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy [\*\*26] and that officers using the device have been trained in its use, a district court does not abuse its discretion in taking judicial notice of the device's general reliability of laser technology"); *State v. Abeskaron*, 326 N.J. Super. 110, 740 A.2d 690, 694 (N.J. Super. Ct. App. Div. 1999) (affirming the lower court's determination in *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System* that "subject to the listed restrictions, the subject laser detector was an appropriate tool in measuring speed"); *City of Columbus v. Barton*, 106 Ohio Misc. 2d 17, 733 N.E.2d 326, 327 (Ohio Mun. Ct. 1994) (holding that the "laser speed detector is reliable and accurate as a scientific measure of the speed of a moving object, which can be used by law enforcement personnel to measure vehicle speed, provided that the device is used in accordance with certain procedures delineated by the manufacturer"); *In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System*, 714 A.2d at 391-92 (N.J. Super. 1998).

Finally, we conclude that the [\*\*27] laser device used by Sergeant Yamada to clock Stoa's speed satisfied all of the Hawai'i Supreme Court's requirements for accuracy. In *Tailo*, the supreme court required the accuracy of a particular radar unit to be established by proof "that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit." *Tailo*, 70 Haw. at 582, 779 P.2d at 13 (citations and quotation marks omitted).

Sergeant Yamada testified that he performed the required functionality tests on the laser gun prior to beginning his patrol, and that the readings indicated that the device was functioning properly. He also testified that he possessed a valid certification for operating the laser gun and that he had twenty years' experience in performing traffic enforcement duties.

In light of the foregoing discussion, [HN5] we join the other states that have taken judicial notice of the scientific acceptance of the accuracy and reliability of laser speed-measuring devices.

We further hold that the prosecution presented evidence sufficient to establish [\*\*28] that the particular laser device

112 Haw. 260, \*268; 145 P.3d 803;  
2006 Haw. App. LEXIS 397, \*\*28

used by Sergeant Yamada was functioning properly and that Sergeant Yamada was qualified by training and experience to operate the device. We therefore reject Stoa's challenge to the admissibility of Sergeant Yamada's testimony on grounds of insufficient foundational evidence.

#### B. The Sufficiency of the Evidence Adduced Below

Stoa claims that the district court improperly denied her HRPP Rule 29 Motion for Judgment of Acquittal because, without the evidence of the laser reading, there was insufficient evidence to prove that she traveled in excess of the speed limit. Under Hawai'i case law,

[HN6] "[s]ubstantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

*State v. Pone*, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (some brackets in original, block quotation format altered) (quoting *State v. Batson*, 73 Haw. 236, 248-49, 831 P.2d 924, 931, [\*29] reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992)).

[\*269] Based on our conclusion that the laser reading was admissible and in light of Sergeant Yamada's testimony regarding his testing of the functionality of his laser gun unit, his qualifications and experience, the posted speed limit in the area where he was performing traffic enforcement duties, the circumstances within which he used the laser gun in measuring Stoa's speed, and the forty-two-mile-per-hour reading on the laser gun, we hold that "credible evidence" of "sufficient quality and probative value" was provided to sustain the court's denial of Stoa's motion.

#### CONCLUSION

We therefore affirm the district court's determination that Stoa committed the offense of Noncompliance with Speed Limit Prohibited, in violation of *HRS* § 291C-102. However, because the district court erroneously found Stoa "guilty" of the offense, which is a civil traffic infraction rather than a crime, we vacate the judgment and remand for entry of a replacement judgment in favor of the State that complies with the applicable statutes governing traffic infractions.

22 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF IDAHO, Plaintiff-Respondent, v. HARVEY G. HALLENBECK,  
Defendant-Appellant.**

**Docket No. 30767, 2005 Opinion No. 35**

**COURT OF APPEALS OF IDAHO**

*141 Idaho 596; 114 P.3d 154; 2005 Ida. App. LEXIS 53*

**June 2, 2005, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1] Released for Publication: June 30, 2005.

**PRIOR HISTORY:** Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. James R. Michaud, District Judge.

**DISPOSITION:** Judgment of conviction for delaying or obstructing an officer, affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted for resisting, delaying or obstructing an officer. The offense was a misdemeanor. After a jury trial in the trial court, he appealed to the District Court of the First Judicial District, Bonner County, Idaho. The latter court affirmed his conviction. He appealed again, asserting that his conduct constituting the basis for the obstructing charge occurred during an alleged illegal seizure during a traffic stop.

**OVERVIEW:** The officer pulled defendant over for speeding. Defendant immediately exited his vehicle. The officer ordered him to get back into his vehicle and he complied. However, he also became confrontational and refused to furnish his license. Ultimately, defendant attempted to open his door and get out of his vehicle, pushing the door against the officer. Finally, the officer gave defendant a ticket and ended the traffic stop. But defendant then got out of his car and began shining a flashlight at the patrol car license plates, stating he needed to identify same. When defendant walked to the rear of the patrol car and ignored the officer's repeated requests that he get back in his car, he was arrested. The appellate court rejected defendant's argument that he was detained illegally after the citation was issued because the patrol car's overhead lights remained on. In any event, defendant failed to obtain a ruling on that issue at trial. Finally, the evidence was sufficient to sustain defendant's conviction because defendant delayed or obstructed the officer in the performance of a duty of his office, even if same was based solely on defendant's conduct after the citation was issued.

**OUTCOME:** Defendant's conviction was affirmed.

**CORE TERMS:** deputy, patrol car, highway, door, speeding, driver, traffic stop, obstructing, lawful, emergency,

license, patrol, flashlight, detention, exit, public officer, resisting, arrested, obstruct, delaying, pushing, trial evidence, suppression, obstructed, occurring, repeated, resisted, traffic, walked, shined

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

***Criminal Law & Procedure > Search & Seizure > Seizures of Persons***

[HN1] Although the activation of the emergency lights is a command for motorists to stop, by terms of *Idaho Code* §§ 49-625 and 49-1404(1), the fact that the emergency lights are not turned off does not constitute a continued show of authority.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] The appellate court will not review a trial court's alleged error on appeal absent an adverse ruling that forms the basis for the assignment of error.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] The appellate court will not, on review of the sufficiency of the evidence at trial, ignore evidence that is admitted at trial without objection.

***Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > False Statements > Penalties***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Elements***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Penalties***

[HN4] See *Idaho Code* § 18-705.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview Governments > Legislation > Interpretation***

[HN5] In the context of what constitutes a "duty" as that term is used in *Idaho Code* § 18-705, where an individual refuses to obey an order or obstructs an act of a public officer which is contrary to the law, be it statute or constitution, that individual does not violate § 18-705, "duty" encompasses only those lawful and authorized acts of a public officer. To hold otherwise will clothe an officer with protection from resistance based only on his status as an officer and will render the "in the discharge, or attempt to discharge, of a duty of his office" language of the statute mere surplusage.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

***Governments > Local Governments > Employees & Officials***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

141 Idaho 596, \*; 114 P.3d 154, \*\*;  
2005 Ida. App. LEXIS 53, \*\*\*1

[HN6] It is beyond dispute that during a traffic stop, an officer has the authority to control the movement of the driver of the stopped vehicle. Thus, during a lawful traffic stop, an officer may instruct the driver to exit the vehicle or to remain inside. The procedure is within the police officer's discretion and is not otherwise unlawful.

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview Evidence > Procedural Considerations > Weight & Sufficiency*

[HN7] A defendant's acts of making physical contact and struggling with an officer are sufficient to sustain a conviction under *Idaho Code* § 18-705.

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

[HN8] In the context of a traffic stop, a defendant's reaction in pushing an officer constituted sufficient grounds to arrest him for obstructing and delaying.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

*Governments > Local Governments > Employees & Officials*

[HN9] A deputy's duties include those enumerated in *Idaho Code* § 31-2202(12).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

*Governments > Local Governments > Employees & Officials*

[HN10] See *Idaho Code* § 31-2202(12)(a).

*Governments > Local Governments > Employees & Officials*

[HN11] In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom.

**COUNSEL:** Alyssa C. Swartz, Coeur d'Alene, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Robert K. Schwarz, Deputy Attorney General, Boise, for respondent. Robert K. Schwarz argued.

**JUDGES:** LANSING, Judge. Chief Judge PERRY and Judge GUTIERREZ CONCUR.

**OPINION BY:** LANSING

**OPINION:** [\*597] [\*\*155] LANSING, Judge

Harvey G. Hallenbeck is appealing from the district court's order affirming his misdemeanor conviction for resisting, delaying or obstructing an officer. We affirm.

**I.**

## FACTUAL & PROCEDURAL BACKGROUND

The events leading to Hallenbeck's prosecution are as follows. In the evening hours of November 14, 2002, Deputy Lehman of the Bonner County Sheriff's office was patrolling Highway 2 when he pulled over a vehicle for speeding. A videotape of the encounter shows the vehicle stopped ahead of the patrol unit, at night, just to the right of [\*\*\*2] the highway's fog line. Hallenbeck, who was the driver, immediately exited his vehicle. Lehman ordered Hallenbeck to get back into his vehicle and Hallenbeck complied. However, Hallenbeck also immediately became confrontational, denying that he had been speeding and questioning Lehman about the calibration of his radar. When asked to produce his driver's license, Hallenbeck did not cooperate. Lehman had to request it two or three times, and when Hallenbeck did eventually produce the license he held it so tightly that Lehman had to forcefully pull it from Hallenbeck's hand. Deputy Lehman then returned to his vehicle, ran a license check through dispatch, wrote out a citation for speeding, and returned to the Hallenbeck vehicle. Hallenbeck continued to be argumentative, [\*\*156] [\*598] asking Lehman in a rude manner about his training and experience as an officer. Lehman tersely but courteously explained the amount of the fine for speeding and discussed the procedures to request a court date. Hallenbeck's passenger then became argumentative, contending that the vehicle was stopped solely because it had California license plates.

At that point, Hallenbeck attempted to open the driver's door and get [\*\*\*3] out of the vehicle, pushing the door against Lehman, who was standing next to the door. Lehman pushed back and told Hallenbeck to close the door and stay in the car. Hallenbeck continued to push on the door. Lehman ordered Hallenbeck four more times to close the door and stay in the car, and he twice stated that Hallenbeck would be arrested for resisting and obstructing if he did not comply. Hallenbeck finally relented. Hallenbeck then asked the license number of Lehman's patrol unit. Lehman responded that his name and badge number were on the ticket.

The deputy then ended the traffic stop by telling Hallenbeck to "drive safe," after which he walked back toward his patrol car. Hallenbeck thereupon emerged from his vehicle, carrying a flashlight, and walked toward the patrol car. Lehman asked, "Can I help you?" Hallenbeck did not respond but shined a flashlight on the license plate of the patrol car and wrote the plate number on a pad. Hallenbeck later testified that he was gathering evidence because he had not been speeding and wanted to identify the patrol car so that he could challenge the calibration of its radar. Hallenbeck next shined the flashlight into the patrol car and then [\*\*\*4] walked to the rear of the patrol car. He later testified that he wanted to write down the make of the car for evidentiary purposes. At that point Deputy Lehman lost patience. He told Hallenbeck three times "Get back in the car or you will go to jail." When Hallenbeck did not comply, he was arrested for misdemeanor resisting, delaying or obstructing an officer, *Idaho Code* § 18-705.

Following a jury trial, Hallenbeck was found guilty. He appealed to the district court, which affirmed the conviction. This appeal followed. Hallenbeck contends he was unlawfully arrested and that the evidence adduced at trial was insufficient to sustain a conviction.

## II.

### ANALYSIS

#### A. Legality of Arrest

Hallenbeck first argues that his arrest for obstructing a police officer was unlawful. While his argument on this issue is not entirely clear, he appears to contend that he was detained illegally after the citation was issued because the patrol car's overhead emergency lights remained on, that his conduct constituting the basis for the obstructing charge occurred during this allegedly illegal seizure, and that such evidence therefore should have been suppressed [\*\*\*5] and cannot be relied upon to sustain a conviction.

Hallenbeck's argument that his detention continued after the citation had issued solely because the officer's overhead emergency lights remained on is significantly eroded by our recent decision in *State v. Roark*, 140 Idaho 868,

141 Idaho 596, \*598; 114 P.3d 154, \*\*156;  
2005 Ida. App. LEXIS 53, \*\*\*5

140 Idaho 868, 103 P.3d 481 (Ct. App. 2004). We there held,[HN1] "Although the activation of the emergency lights is a command for motorists to stop, by terms of *I.C. § 49-625* and *49-1404(1)*, the fact that the emergency lights had not yet been turned off did not constitute a continued show of authority detaining Roark in the face of at least two notifications from the officer that he was free to go." *Id. at 871, 103 P.3d at 484*. We also have grave doubts as to the validity of Hallenbeck's premise that a court must suppress evidence of criminal acts committed by a defendant occurring during the course of an illegal seizure. We need not pass upon these issues however, because Hallenbeck did not obtain a ruling on his suppression theory in the trial court. Although Hallenbeck filed a pretrial motion to suppress, the matter was never scheduled for hearing, heard, or ruled [\*\*\*6] upon by the magistrate. The evidence that Hallenbeck complains of on appeal was presented without objection at trial. [HN2] This Court will not review a trial court's alleged error on appeal absent an adverse ruling that forms the basis for the assignment of error. *State* [\*\*157] [\*599] *v. Fisher*, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993).

In short, Hallenbeck cannot, at this late date, assert the jury should not have heard the evidence that it did hear after Hallenbeck abandoned any effort to obtain suppression of the evidence. Similarly,[HN3] this Court will not, on review of the sufficiency of the evidence at trial, ignore evidence that was admitted at trial without objection.

## B. Sufficiency of the Evidence

Hallenbeck next argues that the trial evidence was insufficient to show that he violated *I.C. § 18-705*, which provides:

[HN4] Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars (\$ 1,000), and imprisonment [\*\*\*7] in the county jail not exceeding one (1) year.

Hallenbeck reasons that, once the speeding citation had been issued, Deputy Lehman could no longer constitutionally detain Hallenbeck and therefore the deputy had no authority to direct or restrict Hallenbeck's movements and activities. Therefore, Hallenbeck asserts, Deputy Lehman could not lawfully order Hallenbeck to return to his own vehicle while Hallenbeck was examining the patrol car, and in ignoring that order Hallenbeck did not resist, delay or obstruct the officer in "any duty of his office."

The question of what constitutes a "duty" as that term is used in *I.C. § 18-705* was addressed by this Court in *State v. Wilkerson*, 114 Idaho 174, 755 P.2d 471 (Ct. App. 1988). n1 We there recognized that "resolution of the question presented here requires an exploration of 'the difficult, dangerous, and subtle field where the essential office of the policeman impinges upon the basic freedom of the citizen.'" *Id. at 178, 755 P.2d at 475*. We concluded:

[HN5] We hold that where an individual refuses to obey an order or obstructs an act of a public officer which is contrary [\*\*\*8] to the law, be it statute or constitution, that individual does not violate *I.C. § 18-705*. We interpret "duty" as used in that statute to encompass only those lawful and authorized acts of a public officer. To hold otherwise would clothe an officer with protection from resistance based only on his status as an officer and would render the "in the discharge, or attempt to discharge, of a duty of his office" language of the statute mere surplusage.

*Id. at 180, 755 P.2d at 477*.

n1 On review, the Idaho Supreme Court authored a five-line opinion adopting this Court's decision as "correctly decided." *State v. Wilkerson*, 115 Idaho 357, 766 P.2d 1238 (1988).

Applying that definition of "duty," we conclude that there was sufficient evidence for a jury finding that Hallenbeck resisted, delayed or obstructed Deputy Lehman in the performance of a duty of his office. We begin by noting that although Hallenbeck's argument on appeal assumes that his only conduct [\*\*\*9] at issue was his failure to comply with Lehman's final orders to return to his car, neither the charging citation nor the jury instructions limited the charge to that conduct. The citation alleged that Hallenbeck resisted and obstructed an officer by "failing to obey commands to get back into his car." And the jury instruction stating the elements of the offense instructed in the general language of the statute and did not identify the specific act or acts that were alleged to constitute the violation. Therefore, the jury could have found Hallenbeck guilty either for his conduct after the citation was issued or for his earlier behavior in attempting to exit the car by pushing the door open against Lehman's body despite the deputy's repeated instructions to close the door and stay in the car. This conduct, which resulted in a shoving match at the door between Hallenbeck and the deputy, occurred during what Hallenbeck concedes to be a lawful segment of the detention, before the deputy concluded the traffic stop. [HN6] It is beyond dispute that during a traffic stop, an officer has the authority to control the movement of the driver of the stopped vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977); [\*\*\*10] *State v. Butcher*, 137 Idaho 125, 131, [\*\*158] [\*600] 44 P.3d 1180, 1186 (Ct. App. 2002) ("During a lawful traffic stop, the officer may instruct the driver to exit the vehicle or to remain inside. The procedure is within the police officer's discretion and is not otherwise unlawful."). [HN7] It is also clear that Hallenbeck's acts of making physical contact and struggling with the officer are sufficient to sustain a conviction under the statute. *See State v. Wight*, 117 Idaho 604, 607, 790 P.2d 385, 388 (Ct. App. 1990) [HN8] (During a pat down search occurring during a traffic stop, the defendant's "reaction in pushing the officer constituted sufficient grounds to arrest him for obstructing and delaying."). Thus, the jury could have based its conviction on Hallenbeck's actions of attempting to exit his vehicle in contravention of Lehman's initial lawful order to get back in his vehicle and repeated lawful orders to remain in his vehicle.

Even if the finding of guilt was based solely on the later confrontation, when Hallenbeck disobeyed Lehman's orders to return from the vicinity of the patrol car to his own vehicle the verdict must be upheld. We conclude that the deputy's orders [\*\*\*11] were not beyond the scope of his authority even though the detention for the speeding violation had by then ended. [HN9] A deputy's duties include those enumerated in *I.C. § 31-2202(12)*, which directs that a sheriff shall:

[HN10] (a) Require all persons using the highways in the state to do so carefully, safely and with exercise of care for the persons, property and safety of others; [and]

. . . .

(d) Regulate traffic on all highways and roads in the state . . . .

*See also Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498, 500 (1939) [HN11] ("In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom."). Here, the traffic stop occurred at night alongside a highway with a fifty-five mile-per-hour speed limit. Both Hallenbeck's vehicle and the patrol unit were parked immediately to the right of the highway's fog line. On the videotape of the stop, other vehicles can be seen passing by intermittently. Some vehicles slow to pass, and others appear to be going at a high speed. Vehicles can [\*\*\*12] be seen crossing into the other lane of the two-lane highway to pass. In short, safety would be a concern in this circumstance. Deputy Lehman testified that when Hallenbeck was walking about conducting his inspection of the patrol car, he was in the traffic lane at times, and Lehman was concerned that an oncoming driver may not be able to see Hallenbeck standing in the road. Thus, the State showed at trial that Deputy Lehman had a legitimate basis for concern about Hallenbeck's personal safety and the safety of approaching drivers. Lehman had the authority, and in fact the duty, to safeguard persons using the highways. Therefore, the jury could properly find that Deputy Lehman was

141 Idaho 596, \*600; 114 P.3d 154, \*\*158;  
2005 Ida. App. LEXIS 53, \*\*\*12

performing a "duty" of his office when he ordered Hallenbeck to return to his own car and that by refusing to comply, Hallenbeck violated *I.C. § 18-705*.

Accordingly, the trial evidence was sufficient to support the jury's verdict, and the judgment of conviction is therefore affirmed.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**

23 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF IDAHO, Plaintiff-Respondent, v. HARVEY G. HALLENBECK,  
Defendant-Appellant.**

**Docket No. 30767, 2005 Opinion No. 35**

**COURT OF APPEALS OF IDAHO**

*141 Idaho 596; 114 P.3d 154; 2005 Ida. App. LEXIS 53*

**June 2, 2005, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1] Released for Publication: June 30, 2005.

**PRIOR HISTORY:** Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. James R. Michaud, District Judge.

**DISPOSITION:** Judgment of conviction for delaying or obstructing an officer, affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted for resisting, delaying or obstructing an officer. The offense was a misdemeanor. After a jury trial in the trial court, he appealed to the District Court of the First Judicial District, Bonner County, Idaho. The latter court affirmed his conviction. He appealed again, asserting that his conduct constituting the basis for the obstructing charge occurred during an alleged illegal seizure during a traffic stop.

**OVERVIEW:** The officer pulled defendant over for speeding. Defendant immediately exited his vehicle. The officer ordered him to get back into his vehicle and he complied. However, he also became confrontational and refused to furnish his license. Ultimately, defendant attempted to open his door and get out of his vehicle, pushing the door against the officer. Finally, the officer gave defendant a ticket and ended the traffic stop. But defendant then got out of his car and began shining a flashlight at the patrol car license plates, stating he needed to identify same. When defendant walked to the rear of the patrol car and ignored the officer's repeated requests that he get back in his car, he was arrested. The appellate court rejected defendant's argument that he was detained illegally after the citation was issued because the patrol car's overhead lights remained on. In any event, defendant failed to obtain a ruling on that issue at trial. Finally, the evidence was sufficient to sustain defendant's conviction because defendant delayed or obstructed the officer in the performance of a duty of his office, even if same was based solely on defendant's conduct after the citation was issued.

**OUTCOME:** Defendant's conviction was affirmed.

**CORE TERMS:** deputy, patrol car, highway, door, speeding, driver, traffic stop, obstructing, lawful, emergency,

license, patrol, flashlight, detention, exit, public officer, resisting, arrested, obstruct, delaying, pushing, trial evidence, suppression, obstructed, occurring, repeated, resisted, traffic, walked, shined

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

***Criminal Law & Procedure > Search & Seizure > Seizures of Persons***

[HN1] Although the activation of the emergency lights is a command for motorists to stop, by terms of *Idaho Code* §§ 49-625 and 49-1404(1), the fact that the emergency lights are not turned off does not constitute a continued show of authority.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] The appellate court will not review a trial court's alleged error on appeal absent an adverse ruling that forms the basis for the assignment of error.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] The appellate court will not, on review of the sufficiency of the evidence at trial, ignore evidence that is admitted at trial without objection.

***Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > False Statements > Penalties***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Elements***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Penalties***

[HN4] See *Idaho Code* § 18-705.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview Governments > Legislation > Interpretation***

[HN5] In the context of what constitutes a "duty" as that term is used in *Idaho Code* § 18-705, where an individual refuses to obey an order or obstructs an act of a public officer which is contrary to the law, be it statute or constitution, that individual does not violate § 18-705, "duty" encompasses only those lawful and authorized acts of a public officer. To hold otherwise will clothe an officer with protection from resistance based only on his status as an officer and will render the "in the discharge, or attempt to discharge, of a duty of his office" language of the statute mere surplusage.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

***Governments > Local Governments > Employees & Officials***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN6] It is beyond dispute that during a traffic stop, an officer has the authority to control the movement of the driver of the stopped vehicle. Thus, during a lawful traffic stop, an officer may instruct the driver to exit the vehicle or to remain inside. The procedure is within the police officer's discretion and is not otherwise unlawful.

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview Evidence > Procedural Considerations > Weight & Sufficiency*

[HN7] A defendant's acts of making physical contact and struggling with an officer are sufficient to sustain a conviction under *Idaho Code* § 18-705.

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

[HN8] In the context of a traffic stop, a defendant's reaction in pushing an officer constituted sufficient grounds to arrest him for obstructing and delaying.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

*Governments > Local Governments > Employees & Officials*

[HN9] A deputy's duties include those enumerated in *Idaho Code* § 31-2202(12).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

*Governments > Local Governments > Employees & Officials*

[HN10] See *Idaho Code* § 31-2202(12)(a).

*Governments > Local Governments > Employees & Officials*

[HN11] In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom.

**COUNSEL:** Alyssa C. Swartz, Coeur d'Alene, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Robert K. Schwarz, Deputy Attorney General, Boise, for respondent. Robert K. Schwarz argued.

**JUDGES:** LANSING, Judge. Chief Judge PERRY and Judge GUTIERREZ CONCUR.

**OPINION BY:** LANSING

**OPINION:** [\*597] [\*\*155] LANSING, Judge

Harvey G. Hallenbeck is appealing from the district court's order affirming his misdemeanor conviction for resisting, delaying or obstructing an officer. We affirm.

**I.**

## FACTUAL & PROCEDURAL BACKGROUND

The events leading to Hallenbeck's prosecution are as follows. In the evening hours of November 14, 2002, Deputy Lehman of the Bonner County Sheriff's office was patrolling Highway 2 when he pulled over a vehicle for speeding. A videotape of the encounter shows the vehicle stopped ahead of the patrol unit, at night, just to the right of [\*\*\*2] the highway's fog line. Hallenbeck, who was the driver, immediately exited his vehicle. Lehman ordered Hallenbeck to get back into his vehicle and Hallenbeck complied. However, Hallenbeck also immediately became confrontational, denying that he had been speeding and questioning Lehman about the calibration of his radar. When asked to produce his driver's license, Hallenbeck did not cooperate. Lehman had to request it two or three times, and when Hallenbeck did eventually produce the license he held it so tightly that Lehman had to forcefully pull it from Hallenbeck's hand. Deputy Lehman then returned to his vehicle, ran a license check through dispatch, wrote out a citation for speeding, and returned to the Hallenbeck vehicle. Hallenbeck continued to be argumentative, [\*\*156] [\*598] asking Lehman in a rude manner about his training and experience as an officer. Lehman tersely but courteously explained the amount of the fine for speeding and discussed the procedures to request a court date. Hallenbeck's passenger then became argumentative, contending that the vehicle was stopped solely because it had California license plates.

At that point, Hallenbeck attempted to open the driver's door and get [\*\*\*3] out of the vehicle, pushing the door against Lehman, who was standing next to the door. Lehman pushed back and told Hallenbeck to close the door and stay in the car. Hallenbeck continued to push on the door. Lehman ordered Hallenbeck four more times to close the door and stay in the car, and he twice stated that Hallenbeck would be arrested for resisting and obstructing if he did not comply. Hallenbeck finally relented. Hallenbeck then asked the license number of Lehman's patrol unit. Lehman responded that his name and badge number were on the ticket.

The deputy then ended the traffic stop by telling Hallenbeck to "drive safe," after which he walked back toward his patrol car. Hallenbeck thereupon emerged from his vehicle, carrying a flashlight, and walked toward the patrol car. Lehman asked, "Can I help you?" Hallenbeck did not respond but shined a flashlight on the license plate of the patrol car and wrote the plate number on a pad. Hallenbeck later testified that he was gathering evidence because he had not been speeding and wanted to identify the patrol car so that he could challenge the calibration of its radar. Hallenbeck next shined the flashlight into the patrol car and then [\*\*\*4] walked to the rear of the patrol car. He later testified that he wanted to write down the make of the car for evidentiary purposes. At that point Deputy Lehman lost patience. He told Hallenbeck three times "Get back in the car or you will go to jail." When Hallenbeck did not comply, he was arrested for misdemeanor resisting, delaying or obstructing an officer, *Idaho Code* § 18-705.

Following a jury trial, Hallenbeck was found guilty. He appealed to the district court, which affirmed the conviction. This appeal followed. Hallenbeck contends he was unlawfully arrested and that the evidence adduced at trial was insufficient to sustain a conviction.

## II.

### ANALYSIS

#### A. Legality of Arrest

Hallenbeck first argues that his arrest for obstructing a police officer was unlawful. While his argument on this issue is not entirely clear, he appears to contend that he was detained illegally after the citation was issued because the patrol car's overhead emergency lights remained on, that his conduct constituting the basis for the obstructing charge occurred during this allegedly illegal seizure, and that such evidence therefore should have been suppressed [\*\*\*5] and cannot be relied upon to sustain a conviction.

Hallenbeck's argument that his detention continued after the citation had issued solely because the officer's overhead emergency lights remained on is significantly eroded by our recent decision in *State v. Roark*, 140 Idaho 868,

141 Idaho 596, \*598; 114 P.3d 154, \*\*156;  
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140 Idaho 868, 103 P.3d 481 (Ct. App. 2004). We there held,[HN1] "Although the activation of the emergency lights is a command for motorists to stop, by terms of *I.C. § 49-625* and *49-1404(1)*, the fact that the emergency lights had not yet been turned off did not constitute a continued show of authority detaining Roark in the face of at least two notifications from the officer that he was free to go." *Id. at 871, 103 P.3d at 484*. We also have grave doubts as to the validity of Hallenbeck's premise that a court must suppress evidence of criminal acts committed by a defendant occurring during the course of an illegal seizure. We need not pass upon these issues however, because Hallenbeck did not obtain a ruling on his suppression theory in the trial court. Although Hallenbeck filed a pretrial motion to suppress, the matter was never scheduled for hearing, heard, or ruled [\*\*\*6] upon by the magistrate. The evidence that Hallenbeck complains of on appeal was presented without objection at trial. [HN2] This Court will not review a trial court's alleged error on appeal absent an adverse ruling that forms the basis for the assignment of error. *State* [\*\*157] [\*599] *v. Fisher*, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993).

In short, Hallenbeck cannot, at this late date, assert the jury should not have heard the evidence that it did hear after Hallenbeck abandoned any effort to obtain suppression of the evidence. Similarly,[HN3] this Court will not, on review of the sufficiency of the evidence at trial, ignore evidence that was admitted at trial without objection.

## B. Sufficiency of the Evidence

Hallenbeck next argues that the trial evidence was insufficient to show that he violated *I.C. § 18-705*, which provides:

[HN4] Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars (\$ 1,000), and imprisonment [\*\*\*7] in the county jail not exceeding one (1) year.

Hallenbeck reasons that, once the speeding citation had been issued, Deputy Lehman could no longer constitutionally detain Hallenbeck and therefore the deputy had no authority to direct or restrict Hallenbeck's movements and activities. Therefore, Hallenbeck asserts, Deputy Lehman could not lawfully order Hallenbeck to return to his own vehicle while Hallenbeck was examining the patrol car, and in ignoring that order Hallenbeck did not resist, delay or obstruct the officer in "any duty of his office."

The question of what constitutes a "duty" as that term is used in *I.C. § 18-705* was addressed by this Court in *State v. Wilkerson*, 114 Idaho 174, 755 P.2d 471 (Ct. App. 1988). n1 We there recognized that "resolution of the question presented here requires an exploration of 'the difficult, dangerous, and subtle field where the essential office of the policeman impinges upon the basic freedom of the citizen.'" *Id. at 178, 755 P.2d at 475*. We concluded:

[HN5] We hold that where an individual refuses to obey an order or obstructs an act of a public officer which is contrary [\*\*\*8] to the law, be it statute or constitution, that individual does not violate *I.C. § 18-705*. We interpret "duty" as used in that statute to encompass only those lawful and authorized acts of a public officer. To hold otherwise would clothe an officer with protection from resistance based only on his status as an officer and would render the "in the discharge, or attempt to discharge, of a duty of his office" language of the statute mere surplusage.

*Id. at 180, 755 P.2d at 477*.

n1 On review, the Idaho Supreme Court authored a five-line opinion adopting this Court's decision as "correctly decided." *State v. Wilkerson*, 115 Idaho 357, 766 P.2d 1238 (1988).

Applying that definition of "duty," we conclude that there was sufficient evidence for a jury finding that Hallenbeck resisted, delayed or obstructed Deputy Lehman in the performance of a duty of his office. We begin by noting that although Hallenbeck's argument on appeal assumes that his only conduct [\*\*\*9] at issue was his failure to comply with Lehman's final orders to return to his car, neither the charging citation nor the jury instructions limited the charge to that conduct. The citation alleged that Hallenbeck resisted and obstructed an officer by "failing to obey commands to get back into his car." And the jury instruction stating the elements of the offense instructed in the general language of the statute and did not identify the specific act or acts that were alleged to constitute the violation. Therefore, the jury could have found Hallenbeck guilty either for his conduct after the citation was issued or for his earlier behavior in attempting to exit the car by pushing the door open against Lehman's body despite the deputy's repeated instructions to close the door and stay in the car. This conduct, which resulted in a shoving match at the door between Hallenbeck and the deputy, occurred during what Hallenbeck concedes to be a lawful segment of the detention, before the deputy concluded the traffic stop. [HN6] It is beyond dispute that during a traffic stop, an officer has the authority to control the movement of the driver of the stopped vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977); [\*\*\*10] *State v. Butcher*, 137 Idaho 125, 131, [\*\*158] [\*600] 44 P.3d 1180, 1186 (Ct. App. 2002) ("During a lawful traffic stop, the officer may instruct the driver to exit the vehicle or to remain inside. The procedure is within the police officer's discretion and is not otherwise unlawful."). [HN7] It is also clear that Hallenbeck's acts of making physical contact and struggling with the officer are sufficient to sustain a conviction under the statute. *See State v. Wight*, 117 Idaho 604, 607, 790 P.2d 385, 388 (Ct. App. 1990) [HN8] (During a pat down search occurring during a traffic stop, the defendant's "reaction in pushing the officer constituted sufficient grounds to arrest him for obstructing and delaying."). Thus, the jury could have based its conviction on Hallenbeck's actions of attempting to exit his vehicle in contravention of Lehman's initial lawful order to get back in his vehicle and repeated lawful orders to remain in his vehicle.

Even if the finding of guilt was based solely on the later confrontation, when Hallenbeck disobeyed Lehman's orders to return from the vicinity of the patrol car to his own vehicle the verdict must be upheld. We conclude that the deputy's orders [\*\*\*11] were not beyond the scope of his authority even though the detention for the speeding violation had by then ended. [HN9] A deputy's duties include those enumerated in *I.C. § 31-2202(12)*, which directs that a sheriff shall:

[HN10] (a) Require all persons using the highways in the state to do so carefully, safely and with exercise of care for the persons, property and safety of others; [and]

. . . .

(d) Regulate traffic on all highways and roads in the state . . . .

*See also Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498, 500 (1939) [HN11] ("In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom."). Here, the traffic stop occurred at night alongside a highway with a fifty-five mile-per-hour speed limit. Both Hallenbeck's vehicle and the patrol unit were parked immediately to the right of the highway's fog line. On the videotape of the stop, other vehicles can be seen passing by intermittently. Some vehicles slow to pass, and others appear to be going at a high speed. Vehicles can [\*\*\*12] be seen crossing into the other lane of the two-lane highway to pass. In short, safety would be a concern in this circumstance. Deputy Lehman testified that when Hallenbeck was walking about conducting his inspection of the patrol car, he was in the traffic lane at times, and Lehman was concerned that an oncoming driver may not be able to see Hallenbeck standing in the road. Thus, the State showed at trial that Deputy Lehman had a legitimate basis for concern about Hallenbeck's personal safety and the safety of approaching drivers. Lehman had the authority, and in fact the duty, to safeguard persons using the highways. Therefore, the jury could properly find that Deputy Lehman was

141 Idaho 596, \*600; 114 P.3d 154, \*\*158;  
2005 Ida. App. LEXIS 53, \*\*\*12

performing a "duty" of his office when he ordered Hallenbeck to return to his own car and that by refusing to comply, Hallenbeck violated *I.C. § 18-705*.

Accordingly, the trial evidence was sufficient to support the jury's verdict, and the judgment of conviction is therefore affirmed.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**

24 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD  
DAVENPORT, Defendant-Appellant**

**No. 84-0191**

**Appellate Court of Illinois, Second District**

*133 Ill. App. 3d 553; 479 N.E.2d 15; 1985 Ill. App. LEXIS 1988; 88 Ill. Dec. 680*

**May 31, 1985, Filed**

**PRIOR HISTORY:** [\*\*\*1]

Appeal from the Circuit Court of Carroll County; the Hon. John DeMoss, Judge, presiding.

**DISPOSITION:**

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a jury verdict in the Circuit Court of Carroll County (Illinois), which found defendant guilty of the offense of speeding under Ill. Rev. Stat. ch. 95 1/2, para. 11-601(b) (1981). The trial court ordered defendant to pay a fine and costs.

**OVERVIEW:** Defendant was charged with speeding and plead not guilty and requested a jury trial. Defendant acted pro se. A jury found defendant guilty. On appeal, the court affirmed. The court rejected defendant's argument that the trial court erred when it denied his oral motions for continuances because there was no evidence in the appellate record to indicate that defendant ever requested a continuance. The court found that the trial court properly denied defendant's request for a continuance to allow him time to issue a subpoena to the highway commissioner because defendant did not act diligently and the potential witness would not have aided defendant's case. The court found (1) that defendant was not entitled to the assistance of the court in the jury selection process, (2) that defendant failed to establish the bias of a juror, (3) that any error in the admission of the officer's testimony as to what defendant said to him immediately after he was stopped was harmless, and (4) that the evidence was sufficient to support defendant's conviction. The state offered evidence that the radar device indicated that defendant was speeding, it was tested periodically, and it functioned properly.

**OUTCOME:** The court affirmed the judgment of the trial court against defendant.

**CORE TERMS:** juror, miles, post-trial, radar, speed limit, continuance, speed, speeding, voir dire, traveling, bias,

reasonable doubt, machine, zone, peremptory, continuance motion, impartially, clocked, miles per hour, prior to trial, guilty beyond, pro se, inaudible, sound discretion, trier of fact, fair trial, suspicion, manifest, scene, abuse of discretion

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

##### ***Criminal Law & Procedure > Trials > Judicial Discretion***

[HN1] The right to a continuance is not absolute, and its denial or allowance is a decision to be made within the sound discretion of the trial court. To warrant reversal of the trial court's ruling, the defendant must demonstrate that the denial of the continuance embarrassed the accused in the preparation of his defense so as to prejudice his rights. The circumstances regarding the continuance motion must be evaluated on a case-by-case basis, including the reasons presented to the trial court at the time the request is denied. The trial court should not refuse to grant a continuance where the ends of justice require that the motion be granted.

#### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

##### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

[HN2] When reviewing the trial court's denial of a motion during trial to obtain a witness, the reviewing court must consider the defendant's diligence, the potential witness' testimony, and the defendant's right to a fair trial.

#### ***Civil Procedure > Pretrial Matters > Continuances***

##### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

[HN3] The allowance or denial of a continuance motion to compel the presence of a witness is within the trial court's discretion. Ill. Rev. Stat. ch. 38, para. 114-4 (1981).

#### ***Civil Procedure > Parties > Self-Representation > General Overview***

##### ***Criminal Law & Procedure > Counsel > Right to Self-Representation***

[HN4] A pro se litigant is not entitled to any special consideration.

#### ***Civil Procedure > Trials > Jury Trials > Jurors > Misconduct***

##### ***Civil Procedure > Trials > Jury Trials > Jurors > Selection > General Overview***

##### ***Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > General Overview***

[HN5] The burden rests with the party challenging a juror to establish that the juror possessed a disqualifying state of mind. The mere suspicion of bias in a juror is insufficient to impeach a verdict.

#### ***Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Bias & Prejudice > General Overview***

[HN6] Prejudice by a juror is the forming of an opinion based upon allegations heard outside the courtroom rather than based upon facts heard during the trial.

#### ***Civil Procedure > Judicial Officers > Judges > Discretion***

##### ***Criminal Law & Procedure > Trials > Judicial Discretion***

##### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN7] The determination of whether a prospective juror possesses the state of mind enabling him to give to an accused a fair and impartial trial rests in the sound discretion of the trial judge, and his determination will not be set aside unless against the manifest weight of the evidence.

133 Ill. App. 3d 553, \*; 479 N.E.2d 15, \*\*;  
1985 Ill. App. LEXIS 1988, \*\*\*1; 88 Ill. Dec. 680

*Civil Procedure > Trials > Jury Trials > Jurors > Misconduct*  
*Civil Procedure > Trials > Jury Trials > Jurors > Selection > Challenges for Cause*  
*Civil Procedure > Trials > Jury Trials > Jurors > Selection > Peremptory Challenges*

[HN8] Failure to challenge a juror for cause or to exercise a peremptory challenge waives any objection to that juror.

*Civil Procedure > Appeals > Records on Appeal*  
*Criminal Law & Procedure > Appeals > Records on Appeal*  
*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Records*

[HN9] An appellant has the duty to provide a complete record on appeal. Any doubt arising from the incompleteness of the record will be resolved against the party prosecuting the appeal.

*Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview*  
*Evidence > Procedural Considerations > Objections & Offers of Proof > Objections*

[HN10] The failure to object to evidence giving specific reasons for the objection constitutes a waiver of any error.

*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview*  
*Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor*  
*Evidence > Relevance > Confusion, Prejudice & Waste of Time*

[HN11] The test of the admissibility of evidence is whether it fairly tends to prove the particular offense charged, and whether what is offered as evidence will be admitted or excluded depends upon whether it tends to make the question of guilt more or less probable; i.e., whether it is relevant. A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. The admission of evidence is within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion.

*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*  
*Criminal Law & Procedure > Trials > Judicial Discretion*

[HN12] The proper standard of proof in the case for a charge of speeding is whether defendant was proved guilty beyond a reasonable doubt.

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN13] A reviewing court will not lightly overturn a jury's verdict and will not substitute its judgment for that of the trier of fact unless the evidence is so improbable as to raise a reasonable doubt of defendant's guilt.

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN14] Reversal of a guilty verdict is not warranted merely because the jury believed the prosecutor's evidence as opposed to that presented by the defendant, or because the transcript contains minor inconsistencies which the trier of fact has resolved in favor of the state.

#### **COUNSEL:**

Walter C. Kilgus and James E. Tusek, both of Nelson, Kilgus, Richey & Tusek, of Morrison, for appellant.

James S. Williams, State's Attorney, of Mt. Carroll, and Charles E. Petersen, of Shearer, Blood, Agrella, Boose & Balog, of St. Charles (Phyllis J. Perko, of State's Attorneys Appellate Service Commission, of counsel), for the People.

#### **JUDGES:**

JUSTICE LINDBERG delivered the opinion of the court. HOPF and STROUSE, JJ., concur.

**OPINION BY:**

LINDBERG

**OPINION:**

[\*555] [\*\*17] Defendant, Donald R. Davenport, was charged by citation and complaint with the offense of speeding (Ill. Rev. Stat. 1981, ch. 95 1/2, par. 11 -- 601(b)), in connection with an incident occurring on August 8, 1983. After a jury trial in the circuit court of Carroll County, defendant was found guilty, his post-trial motion was denied, and he was ordered to pay a \$ 150 fine and costs. Defendant has raised five issues on appeal. Because we find no reversible errors, we affirm.

The citation and complaint indicates that defendant was arrested and ticketed for speeding on August 8, 1983, [\*\*\*2] at 7:48 p.m. in the village of Milledgeville, county of Carroll, State of Illinois. Defendant pleaded not guilty and requested a jury trial, which was held on October 31, 1983.

Acting *pro se*, defendant during the *voir dire* conducted by the court exhausted his five peremptory challenges, and the court rejected defendant's two challenges for cause. The only witnesses at trial were the arresting officer, James Haag, and defendant. Distilled to its essence, Haag's testimony was that his radar device, tested before and after the incident, indicated that defendant was traveling 53 miles per hour in a 35 miles per hour zone. In contrast, defendant stated he did not exceed the speed limit, braking as necessary in compliance with the posted speed limit signs. Defendant suggested during trial that he believed Haag was enforcing the speed laws selectively against him because Haag did not like him. In support of his theory, defendant presented testimony that Haag had previously ticketed defendant for speeding. Defendant's testimony also suggested Haag was too zealous in his enforcement of the speed laws.

Defendant was sentenced on November 18, 1983. On November 22, 1983, defendant, [\*\*\*3] through counsel, filed a post-trial motion requesting an arrest of judgment and a new trial. The only issues raised in that motion which are also raised on appeal were: (1) defendant was [\*556] not proved guilty beyond a reasonable doubt, and (2) the trial court erred by (a) denying his motions for continuances and (b) by failing to assist him during *voir dire*. Defendant also included the general assignment of error that "other errors occurred in the conduct of the trial, the ruling on Motions, and the introduction of evidence, which are general and non-specific but which require a new trial."

Defendant did not raise the issue of the admission into evidence of defendant's belligerent and profane post-arrest statements in his original post-trial motion, but instead [\*\*18] only raised this issue in his amendment to post-trial motion filed on February 17, 1984. That same day, the trial court denied defendant's post-trial motions and defendant on March 2, 1984, filed a timely notice of appeal.

Defendant raises as his first argument that the trial court erred in denying his oral motions for continuances made prior to trial and during the pendency of the trial. [\*\*\*4] The State responds that the trial court did not abuse its discretion in denying defendant's motions.

[HN1] The right to a continuance is not absolute, and its denial or allowance is a decision to be made within the sound discretion of the trial court. (*People v. Davis* (1970), 45 Ill. 2d 514, 519.) To warrant reversal of the trial court's ruling, the defendant must demonstrate that the denial of the continuance embarrassed the accused in the preparation of his defense so as to prejudice his rights. (*People v. McEwen* (1982), 104 Ill. App. 3d 410, 432 N.E.2d 1043.) The circumstances regarding the continuance motion must be evaluated on a case-by-case basis, including the reasons presented to the trial court at the time the request is denied. (*People v. Lott* (1977), 66 Ill. 2d 290, 297.) The trial court should not refuse to grant a continuance where the ends of justice require that the motion be granted. *Waltz v. Schlattman* (1980), 81 Ill. App. 3d 971, 974, 401 N.E.2d 994, 997.

133 Ill. App. 3d 553, \*556; 479 N.E.2d 15, \*\*18;  
1985 Ill. App. LEXIS 1988, \*\*\*4; 88 Ill. Dec. 680

Although defendant argues he made an oral motion for a continuance prior to the commencement of trial, no evidence of such a motion is contained either in the common law record or in the report [\*\*\*5] of proceedings. Defendant admits to the inadequacy of the record in his appellate brief: "The Motion does not appear on the trial court transcript, having been made prior to the initiation of the trial." Attempting to rectify the inadequate record, defendant's counsel cites his statement made during a hearing on defendant's post-trial motion that "[i]t is my understanding prior to trial the Defendant made a motion to continue to obtain counsel and that motion was denied." This statement cannot be relied upon to establish that the oral motion was actually made, especially where defendant's counsel admitted that his own review of the transcript failed to disclose evidence that the motion [\*557] was ever made.

During a hearing on defendant's post-trial motion, the trial court stated it did not recall defendant's ever having made the pretrial motion for a continuance.

"As to the Court denying Defendant's motion for continuance to obtain counsel, I do not recall frankly any such thing happening. This defendant has appeared before this court before at a jury trial on a speeding case and not too terribly long before this particular case. He represented himself in that case. [\*\*\*6] I would think that this court would remember if he did make a request for counsel because it would have come as somewhat of a surprise to this court. I do not recall him making any such request." Since no evidence of a motion for a continuance is found in the appellate record and since the trial court expressly stated it did not recall defendant's ever making such a motion, defendant's contention that the trial court committed error in "denying" the motion is unsupported by the record. Even if defendant did file the motion, he asserted no justification either in the trial court or this court to explain his lack of diligence in obtaining counsel. On these facts, therefore, the ends of justice did not require the trial court to have granted defendant a continuance, and the denial of the continuance motion, if the motion ever actually was made in the trial court, would not have constituted an abuse of discretion.

In contrast to the absence of any record reference concerning defendant's first continuance motion, the record does contain a reference to defendant's request for a continuance to allow him time to issue a subpoena to secure the testimony of the county highway commissioner [\*\*\*7] concerning the exact location of speed limit signs at the scene of the speeding violation. [HN2] When [\*\*19] reviewing the trial court's denial of a motion during trial to obtain a witness, the reviewing court must consider the defendant's diligence, the potential witness' testimony, and the defendant's right to a fair trial. (*People v. Williams (1981)*, 96 Ill. App. 3d 958, 422 N.E.2d 199.) [HN3] The allowance or denial of the continuance motion to compel the presence of a witness is within the trial court's discretion. Ill. Rev. Stat. 1981, ch. 38, par. 114 -- 4.

Our review of the record convinces us that no abuse of discretion occurred here, because defendant did not act diligently and the potential witness' testimony would not aid defendant in any significant way. As correctly argued by the State, defendant was aware prior to trial both of the location of the offense and that he was [\*558] charged with exceeding the 35 miles per hour speed limit. Defendant also knew that his argument at trial would be that the officer clocked his vehicle in a 40 miles per hour zone instead of a 35 miles per hour zone. Knowing these facts prior to trial, defendant should have [\*\*\*8] either deposed the county highway commissioner or subpoenaed him before the trial began. This case does not present a situation where a defendant was surprised by the State's evidence. (See, e.g., *People v. Lott (1975)*, 33 Ill. App. 3d 779, 338 N.E.2d 434.) Moreover, the witness' testimony would not aid defendant. At trial, defendant stated he sought to subpoena the commissioner "to prove what the speed limit is at the location on this traffic ticket." Even were this witness to have testified that the speed limit was 40 miles per hour, as was asserted by defendant, the State still would have proved that defendant was traveling 13 miles per hour over the posted speed limit. Accordingly, defendant's witness would not have been material, and thus, defendant's right to a fair trial was not denied when his motion for a continuance was not granted.

The second argument advanced by defendant is that the trial court precluded him from effectively using his peremptory challenges by failing to inform him of the number of challenges to which he was entitled. Defendant's argument is not convincing. [HN4] A *pro se* litigant is not entitled to any special consideration. (*People v. Siler [\*\*\*9] (1980)*, 85 Ill. App. 3d 304, 309, 406 N.E.2d 891, 895.) As the court stated in *People v. Tuczynski (1978)*, 62 Ill.

133 Ill. App. 3d 553, \*558; 479 N.E.2d 15, \*\*19;  
1985 Ill. App. LEXIS 1988, \*\*\*9; 88 Ill. Dec. 680

*App. 3d 644, 651, 378 N.E.2d 1200, 1205:*

"If his pro se representation was less effective than if he had retained an attorney, it was attributable to his decision to forego the services of counsel."

See also *People v. Tessier (1984)*, 123 Ill. App. 3d 984, 988, 463 N.E.2d 1006, 1010 ("Since the defendant was firm in his desire to represent himself, the defendant's choice to waive his right to counsel and to proceed to trial *pro se* must be honored although he conducts his defense ultimately to his own detriment").

Fatal to defendant's argument is his concession in his appellate brief that a trial court is under no duty to discuss procedure with the parties. The absence of a duty to inform undercuts defendant's contention that the court here erred in not explaining the procedures governing peremptory challenges to defendant. Moreover, defendant's claim of "prejudice" is unsustainable, for defendant exercised his five peremptory challenges allowed by law. (Compare *People v. Nathaniel (1981)*, 103 Ill. App. 3d 610, 431 N.E.2d 1080 (where trial court [\*\*\*10] committed reversible error by preventing the defendant from using all of his peremptory challenges).) Because the trial court did not prevent [\*559] defendant from using his allocated challenges, defendant's claim of prejudice based upon the trial court's failure to guide defendant through the jury selection process is without basis.

The third issue raised on appeal by defendant is that he was denied a fair trial because three jurors could not guarantee that they would act fairly and impartially. [HN5] The burden rests with the party challenging a juror to establish that the juror possessed a disqualifying state of mind. (*People v. Cole (1973)*, 54 Ill. 2d 401.) The mere suspicion of bias in a juror is insufficient to impeach a verdict. [\*\*20] (*People v. White (1980)*, 88 Ill. App. 3d 788, 410 N.E.2d 1082.) [HN6] Prejudice is "the forming of an opinion based upon allegations heard outside the courtroom rather than based upon facts heard during the trial." (*People v. Toellen (1978)*, 66 Ill. App. 3d 967, 969, 384 N.E.2d 480.) [HN7] The determination of whether a prospective juror possesses the state of mind enabling him to give to an accused a fair and impartial trial [\*\*\*11] rests in the sound discretion of the trial judge, and his determination will not be set aside unless against the manifest weight of the evidence. *People v. Cole (1973)*, 54 Ill. 2d 401, 414.

The report of proceedings revealed that two of the jurors -- Richard Picolotti and Richard Buckley -- alleged by defendant to have been biased were actually accepted by him. [HN8] Failure to challenge a juror for cause or to exercise a peremptory challenge waives any objection to that juror. (*People v. Tribett (1981)*, 98 Ill. App. 3d 663, 678, 424 N.E.2d 688.) Because defendant accepted these two jurors, he has waived any objection to their presence on the jury. Similarly, defendant's argument concerning Inez Barr deserves no consideration, because defendant exercised his peremptory challenge against her and thus, she did not sit as a juror in this case.

The claim of juror bias raised by defendant which he has not waived concerns juror Nancy Adolph. As both parties concede, the report of proceedings of the *voir dire* is seriously deficient because many of the answers given by the potential jurors are transcribed with the words "response inaudible" or "response unintelligible."

Nonetheless, [\*\*\*12] the [HN9] appellant has the duty to provide a complete record on appeal. (*People ex rel. Spicer v. Coleman (1979)*, 72 Ill. App. 3d 631, 391 N.E.2d 46.) Any doubt arising from the incompleteness of the record will be resolved against the party prosecuting the appeal. (*Hall v. Lyons (1979)*, 71 Ill. App. 3d 1023, 389 N.E.2d 1309.) In the instant case, the record discloses that the transcription of the deficient report of proceedings was completed on December 9, 1983. While this date was later than the date on which defendant had filed his initial post-trial motion, the transcript was available to defendant [\*560] more than two months prior to the date on which he filed his amendment to post-trial motion and on which the trial court heard arguments concerning his post-trial motion. Despite the availability of the transcript, however, defendant did not raise the deficiency in his amended post-trial motion filed on February 17, 1984. At the hearing on his post-trial motion held that same day, defendant's counsel made one reference to the inadequacy of the transcript.

"I find that unfortunately the transcript in the situation where the *voir dire* of the jurors indicates that

133 Ill. App. 3d 553, \*560; 479 N.E.2d 15, \*\*20;  
1985 Ill. App. LEXIS 1988, \*\*\*13; 88 Ill. Dec. 680

[\*\*\*13] almost all the responses were inaudible. We therefore have no way of knowing what those responses might have been."

His recognition of the deficiency apparently did not prompt him to rectify the record, for he has cited to no efforts at obtaining an agreed statement of facts or a bystander's report. (See 87 Ill. 2d Rules 612(c), 323(c), (d).) Because defendant elected to file the record without supplementation even though he was aware that the report of proceedings was inadequate, this case is appropriate for invocation of the rule cited previously that the incompleteness of the record will be resolved against the appellant.

Even if the merits of defendant's argument are addressed, the record reveals only one basis upon which defendant challenged Adolph for cause; that her relationship with her future son-in-law, who was employed in the law enforcement field, would render her incapable of deciding the case impartially. The record indicates that Adolph did admit she had a close friend or relative in law enforcement. However, the trial court asked all four potential jurors, including Adolph, whether they would automatically place greater weight on the testimony [\*\*21] [\*\*\*14] of a police officer over that of any other witness under oath, and the transcript, while indicating "response inaudible," also shows that the trial court did not ask any followup questions based upon their answers. Common sense suggests that the court would have probed further had any potential juror responded affirmatively. Defendant implicitly concedes this fact by failing to ever argue that Adolph actually stated during *voir dire* that she would weigh the officer's testimony more heavily. The court also asked Adolph individually the same question as was asked of all four jurors together, and again, her answer, although not transcribed, did not prompt the trial court to ask her any followup questions. Adolph also was asked whether she knew of any reason why she would find it difficult to be impartial and her response, although inaudible again, did not provoke further questioning by the court. Finally, responding to defendant's challenge against Adolph for cause because she had a relative or friend employed [\*561] in law enforcement, the trial court denied defendant's challenge for cause with one brief statement that cause had not been stated. The certainty with which [\*\*\*15] the court responded to defendant's cause challenge suggests that Adolph's answers did not indicate any bias or prejudice.

The trial court's own recollection of the *voir dire* confirms our interpretation of the record. When confronted in the post-trial motion hearing with defendant's argument that Adolph had given answers which suggested bias, the trial court expressly rejected defendant's interpretation of the *voir dire* record.

"As to the specific challenges, the one challenge was that the one lady indicated her -- perhaps her future son-in-law was a Thomson police officer. I know, and I would remember this matter, that the Court went back to ask the lady if she thought this fact that she might in the future have a son-in-law that was involved in law enforcement would effect [*sic*] her in any way as a juror. She indicated that it would not. Her response evidently was not picked up by the tape, but I can assure you that she indicated it wouldn't bother her anyway, or she would have been excused by this court."

The trial court's recollection that Adolph stated she could act impartially puts this case squarely on point with *People v. Cole (1973)*, 54 Ill. 2d [\*\*\*16] 401, 415. There, the supreme court stated that suspicion of bias does not amount to evidence of bias, the latter being necessary to establish cause. (*People v. Cole (1973)*, 54 Ill. 2d 401.) The juror challenged in *Cole* admitted during *voir dire* that he knew the State's Attorney, the assistant State's Attorney, and one of the State's witnesses, who had been his neighbor and family physician. The juror also admitted he was a friend of the sheriff and explained that another State's witness had a sister who was married to his son. Despite these numerous and potentially prejudicial relationships, the *Cole* court concluded the juror's statements that he could act impartially were sufficient to defeat the defendant's challenge for cause. While the poorly transcribed record here does not contain expressions of impartiality as clear as were present in *Cole*, the trial judge here expressly stated he remembered that the juror did not give any answers which suggested partiality or bias. Because we conclude defendant raised only a mere suspicion of bias which was dispelled by the trial court's post-trial hearing comments, he has failed to sustain his burden, and, therefore, [\*\*\*17] the trial court's denial of defendant's challenge for cause is not against the manifest weight of the evidence. *People v. Cole (1973)*, 54 Ill. 2d 401.

133 Ill. App. 3d 553, \*561; 479 N.E.2d 15, \*\*21;  
1985 Ill. App. LEXIS 1988, \*\*\*17; 88 Ill. Dec. 680

[\*562] The next error assigned by defendant is the trial court's admission into evidence of the testimony of the arresting officer as to what defendant said to him immediately after the stop. Apparently anticipating the officer's testimony, defendant initially objected before the officer gave his answers to the State's questions, arguing, "Counsel is trying to lead the witness into something that would influence the jury. The charge is speeding here; not having a conversation with the officer." After the trial court overruled the objection, the officer characterized [\*\*22] defendant's attitude after the stop as belligerent. The court sustained defendant's objection to Haag's characterization of defendant's attitude. The officer then testified that defendant, in response to a charge of speeding, asserted, "Bullshit, you fucking asshole." Defendant again objected "to any conversation that the officer and I might have had that does not directly relate to the charge of speeding," but the trial court denied [\*\*\*18] the objection, ruling that the conversation was part of the stop and the arrest.

In response to additional questioning by the State and after another objection by defendant which was characterized as "general" by the trial court, the officer recounted defendant's comments made at the scene of the stop. According to Haag, defendant stated:

"You are a fucking wimp. If you had guts and weren't a wimp you'd get a job in a real police department. We run assholes like you out the door."

Several questions and answers later, defendant twice more objected on relevancy grounds to the officer's recitation of defendant's comments at the scene, suggesting "that if the officer feels I'm guilty of disorderly conduct, he could have charge[d] me with that." The trial court overruled both objections.

As correctly noted by the trial court, defendant's objections were general and only challenged the relevance of the officer's recollection of defendant's statements. Because [HN10] the failure to object to evidence giving specific reasons for the objection constitutes a waiver of any error (*People v. Ishmael (1984), 126 Ill. App. 3d 320, 466 N.E.2d 1334*), defendant's objection based upon relevance [\*\*\*19] is the only ground properly presented for this court to consider. The supreme court recently summarized the rules regarding admissible evidence.

[HN11] "'The test of the admissibility of evidence is whether it fairly tends to prove the particular offense charged' [citation], and whether what is offered as evidence will be admitted or excluded depends upon whether it tends to make the question of guilt more or less probable; *i.e.*, whether it is relevant [citation]. A trial court may reject offered evidence on grounds of [\*563] irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. [Citations.] The admission of evidence is within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion." *People v. Ward (1984), 101 Ill. 2d 443, 455-56.*

Defendant argues that testimony concerning his profane language was not relevant to prove the offense for which he was charged and was highly prejudicial because jurors would conclude he possessed no respect for the law. The State responds that the statements are relevant because they show a [\*\*\*20] disrespect for the law and relate to his credibility. Alternatively, the State argues that the comments constitute admissions. In one sense, the testimony that defendant acted belligerently and used profane language suggests that defendant was more likely to have been speeding, as was alleged by the officer. A common reaction for one traveling within the speed limit would be to profess innocence in a polite, nonoffending way. In another sense, however, the comments attributed to defendant arguably have the potential for creating antipathy toward defendant or at least affecting the jurors' impartiality. Because the question is closely balanced, we conclude the trial court's admission of the officer's testimony does not constitute an abuse of discretion.

More importantly, the officer's testimony, even if erroneously allowed, did not contribute to defendant's conviction, and thus, any error in its introduction is harmless beyond a reasonable doubt. Harmless error is discussed together with the last issue raised by defendant -- whether defendant's conviction was against the manifest weight of the evidence -- because the adequacy of the State's proof establishes both that defendant [\*\*\*21] was proved guilty beyond a reasonable [\*23] doubt and that any error in the introduction of the officer's testimony did not contribute to defendant's conviction. Initially, [HN12] the proper standard of proof in this case is whether defendant was proved

133 Ill. App. 3d 553, \*563; 479 N.E.2d 15, \*\*23;  
1985 Ill. App. LEXIS 1988, \*\*\*21; 88 Ill. Dec. 680

guilty beyond a reasonable doubt. See *People v. Beil* (1979), 76 Ill. App. 3d 924, 395 N.E.2d 400; Ill. Rev. Stat. 1981, ch. 38, par. 2 -- 12; Ill. Rev. Stat. 1981, ch. 38, par. 3 -- 1.

The State's case was principally based upon the testimony of Officer Haag, who stated that on August 8, 1983, at approximately 7:45 p.m., he was conducting speed enforcement on the stretch of highway coming through Route 88. While set up to clock cars coming in both the north and south directions, he observed a tan Lincoln Continental southbound on Route 88 which appeared to him to be traveling in excess of the 35 miles per hour speed limit. The officer activated his radar [\*564] device, which indicated defendant's car was traveling 56 miles per hour, and observed that the car's speed rose to 57 miles per hour and then dropped suddenly to 53 miles per hour. Haag observed that the front end of the car dipped as if the driver had [\*\*\*22] rapidly applied the brakes. The posted speed limit in the stretch where defendant was clocked, Haag stated, was 35 miles per hour. At the time of the clocking, no other traffic was present on the road. During the stop, Haag issued defendant the traffic citation for traveling 53 miles per hour in a 35 miles per hour zone.

On the subject of his training and experience with radar devices, Haag stated that he had been a police officer for seven years, and had received extensive training in the use of speed devices. In 1980, Haag began and completed a training course offered by the manufacturer of the device used to clock defendant. This course required him to use the device in calculating car speeds. Also in 1980, Haag began and completed a course taught by the Illinois State Police on the operation of radar. In 1982, Haag began and completed a 40-hour instructor's course offered by the Department of Law Enforcement and thereby became qualified not only to use the radar device but also to teach others how to use it. Haag testified that on the basis of his training, he was certified to operate the K55 MPH Industries Radar Unit involved in this case. He had been using the radar [\*\*\*23] unit since 1980.

Haag testified that he conducted both an internal and external test for the calibration of the device about 20 minutes before the clocking of defendant. Both tests indicated the device was functioning properly. In addition, Haag testified, he ran the same two tests about 20 minutes after the stop. These tests likewise indicated the machine was functioning properly. Based upon these tests, Haag stated his opinion that the machine was in proper operating condition when defendant's speed was recorded by the radar device.

On cross-examination, Haag indicated he was not precisely certain where the 35 miles per hour sign was located on the highway, but was unwavering in his testimony that defendant was traveling 53 miles per hour in a 35 miles per hour zone inside the village of Milledgeville. Also, Haag stated that from the direction defendant was traveling, he necessarily would have passed three different signs posting the 35 miles per hour limit prior to being clocked. While Haag admitted that the radar device once had been sent to the manufacturer for repairs, he also testified it was tested periodically by Decatur Radar.

Testifying on his own behalf, defendant [\*\*\*24] stated that his car was equipped with a Spectrum unit which was designed to register a response [\*565] when radar units were operating in the vicinity. Defendant testified he was driving 54 miles per hour when he approached a 45 miles per hour sign. Just then, his Spectrum unit registered Haag's radar device. Turning his head to his left as he was passing the 45 miles per hour speed limit sign, defendant saw the police car and continued to reduce his speed to 30 miles per hour. Thereafter, defendant testified, Haag followed him for two miles and only arrested defendant after he had stopped for some cigarettes. On cross-examination, defendant asserted he did not buy the radar detector to avoid a ticket, but rather just to be more aware of [\*\*24] his speed. Defendant admitted, however, that the machine did not activate when he exceeded the speed limit, but instead only activated when a radar unit was operating nearby. He explained that he had begun reducing his speed before his unit indicated Haag's radar "[b]ecause I had just received a traffic ticket going into a small community at the edge of town." The State then called Haag in rebuttal, who contradicted [\*\*\*25] defendant by testifying that he did clock defendant while his car was in the 35 miles per hour zone.

In considering testimony such as that recounted above, the [HN13] reviewing court will not lightly overturn a jury's verdict and will not substitute its judgment for that of the trier of fact unless the evidence is so improbable as to raise a

133 Ill. App. 3d 553, \*565; 479 N.E.2d 15, \*\*24;  
1985 Ill. App. LEXIS 1988, \*\*\*25; 88 Ill. Dec. 680

reasonable doubt of defendant's guilt. (*People v. Molstad* (1984), 101 Ill. 2d 128.) [HN14] Reversal of a guilty verdict is not warranted merely because the jury believed the prosecutor's evidence as opposed to that presented by the defendant (*People v. West* (1981), 102 Ill. App. 3d 50, 429 N.E.2d 599), or because the transcript contains minor inconsistencies which the trier of fact has resolved in favor of the State. *People v. Devine* (1981), 101 Ill. App. 3d 158, 427 N.E.2d 1277.

The versions of the facts testified to by Haag and defendant are for the most part irreconcilable. Since the credibility of the witnesses is to be determined by the trier of fact, affirmance of the trial court is warranted on this basis alone. In addition to the officer's testimony, however, the record discloses through Haag that the radar machine clocked defendant [\*\*\*26] at 53 miles per hour. Our review of the evidence convinces us that the State established that the machine was operating properly on the day of the occurrence. Defendant offered no evidence to rebut the State's evidence that the machine was operating properly, and this failure also supports affirmance of the defendant's conviction. (See *People v. Boalbey* (1980), 90 Ill. App. 3d 738, 741, 413 N.E.2d 553, 555.) We conclude, after reviewing the entire record, that defendant was proved guilty beyond a reasonable doubt [\*566] of violating section 11 -- 601(b) of the Illinois Vehicle Code. See *Village of Schaumburg v. Pedersen* (1978), 60 Ill. App. 3d 630, 633, 377 N.E.2d 252, 254-55.

Moreover, because of the convincing nature of the State's proof, we conclude any error in the introduction of defendant's profane statements directed at the officer did not affect the jury's determination of his credibility, did not contribute to his conviction, and thus was harmless beyond a reasonable doubt.

The judgment of the circuit court of Carroll County is affirmed.

Affirmed.

25 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD  
DAVENPORT, Defendant-Appellant**

**No. 84-0191**

**Appellate Court of Illinois, Second District**

*133 Ill. App. 3d 553; 479 N.E.2d 15; 1985 Ill. App. LEXIS 1988; 88 Ill. Dec. 680*

**May 31, 1985, Filed**

**PRIOR HISTORY:** [\*\*\*1]

Appeal from the Circuit Court of Carroll County; the Hon. John DeMoss, Judge, presiding.

**DISPOSITION:**

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a jury verdict in the Circuit Court of Carroll County (Illinois), which found defendant guilty of the offense of speeding under Ill. Rev. Stat. ch. 95 1/2, para. 11-601(b) (1981). The trial court ordered defendant to pay a fine and costs.

**OVERVIEW:** Defendant was charged with speeding and plead not guilty and requested a jury trial. Defendant acted pro se. A jury found defendant guilty. On appeal, the court affirmed. The court rejected defendant's argument that the trial court erred when it denied his oral motions for continuances because there was no evidence in the appellate record to indicate that defendant ever requested a continuance. The court found that the trial court properly denied defendant's request for a continuance to allow him time to issue a subpoena to the highway commissioner because defendant did not act diligently and the potential witness would not have aided defendant's case. The court found (1) that defendant was not entitled to the assistance of the court in the jury selection process, (2) that defendant failed to establish the bias of a juror, (3) that any error in the admission of the officer's testimony as to what defendant said to him immediately after he was stopped was harmless, and (4) that the evidence was sufficient to support defendant's conviction. The state offered evidence that the radar device indicated that defendant was speeding, it was tested periodically, and it functioned properly.

**OUTCOME:** The court affirmed the judgment of the trial court against defendant.

**CORE TERMS:** juror, miles, post-trial, radar, speed limit, continuance, speed, speeding, voir dire, traveling, bias,

reasonable doubt, machine, zone, peremptory, continuance motion, impartially, clocked, miles per hour, prior to trial, guilty beyond, pro se, inaudible, sound discretion, trier of fact, fair trial, suspicion, manifest, scene, abuse of discretion

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

##### ***Criminal Law & Procedure > Trials > Judicial Discretion***

[HN1] The right to a continuance is not absolute, and its denial or allowance is a decision to be made within the sound discretion of the trial court. To warrant reversal of the trial court's ruling, the defendant must demonstrate that the denial of the continuance embarrassed the accused in the preparation of his defense so as to prejudice his rights. The circumstances regarding the continuance motion must be evaluated on a case-by-case basis, including the reasons presented to the trial court at the time the request is denied. The trial court should not refuse to grant a continuance where the ends of justice require that the motion be granted.

#### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

##### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

[HN2] When reviewing the trial court's denial of a motion during trial to obtain a witness, the reviewing court must consider the defendant's diligence, the potential witness' testimony, and the defendant's right to a fair trial.

#### ***Civil Procedure > Pretrial Matters > Continuances***

##### ***Criminal Law & Procedure > Pretrial Motions > Continuances***

[HN3] The allowance or denial of a continuance motion to compel the presence of a witness is within the trial court's discretion. Ill. Rev. Stat. ch. 38, para. 114-4 (1981).

#### ***Civil Procedure > Parties > Self-Representation > General Overview***

##### ***Criminal Law & Procedure > Counsel > Right to Self-Representation***

[HN4] A pro se litigant is not entitled to any special consideration.

#### ***Civil Procedure > Trials > Jury Trials > Jurors > Misconduct***

##### ***Civil Procedure > Trials > Jury Trials > Jurors > Selection > General Overview***

##### ***Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > General Overview***

[HN5] The burden rests with the party challenging a juror to establish that the juror possessed a disqualifying state of mind. The mere suspicion of bias in a juror is insufficient to impeach a verdict.

#### ***Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Bias & Prejudice > General Overview***

[HN6] Prejudice by a juror is the forming of an opinion based upon allegations heard outside the courtroom rather than based upon facts heard during the trial.

#### ***Civil Procedure > Judicial Officers > Judges > Discretion***

##### ***Criminal Law & Procedure > Trials > Judicial Discretion***

##### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN7] The determination of whether a prospective juror possesses the state of mind enabling him to give to an accused a fair and impartial trial rests in the sound discretion of the trial judge, and his determination will not be set aside unless against the manifest weight of the evidence.

*Civil Procedure > Trials > Jury Trials > Jurors > Misconduct*  
*Civil Procedure > Trials > Jury Trials > Jurors > Selection > Challenges for Cause*  
*Civil Procedure > Trials > Jury Trials > Jurors > Selection > Peremptory Challenges*

[HN8] Failure to challenge a juror for cause or to exercise a peremptory challenge waives any objection to that juror.

*Civil Procedure > Appeals > Records on Appeal*  
*Criminal Law & Procedure > Appeals > Records on Appeal*  
*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Records*

[HN9] An appellant has the duty to provide a complete record on appeal. Any doubt arising from the incompleteness of the record will be resolved against the party prosecuting the appeal.

*Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview*  
*Evidence > Procedural Considerations > Objections & Offers of Proof > Objections*

[HN10] The failure to object to evidence giving specific reasons for the objection constitutes a waiver of any error.

*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview*  
*Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor*  
*Evidence > Relevance > Confusion, Prejudice & Waste of Time*

[HN11] The test of the admissibility of evidence is whether it fairly tends to prove the particular offense charged, and whether what is offered as evidence will be admitted or excluded depends upon whether it tends to make the question of guilt more or less probable; i.e., whether it is relevant. A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. The admission of evidence is within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion.

*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*  
*Criminal Law & Procedure > Trials > Judicial Discretion*

[HN12] The proper standard of proof in the case for a charge of speeding is whether defendant was proved guilty beyond a reasonable doubt.

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN13] A reviewing court will not lightly overturn a jury's verdict and will not substitute its judgment for that of the trier of fact unless the evidence is so improbable as to raise a reasonable doubt of defendant's guilt.

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN14] Reversal of a guilty verdict is not warranted merely because the jury believed the prosecutor's evidence as opposed to that presented by the defendant, or because the transcript contains minor inconsistencies which the trier of fact has resolved in favor of the state.

#### **COUNSEL:**

Walter C. Kilgus and James E. Tusek, both of Nelson, Kilgus, Richey & Tusek, of Morrison, for appellant.

James S. Williams, State's Attorney, of Mt. Carroll, and Charles E. Petersen, of Shearer, Blood, Agrella, Boose & Balog, of St. Charles (Phyllis J. Perko, of State's Attorneys Appellate Service Commission, of counsel), for the People.

#### **JUDGES:**

JUSTICE LINDBERG delivered the opinion of the court. HOPF and STROUSE, JJ., concur.

**OPINION BY:**

LINDBERG

**OPINION:**

[\*555] [\*\*17] Defendant, Donald R. Davenport, was charged by citation and complaint with the offense of speeding (Ill. Rev. Stat. 1981, ch. 95 1/2, par. 11 -- 601(b)), in connection with an incident occurring on August 8, 1983. After a jury trial in the circuit court of Carroll County, defendant was found guilty, his post-trial motion was denied, and he was ordered to pay a \$ 150 fine and costs. Defendant has raised five issues on appeal. Because we find no reversible errors, we affirm.

The citation and complaint indicates that defendant was arrested and ticketed for speeding on August 8, 1983, [\*\*\*2] at 7:48 p.m. in the village of Milledgeville, county of Carroll, State of Illinois. Defendant pleaded not guilty and requested a jury trial, which was held on October 31, 1983.

Acting *pro se*, defendant during the *voir dire* conducted by the court exhausted his five peremptory challenges, and the court rejected defendant's two challenges for cause. The only witnesses at trial were the arresting officer, James Haag, and defendant. Distilled to its essence, Haag's testimony was that his radar device, tested before and after the incident, indicated that defendant was traveling 53 miles per hour in a 35 miles per hour zone. In contrast, defendant stated he did not exceed the speed limit, braking as necessary in compliance with the posted speed limit signs. Defendant suggested during trial that he believed Haag was enforcing the speed laws selectively against him because Haag did not like him. In support of his theory, defendant presented testimony that Haag had previously ticketed defendant for speeding. Defendant's testimony also suggested Haag was too zealous in his enforcement of the speed laws.

Defendant was sentenced on November 18, 1983. On November 22, 1983, defendant, [\*\*\*3] through counsel, filed a post-trial motion requesting an arrest of judgment and a new trial. The only issues raised in that motion which are also raised on appeal were: (1) defendant was [\*556] not proved guilty beyond a reasonable doubt, and (2) the trial court erred by (a) denying his motions for continuances and (b) by failing to assist him during *voir dire*. Defendant also included the general assignment of error that "other errors occurred in the conduct of the trial, the ruling on Motions, and the introduction of evidence, which are general and non-specific but which require a new trial."

Defendant did not raise the issue of the admission into evidence of defendant's belligerent and profane post-arrest statements in his original post-trial motion, but instead [\*\*18] only raised this issue in his amendment to post-trial motion filed on February 17, 1984. That same day, the trial court denied defendant's post-trial motions and defendant on March 2, 1984, filed a timely notice of appeal.

Defendant raises as his first argument that the trial court erred in denying his oral motions for continuances made prior to trial and during the pendency of the trial. [\*\*\*4] The State responds that the trial court did not abuse its discretion in denying defendant's motions.

[HN1] The right to a continuance is not absolute, and its denial or allowance is a decision to be made within the sound discretion of the trial court. (*People v. Davis* (1970), 45 Ill. 2d 514, 519.) To warrant reversal of the trial court's ruling, the defendant must demonstrate that the denial of the continuance embarrassed the accused in the preparation of his defense so as to prejudice his rights. (*People v. McEwen* (1982), 104 Ill. App. 3d 410, 432 N.E.2d 1043.) The circumstances regarding the continuance motion must be evaluated on a case-by-case basis, including the reasons presented to the trial court at the time the request is denied. (*People v. Lott* (1977), 66 Ill. 2d 290, 297.) The trial court should not refuse to grant a continuance where the ends of justice require that the motion be granted. *Waltz v. Schlattman* (1980), 81 Ill. App. 3d 971, 974, 401 N.E.2d 994, 997.

133 Ill. App. 3d 553, \*556; 479 N.E.2d 15, \*\*18;  
1985 Ill. App. LEXIS 1988, \*\*\*4; 88 Ill. Dec. 680

Although defendant argues he made an oral motion for a continuance prior to the commencement of trial, no evidence of such a motion is contained either in the common law record or in the report [\*\*\*5] of proceedings. Defendant admits to the inadequacy of the record in his appellate brief: "The Motion does not appear on the trial court transcript, having been made prior to the initiation of the trial." Attempting to rectify the inadequate record, defendant's counsel cites his statement made during a hearing on defendant's post-trial motion that "[i]t is my understanding prior to trial the Defendant made a motion to continue to obtain counsel and that motion was denied." This statement cannot be relied upon to establish that the oral motion was actually made, especially where defendant's counsel admitted that his own review of the transcript failed to disclose evidence that the motion [\*557] was ever made.

During a hearing on defendant's post-trial motion, the trial court stated it did not recall defendant's ever having made the pretrial motion for a continuance.

"As to the Court denying Defendant's motion for continuance to obtain counsel, I do not recall frankly any such thing happening. This defendant has appeared before this court before at a jury trial on a speeding case and not too terribly long before this particular case. He represented himself in that case. [\*\*\*6] I would think that this court would remember if he did make a request for counsel because it would have come as somewhat of a surprise to this court. I do not recall him making any such request." Since no evidence of a motion for a continuance is found in the appellate record and since the trial court expressly stated it did not recall defendant's ever making such a motion, defendant's contention that the trial court committed error in "denying" the motion is unsupported by the record. Even if defendant did file the motion, he asserted no justification either in the trial court or this court to explain his lack of diligence in obtaining counsel. On these facts, therefore, the ends of justice did not require the trial court to have granted defendant a continuance, and the denial of the continuance motion, if the motion ever actually was made in the trial court, would not have constituted an abuse of discretion.

In contrast to the absence of any record reference concerning defendant's first continuance motion, the record does contain a reference to defendant's request for a continuance to allow him time to issue a subpoena to secure the testimony of the county highway commissioner [\*\*\*7] concerning the exact location of speed limit signs at the scene of the speeding violation. [HN2] When [\*\*19] reviewing the trial court's denial of a motion during trial to obtain a witness, the reviewing court must consider the defendant's diligence, the potential witness' testimony, and the defendant's right to a fair trial. (*People v. Williams (1981)*, 96 Ill. App. 3d 958, 422 N.E.2d 199.) [HN3] The allowance or denial of the continuance motion to compel the presence of a witness is within the trial court's discretion. Ill. Rev. Stat. 1981, ch. 38, par. 114 -- 4.

Our review of the record convinces us that no abuse of discretion occurred here, because defendant did not act diligently and the potential witness' testimony would not aid defendant in any significant way. As correctly argued by the State, defendant was aware prior to trial both of the location of the offense and that he was [\*558] charged with exceeding the 35 miles per hour speed limit. Defendant also knew that his argument at trial would be that the officer clocked his vehicle in a 40 miles per hour zone instead of a 35 miles per hour zone. Knowing these facts prior to trial, defendant should have [\*\*\*8] either deposed the county highway commissioner or subpoenaed him before the trial began. This case does not present a situation where a defendant was surprised by the State's evidence. (See, e.g., *People v. Lott (1975)*, 33 Ill. App. 3d 779, 338 N.E.2d 434.) Moreover, the witness' testimony would not aid defendant. At trial, defendant stated he sought to subpoena the commissioner "to prove what the speed limit is at the location on this traffic ticket." Even were this witness to have testified that the speed limit was 40 miles per hour, as was asserted by defendant, the State still would have proved that defendant was traveling 13 miles per hour over the posted speed limit. Accordingly, defendant's witness would not have been material, and thus, defendant's right to a fair trial was not denied when his motion for a continuance was not granted.

The second argument advanced by defendant is that the trial court precluded him from effectively using his peremptory challenges by failing to inform him of the number of challenges to which he was entitled. Defendant's argument is not convincing. [HN4] A *pro se* litigant is not entitled to any special consideration. (*People v. Siler [\*\*\*9] (1980)*, 85 Ill. App. 3d 304, 309, 406 N.E.2d 891, 895.) As the court stated in *People v. Tuczynski (1978)*, 62 Ill.

133 Ill. App. 3d 553, \*558; 479 N.E.2d 15, \*\*19;  
1985 Ill. App. LEXIS 1988, \*\*\*9; 88 Ill. Dec. 680

*App. 3d 644, 651, 378 N.E.2d 1200, 1205:*

"If his pro se representation was less effective than if he had retained an attorney, it was attributable to his decision to forego the services of counsel."

See also *People v. Tessier (1984)*, 123 Ill. App. 3d 984, 988, 463 N.E.2d 1006, 1010 ("Since the defendant was firm in his desire to represent himself, the defendant's choice to waive his right to counsel and to proceed to trial *pro se* must be honored although he conducts his defense ultimately to his own detriment").

Fatal to defendant's argument is his concession in his appellate brief that a trial court is under no duty to discuss procedure with the parties. The absence of a duty to inform undercuts defendant's contention that the court here erred in not explaining the procedures governing peremptory challenges to defendant. Moreover, defendant's claim of "prejudice" is unsustainable, for defendant exercised his five peremptory challenges allowed by law. (Compare *People v. Nathaniel (1981)*, 103 Ill. App. 3d 610, 431 N.E.2d 1080 (where trial court [\*\*\*10] committed reversible error by preventing the defendant from using all of his peremptory challenges).) Because the trial court did not prevent [\*559] defendant from using his allocated challenges, defendant's claim of prejudice based upon the trial court's failure to guide defendant through the jury selection process is without basis.

The third issue raised on appeal by defendant is that he was denied a fair trial because three jurors could not guarantee that they would act fairly and impartially. [HN5] The burden rests with the party challenging a juror to establish that the juror possessed a disqualifying state of mind. (*People v. Cole (1973)*, 54 Ill. 2d 401.) The mere suspicion of bias in a juror is insufficient to impeach a verdict. [\*\*20] (*People v. White (1980)*, 88 Ill. App. 3d 788, 410 N.E.2d 1082.) [HN6] Prejudice is "the forming of an opinion based upon allegations heard outside the courtroom rather than based upon facts heard during the trial." (*People v. Toellen (1978)*, 66 Ill. App. 3d 967, 969, 384 N.E.2d 480.) [HN7] The determination of whether a prospective juror possesses the state of mind enabling him to give to an accused a fair and impartial trial [\*\*\*11] rests in the sound discretion of the trial judge, and his determination will not be set aside unless against the manifest weight of the evidence. *People v. Cole (1973)*, 54 Ill. 2d 401, 414.

The report of proceedings revealed that two of the jurors -- Richard Picolotti and Richard Buckley -- alleged by defendant to have been biased were actually accepted by him. [HN8] Failure to challenge a juror for cause or to exercise a peremptory challenge waives any objection to that juror. (*People v. Tribett (1981)*, 98 Ill. App. 3d 663, 678, 424 N.E.2d 688.) Because defendant accepted these two jurors, he has waived any objection to their presence on the jury. Similarly, defendant's argument concerning Inez Barr deserves no consideration, because defendant exercised his peremptory challenge against her and thus, she did not sit as a juror in this case.

The claim of juror bias raised by defendant which he has not waived concerns juror Nancy Adolph. As both parties concede, the report of proceedings of the *voir dire* is seriously deficient because many of the answers given by the potential jurors are transcribed with the words "response inaudible" or "response unintelligible."

Nonetheless, [\*\*\*12] the [HN9] appellant has the duty to provide a complete record on appeal. (*People ex rel. Spicer v. Coleman (1979)*, 72 Ill. App. 3d 631, 391 N.E.2d 46.) Any doubt arising from the incompleteness of the record will be resolved against the party prosecuting the appeal. (*Hall v. Lyons (1979)*, 71 Ill. App. 3d 1023, 389 N.E.2d 1309.) In the instant case, the record discloses that the transcription of the deficient report of proceedings was completed on December 9, 1983. While this date was later than the date on which defendant had filed his initial post-trial motion, the transcript was available to defendant [\*560] more than two months prior to the date on which he filed his amendment to post-trial motion and on which the trial court heard arguments concerning his post-trial motion. Despite the availability of the transcript, however, defendant did not raise the deficiency in his amended post-trial motion filed on February 17, 1984. At the hearing on his post-trial motion held that same day, defendant's counsel made one reference to the inadequacy of the transcript.

"I find that unfortunately the transcript in the situation where the *voir dire* of the jurors indicates that

133 Ill. App. 3d 553, \*560; 479 N.E.2d 15, \*\*20;  
1985 Ill. App. LEXIS 1988, \*\*\*13; 88 Ill. Dec. 680

[\*\*\*13] almost all the responses were inaudible. We therefore have no way of knowing what those responses might have been."

His recognition of the deficiency apparently did not prompt him to rectify the record, for he has cited to no efforts at obtaining an agreed statement of facts or a bystander's report. (See 87 Ill. 2d Rules 612(c), 323(c), (d).) Because defendant elected to file the record without supplementation even though he was aware that the report of proceedings was inadequate, this case is appropriate for invocation of the rule cited previously that the incompleteness of the record will be resolved against the appellant.

Even if the merits of defendant's argument are addressed, the record reveals only one basis upon which defendant challenged Adolph for cause; that her relationship with her future son-in-law, who was employed in the law enforcement field, would render her incapable of deciding the case impartially. The record indicates that Adolph did admit she had a close friend or relative in law enforcement. However, the trial court asked all four potential jurors, including Adolph, whether they would automatically place greater weight on the testimony [\*\*21] [\*\*\*14] of a police officer over that of any other witness under oath, and the transcript, while indicating "response inaudible," also shows that the trial court did not ask any followup questions based upon their answers. Common sense suggests that the court would have probed further had any potential juror responded affirmatively. Defendant implicitly concedes this fact by failing to ever argue that Adolph actually stated during *voir dire* that she would weigh the officer's testimony more heavily. The court also asked Adolph individually the same question as was asked of all four jurors together, and again, her answer, although not transcribed, did not prompt the trial court to ask her any followup questions. Adolph also was asked whether she knew of any reason why she would find it difficult to be impartial and her response, although inaudible again, did not provoke further questioning by the court. Finally, responding to defendant's challenge against Adolph for cause because she had a relative or friend employed [\*561] in law enforcement, the trial court denied defendant's challenge for cause with one brief statement that cause had not been stated. The certainty with which [\*\*\*15] the court responded to defendant's cause challenge suggests that Adolph's answers did not indicate any bias or prejudice.

The trial court's own recollection of the *voir dire* confirms our interpretation of the record. When confronted in the post-trial motion hearing with defendant's argument that Adolph had given answers which suggested bias, the trial court expressly rejected defendant's interpretation of the *voir dire* record.

"As to the specific challenges, the one challenge was that the one lady indicated her -- perhaps her future son-in-law was a Thomson police officer. I know, and I would remember this matter, that the Court went back to ask the lady if she thought this fact that she might in the future have a son-in-law that was involved in law enforcement would effect [*sic*] her in any way as a juror. She indicated that it would not. Her response evidently was not picked up by the tape, but I can assure you that she indicated it wouldn't bother her anyway, or she would have been excused by this court."

The trial court's recollection that Adolph stated she could act impartially puts this case squarely on point with *People v. Cole (1973)*, 54 Ill. 2d [\*\*\*16] 401, 415. There, the supreme court stated that suspicion of bias does not amount to evidence of bias, the latter being necessary to establish cause. (*People v. Cole (1973)*, 54 Ill. 2d 401.) The juror challenged in *Cole* admitted during *voir dire* that he knew the State's Attorney, the assistant State's Attorney, and one of the State's witnesses, who had been his neighbor and family physician. The juror also admitted he was a friend of the sheriff and explained that another State's witness had a sister who was married to his son. Despite these numerous and potentially prejudicial relationships, the *Cole* court concluded the juror's statements that he could act impartially were sufficient to defeat the defendant's challenge for cause. While the poorly transcribed record here does not contain expressions of impartiality as clear as were present in *Cole*, the trial judge here expressly stated he remembered that the juror did not give any answers which suggested partiality or bias. Because we conclude defendant raised only a mere suspicion of bias which was dispelled by the trial court's post-trial hearing comments, he has failed to sustain his burden, and, therefore, [\*\*\*17] the trial court's denial of defendant's challenge for cause is not against the manifest weight of the evidence. *People v. Cole (1973)*, 54 Ill. 2d 401.

133 Ill. App. 3d 553, \*561; 479 N.E.2d 15, \*\*21;  
1985 Ill. App. LEXIS 1988, \*\*\*17; 88 Ill. Dec. 680

[\*562] The next error assigned by defendant is the trial court's admission into evidence of the testimony of the arresting officer as to what defendant said to him immediately after the stop. Apparently anticipating the officer's testimony, defendant initially objected before the officer gave his answers to the State's questions, arguing, "Counsel is trying to lead the witness into something that would influence the jury. The charge is speeding here; not having a conversation with the officer." After the trial court overruled the objection, the officer characterized [\*\*22] defendant's attitude after the stop as belligerent. The court sustained defendant's objection to Haag's characterization of defendant's attitude. The officer then testified that defendant, in response to a charge of speeding, asserted, "Bullshit, you fucking asshole." Defendant again objected "to any conversation that the officer and I might have had that does not directly relate to the charge of speeding," but the trial court denied [\*\*\*18] the objection, ruling that the conversation was part of the stop and the arrest.

In response to additional questioning by the State and after another objection by defendant which was characterized as "general" by the trial court, the officer recounted defendant's comments made at the scene of the stop. According to Haag, defendant stated:

"You are a fucking wimp. If you had guts and weren't a wimp you'd get a job in a real police department. We run assholes like you out the door."

Several questions and answers later, defendant twice more objected on relevancy grounds to the officer's recitation of defendant's comments at the scene, suggesting "that if the officer feels I'm guilty of disorderly conduct, he could have charge[d] me with that." The trial court overruled both objections.

As correctly noted by the trial court, defendant's objections were general and only challenged the relevance of the officer's recollection of defendant's statements. Because [HN10] the failure to object to evidence giving specific reasons for the objection constitutes a waiver of any error ( *People v. Ishmael (1984)*, 126 Ill. App. 3d 320, 466 N.E.2d 1334), defendant's objection based upon relevance [\*\*\*19] is the only ground properly presented for this court to consider. The supreme court recently summarized the rules regarding admissible evidence.

[HN11] "'The test of the admissibility of evidence is whether it fairly tends to prove the particular offense charged' [citation], and whether what is offered as evidence will be admitted or excluded depends upon whether it tends to make the question of guilt more or less probable; *i.e.*, whether it is relevant [citation]. A trial court may reject offered evidence on grounds of [\*563] irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature. [Citations.] The admission of evidence is within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion." *People v. Ward (1984)*, 101 Ill. 2d 443, 455-56.

Defendant argues that testimony concerning his profane language was not relevant to prove the offense for which he was charged and was highly prejudicial because jurors would conclude he possessed no respect for the law. The State responds that the statements are relevant because they show a [\*\*\*20] disrespect for the law and relate to his credibility. Alternatively, the State argues that the comments constitute admissions. In one sense, the testimony that defendant acted belligerently and used profane language suggests that defendant was more likely to have been speeding, as was alleged by the officer. A common reaction for one traveling within the speed limit would be to profess innocence in a polite, nonoffending way. In another sense, however, the comments attributed to defendant arguably have the potential for creating antipathy toward defendant or at least affecting the jurors' impartiality. Because the question is closely balanced, we conclude the trial court's admission of the officer's testimony does not constitute an abuse of discretion.

More importantly, the officer's testimony, even if erroneously allowed, did not contribute to defendant's conviction, and thus, any error in its introduction is harmless beyond a reasonable doubt. Harmless error is discussed together with the last issue raised by defendant -- whether defendant's conviction was against the manifest weight of the evidence -- because the adequacy of the State's proof establishes both that defendant [\*\*\*21] was proved guilty beyond a reasonable [\*23] doubt and that any error in the introduction of the officer's testimony did not contribute to defendant's conviction. Initially, [HN12] the proper standard of proof in this case is whether defendant was proved

133 Ill. App. 3d 553, \*563; 479 N.E.2d 15, \*\*23;  
1985 Ill. App. LEXIS 1988, \*\*\*21; 88 Ill. Dec. 680

guilty beyond a reasonable doubt. See *People v. Beil* (1979), 76 Ill. App. 3d 924, 395 N.E.2d 400; Ill. Rev. Stat. 1981, ch. 38, par. 2 -- 12; Ill. Rev. Stat. 1981, ch. 38, par. 3 -- 1.

The State's case was principally based upon the testimony of Officer Haag, who stated that on August 8, 1983, at approximately 7:45 p.m., he was conducting speed enforcement on the stretch of highway coming through Route 88. While set up to clock cars coming in both the north and south directions, he observed a tan Lincoln Continental southbound on Route 88 which appeared to him to be traveling in excess of the 35 miles per hour speed limit. The officer activated his radar [\*564] device, which indicated defendant's car was traveling 56 miles per hour, and observed that the car's speed rose to 57 miles per hour and then dropped suddenly to 53 miles per hour. Haag observed that the front end of the car dipped as if the driver had [\*\*\*22] rapidly applied the brakes. The posted speed limit in the stretch where defendant was clocked, Haag stated, was 35 miles per hour. At the time of the clocking, no other traffic was present on the road. During the stop, Haag issued defendant the traffic citation for traveling 53 miles per hour in a 35 miles per hour zone.

On the subject of his training and experience with radar devices, Haag stated that he had been a police officer for seven years, and had received extensive training in the use of speed devices. In 1980, Haag began and completed a training course offered by the manufacturer of the device used to clock defendant. This course required him to use the device in calculating car speeds. Also in 1980, Haag began and completed a course taught by the Illinois State Police on the operation of radar. In 1982, Haag began and completed a 40-hour instructor's course offered by the Department of Law Enforcement and thereby became qualified not only to use the radar device but also to teach others how to use it. Haag testified that on the basis of his training, he was certified to operate the K55 MPH Industries Radar Unit involved in this case. He had been using the radar [\*\*\*23] unit since 1980.

Haag testified that he conducted both an internal and external test for the calibration of the device about 20 minutes before the clocking of defendant. Both tests indicated the device was functioning properly. In addition, Haag testified, he ran the same two tests about 20 minutes after the stop. These tests likewise indicated the machine was functioning properly. Based upon these tests, Haag stated his opinion that the machine was in proper operating condition when defendant's speed was recorded by the radar device.

On cross-examination, Haag indicated he was not precisely certain where the 35 miles per hour sign was located on the highway, but was unwavering in his testimony that defendant was traveling 53 miles per hour in a 35 miles per hour zone inside the village of Milledgeville. Also, Haag stated that from the direction defendant was traveling, he necessarily would have passed three different signs posting the 35 miles per hour limit prior to being clocked. While Haag admitted that the radar device once had been sent to the manufacturer for repairs, he also testified it was tested periodically by Decatur Radar.

Testifying on his own behalf, defendant [\*\*\*24] stated that his car was equipped with a Spectrum unit which was designed to register a response [\*565] when radar units were operating in the vicinity. Defendant testified he was driving 54 miles per hour when he approached a 45 miles per hour sign. Just then, his Spectrum unit registered Haag's radar device. Turning his head to his left as he was passing the 45 miles per hour speed limit sign, defendant saw the police car and continued to reduce his speed to 30 miles per hour. Thereafter, defendant testified, Haag followed him for two miles and only arrested defendant after he had stopped for some cigarettes. On cross-examination, defendant asserted he did not buy the radar detector to avoid a ticket, but rather just to be more aware of [\*\*24] his speed. Defendant admitted, however, that the machine did not activate when he exceeded the speed limit, but instead only activated when a radar unit was operating nearby. He explained that he had begun reducing his speed before his unit indicated Haag's radar "[b]ecause I had just received a traffic ticket going into a small community at the edge of town." The State then called Haag in rebuttal, who contradicted [\*\*\*25] defendant by testifying that he did clock defendant while his car was in the 35 miles per hour zone.

In considering testimony such as that recounted above, the [HN13] reviewing court will not lightly overturn a jury's verdict and will not substitute its judgment for that of the trier of fact unless the evidence is so improbable as to raise a

133 Ill. App. 3d 553, \*565; 479 N.E.2d 15, \*\*24;  
1985 Ill. App. LEXIS 1988, \*\*\*25; 88 Ill. Dec. 680

reasonable doubt of defendant's guilt. (*People v. Molstad* (1984), 101 Ill. 2d 128.) [HN14] Reversal of a guilty verdict is not warranted merely because the jury believed the prosecutor's evidence as opposed to that presented by the defendant (*People v. West* (1981), 102 Ill. App. 3d 50, 429 N.E.2d 599), or because the transcript contains minor inconsistencies which the trier of fact has resolved in favor of the State. *People v. Devine* (1981), 101 Ill. App. 3d 158, 427 N.E.2d 1277.

The versions of the facts testified to by Haag and defendant are for the most part irreconcilable. Since the credibility of the witnesses is to be determined by the trier of fact, affirmance of the trial court is warranted on this basis alone. In addition to the officer's testimony, however, the record discloses through Haag that the radar machine clocked defendant [\*\*\*26] at 53 miles per hour. Our review of the evidence convinces us that the State established that the machine was operating properly on the day of the occurrence. Defendant offered no evidence to rebut the State's evidence that the machine was operating properly, and this failure also supports affirmance of the defendant's conviction. (See *People v. Boalbey* (1980), 90 Ill. App. 3d 738, 741, 413 N.E.2d 553, 555.) We conclude, after reviewing the entire record, that defendant was proved guilty beyond a reasonable doubt [\*566] of violating section 11 -- 601(b) of the Illinois Vehicle Code. See *Village of Schaumburg v. Pedersen* (1978), 60 Ill. App. 3d 630, 633, 377 N.E.2d 252, 254-55.

Moreover, because of the convincing nature of the State's proof, we conclude any error in the introduction of defendant's profane statements directed at the officer did not affect the jury's determination of his credibility, did not contribute to his conviction, and thus was harmless beyond a reasonable doubt.

The judgment of the circuit court of Carroll County is affirmed.

Affirmed.

26 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**TONY E. ROBLES, Appellant-Defendant, vs. STATE OF INDIANA,  
Appellee-Plaintiff.**

**No. 32A01-9801-CR-23**

**COURT OF APPEALS OF INDIANA, FIRST DISTRICT**

*705 N.E.2d 183; 1998 Ind. App. LEXIS 2259*

**December 28, 1998, Filed**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE HENDRICKS SUPERIOR COURT. The Honorable Karen M. Love, Judge. Cause No. 32D03-9703-CM-100.

**DISPOSITION:** Judgment affirmed in part and reversed in part.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of his convictions for operating a motor vehicle while intoxicated, driving while suspended, and speeding entered by the Hendricks Superior Court (Indiana). Defendant produced evidence pursuant to *Ind. Code § 9-24-18-5(g)* that his suspended license had been reinstated.

**OVERVIEW:** A police officer stopped defendant for speeding and the officer noticed that defendant appeared to be intoxicated. Defendant was transported to the police station where it was determined that his California driver's license had been suspended. Defendant was then charged with driving while suspended, speeding, and driving while intoxicated. He was convicted on all counts. On appeal, defendant contended that the evidence was insufficient to support the conviction for driving while suspended because he demonstrated at trial that his California license had been suspended in error. In reversing the conviction for driving while suspended, the court ruled that defendant satisfied his burden of proof under *Ind. Code § 9-34-18-5(g)* by presenting an order of reinstatement that provided that the suspension had been set aside the same day it was imposed. The court held that defendant demonstrated by a preponderance of the evidence that his license was valid when he was charged with driving while suspended.

**OUTCOME:** The court reversed defendant's conviction for driving while suspended because defendant demonstrated by a preponderance of the evidence that his driver's license was valid when he was charged with driving while suspended. The court affirmed defendant's convictions for operating a motor vehicle while intoxicated and speeding.

**CORE TERMS:** suspended, driving, deputy, sentencing, sentence, imprisoned, radar, indigent, license, ineffective assistance of counsel, failing to pay, intoxicated, ineffective, desired, driver's, fine, failed to demonstrate, inasmuch, state of intoxication, driving record, speeding, arrest, failure to object, preponderance, resentencing, prejudiced, indigency, possessed, tested, ineffective assistance

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution Governments > State & Territorial Governments > Licenses Torts > Transportation Torts > General Overview***

[HN1] Before a defendant may be convicted for driving with a suspended license, the state must prove that he operated a motor vehicle while his driving privileges, license, or permit was suspended or revoked. Ind. Code. § 9-24-18-5(b). However, a defendant may be absolved of criminal liability if he establishes, by a preponderance of the evidence, that he possessed a valid driver's license. Ind. Code. § 9-24-18-5(g).

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN2] To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance failed to meet an objective standard of reasonableness as measured by predominate professional norms, and (2) such deficient performance so prejudiced the defendant as to deprive him of a fair trial.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN3] The court looks to the totality of the circumstances when evaluating claims of ineffective assistance of counsel.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN4] In determining whether prejudice exists, the court begins with the presumption that counsel is competent. Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests******Criminal Law & Procedure > Counsel > Effective Assistance > Trials***

[HN5] In order to prove ineffective assistance due to the failure to object, a defendant must prove that an objection would have been sustained had one been made and that he was prejudiced by the failure to object.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor******Evidence > Testimony > Experts > Admissibility***

[HN6] Before the results of a radar test may be admitted into evidence, the state must prove that the equipment was properly operated and regularly tested. It is unnecessary for the state to present expert testimony to explain the proper operation, reliability, or maintenance of the unit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN7] Law enforcement testimony regarding an individual's intoxication is admissible.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN8] See *Ind. Code* § 35-38-1-5.

***Criminal Law & Procedure > Appeals > Remands & Remittiturs******Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN9] A defendant's failure to timely object to an alleged error constitutes a waiver and the cause will not be remanded for resentencing. A party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN10] A trial court should state in its sentencing order that a defendant may not be imprisoned for failing to pay a court-imposed fine if it is determined that the defendant is indigent.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN11] In accordance with the costs statute, Ind. Code § 33-19-2-3, the trial court is required to conduct an indigency hearing if court costs are imposed. If it is determined that the defendant is not indigent, the trial court is required to order the defendant to pay court costs at the time sentence is pronounced, at some later date, or specified parts at designated intervals.

**COUNSEL:** For APPELLANT: PAULA M. SAUER, Danville, Indiana.

ATTORNEYS FOR APPELLEE: JEFFREY A. MODISSETT, Attorney General of Indiana, K. C. NORWALK, Deputy Attorney General, Indianapolis, Indiana.

**JUDGES:** BAKER, Judge. GARRARD, J., and ROBB, J., concur.

**OPINION BY:** BAKER

**OPINION:** [\*184] OPINION

BAKER, Judge

Appellant-defendant Tony E. Robles appeals his convictions for Operating a Motor Vehicle While Intoxicated, n1 a Class A misdemeanor; Driving While Suspended, n2 a Class A infraction; and Speeding, n3 a Class C infraction, claiming that: (1) the evidence was insufficient to support the conviction for driving while suspended; (2) trial counsel was ineffective; (3) the trial court erred in denying Robles the opportunity to make a statement at sentencing; and (4) the trial court failed to state in its sentencing order that Robles could not be imprisoned for failing to pay fines and costs.

n1 *IND. CODE § 9-30-5-2.*

n2 *IND. CODE § 9-24-18-5.*

[\*\*2]

n3 *IND. CODE § 9-21-5-13.*

**FACTS**

The facts most favorable to the judgment reveal that at approximately 1:57 a.m. on March 22, 1997, Hendricks County Sheriff's [\*185] Deputy Charles Morefield stopped Robles for speeding. Deputy Morefield's radar equipment indicated that Robles had been driving seventy-two miles per hour in a forty mile per hour zone. As Deputy Morefield approached Robles, he observed that Robles smelled of alcohol. Deputy Morefield also noticed that Robles' balance was

unsteady and that his speech was slurred. After Robles failed several field sobriety tests, he was transported to the police station where Deputy Morefield attempted to administer a breath test. Robles refused to take the test. Following Robles' arrest, the State determined that his California driver's license had been suspended. Ross was charged with speeding, driving while intoxicated and driving while suspended. Following a trial by court which commenced on December 16, 1997, Robles was convicted on all three counts. Robles was then sentenced to 365 days in jail with 357 of those days suspended. Robles also received [\*\*3] credit for the two days that he remained in jail following the arrest. The trial court imposed no fines, but ordered Robles to pay court costs, a substance evaluation fee and a probation user's fee. He now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence--Driving While Suspended

Robles first contends that the evidence was insufficient to support the conviction for driving while suspended. Specifically, Robles asserts that the conviction for this offense must be set aside because he demonstrated at trial that his driver's license had been suspended in error by the California Department of Motor Vehicles.

[HN1] Before a defendant may be convicted for driving with a suspended license, the State must prove that he "operated a motor vehicle . . . while his driving privileges, license or permit is suspended or revoked." *I.C. § 9-24-18-5(b)*. However, a defendant may be absolved of criminal liability under this section if he establishes, by a preponderance of the evidence, that he possessed a valid driver's license. *I.C. § 9-24-18-5(g)*.

In the instant case, the only evidence the State presented at trial to establish that Robles was driving while suspended was a certified [\*\*4] copy of Robles' California driving record, dated April 3, 1997. Record at 88-90. Attached to the driving record was a copy of a letter sent to Robles on June 16, 1996, from the California Department of Motor Vehicles. That correspondence informed Robles that his driving privileges would be suspended effective November 14, 1996, because of his failure to comply with a child support order. R. at 88. Robles submitted an order of reinstatement from the California Department of Motor Vehicles during his case-in-chief, dated April 4, 1997, just one day after the State had obtained its certified copy of Robles' driving record. That order provided that the suspension had "been set aside . . . effective Nov. 14, 1996." R. at 154. While Robles' copy of the reinstatement order was not certified, the State did not object to its admission into evidence. Additionally, Robles provided a letter signed by counsel with the California Family Support Division, stating that the suspension had been "submitted in error." R. at 155-56.

While we adhere to our well-known standard of review which precludes us from reweighing the evidence, it is apparent to us that Robles satisfied his burden of proof under [\*\*5] *I.C. § 9-34-18-5(g)*. Specifically, Robles demonstrated by a preponderance of the evidence that his driver's license was valid when he was charged with driving while suspended on March 22, 1997. Thus, we are compelled to reverse Robles' conviction for that offense.

### II. Ineffective Assistance Of Counsel

Robles next contends that trial counsel was ineffective because he did not object at trial to the purported lack of foundation regarding the accuracy of the radar equipment Deputy Morefield used when stopping Robles' vehicle. Additionally, Robles claims ineffective assistance of counsel because he failed to object to the alleged prejudicial testimony of several deputies regarding Robles' state of intoxication at the time of arrest.

#### [\*186] A. Standard of Review

[HN2] To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance failed to meet an objective standard of reasonableness as measured by predominate professional norms, and (2) such deficient performance so prejudiced the defendant as to deprive him of a fair trial. *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind. 1995). Additionally, [HN3] this court looks to the totality of the [\*\*6] circumstances when evaluating claims of ineffective assistance of counsel. *Sharkey v. State*, 672 N.E.2d 937, 940 (Ind. Ct. App. 1996), trans.

denied. [HN4] In determining whether prejudice exists, we begin with the presumption that counsel is competent. *Pemberton v. State*, 560 N.E.2d 524, 526 (Ind. 1990). "Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel." Id. [HN5] In order to prove ineffective assistance due to the failure to object, a defendant must prove that an objection would have been sustained had one been made and that he was prejudiced by the failure to object. *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997).

### B. Radar Equipment

[HN6] Before the results of a radar test may be admitted into evidence, the State must prove that the equipment was properly operated and regularly tested. See *Charley v. State*, 651 N.E.2d 300, 303 (Ind. Ct. App. 1995). It is unnecessary for the State to present expert testimony to explain the proper operation, reliability or maintenance of the unit. In at least one instance, this court has determined that a police officer's testimony that he tested the radar unit and [\*\*7] checked the calibration along with his explanation that the unit was in good working order and inspected annually, was sufficient to meet the foundational requirements. Id.

In the instant case, Deputy Morefield testified that the radar was working properly the night that Robles was arrested and that it had been calibrated that day. R. at 69. We also note that Robles has made no claim that the radar equipment was inaccurate or unreliable. Thus, Robles has failed to demonstrate that counsel's objection would have been sustained had one been lodged. See *Timberlake*, 690 N.E.2d at 259. As a result, Robles has failed to show that trial counsel was ineffective.

### C. Prejudicial Testimony

Robles also claims that counsel was ineffective because he failed to object to "highly prejudicial opinion testimony." Appellant's Brief at 14. Specifically, he claims that permitting the opinions of three sheriff's deputies as to whether Robles was intoxicated, constituted ineffectiveness of trial counsel.

In support of the contention that such evidence was inadmissible, Robles points to Ind. Evidence Rule 704(b) which provides that "witnesses may not testify to opinions concerning intent, [\*\*8] guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

At trial, the three sheriff's deputies, who had observed Robles following the arrest, testified it was their opinion that Robles was intoxicated. R. at 93, 105, 109. All three based their conclusion upon Robles' behavior and demeanor, along with their acknowledgment that they had observed other individuals in a state of intoxication. Contrary to Robles' assertions that such testimony was improper, the deputies were not testifying with respect to whether Robles was guilty or innocent of the charged offense. Moreover, this court has recognized [HN7] that law enforcement testimony regarding an individual's intoxication is admissible. *Staley v. State*, 633 N.E.2d 314, 317-18 (Ind. Ct. App. 1994); see also *Reeves v. Boyd & Sons, Inc.*, 654 N.E.2d 864, 871 (Ind. Ct. App. 1995), trans. denied (non-expert witness may give opinion of another's state of intoxication). As Robles has failed to show that an objection by defense counsel would have been sustained, he has failed to demonstrate ineffective assistance of counsel.

### III. Sentencing [\*\*9] Statement

Robles argues that the sentence should be set aside because the trial court failed to grant him an opportunity to speak [\*187] in his own behalf before the trial court imposed the sentence. Specifically, Robles asserts that the trial court erred when it did not expressly ask him if he desired to make a statement.

To resolve this issue, we first turn to the provisions of our allocution statute, [HN8] *I.C. § 35-38-1-5* which provides in relevant part that:

The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in his own behalf and, before pronouncing sentence, the court shall ask him

whether he wishes to make such a statement.

Here, the record reveals that the trial court did not inquire of Robles or his counsel as to whether either desired to make a statement before the sentence was imposed. Notwithstanding such an omission, Robles made no objection.

We note that in *Fields v. State*, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997), trans. denied, this court remanded for resentencing when the trial court did not inquire of the defendant as to whether he desired to make a statement [\*\*10] at sentencing. In the instant case, however, the record is clear that Robles did not pose any objection at sentencing. Moreover, Robles has not made any assertion as to the content of any purported statement that he might have made, how a statement may have benefited him, or that he intended to call any witnesses to testify on his behalf.

In *Locke v. State*, 461 N.E.2d 1090, 1093 (Ind. 1984), our supreme court observed that [HN9] a defendant's failure to timely object to such an alleged error constitutes a waiver and the cause will not be remanded for resentencing. *Id.* Additionally, we have determined that a party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time. *State v. Keith*, 507 N.E.2d 245 (Ind. Ct. App. 1987). A timely objection must be lodged so that the alleged error may be promptly corrected by the trial court. *Id.*; see also *Hensley v. State*, 251 Ind. 633, 639, 244 N.E.2d 225, 228 (1969). Inasmuch as Robles did not object to the trial court's failure to grant him or his counsel the opportunity to speak before the pronouncement of the sentence, Robles has waived [\*\*11] the alleged error and is precluded from raising it for the first time on appeal.

#### IV. Imprisonment For Failure To Pay Costs

Finally, Robles contends that because he was determined to be partially indigent at the sentencing hearing, the trial court erroneously failed to state on the record that Robles could not be imprisoned for failing to pay court costs. Thus, Robles maintains that this cause must be remanded for correction of the sentencing order to expressly reflect that he cannot be imprisoned if he fails to pay those costs.

We initially note that our supreme court has determined that [HN10] a trial court should state in its sentencing order that a defendant may not be imprisoned for failing to pay a court-imposed fine if it is determined that the defendant is indigent. *Ridley v. State*, 690 N.E.2d 177, 182 (Ind. 1997); *Whitehead v. State*, 511 N.E.2d 284, 296 (Ind. 1987). [HN11] In accordance with the Costs statute, IND. CODE § 33-19-2-3, the trial court is required to conduct an indigency hearing if court costs are imposed. If it is determined that the defendant is not indigent, the trial court is required to order the defendant to pay court costs "at the time sentence is pronounced, [\*\*12] at some later date, or specified parts at designated intervals." *Id.*

Here, the record reflects that no fine was assessed against Robles. Additionally, the trial court conducted an indigency hearing at sentencing and determined that Robles was employed and only partially indigent. R. at 200. The trial judge also ordered Robles to pay a portion of the appellate costs in light of his employment and income, notwithstanding the appointment of counsel. R. at 200. After ordering Robles to pay court costs, the trial court granted him nearly seven months in which to pay them. R. at 197. At the time of sentencing, Robles did not allege or make any showing that his financial status might prevent him from paying those costs. Inasmuch as the trial judge did not find [\*188] Robles indigent at the time of sentencing with respect to an inability to pay the costs in the future, he was not required to specifically indicate in the sentencing order that Robles could not be imprisoned for failing to pay the court costs. As a result, Robles' argument fails and we decline to remand this cause to the trial court.

#### CONCLUSION

In light of our resolution of the issues set forth above, we conclude that Robles' [\*\*13] conviction for driving while suspended must be vacated, inasmuch as he demonstrated that he possessed a valid license when charged with that offense. Additionally, we note that Robles failed to demonstrate that he received ineffective assistance of trial counsel. We also conclude that the trial court's failure to ask Robles whether he desired to make a statement prior to the imposition of his sentence was not reversible error, and that this cause need not be remanded for correction of the

sentencing order when the trial court did not expressly state that Robles could not be imprisoned if he failed to pay court costs.

Judgment affirmed in part and reversed in part.

GARRARD, J., and ROBB, J., concur.

27 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**TONY E. ROBLES, Appellant-Defendant, vs. STATE OF INDIANA,  
Appellee-Plaintiff.**

**No. 32A01-9801-CR-23**

**COURT OF APPEALS OF INDIANA, FIRST DISTRICT**

*705 N.E.2d 183; 1998 Ind. App. LEXIS 2259*

**December 28, 1998, Filed**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE HENDRICKS SUPERIOR COURT. The Honorable Karen M. Love, Judge. Cause No. 32D03-9703-CM-100.

**DISPOSITION:** Judgment affirmed in part and reversed in part.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of his convictions for operating a motor vehicle while intoxicated, driving while suspended, and speeding entered by the Hendricks Superior Court (Indiana). Defendant produced evidence pursuant to *Ind. Code § 9-24-18-5(g)* that his suspended license had been reinstated.

**OVERVIEW:** A police officer stopped defendant for speeding and the officer noticed that defendant appeared to be intoxicated. Defendant was transported to the police station where it was determined that his California driver's license had been suspended. Defendant was then charged with driving while suspended, speeding, and driving while intoxicated. He was convicted on all counts. On appeal, defendant contended that the evidence was insufficient to support the conviction for driving while suspended because he demonstrated at trial that his California license had been suspended in error. In reversing the conviction for driving while suspended, the court ruled that defendant satisfied his burden of proof under *Ind. Code § 9-34-18-5(g)* by presenting an order of reinstatement that provided that the suspension had been set aside the same day it was imposed. The court held that defendant demonstrated by a preponderance of the evidence that his license was valid when he was charged with driving while suspended.

**OUTCOME:** The court reversed defendant's conviction for driving while suspended because defendant demonstrated by a preponderance of the evidence that his driver's license was valid when he was charged with driving while suspended. The court affirmed defendant's convictions for operating a motor vehicle while intoxicated and speeding.

**CORE TERMS:** suspended, driving, deputy, sentencing, sentence, imprisoned, radar, indigent, license, ineffective assistance of counsel, failing to pay, intoxicated, ineffective, desired, driver's, fine, failed to demonstrate, inasmuch, state of intoxication, driving record, speeding, arrest, failure to object, preponderance, resentencing, prejudiced, indigency, possessed, tested, ineffective assistance

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution Governments > State & Territorial Governments > Licenses Torts > Transportation Torts > General Overview***

[HN1] Before a defendant may be convicted for driving with a suspended license, the state must prove that he operated a motor vehicle while his driving privileges, license, or permit was suspended or revoked. Ind. Code. § 9-24-18-5(b). However, a defendant may be absolved of criminal liability if he establishes, by a preponderance of the evidence, that he possessed a valid driver's license. Ind. Code. § 9-24-18-5(g).

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN2] To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance failed to meet an objective standard of reasonableness as measured by predominate professional norms, and (2) such deficient performance so prejudiced the defendant as to deprive him of a fair trial.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN3] The court looks to the totality of the circumstances when evaluating claims of ineffective assistance of counsel.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests***

[HN4] In determining whether prejudice exists, the court begins with the presumption that counsel is competent. Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests******Criminal Law & Procedure > Counsel > Effective Assistance > Trials***

[HN5] In order to prove ineffective assistance due to the failure to object, a defendant must prove that an objection would have been sustained had one been made and that he was prejudiced by the failure to object.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor******Evidence > Testimony > Experts > Admissibility***

[HN6] Before the results of a radar test may be admitted into evidence, the state must prove that the equipment was properly operated and regularly tested. It is unnecessary for the state to present expert testimony to explain the proper operation, reliability, or maintenance of the unit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN7] Law enforcement testimony regarding an individual's intoxication is admissible.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN8] See *Ind. Code* § 35-38-1-5.

***Criminal Law & Procedure > Appeals > Remands & Remittiturs******Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN9] A defendant's failure to timely object to an alleged error constitutes a waiver and the cause will not be remanded for resentencing. A party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN10] A trial court should state in its sentencing order that a defendant may not be imprisoned for failing to pay a court-imposed fine if it is determined that the defendant is indigent.

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN11] In accordance with the costs statute, Ind. Code § 33-19-2-3, the trial court is required to conduct an indigency hearing if court costs are imposed. If it is determined that the defendant is not indigent, the trial court is required to order the defendant to pay court costs at the time sentence is pronounced, at some later date, or specified parts at designated intervals.

**COUNSEL:** For APPELLANT: PAULA M. SAUER, Danville, Indiana.

ATTORNEYS FOR APPELLEE: JEFFREY A. MODISETT, Attorney General of Indiana, K. C. NORWALK, Deputy Attorney General, Indianapolis, Indiana.

**JUDGES:** BAKER, Judge. GARRARD, J., and ROBB, J., concur.

**OPINION BY:** BAKER

**OPINION:** [\*184] OPINION

BAKER, Judge

Appellant-defendant Tony E. Robles appeals his convictions for Operating a Motor Vehicle While Intoxicated, n1 a Class A misdemeanor; Driving While Suspended, n2 a Class A infraction; and Speeding, n3 a Class C infraction, claiming that: (1) the evidence was insufficient to support the conviction for driving while suspended; (2) trial counsel was ineffective; (3) the trial court erred in denying Robles the opportunity to make a statement at sentencing; and (4) the trial court failed to state in its sentencing order that Robles could not be imprisoned for failing to pay fines and costs.

n1 *IND. CODE* § 9-30-5-2.

n2 *IND. CODE* § 9-24-18-5.

[\*\*2]

n3 *IND. CODE* § 9-21-5-13.

**FACTS**

The facts most favorable to the judgment reveal that at approximately 1:57 a.m. on March 22, 1997, Hendricks County Sheriff's [\*185] Deputy Charles Morefield stopped Robles for speeding. Deputy Morefield's radar equipment indicated that Robles had been driving seventy-two miles per hour in a forty mile per hour zone. As Deputy Morefield approached Robles, he observed that Robles smelled of alcohol. Deputy Morefield also noticed that Robles' balance was

unsteady and that his speech was slurred. After Robles failed several field sobriety tests, he was transported to the police station where Deputy Morefield attempted to administer a breath test. Robles refused to take the test. Following Robles' arrest, the State determined that his California driver's license had been suspended. Ross was charged with speeding, driving while intoxicated and driving while suspended. Following a trial by court which commenced on December 16, 1997, Robles was convicted on all three counts. Robles was then sentenced to 365 days in jail with 357 of those days suspended. Robles also received [\*\*3] credit for the two days that he remained in jail following the arrest. The trial court imposed no fines, but ordered Robles to pay court costs, a substance evaluation fee and a probation user's fee. He now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence--Driving While Suspended

Robles first contends that the evidence was insufficient to support the conviction for driving while suspended. Specifically, Robles asserts that the conviction for this offense must be set aside because he demonstrated at trial that his driver's license had been suspended in error by the California Department of Motor Vehicles.

[HN1] Before a defendant may be convicted for driving with a suspended license, the State must prove that he "operated a motor vehicle . . . while his driving privileges, license or permit is suspended or revoked." *I.C. § 9-24-18-5(b)*. However, a defendant may be absolved of criminal liability under this section if he establishes, by a preponderance of the evidence, that he possessed a valid driver's license. *I.C. § 9-24-18-5(g)*.

In the instant case, the only evidence the State presented at trial to establish that Robles was driving while suspended was a certified [\*\*4] copy of Robles' California driving record, dated April 3, 1997. Record at 88-90. Attached to the driving record was a copy of a letter sent to Robles on June 16, 1996, from the California Department of Motor Vehicles. That correspondence informed Robles that his driving privileges would be suspended effective November 14, 1996, because of his failure to comply with a child support order. R. at 88. Robles submitted an order of reinstatement from the California Department of Motor Vehicles during his case-in-chief, dated April 4, 1997, just one day after the State had obtained its certified copy of Robles' driving record. That order provided that the suspension had "been set aside . . . effective Nov. 14, 1996." R. at 154. While Robles' copy of the reinstatement order was not certified, the State did not object to its admission into evidence. Additionally, Robles provided a letter signed by counsel with the California Family Support Division, stating that the suspension had been "submitted in error." R. at 155-56.

While we adhere to our well-known standard of review which precludes us from reweighing the evidence, it is apparent to us that Robles satisfied his burden of proof under [\*\*5] *I.C. § 9-34-18-5(g)*. Specifically, Robles demonstrated by a preponderance of the evidence that his driver's license was valid when he was charged with driving while suspended on March 22, 1997. Thus, we are compelled to reverse Robles' conviction for that offense.

### II. Ineffective Assistance Of Counsel

Robles next contends that trial counsel was ineffective because he did not object at trial to the purported lack of foundation regarding the accuracy of the radar equipment Deputy Morefield used when stopping Robles' vehicle. Additionally, Robles claims ineffective assistance of counsel because he failed to object to the alleged prejudicial testimony of several deputies regarding Robles' state of intoxication at the time of arrest.

#### [\*186] A. Standard of Review

[HN2] To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance failed to meet an objective standard of reasonableness as measured by predominate professional norms, and (2) such deficient performance so prejudiced the defendant as to deprive him of a fair trial. *Spranger v. State*, 650 N.E.2d 1117, 1121 (*Ind.* 1995). Additionally, [HN3] this court looks to the totality of the [\*\*6] circumstances when evaluating claims of ineffective assistance of counsel. *Sharkey v. State*, 672 N.E.2d 937, 940 (*Ind. Ct. App.* 1996), trans.

denied. [HN4] In determining whether prejudice exists, we begin with the presumption that counsel is competent. *Pemberton v. State*, 560 N.E.2d 524, 526 (Ind. 1990). "Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel." Id. [HN5] In order to prove ineffective assistance due to the failure to object, a defendant must prove that an objection would have been sustained had one been made and that he was prejudiced by the failure to object. *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997).

### B. Radar Equipment

[HN6] Before the results of a radar test may be admitted into evidence, the State must prove that the equipment was properly operated and regularly tested. See *Charley v. State*, 651 N.E.2d 300, 303 (Ind. Ct. App. 1995). It is unnecessary for the State to present expert testimony to explain the proper operation, reliability or maintenance of the unit. In at least one instance, this court has determined that a police officer's testimony that he tested the radar unit and [\*\*7] checked the calibration along with his explanation that the unit was in good working order and inspected annually, was sufficient to meet the foundational requirements. Id.

In the instant case, Deputy Morefield testified that the radar was working properly the night that Robles was arrested and that it had been calibrated that day. R. at 69. We also note that Robles has made no claim that the radar equipment was inaccurate or unreliable. Thus, Robles has failed to demonstrate that counsel's objection would have been sustained had one been lodged. See *Timberlake*, 690 N.E.2d at 259. As a result, Robles has failed to show that trial counsel was ineffective.

### C. Prejudicial Testimony

Robles also claims that counsel was ineffective because he failed to object to "highly prejudicial opinion testimony." Appellant's Brief at 14. Specifically, he claims that permitting the opinions of three sheriff's deputies as to whether Robles was intoxicated, constituted ineffectiveness of trial counsel.

In support of the contention that such evidence was inadmissible, Robles points to Ind. Evidence Rule 704(b) which provides that "witnesses may not testify to opinions concerning intent, [\*\*8] guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

At trial, the three sheriff's deputies, who had observed Robles following the arrest, testified it was their opinion that Robles was intoxicated. R. at 93, 105, 109. All three based their conclusion upon Robles' behavior and demeanor, along with their acknowledgment that they had observed other individuals in a state of intoxication. Contrary to Robles' assertions that such testimony was improper, the deputies were not testifying with respect to whether Robles was guilty or innocent of the charged offense. Moreover, this court has recognized [HN7] that law enforcement testimony regarding an individual's intoxication is admissible. *Staley v. State*, 633 N.E.2d 314, 317-18 (Ind. Ct. App. 1994); see also *Reeves v. Boyd & Sons, Inc.*, 654 N.E.2d 864, 871 (Ind. Ct. App. 1995), trans. denied (non-expert witness may give opinion of another's state of intoxication). As Robles has failed to show that an objection by defense counsel would have been sustained, he has failed to demonstrate ineffective assistance of counsel.

### III. Sentencing [\*\*9] Statement

Robles argues that the sentence should be set aside because the trial court failed to grant him an opportunity to speak [\*187] in his own behalf before the trial court imposed the sentence. Specifically, Robles asserts that the trial court erred when it did not expressly ask him if he desired to make a statement.

To resolve this issue, we first turn to the provisions of our allocution statute, [HN8] *I.C. § 35-38-1-5* which provides in relevant part that:

The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in his own behalf and, before pronouncing sentence, the court shall ask him

whether he wishes to make such a statement.

Here, the record reveals that the trial court did not inquire of Robles or his counsel as to whether either desired to make a statement before the sentence was imposed. Notwithstanding such an omission, Robles made no objection.

We note that in *Fields v. State*, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997), trans. denied, this court remanded for resentencing when the trial court did not inquire of the defendant as to whether he desired to make a statement [\*\*10] at sentencing. In the instant case, however, the record is clear that Robles did not pose any objection at sentencing. Moreover, Robles has not made any assertion as to the content of any purported statement that he might have made, how a statement may have benefited him, or that he intended to call any witnesses to testify on his behalf.

In *Locke v. State*, 461 N.E.2d 1090, 1093 (Ind. 1984), our supreme court observed that [HN9] a defendant's failure to timely object to such an alleged error constitutes a waiver and the cause will not be remanded for resentencing. *Id.* Additionally, we have determined that a party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time. *State v. Keith*, 507 N.E.2d 245 (Ind. Ct. App. 1987). A timely objection must be lodged so that the alleged error may be promptly corrected by the trial court. *Id.*; see also *Hensley v. State*, 251 Ind. 633, 639, 244 N.E.2d 225, 228 (1969). Inasmuch as Robles did not object to the trial court's failure to grant him or his counsel the opportunity to speak before the pronouncement of the sentence, Robles has waived [\*\*11] the alleged error and is precluded from raising it for the first time on appeal.

#### IV. Imprisonment For Failure To Pay Costs

Finally, Robles contends that because he was determined to be partially indigent at the sentencing hearing, the trial court erroneously failed to state on the record that Robles could not be imprisoned for failing to pay court costs. Thus, Robles maintains that this cause must be remanded for correction of the sentencing order to expressly reflect that he cannot be imprisoned if he fails to pay those costs.

We initially note that our supreme court has determined that [HN10] a trial court should state in its sentencing order that a defendant may not be imprisoned for failing to pay a court-imposed fine if it is determined that the defendant is indigent. *Ridley v. State*, 690 N.E.2d 177, 182 (Ind. 1997); *Whitehead v. State*, 511 N.E.2d 284, 296 (Ind. 1987). [HN11] In accordance with the Costs statute, IND. CODE § 33-19-2-3, the trial court is required to conduct an indigency hearing if court costs are imposed. If it is determined that the defendant is not indigent, the trial court is required to order the defendant to pay court costs "at the time sentence is pronounced, [\*\*12] at some later date, or specified parts at designated intervals." *Id.*

Here, the record reflects that no fine was assessed against Robles. Additionally, the trial court conducted an indigency hearing at sentencing and determined that Robles was employed and only partially indigent. R. at 200. The trial judge also ordered Robles to pay a portion of the appellate costs in light of his employment and income, notwithstanding the appointment of counsel. R. at 200. After ordering Robles to pay court costs, the trial court granted him nearly seven months in which to pay them. R. at 197. At the time of sentencing, Robles did not allege or make any showing that his financial status might prevent him from paying those costs. Inasmuch as the trial judge did not find [\*188] Robles indigent at the time of sentencing with respect to an inability to pay the costs in the future, he was not required to specifically indicate in the sentencing order that Robles could not be imprisoned for failing to pay the court costs. As a result, Robles' argument fails and we decline to remand this cause to the trial court.

#### CONCLUSION

In light of our resolution of the issues set forth above, we conclude that Robles' [\*\*13] conviction for driving while suspended must be vacated, inasmuch as he demonstrated that he possessed a valid license when charged with that offense. Additionally, we note that Robles failed to demonstrate that he received ineffective assistance of trial counsel. We also conclude that the trial court's failure to ask Robles whether he desired to make a statement prior to the imposition of his sentence was not reversible error, and that this cause need not be remanded for correction of the

sentencing order when the trial court did not expressly state that Robles could not be imprisoned if he failed to pay court costs.

Judgment affirmed in part and reversed in part.

GARRARD, J., and ROBB, J., concur.

28 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF IOWA, Plaintiff-Appellee, vs. WILLIAM CLARE KNAPP III,  
Defendant-Appellant.**

**No. 4-183 / 02-2103**

**COURT OF APPEALS OF IOWA**

*2004 Iowa App. LEXIS 1049*

**September 9, 2004, Filed**

**NOTICE:** [\*1] NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

**SUBSEQUENT HISTORY:** Reported at *State v. Knapp, 2004 Iowa App. LEXIS 1636 (Iowa Ct. App., Sept. 9, 2004)*

**PRIOR HISTORY:** Appeal from the Iowa District Court for Polk County, Joe Smith, District Associate Judge. Defendant appeals from operating a motor vehicle while under the influence conviction, first offense, raising issues of arrest and operation of intoxilizer device.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a conviction by the Iowa District Court for Polk County on a charge of operating a motor vehicle while under the influence, first offense, in violation of *Iowa Code § 321J.2* (2001). Defendant raised issues about his arrest and the operation of an Intoxilizer device.

**OVERVIEW:** The officer properly invoked the implied consent statute, *Iowa Code § 321J.6*, as the evidence established defendant was speeding, admitted to drinking beer at a friend's house, and had cases of beer in the back seat of the car. His eyes were a little watery, and he smelled of alcohol. The stop occurred at about 2:00 a.m. Defendant consented to field sobriety tests. Yet, defendant vigorously challenged the accuracy of those tests for admissibility. Even so, the enumerated circumstances were clearly sufficient to establish reasonable grounds to believe defendant operated his vehicle while intoxicated. The grounds also provided probable cause to place defendant under arrest for violation of *Iowa Code § 321J.2*. The officer's judgment to place defendant under arrest was bolstered by the result of a preliminary breath test. After arrest, defendant was administered the Intoxilizer breath test, which registered a blood alcohol concentration of .168. Contrary to defendant's challenge, the calibration and certification of the Intoxilizer instrument met the statutory and administrative requirements for accuracy. That evidence was admitted properly for

consideration by the trial judge.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** calibration, breath test, margin of error, testing, administered, accuracy, arrest, reasonable grounds, motor vehicle, log, concentration, beer, seat, chemical test, certification, intoxicated, calibrating, enumerated, calibrated, invoked, minus, alcoholic beverage, blood alcohol, sobriety, speeding, invalid, watery, breath, odor

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*  
*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*  
*Governments > Legislation > Interpretation*

[HN1] Appellate claims pertaining to statutory interpretation and application are reviewed for errors at law. A district court's findings are binding, if supported by substantial evidence.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Prerequisites*  
*Evidence > Procedural Considerations > Circumstantial & Direct Evidence*  
*Evidence > Relevance > Circumstantial & Direct Evidence*

[HN2] The implied consent law, *Iowa Code* § 321J.6, may be invoked when an officer has reasonable grounds to believe a driver was operating a motor vehicle while intoxicated and any one of seven enumerated conditions in the statute existed. Reasonable grounds are established when the facts and circumstances lead to a prudent person's belief that an offense has been committed. Both direct and circumstantial evidence may be considered in determining if reasonable grounds exist.

*Evidence > Scientific Evidence > Sobriety Tests*

[HN3] *Iowa Admin. Code* r. 661-7.2(1) requires certification of the proper working order of a breathalyzer device within one year immediately preceding use of the preliminary breath testing device.

*Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*  
*Evidence > Scientific Evidence > Sobriety Tests*

[HN4] *Iowa Code* § 321J.2(10) requires only that the result of a breathalyzer test minus the established margin for error equal or exceed .10.

**COUNSEL:** Richard Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and John Heinicke, Assistant County Attorney, for appellee.

**JUDGES:** Considered by Huitink, P.J., and Mahan, J., and Snell, S.J. \*

\* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2003).

**OPINION BY:** SNELL

**OPINION: SNELL, S.J.**

Defendant William Knapp III was charged with operating a motor vehicle while under the influence of alcohol in violation of *Iowa Code section 321J.2* [\*2] (2001). The charge was based on an incident that occurred on March 10, 2002. Defendant waived his right to a trial by jury and stipulated to a trial on the minutes of testimony. The trial court found him guilty and sentenced him to a first offense incarceration and a fine of \$ 1000.

The operative facts show that an Urbandale police officer observed defendant's vehicle traveling on Hickman Road. The officer's radar showed that defendant was speeding. Defendant was stopped, questioned, and observed by the officer to have an odor of alcohol emanating from the car's back seat. Some cases of beer were in the back seat. Defendant's eyes were watery. He told the officer he had consumed a couple of beers at a friend's house. When defendant sat in the back of the officer's patrol car, the officer smelled the odor of an alcoholic beverage.

The officer administered three field sobriety tests and a preliminary breath test to defendant. Defendant performed poorly, leading the officer to arrest him. Defendant later submitted to an Intoxilizer breath test, which showed a blood alcohol concentration of .168.

On appeal, defendant sets forth numerous propositions claiming justification for relief. [\*3] We consolidate and summarize them for purposes of analysis. [HN1] Because they pertain to statutory interpretation and application, we review them for errors at law. *State v. Booth*, 670 N.W.2d 209, 211 (Iowa 2003). The district court's findings are binding if supported by substantial evidence. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990); see also *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

Defendant filed a motion to suppress and a motion in limine. Error was preserved. Evidence was taken in regard to both motions.

Defendant believes the provisions of the implied consent law were improperly invoked. See *Iowa Code § 321J.6*. [HN2] That law may be invoked when the officer has reasonable grounds to believe the driver was operating a motor vehicle while intoxicated and anyone of seven enumerated conditions in the statute existed. Reasonable grounds are established when the facts and circumstances lead to a prudent person's belief that an offense has been committed. *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). Both direct and circumstantial evidence may be considered [\*4] in determining if reasonable grounds exist. *Id.* at 626.

In this case, the evidence established defendant was speeding, admitted to drinking beer at a friend's house, and had cases of beer in the back seat of the car. His eyes were a little watery, and he exhibited the odor of an alcoholic beverage. The car stop by the officer occurred at about 2:00 a.m.. With the consent of defendant, the officer administered the field sobriety tests. The accuracy of those tests for admissibility is vigorously challenged by defendant.

The walk and turn test is claimed to be invalid because the officer did not instruct defendant to look at his feet during the test. The one-legged stand test is claimed to be invalid because defendant was not told to keep his legs straight. Defendant failed the tests notwithstanding these instructions would have aided not hindered him. Defendant's objection is more technical than based on any substantive difference it would make.

The horizontal gaze nystagmus test was also administered. This was claimed to be faulty on numerous grounds including that car headlights would be passing through the defendant's field of vision. We ignore the results of this [\*5] test. Even so, the enumerated circumstances are clearly sufficient to establish reasonable grounds to believe defendant was intoxicated when operating his motor vehicle. These grounds also provide probable cause to place defendant under arrest for violation of *section 321J.2*.

The officer's judgment to place defendant under arrest was bolstered by the result of a preliminary breath test. After arrest, defendant was administered the Intoxilizer breath test which registered blood alcohol concentration of .168.

Defendant challenges the admission in evidence of this test result on numerous grounds. He asserts the administrative rules were violated which require monthly calibration of the preliminary breath testing (PBT) device and maintenance of a calibration log. *Iowa Admin. Code r. 661-7.5(2)*. The calibration log for the PBT device used here showed it had been calibrated on March 2, 2002, and used on March 27, 2002. The log also identified the officer calibrating the device, listed the unit and identification number, and the calibration reading of the test. Although it is not signed by the calibrating officer, that is not required. [HN3] The administrative rule requires certification of proper [\*6] working order "within one year immediately preceding use." *Iowa Admin. Code r. 661-7.2(1)*. The Intoxilizer was properly certified.

Defendant also makes an argument based on margin of error. Under *Iowa Code section 321J.2(10)*, the results of the breath test may not be used to prove a defendant had an alcohol concentration of .10 or more "if the alcohol . . . concentration indicated by the chemical test minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal or exceed" .10. Defendant's arguments focus on the margin of error caveat. He correctly says the device used here was not calibrated and certified for accuracy of breath testing above .16. However, the law does not require that. The critical area for testing for accuracy was .10. Division of Criminal Investigation Criminalist Robert Monserrate testified that the margin of error would never be great enough to bring a reading of .160 under .10. [HN4] *Iowa Code section 321J.2(10)* requires only that the result minus the established margin for error equal or exceed .10. The calibration and certification of the Intoxilizer instrument [\*7] used here met the statutory and administrative requirements for accuracy. This evidence was properly admitted for consideration by the trial judge.

Our supreme court in two recent cases approved the use of the Data Master device for testing intoxication, which is similar to the type of device used in the case here. See *State v. Stratmeier*, 672 N.W.2d 817 (Iowa 2003); *State v. Hornik*, 672 N.W.2d 836 (Iowa 2003). In both cases, questions of improper use of the device, similar to those raised here, are analyzed and found not to constitute reversible error. We deem no error has been committed by the trial court in this regard.

We have considered all of the questions raised by the defendant in appealing his conviction. The judgment of the trial court is affirmed.

**AFFIRMED.**

29 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF IOWA, Plaintiff-Appellee, vs. WILLIAM CLARE KNAPP III,  
Defendant-Appellant.**

**No. 4-183 / 02-2103**

**COURT OF APPEALS OF IOWA**

*2004 Iowa App. LEXIS 1049*

**September 9, 2004, Filed**

**NOTICE:** [\*1] NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

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**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a conviction by the Iowa District Court for Polk County on a charge of operating a motor vehicle while under the influence, first offense, in violation of *Iowa Code § 321J.2* (2001). Defendant raised issues about his arrest and the operation of an Intoxilizer device.

**OVERVIEW:** The officer properly invoked the implied consent statute, *Iowa Code § 321J.6*, as the evidence established defendant was speeding, admitted to drinking beer at a friend's house, and had cases of beer in the back seat of the car. His eyes were a little watery, and he smelled of alcohol. The stop occurred at about 2:00 a.m. Defendant consented to field sobriety tests. Yet, defendant vigorously challenged the accuracy of those tests for admissibility. Even so, the enumerated circumstances were clearly sufficient to establish reasonable grounds to believe defendant operated his vehicle while intoxicated. The grounds also provided probable cause to place defendant under arrest for violation of *Iowa Code § 321J.2*. The officer's judgment to place defendant under arrest was bolstered by the result of a preliminary breath test. After arrest, defendant was administered the Intoxilizer breath test, which registered a blood alcohol concentration of .168. Contrary to defendant's challenge, the calibration and certification of the Intoxilizer instrument met the statutory and administrative requirements for accuracy. That evidence was admitted properly for

consideration by the trial judge.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** calibration, breath test, margin of error, testing, administered, accuracy, arrest, reasonable grounds, motor vehicle, log, concentration, beer, seat, chemical test, certification, intoxicated, calibrating, enumerated, calibrated, invoked, minus, alcoholic beverage, blood alcohol, sobriety, speeding, invalid, watery, breath, odor

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[HN1] Appellate claims pertaining to statutory interpretation and application are reviewed for errors at law. A district court's findings are binding, if supported by substantial evidence.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Prerequisites*  
*Evidence > Procedural Considerations > Circumstantial & Direct Evidence*  
*Evidence > Relevance > Circumstantial & Direct Evidence*

[HN2] The implied consent law, *Iowa Code § 321J.6*, may be invoked when an officer has reasonable grounds to believe a driver was operating a motor vehicle while intoxicated and any one of seven enumerated conditions in the statute existed. Reasonable grounds are established when the facts and circumstances lead to a prudent person's belief that an offense has been committed. Both direct and circumstantial evidence may be considered in determining if reasonable grounds exist.

*Evidence > Scientific Evidence > Sobriety Tests*

[HN3] *Iowa Admin. Code r. 661-7.2(1)* requires certification of the proper working order of a breathalyzer device within one year immediately preceding use of the preliminary breath testing device.

*Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*  
*Evidence > Scientific Evidence > Sobriety Tests*

[HN4] *Iowa Code § 321J.2(10)* requires only that the result of a breathalyzer test minus the established margin for error equal or exceed .10.

**COUNSEL:** Richard Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and John Heinicke, Assistant County Attorney, for appellee.

**JUDGES:** Considered by Huitink, P.J., and Mahan, J., and Snell, S.J. \*

\* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2003).

**OPINION BY:** SNELL

**OPINION: SNELL, S.J.**

Defendant William Knapp III was charged with operating a motor vehicle while under the influence of alcohol in violation of *Iowa Code section 321J.2* [\*2] (2001). The charge was based on an incident that occurred on March 10, 2002. Defendant waived his right to a trial by jury and stipulated to a trial on the minutes of testimony. The trial court found him guilty and sentenced him to a first offense incarceration and a fine of \$ 1000.

The operative facts show that an Urbandale police officer observed defendant's vehicle traveling on Hickman Road. The officer's radar showed that defendant was speeding. Defendant was stopped, questioned, and observed by the officer to have an odor of alcohol emanating from the car's back seat. Some cases of beer were in the back seat. Defendant's eyes were watery. He told the officer he had consumed a couple of beers at a friend's house. When defendant sat in the back of the officer's patrol car, the officer smelled the odor of an alcoholic beverage.

The officer administered three field sobriety tests and a preliminary breath test to defendant. Defendant performed poorly, leading the officer to arrest him. Defendant later submitted to an Intoxilizer breath test, which showed a blood alcohol concentration of .168.

On appeal, defendant sets forth numerous propositions claiming justification for relief. [\*3] We consolidate and summarize them for purposes of analysis. [HN1] Because they pertain to statutory interpretation and application, we review them for errors at law. *State v. Booth*, 670 N.W.2d 209, 211 (Iowa 2003). The district court's findings are binding if supported by substantial evidence. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990); see also *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

Defendant filed a motion to suppress and a motion in limine. Error was preserved. Evidence was taken in regard to both motions.

Defendant believes the provisions of the implied consent law were improperly invoked. See *Iowa Code § 321J.6*. [HN2] That law may be invoked when the officer has reasonable grounds to believe the driver was operating a motor vehicle while intoxicated and anyone of seven enumerated conditions in the statute existed. Reasonable grounds are established when the facts and circumstances lead to a prudent person's belief that an offense has been committed. *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). Both direct and circumstantial evidence may be considered [\*4] in determining if reasonable grounds exist. *Id.* at 626.

In this case, the evidence established defendant was speeding, admitted to drinking beer at a friend's house, and had cases of beer in the back seat of the car. His eyes were a little watery, and he exhibited the odor of an alcoholic beverage. The car stop by the officer occurred at about 2:00 a.m.. With the consent of defendant, the officer administered the field sobriety tests. The accuracy of those tests for admissibility is vigorously challenged by defendant.

The walk and turn test is claimed to be invalid because the officer did not instruct defendant to look at his feet during the test. The one-legged stand test is claimed to be invalid because defendant was not told to keep his legs straight. Defendant failed the tests notwithstanding these instructions would have aided not hindered him. Defendant's objection is more technical than based on any substantive difference it would make.

The horizontal gaze nystagmus test was also administered. This was claimed to be faulty on numerous grounds including that car headlights would be passing through the defendant's field of vision. We ignore the results of this [\*5] test. Even so, the enumerated circumstances are clearly sufficient to establish reasonable grounds to believe defendant was intoxicated when operating his motor vehicle. These grounds also provide probable cause to place defendant under arrest for violation of *section 321J.2*.

The officer's judgment to place defendant under arrest was bolstered by the result of a preliminary breath test. After arrest, defendant was administered the Intoxilizer breath test which registered blood alcohol concentration of .168.

Defendant challenges the admission in evidence of this test result on numerous grounds. He asserts the administrative rules were violated which require monthly calibration of the preliminary breath testing (PBT) device and maintenance of a calibration log. *Iowa Admin. Code r. 661-7.5(2)*. The calibration log for the PBT device used here showed it had been calibrated on March 2, 2002, and used on March 27, 2002. The log also identified the officer calibrating the device, listed the unit and identification number, and the calibration reading of the test. Although it is not signed by the calibrating officer, that is not required. [HN3] The administrative rule requires certification of proper [\*6] working order "within one year immediately preceding use." *Iowa Admin. Code r. 661-7.2(1)*. The Intoxilizer was properly certified.

Defendant also makes an argument based on margin of error. Under *Iowa Code section 321J.2(10)*, the results of the breath test may not be used to prove a defendant had an alcohol concentration of .10 or more "if the alcohol . . . concentration indicated by the chemical test minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal or exceed" .10. Defendant's arguments focus on the margin of error caveat. He correctly says the device used here was not calibrated and certified for accuracy of breath testing above .16. However, the law does not require that. The critical area for testing for accuracy was .10. Division of Criminal Investigation Criminalist Robert Monserrate testified that the margin of error would never be great enough to bring a reading of .160 under .10. [HN4] *Iowa Code section 321J.2(10)* requires only that the result minus the established margin for error equal or exceed .10. The calibration and certification of the Intoxilizer instrument [\*7] used here met the statutory and administrative requirements for accuracy. This evidence was properly admitted for consideration by the trial judge.

Our supreme court in two recent cases approved the use of the Data Master device for testing intoxication, which is similar to the type of device used in the case here. See *State v. Stratmeier*, 672 N.W.2d 817 (Iowa 2003); *State v. Hornik*, 672 N.W.2d 836 (Iowa 2003). In both cases, questions of improper use of the device, similar to those raised here, are analyzed and found not to constitute reversible error. We deem no error has been committed by the trial court in this regard.

We have considered all of the questions raised by the defendant in appealing his conviction. The judgment of the trial court is affirmed.

**AFFIRMED.**

30 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF KANSAS, Appellee, v. THOMAS P. GUILFOYLE, Appellant**

**No. 65,131**

**Court of Appeals of Kansas**

***814 P.2d 456; 1991 Kan. App. LEXIS 520***

**July 12, 1991, Filed**

**NOTICE:** [\*1]

NOT DESIGNATED FOR PUBLICATION

**PRIOR HISTORY:**

Appeal from Jefferson District Court; Gary L. Nafziger, judge.

**DISPOSITION:**

Affirmed in part, reversed in part, and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted of manufacture of marijuana, possession of marijuana without payment of tax, possession of marijuana, possession of drug paraphernalia, and speeding in a 55 miles per hour zone, in violation of *Kan. Stat. Ann. §§ 65-4127b(b)(3), 79-5204(a), 65-4127b(a)(3), 65-4152, and 8-1336* (Supp. 1990), respectively. He appealed from the judgment of the Jefferson County District Court (Kansas).

**OVERVIEW:** Defendant was stopped for speeding and consented to a search of his car. Trash bags that were inside the car held marijuana seeds and stems and a bill showing defendant's home address. Inside the trunk was found a bag containing what appeared to be marijuana. Defendant was arrested and a warrant was obtained to search his home and barn, where marijuana growing paraphernalia and plants were found. The court established a rule for determining the sufficiency of informations, holding that the failure of an information to charge a crime could be raised for the first time on appeal, even if a defendant had not first filed a motion to arrest judgment. Applying that rule, the court held that defendant's conviction for possession of marijuana without payment of tax was void. The complaint failed to charge that defendant was a dealer, an essential element of that crime pursuant to *Kan. Stat. Ann. § 79-5201(c)* (Supp. 1990). The

complaint failed to charge possession of marijuana, an element of manufacture of marijuana under *Kan. Stat. Ann. § 65-4127b(b)*. However, defendant did not show that he was prejudiced, as the possession of marijuana was inherent in the manufacture of it.

**OUTCOME:** The court reversed the judgment that convicted defendant of possession of marijuana without payment of tax. The court affirmed the judgment with regard to all other convictions.

**CORE TERMS:** marijuana, manufacture, possession of marijuana, radar, bag, controlled substance, plastic, filled, drug paraphernalia, trunk, plant, barn, payment of tax, glove, leafy, search warrant, trash, convicted, possessed, dealer, manufacturing, containers, tending, sealed, sack, constitutionally valid, arrest of judgment, fair trial, authorize, introduce

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] Before a search warrant may issue, a magistrate should consider the totality of the circumstances presented. He should make a practical common-sense decision whether there is a fair probability that a crime has been committed and the defendant committed the crime or that contraband or evidence of a crime will be found in a particular place. On appeal, the duty of the reviewing court is simply to ensure that the magistrate issuing a warrant had a substantial basis for concluding that probable cause existed.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] Whether the description on a warrant of the property to be seized is sufficiently specific is a question of law. An appellate court's review of conclusions of law is unlimited.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

[HN3] A warrant must particularly describe the person, place, or means of conveyance to be searched and the things to be seized. General warrants that give executing officers a roving commission to search where they choose are forbidden.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant***

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

[HN4] A warrant authorizing a search for and seizure of articles of personal property tending to establish identification is defective. The United State Supreme Court has upheld the validity of a search warrant, which stated: "together with other fruits, instrumentalities and evidence of crime at a time unknown." Such a warrant does not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crimes the defendant was suspected of committing. The scope of such a provision is narrowed by limiting words immediately preceding it.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope***

[HN5] With the exception of handwriting samples, and other writings or recordings of evidentiary value for reasons other than their testimonial content, things subject to seizure shall not include personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a

substantial purpose in furtherance of a criminal enterprise. The immunity from search does not extend to documents sought for reasons other than their testimonial content.

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant***

***Criminal Law & Procedure > Accusatory Instruments > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN6] According to *Kan. Stat. Ann. § 22-2504*, all search warrants shall show the time and date of issuance and shall be the warrants of the magistrate issuing the same. Kansas Statutes also provide that no warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. *Kan. Stat. Ann. § 22-2511*.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN7] Where a trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated in another way, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Search & Seizure***

[HN8] A search warrant is not required where a search is made with consent or a waiver voluntarily, intelligently, and knowingly given. The existence and voluntariness of a consent to search and seizure is a question of fact to be decided in light of attendant circumstances by the trier of fact and will not be overturned on appeal unless clearly erroneous. The consent must be knowingly and voluntarily given without threats or coercion.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness***

***Criminal Law & Procedure > Witnesses > Credibility***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN9] The State must prove the voluntariness of a consent to search by a preponderance of the evidence. Whether the State has met its burden depends upon the credibility of the witnesses. A trial court's observations of the demeanor of law enforcement officers and a defendant during testimony is essential to deciding if the State met its burden. An appellate court cannot decide a question of fact that is based upon conflicting testimony which requires an assessment of the demeanor and credibility of the witnesses.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search***

[HN10] Consent to look around a house does not authorize a search into containers. Consent to search a trunk of a car does not authorize police to search the passenger compartment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Scientific Evidence > General Overview***

[HN11] Evidence of accuracy of a radar unit is generally a prerequisite to the admissibility of evidence of speed

obtained by the use of a radar device. The accuracy of a particular radar unit can be established by showing that the officer tested the device in accordance with accepted procedures. Tuning forks and internal calibration devices are acceptable means of proving radar accuracy.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Scientific Evidence > General Overview***

[HN12] It is generally required that proof be offered that a radar operator is qualified to operate a radar.

***Criminal Law & Procedure > Accusatory Instruments > Complaints  
Criminal Law & Procedure > Accusatory Instruments > Indictments  
Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN13] A conviction based on a complaint or information which does not sufficiently charge the offense for which the accused is convicted is void. If the facts alleged in a complaint or information do not constitute an offense in the terms and meaning of the statute upon which it is based, a complaint or information is fatally defective. A district court lacks jurisdiction over a defendant where an information is fatally defective. An information that charges an offense in the language of the statute is sufficient; however, the exact statutory words need not be used if the meaning is clear.

***Constitutional Law > Bill of Rights > Fundamental Rights > General Overview  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Accusatory Instruments > Superseding Indictments***

[HN14] The Supreme Court of Kansas has recently adopted a new rule for appellate review of issues of defective informations raised for the first time on appeal. Prospectively, for all informations filed after the date of that opinion, the Court has adopted the following rule: Information defect challenges raised for the first time on appeal shall be reviewed by applying (1) the reasoning of *Kan. Stat. Ann. § 22-3201(4)* complaint/information/indictment amendment cases, as their reasoning relates to jurisdiction and the substantial rights of the defendant; (2) the common-sense test established by the Court; and (3) the rationale of the United States Court of Appeals for the Ninth Circuit. Of paramount importance, an appellate court shall look to whether the claimed defect in the information has: (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kan. Const. Bill of Rights § 10. If a defendant is able to establish a claim under either (a), (b), or (c), the defective information claim, raised for the first time on appeal, will be allowed. All prior cases decided contrary to this rule are overruled.

***Civil Procedure > Appeals > Reviewability > General Overview  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Appeals > Reviewability > General Overview***

[HN15] When an information filed in a trial court is claimed for the first time on appeal to be defective, the sufficiency of the information should be determined on the basis of practical rather than technical considerations. Common sense is a better guide than arbitrary and artificial rules.

***Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN16] When an information filed in a trial court is claimed for the first time on appeal to be defective, the information is sufficient, even if an essential averment is faulty in form, if by a fair construction the essential averment may be found within the text. All parts of the pleading must be looked to in determining its sufficiency.

***Criminal Law & Procedure > Accusatory Instruments > Informations******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN17] When an information filed in a trial court is claimed for the first time on appeal to be defective, defects in the institution of the prosecution or in the information, other than lack of jurisdiction or the failure to charge a crime, are waived if not raised by motion prior to trial.

***Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere******Criminal Law & Procedure > Guilty Pleas > No Contest Pleas******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN18] When an information filed in a trial court is claimed for the first time on appeal to be defective, *Kan. Stat. Ann. § 22-3208(3)* (Supp. 1989) states that lack of jurisdiction or the failure of the information to charge a crime shall be noticed by the court at any time during the pendency of the proceedings.

***Civil Procedure > Jurisdiction > General Overview******Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment******Governments > Legislation > Statutory Remedies & Rights***

[HN19] When an information filed in a trial court is claimed for the first time on appeal to be defective, after a verdict or finding of guilty or after a plea of guilty or nolo contendere, the proper procedure for a defendant who contends either that the information does not charge a crime or that the court was without jurisdiction of the crime charged is to utilize the statutory remedy extended by the legislature for these two specific situations - a *Kan. Stat. Ann. § 22-3502* motion for arrest of judgment.

***Criminal Law & Procedure > Accusatory Instruments > Informations******Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN20] When an information filed in a trial court is claimed for the first time on appeal to be defective, if a defendant fails to challenge the sufficiency of the information or the jurisdiction of the trial court by motion for arrest of judgment pursuant to *Kan. Stat. Ann. § 22-3502*, the issue may be raised in the appellate court for the first time, subject to the rules announced by the Supreme Court of Kansas.

***Criminal Law & Procedure > Accusatory Instruments > Informations******Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment******Criminal Law & Procedure > Appeals > Reviewability > Time Limitations***

[HN21] When an information filed in a trial court is claimed for the first time on appeal to be defective, the orderly resolution of criminal law issues requires the timely raising of claims relating to the validity of an information. Tardily challenged informations are to be construed liberally in favor of validity. The validity of an information is to be tested by reading the information as a whole. The information is sufficient, first, if it alleges the elements of the offense charged and fairly informs the defendant of the charge and, second, if a judgment thereon will safeguard the accused from a subsequent prosecution for the same offense. The elements of the offense may be gleaned from the information as a whole. An information not challenged before verdict or finding of guilty or pursuant to *Kan. Stat. Ann. § 22-3502* by a motion for arrest of judgment will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN22] The offense of possession of marijuana without payment of tax is defined in *Kan. Stat. Ann. § 79-5204* (Supp. 1990), which provides: No dealer may possess any marijuana, domestic marijuana plant or controlled substance upon which a tax is imposed pursuant to *Kan. Stat. Ann. § 79-5202*, and amendments thereto, unless the tax has been paid as

evidenced by an official stamp or other indicia.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN23] A dealer is defined in *Kan. Stat. Ann. § 79-5201(c)* (Supp. 1990) as: any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than 1 gram of any controlled substance, or 10 or more dosage units of any controlled substance with is not sold by weight.

***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > Elements***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN24] *Kan. Stat. Ann. § 65-4152* is entitled "possession of drug paraphernalia." Section 65-4152(2) provides: No person shall use or possess with intent to use any drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Act.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Drug Paraphernalia > Elements***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview***

[HN25] *Kan. Pattern Instructions Crim. No. 67.17* (2d ed.) requires the State to prove (1) that a defendant used or possessed with the intent to use any drug paraphernalia and (2) that the defendant did so intentionally.

***Criminal Law & Procedure > Scienter > Knowledge***

***Criminal Law & Procedure > Scienter > Specific Intent***

***Criminal Law & Procedure > Scienter > Willfulness***

[HN26] Willful conduct is conduct that is purposeful and intentional. The terms "knowing" and "intentional" are included within the term "willful." *Kan. Stat. Ann. § 21-3201(2)*.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements***

[HN27] *Kan. Stat. Ann. § 65-4127b(b)(3)* (Supp. 1990) provides: Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with the intent to sell, manufacture, prescribe, administer, deliver, distribute, dispense or compound any hallucinogenic drug designated in *Kan. Stat. Ann. § 65-4105(d)*, and amendments thereto or designated in *Kan. Stat. Ann. 65-4107(g)* and amendments thereto.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > Elements***

[HN28] The term manufacture in *Kan. Stat. Ann. § 65-4127b(b)(3)* (Supp. 1990) does not include the preparation or compounding of a controlled substance by an individual for the individual's own use. *Kan. Stat. Ann. § 65-4101(n)* (Supp. 1990).

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN29] *Kan. Stat. Ann. § 65-4127b(b)* (Supp. 1990) prohibits (1) the sale or manufacture, or (2) to offer for sale, or (3) possession with intent to manufacture. Thus, the State is required to prove possession with intent to manufacture.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN30] When a defendant challenges the sufficiency of the evidence to support a conviction, the standard of review on appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Simple Possession > Elements***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview***

[HN31] The State must prove for a conviction of possession of marijuana that a defendant intentionally possessed marijuana. *Kan. Pattern Instructions Crim. No. 67.16* (2d ed.).

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN32] No rule governing oral argument is more fundamental than that requiring counsel to confine their remarks to matters in evidence. The stating of facts not in evidence is clearly improper. If a statement is improper, the reviewing court must determine whether the argument was so prejudicial as to deny the defendant a fair trial and thus to require a new trial.

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted***

***Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements***

***Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibitions Against Improper Statements***

[HN33] Misconduct of a county attorney in closing argument will not always require the granting of a new trial unless such misconduct has resulted in prejudice to the extent that the accused has been denied a fair trial.

***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***

[HN34] The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the United States Constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. The burden of proof is on the party challenging a statute's constitutionality.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Tax Law > State & Local Taxes > Franchise Tax > General Overview***

***Tax Law > State & Local Taxes > Sales Tax > General Overview***

[HN35] *Kan. Stat. Ann. § 79-5204* (Supp. 1990) provides for the issuance of tax stamps, labels, or other official indicia affixed to marijuana showing payment of the tax. Section 79-5204(b) also states: Any person may purchase any such stamp, label or other indicia without disclosing such person's identity.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Tax Law > State & Local Taxes > Administration & Proceedings > General Overview***

[HN36] Neither the director of taxation nor a public employee may reveal facts contained in a report or return required by the Kansas Drug Tax Act, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under the Act from the taxpayer making the return.

***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Tax Law > State & Local Taxes > Administration & Proceedings > Collection***

[HN37] *Kan. Stat. Ann. § 75-5133* provides: Except as otherwise more specifically provided by law, all information received by the director of taxation from applications for licensure or registration made or returns or reports filed under the provisions of any law imposing any excise tax administered by the director, or from any investigation conducted under such provisions, shall be confidential, and it shall be unlawful for any officer or employee of the department of revenue to divulge any such information except in accordance with other provisions of law respecting the enforcement and collection of such tax, in accordance with other provisions of law respecting the enforcement and collection of such tax in accordance with proper judicial order and as provided in *Kan. Stat. Ann. § 74-2424*, and amendments thereto.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Tax Law > State & Local Taxes > Sales Tax > Imposition of Tax***

[HN38] The Kansas Drug Tax Act does not violate due process provisions of the Fourteenth Amendment and is constitutionally valid. Because revenue collection is one of the objectives of the Act and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana, the Act is constitutionally valid under the United States Constitution.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Tax Law > State & Local Taxes > Franchise Tax > General Overview***

[HN39] The Kansas Drug Tax Act does not violate the Due Process Clause of the Fourteenth Amendment and is constitutionally valid.

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN40] Under the doctrine of double jeopardy, the State may not split a single offense into separate parts. Where there is a single wrongful act, such act will not furnish the basis for more than one criminal prosecution.

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN41] A test concerning whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge, and if not, the fact that both charges relate to and grow out of one

transaction does not make a single offense where two distinct offenses are defined by statute.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

***Tax Law > State & Local Taxes > Franchise Tax > General Overview***

[HN42] The crimes of possession of marijuana and possession of marijuana without payment of tax are two distinct offenses. A crime under *Kan. Stat. Ann. § 79-5204(a)* (Supp. 1990) requires proof that the defendant is a dealer and that more than 28 grams of marijuana is possessed in addition to possession with intent. Furthermore, possession of marijuana is not a lesser included offense of possession of marijuana without payment of tax. A violation of *Kan. Stat. Ann. § 79-5208* for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments***

***Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Tests***

[HN43] The Double Jeopardy Clause of the United States Constitution protects defendants in criminal proceedings from multiple punishments for the same offense. The test of whether convictions for possession and manufacture of marijuana are multiplicitous depends upon whether each offense requires proof of an essential element which the other does not.

***Criminal Law & Procedure > Accusatory Instruments > Merger of Offenses***

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN44] The general principles for determining whether charges are multiplicitous are described as follows: (1) A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution. (2) If each offense charged requires proof of a fact not required in proving the other, the offenses do not merge. (3) Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act.

**COUNSEL:**

*Benjamin C. Wood*, of Overland Park, for appellant.

*Michael C. Hayes*, county attorney, and *Robert T. Stephan*, attorney general, for appellee.

**JUDGES:**

Brazil, P.J., Rulon, J., and David S. Knudson, District Judge, assigned.

**OPINION BY:**

PER CURIAM

**OPINION:**

MEMORANDUM OPINION

Thomas Guilfoyle appeals from his conviction of manufacture of marijuana, *K.S.A. 1990 Supp. 65-4127b(b)(3)*, possession of marijuana without payment of tax, *K.S.A. 1990 Supp. 79-5204(a)*, possession of marijuana, *K.S.A. 1990*

*Supp. 65-4127b(a)(3)*, possession of drug paraphernalia, *K.S.A. 65-4152*, and speeding in a 55 m.p.h. zone, *K.S.A. 1990 Supp. 8-1336*.

Highway Patrol Trooper Kyle Moomau stopped Guilfoyle for driving 67 miles per hour in a 55 miles per hour zone based on a radar reading. While asking for Guilfoyle's driver's license and proof of insurance, Moomau detected a strong odor of marijuana coming from the car. Moomau returned to his patrol car to check Guilfoyle's license and for warrants. Moomau's records' check indicated that the car Guilfoyle was driving was owned by Thomas [\*2] P. Guilfoyle, Route 1, Box 247, Perry, Kansas. Moomau then told Guilfoyle he could smell the odor of marijuana coming from Guilfoyle's car, but Guilfoyle denied having any marijuana.

When Moomau returned to Guilfoyle's car, he noticed two plastic trash bags on the back seat. Moomau asked Guilfoyle if he could search the car, and Guilfoyle verbally consented. Moomau removed the plastic bags and found marijuana seeds and stems and smelled a strong odor of marijuana. Deputy Rex Taylor opened the trunk and found a white bag, called a cry-o-vac, which is an air sealed bag. It contained what appeared to be marijuana. Moomau arrested Guilfoyle at that time.

While Guilfoyle was in custody, a warrant was issued to search Guilfoyle's home and barn. In the house, police found marijuana in several sealed "foosaver bags," some packaging equipment, a High Times Magazine, and an O'Haus scale. In the barn they found 1,756 feet of hose, grow lights, a backpack with scissors and a glove in it, some screens, and various gardening equipment. The glove and scissors tested positive for Tetrahydrocannabinol (THC). One hundred and twenty-three marijuana plants were seized from a neighbor's property. In [\*3] the neighbor's field, police also found a glove appearing to be the mate of the glove found in Guilfoyle's barn. Guilfoyle raises numerous issues on appeal.

#### 1. The search warrant.

Guilfoyle argues there was no probable cause to search his home or barn. The State responds that, based on the totality of the circumstances, the judge issuing the search warrant had a substantial basis for concluding that probable cause existed to search his residence and barn.

[HN1] Before a search warrant may issue, a magistrate should consider the totality of the circumstances presented. He should make a practical common-sense decision whether there is a fair probability that a crime has been committed and the defendant committed the crime or that contraband or evidence of a crime will be found in a particular place. *State v. Doile*, 244 Kan. 493, 769 P.2d 666 (1989). "On appeal, the duty of the reviewing court is simply to ensure that the magistrate issuing a warrant had a substantial basis for concluding that probable cause existed." 244 Kan. 493, Syl. para. 5.

Guilfoyle cites *Doile* in support of his argument there was no probable cause. In [\*4] *Doile*, an officer had viewed a marijuana cigarette in Doile's car after he had been stopped for DUI and arrested. Police found a baggie of marijuana, a mirror, and a straw with a white powdery residue in Doile's car. Five years earlier he had sold cocaine. 244 Kan. at 501. The court held that this evidence did not rise to the level of probable cause to believe Doile had contraband in his house and the cocaine seized from his house should have been suppressed. 244 Kan. at 503.

In the present case, the affidavit to search Guilfoyle's house and barn stated the following facts:

"1) Trooper Moomau first searched one of the plastic garbage sacks [from] the back seat and found contained within the plastic sack the smell of marijuana, green leafy substance, green seeds, green plant stems and a United Telephone Bill to Telephone Number (913) 597-5297, an 'Onsat' magazine with mailing label to Tom Guilfoyle, R 1, Box 247, Perry, Kansas 66073, potato peels and other kitchen type trash.

"m) The second trash bag contained eleven plastic trash bags, three paper grocery bags that were empty except for green leafy residue.

"n) Trooper [\*5] Moomau [then] did a search of the trunk area and found a plastic trash bag containing four vacuum sealed plastic bags which contained approximately one pound of green leafy substance with the weight of each bag clearly marked on the outside.

"o) That said affiant conducted a field tests on the green leafy substance from both trash sacks found in the back seat which showed a positive test for the presumption of THC.

"p) Said affiant verified that the phone number on the telephone bills found in said trash was the same given by Guilfoyle on his booking card and given out by phone company information when asking for a Perry, Kansas listing for Tom or Thomas Guilfoyle."

On these facts, it could reasonably be inferred that: (1) the items in the first plastic sack were obviously garbage and/or trash; (2) all of the sack's contents came from the same location; (3) that location was a dwelling or at least a place where food had been prepared; (4) the magazine was addressed to and the phone number belonged to the same location; (5) the address on the magazine and phone bill was the same as Guilfoyle's address obtained in Moomau's records check; (6) the phone number on the bill was the same [\*6] as given by Guilfoyle during booking; and (7) the remnants or traces of marijuana, green leafy substance, green seeds, plant stems found in the trash bag are consistent with a marijuana manufacturing and packaging operation, which would explain the source of four one pound sealed plastic bags of green leafy substance found in the trunk. Unlike *Doile*, considering the totality of the circumstances and this court's scope of review, the magistrate had a substantial basis for concluding that probable cause existed to search Guilfoyle's home and barn.

## 2. Was the warrant overbroad?

Guilfoyle argues the warrant was overbroad and constituted an unlawful general warrant.

[HN2] Whether the description on the warrant of the property to be seized is sufficiently specific is a question of law. "This court's review of conclusions of law is unlimited." *Hutchinson Nat'l Bank & Tr. Co. v. Brown*, 12 Kan. App. 2d 673, 674, 753 P.2d 1299, rev. denied 243 Kan. 778 (1988).

The warrant authorized a search of dwellings, outbuildings, and vehicles for the following: marijuana in all forms; paraphernalia commonly associated with the storage of marijuana, including [\*7] but not limited to scales, sifters, containers, and plastic bags; guns; items shot with guns, articles of personal property tending to establish the identity of persons in control of the house, vehicles, storage areas, or containers; utility company receipts, rent receipts, addressed envelopes, correspondence, and keys; trace evidence such as hair, fibers, fingerprints, notebooks, phone lists, receipt books, and accounts receivable books; and U.S. currency.

[HN3] A warrant must particularly describe the person, place, or means of conveyance to be searched and the things to be seized. *State v. Morgan*, 222 Kan. 149, 151, 563 P.2d 1056 (1977). General warrants that give executing officers a roving commission to search where they choose are forbidden. *State v. Gordon*, 221 Kan. 253, 258, 559 P.2d 312 (1977).

Guilfoyle claims that specifically the phrase "property tending to establish the identity of persons in control" of the premises too closely resembles the wording of a forbidden "general warrant" and invites a strong intrusion into personal effects and private papers. Guilfoyle cites several other jurisdictions in support of [\*8] his argument.

In *State v. Kealoha*, 62 Hawaii 166, 174, 613 P.2d 645 (1980), the Supreme Court of Hawaii held that [HN4] a warrant authorizing a search for and seizure of "articles of personal property tending to establish . . . identification" is defective. In so holding, the court distinguished the case from *Andresen v. Maryland*, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). In *Andresen*, the court upheld the validity of a search warrant, which stated: "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 427 U.S. at 479. The Court reasoned that the warrants did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crimes the defendant was suspected of committing. 427 U.S. at 481-82. The scope

had also been narrowed by limiting words immediately preceding it.

The warrant in *Kealoha* was also distinguished from that in *United States v. Honore*, 450 F.2d 31 (9th Cir. 1971), [\*9] *cert. denied* 404 U.S. 1048 (1972). In *Honore*, the court found a warrant valid where it authorized seizure of "articles [of] personal property tending to establish the [identity] of the persons in control of the premises . . . including but not limited to utility company receipts, rent receipts, cancelled mail envelopes, and keys." 450 F.2d at 33.

According to the American Law Institute, Model Code of Pre-Arrest Procedure, § SS 210.3:

[HN5] "With the exception of handwriting samples, and other writings or recordings of evidentiary value for reasons other than their testimonial content, things subject to seizure . . . shall not include personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise."

Comments to that section state the immunity from search "does not extend to documents sought for reasons other than their testimonial content."

In the instant case, the warrant, [\*10] when examined in its entirety, is not overly broad. The items listed in paragraph two of the warrant, at first blush, might appear to extend beyond the relevance of the crimes involved. But, like *Andresen*, the scope of the search is limited by the first line of paragraph number two, which states: "The following particularly described items are *contraband, evidence, fruits, or instrumentalities of said crime or crimes.*" (Emphasis added.) The "said crime or crimes" are those set out in paragraph number one, namely crimes related to possession, sale and manufacture of marijuana and possession of drug paraphernalia. Obviously, personal diaries, letters, and other items of a personal nature having no relation to the described crimes would be beyond the scope of the warrant.

The warrant to search for "property tending to establish the identify of persons in control" of the premises when considered in the context of the entire warrant and attached copy of a quitclaim deed showing Thomas Guilfoyle as grantee would reasonably be for the purpose of corroborating the other evidence of Guilfoyle's involvement and possibly the involvement of others. The warrant was not overbroad.

### 3. [\*11] Other defects in the warrant.

Guilfoyle claims the warrant was invalid because the date and time on the warrant were filled in by Trooper Moomau after he obtained the magistrate's signature. The State responds that the omission of the date and time was a technical irregularity not affecting the validity of the warrant.

Moomau testified to the following regarding the search warrant:

"Q. And what time did you write October 3rd on there?"

"A. I wrote it all in one, as far as I can tell I wrote it all in one, I don't know what I'm trying to say, at one time. I received it and wrote it.

"Q. Okay, in otherwords, it is your testimony at the same time you filled out your handwriting on the return portion indicating that you received the warrant on the third, and returned on the 4th that you also filled in the 3rd up on top here on the date of issuance, at the top of the warrant. At the same time you filled out the bottom, and that would have been the 4th?"

"A. I believe I filled it out this portion at the top at the date, I believe I filled it out at the same I started filling out date of issue, October 3, 1989 at 10:55 and then I filled this in after we completed it, I filled this in when I [\*12] returned.

"Q. Okay. Did you fill in--the portion you have just testified to, I received this warrant October, etc., you filled in that portion after presentation to the magistrate for signing?

"A. Yes."

The trial court stated it found the warrant had been issued on the 3rd, executed on the 3rd, and returned on the 4th. It determined the warrant met the warrant requirements and there was no uncertainty as to the date of issuance, execution, and return.

[HN6] According to *K.S.A. 22-2504*, "All search warrants shall show the time and date of issuance and shall be the warrants of the magistrate issuing the same." Kansas Statutes also provide that no warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. *K.S.A. 22-2511*.

"Legislative intent is to be determined from a consideration of the entire act, and effect must be given, if possible, to the entire act and every part thereof." *Director of Property Valuation v. Golden Plains Express, Inc.*, 13 Kan. App. 2d 48, 49, 760 P.2d 1227 (1988). In the instant case, based on the trial court's finding that the warrant was in fact issued on [\*13] the 3rd and returned on the 4th, and absent any showing that Guilfoyle's substantial rights have been affected, any irregularities were technical in nature and would not justify quashing the warrant or suppressing evidence.

#### 4. Consent to search Guilfoyle's car.

Guilfoyle claims the State did not meet its burden of proving he consented to the search of his car.

"The scope of appellate review is clear. [HN7] Where the trial court has made findings of fact and conclusions of law, the function of [an appellate court] is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. [Citations omitted.] Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.] Stated in another way, 'substantial evidence' is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988).

[HN8] A search warrant [\*14] is not required where a search is made with consent or a waiver voluntarily, intelligently, and knowingly given. *State v. Jakeway*, 221 Kan. 142, Syl. para. 4, 558 P.2d 113 (1976). "The existence and voluntariness of a consent to search and seizure is a question of fact to be decided in light of attendant circumstances by the trier of fact and will not be overturned on appeal unless clearly erroneous." *State v. Nicholson*, 225 Kan. 418, 423, 590 P.2d 1069 (1979). The consent must be knowingly and voluntarily given without threats or coercion. *State v. Niblock*, 230 Kan. 156, 162, 631 P.2d 661 (1981).

[HN9] The State must prove the voluntariness by a preponderance of the evidence. *State v. Buckner*, 223 Kan. 138, 143, 574 P.2d 918 (1977). Whether the State met its burden depends upon the credibility of the witnesses. The trial court's observations of the demeanor of the officers and the defendant during testimony is essential to deciding if the State met its burden. "The appellate court cannot decide a question of fact that is based upon conflicting testimony which [\*15] requires an assessment of the demeanor and credibility of the witnesses." *State v. Ruden*, 245 Kan. 95, 106, 774 P.2d 972 (1989).

At the motion to suppress, Moomau testified: "I asked him if I could search his vehicle and he verbally consented." Moomau did not tell Guilfoyle he was not required to let him search the car nor did he have Guilfoyle sign a written waiver form. Moomau testified that he recalls asking Guilfoyle if he could search the car rather than look in his car. An affidavit for prosecution stated Guilfoyle gave verbal consent to "look in" the vehicle. Moomau believes the use of "look in" rather than "searched" in the affidavit was an error.

Deputy Taylor overheard Moomau explaining to Guilfoyle he thought he smelled marijuana and asked if he could

search the car. Taylor heard Guilfoyle respond, "sure." While Moomau searched the car, Taylor watched Guilfoyle by the trunk. Taylor noticed a button and asked Guilfoyle if it opened the trunk, and he said yes. Taylor pushed the button and opened the trunk.

On the basis of the testimony at the suppression hearing, the court's finding there was voluntary and knowing consent to search the car was [\*16] not erroneous. There is nothing in the record to suggest that Guilfoyle's consent was the result of fraud, coercion, or duress or that he lacked sufficient intelligence to appreciate the consequences of such consent.

Guilfoyle claims that Moomau asked to "look in" the car, causing a search of the trunk and containers to be improper. In support of his argument, he cites *People v. Thiret*, 685 P.2d 193 (Colo. 1984) [HN10] (consent to "look around" a house did not authorize search into containers), and *State v. Johnson*, 71 Wash. 2d 239, 427 P.2d 705 (1967) (consent to search a trunk of a car did not authorize police to search the passenger compartment).

In the instant case, however, there was sufficient evidence for the trial court to find Moomau requested to *search* Guilfoyle's car; thus his argument is without merit.

#### 5. Admissibility of radar results.

Guilfoyle claims the State failed to lay the requisite foundation for admission of the radar results, which was required for the State to meet its burden of proving it had lawfully stopped him for speeding.

[HN11] Evidence of accuracy of a radar unit is generally a prerequisite to the admissibility [\*17] of evidence of speed obtained by the use of a radar device. *State v. Primm*, 4 Kan. App. 2d 314, 315, 606 P.2d 112 (1980). "The accuracy of a particular radar unit can be established by showing that the officer tested the device in accordance with accepted procedures." 4 Kan. App. 2d at 315. Tuning forks and internal calibration devices are acceptable means of proving radar accuracy. 4 Kan. App. 2d at 316.

In the present case, Moomau testified he was certified by the Kansas Highway Patrol to operate moving radar and traffic radar and that he is trained to set the radar up and check it on and off to operate it. He also testified that, whenever starting his shift, he turns the radar on, makes sure it has the power supply, and pushes the test button to make sure it is displaying the correct numbers. The light button is pushed to make sure all the light modules for the numbers are working and then a tuning fork in front of the antenna is used to make sure it has the correct read out. Thus there is evidence to infer the radar was accurately operating at the time of Guilfoyle's stop.

[HN12] It is also generally [\*18] required that proof be offered that the radar operator is qualified to operate the radar. 4 Kan. App. 2d at 316. In light of Moomau's testimony regarding his training, there was sufficient evidence to establish his qualifications to operate the radar.

#### 6. Defective complaint.

Guilfoyle argues that counts two, three, and four of the amended complaint are fatally defective for failing to allege every essential element of the crimes charged.

[HN13] A conviction based on a complaint or information which does not sufficiently charge the offense for which the accused is convicted is void. *State v. Howell & Taylor*, 226 Kan. 511, 601 P.2d 1141 (1979). "If the facts alleged in a complaint or information do not constitute an offense in the terms and meaning of the statute upon which it is based, a complaint or information is fatally defective." 226 Kan. at 513. The district court lacks jurisdiction over a defendant where an information is fatally defective. 226 Kan. at 514. An information that charges an offense in the language of the statute is sufficient; however, the exact statutory [\*19] words need not be used if the meaning is clear. *State v. Garcia*, 243 Kan. 662, 667, 763 P.2d 585 (1988).

[HN14] Our Supreme Court has recently adopted a new rule for appellate review of issues of defective informations raised for the first time on appeal. In *State v. Hall*, 246 Kan. 728, Syl. para. 12, 793 P.2d 737 (1990), the court held:

"Prospectively, for all informations filed after the date of this opinion, we adopt the following rule: Information defect challenges raised for the first time on appeal shall be reviewed by applying (1) the reasoning of *K.S.A. 22-3201(4)* complaint/information/indictment amendment cases as expressed in *State v. Switzer*, 244 Kan. 449, 769 P.2d 645 (1989), *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1988), and *State v. Rasch*, 243 Kan. 495, 497, 758 P.2d 214 (1988), as that reasoning relates to jurisdiction and the substantial rights of the defendant; (2) the 'common-sense' test of *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989), and *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987); [\*20] and (3) the rationale of *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied 429 U.S. 1099 (1977). Of paramount importance, we shall look to whether the claimed defect in the information has: (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kansas Constitution Bill of Rights, § 10. If a defendant is able to establish a claim under either (a), (b), or (c), the defective information claim, raised for the first time on appeal, will be allowed. All prior cases decided contrary to this rule are overruled."

The court went on to say:

[HN15] "When an information filed in the trial court after the date of this opinion is claimed for the first time on appeal to be defective:

"(a) The sufficiency of the information should be determined on the basis of practical rather than technical considerations. Common sense is a better guide than arbitrary and artificial rules. [\*21]

"(b) [HN16] The information is sufficient, even if an essential averment is faulty in form, if by a fair construction the essential averment may be found within the text. All parts of the pleading must be looked to in determining its sufficiency.

"(c) [HN17] Defects in the institution of the prosecution or in the information, other than lack of jurisdiction or the failure to charge a crime, are waived if not raised by motion prior to trial.

"(d) *K.S.A. 1989 Supp. 22-3208(3)* states that [HN18] lack of jurisdiction or the failure of the information to charge a crime shall be noticed by the court at any time during the pendency of the proceedings.

"(e) [HN19] After the verdict or finding of guilty or after a plea of guilty or nolo contendere, the proper procedure for a defendant who contends either that the information does not charge a crime or that the court was without jurisdiction of the crime charged is to utilize the statutory remedy extended by the legislature for these two specific situations--a *K.S.A. 22-3502* motion for arrest of judgment.

"(f) *K.S.A. 22-3503* authorizes the trial court to arrest judgment without motion whenever the trial court becomes aware of the existence of grounds which would require [\*22] that a motion for arrest of judgment be sustained, if filed.

"(g) [HN20] If a defendant fails to challenge the sufficiency of the information or the jurisdiction of the trial court by motion for arrest of judgment pursuant to *K.S.A. 22-3502*, the issue may be raised in the appellate court for the first time, subject to the rule announced in Syl. para. 12 and corresponding parts of this opinion.

"(h) [HN21] The orderly resolution of criminal law issues requires the timely raising of claims relating to the validity of an information. Tardily challenged informations are to be construed liberally in favor of validity. The validity of an information is to be tested by reading the information as a whole. The information is sufficient, first, if it alleges the elements of the offense charged and fairly informs the defendant of the charge and, second, if a judgment

thereon will safeguard the accused from a subsequent prosecution for the same offense. The elements of the offense may be gleaned from the information as a whole. An information not challenged before verdict or finding of guilty or pursuant to *K.S.A. 22-3502* by a motion for arrest of judgment will be upheld unless it is so defective that it does [\*23] not, by any reasonable construction, charge an offense for which the defendant is convicted." *246 Kan. 728*, Syl. para. 13.

In *State v. Waterberry*, *248 Kan. 169*, Syl. para. 2, *804 P.2d 1000 (1991)*, the court modified the prospective application of the rule in *Hall* to apply to cases pending in Kansas courts as of May 31, 1990. The notice of appeal in the instant case was filed March 30, 1990. The rule in *Hall* applies in the present case.

Count IV reads as follows:

"That on or about the 3rd day of October, 1989, the said THOMAS F. GUILFOYLE . . . did then and there . . . unlawfully, willfully and feloniously possess marijuana upon which a tax is imposed pursuant to *K.S.A. 1987 Supp. 79-5202* and had no evidence of an official stamp or other indicia, in violation of *K.S.A. 79-5204(a)*; *K.S.A. 79-5208*; Unclassified Felony."

[HN22] The offense of possession of marijuana without payment of tax is defined in *K.S.A. 1990 Supp. 79-5204*, which provides: "No dealer may possess any marijuana, domestic marijuana plant or controlled substance upon which a tax is imposed pursuant to *K.S.A. 79-5202*, and amendments thereto, unless the tax has [\*24] been paid as evidenced by an official stamp or other indicia."

Guilfoyle points out that the complaint did not allege Guilfoyle to be a dealer. [HN23] A dealer is defined in *K.S.A. 1990 Supp. 79-5201(c)* as

"any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than one gram of any controlled substance, or 10 or more dosage units of any controlled substance with is not sold by weight."

An essential element that must be proved by the State is that Guilfoyle possessed more than 28 grams of marijuana. *K.S.A. 1990 Supp. 79-5204*. Accordingly, the complaint does not sufficiently charge the offense for which Guilfoyle was convicted. Guilfoyle's conviction for possession of marijuana without payment of tax is void. *State v. Howell & Taylor*, *226 Kan. 514*.

Count III charged Guilfoyle as follows:

"THOMAS P. GUILFOYLE . . . did . . . unlawfully and willfully possess drug paraphernalia, to wit: scales, sifters and containers, knowing or under circumstances where one reasonably should know that said objects were to be used to introduce [\*25] into the human body a controlled substance."

*K.S.A. 65-4152*, [HN24] possession of drug paraphernalia, provides:

"No person shall use or possess with intent to use:

. . . .

"(2) any drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the uniform controlled substances act."

Guilfoyle claims count three is defective for failing to allege the use, or possession with intent to use, paraphernalia in order to introduce controlled substance into the body. Guilfoyle points out that the State moved to amend this count

of the complaint after all the evidence was in and the instructions were being argued but apparently requested the same language that already appeared in the amended complaint it had filed before trial. Guilfoyle objected before trial to the amendment of count III but not on the grounds he now claims error.

PIK Crim. 2d 67.17 [HN25] requires the State to prove (1) that the defendant used or possessed with the intent to use any drug paraphernalia and (2) that the [\*26] defendant did so intentionally.

Applying a common sense test to the review of the complaint as required by *State v. Micheaux*, 242 Kan. 192, 199, 747 P.2d 784 (1987), the present complaint is not defective. [HN26] "Willful conduct is conduct that is purposeful and intentional . . . . The terms 'knowing,' 'intentional,' . . . are included within the term 'willful.'" *K.S.A. 21-3201(2)*. The complaint charges the possession was willful and "knowing or under circumstances where one reasonably should know that said objects were to be used to introduce" a controlled substance into the human body. This language sufficiently alleges intent.

Count II charges Guilfoyle as follows: "THOMAS P. GUILFOYLE . . . did . . . unlawfully, feloniously and willfully manufacture a certain quantity of Cannabis, commonly known as marijuana."

*K.S.A. 1990 Supp. 65-4127b(b)* provides:

[HN27] "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with the intent to sell, manufacture, prescribe, administer, deliver, distribute, dispense or compound:

. . . .

"(3) any hallucinogenic drug designated [\*27] in subsection (d) of *K.S.A. 65-4105*, and amendments thereto or designated in subsection (g) of *K.S.A. 65-4107* and amendments thereto."

[HN28] The term manufacture "does not include the preparation or compounding of a controlled substance by an individual for the individual's own use." *K.S.A. 1990 Supp. 65-4101(n)*. Thus, Guilfoyle claims, the State must allege intent to sell or distribute; otherwise no offense has been committed. The State, he argues, also failed to allege and prove possession with intent to manufacture.

*K.S.A. 1990 Supp. 65-4127b(b)* [HN29] prohibits (1) the sale or manufacture, or (2) to offer for sale, or (3) possession with intent to manufacture. Thus, the State in the instant case was required to prove possession with intent to manufacture. The complaint fails to charge possession of marijuana.

In motions regarding amending the complaint, the prosecution stated: "Count II, changed the manufacture from possession with intent to sell, all under the same statute, no statute change, no penalty section change." The complaint was amended January 23, 1990.

Guilfoyle appears to have objected to the amendment of count II. He stated:

"Thus far we have been looking at this case as possession [\*28] with intent to sell . . . I think it does charge a different theory to the offense, there may have been evidence of possession elicited at the preliminary. I don't, I'm not sure there was evidence of manufacture as opposed to possession."

In raising this issue, Guilfoyle has not shown how these alleged defects (a) prejudiced him in his defense, (b) impaired his ability to plead the conviction in any subsequent prosecution, or (c) limited his substantial rights to a fair trial.

Reviewing the complaint in a common sense manner as required in *Hall*, Guilfoyle was apprised of charges against

him. He was aware the State was charging him with manufacturing marijuana under *K.S.A. 1990 Supp. 65-4127b(b)*. Furthermore, in order to manufacture marijuana, it is necessary that marijuana be possessed. The language charging Guilfoyle sufficiently alleges the statutory elements under *K.S.A. 1990 Supp. 65-4127b(b)*.

#### 7. Sufficiency of the evidence.

Guilfoyle claims the State presented insufficient evidence to convict him of possession of marijuana, manufacture of marijuana, possession of drug paraphernalia, and possession of marijuana without payment of the drug tax. This issue is now moot as to [\*29] the drug tax conviction.

[HN30] When, as here, a defendant challenges the sufficiency of the evidence to support a conviction, the standard of review on appeal is "whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Graham, 247 Kan. 388, 398, 799 P.2d 1003 (1990)*.

[HN31] The State must prove for a conviction of possession of marijuana that Guilfoyle intentionally possessed marijuana. PIK Crim. 2d 67.16. A review of the evidence shows a rational factfinder could have found Guilfoyle guilty beyond a reasonable doubt of possession of marijuana, manufacture of marijuana, and possession of drug paraphernalia.

Police found marijuana in Guilfoyle's car. Moomau found a bong pipe in Guilfoyle's home, and there appeared to be residue on the pipe. Ronald E. Ewing, an investigator with the Jefferson County Sheriff's Department, testified that, upon entering the house, they found several sealed bags of a green leafy substance, which was believed to be marijuana. In an upstairs dresser, they found some [\*30] more small baggies of marijuana. Ewing got permission from Guilfoyle's neighbors to search their land. After about an hour and a half of criss-crossing through the timber, he found a cultivated marijuana field. There were 213 marijuana plants. About a third of the plants had been chopped off, meaning the buds of the plants had been taken to another location. He found a gardener's right hand glove in the field. Police also found a marijuana planter in the marijuana field. A duffel bag was found in Guilfoyle's barn. It contained hoses, a left hand gardener's glove, a pair of scissors and insect repellent. Ewing gathered four bags of marijuana from the field. A can of Spritzer Grape nonalcoholic drink was found in the field. There was a case of the same brand in Guilfoyle's basement. A water spigot was found 1,280 feet from the marijuana field; 1,756 feet (20 sections) of hose was found. Analysis of the gloves and scissors showed chemical presence of THC. A path led from the southeast corner of the property to the creek bottom to the marijuana field; a couple of paths ran between the two fields. No plants were found growing on Guilfoyle's property.

Ewing testified the growing lights, [\*31] pots, and bags of dirt were consistent with a marijuana growing operation that had been started earlier than normal in the growing season in an inside environment and then moved to an outside environment.

#### 8. Closing argument.

Guilfoyle argues the State committed error in closing argument to the jury when it made statements about him placing drugs in the hands of the jury's children. The State made the following remarks in closing: "The jury instruction doesn't say any place in that instruction that I got to wait until he harvests all of his field and he gets it all nice and neatly packaged and he puts it in your kid's hands before I charge him in manufacturing." In response to Guilfoyle's objection to the statement, the court said: "Well, we're about through. Let's wind up gentlemen."

Guilfoyle claims the statement focussed the jury on matters that were irrelevant, prejudicial, improper and was a comment on matters not in evidence. He relies on *State v. Bradford, 219 Kan. 336, 548 P.2d 812 (1976)*, in support of his claim.

In *Bradford*, the court stated: [HN32] "No rule governing oral argument is more fundamental than that requiring

counsel to confine [\*32] their remarks to matters *in evidence*. The stating of facts not in evidence is clearly improper." 219 Kan. at 340. If a statement is improper, the reviewing court must determine whether the argument was so prejudicial as to deny the defendant a fair trial and thus to require a new trial. 219 Kan. at 340.

These cases, however, do not control disposition of the present case because the State was not arguing facts not in evidence. He did not state Guilfoyle was selling to the jury's children. His comment is better characterized as an example of something not required by the law to have occurred before one can be convicted of manufacturing marijuana. Guilfoyle's claim is without merit.

Even if the statement were improper there is no reversible error. [HN33] "Misconduct of the county attorney in closing argument will not always require the granting of a new trial unless such misconduct has resulted in prejudice to the extent that the accused has been denied a fair trial." *State v. Nelson*, 223 Kan. 572, 575, 575 P.2d 547 (1978).

#### 9. Constitutionality of *K.S.A. 79-5201, et seq.*

Because the State may refile [\*33] charges against Guilfoyle for possession of marijuana without payment of tax, we will address this issue.

Guilfoyle claims the Kansas tax on marijuana and controlled substances, *K.S.A. 79-5201 et seq.*, is in reality a criminal penalty and as such is unconstitutional under the due process clause of the Fourteenth Amendment. He argues the tax operates as a criminal fine and is therefore a penalty under the law. The State responds Guilfoyle's argument is without merit because the statute has been found constitutional.

[HN34] "The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. The burden of proof is on the party challenging a statute's constitutionality." *State v. Durrant*, 244 Kan. 522, Syl. para. 1, 769 P.2d 1174 (1989).

*K.S.A. 1990 Supp. 79-5204* [HN35] provides for the issuance of tax stamps, labels, [\*34] or other official indicia affixed to marijuana showing payment of the tax. Subsection (b) also states: "Any person may purchase any such stamp, label or other indicia without disclosing such person's identity."

*K.S.A. 79-5206* provides:

[HN36] "Neither the director of taxation nor a public employee may reveal facts contained in a report or return required by this act, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this act from the taxpayer making the return."

*K.S.A. 75-5133* provides in part:

"(a) [HN37] Except as otherwise more specifically provided by law, all information received by the director of taxation from applications for licensure or registration made or returns or reports filed under the provisions of any law imposing any excise tax administered by the director, or from any investigation conducted under such provisions, shall be confidential, and it shall be unlawful for any officer or employee of the department of revenue to divulge any such information except in accordance with other provisions of law respecting the enforcement [\*35] and collection of such tax, in accordance with other provisions of law respecting the enforcement and collection of such tax in accordance with proper judicial order and as provided in *K.S.A. 74-2424*, and amendments thereto."

In *State v. Matson*, 14 Kan. App. 2d 632, Syl. para. 4, 798 P.2d 488 (1990), rev. denied 248 Kan. (May 24, 1991) the court held that [HN38] drug tax act "does not violate due process provisions of the Fourteenth Amendment

and is constitutionally valid." In *Matson*, the defendant claimed that the tax on marijuana and controlled substances is in reality a criminal penalty and, as such, is an unconstitutional denial of due process under the *Fourteenth Amendment*. *14 Kan. App. 2d at 637*. The *Matson* court stated: "Because revenue collection is one of the objectives of the statute and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana, we hold that the statute is constitutionally valid under the United States Constitution." *14 Kan. App. 2d at 640*.

The Kansas Supreme Court was recently asked to overrule *Matson*, [\*36] which it declined to do. It also held [HN39] the Kansas Drug Tax Act does not violate the due process clause of the Fourteenth Amendment and is constitutionally valid. *State v. Berberich*, 248 Kan. 854, P.2d (1991).

Guilfoyle also claims the tax act violates the double jeopardy clause of the state and federal Constitutions. He claims that putting him on trial for possession or manufacture of marijuana and for failure to pay a tax that bears no rational relationship to the government's purported loss exposes him to multiple punishments for the same alleged criminal offenses.

[HN40] Under the doctrine of double jeopardy, the State may not split a single offense into separate parts. Where there is a single wrongful act, such act will not furnish the basis for more than one criminal prosecution. *State v. Mourning*, 233 Kan. 678, 679, 664 P.2d 857 (1983).

[HN41] "A test concerning whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge, and if not, the fact that both charges relate to and grow out of one transaction does not make a single offense where two distinct [\*37] offenses are defined by statute." *Lawton v. Hand*, 186 Kan. 385, 388, 350 P.2d 28 (1960).

[HN42] The crimes of possession of marijuana and possession of marijuana without payment of tax are two distinct offenses. A crime under *K.S.A. 1990 Supp. 79-5204(a)* requires proof that the defendant is a dealer and that more than 28 grams of marijuana is possessed in addition to possession with intent. Furthermore, possession of marijuana is not a lesser included offense of possession of marijuana without payment of tax. In *State v. Berberich*, 248 Kan. at 862, the court held: "A violation of *K.S.A. 79-5208* for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other." Thus, Gilfoyle's claim is without merit.

#### 10. Multiplicitous charges.

Guilfoyle argues the jury could have convicted him of manufacture of marijuana and possession of marijuana based on the same conduct. The State responds the offenses were committed separately and severally at different times and places. [\*38]

[HN43] The double jeopardy clause of the United States Constitution protects defendants in criminal proceedings from multiple punishments for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976). The test of whether convictions for possession and manufacture of marijuana are multiplicitous depends upon whether each offense requires proof of an essential element which the other does not. *State v. Garnes*, 229 Kan. 368, Syl. para. 6, 624 P.2d 448 (1981).

[HN44] The general principles for determining whether charges are multiplicitous are described as follows:

"(1) A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution.

....

"(2) If each offense charged requires proof of a fact not required in proving the other, the offenses do not merge.

....

"(3) Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act." *State v. Garnes*, 229 Kan. at 373. [\*39]

There was evidence presented that these convictions were based on conduct occurring at different times and places. The marijuana found in Guilfoyle's car supports the conviction of possession of marijuana while the evidence of a manufacturing operation found at his home supports the conviction of manufacturing marijuana. Furthermore, the State was confined to the theory of proof at trial that the seizure of marijuana from the car forms the basis of the charge of possession of marijuana. Accordingly, the convictions are not multiplicitous.

The conviction for possession of marijuana without payment of tax is reversed; all other convictions are affirmed.

31 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF KANSAS, Appellee, v. THOMAS P. GUILFOYLE, Appellant**

**No. 65,131**

**Court of Appeals of Kansas**

***814 P.2d 456; 1991 Kan. App. LEXIS 520***

**July 12, 1991, Filed**

**NOTICE:** [\*1]

NOT DESIGNATED FOR PUBLICATION

**PRIOR HISTORY:**

Appeal from Jefferson District Court; Gary L. Nafziger, judge.

**DISPOSITION:**

Affirmed in part, reversed in part, and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted of manufacture of marijuana, possession of marijuana without payment of tax, possession of marijuana, possession of drug paraphernalia, and speeding in a 55 miles per hour zone, in violation of *Kan. Stat. Ann. §§ 65-4127b(b)(3), 79-5204(a), 65-4127b(a)(3), 65-4152, and 8-1336* (Supp. 1990), respectively. He appealed from the judgment of the Jefferson County District Court (Kansas).

**OVERVIEW:** Defendant was stopped for speeding and consented to a search of his car. Trash bags that were inside the car held marijuana seeds and stems and a bill showing defendant's home address. Inside the trunk was found a bag containing what appeared to be marijuana. Defendant was arrested and a warrant was obtained to search his home and barn, where marijuana growing paraphernalia and plants were found. The court established a rule for determining the sufficiency of informations, holding that the failure of an information to charge a crime could be raised for the first time on appeal, even if a defendant had not first filed a motion to arrest judgment. Applying that rule, the court held that defendant's conviction for possession of marijuana without payment of tax was void. The complaint failed to charge that defendant was a dealer, an essential element of that crime pursuant to *Kan. Stat. Ann. § 79-5201(c)* (Supp. 1990). The

complaint failed to charge possession of marijuana, an element of manufacture of marijuana under *Kan. Stat. Ann. § 65-4127b(b)*. However, defendant did not show that he was prejudiced, as the possession of marijuana was inherent in the manufacture of it.

**OUTCOME:** The court reversed the judgment that convicted defendant of possession of marijuana without payment of tax. The court affirmed the judgment with regard to all other convictions.

**CORE TERMS:** marijuana, manufacture, possession of marijuana, radar, bag, controlled substance, plastic, filled, drug paraphernalia, trunk, plant, barn, payment of tax, glove, leafy, search warrant, trash, convicted, possessed, dealer, manufacturing, containers, tending, sealed, sack, constitutionally valid, arrest of judgment, fair trial, authorize, introduce

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] Before a search warrant may issue, a magistrate should consider the totality of the circumstances presented. He should make a practical common-sense decision whether there is a fair probability that a crime has been committed and the defendant committed the crime or that contraband or evidence of a crime will be found in a particular place. On appeal, the duty of the reviewing court is simply to ensure that the magistrate issuing a warrant had a substantial basis for concluding that probable cause existed.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] Whether the description on a warrant of the property to be seized is sufficiently specific is a question of law. An appellate court's review of conclusions of law is unlimited.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

[HN3] A warrant must particularly describe the person, place, or means of conveyance to be searched and the things to be seized. General warrants that give executing officers a roving commission to search where they choose are forbidden.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant***

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***

[HN4] A warrant authorizing a search for and seizure of articles of personal property tending to establish identification is defective. The United State Supreme Court has upheld the validity of a search warrant, which stated: "together with other fruits, instrumentalities and evidence of crime at a time unknown." Such a warrant does not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crimes the defendant was suspected of committing. The scope of such a provision is narrowed by limiting words immediately preceding it.

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope***

[HN5] With the exception of handwriting samples, and other writings or recordings of evidentiary value for reasons other than their testimonial content, things subject to seizure shall not include personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a

substantial purpose in furtherance of a criminal enterprise. The immunity from search does not extend to documents sought for reasons other than their testimonial content.

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant***

***Criminal Law & Procedure > Accusatory Instruments > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN6] According to *Kan. Stat. Ann. § 22-2504*, all search warrants shall show the time and date of issuance and shall be the warrants of the magistrate issuing the same. Kansas Statutes also provide that no warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. *Kan. Stat. Ann. § 22-2511*.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN7] Where a trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated in another way, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Search & Seizure***

[HN8] A search warrant is not required where a search is made with consent or a waiver voluntarily, intelligently, and knowingly given. The existence and voluntariness of a consent to search and seizure is a question of fact to be decided in light of attendant circumstances by the trier of fact and will not be overturned on appeal unless clearly erroneous. The consent must be knowingly and voluntarily given without threats or coercion.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness***

***Criminal Law & Procedure > Witnesses > Credibility***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN9] The State must prove the voluntariness of a consent to search by a preponderance of the evidence. Whether the State has met its burden depends upon the credibility of the witnesses. A trial court's observations of the demeanor of law enforcement officers and a defendant during testimony is essential to deciding if the State met its burden. An appellate court cannot decide a question of fact that is based upon conflicting testimony which requires an assessment of the demeanor and credibility of the witnesses.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search***

[HN10] Consent to look around a house does not authorize a search into containers. Consent to search a trunk of a car does not authorize police to search the passenger compartment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Scientific Evidence > General Overview***

[HN11] Evidence of accuracy of a radar unit is generally a prerequisite to the admissibility of evidence of speed

obtained by the use of a radar device. The accuracy of a particular radar unit can be established by showing that the officer tested the device in accordance with accepted procedures. Tuning forks and internal calibration devices are acceptable means of proving radar accuracy.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Scientific Evidence > General Overview***

[HN12] It is generally required that proof be offered that a radar operator is qualified to operate a radar.

***Criminal Law & Procedure > Accusatory Instruments > Complaints  
Criminal Law & Procedure > Accusatory Instruments > Indictments  
Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN13] A conviction based on a complaint or information which does not sufficiently charge the offense for which the accused is convicted is void. If the facts alleged in a complaint or information do not constitute an offense in the terms and meaning of the statute upon which it is based, a complaint or information is fatally defective. A district court lacks jurisdiction over a defendant where an information is fatally defective. An information that charges an offense in the language of the statute is sufficient; however, the exact statutory words need not be used if the meaning is clear.

***Constitutional Law > Bill of Rights > Fundamental Rights > General Overview  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Accusatory Instruments > Superseding Indictments***

[HN14] The Supreme Court of Kansas has recently adopted a new rule for appellate review of issues of defective informations raised for the first time on appeal. Prospectively, for all informations filed after the date of that opinion, the Court has adopted the following rule: Information defect challenges raised for the first time on appeal shall be reviewed by applying (1) the reasoning of *Kan. Stat. Ann. § 22-3201(4)* complaint/information/indictment amendment cases, as their reasoning relates to jurisdiction and the substantial rights of the defendant; (2) the common-sense test established by the Court; and (3) the rationale of the United States Court of Appeals for the Ninth Circuit. Of paramount importance, an appellate court shall look to whether the claimed defect in the information has: (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kan. Const. Bill of Rights § 10. If a defendant is able to establish a claim under either (a), (b), or (c), the defective information claim, raised for the first time on appeal, will be allowed. All prior cases decided contrary to this rule are overruled.

***Civil Procedure > Appeals > Reviewability > General Overview  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Appeals > Reviewability > General Overview***

[HN15] When an information filed in a trial court is claimed for the first time on appeal to be defective, the sufficiency of the information should be determined on the basis of practical rather than technical considerations. Common sense is a better guide than arbitrary and artificial rules.

***Criminal Law & Procedure > Accusatory Instruments > Informations  
Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN16] When an information filed in a trial court is claimed for the first time on appeal to be defective, the information is sufficient, even if an essential averment is faulty in form, if by a fair construction the essential averment may be found within the text. All parts of the pleading must be looked to in determining its sufficiency.

***Criminal Law & Procedure > Accusatory Instruments > Informations***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN17] When an information filed in a trial court is claimed for the first time on appeal to be defective, defects in the institution of the prosecution or in the information, other than lack of jurisdiction or the failure to charge a crime, are waived if not raised by motion prior to trial.

***Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere***

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN18] When an information filed in a trial court is claimed for the first time on appeal to be defective, *Kan. Stat. Ann. § 22-3208(3)* (Supp. 1989) states that lack of jurisdiction or the failure of the information to charge a crime shall be noticed by the court at any time during the pendency of the proceedings.

***Civil Procedure > Jurisdiction > General Overview***

***Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment***

***Governments > Legislation > Statutory Remedies & Rights***

[HN19] When an information filed in a trial court is claimed for the first time on appeal to be defective, after a verdict or finding of guilty or after a plea of guilty or nolo contendere, the proper procedure for a defendant who contends either that the information does not charge a crime or that the court was without jurisdiction of the crime charged is to utilize the statutory remedy extended by the legislature for these two specific situations - a *Kan. Stat. Ann. § 22-3502* motion for arrest of judgment.

***Criminal Law & Procedure > Accusatory Instruments > Informations***

***Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN20] When an information filed in a trial court is claimed for the first time on appeal to be defective, if a defendant fails to challenge the sufficiency of the information or the jurisdiction of the trial court by motion for arrest of judgment pursuant to *Kan. Stat. Ann. § 22-3502*, the issue may be raised in the appellate court for the first time, subject to the rules announced by the Supreme Court of Kansas.

***Criminal Law & Procedure > Accusatory Instruments > Informations***

***Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment***

***Criminal Law & Procedure > Appeals > Reviewability > Time Limitations***

[HN21] When an information filed in a trial court is claimed for the first time on appeal to be defective, the orderly resolution of criminal law issues requires the timely raising of claims relating to the validity of an information. Tardily challenged informations are to be construed liberally in favor of validity. The validity of an information is to be tested by reading the information as a whole. The information is sufficient, first, if it alleges the elements of the offense charged and fairly informs the defendant of the charge and, second, if a judgment thereon will safeguard the accused from a subsequent prosecution for the same offense. The elements of the offense may be gleaned from the information as a whole. An information not challenged before verdict or finding of guilty or pursuant to *Kan. Stat. Ann. § 22-3502* by a motion for arrest of judgment will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN22] The offense of possession of marijuana without payment of tax is defined in *Kan. Stat. Ann. § 79-5204* (Supp. 1990), which provides: No dealer may possess any marijuana, domestic marijuana plant or controlled substance upon which a tax is imposed pursuant to *Kan. Stat. Ann. § 79-5202*, and amendments thereto, unless the tax has been paid as

evidenced by an official stamp or other indicia.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN23] A dealer is defined in *Kan. Stat. Ann. § 79-5201(c)* (Supp. 1990) as: any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than 1 gram of any controlled substance, or 10 or more dosage units of any controlled substance with is not sold by weight.

***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > Elements***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN24] *Kan. Stat. Ann. § 65-4152* is entitled "possession of drug paraphernalia." Section 65-4152(2) provides: No person shall use or possess with intent to use any drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Act.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Drug Paraphernalia > Elements***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview***

[HN25] *Kan. Pattern Instructions Crim. No. 67.17* (2d ed.) requires the State to prove (1) that a defendant used or possessed with the intent to use any drug paraphernalia and (2) that the defendant did so intentionally.

***Criminal Law & Procedure > Scienter > Knowledge***

***Criminal Law & Procedure > Scienter > Specific Intent***

***Criminal Law & Procedure > Scienter > Willfulness***

[HN26] Willful conduct is conduct that is purposeful and intentional. The terms "knowing" and "intentional" are included within the term "willful." *Kan. Stat. Ann. § 21-3201(2)*.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements***

[HN27] *Kan. Stat. Ann. § 65-4127b(b)(3)* (Supp. 1990) provides: Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with the intent to sell, manufacture, prescribe, administer, deliver, distribute, dispense or compound any hallucinogenic drug designated in *Kan. Stat. Ann. § 65-4105(d)*, and amendments thereto or designated in *Kan. Stat. Ann. 65-4107(g)* and amendments thereto.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > Elements***

[HN28] The term manufacture in *Kan. Stat. Ann. § 65-4127b(b)(3)* (Supp. 1990) does not include the preparation or compounding of a controlled substance by an individual for the individual's own use. *Kan. Stat. Ann. § 65-4101(n)* (Supp. 1990).

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN29] *Kan. Stat. Ann. § 65-4127b(b)* (Supp. 1990) prohibits (1) the sale or manufacture, or (2) to offer for sale, or (3) possession with intent to manufacture. Thus, the State is required to prove possession with intent to manufacture.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN30] When a defendant challenges the sufficiency of the evidence to support a conviction, the standard of review on appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Simple Possession > Elements***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview***

[HN31] The State must prove for a conviction of possession of marijuana that a defendant intentionally possessed marijuana. *Kan. Pattern Instructions Crim. No. 67.16* (2d ed.).

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN32] No rule governing oral argument is more fundamental than that requiring counsel to confine their remarks to matters in evidence. The stating of facts not in evidence is clearly improper. If a statement is improper, the reviewing court must determine whether the argument was so prejudicial as to deny the defendant a fair trial and thus to require a new trial.

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted***

***Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements***

***Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibitions Against Improper Statements***

[HN33] Misconduct of a county attorney in closing argument will not always require the granting of a new trial unless such misconduct has resulted in prejudice to the extent that the accused has been denied a fair trial.

***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***

[HN34] The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the United States Constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. The burden of proof is on the party challenging a statute's constitutionality.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview***

***Tax Law > State & Local Taxes > Franchise Tax > General Overview******Tax Law > State & Local Taxes > Sales Tax > General Overview***

[HN35] *Kan. Stat. Ann. § 79-5204* (Supp. 1990) provides for the issuance of tax stamps, labels, or other official indicia affixed to marijuana showing payment of the tax. Section 79-5204(b) also states: Any person may purchase any such stamp, label or other indicia without disclosing such person's identity.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview******Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor******Tax Law > State & Local Taxes > Administration & Proceedings > General Overview***

[HN36] Neither the director of taxation nor a public employee may reveal facts contained in a report or return required by the Kansas Drug Tax Act, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under the Act from the taxpayer making the return.

***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend******Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview******Tax Law > State & Local Taxes > Administration & Proceedings > Collection***

[HN37] *Kan. Stat. Ann. § 75-5133* provides: Except as otherwise more specifically provided by law, all information received by the director of taxation from applications for licensure or registration made or returns or reports filed under the provisions of any law imposing any excise tax administered by the director, or from any investigation conducted under such provisions, shall be confidential, and it shall be unlawful for any officer or employee of the department of revenue to divulge any such information except in accordance with other provisions of law respecting the enforcement and collection of such tax, in accordance with other provisions of law respecting the enforcement and collection of such tax in accordance with proper judicial order and as provided in *Kan. Stat. Ann. § 74-2424*, and amendments thereto.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview******Tax Law > State & Local Taxes > Sales Tax > Imposition of Tax***

[HN38] The Kansas Drug Tax Act does not violate due process provisions of the Fourteenth Amendment and is constitutionally valid. Because revenue collection is one of the objectives of the Act and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana, the Act is constitutionally valid under the United States Constitution.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview******Tax Law > State & Local Taxes > Franchise Tax > General Overview***

[HN39] The Kansas Drug Tax Act does not violate the Due Process Clause of the Fourteenth Amendment and is constitutionally valid.

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN40] Under the doctrine of double jeopardy, the State may not split a single offense into separate parts. Where there is a single wrongful act, such act will not furnish the basis for more than one criminal prosecution.

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN41] A test concerning whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge, and if not, the fact that both charges relate to and grow out of one

transaction does not make a single offense where two distinct offenses are defined by statute.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

***Tax Law > State & Local Taxes > Franchise Tax > General Overview***

[HN42] The crimes of possession of marijuana and possession of marijuana without payment of tax are two distinct offenses. A crime under *Kan. Stat. Ann. § 79-5204(a)* (Supp. 1990) requires proof that the defendant is a dealer and that more than 28 grams of marijuana is possessed in addition to possession with intent. Furthermore, possession of marijuana is not a lesser included offense of possession of marijuana without payment of tax. A violation of *Kan. Stat. Ann. § 79-5208* for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

***Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments***

***Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Tests***

[HN43] The Double Jeopardy Clause of the United States Constitution protects defendants in criminal proceedings from multiple punishments for the same offense. The test of whether convictions for possession and manufacture of marijuana are multiplicitous depends upon whether each offense requires proof of an essential element which the other does not.

***Criminal Law & Procedure > Accusatory Instruments > Merger of Offenses***

***Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy***

[HN44] The general principles for determining whether charges are multiplicitous are described as follows: (1) A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution. (2) If each offense charged requires proof of a fact not required in proving the other, the offenses do not merge. (3) Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act.

**COUNSEL:**

*Benjamin C. Wood*, of Overland Park, for appellant.

*Michael C. Hayes*, county attorney, and *Robert T. Stephan*, attorney general, for appellee.

**JUDGES:**

Brazil, P.J., Rulon, J., and David S. Knudson, District Judge, assigned.

**OPINION BY:**

PER CURIAM

**OPINION:**

MEMORANDUM OPINION

Thomas Guilfoyle appeals from his conviction of manufacture of marijuana, *K.S.A. 1990 Supp. 65-4127b(b)(3)*, possession of marijuana without payment of tax, *K.S.A. 1990 Supp. 79-5204(a)*, possession of marijuana, *K.S.A. 1990*

*Supp. 65-4127b(a)(3)*, possession of drug paraphernalia, *K.S.A. 65-4152*, and speeding in a 55 m.p.h. zone, *K.S.A. 1990 Supp. 8-1336*.

Highway Patrol Trooper Kyle Moomau stopped Guilfoyle for driving 67 miles per hour in a 55 miles per hour zone based on a radar reading. While asking for Guilfoyle's driver's license and proof of insurance, Moomau detected a strong odor of marijuana coming from the car. Moomau returned to his patrol car to check Guilfoyle's license and for warrants. Moomau's records' check indicated that the car Guilfoyle was driving was owned by Thomas [\*2] P. Guilfoyle, Route 1, Box 247, Perry, Kansas. Moomau then told Guilfoyle he could smell the odor of marijuana coming from Guilfoyle's car, but Guilfoyle denied having any marijuana.

When Moomau returned to Guilfoyle's car, he noticed two plastic trash bags on the back seat. Moomau asked Guilfoyle if he could search the car, and Guilfoyle verbally consented. Moomau removed the plastic bags and found marijuana seeds and stems and smelled a strong odor of marijuana. Deputy Rex Taylor opened the trunk and found a white bag, called a cry-o-vac, which is an air sealed bag. It contained what appeared to be marijuana. Moomau arrested Guilfoyle at that time.

While Guilfoyle was in custody, a warrant was issued to search Guilfoyle's home and barn. In the house, police found marijuana in several sealed "foosaver bags," some packaging equipment, a High Times Magazine, and an O'Haus scale. In the barn they found 1,756 feet of hose, grow lights, a backpack with scissors and a glove in it, some screens, and various gardening equipment. The glove and scissors tested positive for Tetrahydrocannabinol (THC). One hundred and twenty-three marijuana plants were seized from a neighbor's property. In [\*3] the neighbor's field, police also found a glove appearing to be the mate of the glove found in Guilfoyle's barn. Guilfoyle raises numerous issues on appeal.

#### 1. The search warrant.

Guilfoyle argues there was no probable cause to search his home or barn. The State responds that, based on the totality of the circumstances, the judge issuing the search warrant had a substantial basis for concluding that probable cause existed to search his residence and barn.

[HN1] Before a search warrant may issue, a magistrate should consider the totality of the circumstances presented. He should make a practical common-sense decision whether there is a fair probability that a crime has been committed and the defendant committed the crime or that contraband or evidence of a crime will be found in a particular place. *State v. Doile*, 244 Kan. 493, 769 P.2d 666 (1989). "On appeal, the duty of the reviewing court is simply to ensure that the magistrate issuing a warrant had a substantial basis for concluding that probable cause existed." 244 Kan. 493, Syl. para. 5.

Guilfoyle cites *Doile* in support of his argument there was no probable cause. In [\*4] *Doile*, an officer had viewed a marijuana cigarette in Doile's car after he had been stopped for DUI and arrested. Police found a baggie of marijuana, a mirror, and a straw with a white powdery residue in Doile's car. Five years earlier he had sold cocaine. 244 Kan. at 501. The court held that this evidence did not rise to the level of probable cause to believe Doile had contraband in his house and the cocaine seized from his house should have been suppressed. 244 Kan. at 503.

In the present case, the affidavit to search Guilfoyle's house and barn stated the following facts:

"1) Trooper Moomau first searched one of the plastic garbage sacks [from] the back seat and found contained within the plastic sack the smell of marijuana, green leafy substance, green seeds, green plant stems and a United Telephone Bill to Telephone Number (913) 597-5297, an 'Onsat' magazine with mailing label to Tom Guilfoyle, R 1, Box 247, Perry, Kansas 66073, potato peels and other kitchen type trash.

"m) The second trash bag contained eleven plastic trash bags, three paper grocery bags that were empty except for green leafy residue.

"n) Trooper [\*5] Moomau [then] did a search of the trunk area and found a plastic trash bag containing four vacuum sealed plastic bags which contained approximately one pound of green leafy substance with the weight of each bag clearly marked on the outside.

"o) That said affiant conducted a field tests on the green leafy substance from both trash sacks found in the back seat which showed a positive test for the presumption of THC.

"p) Said affiant verified that the phone number on the telephone bills found in said trash was the same given by Guilfoyle on his booking card and given out by phone company information when asking for a Perry, Kansas listing for Tom or Thomas Guilfoyle."

On these facts, it could reasonably be inferred that: (1) the items in the first plastic sack were obviously garbage and/or trash; (2) all of the sack's contents came from the same location; (3) that location was a dwelling or at least a place where food had been prepared; (4) the magazine was addressed to and the phone number belonged to the same location; (5) the address on the magazine and phone bill was the same as Guilfoyle's address obtained in Moomau's records check; (6) the phone number on the bill was the same [\*6] as given by Guilfoyle during booking; and (7) the remnants or traces of marijuana, green leafy substance, green seeds, plant stems found in the trash bag are consistent with a marijuana manufacturing and packaging operation, which would explain the source of four one pound sealed plastic bags of green leafy substance found in the trunk. Unlike *Doile*, considering the totality of the circumstances and this court's scope of review, the magistrate had a substantial basis for concluding that probable cause existed to search Guilfoyle's home and barn.

## 2. Was the warrant overbroad?

Guilfoyle argues the warrant was overbroad and constituted an unlawful general warrant.

[HN2] Whether the description on the warrant of the property to be seized is sufficiently specific is a question of law. "This court's review of conclusions of law is unlimited." *Hutchinson Nat'l Bank & Tr. Co. v. Brown*, 12 Kan. App. 2d 673, 674, 753 P.2d 1299, rev. denied 243 Kan. 778 (1988).

The warrant authorized a search of dwellings, outbuildings, and vehicles for the following: marijuana in all forms; paraphernalia commonly associated with the storage of marijuana, including [\*7] but not limited to scales, sifters, containers, and plastic bags; guns; items shot with guns, articles of personal property tending to establish the identity of persons in control of the house, vehicles, storage areas, or containers; utility company receipts, rent receipts, addressed envelopes, correspondence, and keys; trace evidence such as hair, fibers, fingerprints, notebooks, phone lists, receipt books, and accounts receivable books; and U.S. currency.

[HN3] A warrant must particularly describe the person, place, or means of conveyance to be searched and the things to be seized. *State v. Morgan*, 222 Kan. 149, 151, 563 P.2d 1056 (1977). General warrants that give executing officers a roving commission to search where they choose are forbidden. *State v. Gordon*, 221 Kan. 253, 258, 559 P.2d 312 (1977).

Guilfoyle claims that specifically the phrase "property tending to establish the identity of persons in control" of the premises too closely resembles the wording of a forbidden "general warrant" and invites a strong intrusion into personal effects and private papers. Guilfoyle cites several other jurisdictions in support of [\*8] his argument.

In *State v. Kealoha*, 62 Hawaii 166, 174, 613 P.2d 645 (1980), the Supreme Court of Hawaii held that [HN4] a warrant authorizing a search for and seizure of "articles of personal property tending to establish . . . identification" is defective. In so holding, the court distinguished the case from *Andresen v. Maryland*, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). In *Andresen*, the court upheld the validity of a search warrant, which stated: "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 427 U.S. at 479. The Court reasoned that the warrants did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crimes the defendant was suspected of committing. 427 U.S. at 481-82. The scope

had also been narrowed by limiting words immediately preceding it.

The warrant in *Kealoha* was also distinguished from that in *United States v. Honore*, 450 F.2d 31 (9th Cir. 1971), [\*9] *cert. denied* 404 U.S. 1048 (1972). In *Honore*, the court found a warrant valid where it authorized seizure of "articles [of] personal property tending to establish the [identity] of the persons in control of the premises . . . including but not limited to utility company receipts, rent receipts, cancelled mail envelopes, and keys." 450 F.2d at 33.

According to the American Law Institute, Model Code of Pre-Arrest Procedure, § 210.3:

[HN5] "With the exception of handwriting samples, and other writings or recordings of evidentiary value for reasons other than their testimonial content, things subject to seizure . . . shall not include personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise."

Comments to that section state the immunity from search "does not extend to documents sought for reasons other than their testimonial content."

In the instant case, the warrant, [\*10] when examined in its entirety, is not overly broad. The items listed in paragraph two of the warrant, at first blush, might appear to extend beyond the relevance of the crimes involved. But, like *Andresen*, the scope of the search is limited by the first line of paragraph number two, which states: "The following particularly described items are *contraband, evidence, fruits, or instrumentalities of said crime or crimes.*" (Emphasis added.) The "said crime or crimes" are those set out in paragraph number one, namely crimes related to possession, sale and manufacture of marijuana and possession of drug paraphernalia. Obviously, personal diaries, letters, and other items of a personal nature having no relation to the described crimes would be beyond the scope of the warrant.

The warrant to search for "property tending to establish the identify of persons in control" of the premises when considered in the context of the entire warrant and attached copy of a quitclaim deed showing Thomas Guilfoyle as grantee would reasonably be for the purpose of corroborating the other evidence of Guilfoyle's involvement and possibly the involvement of others. The warrant was not overbroad.

### 3. [\*11] Other defects in the warrant.

Guilfoyle claims the warrant was invalid because the date and time on the warrant were filled in by Trooper Moomau after he obtained the magistrate's signature. The State responds that the omission of the date and time was a technical irregularity not affecting the validity of the warrant.

Moomau testified to the following regarding the search warrant:

"Q. And what time did you write October 3rd on there?"

"A. I wrote it all in one, as far as I can tell I wrote it all in one, I don't know what I'm trying to say, at one time. I received it and wrote it.

"Q. Okay, in otherwords, it is your testimony at the same time you filled out your handwriting on the return portion indicating that you received the warrant on the third, and returned on the 4th that you also filled in the 3rd up on top here on the date of issuance, at the top of the warrant. At the same time you filled out the bottom, and that would have been the 4th?"

"A. I believe I filled it out this portion at the top at the date, I believe I filled it out at the same I started filling out date of issue, October 3, 1989 at 10:55 and then I filled this in after we completed it, I filled this in when I [\*12] returned.

"Q. Okay. Did you fill in--the portion you have just testified to, I received this warrant October, etc., you filled in that portion after presentation to the magistrate for signing?"

"A. Yes."

The trial court stated it found the warrant had been issued on the 3rd, executed on the 3rd, and returned on the 4th. It determined the warrant met the warrant requirements and there was no uncertainty as to the date of issuance, execution, and return.

[HN6] According to *K.S.A. 22-2504*, "All search warrants shall show the time and date of issuance and shall be the warrants of the magistrate issuing the same." Kansas Statutes also provide that no warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. *K.S.A. 22-2511*.

"Legislative intent is to be determined from a consideration of the entire act, and effect must be given, if possible, to the entire act and every part thereof." *Director of Property Valuation v. Golden Plains Express, Inc.*, 13 Kan. App. 2d 48, 49, 760 P.2d 1227 (1988). In the instant case, based on the trial court's finding that the warrant was in fact issued on [\*13] the 3rd and returned on the 4th, and absent any showing that Guilfoyle's substantial rights have been affected, any irregularities were technical in nature and would not justify quashing the warrant or suppressing evidence.

#### 4. Consent to search Guilfoyle's car.

Guilfoyle claims the State did not meet its burden of proving he consented to the search of his car.

"The scope of appellate review is clear. [HN7] Where the trial court has made findings of fact and conclusions of law, the function of [an appellate court] is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. [Citations omitted.] Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.] Stated in another way, 'substantial evidence' is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988).

[HN8] A search warrant [\*14] is not required where a search is made with consent or a waiver voluntarily, intelligently, and knowingly given. *State v. Jakeway*, 221 Kan. 142, Syl. para. 4, 558 P.2d 113 (1976). "The existence and voluntariness of a consent to search and seizure is a question of fact to be decided in light of attendant circumstances by the trier of fact and will not be overturned on appeal unless clearly erroneous." *State v. Nicholson*, 225 Kan. 418, 423, 590 P.2d 1069 (1979). The consent must be knowingly and voluntarily given without threats or coercion. *State v. Niblock*, 230 Kan. 156, 162, 631 P.2d 661 (1981).

[HN9] The State must prove the voluntariness by a preponderance of the evidence. *State v. Buckner*, 223 Kan. 138, 143, 574 P.2d 918 (1977). Whether the State met its burden depends upon the credibility of the witnesses. The trial court's observations of the demeanor of the officers and the defendant during testimony is essential to deciding if the State met its burden. "The appellate court cannot decide a question of fact that is based upon conflicting testimony which [\*15] requires an assessment of the demeanor and credibility of the witnesses." *State v. Ruden*, 245 Kan. 95, 106, 774 P.2d 972 (1989).

At the motion to suppress, Moomau testified: "I asked him if I could search his vehicle and he verbally consented." Moomau did not tell Guilfoyle he was not required to let him search the car nor did he have Guilfoyle sign a written waiver form. Moomau testified that he recalls asking Guilfoyle if he could search the car rather than look in his car. An affidavit for prosecution stated Guilfoyle gave verbal consent to "look in" the vehicle. Moomau believes the use of "look in" rather than "searched" in the affidavit was an error.

Deputy Taylor overheard Moomau explaining to Guilfoyle he thought he smelled marijuana and asked if he could

search the car. Taylor heard Guilfoyle respond, "sure." While Moomau searched the car, Taylor watched Guilfoyle by the trunk. Taylor noticed a button and asked Guilfoyle if it opened the trunk, and he said yes. Taylor pushed the button and opened the trunk.

On the basis of the testimony at the suppression hearing, the court's finding there was voluntary and knowing consent to search the car was [\*16] not erroneous. There is nothing in the record to suggest that Guilfoyle's consent was the result of fraud, coercion, or duress or that he lacked sufficient intelligence to appreciate the consequences of such consent.

Guilfoyle claims that Moomau asked to "look in" the car, causing a search of the trunk and containers to be improper. In support of his argument, he cites *People v. Thiret*, 685 P.2d 193 (Colo. 1984) [HN10] (consent to "look around" a house did not authorize search into containers), and *State v. Johnson*, 71 Wash. 2d 239, 427 P.2d 705 (1967) (consent to search a trunk of a car did not authorize police to search the passenger compartment).

In the instant case, however, there was sufficient evidence for the trial court to find Moomau requested to search Guilfoyle's car; thus his argument is without merit.

#### 5. Admissibility of radar results.

Guilfoyle claims the State failed to lay the requisite foundation for admission of the radar results, which was required for the State to meet its burden of proving it had lawfully stopped him for speeding.

[HN11] Evidence of accuracy of a radar unit is generally a prerequisite to the admissibility [\*17] of evidence of speed obtained by the use of a radar device. *State v. Primm*, 4 Kan. App. 2d 314, 315, 606 P.2d 112 (1980). "The accuracy of a particular radar unit can be established by showing that the officer tested the device in accordance with accepted procedures." 4 Kan. App. 2d at 315. Tuning forks and internal calibration devices are acceptable means of proving radar accuracy. 4 Kan. App. 2d at 316.

In the present case, Moomau testified he was certified by the Kansas Highway Patrol to operate moving radar and traffic radar and that he is trained to set the radar up and check it on and off to operate it. He also testified that, whenever starting his shift, he turns the radar on, makes sure it has the power supply, and pushes the test button to make sure it is displaying the correct numbers. The light button is pushed to make sure all the light modules for the numbers are working and then a tuning fork in front of the antenna is used to make sure it has the correct read out. Thus there is evidence to infer the radar was accurately operating at the time of Guilfoyle's stop.

[HN12] It is also generally [\*18] required that proof be offered that the radar operator is qualified to operate the radar. 4 Kan. App. 2d at 316. In light of Moomau's testimony regarding his training, there was sufficient evidence to establish his qualifications to operate the radar.

#### 6. Defective complaint.

Guilfoyle argues that counts two, three, and four of the amended complaint are fatally defective for failing to allege every essential element of the crimes charged.

[HN13] A conviction based on a complaint or information which does not sufficiently charge the offense for which the accused is convicted is void. *State v. Howell & Taylor*, 226 Kan. 511, 601 P.2d 1141 (1979). "If the facts alleged in a complaint or information do not constitute an offense in the terms and meaning of the statute upon which it is based, a complaint or information is fatally defective." 226 Kan. at 513. The district court lacks jurisdiction over a defendant where an information is fatally defective. 226 Kan. at 514. An information that charges an offense in the language of the statute is sufficient; however, the exact statutory [\*19] words need not be used if the meaning is clear. *State v. Garcia*, 243 Kan. 662, 667, 763 P.2d 585 (1988).

[HN14] Our Supreme Court has recently adopted a new rule for appellate review of issues of defective informations raised for the first time on appeal. In *State v. Hall*, 246 Kan. 728, Syl. para. 12, 793 P.2d 737 (1990), the court held:

"Prospectively, for all informations filed after the date of this opinion, we adopt the following rule: Information defect challenges raised for the first time on appeal shall be reviewed by applying (1) the reasoning of *K.S.A. 22-3201(4)* complaint/information/indictment amendment cases as expressed in *State v. Switzer*, 244 Kan. 449, 769 P.2d 645 (1989), *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1988), and *State v. Rasch*, 243 Kan. 495, 497, 758 P.2d 214 (1988), as that reasoning relates to jurisdiction and the substantial rights of the defendant; (2) the 'common-sense' test of *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989), and *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987); [\*20] and (3) the rationale of *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied 429 U.S. 1099 (1977). Of paramount importance, we shall look to whether the claimed defect in the information has: (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kansas Constitution Bill of Rights, § 10. If a defendant is able to establish a claim under either (a), (b), or (c), the defective information claim, raised for the first time on appeal, will be allowed. All prior cases decided contrary to this rule are overruled."

The court went on to say:

[HN15] "When an information filed in the trial court after the date of this opinion is claimed for the first time on appeal to be defective:

"(a) The sufficiency of the information should be determined on the basis of practical rather than technical considerations. Common sense is a better guide than arbitrary and artificial rules. [\*21]

"(b) [HN16] The information is sufficient, even if an essential averment is faulty in form, if by a fair construction the essential averment may be found within the text. All parts of the pleading must be looked to in determining its sufficiency.

"(c) [HN17] Defects in the institution of the prosecution or in the information, other than lack of jurisdiction or the failure to charge a crime, are waived if not raised by motion prior to trial.

"(d) *K.S.A. 1989 Supp. 22-3208(3)* states that [HN18] lack of jurisdiction or the failure of the information to charge a crime shall be noticed by the court at any time during the pendency of the proceedings.

"(e) [HN19] After the verdict or finding of guilty or after a plea of guilty or nolo contendere, the proper procedure for a defendant who contends either that the information does not charge a crime or that the court was without jurisdiction of the crime charged is to utilize the statutory remedy extended by the legislature for these two specific situations--a *K.S.A. 22-3502* motion for arrest of judgment.

"(f) *K.S.A. 22-3503* authorizes the trial court to arrest judgment without motion whenever the trial court becomes aware of the existence of grounds which would require [\*22] that a motion for arrest of judgment be sustained, if filed.

"(g) [HN20] If a defendant fails to challenge the sufficiency of the information or the jurisdiction of the trial court by motion for arrest of judgment pursuant to *K.S.A. 22-3502*, the issue may be raised in the appellate court for the first time, subject to the rule announced in Syl. para. 12 and corresponding parts of this opinion.

"(h) [HN21] The orderly resolution of criminal law issues requires the timely raising of claims relating to the validity of an information. Tardily challenged informations are to be construed liberally in favor of validity. The validity of an information is to be tested by reading the information as a whole. The information is sufficient, first, if it alleges the elements of the offense charged and fairly informs the defendant of the charge and, second, if a judgment

thereon will safeguard the accused from a subsequent prosecution for the same offense. The elements of the offense may be gleaned from the information as a whole. An information not challenged before verdict or finding of guilty or pursuant to *K.S.A. 22-3502* by a motion for arrest of judgment will be upheld unless it is so defective that it does [\*23] not, by any reasonable construction, charge an offense for which the defendant is convicted." *246 Kan. 728*, Syl. para. 13.

In *State v. Waterberry*, *248 Kan. 169*, Syl. para. 2, *804 P.2d 1000 (1991)*, the court modified the prospective application of the rule in *Hall* to apply to cases pending in Kansas courts as of May 31, 1990. The notice of appeal in the instant case was filed March 30, 1990. The rule in *Hall* applies in the present case.

Count IV reads as follows:

"That on or about the 3rd day of October, 1989, the said THOMAS F. GUILFOYLE . . . did then and there . . . unlawfully, willfully and feloniously possess marijuana upon which a tax is imposed pursuant to *K.S.A. 1987 Supp. 79-5202* and had no evidence of an official stamp or other indicia, in violation of *K.S.A. 79-5204(a)*; *K.S.A. 79-5208*; Unclassified Felony."

[HN22] The offense of possession of marijuana without payment of tax is defined in *K.S.A. 1990 Supp. 79-5204*, which provides: "No dealer may possess any marijuana, domestic marijuana plant or controlled substance upon which a tax is imposed pursuant to *K.S.A. 79-5202*, and amendments thereto, unless the tax has [\*24] been paid as evidenced by an official stamp or other indicia."

Guilfoyle points out that the complaint did not allege Guilfoyle to be a dealer. [HN23] A dealer is defined in *K.S.A. 1990 Supp. 79-5201(c)* as

"any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than one gram of any controlled substance, or 10 or more dosage units of any controlled substance with is not sold by weight."

An essential element that must be proved by the State is that Guilfoyle possessed more than 28 grams of marijuana. *K.S.A. 1990 Supp. 79-5204*. Accordingly, the complaint does not sufficiently charge the offense for which Guilfoyle was convicted. Guilfoyle's conviction for possession of marijuana without payment of tax is void. *State v. Howell & Taylor*, *226 Kan. 514*.

Count III charged Guilfoyle as follows:

"THOMAS P. GUILFOYLE . . . did . . . unlawfully and willfully possess drug paraphernalia, to wit: scales, sifters and containers, knowing or under circumstances where one reasonably should know that said objects were to be used to introduce [\*25] into the human body a controlled substance."

*K.S.A. 65-4152*, [HN24] possession of drug paraphernalia, provides:

"No person shall use or possess with intent to use:

. . . .

"(2) any drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the uniform controlled substances act."

Guilfoyle claims count three is defective for failing to allege the use, or possession with intent to use, paraphernalia in order to introduce controlled substance into the body. Guilfoyle points out that the State moved to amend this count

of the complaint after all the evidence was in and the instructions were being argued but apparently requested the same language that already appeared in the amended complaint it had filed before trial. Guilfoyle objected before trial to the amendment of count III but not on the grounds he now claims error.

PIK Crim. 2d 67.17 [HN25] requires the State to prove (1) that the defendant used or possessed with the intent to use any drug paraphernalia and (2) that the [\*26] defendant did so intentionally.

Applying a common sense test to the review of the complaint as required by *State v. Micheaux*, 242 Kan. 192, 199, 747 P.2d 784 (1987), the present complaint is not defective. [HN26] "Willful conduct is conduct that is purposeful and intentional . . . . The terms 'knowing,' 'intentional,' . . . are included within the term 'willful.'" *K.S.A. 21-3201(2)*. The complaint charges the possession was willful and "knowing or under circumstances where one reasonably should know that said objects were to be used to introduce" a controlled substance into the human body. This language sufficiently alleges intent.

Count II charges Guilfoyle as follows: "THOMAS P. GUILFOYLE . . . did . . . unlawfully, feloniously and willfully manufacture a certain quantity of Cannabis, commonly known as marijuana."

*K.S.A. 1990 Supp. 65-4127b(b)* provides:

[HN27] "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to sell, offer for sale or have in such person's possession with the intent to sell, manufacture, prescribe, administer, deliver, distribute, dispense or compound:

. . . .

"(3) any hallucinogenic drug designated [\*27] in subsection (d) of *K.S.A. 65-4105*, and amendments thereto or designated in subsection (g) of *K.S.A. 65-4107* and amendments thereto."

[HN28] The term manufacture "does not include the preparation or compounding of a controlled substance by an individual for the individual's own use." *K.S.A. 1990 Supp. 65-4101(n)*. Thus, Guilfoyle claims, the State must allege intent to sell or distribute; otherwise no offense has been committed. The State, he argues, also failed to allege and prove possession with intent to manufacture.

*K.S.A. 1990 Supp. 65-4127b(b)* [HN29] prohibits (1) the sale or manufacture, or (2) to offer for sale, or (3) possession with intent to manufacture. Thus, the State in the instant case was required to prove possession with intent to manufacture. The complaint fails to charge possession of marijuana.

In motions regarding amending the complaint, the prosecution stated: "Count II, changed the manufacture from possession with intent to sell, all under the same statute, no statute change, no penalty section change." The complaint was amended January 23, 1990.

Guilfoyle appears to have objected to the amendment of count II. He stated:

"Thus far we have been looking at this case as possession [\*28] with intent to sell . . . I think it does charge a different theory to the offense, there may have been evidence of possession elicited at the preliminary. I don't, I'm not sure there was evidence of manufacture as opposed to possession."

In raising this issue, Guilfoyle has not shown how these alleged defects (a) prejudiced him in his defense, (b) impaired his ability to plead the conviction in any subsequent prosecution, or (c) limited his substantial rights to a fair trial.

Reviewing the complaint in a common sense manner as required in *Hall*, Guilfoyle was apprised of charges against

him. He was aware the State was charging him with manufacturing marijuana under *K.S.A. 1990 Supp. 65-4127b(b)*. Furthermore, in order to manufacture marijuana, it is necessary that marijuana be possessed. The language charging Guilfoyle sufficiently alleges the statutory elements under *K.S.A. 1990 Supp. 65-4127b(b)*.

#### 7. Sufficiency of the evidence.

Guilfoyle claims the State presented insufficient evidence to convict him of possession of marijuana, manufacture of marijuana, possession of drug paraphernalia, and possession of marijuana without payment of the drug tax. This issue is now moot as to [\*29] the drug tax conviction.

[HN30] When, as here, a defendant challenges the sufficiency of the evidence to support a conviction, the standard of review on appeal is "whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Graham*, 247 Kan. 388, 398, 799 P.2d 1003 (1990).

[HN31] The State must prove for a conviction of possession of marijuana that Guilfoyle intentionally possessed marijuana. PIK Crim. 2d 67.16. A review of the evidence shows a rational factfinder could have found Guilfoyle guilty beyond a reasonable doubt of possession of marijuana, manufacture of marijuana, and possession of drug paraphernalia.

Police found marijuana in Guilfoyle's car. Moomau found a bong pipe in Guilfoyle's home, and there appeared to be residue on the pipe. Ronald E. Ewing, an investigator with the Jefferson County Sheriff's Department, testified that, upon entering the house, they found several sealed bags of a green leafy substance, which was believed to be marijuana. In an upstairs dresser, they found some [\*30] more small baggies of marijuana. Ewing got permission from Guilfoyle's neighbors to search their land. After about an hour and a half of criss-crossing through the timber, he found a cultivated marijuana field. There were 213 marijuana plants. About a third of the plants had been chopped off, meaning the buds of the plants had been taken to another location. He found a gardener's right hand glove in the field. Police also found a marijuana planter in the marijuana field. A duffel bag was found in Guilfoyle's barn. It contained hoses, a left hand gardener's glove, a pair of scissors and insect repellent. Ewing gathered four bags of marijuana from the field. A can of Spritzer Grape nonalcoholic drink was found in the field. There was a case of the same brand in Guilfoyle's basement. A water spigot was found 1,280 feet from the marijuana field; 1,756 feet (20 sections) of hose was found. Analysis of the gloves and scissors showed chemical presence of THC. A path led from the southeast corner of the property to the creek bottom to the marijuana field; a couple of paths ran between the two fields. No plants were found growing on Guilfoyle's property.

Ewing testified the growing lights, [\*31] pots, and bags of dirt were consistent with a marijuana growing operation that had been started earlier than normal in the growing season in an inside environment and then moved to an outside environment.

#### 8. Closing argument.

Guilfoyle argues the State committed error in closing argument to the jury when it made statements about him placing drugs in the hands of the jury's children. The State made the following remarks in closing: "The jury instruction doesn't say any place in that instruction that I got to wait until he harvests all of his field and he gets it all nice and neatly packaged and he puts it in your kid's hands before I charge him in manufacturing." In response to Guilfoyle's objection to the statement, the court said: "Well, we're about through. Let's wind up gentlemen."

Guilfoyle claims the statement focussed the jury on matters that were irrelevant, prejudicial, improper and was a comment on matters not in evidence. He relies on *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976), in support of his claim.

In *Bradford*, the court stated: [HN32] "No rule governing oral argument is more fundamental than that requiring

counsel to confine [\*32] their remarks to matters *in evidence*. The stating of facts not in evidence is clearly improper." 219 Kan. at 340. If a statement is improper, the reviewing court must determine whether the argument was so prejudicial as to deny the defendant a fair trial and thus to require a new trial. 219 Kan. at 340.

These cases, however, do not control disposition of the present case because the State was not arguing facts not in evidence. He did not state Guilfoyle was selling to the jury's children. His comment is better characterized as an example of something not required by the law to have occurred before one can be convicted of manufacturing marijuana. Guilfoyle's claim is without merit.

Even if the statement were improper there is no reversible error. [HN33] "Misconduct of the county attorney in closing argument will not always require the granting of a new trial unless such misconduct has resulted in prejudice to the extent that the accused has been denied a fair trial." *State v. Nelson*, 223 Kan. 572, 575, 575 P.2d 547 (1978).

#### 9. Constitutionality of *K.S.A. 79-5201, et seq.*

Because the State may refile [\*33] charges against Guilfoyle for possession of marijuana without payment of tax, we will address this issue.

Guilfoyle claims the Kansas tax on marijuana and controlled substances, *K.S.A. 79-5201 et seq.*, is in reality a criminal penalty and as such is unconstitutional under the due process clause of the Fourteenth Amendment. He argues the tax operates as a criminal fine and is therefore a penalty under the law. The State responds Guilfoyle's argument is without merit because the statute has been found constitutional.

[HN34] "The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. The burden of proof is on the party challenging a statute's constitutionality." *State v. Durrant*, 244 Kan. 522, Syl. para. 1, 769 P.2d 1174 (1989).

*K.S.A. 1990 Supp. 79-5204* [HN35] provides for the issuance of tax stamps, labels, [\*34] or other official indicia affixed to marijuana showing payment of the tax. Subsection (b) also states: "Any person may purchase any such stamp, label or other indicia without disclosing such person's identity."

*K.S.A. 79-5206* provides:

[HN36] "Neither the director of taxation nor a public employee may reveal facts contained in a report or return required by this act, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this act from the taxpayer making the return."

*K.S.A. 75-5133* provides in part:

"(a) [HN37] Except as otherwise more specifically provided by law, all information received by the director of taxation from applications for licensure or registration made or returns or reports filed under the provisions of any law imposing any excise tax administered by the director, or from any investigation conducted under such provisions, shall be confidential, and it shall be unlawful for any officer or employee of the department of revenue to divulge any such information except in accordance with other provisions of law respecting the enforcement [\*35] and collection of such tax, in accordance with other provisions of law respecting the enforcement and collection of such tax in accordance with proper judicial order and as provided in *K.S.A. 74-2424*, and amendments thereto."

In *State v. Matson*, 14 Kan. App. 2d 632, Syl. para. 4, 798 P.2d 488 (1990), rev. denied 248 Kan. (May 24, 1991) the court held that [HN38] drug tax act "does not violate due process provisions of the Fourteenth Amendment

and is constitutionally valid." In *Matson*, the defendant claimed that the tax on marijuana and controlled substances is in reality a criminal penalty and, as such, is an unconstitutional denial of due process under the *Fourteenth Amendment*. *14 Kan. App. 2d at 637*. The *Matson* court stated: "Because revenue collection is one of the objectives of the statute and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana, we hold that the statute is constitutionally valid under the United States Constitution." *14 Kan. App. 2d at 640*.

The Kansas Supreme Court was recently asked to overrule *Matson*, [\*36] which it declined to do. It also held [HN39] the Kansas Drug Tax Act does not violate the due process clause of the Fourteenth Amendment and is constitutionally valid. *State v. Berberich*, *248 Kan. 854*, *P.2d (1991)*.

Guilfoyle also claims the tax act violates the double jeopardy clause of the state and federal Constitutions. He claims that putting him on trial for possession or manufacture of marijuana and for failure to pay a tax that bears no rational relationship to the government's purported loss exposes him to multiple punishments for the same alleged criminal offenses.

[HN40] Under the doctrine of double jeopardy, the State may not split a single offense into separate parts. Where there is a single wrongful act, such act will not furnish the basis for more than one criminal prosecution. *State v. Mourning*, *233 Kan. 678, 679, 664 P.2d 857 (1983)*.

[HN41] "A test concerning whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge, and if not, the fact that both charges relate to and grow out of one transaction does not make a single offense where two distinct [\*37] offenses are defined by statute." *Lawton v. Hand*, *186 Kan. 385, 388, 350 P.2d 28 (1960)*.

[HN42] The crimes of possession of marijuana and possession of marijuana without payment of tax are two distinct offenses. A crime under *K.S.A. 1990 Supp. 79-5204(a)* requires proof that the defendant is a dealer and that more than 28 grams of marijuana is possessed in addition to possession with intent. Furthermore, possession of marijuana is not a lesser included offense of possession of marijuana without payment of tax. In *State v. Berberich*, *248 Kan. at 862*, the court held: "A violation of *K.S.A. 79-5208* for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other." Thus, Gilfoyle's claim is without merit.

#### 10. Multiplicitous charges.

Guilfoyle argues the jury could have convicted him of manufacture of marijuana and possession of marijuana based on the same conduct. The State responds the offenses were committed separately and severally at different times and places. [\*38]

[HN43] The double jeopardy clause of the United States Constitution protects defendants in criminal proceedings from multiple punishments for the same offense. *United States v. Dinitz*, *424 U.S. 600, 606, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976)*. The test of whether convictions for possession and manufacture of marijuana are multiplicitous depends upon whether each offense requires proof of an essential element which the other does not. *State v. Garnes*, *229 Kan. 368, Syl. para. 6, 624 P.2d 448 (1981)*.

[HN44] The general principles for determining whether charges are multiplicitous are described as follows:

"(1) A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution.

....

"(2) If each offense charged requires proof of a fact not required in proving the other, the offenses do not merge.

....

"(3) Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act." *State v. Garnes*, 229 Kan. at 373. [\*39]

There was evidence presented that these convictions were based on conduct occurring at different times and places. The marijuana found in Guilfoyle's car supports the conviction of possession of marijuana while the evidence of a manufacturing operation found at his home supports the conviction of manufacturing marijuana. Furthermore, the State was confined to the theory of proof at trial that the seizure of marijuana from the car forms the basis of the charge of possession of marijuana. Accordingly, the convictions are not multiplicitous.

The conviction for possession of marijuana without payment of tax is reversed; all other convictions are affirmed.

32 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF MAINE v. JAMES L. HEBERT****Law Docket No. Law-81-59****Supreme Judicial Court of Maine***437 A.2d 185; 1981 Me. LEXIS 1011***September 23, 1981, Argued****November 24, 1981, Decided****DISPOSITION:** [\*\*1]

The entry is: Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged his conviction for speeding and operating under the influence of intoxicating liquor found by the Superior Court, York County (Maine), complaining that the trial court improperly admitted evidence concerning a speedometer calibration test and that the evidence was insufficient to support the verdict.

**OVERVIEW:** Defendant was arrested for criminal speeding and operating under the influence of intoxicating liquor by a state trooper who had pulled him over. Defendant's car had been traveling 85 mph in a 50 mph zone. After he was convicted as charged, defendant claimed that the trial court erred in admitting testimony concerning a calibration test of the troopers' car speedometer and in denying his motion to acquit for lack of evidence. The court noted that the disparity in the trooper's speedometer test was never more than two mph at any one reading. Next, the court noted that the arresting officer's testimony was hearsay where he testified as to what another trooper told him as to the radar unit read. However, while the evidence was hearsay under Me. R. Evid. 801, its admission was harmless error because this testimony was merely cumulative. The court next held that the evidence of the accuracy of the trooper's speedometer went to the weight to be assigned to the speed reading and was not a foundational requirement for admission of the speedometer reading into evidence. Because the evidence was sufficient to support the conviction, the judgment was affirmed.

**OUTCOME:** The judgment was affirmed on appeal.

**CORE TERMS:** speedometer, radar, mph, speed, trooper, calibration, speeding, hearsay, calibrated, accuracy, arrest, influence of intoxicating liquor, card, arresting, tuning, forks, miles

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] See Me. Rev. Stat. Ann. tit. 29 § 1252 (1978).

**COUNSEL:**

Attorneys for the State: G. Arthur Brennan, Esq. District Attorney. Joseph Wannemacher, Esq. Assistant District Attorney. Mary C. Tousignant, Legal Intern (orally). Alfred, Maine.

Attorneys for the Defendant: Charles D. Jamieson, Esq. (orally). Grover G. Alexander, Esq. Gray, Maine.

**JUDGES:**

Violette, J. wrote the opinion. McKusick, C.J. and Godfrey, Nichols, Roberts, Carter, Violette and Wathen, JJ.

**OPINION BY:**

VIOLETTE

**OPINION:**

[\*185] The defendant brings this timely appeal from convictions for speeding, 29 M.R.S.A. § 1252, n1 and operating under the influence [\*186] of intoxicating liquor, 29 M.R.S.A. § 1312 (Supp. 1981), following a jury trial held in Superior Court, York County, on January 26-27, 1981. Defendant claims error in the trial court's admission into evidence of testimony concerning a calibration test of the officer's car speedometer, and in the denial of his motion to acquit for lack of evidence. We affirm the two convictions.

n1 The statute reads in pertinent part:

4. *Criminal offense.* [HN1] Any person who operates a motor vehicle at a speed which exceeds, by 30 miles an hour or more, speeds fixed pursuant to section 1251 or section 1255, or which exceeds, by 30 miles an hour or more, the maximum rates of speed fixed by subsection 2 shall be guilty of a misdemeanor.

29 M.R.S.A. § 1252 (1978).

[\*\*2]

Defendant was arrested for criminal speeding and operating under the influence of intoxicating liquor on January 25, 1980, by a state trooper who had pulled him over after following Hebert's car which was passing other vehicles rapidly and far to the left side of the road. The trooper clocked the car's speed at 85 mph in a 50 mph zone. The jury could have found the following facts to be true at the time of the arrest: defendant's eyes were red and glassy, and his speech was slow; he had difficulty locating his registration and driver's license; he nearly fell over when he bent to pick something up; he could not walk a straight line without stumbling; and he had consumed at least four beers that evening.

I

At trial, the arresting officer testified that prior to the arrest, on September 12, 1979, he had calibrated his car's speedometer. This test consisted of driving his car past a stationary police vehicle which recorded the car's speed on a

radar unit. The officer testified that when his car speedometer read 40, the radar unit read 40; when his speedometer indicated 50 mph, the radar unit read 48 mph, and so on up to a speedometer reading of 80 mph when the unit indicated 78 [\*\*3] mph. The disparity between the speedometer and radar unit was never more than 2 mph at any one reading.

Defendant argues that the arresting officer's testimony was hearsay, since the trooper testified to what another trooper told him the radar unit read, and should have been excluded from evidence. We agree that this testimony was clearly hearsay as defined in M.R.Evid. 801 and therefore was improperly admitted into evidence. We find, however, that the error was harmless because the trooper's testimony was merely cumulative: the state introduced into evidence, without objection by defendant, a card entitled "Radar Check" which was a written record of the calibration test of the arresting officer's car speedometer. The card, though hearsay, was admissible into evidence under the business records exception to the hearsay rule. M.R.Evid. 803(6); *see State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972); *People v. Foster*, 27 N.Y. 2d 47, 261 N.E. 2d 389, 313 N.Y.S.2d 384 (1970) (speedometer test record is a "classic example" of a routine business record).

## II.

As his second point on appeal, defendant asserts that the officer's testimony indicating that defendant's car exceeded a [\*\*4] speed of 85 mph should not have been admitted into evidence because the accuracy of the police vehicle's speedometer had not been established. The state presented evidence that prior to the arrest, the speedometer had been calibrated for accuracy against a radar unit as hereinbefore stated, and the radar itself had been calibrated internally and by using two different tuning forks, a standard procedure for calibrating radar units. Defendant maintains that the reliability of the internal calibration and the tuning forks must also be proven. We hold that evidence of the accuracy of the speedometer goes only to the weight to be assigned the speed reading and is not a foundational requirement for admission of the speedometer reading into evidence. Therefore, the presiding justice correctly overruled defendant's objection to the admission of this evidence.

## III.

Our resolution of the issues discussed above disposes of defendant's third contention [\*187] that without the speeding evidence both convictions must fall for lack of sufficient evidence.

The entry is:

Judgment affirmed.

33 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

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**LexisNexis(R) Headnotes**

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**OPINION BY:**

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Judgment affirmed.

34 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**Edward Hugh FITZWATER v. STATE of Maryland****No. 466, September Term, 1983****Court of Special Appeals of Maryland*****57 Md. App. 274; 469 A.2d 909; 1984 Md. App. LEXIS 256*****January 12, 1984****PRIOR HISTORY:** [\*\*\*1]

APPEAL FROM THE CIRCUIT COURT FOR GARRETT COUNTY FRED A. THAYER, JUDGE.

**DISPOSITION:**

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant appealed from his conviction and sentence entered by the Circuit Court for Garrett County (Maryland) after a jury found him guilty of resisting arrest, failure to display a license, and speeding.**OVERVIEW:** Defendant was found guilty by a jury of resisting arrest, failure to display a license, and speeding. He appealed from the trial court's judgment of conviction and from the sentencing order for him to pay fines. The court found no error in the trial court requiring no proof of maintenance records for the radar used to show that defendant was speeding because state law provided for the speed of a motor vehicle to be measured by radar. *Md. Code Ann., Cts. & Jud. Proc. § 10-301* (1974, Cum. Supp. 1983). It was sufficient to show that the equipment was properly tested and checked, that it was used by a competent operator, that proper procedures were followed, and that proper records were kept. The court ruled that the trial court was not clearly erroneous in admitting the expert testimony of a witness who had a special knowledge of the radar gained from his experience as a police officer. Because there was no rule prohibiting a witness from refreshing his recollection prior to taking the oath and testifying, the trial court did not abuse its discretion in allowing the testimony of a witness who may have looked at a folder before taking the stand. The court found no error and affirmed.**OUTCOME:** The court affirmed the trial court judgments that entered defendant's conviction of resisting arrest, failure to display a license, and speeding and that sentenced him to pay fines for those offenses. Costs were to be paid by defendant.**CORE TERMS:** recollection, radar, calibration, machine, speed, memorandum, accuracy, refresh, past recollection recorded, trooper, miles, technician, present recollection revived, special knowledge, working order, internally,

calibrated, calibrate, speeding, readout, folder, opened, van, expert testimony, appreciable, resisting arrest, state trooper, tuning fork, cross-examine, authorship

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] Maryland has long recognized that the speed of a motor vehicle may be measured by radar. *Md. Code Ann., Cts. & Jud. Proc. § 10-301* (1974, Cum. Supp. 1983). Although the statute does not set forth any requirements for proving the accuracy of the radar, the courts set forth some guidelines. It is sufficient to show that the equipment has been properly tested and checked, that it is manned by a competent operator, that proper operative procedures are followed, and that proper records are kept. There has to be proof to indicate that the instrument relied upon was in good working order and accurate at the time the recording was made.

#### ***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

##### ***Evidence > Testimony > Experts > Admissibility***

##### ***Evidence > Testimony > Experts > Helpfulness***

[HN2] The test for admissibility of expert testimony is whether the jury can receive appreciable help from the particular witness on the subject. The determination of whether the expert testimony will be of appreciable help and therefore admissible is within the sound discretion of the trial court. The court's exercise of that discretion will not be disturbed on appeal unless clearly erroneous. A witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether special knowledge is based on professional training, observation, and/or actual experience. A police officer possessing a special knowledge gained from a background of experience, in the discretion of the trial court, may be permitted to express an expert opinion in the area of that special knowledge. Once the court admits the expert testimony, the weight to be accorded it is for the trier of fact.

#### ***Evidence > Hearsay > Exceptions > Recorded Recollection > Criminal Trials***

##### ***Evidence > Testimony > Lay Witnesses > Personal Knowledge***

##### ***Evidence > Testimony > Refreshing Recollection > General Overview***

[HN3] The law regarding present recollection refreshed distinguished present recollection revived from past recollection recorded. The standards for the admission of a memorandum into evidence as past recollection recorded and those for the use of a memorandum to revive present recollection differ. The former is an exception to the hearsay rule where the memorandum is actually admitted into evidence as substantive evidence. The foundation necessary to use a memorandum to revive present recollection differs from that for the use of past recollection recorded. Past recollection recorded is where a witness, who is either devoid of a present recollection or possessed of an imperfect present recollection, desires to use a past recollection. This he proposes to do by employing some record of his past recollection. In order to introduce past recollection recorded, the general rule is that it is necessary to adduce from the witness (a) that he at one time had personal knowledge of the facts, (b) that the writing was, when made, an accurate record of the event, and (c) that after seeing the writing, he has not sufficient present independent recollection of the facts to testify accurately in regard thereto.

#### ***Civil Procedure > Judicial Officers > Judges > Discretion***

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[HN4] Present recollection revived is the use by a witness of some writing or other object to refresh his recollection so that he may testify about past events from present recollection. Generally, the authorities agree that none of the limiting rules for past recollection recorded have any bearing on present recollection revived and that any writing whatever is

eligible for use. On the other hand, the authorities are in agreement that in certain circumstances the expedients for stimulating recollection may be so misused that the witness may put before the court that which purports to be, but is not in fact, his recollection and knowledge and that, therefore, any writing whatever, in the circumstances, may become improper. Although no hard and fast rule can be laid down for invariable application, the predominant view today seems to be that within the sound discretion of the trial judge any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness, or time of making.

*Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview  
Evidence > Testimony > Refreshing Recollection > General Overview*

[HN5] There is no rule prohibiting a witness from refreshing his recollection prior to taking the oath and testifying.

*Civil Procedure > Appeals > Reviewability > Preservation for Review  
Criminal Law & Procedure > Juries & Jurors > General Overview*

[HN6] Rule 751 of the Maryland Rules of Procedure states that the court shall designate a juror as foreman.

**COUNSEL:**

Scott McLarty, Athens, Georgia, for appellant.

Ann E. Singleton, Assistant Attorney General, with whom were Stephen H. Sachs, Attorney General of Maryland, James L. Sherbin, State's Attorney, for Garrett County and Daun R. Weiers, Assistant State's Attorney, for Garrett County on the brief, for appellee.

**JUDGES:**

Garrity, Getty and Bell, JJ.

**OPINION BY:**

BELL

**OPINION:**

[\*276] [\*\*910] Appellant, Edward Hugh Fitzwater (Fitzwater) was found guilty by a jury in the Circuit Court for Garrett County of resisting arrest, failure to display a license, and speeding. The court sentenced Fitzwater to pay fines of: \$ 500.00 for resisting arrest; \$ 10.00 for failure to display a license; \$ 40.00 for speeding and court costs. Fitzwater timely noted an appeal, raising four issues:

[\*277] 1. Did the court err in not requiring maintenance records to establish the internal calibration of the radar?

2. Did the court err in permitting a state trooper to testify as to the accuracy of the internal calibration procedure?

[\*\*911] 3. Did the [\*\*\*2] court err regarding the use of documents by the state trooper to refresh his recollection?

4. Did the court invade the province of the jury by appointing a jury foreperson?

Our answer is no to all four questions; and we affirm.

## FACTS

On June 3, 1982, Trooper John E. Foley (Foley) stopped Fitzwater for an alleged speeding violation. Foley had detected a speed of 66 m.p.h. with the Decatur radar device mounted in the patrol vehicle and had visually observed Fitzwater's car travelling in excess of 50 m.p.h. When Foley stopped Fitzwater and requested to see his driver's license and registration, Fitzwater refused to show him either. Fitzwater refused a second request and Foley arrested Fitzwater. Due to Fitzwater's persistent resistance, Foley forcibly removed Fitzwater from his vehicle.

Trooper Foley was a certified operator of the radar. He testified at trial how the radar operated and how it was calibrated. His testimony explained that: the device, which is mounted in the patrol vehicle, projects a beam that will pick up a moving object, an indicator shows the speed of the object-vehicle. It also has a digital readout indicating the simultaneous speed of the [\*\*\*3] police vehicle.

The machine is calibrated before use by a certified operator (Foley in this case) and it has two internal checks. One is a check to make sure all lights are functioning on the machine and the other is a tuning fork check which calibrates the speed. Two tuning forks are assigned to the machine and are tuned to set speeds of 45 m.p.h. and 90 m.p.h.

[\*278] Foley, who had successfully performed both of these tests, further testified that the machine is internally calibrated by a certified technician. When the State offered the maintenance records of the internal calibration into evidence, Fitzwater objected on grounds that the State violated discovery rules by failing to list the records as an exhibit. The court sustained the objection. Fitzwater also objected to Foley's testimony regarding the internal calibration procedures and the radar readout. The ground for objection was that no foundation had been laid because the maintenance records were not admitted and Foley was not a certified technician. The court overruled this objection, stating:

"I think by this point it has been established that the use of the tuning fork calibrates the instrument, [\*\*\*4] and if it doesn't give you 45 and it doesn't give you 90, it isn't working. When it does, it is working."

Foley compared his speed on the readout of the radar device to that on the speedometer of his vehicle and it was the same. He had no indication that the radar device was not working properly and explained there were no other checkout or starting up procedures recommended for that particular machine. He stated that he had followed all of the recommended procedures "faithfully".

On cross-examination, Foley testified that he did not know how the machine worked internally or exactly why tuning forks were used to test the machine. He stated that further internal calibration was done by a certified technician working for the Maryland State Police every six months. Fitzwater's renewed objection to admission of testimony concerning calibration and the radar readout was denied, since the court accepted the trooper's testimony that external readings would not be correct if the machine's internal calibration was off. His motion for judgment of acquittal at the end of the State's case in chief was denied.

Several witnesses testified for the defense. Charles E. Stemple, Jr., an [\*\*\*5] employee of Fitzwater, testified he used the beige van for delivery of furniture and it could barely do 55 [\*279] miles per hour. William Madigan, another employee of Fitzwater, also testified that the beige van would not go over 55 miles per hour, loaded or unloaded.

[\*\*912] Fitzwater testified that he was driving the van between 45 and 55 miles per hour that afternoon and that his speedometer registered 50 miles per hour. When he was stopped, Fitzwater asked the trooper what was the probable cause. Foley responded that Fitzwater was speeding at 66 miles per hour. Fitzwater stated he asked the trooper to read him his rights since it was a criminal violation but the officer put him under arrest, grabbed him, jerked him out of the van and handcuffed him without reading him his rights. Fitzwater denied that he was resisting arrest, but explained he was just protecting himself. Additionally, Fitzwater testified that Foley changed the reading on the citation to read 66

57 Md. App. 274, \*279; 469 A.2d 909, \*\*912;  
1984 Md. App. LEXIS 256, \*\*\*5

miles per hour so that he would receive a higher number of points.

Fitzwater's motion for judgment of acquittal at the end of the case was denied and the jury returned verdicts of guilty on all three counts. [\*\*\*6]

I. *Did the court err in not requiring maintenance records to prove the accuracy of internal calibration?*

Fitzwater contends that the court erred in not requiring maintenance records to establish the accuracy of the internal calibration of the radar. Fitzwater maintains that by violating the discovery rules and thus not being able to produce the records at trial, the state failed to meet its burden to prove proper records were kept, as established by this Court in *Great Coastal Express, Inc. v. Schrufer*, 34 Md.App. 706, 369 A.2d 118 (1977).

[HN1] Maryland has long recognized that the speed of a motor vehicle may be measured by radar. Md.Code (1974, Cum.Supp.1983) *Courts and Judicial Proceedings Art.*, § 10-301. Although the statute does not set forth any requirements for proving the accuracy of the radar, the Court in *Great Coastal Express, Inc. supra*, relying on *United States v. Dreos*, 156 F.Supp. 200 (D.Md.1957) and *Villegas v. Brysor*, 494 P.2d 61, 16 Ariz.App. 456 (1972), set forth some guidelines stating at p. 715, 369 A.2d 118,

It is sufficient to show that the equipment has been properly tested and checked, that it was manned [\*\*\*7] by a competent operator, that proper operative procedures were followed, and that proper records were kept.

. . . . .

[There should be proof to indicate] the instrument relied upon was in good working order and accurate at the time the recording was made.

Applying the above principles to the case at bar, we agree with the trial court that the requirements set forth in *Great Coastal* have been met. As Judge Thayer stated:

As I read the requirements set forth [in *Great Coastal, supra.*] . . . it is sufficient to show that the equipment has been properly tested and checked, and I take it the calibration that the officer did at 4:00 when he came on duty would satisfy that. That it was manned by a competent operator, the officer has testified that he is such. That proper operative procedures were followed, I haven't heard any evidence of that at this time. And that proper records were kept, I don't know records of what, but it goes on to say that it must be shown that it was in good working order and accurate at the time the recording was made. *Now the State has a record. I've not permitted it into evidence, but the fact that there is a record, I think [\*\*\*8] is admissible. . . .* (Emphasis added).

At the time the court ruled on the objection, there was no testimony as to whether operative procedures were properly followed; however, by the end of the trial the evidence showed that Foley faithfully followed all the checkout and startup procedures. In light of the fact that Foley performed the two calibration tests, was a certified operator of that particular device and maintenance records did exist, we find this case to fall within the perimeters of *Great Coastal*. The court did not err.

[\*281] [\*\*\*913] II. *Did the court err in allowing a state trooper to testify as to the accuracy of the internal calibration of the radar?*

Fitzwater contends that since Foley was not a certified technician he was not competent to testify as to the accuracy

57 Md. App. 274, \*281; 469 A.2d 909, \*\*913;  
1984 Md. App. LEXIS 256, \*\*\*8

of the internal calibration. Fitzwater maintains that the court erred in admitting such testimony; and therefore, it had not been established that the equipment was built and operated on sound scientific principles and was in proper working order. The State, on the other hand, contends that since Foley was a qualified operator of the machine the court properly [\*\*\*9] permitted Foley's testimony as to calibration and speed detected by the radar.

[HN2] The Court of Appeals of Maryland has established the test for admissibility of expert testimony. That test is whether the jury can receive appreciable help from the particular witness on the subject. *Nizer v. Phelps*, 252 Md. 185, 249 A.2d 112 (1967). The determination of whether the expert testimony will be of appreciable help and therefore admissible is within the sound discretion of the trial court. *Nolan v. Dillon*, 261 Md. 516, 276 A.2d 36 (1971); *Terry v. State*, 34 Md.App. 99, 366 A.2d 65 (1976). The court's exercise of that discretion will not be disturbed on appeal unless clearly erroneous. *Spence v. Wiles*, 255 Md. 98, 257 A.2d 164 (1969); *Brown v. State*, 29 Md.App. 1, 349 A.2d 359 (1975). A witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether special knowledge is based on professional training, observation, and/or actual experience. *Casualty Ins. Co. v. Messenger*, 181 Md. 295, 298-99, 29 A.2d 653; *Redman v. Harold*, 279 Md. 167, 367 A.2d 472 (1977). A police officer possessing [\*\*\*10] a special knowledge gained from a background of experience, in the discretion of the trial court, may be permitted to express an expert opinion in the area of that special knowledge. *Butler v. State*, 19 Md.App. 601, 313 A.2d 554 (1974). Once the court admits the expert testimony, the weight to be accorded [\*282] it is for the trier of fact. *Duvall v. Potomac Electric*, 234 Md. 42, 47, 197 A.2d 893 (1963); *Bergeman v. State Roads Comm.*, 218 Md. 137, 142-43, 146 A.2d 48 (1958).

Applying the above principles, we find the court was not clearly erroneous and did not abuse its discretion in admitting Foley's testimony. Foley had a special knowledge of the radar gained from his experience as a police officer. In fact, he was certified on the particular radar device in his vehicle since 1978. He had specific knowledge as to the procedures used to calibrate the radar (tuning fork tests). Foley knew the instrument was internally calibrated every six months. This testimony certainly was of appreciable help to the jury. Moreover, Fitzwater had an opportunity to cross-examine Foley on his qualifications and on the actual procedures used to calibrate the radar internally. [\*\*\*11] The fact that Foley was not a certified technician was simply another factor to be considered by the jury in evaluating Foley's testimony.

Fitzwater's contention that the State did not establish that the radar was built and operated on sound scientific principles is without merit since the Legislature has specifically stated that the speed of a motor vehicle may be measured by radar. Md.Code (1974, Cum.Supp.1983) *Courts and Judicial Proceedings Art. § 10-301*. The evidence adduced at trial shows that this specific radar device was in proper working order. See Issue I, *supra*.

### III. Did the court err regarding the use of documents by Foley to refresh his recollection?

Fitzwater contends the court erred: (1) in allowing Foley to refresh his recollection by reviewing a document when the time of making, the authorship, and the accuracy of the writing had not been established; and (2) in not permitting Fitzwater's counsel to review the writing allegedly used to refresh Foley's recollection.

[\*\*914] [HN3] The law regarding present recollection refreshed was set forth by this Court in *Askins v. State*, 13 Md.App. 702, 284 [\*283] A.2d 626 (1971), which distinguished [\*\*\*12] present recollection revived from past recollection recorded. The Court stated at pp. 709-710, 284 A.2d 626:

The standards for the admission of a memorandum into evidence as past recollection recorded and those for the use of a memorandum to revive present recollection differ. The former is an exception to the hearsay rule where the memorandum is actually admitted into evidence as substantive evidence. Unfortunately, some courts have tended to lump the two together under the heading of 'refreshing recollection' and have applied the same standards to both. However, the foundation necessary to use a memorandum to revive present recollection differs from that for the use of past recollection recorded. Past recollection recorded is where 'a witness, who is either devoid of a present recollection or possessed

57 Md. App. 274, \*283; 469 A.2d 909, \*\*914;  
1984 Md. App. LEXIS 256, \*\*\*12

of an imperfect present recollection, desires to use a past recollection. This he proposes to do by employing some record of his past recollection.' The authorities are in general agreement, as to past recollection recorded, that to introduce the memorandum into evidence there must be a showing that the witness identifies the memorandum as made immediately after or contemporaneously [\*\*\*13] with the event and that the memorandum is a correct statement of those facts which the witness recorded. *Hall v. State*, 223 Md. 158, 176 [162 A.2d 751]. Stated succinctly, in order to introduce past recollection recorded, the general rule is that it is necessary to adduce from the witness '(a) that he at one time had personal knowledge of the facts, (b) that the writing was, when made, an accurate record of the event, and (c) that after seeing the writing, he has not sufficient present independent recollection of the facts to testify accurately in regard thereto.' *Kinsey v. Arizona*, 49 Ariz. 201, 65 P.2d 1141 at 1148, cited with approval in *Hall v. State*, *supra*, at 173 [162 A.2d 751].

[HN4] Present recollection revived, on the other hand, is the use by a witness of some writing or other object to refresh his recollection so that he may testify about past events [\*284] from present recollection. Generally, the authorities agree that none of the limiting rules for past recollection recorded have any bearing on present recollection revived and that any writing whatever is eligible for use. On the other hand, the authorities are in agreement that in certain circumstances [\*\*\*14] the expedients for stimulating recollection may be so misused that the witness may put before the court that which purports to be, but is not in fact, his recollection and knowledge and that, therefore, any writing whatever, in the circumstances, may become improper. Although no hard and fast rule can be laid down for invariable application, the *predominant view today seems to be that within the sound discretion of the trial judge any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness, or time of making.* *Kramer v. Commission of Internal Revenue*, 389 F.2d 236, 238 (1968) (Emphasis Added).

In the case at bar, Foley testified as to past events but from his present recollection. The State did not attempt to admit the document into evidence. Thus, the rules of present recollection revived, rather than past recollection recorded apply to the instant case. The pertinent testimony is as follows:

MR. McLARTY: Excuse me, your Honor, I'm -- I'm going to object to his using something to refresh his recollection unless I'm going to have an opportunity to review it and cross-examine him [\*\*\*15] on it. I notice he's reviewing -- he's reciting from his notes there.

THE COURT: You obviously will have an opportunity to cross-examine him.

[\*\*915] MR. McLARTY: I'd just like an opportunity to review those notes that he's using.

THE COURT: I don't see that he has opened his folder yet, Mr. McLarty.

MR. McLARTY: Okay, well I -- the State, I believe, will concede that he, in fact, had opened it and was reading from it. Is that not correct, Officer Foley?

[\*285] MR. WEIERS: It looked like he was leafing through it your Honor, a while ago.

THE COURT: All right.

By Mr. Weiers:

Q. Do you need the items in your hand to refresh your recollection, Trooper?

A. No. It would be helpful.

Q. If you do, let us know.

A. Okay.

A review of the pertinent testimony indicates that since the rules of present recollection revived apply, the court did not err. The court was not required to insure that the time of making, the authorship and the accuracy had been established. Furthermore, at most the evidence shows that Foley opened his folder prior to the time he was on the witness stand. [HN5] There is no rule prohibiting a witness from refreshing his recollection prior to [\*\*\*16] taking the oath and testifying. The court certainly did not abuse its discretion in determining that Foley had not opened his folder while on the witness stand.

Fitzwater's second allegation -- that his attorney was not permitted to see the contents of the folder -- is likewise without merit. Since the court determined that Foley was not using the document to refresh his recollection, there was no reason for Fitzwater's counsel to view it. Moreover, the request to see the document was not renewed after the court's determination.

*IV. Did the court invade the province of the jury by appointing a foreperson?*

Fitzwater contends the court deprived him of a fair trial by appointing a jury foreman. [HN6] Rule 751 of the Maryland Rules of Procedure states "the Court *shall* designate a juror as foreman". (Emphasis added). In addition, this issue was not preserved for appeal.

The court did not err.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

35 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**Edward Hugh FITZWATER v. STATE of Maryland****No. 466, September Term, 1983****Court of Special Appeals of Maryland*****57 Md. App. 274; 469 A.2d 909; 1984 Md. App. LEXIS 256*****January 12, 1984****PRIOR HISTORY:** [\*\*\*1]

APPEAL FROM THE CIRCUIT COURT FOR GARRETT COUNTY FRED A. THAYER, JUDGE.

**DISPOSITION:**

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant appealed from his conviction and sentence entered by the Circuit Court for Garrett County (Maryland) after a jury found him guilty of resisting arrest, failure to display a license, and speeding.**OVERVIEW:** Defendant was found guilty by a jury of resisting arrest, failure to display a license, and speeding. He appealed from the trial court's judgment of conviction and from the sentencing order for him to pay fines. The court found no error in the trial court requiring no proof of maintenance records for the radar used to show that defendant was speeding because state law provided for the speed of a motor vehicle to be measured by radar. *Md. Code Ann., Cts. & Jud. Proc. § 10-301* (1974, Cum. Supp. 1983). It was sufficient to show that the equipment was properly tested and checked, that it was used by a competent operator, that proper procedures were followed, and that proper records were kept. The court ruled that the trial court was not clearly erroneous in admitting the expert testimony of a witness who had a special knowledge of the radar gained from his experience as a police officer. Because there was no rule prohibiting a witness from refreshing his recollection prior to taking the oath and testifying, the trial court did not abuse its discretion in allowing the testimony of a witness who may have looked at a folder before taking the stand. The court found no error and affirmed.**OUTCOME:** The court affirmed the trial court judgments that entered defendant's conviction of resisting arrest, failure to display a license, and speeding and that sentenced him to pay fines for those offenses. Costs were to be paid by defendant.**CORE TERMS:** recollection, radar, calibration, machine, speed, memorandum, accuracy, refresh, past recollection recorded, trooper, miles, technician, present recollection revived, special knowledge, working order, internally,

calibrated, calibrate, speeding, readout, folder, opened, van, expert testimony, appreciable, resisting arrest, state trooper, tuning fork, cross-examine, authorship

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**JUDGES:**

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Our answer is no to all four questions; and we affirm.

## FACTS

On June 3, 1982, Trooper John E. Foley (Foley) stopped Fitzwater for an alleged speeding violation. Foley had detected a speed of 66 m.p.h. with the Decatur radar device mounted in the patrol vehicle and had visually observed Fitzwater's car travelling in excess of 50 m.p.h. When Foley stopped Fitzwater and requested to see his driver's license and registration, Fitzwater refused to show him either. Fitzwater refused a second request and Foley arrested Fitzwater. Due to Fitzwater's persistent resistance, Foley forcibly removed Fitzwater from his vehicle.

Trooper Foley was a certified operator of the radar. He testified at trial how the radar operated and how it was calibrated. His testimony explained that: the device, which is mounted in the patrol vehicle, projects a beam that will pick up a moving object, an indicator shows the speed of the object-vehicle. It also has a digital readout indicating the simultaneous speed of the [\*\*\*3] police vehicle.

The machine is calibrated before use by a certified operator (Foley in this case) and it has two internal checks. One is a check to make sure all lights are functioning on the machine and the other is a tuning fork check which calibrates the speed. Two tuning forks are assigned to the machine and are tuned to set speeds of 45 m.p.h. and 90 m.p.h.

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"I think by this point it has been established that the use of the tuning fork calibrates the instrument, [\*\*\*4] and if it doesn't give you 45 and it doesn't give you 90, it isn't working. When it does, it is working."

Foley compared his speed on the readout of the radar device to that on the speedometer of his vehicle and it was the same. He had no indication that the radar device was not working properly and explained there were no other checkout or starting up procedures recommended for that particular machine. He stated that he had followed all of the recommended procedures "faithfully".

On cross-examination, Foley testified that he did not know how the machine worked internally or exactly why tuning forks were used to test the machine. He stated that further internal calibration was done by a certified technician working for the Maryland State Police every six months. Fitzwater's renewed objection to admission of testimony concerning calibration and the radar readout was denied, since the court accepted the trooper's testimony that external readings would not be correct if the machine's internal calibration was off. His motion for judgment of acquittal at the end of the State's case in chief was denied.

Several witnesses testified for the defense. Charles E. Stemple, Jr., an [\*\*\*5] employee of Fitzwater, testified he used the beige van for delivery of furniture and it could barely do 55 [\*279] miles per hour. William Madigan, another employee of Fitzwater, also testified that the beige van would not go over 55 miles per hour, loaded or unloaded.

[\*\*912] Fitzwater testified that he was driving the van between 45 and 55 miles per hour that afternoon and that his speedometer registered 50 miles per hour. When he was stopped, Fitzwater asked the trooper what was the probable cause. Foley responded that Fitzwater was speeding at 66 miles per hour. Fitzwater stated he asked the trooper to read him his rights since it was a criminal violation but the officer put him under arrest, grabbed him, jerked him out of the van and handcuffed him without reading him his rights. Fitzwater denied that he was resisting arrest, but explained he was just protecting himself. Additionally, Fitzwater testified that Foley changed the reading on the citation to read 66

57 Md. App. 274, \*279; 469 A.2d 909, \*\*912;  
1984 Md. App. LEXIS 256, \*\*\*5

miles per hour so that he would receive a higher number of points.

Fitzwater's motion for judgment of acquittal at the end of the case was denied and the jury returned verdicts of guilty on all three counts. [\*\*\*6]

I. *Did the court err in not requiring maintenance records to prove the accuracy of internal calibration?*

Fitzwater contends that the court erred in not requiring maintenance records to establish the accuracy of the internal calibration of the radar. Fitzwater maintains that by violating the discovery rules and thus not being able to produce the records at trial, the state failed to meet its burden to prove proper records were kept, as established by this Court in *Great Coastal Express, Inc. v. Schrufer*, 34 Md.App. 706, 369 A.2d 118 (1977).

[HN1] Maryland has long recognized that the speed of a motor vehicle may be measured by radar. Md.Code (1974, Cum.Supp.1983) *Courts and Judicial Proceedings Art.*, § 10-301. Although the statute does not set forth any requirements for proving the accuracy of the radar, the Court in *Great Coastal Express, Inc. supra*, relying on *United States v. Dreos*, 156 F.Supp. 200 (D.Md.1957) and *Villegas v. Brysor*, 494 P.2d 61, 16 Ariz.App. 456 (1972), set forth some guidelines stating at p. 715, 369 A.2d 118,

It is sufficient to show that the equipment has been properly tested and checked, that it was manned [\*\*\*7] by a competent operator, that proper operative procedures were followed, and that proper records were kept.

.....

[There should be proof to indicate] the instrument relied upon was in good working order and accurate at the time the recording was made.

Applying the above principles to the case at bar, we agree with the trial court that the requirements set forth in *Great Coastal* have been met. As Judge Thayer stated:

As I read the requirements set forth [in *Great Coastal, supra.*] . . . it is sufficient to show that the equipment has been properly tested and checked, and I take it the calibration that the officer did at 4:00 when he came on duty would satisfy that. That it was manned by a competent operator, the officer has testified that he is such. That proper operative procedures were followed, I haven't heard any evidence of that at this time. And that proper records were kept, I don't know records of what, but it goes on to say that it must be shown that it was in good working order and accurate at the time the recording was made. *Now the State has a record. I've not permitted it into evidence, but the fact that there is a record, I think [\*\*\*8] is admissible. . . .* (Emphasis added).

At the time the court ruled on the objection, there was no testimony as to whether operative procedures were properly followed; however, by the end of the trial the evidence showed that Foley faithfully followed all the checkout and startup procedures. In light of the fact that Foley performed the two calibration tests, was a certified operator of that particular device and maintenance records did exist, we find this case to fall within the perimeters of *Great Coastal*. The court did not err.

[\*281] [\*\*\*913] II. *Did the court err in allowing a state trooper to testify as to the accuracy of the internal calibration of the radar?*

Fitzwater contends that since Foley was not a certified technician he was not competent to testify as to the accuracy

57 Md. App. 274, \*281; 469 A.2d 909, \*\*913;  
1984 Md. App. LEXIS 256, \*\*\*8

of the internal calibration. Fitzwater maintains that the court erred in admitting such testimony; and therefore, it had not been established that the equipment was built and operated on sound scientific principles and was in proper working order. The State, on the other hand, contends that since Foley was a qualified operator of the machine the court properly [\*\*\*9] permitted Foley's testimony as to calibration and speed detected by the radar.

[HN2] The Court of Appeals of Maryland has established the test for admissibility of expert testimony. That test is whether the jury can receive appreciable help from the particular witness on the subject. *Nizer v. Phelps*, 252 Md. 185, 249 A.2d 112 (1967). The determination of whether the expert testimony will be of appreciable help and therefore admissible is within the sound discretion of the trial court. *Nolan v. Dillon*, 261 Md. 516, 276 A.2d 36 (1971); *Terry v. State*, 34 Md.App. 99, 366 A.2d 65 (1976). The court's exercise of that discretion will not be disturbed on appeal unless clearly erroneous. *Spence v. Wiles*, 255 Md. 98, 257 A.2d 164 (1969); *Brown v. State*, 29 Md.App. 1, 349 A.2d 359 (1975). A witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether special knowledge is based on professional training, observation, and/or actual experience. *Casualty Ins. Co. v. Messenger*, 181 Md. 295, 298-99, 29 A.2d 653; *Redman v. Harold*, 279 Md. 167, 367 A.2d 472 (1977). A police officer possessing [\*\*\*10] a special knowledge gained from a background of experience, in the discretion of the trial court, may be permitted to express an expert opinion in the area of that special knowledge. *Butler v. State*, 19 Md.App. 601, 313 A.2d 554 (1974). Once the court admits the expert testimony, the weight to be accorded [\*282] it is for the trier of fact. *Duvall v. Potomac Electric*, 234 Md. 42, 47, 197 A.2d 893 (1963); *Bergeman v. State Roads Comm.*, 218 Md. 137, 142-43, 146 A.2d 48 (1958).

Applying the above principles, we find the court was not clearly erroneous and did not abuse its discretion in admitting Foley's testimony. Foley had a special knowledge of the radar gained from his experience as a police officer. In fact, he was certified on the particular radar device in his vehicle since 1978. He had specific knowledge as to the procedures used to calibrate the radar (tuning fork tests). Foley knew the instrument was internally calibrated every six months. This testimony certainly was of appreciable help to the jury. Moreover, Fitzwater had an opportunity to cross-examine Foley on his qualifications and on the actual procedures used to calibrate the radar internally. [\*\*\*11] The fact that Foley was not a certified technician was simply another factor to be considered by the jury in evaluating Foley's testimony.

Fitzwater's contention that the State did not establish that the radar was built and operated on sound scientific principles is without merit since the Legislature has specifically stated that the speed of a motor vehicle may be measured by radar. Md.Code (1974, Cum.Supp.1983) *Courts and Judicial Proceedings Art. § 10-301*. The evidence adduced at trial shows that this specific radar device was in proper working order. See Issue I, *supra*.

### III. Did the court err regarding the use of documents by Foley to refresh his recollection?

Fitzwater contends the court erred: (1) in allowing Foley to refresh his recollection by reviewing a document when the time of making, the authorship, and the accuracy of the writing had not been established; and (2) in not permitting Fitzwater's counsel to review the writing allegedly used to refresh Foley's recollection.

[\*\*914] [HN3] The law regarding present recollection refreshed was set forth by this Court in *Askins v. State*, 13 Md.App. 702, 284 [\*283] A.2d 626 (1971), which distinguished [\*\*\*12] present recollection revived from past recollection recorded. The Court stated at pp. 709-710, 284 A.2d 626:

The standards for the admission of a memorandum into evidence as past recollection recorded and those for the use of a memorandum to revive present recollection differ. The former is an exception to the hearsay rule where the memorandum is actually admitted into evidence as substantive evidence. Unfortunately, some courts have tended to lump the two together under the heading of 'refreshing recollection' and have applied the same standards to both. However, the foundation necessary to use a memorandum to revive present recollection differs from that for the use of past recollection recorded. Past recollection recorded is where 'a witness, who is either devoid of a present recollection or possessed

57 Md. App. 274, \*283; 469 A.2d 909, \*\*914;  
1984 Md. App. LEXIS 256, \*\*\*12

of an imperfect present recollection, desires to use a past recollection. This he proposes to do by employing some record of his past recollection.' The authorities are in general agreement, as to past recollection recorded, that to introduce the memorandum into evidence there must be a showing that the witness identifies the memorandum as made immediately after or contemporaneously [\*\*\*13] with the event and that the memorandum is a correct statement of those facts which the witness recorded. *Hall v. State*, 223 Md. 158, 176 [162 A.2d 751]. Stated succinctly, in order to introduce past recollection recorded, the general rule is that it is necessary to adduce from the witness '(a) that he at one time had personal knowledge of the facts, (b) that the writing was, when made, an accurate record of the event, and (c) that after seeing the writing, he has not sufficient present independent recollection of the facts to testify accurately in regard thereto.' *Kinsey v. Arizona*, 49 Ariz. 201, 65 P.2d 1141 at 1148, cited with approval in *Hall v. State*, *supra*, at 173 [162 A.2d 751].

[HN4] Present recollection revived, on the other hand, is the use by a witness of some writing or other object to refresh his recollection so that he may testify about past events [\*284] from present recollection. Generally, the authorities agree that none of the limiting rules for past recollection recorded have any bearing on present recollection revived and that any writing whatever is eligible for use. On the other hand, the authorities are in agreement that in certain circumstances [\*\*\*14] the expedients for stimulating recollection may be so misused that the witness may put before the court that which purports to be, but is not in fact, his recollection and knowledge and that, therefore, any writing whatever, in the circumstances, may become improper. Although no hard and fast rule can be laid down for invariable application, the *predominant view today seems to be that within the sound discretion of the trial judge any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness, or time of making.* *Kramer v. Commission of Internal Revenue*, 389 F.2d 236, 238 (1968) (Emphasis Added).

In the case at bar, Foley testified as to past events but from his present recollection. The State did not attempt to admit the document into evidence. Thus, the rules of present recollection revived, rather than past recollection recorded apply to the instant case. The pertinent testimony is as follows:

MR. McLARTY: Excuse me, your Honor, I'm -- I'm going to object to his using something to refresh his recollection unless I'm going to have an opportunity to review it and cross-examine him [\*\*\*15] on it. I notice he's reviewing -- he's reciting from his notes there.

THE COURT: You obviously will have an opportunity to cross-examine him.

[\*\*915] MR. McLARTY: I'd just like an opportunity to review those notes that he's using.

THE COURT: I don't see that he has opened his folder yet, Mr. McLarty.

MR. McLARTY: Okay, well I -- the State, I believe, will concede that he, in fact, had opened it and was reading from it. Is that not correct, Officer Foley?

[\*285] MR. WEIERS: It looked like he was leafing through it your Honor, a while ago.

THE COURT: All right.

By Mr. Weiers:

Q. Do you need the items in your hand to refresh your recollection, Trooper?

A. No. It would be helpful.

Q. If you do, let us know.

A. Okay.

A review of the pertinent testimony indicates that since the rules of present recollection revived apply, the court did not err. The court was not required to insure that the time of making, the authorship and the accuracy had been established. Furthermore, at most the evidence shows that Foley opened his folder prior to the time he was on the witness stand. [HN5] There is no rule prohibiting a witness from refreshing his recollection prior to [\*\*\*16] taking the oath and testifying. The court certainly did not abuse its discretion in determining that Foley had not opened his folder while on the witness stand.

Fitzwater's second allegation -- that his attorney was not permitted to see the contents of the folder -- is likewise without merit. Since the court determined that Foley was not using the document to refresh his recollection, there was no reason for Fitzwater's counsel to view it. Moreover, the request to see the document was not renewed after the court's determination.

*IV. Did the court invade the province of the jury by appointing a foreperson?*

Fitzwater contends the court deprived him of a fair trial by appointing a jury foreman. [HN6] Rule 751 of the Maryland Rules of Procedure states "the Court *shall* designate a juror as foreman". (Emphasis added). In addition, this issue was not preserved for appeal.

The court did not err.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

36 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Minnesota, Respondent, vs. Noor Mohamed Ali, Appellant.****A03-806****COURT OF APPEALS OF MINNESOTA***679 N.W.2d 359; 2004 Minn. App. LEXIS 517***May 11, 2004, Filed****PRIOR HISTORY:** [\*\*1] Hennepin County District Court. File No. 03023827.**DISPOSITION:** Affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant challenged a decision from the Hennepin County District Court (Minnesota), which convicted him of speeding.**OVERVIEW:** An officer observed defendant's car traveling above the posted speed limit. He used a laser to confirm his suspicions. After defendant was convicted, he sought review. In affirming, the court determined that the district court did not take judicial notice of the general reliability of laser technology. However, judicial notice was appropriate based on the testing of the laser device and the training of the officer. Also, *Minn. Stat. § 169.14*, subd. 10(a), (b) (2002) did not violate the separation-of-powers doctrine because it did not conflict with the Minnesota Rules of Evidence. Further, the district court did not abuse its discretion by admitting the laser reading to establish defendant's speed because the officer was trained, and the device had been routinely tested for accuracy. A certificate of testing and accuracy was admissible under Minn. R. Evid. 803(6) because the certificate was reliable, and it was not prepared solely for litigation purposes. Finally, the officer's visual estimate of speed was alone sufficient to support the conviction.**OUTCOME:** The decision of the district court was affirmed.**CORE TERMS:** laser, speed, radar, mph, visual, accuracy, reliability, speeding, admissible, speed-measuring, external, tested, reliable, miles, estimate, speed limit, certificate, rules of evidence, traveling, separation-of-powers, judicial notice, distance, routinely, admitting, training, trained, testing, reasonable doubt, business records, regular course**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Verdicts > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN1] In considering a claim of insufficient evidence, an appellate court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the court to reach the verdict that it did. The appellate court will not disturb the verdict if the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN2] When reviewing a district court's evidentiary rulings, an appellate court looks at the record as a whole to determine whether, in light of the evidence therein, the district court acted arbitrarily, capriciously, or contrary to legal usage. Evidentiary rulings rest within the sound discretion of the district court, and will not be reversed absent an abuse of that discretion.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

***Evidence > Judicial Notice > General Overview***

[HN3] The reliability of radar speedometers is accepted where there is evidence they were operated by trained personnel who have adequately tested the accuracy of the particular device by which the defendant's speed was determined. Consequently, it is proper for a trial court to take judicial notice of the reliability of radar as a means of establishing speed without requiring the operator to be qualified as an expert in the field. By analogy, so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability of laser technology.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

***Evidence > Scientific Evidence > General Overview***

[HN4] See *Minn. Stat. § 169.14*, subd. 10 (2002).

***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

[HN5] A statute is presumed to be constitutional, and a court's power to declare a statute unconstitutional is exercised with extreme caution and only when absolutely necessary.

***Governments > Courts > Authority to Adjudicate***

***Governments > Courts > Judicial Comity***

***Governments > Courts > Rule Application & Interpretation***

[HN6] While the power to establish rules of evidence lies within the inherent authority of the judiciary, courts have nevertheless enforced reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence.

***Constitutional Law > Separation of Powers***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Governments > Courts > Rule Application & Interpretation***

[HN7] Because *Minn. Stat. § 169.14* (2002) complies with, rather than conflicts with, the Minnesota Rules of Evidence, it does not violate the separation-of-powers doctrine.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN8] There is no requirement in the *Minn. Stat. § 169.14*, subd. 10(a) (2002) that a laser be tested in any particular manner. Rather, § 169.14, subd. 10(a)(4) requires only that the device be tested by an "accurate and reliable" external method.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Evidence > Documentary Evidence > Writings > General Overview***

[HN9] *Minn. Stat. § 169.14*, subd. 10(b) (2002) specifically contemplates that records of tests made of such devices and kept in the regular course of operations of any law enforcement agency are admissible in evidence without further foundation as to the results of the tests. Nonetheless, while business records are generally admissible under Minn. R. Evid. 803(6), documents prepared solely for litigation purposes do not qualify under this exception. Minn. R. Evid. 803(6).

***Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials***

[HN10] Under Minn. R. Evid. 803(6), it is recognized that if a document is prepared in part for business purposes, but with an eye toward litigation, a court must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination  
Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials***

[HN11] If business records are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available for cross-examination.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Testimony > Lay Witnesses > General Overview***

[HN12] The estimation of the speed of an automobile lies in a field in which a lay person gifted with reasonable intelligence, given a fair opportunity to observe, and having ordinary experience with moving vehicles may give opinion testimony.

**SYLLABUS:** 1. When there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability.

2. Because *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), complies with, rather than conflicts with, the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional.

3. Where the record demonstrates that a police officer is trained to use a laser-based speed-measuring device and that the device is routinely tested for accuracy by reliable internal and external methods, a district court does not abuse its discretion by admitting the laser reading under *Minn. Stat. § 169.14, subd. 10(a)*.

4. The district court did not abuse its discretion by admitting the Certificate of Testing and Accuracy into evidence under the business-records exception where the record demonstrates that the certificate was reliable [\*\*2] and was not prepared solely for litigation purposes.

5. A police officer's visual estimate of the speed of a moving vehicle is alone sufficient to support a speeding conviction where the record demonstrates that the officer received proper training in visual estimations and his observations were reasonably accurate.

**COUNSEL:** Mike Hatch, Attorney General, St. Paul, MN; and Jay M. Heffern, Minneapolis City Attorney, Marcia A. Johnson, Assistant City Attorney, Minneapolis, MN (for respondent).

Stephen V. Grigsby, Minneapolis, MN (for appellant).

**JUDGES:** Considered and decided by Peterson, Presiding Judge, Lansing, Judge, and Halbrooks, Judge.

**OPINION BY:** HALBROOKS

**OPINION:** [\*361] **HALBROOKS**, Judge

Appellant challenges his conviction of speeding, arguing that the evidence is insufficient to support the conviction and the district court erroneously admitted the results of a laser-based speed-measuring device. Because we conclude that the laser evidence was properly admitted, and that the laser reading and the officer's observations are sufficient to support appellant's conviction, we affirm.

#### **FACTS**

On March 2, 2003, Officer Jerry Johnson of the Minneapolis Police Department was on duty [\*\*3] near the intersection of Hennepin and Wilder in Minneapolis. The posted speed limit in the area is 30 mph. Officer Johnson noticed two vehicles approaching and observed that the vehicle in the center lane was overtaking the vehicle in the left lane. In order to verify his visual perception that the vehicles were speeding, Officer Johnson measured the speed of both vehicles with a Kustom Pro Laser III speed-measuring device. Officer Johnson determined that the vehicle in the left lane was traveling at 37 mph, while the vehicle [\*362] in the center lane, driven by appellant Noor Mohamed Ali, was traveling 41 mph. Officer Johnson then stopped appellant and issued him a speeding ticket.

Officer Johnson was the only witness to testify at trial. In addition to explaining the events of March 2, Officer Johnson told the court that he has been employed in the traffic division of the Minneapolis Police Department for 17 years, where he routinely investigates accidents and enforces traffic laws. Officer Johnson is certified to use laser devices. In 1990, he received training in Arizona to become a laser instructor and received additional instructor's training in 1994 through a laser manufacturer. Officer [\*\*4] Johnson has been the laser instructor for the Minneapolis Police Department since 1990.

Officer Johnson testified that the laser unit he used on March 2 is tested annually to ensure that it meets the manufacturer's specifications for output and detection and to make sure it can "clock" moving vehicles accurately. Laser testing is conducted by the police department's radio shop; once a laser passes the tests, the department issues a Certificate of Testing and Accuracy in its ordinary course of business. The laser used by Officer Johnson on March 2 was certified in May 2002, which indicated that it had passed all the necessary tests, including the Scope Alignment Test, Display and Integrity Test, Fixed Distance Test, and the Delta Distance Velocity Test. Although appellant repeatedly objected to admission of this document on the bases of hearsay, lack of foundation, and unreliability, the court admitted the certificate into evidence.

Additionally, Officer Johnson testified how he routinely tests the laser devices on the same day that they will be

used. Officer Johnson explained:

First thing I do is I turn the unit on. It goes through a series of internal checks, checking both the [\*\*5] internal computer, which converts changes and distance to speeds, and collects all the lighting dial out segments to make sure [the laser is] lighting up correctly. . . .

And then I, we have a course set up in our garage which we've measured out with steel engineering tapes with two different distances. We go through what's called a Delta Distance Check, or Difference Test. Because the basic theory of separation for the laser is to determine speeds based on changes in distance over time, using the speed of light as a basis.

So we aim it at the first measurement, get that measurement, make sure it measures it what the steel tape measures it out. Second measurement, and make sure it gets the same measurement it was supposed to, and then we push a button, puts it in the mode which will determine the difference between those two and simulate a speed based on the doubling of that distance. If it passes that test, [we] use the Scope Alignment Test to make sure there's actually a red dot in the scope that you look through. It projects the dot on the vehicle, just like a rifle scope, and make sure the red dot is aligned properly with the laser beam that comes out. And one additional [\*\*6] test that's not even required but [we] do it as a part of course, the Zero Velocity Test. Aim it at a known point in regular speed mode and make sure it gets that distance, giving you a speed, to know it's not going to detect or simulate movement on something that's not moving.

Officer Johnson later explained the Scope Alignment Test in more detail, stating:

I . . . put it in the range mode which gives, instead of pulsed light energy, it gives it steady light energy. And then I aim it at a narrow pipe about . . . two [\*363] inches in diameter at the end of the garage. And when it passes over that pipe, you'll hear a change in tone if the laser beam is striking the pipe at the exact same time as your dot moves over it. I do that both horizontally and vertically for wind and elevation and make sure it's on the exact spot where it's supposed to be.

Officer Johnson stated that it is the department's practice for officers to record the results of these tests at both the beginning and end of the officer's shift. The log sheet for March 2 was admitted into evidence over appellant's hearsay objection. The log indicates that the laser was tested and was working properly at both [\*\*7] the beginning and the end of Officer Johnson's shift.

Finally, Officer Johnson testified that he received training in 1978 on how to visually estimate the speed of a moving vehicle. He can accurately estimate the speed of a vehicle traveling at 30 mph, 50 mph, and 65 mph, within five mph. The laser's indication of 41 mph was consistent with Johnson's visual observation of the speed of appellant's vehicle. Officer Johnson also testified that he measured the speeds of numerous other vehicles on March 2, and the laser was consistent with his visual observations of the speed of those vehicles. Officer Johnson explained that

the laser merely is used as a tool to verify my visual impressions and give me an actual number to put on paper here. I mean, as a driver, as a police traffic officer for a number of years, certainly a skill I've learned is to look at vehicles and determine which ones appear to be speeding.

After considering the testimony and the arguments of both parties, the district court found appellant guilty of speeding and imposed a fine. The court stated on the record:

I find that Officer Johnson's testimony is credible with respect to the fact that he's [\*\*8] trained in determining speeds visually, that he observed [appellant] to be driving the vehicle which he believed to be driven in excess of the speed limit somewhere around 41 miles per hour, that he then used the laser

[which] . . . indicated it was 41 miles per hour. I also take note that, of course, the speed limit was 30 miles per hour. If this was a case in which Officer Johnson was here saying it was 31 miles per hour that [appellant] was going, maybe the arguments would be more persuasive; however, on the fact 11 miles per hour gap there, I find Officer Johnson's testimony credible.

This appeal follows.

## ISSUES

1. Did the district court abuse its discretion by taking judicial notice of the reliability of evidence from a laser-based speed-measuring device?
2. Does *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), violate the separation-of-powers doctrine?
3. Did the district court abuse its discretion by admitting the laser reading establishing appellant's speed on March 2, 2003?
4. Did the district court abuse its discretion by admitting the Certificate of Testing and Accuracy?
5. Is Officer Johnson's visual [\*\*9] estimate of appellant's speed sufficient to support the conviction?

## ANALYSIS

Appellant contends that the evidence is insufficient to support his conviction for speeding on the grounds that (1) the laser-device evidence was erroneously admitted and (2) Officer Johnson's visual observations [\*364] alone cannot support the verdict. [HN1] In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the court to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

[HN2] When reviewing a district court's evidentiary rulings, this court looks "at the record as a whole to determine whether, in light of the evidence therein, the district court acted arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999) [\*\*10] (quotation omitted). Evidentiary rulings rest within the sound discretion of the district court, and will not be reversed absent an abuse of that discretion. *State v. Smith*, 669 N.W.2d 19, 26 (Minn. 2003).

### 1. Judicial notice of the reliability of laser technology.

Appellant argues that "the admission of the laser device without sufficient evidence of its reliability by a qualified expert amounts to a judicial noticing of the device's reliability," in violation of Minn. R. Evid. 201. While we do not agree that the court took judicial notice of the laser's reliability in this case, even if it had, there would be no abuse of discretion. In *State v. Gerdes*, 291 Minn. 353, 191 N.W.2d 428 (1971), the Minnesota Supreme Court held that district courts could take judicial notice of the reliability of radar. *Id.* at 354, 191 N.W.2d at 429. The court stated:

We are in accord with the authorities which accept [HN3] the reliability of radar speedometers where there is evidence they were operated by trained personnel who have adequately tested the accuracy of the particular device by which the defendant's speed was determined. Consequently, [\*\*11] we hold that it was proper for the trial court to take judicial notice of the reliability of radar as a means of establishing speed without requiring the operated to be qualified as an expert in the field.

*Id.* at 356, 191 N.W.2d at 430-31. This court has cited the *Gerdes* holding on several occasions. *See, e.g., State, City of St. Louis Park v. Bogren*, 410 N.W.2d 383, 385 (Minn. App. 1987) (stating that "radar is accepted as a reliable measure of speed when there is evidence of proper testing and operation by trained personnel"); *State v. Dow*, 352 N.W.2d 125, 126-27 (Minn. App. 1984) (stating that "radar speedometer results are reliable if the unit is properly tested and operated"). By analogy, so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability of laser technology.

## 2. Constitutionality of Minn. Stat. § 169.14, subd. 10 (2002). [\*\*12]

*Minn. Stat. § 169.14, subd. 10(a), (b)*, sets forth the requirements for admitting evidence from a radar or other "speed-measuring device" to show that a defendant was speeding. The statute provides:

[HN4] (a) In any prosecution in which the rate of speed of a motor vehicle is relevant, evidence of the speed as indicated on radar or other speed-measuring device [\*365] is admissible in evidence, subject to the following conditions:

- (1) the officer operating the device has sufficient training to properly operate the equipment;
- (2) the officer testifies as to the manner in which the device was set up and operated;
- (3) the device was operated with minimal distortion or interference from outside sources; and
- (4) the device was tested by an accurate and reliable external mechanism, method, or system at the time it was set up.

(b) Records of tests made of such devices and kept in the regular course of operations of any law enforcement agency are admissible in evidence without further foundation as to the results of the tests. The records shall be available to a defendant upon demand. Nothing in this subdivision shall be construed to preclude or interfere with cross [\*13] examination or impeachment of evidence of the rate of speed as indicated on the radar or speed-measuring device.

*Minn. Stat. § 169.14, subd. 10(a), (b)*.

Appellant contends that *Minn. Stat. § 169.14* (2002) is unconstitutional, asserting that it violates the separation-of-powers doctrine because the legislature has removed the judiciary's power to regulate evidentiary matters. [HN5] A statute is presumed to be constitutional, and a court's power to declare a statute unconstitutional is exercised "with extreme caution and only when absolutely necessary." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (quotation omitted).

[HN6] While the power to establish rules of evidence lies within the inherent authority of the judiciary, *State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983), courts have nevertheless enforced "reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence." *State v. Larson*, 453 N.W.2d 42, 46 n.3 (Minn. 1990). Therefore, the statute may set guidelines for the admissibility of evidence from a speed-measuring [\*14] device without violating the separation-of-powers doctrine so long as it does not conflict with the rules of evidence. *See State v. McCoy*, 668 N.W.2d 425, 427 (Minn. App. 2003), review granted (Minn. Nov. 18, 2003).

Here, two rules of evidence are analogous: Minn. R. Evid. 402 ("relevant evidence is [generally] admissible") and Minn. R. Evid. 803(6) ("data compilation . . . if kept in the course of a regularly conducted business activity [is admissible] unless the source of information or the method or circumstances of preparation indicate lack of

trustworthiness"). *Minn. Stat. § 169.14* does not conflict with rule 402, as evidence from a speed-measuring device is certainly relevant in establishing that a defendant was speeding, and none of the exclusionary rules apply. Furthermore, the statute does not conflict with rule 803(6) because the device's readings are routinely written on speeding tickets in the regular course of the police department's business, and there is nothing inherently untrustworthy about the evidence. Therefore, we conclude that [HN7] because *Minn. Stat. § 169.14* complies with, rather than conflicts [\*\*15] with, the rules of evidence, it does not violate the separation-of-powers doctrine.

### 3. Admissibility of the results from the laser device used on March 2.

Although the admissibility of evidence from a laser-based speed-measuring device under *Minn. Stat. § 169.14, subd. 10(a)*, is a case of first impression, we conclude that the existing caselaw concerning the admissibility of radar evidence is analogous. For example, in *Dow*, we concluded that [\*366] radar evidence was admissible where the officer was a certified radar operator, was familiar with the radar device used, and had checked the accuracy of the radar unit by performing internal and external tests both before and after his shift. *352 N.W.2d at 126*. Specifically, we stated that "the external methods, consisting of a tuning fork and a calibrated speedometer on the squad car," were sufficient to satisfy the condition that the device be "tested by an accurate and reliable external mechanism, method, or system at the time it was set up." *Id. at 127* (quoting *Minn. Stat. § 169.14, subd. 10(a)(4)*). Likewise, in *State v. Pulos*, we held that [\*\*16] the radar evidence was admissible under *subdivision 10(a)* where the police officer was a certified radar operator who conducted internal and external checks of the radar unit, and all tests indicated that the unit was in proper working order. *406 N.W.2d 75, 76 (Minn. App. 1987)*. Additionally, in *Bogren*, we concluded that radar evidence was admissible where the officer performed external and internal calibration checks both before and after issuing the appellant's ticket, records were introduced verifying the accuracy of both the radar unit and tuning forks used in testing, the officer was certified to operate the radar unit, and there was no evidence of outside interference. *410 N.W.2d at 384-85*. The record here demonstrates that the results of the laser device used by Officer Johnson were admissible under *Minn. Stat. § 169.14, subd 10(a)*.

While appellant contends that *subdivision 10(a)(4)* is not satisfied because Officer Johnson "failed to perform an external test of moving objects," [HN8] there is no requirement in the statute that the laser be tested in any particular manner. Rather, *subdivision 10(a)(4)* requires only that the [\*\*17] device be tested by an "accurate and reliable" external method. The record shows that several external methods were routinely used to test the Minneapolis Police Department's laser devices, and that those methods were reliable in determining whether the laser was working properly or experiencing accuracy problems. Therefore, *subdivision 10(a)(4)* has been satisfied, and we reject appellant's argument that a test on moving objects was required. *See Bogren, 410 N.W.2d at 385* (rejecting appellant's claim that he was entitled to question the city about whether it was licensed by the FCC to operate radar units because *section 169.14* does not require evidence of a valid FCC license).

### 4. Admissibility of Certificate of Testing and Accuracy.

Appellant also argues that the district court abused its discretion by admitting the Certificate of Testing and Accuracy, claiming that the document was hearsay and not admissible under the business-records exception. *See Minn. R. Evid. 803(6). Minn. Stat. § 169.14, subd. 10(b)*, [HN9] specifically contemplates that "records of tests made of such devices and kept in the regular course of operations of [\*\*18] any law enforcement agency are admissible in evidence without further foundation as to the results of the tests." Nonetheless, while business records are generally admissible under rule 803(6), "documents prepared solely for litigation purposes do not qualify under this exception." *Minn. R. Evid. 803(6) 1989 comm. cmt.*

Officer Johnson testified that when a laser device passes the appropriate testing, the radio shop issues a certificate of accuracy for police officers to use "for purposes like today," i.e., court proceedings. Officer Johnson also stated that the people who prepare the certificates know that the documents are regularly brought into court. But Officer Johnson also testified that the certification document was created in the [\*367] regular course of the department's business to ensure that the laser is accurately measuring speed and meeting the "manufacturer's specifications for the output and

detection circuits." Therefore, we disagree with appellant's contention that the certification was prepared "solely for litigation purposes." The comments to rule 803(6) [HN10] recognize that "if the document is prepared in part for business purposes but with an eye toward litigation the court [\*\*19] must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission." Minn. R. Evid. 803(6) 1989 comm. cmt. Here, the district court specifically found that the document was "reliable" despite appellant's concerns that the department knew it could be used in court proceedings. We conclude that the district court did not abuse its discretion in admitting the certificate under the business-records exception.

Appellant also contends that "even if the business records were properly introduced, [his] confrontations rights . . . were denied by the reception of hearsay to establish an element of the crime." See *State v. Matousek*, 287 Minn. 344, 350, 178 N.W.2d 604, 608 (1970) (recognizing that [HN11] if business records "are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available for cross-examination"). But the certificate does not raise confrontation problems because it was not offered to prove an essential element of the [\*\*20] crime or to directly connect appellant to the commission of the crime. In *State v. Jensen*, 351 N.W.2d 29, 32-33 (Minn. App. 1984), this court concluded that business records establishing that a breathalyzer test was working properly did not pose a confrontation problem because they were "merely collateral evidence of the reliability of the breathalyzer test." Similarly, in this case, the certification document was admitted only as collateral evidence of the reliability of the tests performed by Officer Johnson. Therefore, we conclude that the certificate was properly received into evidence.

##### **5. Officer Johnson's visual observations.**

Appellant's final argument is that Officer Johnson's visual speed estimation is insufficient to establish that he was speeding. In *LeMieux v. Bishop*, 296 Minn. 372, 378, 209 N.W.2d 379, 383 (1973), the supreme court recognized that [HN12] the estimation of "the speed of an automobile lies in a field in which a lay person gifted with reasonable intelligence, given a fair opportunity to observe, and having ordinary experience with moving vehicles may give opinion testimony." Beyond having this type of "ordinary experience, [\*\*21] " Officer Johnson testified that he was trained in 1978 to accurately estimate the speed of a moving vehicle within five mph, and that he has perfected that skill over the past 25 years. The laser's indication of 41 mph for appellant's speed was consistent with Johnson's visual observation; the laser was also consistent with Johnson's visual estimates of the speed of other vehicles that day. Officer Johnson explained that "the laser merely is used as a tool to verify my visual impressions." Based on this record, we agree with the district court's conclusion that "Officer Johnson's testimony is credible with respect to the fact that he's trained in determining speeds visually [and] that he observed [appellant] to be driving the vehicle . . . in excess of the speed limit somewhere around 41 miles per hour."

[\*368] Appellant also raises concerns that the district court entertained reasonable doubt by stating, "if this was a case in which Officer Johnson was here saying it was 31 miles per hour that [appellant] was going, maybe the arguments would be more persuasive; however, on the fact 11 miles per hour gap there, I find Officer Johnson's testimony credible." But the state was required [\*\*22] to prove only that appellant was exceeding the speed limit, not that he was driving 41 mph. See *State v. Aanerud*, 374 N.W.2d 491, 492 (Minn. App. 1985). In *Aanerud*, the district court found the appellant guilty of speeding, stating, "there was reasonable doubt that [the appellant] was going fifteen miles per hour over the speed limit but there can be no doubt that he exceeded the limit by some amount." We affirmed, reasoning that

the court could have found that there was a margin of error in the radar unit's readout, which would have meant that [the appellant's] car was traveling either somewhat less or somewhat more than 45 mph [in a 30 mph zone]. This would have been sufficient to raise the reasonable doubt stated by the court without the total discrediting of the reading urged by appellant.

*Id.*

Here, Officer Johnson's visual estimate was consistent with the laser's determination that appellant was traveling 41 mph. Even if we presume a five mph margin of error, the testimony still demonstrates that appellant was traveling at least 36 mph. Therefore, Officer Johnson's visual estimate alone is sufficient to establish that appellant exceeded [\*\*23] the 30 mph speed limit.

#### **DECISION**

Although we disagree that the district court took judicial notice of the general reliability of laser technology, we conclude that where there is adequate evidence of the testing of the laser device and the training of the officer using the device to support the conviction, judicial notice is appropriate. Furthermore, we conclude that because *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), does not conflict with the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional. Additionally, we conclude that the district court did not abuse its discretion by admitting the laser reading establishing appellant's speed on March 2, 2003, under *Minn. Stat. § 169.14, subd. 10(a)*, as the record demonstrates that Officer Johnson was trained to use the laser device and that the device was routinely tested for accuracy by reliable internal and external methods. We also find no abuse of discretion in the district court's admission of the Certificate of Testing and Accuracy under the business-records exception, as the record demonstrates that the certificate [\*\*24] was reliable and was not prepared solely for litigation purposes. Finally, we conclude that Officer Johnson's visual estimate of appellant's speed was alone sufficient to support his conviction for speeding.

**Affirmed.**

37 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Minnesota, Respondent, vs. Noor Mohamed Ali, Appellant.****A03-806****COURT OF APPEALS OF MINNESOTA***679 N.W.2d 359; 2004 Minn. App. LEXIS 517***May 11, 2004, Filed****PRIOR HISTORY:** [\*\*1] Hennepin County District Court. File No. 03023827.**DISPOSITION:** Affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant challenged a decision from the Hennepin County District Court (Minnesota), which convicted him of speeding.**OVERVIEW:** An officer observed defendant's car traveling above the posted speed limit. He used a laser to confirm his suspicions. After defendant was convicted, he sought review. In affirming, the court determined that the district court did not take judicial notice of the general reliability of laser technology. However, judicial notice was appropriate based on the testing of the laser device and the training of the officer. Also, *Minn. Stat. § 169.14*, subd. 10(a), (b) (2002) did not violate the separation-of-powers doctrine because it did not conflict with the Minnesota Rules of Evidence. Further, the district court did not abuse its discretion by admitting the laser reading to establish defendant's speed because the officer was trained, and the device had been routinely tested for accuracy. A certificate of testing and accuracy was admissible under Minn. R. Evid. 803(6) because the certificate was reliable, and it was not prepared solely for litigation purposes. Finally, the officer's visual estimate of speed was alone sufficient to support the conviction.**OUTCOME:** The decision of the district court was affirmed.**CORE TERMS:** laser, speed, radar, mph, visual, accuracy, reliability, speeding, admissible, speed-measuring, external, tested, reliable, miles, estimate, speed limit, certificate, rules of evidence, traveling, separation-of-powers, judicial notice, distance, routinely, admitting, training, trained, testing, reasonable doubt, business records, regular course**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Verdicts > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN1] In considering a claim of insufficient evidence, an appellate court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the court to reach the verdict that it did. The appellate court will not disturb the verdict if the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN2] When reviewing a district court's evidentiary rulings, an appellate court looks at the record as a whole to determine whether, in light of the evidence therein, the district court acted arbitrarily, capriciously, or contrary to legal usage. Evidentiary rulings rest within the sound discretion of the district court, and will not be reversed absent an abuse of that discretion.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

***Evidence > Judicial Notice > General Overview***

[HN3] The reliability of radar speedometers is accepted where there is evidence they were operated by trained personnel who have adequately tested the accuracy of the particular device by which the defendant's speed was determined. Consequently, it is proper for a trial court to take judicial notice of the reliability of radar as a means of establishing speed without requiring the operator to be qualified as an expert in the field. By analogy, so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability of laser technology.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

***Evidence > Scientific Evidence > General Overview***

[HN4] See *Minn. Stat. § 169.14*, subd. 10 (2002).

***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

[HN5] A statute is presumed to be constitutional, and a court's power to declare a statute unconstitutional is exercised with extreme caution and only when absolutely necessary.

***Governments > Courts > Authority to Adjudicate***

***Governments > Courts > Judicial Comity***

***Governments > Courts > Rule Application & Interpretation***

[HN6] While the power to establish rules of evidence lies within the inherent authority of the judiciary, courts have nevertheless enforced reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence.

***Constitutional Law > Separation of Powers***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Governments > Courts > Rule Application & Interpretation***

[HN7] Because *Minn. Stat. § 169.14* (2002) complies with, rather than conflicts with, the Minnesota Rules of Evidence, it does not violate the separation-of-powers doctrine.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN8] There is no requirement in the *Minn. Stat. § 169.14*, subd. 10(a) (2002) that a laser be tested in any particular manner. Rather, § 169.14, subd. 10(a)(4) requires only that the device be tested by an "accurate and reliable" external method.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Evidence > Documentary Evidence > Writings > General Overview***

[HN9] *Minn. Stat. § 169.14*, subd. 10(b) (2002) specifically contemplates that records of tests made of such devices and kept in the regular course of operations of any law enforcement agency are admissible in evidence without further foundation as to the results of the tests. Nonetheless, while business records are generally admissible under Minn. R. Evid. 803(6), documents prepared solely for litigation purposes do not qualify under this exception. Minn. R. Evid. 803(6).

***Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials***

[HN10] Under Minn. R. Evid. 803(6), it is recognized that if a document is prepared in part for business purposes, but with an eye toward litigation, a court must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination  
Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials***

[HN11] If business records are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available for cross-examination.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Testimony > Lay Witnesses > General Overview***

[HN12] The estimation of the speed of an automobile lies in a field in which a lay person gifted with reasonable intelligence, given a fair opportunity to observe, and having ordinary experience with moving vehicles may give opinion testimony.

**SYLLABUS:** 1. When there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability.

2. Because *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), complies with, rather than conflicts with, the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional.

3. Where the record demonstrates that a police officer is trained to use a laser-based speed-measuring device and that the device is routinely tested for accuracy by reliable internal and external methods, a district court does not abuse its discretion by admitting the laser reading under *Minn. Stat. § 169.14, subd. 10(a)*.

4. The district court did not abuse its discretion by admitting the Certificate of Testing and Accuracy into evidence under the business-records exception where the record demonstrates that the certificate was reliable [\*\*2] and was not prepared solely for litigation purposes.

5. A police officer's visual estimate of the speed of a moving vehicle is alone sufficient to support a speeding conviction where the record demonstrates that the officer received proper training in visual estimations and his observations were reasonably accurate.

**COUNSEL:** Mike Hatch, Attorney General, St. Paul, MN; and Jay M. Heffern, Minneapolis City Attorney, Marcia A. Johnson, Assistant City Attorney, Minneapolis, MN (for respondent).

Stephen V. Grigsby, Minneapolis, MN (for appellant).

**JUDGES:** Considered and decided by Peterson, Presiding Judge, Lansing, Judge, and Halbrooks, Judge.

**OPINION BY:** HALBROOKS

**OPINION:** [\*361] **HALBROOKS**, Judge

Appellant challenges his conviction of speeding, arguing that the evidence is insufficient to support the conviction and the district court erroneously admitted the results of a laser-based speed-measuring device. Because we conclude that the laser evidence was properly admitted, and that the laser reading and the officer's observations are sufficient to support appellant's conviction, we affirm.

#### **FACTS**

On March 2, 2003, Officer Jerry Johnson of the Minneapolis Police Department was on duty [\*\*3] near the intersection of Hennepin and Wilder in Minneapolis. The posted speed limit in the area is 30 mph. Officer Johnson noticed two vehicles approaching and observed that the vehicle in the center lane was overtaking the vehicle in the left lane. In order to verify his visual perception that the vehicles were speeding, Officer Johnson measured the speed of both vehicles with a Kustom Pro Laser III speed-measuring device. Officer Johnson determined that the vehicle in the left lane was traveling at 37 mph, while the vehicle [\*362] in the center lane, driven by appellant Noor Mohamed Ali, was traveling 41 mph. Officer Johnson then stopped appellant and issued him a speeding ticket.

Officer Johnson was the only witness to testify at trial. In addition to explaining the events of March 2, Officer Johnson told the court that he has been employed in the traffic division of the Minneapolis Police Department for 17 years, where he routinely investigates accidents and enforces traffic laws. Officer Johnson is certified to use laser devices. In 1990, he received training in Arizona to become a laser instructor and received additional instructor's training in 1994 through a laser manufacturer. Officer [\*\*4] Johnson has been the laser instructor for the Minneapolis Police Department since 1990.

Officer Johnson testified that the laser unit he used on March 2 is tested annually to ensure that it meets the manufacturer's specifications for output and detection and to make sure it can "clock" moving vehicles accurately. Laser testing is conducted by the police department's radio shop; once a laser passes the tests, the department issues a Certificate of Testing and Accuracy in its ordinary course of business. The laser used by Officer Johnson on March 2 was certified in May 2002, which indicated that it had passed all the necessary tests, including the Scope Alignment Test, Display and Integrity Test, Fixed Distance Test, and the Delta Distance Velocity Test. Although appellant repeatedly objected to admission of this document on the bases of hearsay, lack of foundation, and unreliability, the court admitted the certificate into evidence.

Additionally, Officer Johnson testified how he routinely tests the laser devices on the same day that they will be

used. Officer Johnson explained:

First thing I do is I turn the unit on. It goes through a series of internal checks, checking both the [\*\*5] internal computer, which converts changes and distance to speeds, and collects all the lighting dial out segments to make sure [the laser is] lighting up correctly. . . .

And then I, we have a course set up in our garage which we've measured out with steel engineering tapes with two different distances. We go through what's called a Delta Distance Check, or Difference Test. Because the basic theory of separation for the laser is to determine speeds based on changes in distance over time, using the speed of light as a basis.

So we aim it at the first measurement, get that measurement, make sure it measures it what the steel tape measures it out. Second measurement, and make sure it gets the same measurement it was supposed to, and then we push a button, puts it in the mode which will determine the difference between those two and simulate a speed based on the doubling of that distance. If it passes that test, [we] use the Scope Alignment Test to make sure there's actually a red dot in the scope that you look through. It projects the dot on the vehicle, just like a rifle scope, and make sure the red dot is aligned properly with the laser beam that comes out. And one additional [\*\*6] test that's not even required but [we] do it as a part of course, the Zero Velocity Test. Aim it at a known point in regular speed mode and make sure it gets that distance, giving you a speed, to know it's not going to detect or simulate movement on something that's not moving.

Officer Johnson later explained the Scope Alignment Test in more detail, stating:

I . . . put it in the range mode which gives, instead of pulsed light energy, it gives it steady light energy. And then I aim it at a narrow pipe about . . . two [\*363] inches in diameter at the end of the garage. And when it passes over that pipe, you'll hear a change in tone if the laser beam is striking the pipe at the exact same time as your dot moves over it. I do that both horizontally and vertically for wind and elevation and make sure it's on the exact spot where it's supposed to be.

Officer Johnson stated that it is the department's practice for officers to record the results of these tests at both the beginning and end of the officer's shift. The log sheet for March 2 was admitted into evidence over appellant's hearsay objection. The log indicates that the laser was tested and was working properly at both [\*\*7] the beginning and the end of Officer Johnson's shift.

Finally, Officer Johnson testified that he received training in 1978 on how to visually estimate the speed of a moving vehicle. He can accurately estimate the speed of a vehicle traveling at 30 mph, 50 mph, and 65 mph, within five mph. The laser's indication of 41 mph was consistent with Johnson's visual observation of the speed of appellant's vehicle. Officer Johnson also testified that he measured the speeds of numerous other vehicles on March 2, and the laser was consistent with his visual observations of the speed of those vehicles. Officer Johnson explained that

the laser merely is used as a tool to verify my visual impressions and give me an actual number to put on paper here. I mean, as a driver, as a police traffic officer for a number of years, certainly a skill I've learned is to look at vehicles and determine which ones appear to be speeding.

After considering the testimony and the arguments of both parties, the district court found appellant guilty of speeding and imposed a fine. The court stated on the record:

I find that Officer Johnson's testimony is credible with respect to the fact that he's [\*\*8] trained in determining speeds visually, that he observed [appellant] to be driving the vehicle which he believed to be driven in excess of the speed limit somewhere around 41 miles per hour, that he then used the laser

[which] . . . indicated it was 41 miles per hour. I also take note that, of course, the speed limit was 30 miles per hour. If this was a case in which Officer Johnson was here saying it was 31 miles per hour that [appellant] was going, maybe the arguments would be more persuasive; however, on the fact 11 miles per hour gap there, I find Officer Johnson's testimony credible.

This appeal follows.

## ISSUES

1. Did the district court abuse its discretion by taking judicial notice of the reliability of evidence from a laser-based speed-measuring device?
2. Does *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), violate the separation-of-powers doctrine?
3. Did the district court abuse its discretion by admitting the laser reading establishing appellant's speed on March 2, 2003?
4. Did the district court abuse its discretion by admitting the Certificate of Testing and Accuracy?
5. Is Officer Johnson's visual [\*\*9] estimate of appellant's speed sufficient to support the conviction?

## ANALYSIS

Appellant contends that the evidence is insufficient to support his conviction for speeding on the grounds that (1) the laser-device evidence was erroneously admitted and (2) Officer Johnson's visual observations [\*364] alone cannot support the verdict. [HN1] In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the court to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

[HN2] When reviewing a district court's evidentiary rulings, this court looks "at the record as a whole to determine whether, in light of the evidence therein, the district court acted arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999) [\*\*10] (quotation omitted). Evidentiary rulings rest within the sound discretion of the district court, and will not be reversed absent an abuse of that discretion. *State v. Smith*, 669 N.W.2d 19, 26 (Minn. 2003).

### 1. Judicial notice of the reliability of laser technology.

Appellant argues that "the admission of the laser device without sufficient evidence of its reliability by a qualified expert amounts to a judicial noticing of the device's reliability," in violation of Minn. R. Evid. 201. While we do not agree that the court took judicial notice of the laser's reliability in this case, even if it had, there would be no abuse of discretion. In *State v. Gerdes*, 291 Minn. 353, 191 N.W.2d 428 (1971), the Minnesota Supreme Court held that district courts could take judicial notice of the reliability of radar. *Id.* at 354, 191 N.W.2d at 429. The court stated:

We are in accord with the authorities which accept [HN3] the reliability of radar speedometers where there is evidence they were operated by trained personnel who have adequately tested the accuracy of the particular device by which the defendant's speed was determined. Consequently, [\*\*11] we hold that it was proper for the trial court to take judicial notice of the reliability of radar as a means of establishing speed without requiring the operated to be qualified as an expert in the field.

*Id.* at 356, 191 N.W.2d at 430-31. This court has cited the *Gerdes* holding on several occasions. *See, e.g., State, City of St. Louis Park v. Bogren*, 410 N.W.2d 383, 385 (Minn. App. 1987) (stating that "radar is accepted as a reliable measure of speed when there is evidence of proper testing and operation by trained personnel"); *State v. Dow*, 352 N.W.2d 125, 126-27 (Minn. App. 1984) (stating that "radar speedometer results are reliable if the unit is properly tested and operated"). By analogy, so long as there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability of laser technology.

## 2. Constitutionality of Minn. Stat. § 169.14, subd. 10 (2002). [\*\*12]

*Minn. Stat. § 169.14, subd. 10(a), (b)*, sets forth the requirements for admitting evidence from a radar or other "speed-measuring device" to show that a defendant was speeding. The statute provides:

[HN4] (a) In any prosecution in which the rate of speed of a motor vehicle is relevant, evidence of the speed as indicated on radar or other speed-measuring device [\*365] is admissible in evidence, subject to the following conditions:

- (1) the officer operating the device has sufficient training to properly operate the equipment;
- (2) the officer testifies as to the manner in which the device was set up and operated;
- (3) the device was operated with minimal distortion or interference from outside sources; and
- (4) the device was tested by an accurate and reliable external mechanism, method, or system at the time it was set up.

(b) Records of tests made of such devices and kept in the regular course of operations of any law enforcement agency are admissible in evidence without further foundation as to the results of the tests. The records shall be available to a defendant upon demand. Nothing in this subdivision shall be construed to preclude or interfere with cross [\*13] examination or impeachment of evidence of the rate of speed as indicated on the radar or speed-measuring device.

*Minn. Stat. § 169.14, subd. 10(a), (b)*.

Appellant contends that *Minn. Stat. § 169.14* (2002) is unconstitutional, asserting that it violates the separation-of-powers doctrine because the legislature has removed the judiciary's power to regulate evidentiary matters. [HN5] A statute is presumed to be constitutional, and a court's power to declare a statute unconstitutional is exercised "with extreme caution and only when absolutely necessary." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (quotation omitted).

[HN6] While the power to establish rules of evidence lies within the inherent authority of the judiciary, *State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983), courts have nevertheless enforced "reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence." *State v. Larson*, 453 N.W.2d 42, 46 n.3 (Minn. 1990). Therefore, the statute may set guidelines for the admissibility of evidence from a speed-measuring [\*14] device without violating the separation-of-powers doctrine so long as it does not conflict with the rules of evidence. *See State v. McCoy*, 668 N.W.2d 425, 427 (Minn. App. 2003), review granted (Minn. Nov. 18, 2003).

Here, two rules of evidence are analogous: Minn. R. Evid. 402 ("relevant evidence is [generally] admissible") and Minn. R. Evid. 803(6) ("data compilation . . . if kept in the course of a regularly conducted business activity [is admissible] unless the source of information or the method or circumstances of preparation indicate lack of

trustworthiness"). *Minn. Stat. § 169.14* does not conflict with rule 402, as evidence from a speed-measuring device is certainly relevant in establishing that a defendant was speeding, and none of the exclusionary rules apply. Furthermore, the statute does not conflict with rule 803(6) because the device's readings are routinely written on speeding tickets in the regular course of the police department's business, and there is nothing inherently untrustworthy about the evidence. Therefore, we conclude that [HN7] because *Minn. Stat. § 169.14* complies with, rather than conflicts [\*\*15] with, the rules of evidence, it does not violate the separation-of-powers doctrine.

### 3. Admissibility of the results from the laser device used on March 2.

Although the admissibility of evidence from a laser-based speed-measuring device under *Minn. Stat. § 169.14, subd. 10(a)*, is a case of first impression, we conclude that the existing caselaw concerning the admissibility of radar evidence is analogous. For example, in *Dow*, we concluded that [\*366] radar evidence was admissible where the officer was a certified radar operator, was familiar with the radar device used, and had checked the accuracy of the radar unit by performing internal and external tests both before and after his shift. *352 N.W.2d at 126*. Specifically, we stated that "the external methods, consisting of a tuning fork and a calibrated speedometer on the squad car," were sufficient to satisfy the condition that the device be "tested by an accurate and reliable external mechanism, method, or system at the time it was set up." *Id. at 127* (quoting *Minn. Stat. § 169.14, subd. 10(a)(4)*). Likewise, in *State v. Pulos*, we held that [\*\*16] the radar evidence was admissible under *subdivision 10(a)* where the police officer was a certified radar operator who conducted internal and external checks of the radar unit, and all tests indicated that the unit was in proper working order. *406 N.W.2d 75, 76 (Minn. App. 1987)*. Additionally, in *Bogren*, we concluded that radar evidence was admissible where the officer performed external and internal calibration checks both before and after issuing the appellant's ticket, records were introduced verifying the accuracy of both the radar unit and tuning forks used in testing, the officer was certified to operate the radar unit, and there was no evidence of outside interference. *410 N.W.2d at 384-85*. The record here demonstrates that the results of the laser device used by Officer Johnson were admissible under *Minn. Stat. § 169.14, subd 10(a)*.

While appellant contends that *subdivision 10(a)(4)* is not satisfied because Officer Johnson "failed to perform an external test of moving objects," [HN8] there is no requirement in the statute that the laser be tested in any particular manner. Rather, *subdivision 10(a)(4)* requires only that the [\*\*17] device be tested by an "accurate and reliable" external method. The record shows that several external methods were routinely used to test the Minneapolis Police Department's laser devices, and that those methods were reliable in determining whether the laser was working properly or experiencing accuracy problems. Therefore, *subdivision 10(a)(4)* has been satisfied, and we reject appellant's argument that a test on moving objects was required. *See Bogren, 410 N.W.2d at 385* (rejecting appellant's claim that he was entitled to question the city about whether it was licensed by the FCC to operate radar units because *section 169.14* does not require evidence of a valid FCC license).

### 4. Admissibility of Certificate of Testing and Accuracy.

Appellant also argues that the district court abused its discretion by admitting the Certificate of Testing and Accuracy, claiming that the document was hearsay and not admissible under the business-records exception. *See Minn. R. Evid. 803(6). Minn. Stat. § 169.14, subd. 10(b)*, [HN9] specifically contemplates that "records of tests made of such devices and kept in the regular course of operations of [\*\*18] any law enforcement agency are admissible in evidence without further foundation as to the results of the tests." Nonetheless, while business records are generally admissible under rule 803(6), "documents prepared solely for litigation purposes do not qualify under this exception." *Minn. R. Evid. 803(6) 1989 comm. cmt.*

Officer Johnson testified that when a laser device passes the appropriate testing, the radio shop issues a certificate of accuracy for police officers to use "for purposes like today," i.e., court proceedings. Officer Johnson also stated that the people who prepare the certificates know that the documents are regularly brought into court. But Officer Johnson also testified that the certification document was created in the [\*367] regular course of the department's business to ensure that the laser is accurately measuring speed and meeting the "manufacturer's specifications for the output and

detection circuits." Therefore, we disagree with appellant's contention that the certification was prepared "solely for litigation purposes." The comments to rule 803(6) [HN10] recognize that "if the document is prepared in part for business purposes but with an eye toward litigation the court [\*\*19] must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission." Minn. R. Evid. 803(6) 1989 comm. cmt. Here, the district court specifically found that the document was "reliable" despite appellant's concerns that the department knew it could be used in court proceedings. We conclude that the district court did not abuse its discretion in admitting the certificate under the business-records exception.

Appellant also contends that "even if the business records were properly introduced, [his] confrontations rights . . . were denied by the reception of hearsay to establish an element of the crime." See *State v. Matousek*, 287 Minn. 344, 350, 178 N.W.2d 604, 608 (1970) (recognizing that [HN11] if business records "are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available for cross-examination"). But the certificate does not raise confrontation problems because it was not offered to prove an essential element of the [\*\*20] crime or to directly connect appellant to the commission of the crime. In *State v. Jensen*, 351 N.W.2d 29, 32-33 (Minn. App. 1984), this court concluded that business records establishing that a breathalyzer test was working properly did not pose a confrontation problem because they were "merely collateral evidence of the reliability of the breathalyzer test." Similarly, in this case, the certification document was admitted only as collateral evidence of the reliability of the tests performed by Officer Johnson. Therefore, we conclude that the certificate was properly received into evidence.

##### **5. Officer Johnson's visual observations.**

Appellant's final argument is that Officer Johnson's visual speed estimation is insufficient to establish that he was speeding. In *LeMieux v. Bishop*, 296 Minn. 372, 378, 209 N.W.2d 379, 383 (1973), the supreme court recognized that [HN12] the estimation of "the speed of an automobile lies in a field in which a lay person gifted with reasonable intelligence, given a fair opportunity to observe, and having ordinary experience with moving vehicles may give opinion testimony." Beyond having this type of "ordinary experience, [\*\*21] " Officer Johnson testified that he was trained in 1978 to accurately estimate the speed of a moving vehicle within five mph, and that he has perfected that skill over the past 25 years. The laser's indication of 41 mph for appellant's speed was consistent with Johnson's visual observation; the laser was also consistent with Johnson's visual estimates of the speed of other vehicles that day. Officer Johnson explained that "the laser merely is used as a tool to verify my visual impressions." Based on this record, we agree with the district court's conclusion that "Officer Johnson's testimony is credible with respect to the fact that he's trained in determining speeds visually [and] that he observed [appellant] to be driving the vehicle . . . in excess of the speed limit somewhere around 41 miles per hour."

[\*368] Appellant also raises concerns that the district court entertained reasonable doubt by stating, "if this was a case in which Officer Johnson was here saying it was 31 miles per hour that [appellant] was going, maybe the arguments would be more persuasive; however, on the fact 11 miles per hour gap there, I find Officer Johnson's testimony credible." But the state was required [\*\*22] to prove only that appellant was exceeding the speed limit, not that he was driving 41 mph. See *State v. Aanerud*, 374 N.W.2d 491, 492 (Minn. App. 1985). In *Aanerud*, the district court found the appellant guilty of speeding, stating, "there was reasonable doubt that [the appellant] was going fifteen miles per hour over the speed limit but there can be no doubt that he exceeded the limit by some amount." We affirmed, reasoning that

the court could have found that there was a margin of error in the radar unit's readout, which would have meant that [the appellant's] car was traveling either somewhat less or somewhat more than 45 mph [in a 30 mph zone]. This would have been sufficient to raise the reasonable doubt stated by the court without the total discrediting of the reading urged by appellant.

*Id.*

Here, Officer Johnson's visual estimate was consistent with the laser's determination that appellant was traveling 41 mph. Even if we presume a five mph margin of error, the testimony still demonstrates that appellant was traveling at least 36 mph. Therefore, Officer Johnson's visual estimate alone is sufficient to establish that appellant exceeded [\*\*23] the 30 mph speed limit.

#### **DECISION**

Although we disagree that the district court took judicial notice of the general reliability of laser technology, we conclude that where there is adequate evidence of the testing of the laser device and the training of the officer using the device to support the conviction, judicial notice is appropriate. Furthermore, we conclude that because *Minn. Stat. § 169.14, subd. 10(a), (b)* (2002), does not conflict with the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional. Additionally, we conclude that the district court did not abuse its discretion by admitting the laser reading establishing appellant's speed on March 2, 2003, under *Minn. Stat. § 169.14, subd. 10(a)*, as the record demonstrates that Officer Johnson was trained to use the laser device and that the device was routinely tested for accuracy by reliable internal and external methods. We also find no abuse of discretion in the district court's admission of the Certificate of Testing and Accuracy under the business-records exception, as the record demonstrates that the certificate [\*\*24] was reliable and was not prepared solely for litigation purposes. Finally, we conclude that Officer Johnson's visual estimate of appellant's speed was alone sufficient to support his conviction for speeding.

**Affirmed.**

38 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF MISSOURI, Respondent, v. MARBIS RAWLINS, Appellant****WD 51165****COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT***932 S.W.2d 449; 1996 Mo. App. LEXIS 1657***October 8, 1996, Opinion Filed**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY. The Honorable John C. Miller, Judge.

**DISPOSITION:** Judgment of the trial court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a decision from the Circuit Court of LaFayette County (Missouri), which convicted her of speeding in violation of *Mo. Rev. Stat. § 304.010* (1994).

**OVERVIEW:** In her first point on appeal, defendant claimed that the trial court erred by allowing the trooper to state the speed recorded by his radar device without having established a sufficient foundation for such testimony. The court found there was a sufficient foundation to establish the accuracy of the radar device at the time of the stop. The trooper testified that he tested the radar device with tuning forks at the beginning and end of his shift and, prior to stopping defendant, he had also checked the device through its internal calibration check, and it was functioning properly. Under this evidence, the results of the radar test were properly admitted. The court found no approved jury instructions. The jury instruction given was proper because it tracked the language of the statute. Because speeding under § 304.010 was a non-code offense, the trial court was correct in submitting the issue of a fine to the jury. Finally, the court found that the prosecutor could refer to a matter not in evidence because it was in retaliation to the closing argument of defense counsel.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** radar, trooper, miles, speed, tested, closing argument, prosecutor, speeding, fine, traveling, accuracy, driving, site, defense counsel, traffic stop, courtroom, directing, tuning, fork, offense charged, guilty verdict, submitting, accurately, damaged, license, statutory language, jury instruction, state trooper, functioning, retaliation

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN1] A site test is of questionable utility in the case of a moving radar device, and therefore when moving radar is at issue, the controlling principle is that the State must prove the operational accuracy of the radar device at the time, not site, of its use in the stop at issue.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Verdicts > General Overview***

[HN2] The Mo. App. Instructions-Crim. 3d series does not include a specific verdict directing instruction for the offense of speeding. Mo. App. Instructions-Crim. 3d 304.02 is a generic verdict directing instruction, and its Notes on Use 2 states that Mo. App. Instructions-Crim. 3d 304.02 must be followed in cases where there is no appropriate verdict directing instruction for the crime charged.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Verdicts > General Overview***

[HN3] Because Mo. App. Instructions-Crim. 3d 304.02 is a generic instruction, it does not direct how the elements of the offense of speeding should be framed. Notes on Use 10 of Mo. App. Instructions-Crim. 3d 304.02 simply suggests a careful reading of the appropriate statutes, examination of the charge against the defendant, and consideration of the evidence. A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of offense charged. In cases challenging the language used in verdict directors, it has been repeatedly held that a verdict directing instruction, which is not erroneous for some other reason, meets the minimum requirements when in words and effect it follows the language of the statute.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview  
Criminal Law & Procedure > Sentencing > Fines***

[HN4] Under Mo. App. Instructions-Crim. 3d Notes on Use 16, when the offense charged is a class A, B, C, or D felony; an A, B or C misdemeanor; an infraction; or an unclassified code offense, the issue of a fine is to be determined by the court and not submitted to the jury. When the crime charged is a non-code offense, however, the issue of a fine is submitted to the jury.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN5] The offense of speeding, under *Mo. Rev. Stat. § 304.010*, is a non-code offense.

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted  
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview  
Legal Ethics > Prosecutorial Conduct***

[HN6] While it is improper for a prosecutor in closing argument to refer to subject matter not in evidence, there is no reversible error if such references are in retaliation to the closing argument of defense counsel.

**COUNSEL:** Weldon W. Perry, Jr. Lexington, Missouri, for appellants.

Terrence M. Messonnier Lexington, Missouri, for respondents.

**JUDGES:** Before Smith, P.J., Breckenridge and Ellis, JJ. All concur.

**OPINION BY: PATRICIA BRECKENRIDGE**

**OPINION:** [\*450] Marbis D. Rawlins appeals from a conviction of speeding, in violation of § 304.010, RSMo 1994. Ms. Rawlins contends that the trial court erred by allowing a state trooper to testify that he used a radar device to determine the speed of Ms. Rawlins' vehicle without a showing that the device had been adequately tested; that the trial court erred by submitting a jury instruction which authorized a guilty verdict on a finding of any speed exceeding 70 miles per hour, and which improperly allowed the jury to set the fine; and that the trial court erred by allowing the prosecutor to assert, during closing argument, that Ms. Rawlins could pursue a separate civil action to assert her claim that the trooper acted improperly when he stopped her, as such argument was outside the scope of the record in this case.

The judgment of the trial court is [\*\*2] affirmed.

On September 24, 1994, Trooper Eric Criss of the Missouri State Highway Patrol was traveling on eastbound Interstate 70 when he observed Ms. Rawlins' vehicle traveling westbound at what he believed to be an excessive speed. When Trooper Criss [\*451] checked Ms. Rawlins' speed with his radar unit, she was traveling at 86 miles per hour. Trooper Criss crossed the median, stopped the vehicle which Ms. Rawlins was driving, and asked her for her driver's license. A radio check of the driver's license which Ms. Rawlins gave him indicated that it was not on file with the issuing state, the State of New Jersey. Also, Trooper Criss received conflicting answers when he asked Ms. Rawlins and her passenger about the purpose of their trip, which made him suspicious that she might be a drug courier. Trooper Criss informed Ms. Rawlins that she was under arrest for operating a vehicle without a valid driver's license.

Trooper Criss placed Ms. Rawlins in handcuffs and waited for a drug-sniffing dog to arrive for a search of the vehicle. No drugs were found during the search, and Ms. Rawlins was released after being given a speeding ticket for traveling 86 miles per hour in a 65 miles per hour [\*\*3] zone. The traffic stop lasted a total of two and a half hours.

At the ensuing trial for speeding, Trooper Criss described the procedures he used to ensure that the radar device was operating accurately. Trooper Criss testified that he tested his radar device with tuning forks each day, both at the beginning and at the end of his shift, as well as after each enforcement. In addition, Trooper Criss testified that he used the internal calibration within the device to test its accuracy. Trooper Criss also stated that he had followed these procedures prior to his stop of Ms. Rawlins. Trooper Criss further testified that he had received training in the use and testing of both the radar device and the tuning forks, and that he had received a certificate in connection with this training.

When Trooper Criss was then asked how fast Ms. Rawlins was driving when he checked her speed with the radar device, Ms. Rawlins' counsel objected on the ground of a "lack of foundation concerning time, nature, extent, and location of test to ensure operability and accuracy of the device on this occasion." The trial court overruled the objection, and Trooper Criss testified that the radar device clocked Ms. [\*\*4] Rawlins at 86 miles per hour.

The jury found Ms. Rawlins guilty and assessed a fine in the amount of \$ 150.00. At the time of sentencing, the trial court followed the recommendation of the jury and ordered Ms. Rawlins to pay a fine of \$ 150.00 and court costs. Ms. Rawlins appeals.

In her first point on appeal, Ms. Rawlins claims that the trial court erred by allowing Trooper Criss to state the speed recorded by his radar device without having established a sufficient foundation for such testimony. According to Ms. Rawlins, the State failed to establish the accuracy of the radar device by showing that it had been tested at a time sufficiently close to the stop or at a location near the scene of the stop.

Ms. Rawlins argues that her conviction should be reversed because this case is controlled by *City of St. Louis v. Boecker*, 370 S.W.2d 731, 737 (Mo. App. 1963), *State v. Weatherwax*, 635 S.W.2d 34, 35 (Mo. App. 1982), and *City of Jackson v. Langford*, 648 S.W.2d 927, 929 (Mo. App. 1983), which hold that a speeding conviction cannot be based

upon a radar device reading without proof that the device was tested and found to be functioning properly at the site of [\*\*5] the alleged violation and reasonably close to the time it occurred.

In **Boecker**, the officer tested the radar device with a tuning fork before he left the police station to go on duty. 370 S.W.2d at 734. In **Weatherwax**, the officer tested the radar device with tuning forks while parked in the driveway of his home prior to going on duty. 635 S.W.2d at 34-35. In **Langford**, there was no evidence of the time and place of testing. 648 S.W.2d at 929. In these cases, the courts held the evidence to be insufficient to support a conviction.

These cases, however, are not controlling. First, they involve a stationary radar device, not moving radar as we have here. As the Missouri Supreme Court noted in *State v. Calvert*, 682 S.W.2d 474, 478 (Mo. banc 1984), [HN1] a site test is of questionable utility in the case of a moving radar device, and therefore when moving radar is at issue, the controlling principle is that the State must prove the operational accuracy of the [\*452] radar device at the time, not site, of its use in the stop at issue.

With respect to the requirement that the radar device be shown to be operating accurately at the time of its [\*\*6] use relative to the violation, the **Calvert** court looked to the facts of the case. 682 S.W.2d at 477-78. There, the arresting officer tested the radar device at the beginning and end of his shift on the day of the arrest; he was aware of the possibility of external interference with the radar readings, but had never experienced any interference in the area where he arrested the defendant; he was trained to evaluate the accuracy of the radar unit and could detect and correct for any spurious readings; and he periodically checked the radar readings with his calibrated speedometer. **Id.** In finding that this evidence was sufficient proof that the radar unit was operating accurately at the time of arrest, the Missouri Supreme Court effectively rejected the more stringent requirement of **Boecker** and **Weatherwax** that the radar unit be tested reasonably close to the time of the stop. **Id.** at 478.

Other courts have utilized the Calvert standard to affirm the admission of radar test results where there was no proof of a test of the radar unit at the site of the traffic stop or reasonably close in time to the stop. *State v. Shoemaker* [\*\*7] , 798 S.W.2d 191, 193 (Mo. App. 1990); *City of Berkeley v. Stringfellow*, 783 S.W.2d 501, 504 (Mo. App. 1990); *State v. Guenther*, 744 S.W.2d 564, 565 (Mo. App. 1988).

In applying this standard to the facts of this case, we find there is sufficient foundation to establish the accuracy of the radar device at the time of Ms. Rawlins' stop. Trooper Criss testified that he tested the radar device with tuning forks at the beginning and end of his shift. Prior to stopping Ms. Rawlins, he had also checked the device through its internal calibration check, and it was functioning properly. He was trained to detect if there was any radio frequency interference in the location of Ms. Rawlins' stop and there was none. Under this evidence, the results of the radar test were properly admitted. Ms. Rawlins' first point on appeal is denied.

In her second point on appeal, Ms. Rawlins claims that the trial court erred by submitting a jury instruction which did not require a finding that she was driving at a speed of 86 miles per hour, but instead authorized a guilty verdict on a finding of any speed exceeding 70 miles per hour. Ms. Rawlins further complains that the instruction allowed the [\*\*8] jury, not the trial court, to set the fine, and she argues that such a provision was in violation of Notes on Use 2 accompanying MAI-CR3d 304.02.

[HN2] The MAI-CR3d series does not include a specific verdict directing instruction for the offense of speeding. MAI-CR3d 304.02 is a generic verdict directing instruction, and its Notes on Use 2 states that MAI-CR3d 304.02 must be followed in cases where there is no appropriate verdict directing instruction for the crime charged. In reviewing the verdict director submitted by the trial court as Instruction No. 5, we find that, although it purports to follow the format of MAI-CR3d 332.40, it also complies with the format of MAI-CR3d 304.02.

One element of Instruction No. 5, as submitted by the trial court, required that the jury find that Ms. Rawlins drove her motor vehicle "at a speed in excess of seventy miles per hour." The State's evidence was that Ms. Rawlins was traveling at 86 miles per hour, while Ms. Rawlins testified that her speed was 65 or 66 miles per hour, but in no event

greater than 70. Ms. Rawlins contends that Instruction No. 5 gave the jury a roving commission, because the jury may have found her guilty predicated upon a finding [\*\*9] of fact contrary to evidence, i.e., that she was driving at a speed of 71 to 85 miles per hour, or over 86 miles per hour.

[HN3] Because MAI-CR3d 304.02 is a generic instruction, it does not direct how the elements of the offense of speeding should be framed. Notes on Use 10 of MAI-CR3d 304.02 simply suggests a careful reading of the appropriate statutes, examination of the charge against the defendant, and consideration of the evidence. "A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential [\*453] elements of offense charged." *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988). In cases challenging the language used in verdict directors, "it has been repeatedly held that a verdict directing instruction, which is not erroneous for some other reason, meets the minimum requirements when in words and effect it follows the language of the statute. . . ." *State v. Hammond*, 571 S.W.2d 114, 116 (Mo. banc 1978) (quoting *State v. Jones*, 365 S.W.2d 508, 515 (Mo. 1963) (citations omitted)).

Here, Instruction No. 5 incorporated the concept and a portion of the language of § [\*\*10] 304.010, which provides that no vehicle shall be "operated in excess of seventy miles per hour. . . ." Nothing in the charge or evidence of the case makes this statutory language inappropriate. From the testimony at trial, Ms. Rawlins was either driving 86 miles per hour or under 70 miles per hour. There is no contention by anyone of any other speed. The use of the statutory language in the instruction to require a finding that Ms. Rawlins was driving in excess of 70 miles per hour was not erroneous.

Ms. Rawlins next contends that the instruction was contrary to MAI-CR3d 304.02, Notes on Use 2, because it directed the jury, not the court, to set the fine. Her claim of error fails, however, because Notes on Use 16, rather than Notes on Use 2, governs the submission of punishment to the jury. [HN4] Under Notes on Use 16, when the offense charged is a class A, B, C, or D felony; an A, B or C misdemeanor; an infraction; or an unclassified code offense, the issue of a fine is to be determined by the court and not submitted to the jury. When the crime charged is a non-code offense, however, the issue of a fine is submitted to the jury.

[HN5] The offense of speeding, under § 304.010, is a non-code [\*\*11] offense. **See** *State v. Canepa*, 670 S.W.2d 205, 206 (Mo. App. 1984). Therefore, the trial court was correct in submitting the issue of a fine to the jury. **Id.** Point two is denied.

In her third point on appeal, Ms. Rawlins claims that the trial court erred by allowing the prosecutor, during the rebuttal portion of his closing argument, to make statements that were outside the scope of the record in this case. The State, on the other hand, argues that the prosecutor's remarks were a proper response to issues raised during defense counsel's closing argument.

During closing argument, defense counsel referred to the deep personal disgrace which Ms. Rawlins and her passenger felt they had experienced during the traffic stop, and emphasized that Ms. Rawlins spent two-and-a-half hours in handcuffs during a fruitless search. Defense counsel argued that Ms. Rawlins had already been punished enough by the nature of the stop and, for this reason, the jury should find her not guilty. Specifically, defense counsel stated:

Even if there was overwhelming, competent evidence in this case that she was traveling 86 miles per hour as alleged in the ticket that Trooper [\*\*12] Criss filled out here, . . . did she deserve to be treated like she was? Is that fair? Is that free? I'm here to respectfully submit to you on Marbis' behalf that the answer to those questions is no.

And how do you stop that overbearing, oppressive, intrusive governmental intervention in someone's life in these same or similar circumstances? There's only one way, ladies and gentlemen. There's only way [sic]. And that's through you jurors collectively assembled as you are in this courtroom today, because your verdict is going to send a message. It's going to send a message as to whether or not this kind of thing is going to be countenanced, approved, tolerated, acquiesced. Is it? Should it be?

....

I don't think we want that kind of overly aggressive, intrusive law enforcement in this country, in this county, predicated on threshold facts like these, escalating into a two-and-a-half-hour ordeal in the darkness, in the cold on something like this.

Ladies and gentlemen, long story short, I'm here on behalf of Marbis to ask you, when you retire to your jury room, to give her the benefit of the reasonable doubt on this occasion under the totality of these circumstances. I'm [\*\*13] here to respectfully [\*454] submit to you that if punishment is deserved under these circumstances here for a speeding episode, she's already served it. She served it out there on that highway. And we don't need to add financial insult to emotional injury. We're asking for your verdict of not guilty and the form and signature upon Verdict Form B. Thank you.

In the rebuttal portion of closing argument, the prosecutor responded to defense counsel's plea for jury nullification by arguing that if Ms. Rawlins was wrongfully damaged by the nature of the traffic stop, she would be able to pursue a claim for that damage in a separate cause of action. The prosecutor stated:

Let me start with a point Mr. Perry raised during his closing argument, that maybe, if you think about it long, you'll realize that life's not correct. He's argued that she has been damaged by what Trooper Criss did and that the only place in this country that she can come to get her rights rectified is this courtroom. Mr. Perry knows that that's not true. Mr. Perry knows there's a courtroom in Kansas City, a federal courtroom, where people who believe they've been held in violation of their rights can go and seek money damages. [\*\*14] . . . If Ms. Rawlins thinks she was damaged by that, she can file a lawsuit and recover those damages. . . . Regardless of what you do today -- even if you returned a not guilty verdict today just to avoid additional punishment, she could still go and get full recovery.

Defense counsel then objected that the prosecutor's argument was improper, and the objection was overruled by the trial court.

In her brief, Ms. Rawlins argues that the prosecutor's remarks on the issue of her ability to seek redress in a subsequent civil suit were improper because they were beyond the issues and evidence which the jury had before it in this case. But Ms. Rawlins' argument does not merit relief, for [HN6] while it is improper for a prosecutor in closing argument to refer to subject matter not in evidence, there is no reversible error if such references are in retaliation to the closing argument of defense counsel. *State v. Griffin, 745 S.W.2d 183, 185 (Mo. App. 1987)*. That is the case here, where defense counsel had invited retaliation by urging the jury to acquit his client as a way of compensating for the alleged improprieties by a state trooper. A defendant may not provoke a reply to his [\*\*15] or her own argument and then claim error. **Id.** Point denied.

The judgment of the trial court is affirmed.

Patricia Breckenridge, Judge

All concur.

39 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF MISSOURI, Respondent, v. MARBIS RAWLINS, Appellant****WD 51165****COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT***932 S.W.2d 449; 1996 Mo. App. LEXIS 1657***October 8, 1996, Opinion Filed**

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY. The Honorable John C. Miller, Judge.

**DISPOSITION:** Judgment of the trial court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a decision from the Circuit Court of LaFayette County (Missouri), which convicted her of speeding in violation of *Mo. Rev. Stat. § 304.010* (1994).

**OVERVIEW:** In her first point on appeal, defendant claimed that the trial court erred by allowing the trooper to state the speed recorded by his radar device without having established a sufficient foundation for such testimony. The court found there was a sufficient foundation to establish the accuracy of the radar device at the time of the stop. The trooper testified that he tested the radar device with tuning forks at the beginning and end of his shift and, prior to stopping defendant, he had also checked the device through its internal calibration check, and it was functioning properly. Under this evidence, the results of the radar test were properly admitted. The court found no approved jury instructions. The jury instruction given was proper because it tracked the language of the statute. Because speeding under § 304.010 was a non-code offense, the trial court was correct in submitting the issue of a fine to the jury. Finally, the court found that the prosecutor could refer to a matter not in evidence because it was in retaliation to the closing argument of defense counsel.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** radar, trooper, miles, speed, tested, closing argument, prosecutor, speeding, fine, traveling, accuracy, driving, site, defense counsel, traffic stop, courtroom, directing, tuning, fork, offense charged, guilty verdict, submitting, accurately, damaged, license, statutory language, jury instruction, state trooper, functioning, retaliation

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN1] A site test is of questionable utility in the case of a moving radar device, and therefore when moving radar is at issue, the controlling principle is that the State must prove the operational accuracy of the radar device at the time, not site, of its use in the stop at issue.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Verdicts > General Overview***

[HN2] The Mo. App. Instructions-Crim. 3d series does not include a specific verdict directing instruction for the offense of speeding. Mo. App. Instructions-Crim. 3d 304.02 is a generic verdict directing instruction, and its Notes on Use 2 states that Mo. App. Instructions-Crim. 3d 304.02 must be followed in cases where there is no appropriate verdict directing instruction for the crime charged.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Verdicts > General Overview***

[HN3] Because Mo. App. Instructions-Crim. 3d 304.02 is a generic instruction, it does not direct how the elements of the offense of speeding should be framed. Notes on Use 10 of Mo. App. Instructions-Crim. 3d 304.02 simply suggests a careful reading of the appropriate statutes, examination of the charge against the defendant, and consideration of the evidence. A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of offense charged. In cases challenging the language used in verdict directors, it has been repeatedly held that a verdict directing instruction, which is not erroneous for some other reason, meets the minimum requirements when in words and effect it follows the language of the statute.

***Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview  
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview  
Criminal Law & Procedure > Sentencing > Fines***

[HN4] Under Mo. App. Instructions-Crim. 3d Notes on Use 16, when the offense charged is a class A, B, C, or D felony; an A, B or C misdemeanor; an infraction; or an unclassified code offense, the issue of a fine is to be determined by the court and not submitted to the jury. When the crime charged is a non-code offense, however, the issue of a fine is submitted to the jury.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN5] The offense of speeding, under *Mo. Rev. Stat. § 304.010*, is a non-code offense.

***Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted  
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview  
Legal Ethics > Prosecutorial Conduct***

[HN6] While it is improper for a prosecutor in closing argument to refer to subject matter not in evidence, there is no reversible error if such references are in retaliation to the closing argument of defense counsel.

**COUNSEL:** Weldon W. Perry, Jr. Lexington, Missouri, for appellants.

Terrence M. Messonnier Lexington, Missouri, for respondents.

**JUDGES:** Before Smith, P.J., Breckenridge and Ellis, JJ. All concur.

**OPINION BY: PATRICIA BRECKENRIDGE**

**OPINION:** [\*450] Marbis D. Rawlins appeals from a conviction of speeding, in violation of § 304.010, RSMo 1994. Ms. Rawlins contends that the trial court erred by allowing a state trooper to testify that he used a radar device to determine the speed of Ms. Rawlins' vehicle without a showing that the device had been adequately tested; that the trial court erred by submitting a jury instruction which authorized a guilty verdict on a finding of any speed exceeding 70 miles per hour, and which improperly allowed the jury to set the fine; and that the trial court erred by allowing the prosecutor to assert, during closing argument, that Ms. Rawlins could pursue a separate civil action to assert her claim that the trooper acted improperly when he stopped her, as such argument was outside the scope of the record in this case.

The judgment of the trial court is [\*\*2] affirmed.

On September 24, 1994, Trooper Eric Criss of the Missouri State Highway Patrol was traveling on eastbound Interstate 70 when he observed Ms. Rawlins' vehicle traveling westbound at what he believed to be an excessive speed. When Trooper Criss [\*451] checked Ms. Rawlins' speed with his radar unit, she was traveling at 86 miles per hour. Trooper Criss crossed the median, stopped the vehicle which Ms. Rawlins was driving, and asked her for her driver's license. A radio check of the driver's license which Ms. Rawlins gave him indicated that it was not on file with the issuing state, the State of New Jersey. Also, Trooper Criss received conflicting answers when he asked Ms. Rawlins and her passenger about the purpose of their trip, which made him suspicious that she might be a drug courier. Trooper Criss informed Ms. Rawlins that she was under arrest for operating a vehicle without a valid driver's license.

Trooper Criss placed Ms. Rawlins in handcuffs and waited for a drug-sniffing dog to arrive for a search of the vehicle. No drugs were found during the search, and Ms. Rawlins was released after being given a speeding ticket for traveling 86 miles per hour in a 65 miles per hour [\*\*3] zone. The traffic stop lasted a total of two and a half hours.

At the ensuing trial for speeding, Trooper Criss described the procedures he used to ensure that the radar device was operating accurately. Trooper Criss testified that he tested his radar device with tuning forks each day, both at the beginning and at the end of his shift, as well as after each enforcement. In addition, Trooper Criss testified that he used the internal calibration within the device to test its accuracy. Trooper Criss also stated that he had followed these procedures prior to his stop of Ms. Rawlins. Trooper Criss further testified that he had received training in the use and testing of both the radar device and the tuning forks, and that he had received a certificate in connection with this training.

When Trooper Criss was then asked how fast Ms. Rawlins was driving when he checked her speed with the radar device, Ms. Rawlins' counsel objected on the ground of a "lack of foundation concerning time, nature, extent, and location of test to ensure operability and accuracy of the device on this occasion." The trial court overruled the objection, and Trooper Criss testified that the radar device clocked Ms. [\*\*4] Rawlins at 86 miles per hour.

The jury found Ms. Rawlins guilty and assessed a fine in the amount of \$ 150.00. At the time of sentencing, the trial court followed the recommendation of the jury and ordered Ms. Rawlins to pay a fine of \$ 150.00 and court costs. Ms. Rawlins appeals.

In her first point on appeal, Ms. Rawlins claims that the trial court erred by allowing Trooper Criss to state the speed recorded by his radar device without having established a sufficient foundation for such testimony. According to Ms. Rawlins, the State failed to establish the accuracy of the radar device by showing that it had been tested at a time sufficiently close to the stop or at a location near the scene of the stop.

Ms. Rawlins argues that her conviction should be reversed because this case is controlled by *City of St. Louis v. Boecker*, 370 S.W.2d 731, 737 (Mo. App. 1963), *State v. Weatherwax*, 635 S.W.2d 34, 35 (Mo. App. 1982), and *City of Jackson v. Langford*, 648 S.W.2d 927, 929 (Mo. App. 1983), which hold that a speeding conviction cannot be based

upon a radar device reading without proof that the device was tested and found to be functioning properly at the site of [\*\*5] the alleged violation and reasonably close to the time it occurred.

In **Boecker**, the officer tested the radar device with a tuning fork before he left the police station to go on duty. 370 S.W.2d at 734. In **Weatherwax**, the officer tested the radar device with tuning forks while parked in the driveway of his home prior to going on duty. 635 S.W.2d at 34-35. In **Langford**, there was no evidence of the time and place of testing. 648 S.W.2d at 929. In these cases, the courts held the evidence to be insufficient to support a conviction.

These cases, however, are not controlling. First, they involve a stationary radar device, not moving radar as we have here. As the Missouri Supreme Court noted in *State v. Calvert*, 682 S.W.2d 474, 478 (Mo. banc 1984), [HN1] a site test is of questionable utility in the case of a moving radar device, and therefore when moving radar is at issue, the controlling principle is that the State must prove the operational accuracy of the [\*452] radar device at the time, not site, of its use in the stop at issue.

With respect to the requirement that the radar device be shown to be operating accurately at the time of its [\*\*6] use relative to the violation, the **Calvert** court looked to the facts of the case. 682 S.W.2d at 477-78. There, the arresting officer tested the radar device at the beginning and end of his shift on the day of the arrest; he was aware of the possibility of external interference with the radar readings, but had never experienced any interference in the area where he arrested the defendant; he was trained to evaluate the accuracy of the radar unit and could detect and correct for any spurious readings; and he periodically checked the radar readings with his calibrated speedometer. **Id.** In finding that this evidence was sufficient proof that the radar unit was operating accurately at the time of arrest, the Missouri Supreme Court effectively rejected the more stringent requirement of **Boecker** and **Weatherwax** that the radar unit be tested reasonably close to the time of the stop. **Id.** at 478.

Other courts have utilized the Calvert standard to affirm the admission of radar test results where there was no proof of a test of the radar unit at the site of the traffic stop or reasonably close in time to the stop. *State v. Shoemaker* [\*\*7] , 798 S.W.2d 191, 193 (Mo. App. 1990); *City of Berkeley v. Stringfellow*, 783 S.W.2d 501, 504 (Mo. App. 1990); *State v. Guenther*, 744 S.W.2d 564, 565 (Mo. App. 1988).

In applying this standard to the facts of this case, we find there is sufficient foundation to establish the accuracy of the radar device at the time of Ms. Rawlins' stop. Trooper Criss testified that he tested the radar device with tuning forks at the beginning and end of his shift. Prior to stopping Ms. Rawlins, he had also checked the device through its internal calibration check, and it was functioning properly. He was trained to detect if there was any radio frequency interference in the location of Ms. Rawlins' stop and there was none. Under this evidence, the results of the radar test were properly admitted. Ms. Rawlins' first point on appeal is denied.

In her second point on appeal, Ms. Rawlins claims that the trial court erred by submitting a jury instruction which did not require a finding that she was driving at a speed of 86 miles per hour, but instead authorized a guilty verdict on a finding of any speed exceeding 70 miles per hour. Ms. Rawlins further complains that the instruction allowed the [\*\*8] jury, not the trial court, to set the fine, and she argues that such a provision was in violation of Notes on Use 2 accompanying MAI-CR3d 304.02.

[HN2] The MAI-CR3d series does not include a specific verdict directing instruction for the offense of speeding. MAI-CR3d 304.02 is a generic verdict directing instruction, and its Notes on Use 2 states that MAI-CR3d 304.02 must be followed in cases where there is no appropriate verdict directing instruction for the crime charged. In reviewing the verdict director submitted by the trial court as Instruction No. 5, we find that, although it purports to follow the format of MAI-CR3d 332.40, it also complies with the format of MAI-CR3d 304.02.

One element of Instruction No. 5, as submitted by the trial court, required that the jury find that Ms. Rawlins drove her motor vehicle "at a speed in excess of seventy miles per hour." The State's evidence was that Ms. Rawlins was traveling at 86 miles per hour, while Ms. Rawlins testified that her speed was 65 or 66 miles per hour, but in no event

greater than 70. Ms. Rawlins contends that Instruction No. 5 gave the jury a roving commission, because the jury may have found her guilty predicated upon a finding [\*\*9] of fact contrary to evidence, i.e., that she was driving at a speed of 71 to 85 miles per hour, or over 86 miles per hour.

[HN3] Because MAI-CR3d 304.02 is a generic instruction, it does not direct how the elements of the offense of speeding should be framed. Notes on Use 10 of MAI-CR3d 304.02 simply suggests a careful reading of the appropriate statutes, examination of the charge against the defendant, and consideration of the evidence. "A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential [\*453] elements of offense charged." *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988). In cases challenging the language used in verdict directors, "it has been repeatedly held that a verdict directing instruction, which is not erroneous for some other reason, meets the minimum requirements when in words and effect it follows the language of the statute. . . ." *State v. Hammond*, 571 S.W.2d 114, 116 (Mo. banc 1978) (quoting *State v. Jones*, 365 S.W.2d 508, 515 (Mo. 1963) (citations omitted)).

Here, Instruction No. 5 incorporated the concept and a portion of the language of § [\*\*10] 304.010, which provides that no vehicle shall be "operated in excess of seventy miles per hour. . . ." Nothing in the charge or evidence of the case makes this statutory language inappropriate. From the testimony at trial, Ms. Rawlins was either driving 86 miles per hour or under 70 miles per hour. There is no contention by anyone of any other speed. The use of the statutory language in the instruction to require a finding that Ms. Rawlins was driving in excess of 70 miles per hour was not erroneous.

Ms. Rawlins next contends that the instruction was contrary to MAI-CR3d 304.02, Notes on Use 2, because it directed the jury, not the court, to set the fine. Her claim of error fails, however, because Notes on Use 16, rather than Notes on Use 2, governs the submission of punishment to the jury. [HN4] Under Notes on Use 16, when the offense charged is a class A, B, C, or D felony; an A, B or C misdemeanor; an infraction; or an unclassified code offense, the issue of a fine is to be determined by the court and not submitted to the jury. When the crime charged is a non-code offense, however, the issue of a fine is submitted to the jury.

[HN5] The offense of speeding, under § 304.010, is a non-code [\*\*11] offense. **See** *State v. Canepa*, 670 S.W.2d 205, 206 (Mo. App. 1984). Therefore, the trial court was correct in submitting the issue of a fine to the jury. **Id.** Point two is denied.

In her third point on appeal, Ms. Rawlins claims that the trial court erred by allowing the prosecutor, during the rebuttal portion of his closing argument, to make statements that were outside the scope of the record in this case. The State, on the other hand, argues that the prosecutor's remarks were a proper response to issues raised during defense counsel's closing argument.

During closing argument, defense counsel referred to the deep personal disgrace which Ms. Rawlins and her passenger felt they had experienced during the traffic stop, and emphasized that Ms. Rawlins spent two-and-a-half hours in handcuffs during a fruitless search. Defense counsel argued that Ms. Rawlins had already been punished enough by the nature of the stop and, for this reason, the jury should find her not guilty. Specifically, defense counsel stated:

Even if there was overwhelming, competent evidence in this case that she was traveling 86 miles per hour as alleged in the ticket that Trooper [\*\*12] Criss filled out here, . . . did she deserve to be treated like she was? Is that fair? Is that free? I'm here to respectfully submit to you on Marbis' behalf that the answer to those questions is no.

And how do you stop that overbearing, oppressive, intrusive governmental intervention in someone's life in these same or similar circumstances? There's only one way, ladies and gentlemen. There's only way [sic]. And that's through you jurors collectively assembled as you are in this courtroom today, because your verdict is going to send a message. It's going to send a message as to whether or not this kind of thing is going to be countenanced, approved, tolerated, acquiesced. Is it? Should it be?

....

I don't think we want that kind of overly aggressive, intrusive law enforcement in this country, in this county, predicated on threshold facts like these, escalating into a two-and-a-half-hour ordeal in the darkness, in the cold on something like this.

Ladies and gentlemen, long story short, I'm here on behalf of Marbis to ask you, when you retire to your jury room, to give her the benefit of the reasonable doubt on this occasion under the totality of these circumstances. I'm [\*\*13] here to respectfully [\*454] submit to you that if punishment is deserved under these circumstances here for a speeding episode, she's already served it. She served it out there on that highway. And we don't need to add financial insult to emotional injury. We're asking for your verdict of not guilty and the form and signature upon Verdict Form B. Thank you.

In the rebuttal portion of closing argument, the prosecutor responded to defense counsel's plea for jury nullification by arguing that if Ms. Rawlins was wrongfully damaged by the nature of the traffic stop, she would be able to pursue a claim for that damage in a separate cause of action. The prosecutor stated:

Let me start with a point Mr. Perry raised during his closing argument, that maybe, if you think about it long, you'll realize that life's not correct. He's argued that she has been damaged by what Trooper Criss did and that the only place in this country that she can come to get her rights rectified is this courtroom. Mr. Perry knows that that's not true. Mr. Perry knows there's a courtroom in Kansas City, a federal courtroom, where people who believe they've been held in violation of their rights can go and seek money damages. [\*\*14] . . . If Ms. Rawlins thinks she was damaged by that, she can file a lawsuit and recover those damages. . . . Regardless of what you do today -- even if you returned a not guilty verdict today just to avoid additional punishment, she could still go and get full recovery.

Defense counsel then objected that the prosecutor's argument was improper, and the objection was overruled by the trial court.

In her brief, Ms. Rawlins argues that the prosecutor's remarks on the issue of her ability to seek redress in a subsequent civil suit were improper because they were beyond the issues and evidence which the jury had before it in this case. But Ms. Rawlins' argument does not merit relief, for [HN6] while it is improper for a prosecutor in closing argument to refer to subject matter not in evidence, there is no reversible error if such references are in retaliation to the closing argument of defense counsel. *State v. Griffin, 745 S.W.2d 183, 185 (Mo. App. 1987)*. That is the case here, where defense counsel had invited retaliation by urging the jury to acquit his client as a way of compensating for the alleged improprieties by a state trooper. A defendant may not provoke a reply to his [\*\*15] or her own argument and then claim error. **Id.** Point denied.

The judgment of the trial court is affirmed.

Patricia Breckenridge, Judge

All concur.

40 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF MISSOURI, Plaintiff-Respondent, vs. ROBERT MICHAEL PATRICK,  
Defendant-Appellant.**

**No. 20417**

**COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, DIVISION TWO**

*920 S.W.2d 633; 1996 Mo. App. LEXIS 716*

**April 23, 1996, FILED**

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY. Honorable W. Robert Cope, Circuit Judge.

**DISPOSITION:**

AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Circuit Court of Ripley County (Missouri) that found him guilty, following a jury trial, of driving a motor vehicle in excess of the speed limit set by law in *Mo. Rev. Stat. § 304.010.2*.

**OVERVIEW:** A highway patrol officer stopped and ticketed defendant for traveling 95 miles per hour in a 55 mile per hour zone. Defendant was found guilty of driving a motor vehicle in excess of the speed limit set in *§ 304.010.2*. He was sentenced to 60 days in the county jail and fined \$ 500. The court affirmed because the ticket was not a nullity and so fatally defective that the trial court had no power to amend the information due to the lack of jurisdiction. Defendant did not go to trial on the ticket, but rather on an amended information in lieu of the ticket. Whatever the defect in the ticket, the trial court still had subject matter jurisdiction over the offense and personal jurisdiction over defendant. Therefore, the trial court had the authority to permit the amendment of the information so long as the correction did not violate *Mo. R. Crim. P. 23.08* and *Mo. Rev. Stat. § 545.300*. Furthermore, the trial court did not abuse its discretion or prejudice defendant in allowing the state to file an amended information and endorse a surprise witness on the day of trial, and in denying defendant's motion for a continuance.

**OUTCOME:** The court affirmed the judgment of the trial court that convicted and sentenced defendant for driving a motor vehicle in excess of the statutory speed limit.

**CORE TERMS:** ticket, highway, radar, miles, continuance, speeding, mph, endorsement, prosecutor, driving, speed,

defense counsel, tuning, forks, amended information, maximum speed, motor vehicle, surprise, abused, traffic ticket, abuse of discretion, fatally defective, surprised, different offense, accuracy, originally charged, speed limit, disadvantaged, disadvantage, indictment

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Jurisdiction > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Indictments***

[HN1] Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. Circuit courts obviously have subject matter jurisdiction to try crimes, including the felony of unlawful use of weapons. Mo. Const. art. V, § 14(a). Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions. That language in those cases should not be relied on in the future. Equally inaccurate is the statement in at least one case that absence of an information deprives the trial court of jurisdiction over the person.

#### ***Civil Procedure > Jurisdiction > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

#### ***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

[HN2] Whatever the defect in a ticket, the trial court still has subject matter jurisdiction over the offense and personal jurisdiction over defendant. It follows that the trial court has authority to permit amendment of an information so long as the correction does not run afoul of Mo. R. Crim. P. 23.08 and *Mo. Rev. Stat. § 545.300*.

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN3] Mo. R. Crim. P. 23.08 provides that any information may be amended at any time before verdict or finding if no additional or different offense is charged and if a defendant's substantial rights are not thereby prejudiced. No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare his defense by reason of such amendment or substitution.

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN4] Mo. R. Crim. P. 23.08's statutory counterpart, *Mo. Rev. Stat. § 545.300*, also deals with amending an information and states that no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. Applying the foregoing, Missouri courts consistently hold that it is not permissible to amend an information if the effect of the amendment is to charge an offense different from the one originally charged. A lesser included offense, however, is not a different offense within the meaning of the foregoing rule.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN5] The state of Missouri has two statutes that set maximum speed limits for persons operating motor vehicles upon the highways of this state. *Mo. Rev. Stat. § 304.009*, commonly referred to as the non-point statute, set the uniform maximum speed limit at 55 miles per hour for all roads and highways of this state which are not part of the interstate system of highways. *Mo. Rev. Stat. § 304.009.1*. Drivers who are charged and convicted under *§ 304.009.1* shall not accumulate points until and unless such speed exceeds those maximums set by other state statute. *Mo. Rev. Stat. § 304.009.2*. The other statute, *Mo. Rev. Stat. § 304.010* (commonly known as the point statute), set different maximum speed limits on the highways of this state depending upon the type of highway, vehicle, and lighting conditions. The

relevant section here is *Mo. Rev. Stat. § 304.010.2(3)*, which provides that no vehicle shall be operated in excess of 60 miles per hour on any undivided highway designated and marked as a federal route when lighted lamps are required by law.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN6] The offense of driving in excess of the limits set in *Mo. Rev. Stat. § 304.010* cannot be proved without proving incidentally that the offender traveled over 55 miles per hour. At speeds over 65 miles per hour, the two offenses, i.e. driving over 55 miles per hour and driving over 65 miles per hour are identical offenses, not a greater inclusive and a lesser included. The same facts (in the over-65 range) would establish an offense against either statute, at the prosecutor's election.

***Criminal Law & Procedure > Trials > Judicial Discretion***

***Criminal Law & Procedure > Witnesses > Presentation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses***

[HN7] Under Mo. R. Crim. P. 23.01(f), the court has discretion to permit the late endorsement of any material witness. Absent an abuse of discretion or prejudice to the appellant, the conviction should not be overturned because a witness was endorsed on the day of trial. In exercising its discretion, the trial court should consider whether appellant waived his objection, whether the state intended to surprise or disadvantage appellant, whether appellant was actually surprised or disadvantaged, and whether the testimony could have been readily foreseen by appellant.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Criminal Law & Procedure > Witnesses > Presentation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses***

[HN8] While the court understands that Mo. R. Crim. P. 23.01(f) is intended to discourage the late endorsement of a witness, the court also recognizes that late endorsements must sometimes be permitted if they can be made without prejudice to a defendant's rights.

***Civil Procedure > Pretrial Matters > Continuances***

***Criminal Law & Procedure > Trials > Continuances***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances***

[HN9] The decision to grant or deny a continuance is a matter of trial court discretion and an appellate court will not interfere unless it clearly appears that such discretion has been abused. The party requesting the continuance bears the burden of showing prejudice, and a very strong showing is required to demonstrate an abuse of discretion.

**COUNSEL:**

Daniel T. Moore, of Poplar Bluff, for appellant.

Paul E. Oesterreicher, of Doniphan, for respondent.

**JUDGES:** Kenneth W. Shrum, Chief Judge. PREWITT, P.J. - CONCURS, PARRISH, J. - CONCURS

**OPINION BY:** Kenneth W. Shrum

**OPINION:**

[\*634] Robert Michael Patrick (Defendant) was convicted by a jury of driving a motor vehicle "in excess of the speed limit set by law" in violation of § 304.010.2, *RSMo 1994*. n1 He was sentenced in accordance with the jury's

verdict to sixty days in the county jail and fined \$ 500. Defendant appeals, contending that the trial court lacked subject matter jurisdiction because of an alleged defect in the original information. He also charges that the trial court erred in allowing the State to file an amended information and to endorse a "surprise witness" on the day of trial. Finally, Defendant claims that the trial court abused its discretion when it denied his motion for continuance. We affirm.

n1 Sections 304.009, RSMo 1994 and 304.010, RSMo 1994 set the maximum speed limits for persons driving on state highways at the time of this offense. On March 13, 1996, the Governor signed H.B. 1047, an enactment that changes maximum speed limits on most of Missouri's highways. Necessarily, this opinion is confined to an analysis of §§ 304.009 and .010, RSMo 1994.

[\*\*2]

## FACTS

From the legal file and the transcript of Defendant's trial, we summarize facts germane to Defendant's points on appeal.

On December 3, 1994, at approximately 6:30 p.m., Missouri State Highway Patrol Sergeant Ronald T. Berry was driving west on U.S. Highway 160 "just west of Highway junction 21" in Ripley County when he saw an automobile approaching him. Because of his impression that the oncoming car was "coming at me at a very high rate of speed," Berry activated the mobile radar unit in his car, whereupon it measured the speed of the vehicle at 95 miles per hour. As soon as the car passed, Berry turned around to follow and ultimately stopped it. After learning that Defendant was the operator of the vehicle, Berry completed a multi-copy, preprinted Uniform Complaint & Summons, substantially similar in form and content to Supreme Court Form 37.A. A Uniform Complaint & Summons is commonly referred to as a "traffic ticket." For convenience, we will refer to the one involved in this case as "the ticket."

Berry used an "x" on the ticket to indicate the Defendant "Did unlawfully operate" his vehicle. In the portion of the ticket that calls for a description of the violation, [\*\*3] Berry wrote, "Speeding 95/55 W/B east of 21." In other parts of the ticket, Berry wrote "95" mph as being Defendant's speed when the limit was "55" mph and also described Defendant's actions as being "in violation of 304.010 RSMo."

After issuing the ticket to Defendant, Berry checked his radar unit with tuning forks and determined that the radar was working properly at that time.

On June 16, 1995, four days before trial, the State filed a motion for leave to file an information in lieu of the ticket. The proposed information endorsed a new witness in addition to Berry; namely, Richard W. King, a patrol employee whose job duties included certification of the annual calibration of radar tuning forks and a monthly check of the accuracy of the device used to calibrate tuning forks. Defendant's counsel did not learn of the State's intention to file an information in lieu of the ticket and about the proposed endorsement of a new witness until around noon, June 19, 1995, approximately 20 hours before trial.

During the pre-trial conference on June 20th, Defendant's lawyer first moved to dismiss the charge, arguing that "no charge has been properly brought as [the ticket] lacks the necessary [\*\*4] elements." The trial court never ruled on that motion, but instead sustained the State's request to file an information [\*\*635] in lieu of the ticket. n2 Moreover, the trial court overruled Defendant's additional objection to the belated endorsement of Richard W. King as a witness and also denied Defendant's request for a continuance. The trial judge explained his ruling thusly:

"Mr. Moore, I'm having some problem in understanding exactly how the defense is prejudiced by Mr. King being able to testify today if I allow you some time to talk to him before his testimony. And we will have some time to do that and will allow you to do that. I'm having some problem in understanding what the prejudice will be since you have said or indicated on the record that this witness is pretty much cut

and dry [sic]. I think we all understand that he is going to . . . testify that he checked the radar device with tuning forks and it was working, which is an essential element of the state's case."

n2 The relevant part of the information reads:

"Defendant . . . in violation of *Section 304.010.2, RSMo.*, committed the misdemeanor of speeding . . . in that on . . . December 3, 1994, in [Ripley County, Missouri], the defendant operated a motor vehicle on a highway known as U.S. Highway 160 by speeding in excess of the speed limit set by law."

[\*\*5]

## DISCUSSION AND DECISION

### *Lack of Jurisdiction*

Defendant's first point maintains that the trial court "erred in overruling Defendant's motion to dismiss the uniform traffic ticket in that [the ticket issued by Berry] and filed by the Prosecutor was fatally defective because it only contained the legal conclusion of 'speeding', and failed to allege the necessary elements that Defendant was 'operating a motor vehicle in excess of the posted speed limit of 70 mph', in violation of *RSMo 304.010*, and, as a result of this omission, the court acquired no jurisdiction."

To support this argument, Defendant relies on *State v. Owens*, 740 S.W.2d 269 (Mo.App. 1987) and *State v. Prock*, 759 S.W.2d 854 (Mo.App. 1988), which in turn relied substantially upon *State v. Gilmore*, 650 S.W.2d 627 (Mo.banc 1983). *Gilmore* and its progeny held that if an information was insufficient, the trial court acquired no jurisdiction, and whatever transpired thereafter was a complete nullity. *Id.* at 628[2]. However, Defendant does not mention that this principle was disapproved and *Gilmore* was specifically overruled by *State v. Parkhurst*, [\*\*6] 845 S.W.2d 31 (Mo.banc 1992).

*Gilmore* and the other cases cited by Defendant predate *Parkhurst* and are of no aid under this point. In holding an information valid, *Parkhurst* stated:

[HN1] "*Gilmore* mistakenly relied on the confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter. . . . Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. . . . Circuit courts obviously have subject matter jurisdiction to try crimes, including the felony of unlawful use of weapons. Mo. Const. art. V, § 14(a). . . . Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions. That language in *Montgomery*, *Gilmore*, *Brooks* and other cases should not be relied on in the future.[] Equally inaccurate is the statement in at least one case that absence of an information deprives the trial court of jurisdiction over the person."

*Parkhurst*, 845 S.W.2d at 34-35 (citations, footnote omitted).

Here, Defendant [\*\*7] did not go to trial on the ticket, but rather on an amended information in lieu of the ticket. [HN2] Whatever the defect in the ticket, the trial court still had subject matter jurisdiction over the offense and personal jurisdiction over Defendant. See *Parkhurst*, 845 S.W.2d at 35; *State v. Stein*, 876 S.W.2d 623, 626 (Mo.App. 1994). It follows that the trial court had authority to permit amendment of the information so long as the correction did not run afoul of Rule 23.08 and § 545.300, *RSMo 1994*. There is no merit to Defendant's first point and it is denied.

[\*636] *Error in Allowing Amendment of Information*

We quote verbatim Defendant's second point relied on:

"The court erred in allowing the state to file, on the day of trial, an information in lieu of the uniform traffic ticket in that the information was a nullity because the uniform traffic ticket was fatally defective and one may not amend a fatally defective information due to a lack of jurisdiction, and in that the charge may not be lawfully amended because the information charged the defendant with a wholly new crime, namely a violation of *RSMo 304.010* involving speeds in excess of 70 mph, when the uniform [\*\*8] traffic ticket mentioned the speed of only 55 mph, which is in violation of *RSMo § 304.090* [sic] and *RSMo § 304.090* [sic] is not a lesser included offense of *§ 304.010*."

Our analysis and rejection of Defendant's first point is dispositive of the initial prong of his second point, i.e., that the ticket was a nullity and so fatally defective that the trial court could not amend the information "due to lack of jurisdiction." See *Parkhurst*, 845 S.W.2d at 35; *Stein*, 876 S.W.2d at 626.

Regarding the second part of Defendant's Point II, we first note Rule 23.08. [HN3] In pertinent part it provides:

"Any information may be amended . . . at any time before verdict or finding if no additional or different offense is charged and if a defendant's substantial rights are not thereby prejudiced. No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare his defense by reason of such amendment or substitution."

[HN4] Rule 23.08's statutory counterpart, *§ 545.300*, also deals with amending an information and states that "no such amendment shall be allowed as would operate to charge an offense different [\*\*9] from that charged or attempted to be charged in the original information." Applying the foregoing, Missouri courts consistently hold that "it is not permissible to amend an information if the effect of the amendment is to charge an offense different from the one originally charged." *State v. Amerson*, 661 S.W.2d 852[1] (Mo.App. 1983). A lesser included offense, however, is not a different offense within the meaning of the foregoing rule. *Id.*

[HN5] Missouri has two statutes that set maximum speed limits for persons operating motor vehicles upon the highways of this state. *Section 304.009, RSMo 1994*, commonly referred to as the non-point statute, set the uniform maximum speed limit at 55 miles per hour for all roads and highways of this state which are not part of the interstate system of highways. *§ 304.009.1, RSMo 1994*. Drivers who were charged and convicted under *§ 304.009.1, RSMo 1994* "shall not accumulate points until and unless such speed exceeds those maximums set by other state statute . . ." *§ 304.009.2, RSMo 1994*.

The other statute, *§ 304.010, RSMo 1994* (commonly known as the point statute), set different maximum speed limits on the highways of this state [\*\*10] depending upon the type of highway, vehicle, and lighting conditions. The relevant section here is *§ 304.010.2(3), RSMo 1994*, which provided that no vehicle shall be operated in excess of "sixty-five miles per hour on any undivided highway designated and marked as a federal route . . . when lighted lamps are required by law . . ."

Here, the ticket as written by Berry described Defendant's violation as "speeding 95/55 w/b East of 21," and it advised that he was "driving 95 MPH . . . when limited to 55 MPH . . . in violation of 304.010." Defendant argues that because the ticket recited a limit of 55 mph, he could only be charged with a violation of 304.009; consequently the amended information charged "a completely different" crime contrary to Rule 23.08 and case authority such as *Amerson*, 661 S.W.2d 852.

That is simply not so. [HN6] The offense of driving in excess of the limits set in *§ 304.010, RSMo 1994* could not

be proved without proving incidentally that the offender traveled over 55 miles per hour. *State v. Canepa*, 671 S.W.2d 22, 23 (Mo.App. 1984). The *Canepa* court analyzed the two speeding statutes thusly: "At speeds over [65] miles per hour, the [\*\*11] two offenses, i.e. driving over [\*637] 55 miles per hour and driving over [65] miles per hour are identical offenses, not a greater inclusive and a lesser included." *Id.* at 23. "The same facts (in the over-[65] range) would establish an offense against either statute, at the prosecutor's election." *Id.*

The prosecutor in this case elected to charge Defendant with a violation of § 304.010, RSMo 1994 by filing the ticket as Berry had written it. The ticket adequately set forth the elements of the offense under § 304.010, RSMo 1994 as well as under § 304.009, RSMo 1994, i.e., driving a motor vehicle on U.S. Highway 160 at 95 miles per hour when the limit was 55 miles per hour. The amended information did not charge a different offense from that originally charged, it merely omitted a reference to a limit of 55 miles per hour and replaced it with a recital that Defendant was speeding on U.S. Highway 160 by operating a motor vehicle in excess of the limit set by § 304.010.2, RSMo 1994. There is no merit to Defendant's second point and it is denied.

#### *Witness Endorsement and Denial of Continuance*

In Defendant's third point, he contends that the trial court abused [\*\*12] its discretion by allowing the endorsement of Richard King as a witness on the morning of trial and by permitting him to testify concerning the calibration of the equipment used to check the accuracy of radar tuning forks. To support his point, Defendant relies on *State v. Stamps*, 865 S.W.2d 393 (Mo.App. 1993), which states:

[HN7] "Under rule 23.01(f), the court has discretion to permit the late endorsement of any material witness. . . . Absent an abuse of discretion or prejudice to the appellant, the conviction should not be overturned because a witness was endorsed on the day of trial. . . . In exercising its discretion, the trial court should consider whether appellant waived his objection, whether the state intended to surprise or disadvantage appellant, whether appellant was actually surprised or disadvantaged, and whether the testimony could have been readily foreseen by appellant."

*Id.* at 397[7] (citations omitted).

Defendant argues--correctly so--that he did not waive his objection to the trial court's permitting witness King to testify. His lawyer objected during the pre-trial conference, renewed that objection when King was called to testify, [\*\*13] and preserved the objection in the motion for new trial. On the other hand, we are not convinced that the State intended to surprise or disadvantage Defendant, that Defendant was actually surprised or disadvantaged, or that King's testimony was unforeseen by Defendant. The record clearly demonstrates otherwise. To illustrate, at the pre-trial conference regarding the State's request to endorse witness King, defense counsel told the court that he had tried "lots of speeding tickets before" and knew that the "state could not make a submissible case with the only witness that they had endorsed up until twenty hours ago, which was Trooper Berry." Additionally, defense counsel told the trial judge that:

"The major defense that the defendant intended to use . . . was that the state would not have a proper foundation in order to introduce the results of the radar gun into evidence. . . . I don't know whether the state intended purposefully to surprise or disadvantage the defendant, but he has certainly been surprised and will be disadvantaged if this case goes to trial today."

When asked to explain the belated witness endorsement, the prosecutor stated that he and defense counsel [\*\*14] had talked for several months about resolving the case but "it wasn't clear until last week . . . that this case was in fact going to go to trial . . ." The prosecutor continued:

"Mr. Moore, by his own statement, admits that he has known for some time there would need to be a

radio [sic] operator to lay a proper foundation. . . . [Trooper King] will only testify as to the accuracy of the tuning forks in which he calibrated at some point along with Trooper Berry. . . . I understand what Mr. Moore is talking about that he had a defense, but by his own admission he knew what the state had to prove and the state is attempting to prove that."

Defense counsel responded: "I essentially agree with Paul, but as the Court knows you [\*638] have to select a defense [and without King's testimony] we . . . have a good defense . . . because it appear[s] that the state would not be able to get the radar results into evidence . . . ." In declining an offer to interview the new witness before trial, defense counsel acknowledged that his testimony would not be a surprise.

"MR. MOORE: . . . I agree with [the prosecutor] . . . I assume that I know what it is that he will testify [\*\*15] about. It's the fact that he is here to testify is what throws a monkey wrench in the defense' [sic] whole strategy and plan. . . . I mean we have got to be able to regroup and see what other defenses are available."

Defense counsel never suggested to the trial court what other defenses he deemed available, nor has he informed this court what defenses he might have employed had he not relied on the absence of witness King.

The so-called defense relied on by Defendant was little more than a hope that procrastination by the prosecutor or prosecutorial incompetence would ultimately lead to his acquittal. By Defendant's own admission he was neither surprised by the existence of witness King nor by his testimony. He knew that such a witness existed and that his proposed testimony was essential to the State's case. [HN8] While we understand that Rule 23.01(f) is intended to discourage the late endorsement of a witness, we also recognize that "late endorsements must sometimes be permitted if they can be made without prejudice to the defendant's rights." *State v. Cobb*, 444 S.W.2d 408, 415 (Mo.banc 1969); *State v. Dees*, 639 S.W.2d 149, 157 (Mo.App. 1982). We believe [\*\*16] that this is such a case. Finding no abuse of trial court discretion in allowing the belated witness endorsement and no prejudice to Defendant, we deny Point III.

#### *Denial of Motion for Continuance*

Defendant's fourth point alleges that the trial court abused its discretion in failing to grant his request for a continuance, thus prejudicially affecting his ability to adequately prepare a defense.

[HN9] The decision to grant or deny a continuance is a matter of trial court discretion and an appellate court will not interfere unless it clearly appears that such discretion has been abused. *State v. Schaal*, 806 S.W.2d 659, 666[12] (Mo.banc 1991), cert. denied, 502 U.S. 1075, 112 S. Ct. 976, 117 L. Ed. 2d 140; *State v. Williams*, 652 S.W.2d 102, 108[4] (Mo.banc 1983). The party requesting the continuance bears the burden of showing prejudice, and a very strong showing is required to demonstrate an abuse of discretion. *Schaal*, 806 S.W.2d at 666[12]. On this record, no abuse of discretion appears.

Via his remarks to the trial judge, defense counsel demonstrated that he was an experienced trial attorney who had previously tried traffic cases involving [\*\*17] radar devices. The record also reflects that trial counsel had represented Defendant from the inception of the case. The fact that Defendant relied on the possible absence of a witness needed to establish the accuracy of the radar as his "only defense" and his "entire trial strategy" demonstrates the weakness of Defendant's position. Defendant made no showing to the trial court that he was not ready to proceed on the scheduled date because of a defense that was overlooked. Moreover, Defendant does not suggest to this court--some ten months after trial--what additional defense he could have presented had he been given more time.

We do not overlook Defendant's three arguments in support of his claim that the trial court abused its discretion in denying his motion for continuance. First, he protests that he was never arraigned on the amended charge. Second, he contends that he was never given the opportunity to conduct discovery on the new charge. Finally, Defendant complains that he could not depose the new witness.

As we explained in addressing Defendant's Point II, the amended information did not charge a different offense from that which was originally charged. Defendant offers [\*\*18] no explanation of how being deprived of a redundant arraignment or repetitious discovery prejudiced him. As to depriving Defendant of the opportunity to depose the new witness, [\*639] we reiterate our observation made in discussing Defendant's third point that defense counsel declined the opportunity to interview the new witness before trial. Given that observation, it is not surprising that Defendant does not identify any particular defense that a continuance would have given him the opportunity to present. Defendant has failed to sustain his burden of demonstrating that the denial of a continuance was prejudicial to his case. *Williams*, 652 S.W.2d at 109. There was no abuse of discretion by the trial court, particularly as Defendant had able representation. *Id.* Point IV is denied.

The judgment and sentence of the trial court are affirmed.

Kenneth W. Shrum, Chief Judge

PREWITT, P.J. - CONCURS

PARRISH, J. - CONCURS

41 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF MISSOURI, Plaintiff-Respondent, vs. ROBERT MICHAEL PATRICK,  
Defendant-Appellant.**

**No. 20417**

**COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, DIVISION TWO**

*920 S.W.2d 633; 1996 Mo. App. LEXIS 716*

**April 23, 1996, FILED**

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY. Honorable W. Robert Cope, Circuit Judge.

**DISPOSITION:**

AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Circuit Court of Ripley County (Missouri) that found him guilty, following a jury trial, of driving a motor vehicle in excess of the speed limit set by law in *Mo. Rev. Stat. § 304.010.2*.

**OVERVIEW:** A highway patrol officer stopped and ticketed defendant for traveling 95 miles per hour in a 55 mile per hour zone. Defendant was found guilty of driving a motor vehicle in excess of the speed limit set in *§ 304.010.2*. He was sentenced to 60 days in the county jail and fined \$ 500. The court affirmed because the ticket was not a nullity and so fatally defective that the trial court had no power to amend the information due to the lack of jurisdiction. Defendant did not go to trial on the ticket, but rather on an amended information in lieu of the ticket. Whatever the defect in the ticket, the trial court still had subject matter jurisdiction over the offense and personal jurisdiction over defendant. Therefore, the trial court had the authority to permit the amendment of the information so long as the correction did not violate *Mo. R. Crim. P. 23.08* and *Mo. Rev. Stat. § 545.300*. Furthermore, the trial court did not abuse its discretion or prejudice defendant in allowing the state to file an amended information and endorse a surprise witness on the day of trial, and in denying defendant's motion for a continuance.

**OUTCOME:** The court affirmed the judgment of the trial court that convicted and sentenced defendant for driving a motor vehicle in excess of the statutory speed limit.

**CORE TERMS:** ticket, highway, radar, miles, continuance, speeding, mph, endorsement, prosecutor, driving, speed,

defense counsel, tuning, forks, amended information, maximum speed, motor vehicle, surprise, abused, traffic ticket, abuse of discretion, fatally defective, surprised, different offense, accuracy, originally charged, speed limit, disadvantaged, disadvantage, indictment

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Jurisdiction > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Indictments***

[HN1] Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. Circuit courts obviously have subject matter jurisdiction to try crimes, including the felony of unlawful use of weapons. Mo. Const. art. V, § 14(a). Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions. That language in those cases should not be relied on in the future. Equally inaccurate is the statement in at least one case that absence of an information deprives the trial court of jurisdiction over the person.

#### ***Civil Procedure > Jurisdiction > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

#### ***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

[HN2] Whatever the defect in a ticket, the trial court still has subject matter jurisdiction over the offense and personal jurisdiction over defendant. It follows that the trial court has authority to permit amendment of an information so long as the correction does not run afoul of Mo. R. Crim. P. 23.08 and *Mo. Rev. Stat. § 545.300*.

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN3] Mo. R. Crim. P. 23.08 provides that any information may be amended at any time before verdict or finding if no additional or different offense is charged and if a defendant's substantial rights are not thereby prejudiced. No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare his defense by reason of such amendment or substitution.

#### ***Criminal Law & Procedure > Accusatory Instruments > Informations***

[HN4] Mo. R. Crim. P. 23.08's statutory counterpart, *Mo. Rev. Stat. § 545.300*, also deals with amending an information and states that no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. Applying the foregoing, Missouri courts consistently hold that it is not permissible to amend an information if the effect of the amendment is to charge an offense different from the one originally charged. A lesser included offense, however, is not a different offense within the meaning of the foregoing rule.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN5] The state of Missouri has two statutes that set maximum speed limits for persons operating motor vehicles upon the highways of this state. *Mo. Rev. Stat. § 304.009*, commonly referred to as the non-point statute, set the uniform maximum speed limit at 55 miles per hour for all roads and highways of this state which are not part of the interstate system of highways. *Mo. Rev. Stat. § 304.009.1*. Drivers who are charged and convicted under *§ 304.009.1* shall not accumulate points until and unless such speed exceeds those maximums set by other state statute. *Mo. Rev. Stat. § 304.009.2*. The other statute, *Mo. Rev. Stat. § 304.010* (commonly known as the point statute), set different maximum speed limits on the highways of this state depending upon the type of highway, vehicle, and lighting conditions. The

relevant section here is *Mo. Rev. Stat. § 304.010.2(3)*, which provides that no vehicle shall be operated in excess of 60 miles per hour on any undivided highway designated and marked as a federal route when lighted lamps are required by law.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN6] The offense of driving in excess of the limits set in *Mo. Rev. Stat. § 304.010* cannot be proved without proving incidentally that the offender traveled over 55 miles per hour. At speeds over 65 miles per hour, the two offenses, i.e. driving over 55 miles per hour and driving over 65 miles per hour are identical offenses, not a greater inclusive and a lesser included. The same facts (in the over-65 range) would establish an offense against either statute, at the prosecutor's election.

***Criminal Law & Procedure > Trials > Judicial Discretion***

***Criminal Law & Procedure > Witnesses > Presentation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses***

[HN7] Under Mo. R. Crim. P. 23.01(f), the court has discretion to permit the late endorsement of any material witness. Absent an abuse of discretion or prejudice to the appellant, the conviction should not be overturned because a witness was endorsed on the day of trial. In exercising its discretion, the trial court should consider whether appellant waived his objection, whether the state intended to surprise or disadvantage appellant, whether appellant was actually surprised or disadvantaged, and whether the testimony could have been readily foreseen by appellant.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Criminal Law & Procedure > Witnesses > Presentation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses***

[HN8] While the court understands that Mo. R. Crim. P. 23.01(f) is intended to discourage the late endorsement of a witness, the court also recognizes that late endorsements must sometimes be permitted if they can be made without prejudice to a defendant's rights.

***Civil Procedure > Pretrial Matters > Continuances***

***Criminal Law & Procedure > Trials > Continuances***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances***

[HN9] The decision to grant or deny a continuance is a matter of trial court discretion and an appellate court will not interfere unless it clearly appears that such discretion has been abused. The party requesting the continuance bears the burden of showing prejudice, and a very strong showing is required to demonstrate an abuse of discretion.

**COUNSEL:**

Daniel T. Moore, of Poplar Bluff, for appellant.

Paul E. Oesterreicher, of Doniphan, for respondent.

**JUDGES:** Kenneth W. Shrum, Chief Judge. PREWITT, P.J. - CONCURS, PARRISH, J. - CONCURS

**OPINION BY:** Kenneth W. Shrum

**OPINION:**

[\*634] Robert Michael Patrick (Defendant) was convicted by a jury of driving a motor vehicle "in excess of the speed limit set by law" in violation of § 304.010.2, *RSMo 1994*. n1 He was sentenced in accordance with the jury's

verdict to sixty days in the county jail and fined \$ 500. Defendant appeals, contending that the trial court lacked subject matter jurisdiction because of an alleged defect in the original information. He also charges that the trial court erred in allowing the State to file an amended information and to endorse a "surprise witness" on the day of trial. Finally, Defendant claims that the trial court abused its discretion when it denied his motion for continuance. We affirm.

n1 Sections 304.009, RSMo 1994 and 304.010, RSMo 1994 set the maximum speed limits for persons driving on state highways at the time of this offense. On March 13, 1996, the Governor signed H.B. 1047, an enactment that changes maximum speed limits on most of Missouri's highways. Necessarily, this opinion is confined to an analysis of §§ 304.009 and .010, RSMo 1994.

[\*\*2]

## FACTS

From the legal file and the transcript of Defendant's trial, we summarize facts germane to Defendant's points on appeal.

On December 3, 1994, at approximately 6:30 p.m., Missouri State Highway Patrol Sergeant Ronald T. Berry was driving west on U.S. Highway 160 "just west of Highway junction 21" in Ripley County when he saw an automobile approaching him. Because of his impression that the oncoming car was "coming at me at a very high rate of speed," Berry activated the mobile radar unit in his car, whereupon it measured the speed of the vehicle at 95 miles per hour. As soon as the car passed, Berry turned around to follow and ultimately stopped it. After learning that Defendant was the operator of the vehicle, Berry completed a multi-copy, preprinted Uniform Complaint & Summons, substantially similar in form and content to Supreme Court Form 37.A. A Uniform Complaint & Summons is commonly referred to as a "traffic ticket." For convenience, we will refer to the one involved in this case as "the ticket."

Berry used an "x" on the ticket to indicate the Defendant "Did unlawfully operate" his vehicle. In the portion of the ticket that calls for a description of the violation, [\*\*3] Berry wrote, "Speeding 95/55 W/B east of 21." In other parts of the ticket, Berry wrote "95" mph as being Defendant's speed when the limit was "55" mph and also described Defendant's actions as being "in violation of 304.010 RSMo."

After issuing the ticket to Defendant, Berry checked his radar unit with tuning forks and determined that the radar was working properly at that time.

On June 16, 1995, four days before trial, the State filed a motion for leave to file an information in lieu of the ticket. The proposed information endorsed a new witness in addition to Berry; namely, Richard W. King, a patrol employee whose job duties included certification of the annual calibration of radar tuning forks and a monthly check of the accuracy of the device used to calibrate tuning forks. Defendant's counsel did not learn of the State's intention to file an information in lieu of the ticket and about the proposed endorsement of a new witness until around noon, June 19, 1995, approximately 20 hours before trial.

During the pre-trial conference on June 20th, Defendant's lawyer first moved to dismiss the charge, arguing that "no charge has been properly brought as [the ticket] lacks the necessary [\*\*4] elements." The trial court never ruled on that motion, but instead sustained the State's request to file an information [\*\*635] in lieu of the ticket. n2 Moreover, the trial court overruled Defendant's additional objection to the belated endorsement of Richard W. King as a witness and also denied Defendant's request for a continuance. The trial judge explained his ruling thusly:

"Mr. Moore, I'm having some problem in understanding exactly how the defense is prejudiced by Mr. King being able to testify today if I allow you some time to talk to him before his testimony. And we will have some time to do that and will allow you to do that. I'm having some problem in understanding what the prejudice will be since you have said or indicated on the record that this witness is pretty much cut

and dry [sic]. I think we all understand that he is going to . . . testify that he checked the radar device with tuning forks and it was working, which is an essential element of the state's case."

n2 The relevant part of the information reads:

"Defendant . . . in violation of *Section 304.010.2, RSMo.*, committed the misdemeanor of speeding . . . in that on . . . December 3, 1994, in [Ripley County, Missouri], the defendant operated a motor vehicle on a highway known as U.S. Highway 160 by speeding in excess of the speed limit set by law."

[\*\*5]

## DISCUSSION AND DECISION

### *Lack of Jurisdiction*

Defendant's first point maintains that the trial court "erred in overruling Defendant's motion to dismiss the uniform traffic ticket in that [the ticket issued by Berry] and filed by the Prosecutor was fatally defective because it only contained the legal conclusion of 'speeding', and failed to allege the necessary elements that Defendant was 'operating a motor vehicle in excess of the posted speed limit of 70 mph', in violation of *RSMo 304.010*, and, as a result of this omission, the court acquired no jurisdiction."

To support this argument, Defendant relies on *State v. Owens*, 740 S.W.2d 269 (Mo.App. 1987) and *State v. Prock*, 759 S.W.2d 854 (Mo.App. 1988), which in turn relied substantially upon *State v. Gilmore*, 650 S.W.2d 627 (Mo.banc 1983). *Gilmore* and its progeny held that if an information was insufficient, the trial court acquired no jurisdiction, and whatever transpired thereafter was a complete nullity. *Id.* at 628[2]. However, Defendant does not mention that this principle was disapproved and *Gilmore* was specifically overruled by *State v. Parkhurst*, [\*\*6] 845 S.W.2d 31 (Mo.banc 1992).

*Gilmore* and the other cases cited by Defendant predate *Parkhurst* and are of no aid under this point. In holding an information valid, *Parkhurst* stated:

[HN1] "*Gilmore* mistakenly relied on the confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter. . . . Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. . . . Circuit courts obviously have subject matter jurisdiction to try crimes, including the felony of unlawful use of weapons. Mo. Const. art. V, § 14(a). . . . Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions. That language in *Montgomery*, *Gilmore*, *Brooks* and other cases should not be relied on in the future.[] Equally inaccurate is the statement in at least one case that absence of an information deprives the trial court of jurisdiction over the person."

*Parkhurst*, 845 S.W.2d at 34-35 (citations, footnote omitted).

Here, Defendant [\*\*7] did not go to trial on the ticket, but rather on an amended information in lieu of the ticket. [HN2] Whatever the defect in the ticket, the trial court still had subject matter jurisdiction over the offense and personal jurisdiction over Defendant. See *Parkhurst*, 845 S.W.2d at 35; *State v. Stein*, 876 S.W.2d 623, 626 (Mo.App. 1994). It follows that the trial court had authority to permit amendment of the information so long as the correction did not run afoul of Rule 23.08 and § 545.300, *RSMo 1994*. There is no merit to Defendant's first point and it is denied.

[\*636] *Error in Allowing Amendment of Information*

We quote verbatim Defendant's second point relied on:

"The court erred in allowing the state to file, on the day of trial, an information in lieu of the uniform traffic ticket in that the information was a nullity because the uniform traffic ticket was fatally defective and one may not amend a fatally defective information due to a lack of jurisdiction, and in that the charge may not be lawfully amended because the information charged the defendant with a wholly new crime, namely a violation of *RSMo 304.010* involving speeds in excess of 70 mph, when the uniform [\*\*8] traffic ticket mentioned the speed of only 55 mph, which is in violation of *RSMo § 304.090* [sic] and *RSMo § 304.090* [sic] is not a lesser included offense of *§ 304.010*."

Our analysis and rejection of Defendant's first point is dispositive of the initial prong of his second point, i.e., that the ticket was a nullity and so fatally defective that the trial court could not amend the information "due to lack of jurisdiction." See *Parkhurst*, 845 S.W.2d at 35; *Stein*, 876 S.W.2d at 626.

Regarding the second part of Defendant's Point II, we first note Rule 23.08. [HN3] In pertinent part it provides:

"Any information may be amended . . . at any time before verdict or finding if no additional or different offense is charged and if a defendant's substantial rights are not thereby prejudiced. No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare his defense by reason of such amendment or substitution."

[HN4] Rule 23.08's statutory counterpart, *§ 545.300*, also deals with amending an information and states that "no such amendment shall be allowed as would operate to charge an offense different [\*\*9] from that charged or attempted to be charged in the original information." Applying the foregoing, Missouri courts consistently hold that "it is not permissible to amend an information if the effect of the amendment is to charge an offense different from the one originally charged." *State v. Amerson*, 661 S.W.2d 852[1] (Mo.App. 1983). A lesser included offense, however, is not a different offense within the meaning of the foregoing rule. *Id.*

[HN5] Missouri has two statutes that set maximum speed limits for persons operating motor vehicles upon the highways of this state. *Section 304.009, RSMo 1994*, commonly referred to as the non-point statute, set the uniform maximum speed limit at 55 miles per hour for all roads and highways of this state which are not part of the interstate system of highways. *§ 304.009.1, RSMo 1994*. Drivers who were charged and convicted under *§ 304.009.1, RSMo 1994* "shall not accumulate points until and unless such speed exceeds those maximums set by other state statute . . ." *§ 304.009.2, RSMo 1994*.

The other statute, *§ 304.010, RSMo 1994* (commonly known as the point statute), set different maximum speed limits on the highways of this state [\*\*10] depending upon the type of highway, vehicle, and lighting conditions. The relevant section here is *§ 304.010.2(3), RSMo 1994*, which provided that no vehicle shall be operated in excess of "sixty-five miles per hour on any undivided highway designated and marked as a federal route . . . when lighted lamps are required by law . . ."

Here, the ticket as written by Berry described Defendant's violation as "speeding 95/55 w/b East of 21," and it advised that he was "driving 95 MPH . . . when limited to 55 MPH . . . in violation of 304.010." Defendant argues that because the ticket recited a limit of 55 mph, he could only be charged with a violation of 304.009; consequently the amended information charged "a completely different" crime contrary to Rule 23.08 and case authority such as *Amerson*, 661 S.W.2d 852.

That is simply not so. [HN6] The offense of driving in excess of the limits set in *§ 304.010, RSMo 1994* could not

be proved without proving incidentally that the offender traveled over 55 miles per hour. *State v. Canepa*, 671 S.W.2d 22, 23 (Mo.App. 1984). The *Canepa* court analyzed the two speeding statutes thusly: "At speeds over [65] miles per hour, the [\*\*11] two offenses, i.e. driving over [\*637] 55 miles per hour and driving over [65] miles per hour are identical offenses, not a greater inclusive and a lesser included." *Id.* at 23. "The same facts (in the over-[65] range) would establish an offense against either statute, at the prosecutor's election." *Id.*

The prosecutor in this case elected to charge Defendant with a violation of § 304.010, RSMo 1994 by filing the ticket as Berry had written it. The ticket adequately set forth the elements of the offense under § 304.010, RSMo 1994 as well as under § 304.009, RSMo 1994, i.e., driving a motor vehicle on U.S. Highway 160 at 95 miles per hour when the limit was 55 miles per hour. The amended information did not charge a different offense from that originally charged, it merely omitted a reference to a limit of 55 miles per hour and replaced it with a recital that Defendant was speeding on U.S. Highway 160 by operating a motor vehicle in excess of the limit set by § 304.010.2, RSMo 1994. There is no merit to Defendant's second point and it is denied.

#### *Witness Endorsement and Denial of Continuance*

In Defendant's third point, he contends that the trial court abused [\*\*12] its discretion by allowing the endorsement of Richard King as a witness on the morning of trial and by permitting him to testify concerning the calibration of the equipment used to check the accuracy of radar tuning forks. To support his point, Defendant relies on *State v. Stamps*, 865 S.W.2d 393 (Mo.App. 1993), which states:

[HN7] "Under rule 23.01(f), the court has discretion to permit the late endorsement of any material witness. . . . Absent an abuse of discretion or prejudice to the appellant, the conviction should not be overturned because a witness was endorsed on the day of trial. . . . In exercising its discretion, the trial court should consider whether appellant waived his objection, whether the state intended to surprise or disadvantage appellant, whether appellant was actually surprised or disadvantaged, and whether the testimony could have been readily foreseen by appellant."

*Id.* at 397[7] (citations omitted).

Defendant argues--correctly so--that he did not waive his objection to the trial court's permitting witness King to testify. His lawyer objected during the pre-trial conference, renewed that objection when King was called to testify, [\*\*13] and preserved the objection in the motion for new trial. On the other hand, we are not convinced that the State intended to surprise or disadvantage Defendant, that Defendant was actually surprised or disadvantaged, or that King's testimony was unforeseen by Defendant. The record clearly demonstrates otherwise. To illustrate, at the pre-trial conference regarding the State's request to endorse witness King, defense counsel told the court that he had tried "lots of speeding tickets before" and knew that the "state could not make a submissible case with the only witness that they had endorsed up until twenty hours ago, which was Trooper Berry." Additionally, defense counsel told the trial judge that:

"The major defense that the defendant intended to use . . . was that the state would not have a proper foundation in order to introduce the results of the radar gun into evidence. . . . I don't know whether the state intended purposefully to surprise or disadvantage the defendant, but he has certainly been surprised and will be disadvantaged if this case goes to trial today."

When asked to explain the belated witness endorsement, the prosecutor stated that he and defense counsel [\*\*14] had talked for several months about resolving the case but "it wasn't clear until last week . . . that this case was in fact going to go to trial . . ." The prosecutor continued:

"Mr. Moore, by his own statement, admits that he has known for some time there would need to be a

radio [sic] operator to lay a proper foundation. . . . [Trooper King] will only testify as to the accuracy of the tuning forks in which he calibrated at some point along with Trooper Berry. . . . I understand what Mr. Moore is talking about that he had a defense, but by his own admission he knew what the state had to prove and the state is attempting to prove that."

Defense counsel responded: "I essentially agree with Paul, but as the Court knows you [\*638] have to select a defense [and without King's testimony] we . . . have a good defense . . . because it appear[s] that the state would not be able to get the radar results into evidence . . . ." In declining an offer to interview the new witness before trial, defense counsel acknowledged that his testimony would not be a surprise.

"MR. MOORE: . . . I agree with [the prosecutor] . . . I assume that I know what it is that he will testify [\*\*15] about. It's the fact that he is here to testify is what throws a monkey wrench in the defense' [sic] whole strategy and plan. . . . I mean we have got to be able to regroup and see what other defenses are available."

Defense counsel never suggested to the trial court what other defenses he deemed available, nor has he informed this court what defenses he might have employed had he not relied on the absence of witness King.

The so-called defense relied on by Defendant was little more than a hope that procrastination by the prosecutor or prosecutorial incompetence would ultimately lead to his acquittal. By Defendant's own admission he was neither surprised by the existence of witness King nor by his testimony. He knew that such a witness existed and that his proposed testimony was essential to the State's case. [HN8] While we understand that Rule 23.01(f) is intended to discourage the late endorsement of a witness, we also recognize that "late endorsements must sometimes be permitted if they can be made without prejudice to the defendant's rights." *State v. Cobb*, 444 S.W.2d 408, 415 (Mo.banc 1969); *State v. Dees*, 639 S.W.2d 149, 157 (Mo.App. 1982). We believe [\*\*16] that this is such a case. Finding no abuse of trial court discretion in allowing the belated witness endorsement and no prejudice to Defendant, we deny Point III.

#### *Denial of Motion for Continuance*

Defendant's fourth point alleges that the trial court abused its discretion in failing to grant his request for a continuance, thus prejudicially affecting his ability to adequately prepare a defense.

[HN9] The decision to grant or deny a continuance is a matter of trial court discretion and an appellate court will not interfere unless it clearly appears that such discretion has been abused. *State v. Schaal*, 806 S.W.2d 659, 666[12] (Mo.banc 1991), cert. denied, 502 U.S. 1075, 112 S. Ct. 976, 117 L. Ed. 2d 140; *State v. Williams*, 652 S.W.2d 102, 108[4] (Mo.banc 1983). The party requesting the continuance bears the burden of showing prejudice, and a very strong showing is required to demonstrate an abuse of discretion. *Schaal*, 806 S.W.2d at 666[12]. On this record, no abuse of discretion appears.

Via his remarks to the trial judge, defense counsel demonstrated that he was an experienced trial attorney who had previously tried traffic cases involving [\*\*17] radar devices. The record also reflects that trial counsel had represented Defendant from the inception of the case. The fact that Defendant relied on the possible absence of a witness needed to establish the accuracy of the radar as his "only defense" and his "entire trial strategy" demonstrates the weakness of Defendant's position. Defendant made no showing to the trial court that he was not ready to proceed on the scheduled date because of a defense that was overlooked. Moreover, Defendant does not suggest to this court--some ten months after trial--what additional defense he could have presented had he been given more time.

We do not overlook Defendant's three arguments in support of his claim that the trial court abused its discretion in denying his motion for continuance. First, he protests that he was never arraigned on the amended charge. Second, he contends that he was never given the opportunity to conduct discovery on the new charge. Finally, Defendant complains that he could not depose the new witness.

As we explained in addressing Defendant's Point II, the amended information did not charge a different offense from that which was originally charged. Defendant offers [\*\*18] no explanation of how being deprived of a redundant arraignment or repetitious discovery prejudiced him. As to depriving Defendant of the opportunity to depose the new witness, [\*639] we reiterate our observation made in discussing Defendant's third point that defense counsel declined the opportunity to interview the new witness before trial. Given that observation, it is not surprising that Defendant does not identify any particular defense that a continuance would have given him the opportunity to present. Defendant has failed to sustain his burden of demonstrating that the denial of a continuance was prejudicial to his case. *Williams*, 652 S.W.2d at 109. There was no abuse of discretion by the trial court, particularly as Defendant had able representation. *Id.* Point IV is denied.

The judgment and sentence of the trial court are affirmed.

Kenneth W. Shrum, Chief Judge

PREWITT, P.J. - CONCURS

PARRISH, J. - CONCURS

42 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF SPRINGFIELD, Respondent, vs. GAREN WADDELL, Appellant.**

**No. 19414**

**COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, DIVISION TWO**

***904 S.W.2d 499; 1995 Mo. App. LEXIS 1284***

**July 13, 1995, FILED**

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM THE CIRCUIT COURT, JUDICIAL CIRCUIT 31, SPRINGFIELD MUNICIPAL DIVISION 22.  
Honorable Todd Thornhill, Municipal Judge.

**DISPOSITION:**

AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, a driver, sought review of the judgment from the Circuit Court, Judicial Circuit 31, Springfield Municipal Division 22 (Missouri), which convicted him of speeding.

**OVERVIEW:** Defendant was convicted of speeding. On appeal, defendant contended that: (1) the evidence was insufficient to support the verdict of guilty returned by the jury because there was no competent evidence to establish his speed; (2) the trial court erred in denying his motion for a change of venue; and (3) the trial court erred in denying proper legal representation. The court affirmed defendant's conviction and held that the evidence was sufficient to establish defendant's speed based on the finding that the police officer's radar unit was accurately gauging speed at the site of the violation at a reasonable proximity to the time when the radar gauged defendant's speed. The court held that the trial court did not err in denying defendant's untimely motion for a change of venue. Further, the court observed that nothing in the record suggested that defendant could not receive a fair trial by jury in the locale where the instant case was pending. Additionally, the court held that defendant had no constitutional right to counsel, since he was merely fined and not sentenced to any term of imprisonment.

**OUTCOME:** The court affirmed defendant's conviction for speeding.

**CORE TERMS:** radar, tuning fork, juror, prosecutor, conversation, mistrial, change of venue, speed, speed limit, driving, posted, mile, tested, jury misconduct, new trial, talking, ordinance, fork, bus, municipal ordinance, tuning, site, misconduct, accuracy, complains, recess, circumstantial evidence, authorize, deadline, arrest

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN1] Mo. R. Crim. P. 30.06(d) (1994) reads, in pertinent part: The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous.

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview******Criminal Law & Procedure > Appeals > Briefs******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN2] An appellate court has no duty to resort to the argument portion of the brief to deduce wherein and why an appellant believes a trial court erred. Appellant has the burden of demonstrating error.

***Civil Procedure > Trials > Jury Trials > Jurors > General Overview******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN3] The appellate court is required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. The appellate court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, the appellate court considers whether a reasonable juror could find each of the elements beyond a reasonable doubt.

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview******Evidence > Procedural Considerations > Weight & Sufficiency******Evidence > Testimony > Examination > General Overview***

[HN4] An appellate court neither weighs the evidence nor judges the credibility of the witnesses. Those are tasks for the jury.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] A speeding conviction cannot be based on radar without proof that the unit was tested and found to be operating properly at the site of the alleged violation and reasonably close to the time it occurred.

***Criminal Law & Procedure > Appeals > Briefs******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview******Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN6] An appellate court is not required to review a contention when it appears without citation of applicable authority. Absent proper explanation concerning why no authority is cited, a contention unaccompanied by citation of authority is deemed waived or abandoned.

***Evidence > Inferences & Presumptions > Inferences******Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

[HN7] Circumstantial evidence is evidence that does not directly prove a fact in issue but gives rise to a logical inference that the fact exists.

***Civil Procedure > Jurisdiction > General Overview***

***Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction***

[HN8] A court has jurisdiction if it has judicial authority over the subject matter and parties.

***Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction***

[HN9] Mo. R. Ordinance and Traffic Violation Bureaus 37.08 reads: If no procedure is specially provided by Mo. R. Ordinance and Traffic Violation Bureaus 37, the judge having jurisdiction shall proceed in a manner consistent with judicial decisions, applicable statutes or other rules of the court.

***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

***Governments > Courts > Justice Courts***

[HN10] *Mo. Rev. Stat. § 479.150.2* (1994), which authorizes the State to provide by ordinance for jury trials in its municipal court, provides that such trials shall be conducted in accordance with procedures applicable before circuit courts.

***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

[HN11] Mo. R. Ordinance and Traffic Violation Bureaus 37.61(e) pertains to jury trials of ordinance violations; it provides that such trials shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure.

***Civil Procedure > Judicial Officers > Judges > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Disqualification & Recusal***

[HN12] Mo. R. Crim. P. 32.07(b) governs applications for a change of judge in misdemeanor cases. The application must be filed not later than ten days before the date set for trial, unless the designation of the trial judge occurs less than ten days before trial.

***Criminal Law & Procedure > Counsel > Assignment***

[HN13] *Mo. Rev. Stat. § 600.042* (1994) reads, in pertinent part:10. The state public defender director and defenders shall provide legal services to an eligible person:(5) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of municipal ordinances.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel***

***Criminal Law & Procedure > Counsel > Right to Counsel > Trials***

***Criminal Law & Procedure > Sentencing > Fines***

[HN14] There is no constitutional impediment to an uncounseled misdemeanor conviction where imprisonment is not imposed.

***Criminal Law & Procedure > Counsel > Right to Counsel > Trials***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Potential Imprisonment***

***Criminal Law & Procedure > Sentencing > Fines***

[HN15] If an accused is merely fined and not sentenced to any term of imprisonment, he has no constitutional right to counsel.

***Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN16] Mo. R. Crim. P. 29.11(d) provides that in jury tried cases, allegations of error to be preserved for appellate review must be included in a motion for new trial.

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

***Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN17] Where a motion for new trial is made on account of communications to the jury during the progress of the trial, there is a rebuttable legal presumption that they were prejudicial to the moving party, and where competent evidence is offered it is the duty of the trial court to hear and consider it; when the court does so, its decision is reviewable for abuse of discretion only.

***Criminal Law & Procedure > Appeals > Briefs***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN18] Appellate review is limited to matters raised in the points relied on.

**COUNSEL:**

Appellant pro se.

No appearance for respondent.

**JUDGES:** Before PREWITT, CROW and PARRISH, JJ.

**OPINION:**

[\*502] PER CURIAM. A jury in Springfield Municipal Division 22 of the Circuit Court of Judicial Circuit 31 found Appellant guilty of speeding in violation of a Springfield municipal ordinance. The jury assessed punishment at a fine of one dollar. The trial court entered judgment in accordance with the verdict.

Appellant brings this appeal per § 479.150.2(2). n1 His brief, submitted pro se, presents the following point relied on:

"1. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: the evidence does not support the verdict beyond a reasonable doubt.

A. There is no competent evidence to establish what speed the Appellant was driving.

B. Evidence was entirely circumstantial.

C. Facts and circumstances relied on by prosecution were inconsistent [sic] with each other and with the hypothesis of guilt.

2. Trial court erred in not entering a [\*\*2] judgement of not guilty that Appellant was driving in excess of the posted speed limit because: court lacked jurisdiction and thus verdict had no validity.

3. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: denial of change of venue, denial of peremptory [sic] challenge.

4. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of

the posted speed limit because: complete corruption of the record to the point of non-viability.

5. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: denial of due process of law by court's display of substantial bias and prejudice denying proper legal representation.

6. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: in permitting the prosecution to comment on Appellant's failure to call the witness.

7. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: erroneously [sic] placing burden [\*\*3] of proof of jury and witness misconduct on Appellant.

8. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: seating of improper jury."

n1 References to statutes are to RSMo 1994 except where otherwise indicated.

Rule 30.06(d) n2 sets forth the requirements for a point relied on in this appeal. Rules 37.01, 37.61(e), and 30.33; §§ 479.150.2(1)-(2) and 543.220.1. [HN1] Rule 30.06(d) reads, in pertinent part:

"The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous . . . ."

n2 Rule references are to Missouri Rules of Court (1994).

Appellant's point relied on fails to satisfy the "wherein and why" requirement of Rule 30.06(d). *City [\*\*4] of Springfield v. Rogers*, 867 S.W.2d 692, 693-94 (Mo.App. S.D. 1993); *State v. Root*, 820 S.W.2d 682, 685-86 (Mo.App. S.D. 1991). [HN2] An appellate court has no duty to resort to the argument portion of the brief to deduce wherein and why an appellant believes a trial court erred. *Root*, 820 S.W.2d at 686. Nonetheless, we have sifted the thirty pages of argument in Appellant's brief in an attempt to extract the import of each paragraph of his point. We shall address the contentions as we understand them, mindful that Appellant has the burden of demonstrating error. *State v. Harrison*, 539 S.W.2d 119, 121[1] (Mo.App. 1976).

Contention 1(A) maintains the evidence was insufficient to support the verdict of guilty returned by the jury in that there was no competent evidence to establish Appellant's speed. In addressing that contention, we are aware that Respondent was required to prove Appellant guilty beyond a [\*503] reasonable doubt. *City of Kansas City v. Oxley*, 579 S.W.2d 113, 114[1] (Mo. banc 1979). The standard of review for determining whether the evidence met that requirement is set forth in *State v. Grim*, 854 S.W.2d 403, 411[5] [\*\*5] (Mo. banc 1993), *cert. denied*, U.S. Ct. 562, 126 L. Ed. 2d 462 (1993).

[HN3] "We are required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. We disregard contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, we consider whether a reasonable juror could find each of the elements

beyond a reasonable doubt."

As explained in *Oxley*, 579 S.W.2d at 115, [HN4] an appellate court neither weighs the evidence nor judges the credibility of the witnesses. Those are tasks for the jury. *State v. Wright*, 476 S.W.2d 581, 584[4] (Mo. 1972).

Viewed favorably to the verdict, the evidence establishes that on the morning of September 28, 1993, Officer David Larry Tuter of the Springfield Police Department was operating a radar unit on Grand Street in Springfield. The power source for the unit was the battery on Tuter's motorcycle. The motorcycle engine was "turned off."

To "set up" the radar unit at that site, Tuter performed three procedures to [\*\*6] ensure it was operating properly. First, he pushed a switch to determine whether all the tubes were working properly. He obtained a reading showing they were. Next, he did an "internal calibration" and again received a reading showing the unit was working properly. Finally, he struck a 50 mile-per-hour tuning fork in front of the unit and obtained a 50 mile-per-hour reading. He testified he followed these procedures "before and after each stop."

Asked whether he did anything else before directing the radar unit toward vehicular traffic, Tuter explained he performed a "sweep [of] the area with the radar" to detect outside interference. He observed none.

Between 10:30 and 11:00, Tuter saw a westbound Pontiac on Grand approaching his position. Tuter estimated its speed at 35 miles per hour, which exceeded the posted speed limit of 20 miles per hour. Tuter "put the radar unit into operation" and achieved a "radar lock" on the Pontiac, obtaining a reading of 36 miles per hour.

Tuter pursued the Pontiac and stopped it. Appellant was the driver. Tuter issued Appellant a citation for speeding.

One of Appellant's challenges to the sufficiency of the evidence is based on *City of St. Louis v. Boecker*, 370 S.W.2d 731 (Mo.App. 1963), and *State v. Weatherwax*, 635 S.W.2d 34 (Mo.App. W.D. 1982), which hold that [HN5] a speeding conviction cannot be based on radar without proof that the unit was tested and found to be operating properly at the site of the alleged violation and reasonably close to the time it occurred. *Boecker*, 370 S.W.2d at 737[5]; *Weatherwax*, 635 S.W.2d at 35.

Appellant maintains Tuter's testimony was insufficient to demonstrate compliance with *Boecker* and *Weatherwax* in that Tuter was unable to recall what time he calibrated the radar unit.

Asked on cross-examination what time he calibrated the unit, Tuter replied it could have been 9:30 or 10:15. That would have been anywhere between 15 and 90 minutes before Appellant's Pontiac appeared.

In *Boecker*, the officer tested the radar unit with a tuning fork before he left the police station to go on duty. 370 S.W.2d at 734. He did not test the unit at the site of the violation, and there was no evidence regarding the elapsed time between the test at the station and the violation. *Id.* In *Weatherwax*, the officer tested the radar unit with tuning forks at his home at 7:00 [\*\*8] a.m., before going on duty. 635 S.W.2d at 34-35. Some four hours later, at a different location, he used the unit to detect a speeding violation. *Id.* at 35. He did not test the unit at that site, nor did he test it again until going off duty at 4:00 p.m. *Id.* In both cases, appellate courts held the evidence insufficient to support a conviction.

Appellant, who acquired knowledge about radar in military service, asserts his research [\*\*504] disclosed no case that holds the accuracy of a radar unit can be established solely by a tuning fork.

The subject was addressed in *Boecker*, where the appellate court did not question the use of a tuning fork to test the accuracy of a radar unit "as a matter of principle." 370 S.W.2d at 736. However, *Boecker* noted the value of such a test hinged on the accuracy of the tuning fork. *Id.* Because there was no evidence that the tuning fork in *Boecker* was accurate, the appellate court had "grave doubts" that the test was sufficient to establish that the radar was functioning properly. *Id.* Despite such doubts, *Boecker* did not base reversal on the tuning fork test, but instead on the failure of the officer to test the [\*\*9] unit at the site of the violation and reasonably close to the time it occurred. *Id.* at 736-38.

Here, there was evidence regarding the accuracy of the tuning fork and radar unit. Don Oliver, who holds a "radio telephone operator's license" from the Federal Communications Commission ("FCC"), has "certified" radar units for "eight to ten years." On May 7, 1993, he certified the unit used by Tuter.

Explaining the process, Oliver testified that the frequency of the tuning fork for that unit is counted by an electronic frequency counter at his shop. Accuracy of the unit itself is tested by the tuning fork and by two other tuning forks at the shop. Oliver avowed Tuter's radar unit had these margins of error: 4/100 of a mile per hour at 30 miles per hour, 12/100 of a mile per hour at 50 miles per hour, and 5/100 of a mile per hour at 65 miles per hour.

In *State v. Moore*, 700 S.W.2d 880 (Mo.App. E.D. 1985), the arresting officer tested his radar unit with a 30-mile-per-hour tuning fork and a 70-mile-per-hour tuning fork approximately an hour before using the unit to gauge the accused's speed. *Id.* at 881. The officer repeated the procedure immediately after the arrest. [\*\*10] *Id.* The officer had tested the tuning forks by striking them in front of a frequency counter some eight months before the arrest. *Id.* 882. The conviction was affirmed.

In *State v. Shoemaker*, 798 S.W.2d 191 (Mo.App. E.D. 1990), the arresting officer tested his radar unit with tuning forks before and after using the unit to gauge the accused's speed. *Id.* at 193. The forks had been certified as accurate six months before the arrest, and were again certified as accurate five months following the arrest. *Id.* The officer also tested the ground speed of the radar unit against the speedometer on his vehicle. *Id.* The conviction was affirmed.

Here, the interval between the date Oliver certified Tuter's radar unit (including tuning fork) and the date Tuter used the unit to gauge Appellant's speed was shorter than the intervals in *Moore* and *Shoemaker*. Like the officers in those cases, Tuter performed a tuning fork test on his unit before and after stopping Appellant. Consistent with *Moore* and *Shoemaker*, we reject Appellant's claim that the evidence was insufficient to support a finding that Tuter's unit was accurately gauging speed when it gauged Appellant's [\*\*11] speed.

Appellant argues that Grand Street has four lanes, and traffic in the two eastbound lanes made it impossible for the radar to accurately gauge his speed. However, Tuter testified there were no other vehicles in the area which would have interfered with the radar reading Tuter got on Appellant's Pontiac. Credibility of Tuter's testimony was for the jury. *State v. Jeffries*, 858 S.W.2d 821, 823-24[4] (Mo.App. E.D. 1993). The jury evidently believed Tuter.

Appellant also argues that a curve in Grand Street, coupled with visual obstructions including trees, signs, poles and other objects, made it impossible for Tuter's radar "to obtain an accurate reading." Appellant presented photographs of the area to the jury in support of that hypothesis. Appellant has filed the photographs with us. They depict a street flanked by trees, signs and poles, but no more than normal for a four-lane street.

Tuter testified he saw Appellant's Pontiac when it was 250 to 300 feet east of Tuter's location. Tuter recounted there were no obstructions "to cause interference with the [\*505] radar." The jury was entitled to believe that testimony. *Jeffries*, 858 S.W.2d at 824.

Appellant [\*\*12] attacks the testimony of witness Oliver, who certified Tuter's radar unit. Appellant asserts Oliver "admitted to violating Federal, State and Local Laws in the performance of his responsibilities for the radar." In support of this accusation, Appellant cites a segment of the transcript where Oliver stated he occasionally pointed radar units at oncoming traffic when returning them after inspection.

Appellant does not (a) identify the laws violated, (b) explain how the alleged violations destroy the competency of Oliver's testimony, (c) cite any authority on the subject, or (d) explain why he cites none. [HN6] An appellate court is not required to review a contention when it appears without citation of applicable authority. *State v. Higgins*, 852 S.W.2d 172, 175[4] (Mo.App. S.D. 1993). Absent proper explanation concerning why no authority is cited, a contention unaccompanied by citation of authority is deemed waived or abandoned. *Id.* at 175[5].

Appellant also questions other aspects of the evidence, such as the power source for the radar and the length of time

his Pontiac was near the radar. Such factors were for the jury's consideration. They do not render the evidence [\*\*13] insufficient to support the verdict. Appellant's contention 1(A) is without merit.

Appellant bases contentions 1(B) and 1(C) on the premise that the evidence against him was entirely circumstantial. [HN7] Circumstantial evidence is evidence that does not directly prove a fact in issue but gives rise to a logical inference that the fact exists. *State v. Fleeer*, 851 S.W.2d 582, 598[50] (Mo.App. E.D. 1993).

Appellant cites no case holding a radar measurement of an automobile's speed is circumstantial evidence. Because of *Grim*, *supra*, 854 S.W.2d 403, we need not decide whether it is. Until *Grim*, the standard of review for sufficiency of the evidence where a criminal conviction was based on circumstantial evidence differed from the standard where a conviction was based on direct evidence. *Id.* at 405-08. *Grim* held that henceforth, the standard would be the same for all criminal convictions, whether based on direct evidence, circumstantial evidence, or both. *Id.* The standard in *Grim* is quoted earlier in this opinion. We hold the evidence in the instant case met that standard. Appellant's contentions 1(B) and 1(C), which are based on the *pre-Grim* circumstantial [\*\*14] evidence standard, provide no basis for reversal.

Contention 2 asserts the trial court "lacked jurisdiction," hence the verdict "had no validity."

[HN8] A court has jurisdiction if it has judicial authority over the subject matter and parties. *State ex rel. Furstenfeld v. Nixon*, 133 S.W. 340, 342 (Mo. 1910); *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 314[7] (Mo.App. E.D. 1981). Appellant, as we understand his argument, does not contend the trial court lacked jurisdiction to adjudicate violations of Springfield traffic ordinances. Instead, Appellant maintains Respondent never proved Tuter's radar unit was "licensed or authorized" by the FCC. Appellant also avers Oliver violated his FCC license in testing and using radar units. These factors, says Appellant, "barred jurisdiction, and nullified any verdict derived thereof."

Appellant cites no authority in support of that hypothesis, and we are aware of none. We fail to see how lack of an FCC license for Tuter's radar unit (if indeed one was required), or how a violation by Oliver of his FCC license (if indeed any occurred), divested the trial court of jurisdiction. Contention 2 is denied.

Contention 3 complains about [\*\*15] "denial of change of venue." Appellant filed a "Motion for Change of Venue Out of Time" on the day trial began (January 10, 1994). The motion prayed that the case be transferred to Division 3 of the Circuit Court of Judicial Circuit 31 or to Dallas County, which lies in Judicial Circuit 30. The trial court denied the motion.

The motion did not cite any rule or statute authorizing the change of venue. Appellant cited none to the trial court when it took up the motion. Appellant's brief likewise cites none.

[\*506] Rule 37 governs the procedure in courts having original jurisdiction of ordinance violations. *See*: Rule 37.01. We find no provision in Rule 37 for a change of venue. n3

n3 [HN9] Rule 37.08 reads: "If no procedure is specially provided by this Rule 37, the judge having jurisdiction shall proceed in a manner consistent with judicial decisions, applicable statutes or other rules of this Court."

[HN10] *Section 479.150.2*, which authorizes Respondent to provide by ordinance for jury trials in its municipal [\*\*16] court, provides that such trials shall be conducted "in accordance with procedures applicable before circuit courts." § 479.150.2(1). It is thus arguable that Rule 32.04, which governs changes of venue for criminal cases in circuit courts, applies here. Paragraph "(b)" of the rule establishes a deadline for filing an application for a change of venue.

Assuming -- without deciding -- that § 479.150.2(1), coupled with Rule 32.04, authorizes a change of venue in a municipal ordinance violation case, Appellant has shown no error in the denial of his motion. Our study of the record

reveals Appellant filed his motion after the deadline in Rule 32.04(b). His motion tacitly concedes this, as its caption brands it "Out of Time."

Appellant cites no authority holding it is error to deny an untimely motion for change of venue, particularly where (as here) nothing in the record suggests an accused cannot receive a fair trial by jury in the locale where the case is pending. Assuming, *arguendo*, that Appellant had a right to a change of venue upon timely application -- we do not imply he did -- we hold the trial court did not err in denying Appellant's untimely application.

In his brief, Appellant [\*\*17] declares Respondent is not empowered to hold jury trials, therefore his case should have been "transferred to the appropriate circuit court." In support of that hypothesis, Appellant cites "House Bill #1386."

We are unable to find any statute pertaining to jury trials of municipal ordinance violations which was enacted as House Bill 1386. *Section 479.150.2*, which authorizes Respondent to provide by ordinance for jury trials in its municipal court, was in force when Appellant was tried. Appellant cites no authority suggesting § 479.150.2 is invalid. We find no merit in Appellant's claim of error regarding denial of his motion for change of venue.

Contention 3 also assigns error in the trial court's denial of "peremptory [sic] challenge." We gather from the argument in Appellant's brief that he refers to the trial court's denial of a "Motion for Change of Judge Out of Time" filed by Appellant on the day trial began.

The motion did not cite any rule or statute authorizing the change of judge. In oral argument to the trial court, Appellant cited Rule 37.53. Paragraph "(a)" of the rule provides it does not govern the procedure for disqualification of a judge in ordinance violation [\*\*18] cases in which there is a timely exercise of a right to a jury trial.

Appellant's brief cites no rule, statute or case demonstrating that the denial of his motion for change of judge was error.

[HN11] Rule 37.61(e) pertains to jury trials of ordinance violations; it provides that such trials "shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure."

[HN12] Rule 32.07(b) governs applications for a change of judge in misdemeanor cases. The application must be filed not later than ten days before the date set for trial, unless the designation of the trial judge occurs less than ten days before trial. Here, the trial judge was designated more than ten days before the trial date.

Assuming -- without deciding -- that Rules 37.61(e) and 32.07(b), read together, authorize a change of judge in a municipal ordinance violation case tried by jury, Appellant has shown no error in the denial of his application. Appellant filed the application after the deadline in Rule 32.07(b), as indicated by the caption on the motion which brands it "Out of Time." Appellant cites no authority holding it is error to deny an untimely application for change of judge. The claim [\*\*19] of error is denied.

[\*507] Contention 4 complains about corruption of the record, but identifies no specific defect or omission. The five pages of argument on contention 4, as we comprehend them, maintain that the record does not contain every document filed in the trial court and does not show everything that occurred before and after trial. The argument mentions numerous alleged deficiencies, but makes only a general allegation of prejudice. No specific prejudice is attributed to any alleged flaw.

We have studied the argument and have found nothing in it which warrants reversal. Further discussion would serve no jurisprudential purpose. Contention 4 is denied per Rule 30.25(b).

Contention 5 complains about the trial court "denying proper legal representation." Again resorting to the argument portion of Appellant's brief, we gather this complaint is based on Appellant's alleged indigence and his belief that the

trial court was consequently required to appoint counsel for him.

[HN13] *Section 600.042* reads, in pertinent part:

"10. The [state public defender] director and defenders shall provide legal services to an eligible person:

. . .

(5) For whom, in a case in which he [\*\*20] faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of . . . municipal ordinances."

Inasmuch as Appellant was charged with a municipal ordinance violation, he was ineligible for public defender representation.

Furthermore, some two months before trial, Appellant and the prosecutor appeared in the trial court, whereupon the prosecutor announced Respondent would not seek a jail sentence if Appellant was convicted. [HN14] There is no constitutional impediment to an uncounseled misdemeanor conviction where imprisonment is not imposed. *White v. King*, 700 S.W.2d 152, 155[7] (Mo.App. W.D. 1985). Appellant was convicted of only a municipal ordinance violation, not a misdemeanor. Furthermore, he was sentenced to only a fine and court costs. [HN15] If an accused is merely fined and not sentenced to any term of imprisonment, he has no constitutional right to counsel. *State v. Albright*, 843 S.W.2d 400, 404[11] n. 3 (Mo.App. W.D. 1992). Contention 5 is meritless.

Contention 6 asserts the trial court erred "in permitting the [\*\*21] prosecution to comment on Appellant's failure to call the witness." We divine from the argument portion of Appellant's brief that this complaint is based on a segment of the cross-examination of Appellant by the prosecutor wherein the prosecutor established that Appellant had the number of a city bus that, according to Appellant, was in front of him just before Tuter stopped him. The prosecutor's questions and Appellant's answers established that Appellant could have obtained the bus driver's name and subpoenaed him.

Appellant maintains the bus driver was equally available to the prosecution, hence the prosecutor's "comments" on Appellant's failure to call the driver were improper.

Nowhere in Tuter's testimony is there any mention of a bus, and nothing in the record indicates Respondent had knowledge of an alleged bus until Appellant mentioned one at trial. The thrust of the prosecutor's questioning was that because Appellant claimed to have written down the bus number, he could have produced the driver at trial if indeed there had been a bus at the site when Tuter stopped Appellant. The obvious implication is that no bus was there. It is thus arguable that the bus driver mentioned [\*\*22] by Appellant was not equally available to Respondent. However, we need not resolve that issue.

Appellant did not object to the prosecutor's questions which he now complains about in contention 6. Furthermore, [HN16] Rule 29.11(d) provides that in jury tried cases, allegations of error to be preserved for appellate review must be included in a motion for new trial, subject to certain exceptions which do not apply to contention 6. As explained below, Appellant failed to satisfy that requirement.

Immediately after the verdict, the trial court granted Appellant until January 28, 1994, to file a motion for a new trial. Appellant [\*508] filed several documents in the trial court within that deadline. The only one resembling a motion for a new trial was a four-page document captioned "Petition for Trial De Novo from Municipal Decision and for Relief from Imposition of Illegal and Unconstitutional Sentence and Fine." We need not decide whether it qualifies as a motion for new trial because even if it does, it fails to mention the alleged error presented by contention 6.

Because Appellant failed to object at trial to the prosecutor's questions regarding the bus driver and failed to

mention [\*\*23] the matter in a motion for new trial, contention 6 is not preserved for review. *State v. Maxwell*, 465 S.W.2d 562, 563[2] (Mo. 1971).

Contention 7 refers to both jury misconduct and witness misconduct at trial. We first address the alleged jury misconduct.

After Respondent rested its case, the trial court declared a recess, admonishing the jurors not to discuss the case among themselves or with others, or to permit anyone to discuss it in their hearing.

During the recess, Appellant moved for a mistrial because Tuter "was out there talking to the jurors." The prosecutor stated that because "this is a nonsmoking building," persons who smoke must do so outside, and Tuter (a smoker) was outside talking to someone.

In support of his motion for mistrial, Appellant presented testimony by Marbelene Pankey. She recounted she saw a police officer, identified to her as Tuter, talking to a female juror. Pankey "heard something in reference to a tuning fork." Pankey also heard the juror ask Tuter "how someone was" -- the name sounded like Kerry or Kenny. Pankey added that she saw Tuter talking to another woman whom she believed was a juror.

The trial court called Tuter into the courtroom [\*\*24] and questioned him. Tuter admitted talking to a juror but avowed he did not know her name. Tuter testified they talked three or four minutes while smoking, and the conversation did not pertain to the trial. Asked specifically whether he talked about tuning forks, Tuter replied, "No, sir."

Appellant then presented testimony by his wife in support of the motion for mistrial. She stated Tuter's conversation with the juror lasted "a good five, ten minutes."

Appellant asked the trial court whether it would be possible to call the juror as a witness on the motion for mistrial. The trial court told Appellant he could do so but it may or may not be in his best interest.

Appellant replied: "I see what you mean, Your Honor. No. I don't wish to call her."

The trial court thereupon denied the motion for mistrial.

As explained earlier, § 479.150.2(1) provides that jury trials in Respondent's municipal court shall be conducted "in accordance with procedures applicable before circuit courts." Section 494.495 provides a court may permit the jury to separate at any adjournment or recess during the trial and jury deliberation in all cases of misdemeanor or felony, except in capital cases. Consequently, [\*\*25] separation of the jurors during the recess in Appellant's trial was not error *per se*.

Appellant cites §§ 546.230 and 546.240, RSMo 1986, which formerly governed jury separation and sequestration; however, those statutes were repealed in 1989. Laws of Missouri 1989, S.B. Nos. 127 *et seq.*

[HN17] Where a motion for new trial is made on account of communications to the jury during the progress of the trial, there is a rebuttable legal presumption that they were prejudicial to the moving party, and where competent evidence is offered it is the duty of the trial court to hear and consider it; when the court does so, its decision is reviewable for abuse of discretion only. *State v. Evans*, 699 S.W.2d 514, 517[4] (Mo.App. S.D. 1985).

In our discussion of contention 6, we referred to a document filed by Appellant after the verdict which could arguably be considered a motion for new trial. In it, Appellant complained about Tuter's conversation with the juror. In adjudicating the claim of jury misconduct in contention 7, we shall assume -- without deciding -- that the document [\*509] qualifies as a motion for a new trial, thereby preserving that issue for review.

Appellant presented [\*\*26] no evidence regarding the claim of jury misconduct at the hearing on his post-verdict motions, thus all of the testimony regarding that issue was heard by the trial court before it denied the motion for

mistrial.

The truth or falsity of the testimony of Pankey, Tuter, and Appellant's wife on the issue of jury misconduct was for the trial court to determine in the exercise of sound judicial discretion. *State v. Stillings*, 882 S.W.2d 696, 700 (Mo. App. S.D. 1994); *State v. Duckett*, 849 S.W.2d 300, 305 (Mo.App. S.D. 1993). Tuter's testimony, if believed, was sufficient to rebut the presumption of prejudice. The trial court evidently found Tuter's testimony credible. On the record here, we cannot convict the trial court of abusing its discretion in that finding. Accordingly, we hold the trial court did not err in denying Appellant's motion for mistrial on the ground of jury misconduct.

Appellant complains that the trial court erroneously placed the burden of proof on him regarding jury misconduct. As we understand Appellant's brief, he bases this complaint on a statement to him by the trial court that he (Appellant) could call any witnesses he desired on the motion for mistrial. [\*\*27]

Nothing in the record indicates the trial court had the notion that it was Appellant's burden to prove Tuter's conversation with the juror was prejudicial. After Appellant presented Pankey's testimony about Tuter's conversation with the juror, it was the trial court who called Tuter into the courtroom and questioned him about the incident. After the trial court questioned Tuter, the court allowed Appellant to question him. Appellant's complaint about the burden of proof is unsupported by the record, and is denied.

We next address the complaint about witness misconduct in contention 7.

During the recess where Tuter talked to the juror, he also talked to witness Oliver who, it will be recalled "certified" Tuter's radar unit. Appellant moved for a mistrial because of that conversation, and presented testimony by Oliver and Tuter about it.

Oliver admitted talking to Tuter, but testified it was just "general conversation." Oliver denied any discussion with Tuter about Appellant's case.

Tuter admitted talking to Oliver, but avowed they were "talking about motorcycles." Tuter denied conversing with Oliver about tuning forks, radar certification, or anything else regarding Appellant's [\*\*28] case.

The testimony of Oliver and Tuter about their conversation was uncontradicted. The trial court denied the motion for mistrial.

The cases cited in our discussion of the jury misconduct issue establish that the credibility of the testimony of Oliver and Tuter about their conversation was for the trial court to determine. The trial court evidently found their testimony credible.

More importantly however, the conversation occurred *after* both of them had testified in front of the jury. Consequently, their testimony to the jury could not have been affected by their conversation. Appellant cites no case where a conviction by jury was reversed because two prosecution witnesses conversed with each other after presenting their testimony to the jury. We hold the trial court did not abuse its discretion in denying Appellant's motion for mistrial on the ground of witness misconduct.

This brings us to contention 8, Appellant's final claim of error: "seating of improper jury." Because contention 8 does not specify what was improper, we have endeavored to identify the alleged impropriety by probing the argument following contention 8.

According to the argument, an alternate juror had [\*\*29] to serve as an alternate on a jury in a case immediately after Appellant's case and was not asked whether that would be a problem. Appellant does not allege this alternate juror replaced a regular juror during his trial, and we find nothing in the record indicating that an alternate juror participated in the verdict. Furthermore, nothing in the record suggests this alternate juror was inconvenienced by serving in both

Appellant's case and the next case (if indeed that occurred), [\*510] and Appellant fails to explain how this could have been prejudicial to him.

The only other averment in the argument regarding the composition of the jury is an allegation that the jury pool "did not consist of impartial jury of the county and record shows that jury seated was biased, prejudiced, and tainted." Appellant does not explain how the record shows this, and cites nothing in the record substantiating the complaint. Contention 8 is denied.

In adjudicating this appeal, we resorted to the argument in Appellant's brief in an effort to discover the meaning of the eight numbered contentions in his point relied on. As noted early in this opinion, this is a task we were not obliged to undertake. [\*\*30] The argument contains a multitude of other complaints, accompanied by accusations of misconduct against the trial court, prosecutor and others. We have not addressed the matters referred to in the preceding sentence because we find no connection between them and anything in the point relied on. [HN18] Appellate review is limited to matters raised in the points relied on. *State v. Gooch*, 831 S.W.2d 277, 277[2] (Mo.App. S.D. 1992).

Judgment affirmed.

43 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF SPRINGFIELD, Respondent, vs. GAREN WADDELL, Appellant.**

**No. 19414**

**COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, DIVISION TWO**

***904 S.W.2d 499; 1995 Mo. App. LEXIS 1284***

**July 13, 1995, FILED**

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM THE CIRCUIT COURT, JUDICIAL CIRCUIT 31, SPRINGFIELD MUNICIPAL DIVISION 22.  
Honorable Todd Thornhill, Municipal Judge.

**DISPOSITION:**

AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, a driver, sought review of the judgment from the Circuit Court, Judicial Circuit 31, Springfield Municipal Division 22 (Missouri), which convicted him of speeding.

**OVERVIEW:** Defendant was convicted of speeding. On appeal, defendant contended that: (1) the evidence was insufficient to support the verdict of guilty returned by the jury because there was no competent evidence to establish his speed; (2) the trial court erred in denying his motion for a change of venue; and (3) the trial court erred in denying proper legal representation. The court affirmed defendant's conviction and held that the evidence was sufficient to establish defendant's speed based on the finding that the police officer's radar unit was accurately gauging speed at the site of the violation at a reasonable proximity to the time when the radar gauged defendant's speed. The court held that the trial court did not err in denying defendant's untimely motion for a change of venue. Further, the court observed that nothing in the record suggested that defendant could not receive a fair trial by jury in the locale where the instant case was pending. Additionally, the court held that defendant had no constitutional right to counsel, since he was merely fined and not sentenced to any term of imprisonment.

**OUTCOME:** The court affirmed defendant's conviction for speeding.

**CORE TERMS:** radar, tuning fork, juror, prosecutor, conversation, mistrial, change of venue, speed, speed limit, driving, posted, mile, tested, jury misconduct, new trial, talking, ordinance, fork, bus, municipal ordinance, tuning, site, misconduct, accuracy, complains, recess, circumstantial evidence, authorize, deadline, arrest

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN1] Mo. R. Crim. P. 30.06(d) (1994) reads, in pertinent part: The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous.

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview******Criminal Law & Procedure > Appeals > Briefs******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN2] An appellate court has no duty to resort to the argument portion of the brief to deduce wherein and why an appellant believes a trial court erred. Appellant has the burden of demonstrating error.

***Civil Procedure > Trials > Jury Trials > Jurors > General Overview******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN3] The appellate court is required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. The appellate court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, the appellate court considers whether a reasonable juror could find each of the elements beyond a reasonable doubt.

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview******Evidence > Procedural Considerations > Weight & Sufficiency******Evidence > Testimony > Examination > General Overview***

[HN4] An appellate court neither weighs the evidence nor judges the credibility of the witnesses. Those are tasks for the jury.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] A speeding conviction cannot be based on radar without proof that the unit was tested and found to be operating properly at the site of the alleged violation and reasonably close to the time it occurred.

***Criminal Law & Procedure > Appeals > Briefs******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview******Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN6] An appellate court is not required to review a contention when it appears without citation of applicable authority. Absent proper explanation concerning why no authority is cited, a contention unaccompanied by citation of authority is deemed waived or abandoned.

***Evidence > Inferences & Presumptions > Inferences******Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

[HN7] Circumstantial evidence is evidence that does not directly prove a fact in issue but gives rise to a logical inference that the fact exists.

***Civil Procedure > Jurisdiction > General Overview***

***Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction***

[HN8] A court has jurisdiction if it has judicial authority over the subject matter and parties.

***Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction***

[HN9] Mo. R. Ordinance and Traffic Violation Bureaus 37.08 reads: If no procedure is specially provided by Mo. R. Ordinance and Traffic Violation Bureaus 37, the judge having jurisdiction shall proceed in a manner consistent with judicial decisions, applicable statutes or other rules of the court.

***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

***Governments > Courts > Justice Courts***

[HN10] *Mo. Rev. Stat. § 479.150.2* (1994), which authorizes the State to provide by ordinance for jury trials in its municipal court, provides that such trials shall be conducted in accordance with procedures applicable before circuit courts.

***Criminal Law & Procedure > Jurisdiction & Venue > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

[HN11] Mo. R. Ordinance and Traffic Violation Bureaus 37.61(e) pertains to jury trials of ordinance violations; it provides that such trials shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure.

***Civil Procedure > Judicial Officers > Judges > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Disqualification & Recusal***

[HN12] Mo. R. Crim. P. 32.07(b) governs applications for a change of judge in misdemeanor cases. The application must be filed not later than ten days before the date set for trial, unless the designation of the trial judge occurs less than ten days before trial.

***Criminal Law & Procedure > Counsel > Assignment***

[HN13] *Mo. Rev. Stat. § 600.042* (1994) reads, in pertinent part: 10. The state public defender director and defenders shall provide legal services to an eligible person: (5) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of municipal ordinances.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel***

***Criminal Law & Procedure > Counsel > Right to Counsel > Trials***

***Criminal Law & Procedure > Sentencing > Fines***

[HN14] There is no constitutional impediment to an uncounseled misdemeanor conviction where imprisonment is not imposed.

***Criminal Law & Procedure > Counsel > Right to Counsel > Trials***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Potential Imprisonment***

***Criminal Law & Procedure > Sentencing > Fines***

[HN15] If an accused is merely fined and not sentenced to any term of imprisonment, he has no constitutional right to counsel.

***Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN16] Mo. R. Crim. P. 29.11(d) provides that in jury tried cases, allegations of error to be preserved for appellate review must be included in a motion for new trial.

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials******Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview******Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN17] Where a motion for new trial is made on account of communications to the jury during the progress of the trial, there is a rebuttable legal presumption that they were prejudicial to the moving party, and where competent evidence is offered it is the duty of the trial court to hear and consider it; when the court does so, its decision is reviewable for abuse of discretion only.

***Criminal Law & Procedure > Appeals > Briefs******Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN18] Appellate review is limited to matters raised in the points relied on.

**COUNSEL:**

Appellant pro se.

No appearance for respondent.

**JUDGES:** Before PREWITT, CROW and PARRISH, JJ.

**OPINION:**

[\*502] PER CURIAM. A jury in Springfield Municipal Division 22 of the Circuit Court of Judicial Circuit 31 found Appellant guilty of speeding in violation of a Springfield municipal ordinance. The jury assessed punishment at a fine of one dollar. The trial court entered judgment in accordance with the verdict.

Appellant brings this appeal per § 479.150.2(2). n1 His brief, submitted pro se, presents the following point relied on:

"1. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: the evidence does not support the verdict beyond a reasonable doubt.

A. There is no competent evidence to establish what speed the Appellant was driving.

B. Evidence was entirely circumstantial.

C. Facts and circumstances relied on by prosecution were inconsistent [sic] with each other and with the hypothesis of guilt.

2. Trial court erred in not entering a [\*\*2] judgement of not guilty that Appellant was driving in excess of the posted speed limit because: court lacked jurisdiction and thus verdict had no validity.

3. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: denial of change of venue, denial of peremptory [sic] challenge.

4. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of

the posted speed limit because: complete corruption of the record to the point of non-viability.

5. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: denial of due process of law by court's display of substantial bias and prejudice denying proper legal representation.

6. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: in permitting the prosecution to comment on Appellant's failure to call the witness.

7. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: erroneously [sic] placing burden [\*\*3] of proof of jury and witness misconduct on Appellant.

8. Trial court erred in not entering a judgement of not guilty that Appellant was driving in excess of the posted speed limit because: seating of improper jury."

n1 References to statutes are to RSMo 1994 except where otherwise indicated.

Rule 30.06(d) n2 sets forth the requirements for a point relied on in this appeal. Rules 37.01, 37.61(e), and 30.33; §§ 479.150.2(1)-(2) and 543.220.1. [HN1] Rule 30.06(d) reads, in pertinent part:

"The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous . . . ."

n2 Rule references are to Missouri Rules of Court (1994).

Appellant's point relied on fails to satisfy the "wherein and why" requirement of Rule 30.06(d). *City [\*\*4] of Springfield v. Rogers*, 867 S.W.2d 692, 693-94 (Mo.App. S.D. 1993); *State v. Root*, 820 S.W.2d 682, 685-86 (Mo.App. S.D. 1991). [HN2] An appellate court has no duty to resort to the argument portion of the brief to deduce wherein and why an appellant believes a trial court erred. *Root*, 820 S.W.2d at 686. Nonetheless, we have sifted the thirty pages of argument in Appellant's brief in an attempt to extract the import of each paragraph of his point. We shall address the contentions as we understand them, mindful that Appellant has the burden of demonstrating error. *State v. Harrison*, 539 S.W.2d 119, 121[1] (Mo.App. 1976).

Contention 1(A) maintains the evidence was insufficient to support the verdict of guilty returned by the jury in that there was no competent evidence to establish Appellant's speed. In addressing that contention, we are aware that Respondent was required to prove Appellant guilty beyond a [\*503] reasonable doubt. *City of Kansas City v. Oxley*, 579 S.W.2d 113, 114[1] (Mo. banc 1979). The standard of review for determining whether the evidence met that requirement is set forth in *State v. Grim*, 854 S.W.2d 403, 411[5] [\*\*5] (Mo. banc 1993), *cert. denied*, U.S. Ct. 562, 126 L. Ed. 2d 462 (1993).

[HN3] "We are required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. We disregard contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, we consider whether a reasonable juror could find each of the elements

beyond a reasonable doubt."

As explained in *Oxley*, 579 S.W.2d at 115, [HN4] an appellate court neither weighs the evidence nor judges the credibility of the witnesses. Those are tasks for the jury. *State v. Wright*, 476 S.W.2d 581, 584[4] (Mo. 1972).

Viewed favorably to the verdict, the evidence establishes that on the morning of September 28, 1993, Officer David Larry Tuter of the Springfield Police Department was operating a radar unit on Grand Street in Springfield. The power source for the unit was the battery on Tuter's motorcycle. The motorcycle engine was "turned off."

To "set up" the radar unit at that site, Tuter performed three procedures to [\*\*6] ensure it was operating properly. First, he pushed a switch to determine whether all the tubes were working properly. He obtained a reading showing they were. Next, he did an "internal calibration" and again received a reading showing the unit was working properly. Finally, he struck a 50 mile-per-hour tuning fork in front of the unit and obtained a 50 mile-per-hour reading. He testified he followed these procedures "before and after each stop."

Asked whether he did anything else before directing the radar unit toward vehicular traffic, Tuter explained he performed a "sweep [of] the area with the radar" to detect outside interference. He observed none.

Between 10:30 and 11:00, Tuter saw a westbound Pontiac on Grand approaching his position. Tuter estimated its speed at 35 miles per hour, which exceeded the posted speed limit of 20 miles per hour. Tuter "put the radar unit into operation" and achieved a "radar lock" on the Pontiac, obtaining a reading of 36 miles per hour.

Tuter pursued the Pontiac and stopped it. Appellant was the driver. Tuter issued Appellant a citation for speeding.

One of Appellant's challenges to the sufficiency of the evidence is based on *City of St. Louis v. Boecker*, 370 S.W.2d 731 (Mo.App. 1963), and *State v. Weatherwax*, 635 S.W.2d 34 (Mo.App. W.D. 1982), which hold that [HN5] a speeding conviction cannot be based on radar without proof that the unit was tested and found to be operating properly at the site of the alleged violation and reasonably close to the time it occurred. *Boecker*, 370 S.W.2d at 737[5]; *Weatherwax*, 635 S.W.2d at 35.

Appellant maintains Tuter's testimony was insufficient to demonstrate compliance with *Boecker* and *Weatherwax* in that Tuter was unable to recall what time he calibrated the radar unit.

Asked on cross-examination what time he calibrated the unit, Tuter replied it could have been 9:30 or 10:15. That would have been anywhere between 15 and 90 minutes before Appellant's Pontiac appeared.

In *Boecker*, the officer tested the radar unit with a tuning fork before he left the police station to go on duty. 370 S.W.2d at 734. He did not test the unit at the site of the violation, and there was no evidence regarding the elapsed time between the test at the station and the violation. *Id.* In *Weatherwax*, the officer tested the radar unit with tuning forks at his home at 7:00 [\*\*8] a.m., before going on duty. 635 S.W.2d at 34-35. Some four hours later, at a different location, he used the unit to detect a speeding violation. *Id.* at 35. He did not test the unit at that site, nor did he test it again until going off duty at 4:00 p.m. *Id.* In both cases, appellate courts held the evidence insufficient to support a conviction.

Appellant, who acquired knowledge about radar in military service, asserts his research [504] disclosed no case that holds the accuracy of a radar unit can be established solely by a tuning fork.

The subject was addressed in *Boecker*, where the appellate court did not question the use of a tuning fork to test the accuracy of a radar unit "as a matter of principle." 370 S.W.2d at 736. However, *Boecker* noted the value of such a test hinged on the accuracy of the tuning fork. *Id.* Because there was no evidence that the tuning fork in *Boecker* was accurate, the appellate court had "grave doubts" that the test was sufficient to establish that the radar was functioning properly. *Id.* Despite such doubts, *Boecker* did not base reversal on the tuning fork test, but instead on the failure of the officer to test the [\*\*9] unit at the site of the violation and reasonably close to the time it occurred. *Id.* at 736-38.

Here, there was evidence regarding the accuracy of the tuning fork and radar unit. Don Oliver, who holds a "radio telephone operator's license" from the Federal Communications Commission ("FCC"), has "certified" radar units for "eight to ten years." On May 7, 1993, he certified the unit used by Tuter.

Explaining the process, Oliver testified that the frequency of the tuning fork for that unit is counted by an electronic frequency counter at his shop. Accuracy of the unit itself is tested by the tuning fork and by two other tuning forks at the shop. Oliver avowed Tuter's radar unit had these margins of error: 4/100 of a mile per hour at 30 miles per hour, 12/100 of a mile per hour at 50 miles per hour, and 5/100 of a mile per hour at 65 miles per hour.

In *State v. Moore*, 700 S.W.2d 880 (Mo.App. E.D. 1985), the arresting officer tested his radar unit with a 30-mile-per-hour tuning fork and a 70-mile-per-hour tuning fork approximately an hour before using the unit to gauge the accused's speed. *Id.* at 881. The officer repeated the procedure immediately after the arrest. [\*\*10] *Id.* The officer had tested the tuning forks by striking them in front of a frequency counter some eight months before the arrest. *Id.* 882. The conviction was affirmed.

In *State v. Shoemaker*, 798 S.W.2d 191 (Mo.App. E.D. 1990), the arresting officer tested his radar unit with tuning forks before and after using the unit to gauge the accused's speed. *Id.* at 193. The forks had been certified as accurate six months before the arrest, and were again certified as accurate five months following the arrest. *Id.* The officer also tested the ground speed of the radar unit against the speedometer on his vehicle. *Id.* The conviction was affirmed.

Here, the interval between the date Oliver certified Tuter's radar unit (including tuning fork) and the date Tuter used the unit to gauge Appellant's speed was shorter than the intervals in *Moore* and *Shoemaker*. Like the officers in those cases, Tuter performed a tuning fork test on his unit before and after stopping Appellant. Consistent with *Moore* and *Shoemaker*, we reject Appellant's claim that the evidence was insufficient to support a finding that Tuter's unit was accurately gauging speed when it gauged Appellant's [\*\*11] speed.

Appellant argues that Grand Street has four lanes, and traffic in the two eastbound lanes made it impossible for the radar to accurately gauge his speed. However, Tuter testified there were no other vehicles in the area which would have interfered with the radar reading Tuter got on Appellant's Pontiac. Credibility of Tuter's testimony was for the jury. *State v. Jeffries*, 858 S.W.2d 821, 823-24[4] (Mo.App. E.D. 1993). The jury evidently believed Tuter.

Appellant also argues that a curve in Grand Street, coupled with visual obstructions including trees, signs, poles and other objects, made it impossible for Tuter's radar "to obtain an accurate reading." Appellant presented photographs of the area to the jury in support of that hypothesis. Appellant has filed the photographs with us. They depict a street flanked by trees, signs and poles, but no more than normal for a four-lane street.

Tuter testified he saw Appellant's Pontiac when it was 250 to 300 feet east of Tuter's location. Tuter recounted there were no obstructions "to cause interference with the [\*505] radar." The jury was entitled to believe that testimony. *Jeffries*, 858 S.W.2d at 824.

Appellant [\*\*12] attacks the testimony of witness Oliver, who certified Tuter's radar unit. Appellant asserts Oliver "admitted to violating Federal, State and Local Laws in the performance of his responsibilities for the radar." In support of this accusation, Appellant cites a segment of the transcript where Oliver stated he occasionally pointed radar units at oncoming traffic when returning them after inspection.

Appellant does not (a) identify the laws violated, (b) explain how the alleged violations destroy the competency of Oliver's testimony, (c) cite any authority on the subject, or (d) explain why he cites none. [HN6] An appellate court is not required to review a contention when it appears without citation of applicable authority. *State v. Higgins*, 852 S.W.2d 172, 175[4] (Mo.App. S.D. 1993). Absent proper explanation concerning why no authority is cited, a contention unaccompanied by citation of authority is deemed waived or abandoned. *Id.* at 175[5].

Appellant also questions other aspects of the evidence, such as the power source for the radar and the length of time

his Pontiac was near the radar. Such factors were for the jury's consideration. They do not render the evidence [\*\*13] insufficient to support the verdict. Appellant's contention 1(A) is without merit.

Appellant bases contentions 1(B) and 1(C) on the premise that the evidence against him was entirely circumstantial. [HN7] Circumstantial evidence is evidence that does not directly prove a fact in issue but gives rise to a logical inference that the fact exists. *State v. Fleeer*, 851 S.W.2d 582, 598[50] (Mo.App. E.D. 1993).

Appellant cites no case holding a radar measurement of an automobile's speed is circumstantial evidence. Because of *Grim*, *supra*, 854 S.W.2d 403, we need not decide whether it is. Until *Grim*, the standard of review for sufficiency of the evidence where a criminal conviction was based on circumstantial evidence differed from the standard where a conviction was based on direct evidence. *Id.* at 405-08. *Grim* held that henceforth, the standard would be the same for all criminal convictions, whether based on direct evidence, circumstantial evidence, or both. *Id.* The standard in *Grim* is quoted earlier in this opinion. We hold the evidence in the instant case met that standard. Appellant's contentions 1(B) and 1(C), which are based on the *pre-Grim* circumstantial [\*\*14] evidence standard, provide no basis for reversal.

Contention 2 asserts the trial court "lacked jurisdiction," hence the verdict "had no validity."

[HN8] A court has jurisdiction if it has judicial authority over the subject matter and parties. *State ex rel. Furstenfeld v. Nixon*, 133 S.W. 340, 342 (Mo. 1910); *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 314[7] (Mo.App. E.D. 1981). Appellant, as we understand his argument, does not contend the trial court lacked jurisdiction to adjudicate violations of Springfield traffic ordinances. Instead, Appellant maintains Respondent never proved Tuter's radar unit was "licensed or authorized" by the FCC. Appellant also avers Oliver violated his FCC license in testing and using radar units. These factors, says Appellant, "barred jurisdiction, and nullified any verdict derived thereof."

Appellant cites no authority in support of that hypothesis, and we are aware of none. We fail to see how lack of an FCC license for Tuter's radar unit (if indeed one was required), or how a violation by Oliver of his FCC license (if indeed any occurred), divested the trial court of jurisdiction. Contention 2 is denied.

Contention 3 complains about [\*\*15] "denial of change of venue." Appellant filed a "Motion for Change of Venue Out of Time" on the day trial began (January 10, 1994). The motion prayed that the case be transferred to Division 3 of the Circuit Court of Judicial Circuit 31 or to Dallas County, which lies in Judicial Circuit 30. The trial court denied the motion.

The motion did not cite any rule or statute authorizing the change of venue. Appellant cited none to the trial court when it took up the motion. Appellant's brief likewise cites none.

[\*506] Rule 37 governs the procedure in courts having original jurisdiction of ordinance violations. *See*: Rule 37.01. We find no provision in Rule 37 for a change of venue. n3

n3 [HN9] Rule 37.08 reads: "If no procedure is specially provided by this Rule 37, the judge having jurisdiction shall proceed in a manner consistent with judicial decisions, applicable statutes or other rules of this Court."

[HN10] *Section 479.150.2*, which authorizes Respondent to provide by ordinance for jury trials in its municipal [\*\*16] court, provides that such trials shall be conducted "in accordance with procedures applicable before circuit courts." § 479.150.2(1). It is thus arguable that Rule 32.04, which governs changes of venue for criminal cases in circuit courts, applies here. Paragraph "(b)" of the rule establishes a deadline for filing an application for a change of venue.

Assuming -- without deciding -- that § 479.150.2(1), coupled with Rule 32.04, authorizes a change of venue in a municipal ordinance violation case, Appellant has shown no error in the denial of his motion. Our study of the record

reveals Appellant filed his motion after the deadline in Rule 32.04(b). His motion tacitly concedes this, as its caption brands it "Out of Time."

Appellant cites no authority holding it is error to deny an untimely motion for change of venue, particularly where (as here) nothing in the record suggests an accused cannot receive a fair trial by jury in the locale where the case is pending. Assuming, arguendo, that Appellant had a right to a change of venue upon timely application -- we do not imply he did -- we hold the trial court did not err in denying Appellant's untimely application.

In his brief, Appellant [\*\*17] declares Respondent is not empowered to hold jury trials, therefore his case should have been "transferred to the appropriate circuit court." In support of that hypothesis, Appellant cites "House Bill #1386."

We are unable to find any statute pertaining to jury trials of municipal ordinance violations which was enacted as House Bill 1386. *Section 479.150.2*, which authorizes Respondent to provide by ordinance for jury trials in its municipal court, was in force when Appellant was tried. Appellant cites no authority suggesting § 479.150.2 is invalid. We find no merit in Appellant's claim of error regarding denial of his motion for change of venue.

Contention 3 also assigns error in the trial court's denial of "peremptory [sic] challenge." We gather from the argument in Appellant's brief that he refers to the trial court's denial of a "Motion for Change of Judge Out of Time" filed by Appellant on the day trial began.

The motion did not cite any rule or statute authorizing the change of judge. In oral argument to the trial court, Appellant cited Rule 37.53. Paragraph "(a)" of the rule provides it does not govern the procedure for disqualification of a judge in ordinance violation [\*\*18] cases in which there is a timely exercise of a right to a jury trial.

Appellant's brief cites no rule, statute or case demonstrating that the denial of his motion for change of judge was error.

[HN11] Rule 37.61(e) pertains to jury trials of ordinance violations; it provides that such trials "shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure."

[HN12] Rule 32.07(b) governs applications for a change of judge in misdemeanor cases. The application must be filed not later than ten days before the date set for trial, unless the designation of the trial judge occurs less than ten days before trial. Here, the trial judge was designated more than ten days before the trial date.

Assuming -- without deciding -- that Rules 37.61(e) and 32.07(b), read together, authorize a change of judge in a municipal ordinance violation case tried by jury, Appellant has shown no error in the denial of his application. Appellant filed the application after the deadline in Rule 32.07(b), as indicated by the caption on the motion which brands it "Out of Time." Appellant cites no authority holding it is error to deny an untimely application for change of judge. The claim [\*\*19] of error is denied.

[\*507] Contention 4 complains about corruption of the record, but identifies no specific defect or omission. The five pages of argument on contention 4, as we comprehend them, maintain that the record does not contain every document filed in the trial court and does not show everything that occurred before and after trial. The argument mentions numerous alleged deficiencies, but makes only a general allegation of prejudice. No specific prejudice is attributed to any alleged flaw.

We have studied the argument and have found nothing in it which warrants reversal. Further discussion would serve no jurisprudential purpose. Contention 4 is denied per Rule 30.25(b).

Contention 5 complains about the trial court "denying proper legal representation." Again resorting to the argument portion of Appellant's brief, we gather this complaint is based on Appellant's alleged indigence and his belief that the

trial court was consequently required to appoint counsel for him.

[HN13] *Section 600.042* reads, in pertinent part:

"10. The [state public defender] director and defenders shall provide legal services to an eligible person:

. . .

(5) For whom, in a case in which he [\*\*20] faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of . . . municipal ordinances."

Inasmuch as Appellant was charged with a municipal ordinance violation, he was ineligible for public defender representation.

Furthermore, some two months before trial, Appellant and the prosecutor appeared in the trial court, whereupon the prosecutor announced Respondent would not seek a jail sentence if Appellant was convicted. [HN14] There is no constitutional impediment to an uncounseled misdemeanor conviction where imprisonment is not imposed. *White v. King*, 700 S.W.2d 152, 155[7] (Mo.App. W.D. 1985). Appellant was convicted of only a municipal ordinance violation, not a misdemeanor. Furthermore, he was sentenced to only a fine and court costs. [HN15] If an accused is merely fined and not sentenced to any term of imprisonment, he has no constitutional right to counsel. *State v. Albright*, 843 S.W.2d 400, 404[11] n. 3 (Mo.App. W.D. 1992). Contention 5 is meritless.

Contention 6 asserts the trial court erred "in permitting the [\*\*21] prosecution to comment on Appellant's failure to call the witness." We divine from the argument portion of Appellant's brief that this complaint is based on a segment of the cross-examination of Appellant by the prosecutor wherein the prosecutor established that Appellant had the number of a city bus that, according to Appellant, was in front of him just before Tuter stopped him. The prosecutor's questions and Appellant's answers established that Appellant could have obtained the bus driver's name and subpoenaed him.

Appellant maintains the bus driver was equally available to the prosecution, hence the prosecutor's "comments" on Appellant's failure to call the driver were improper.

Nowhere in Tuter's testimony is there any mention of a bus, and nothing in the record indicates Respondent had knowledge of an alleged bus until Appellant mentioned one at trial. The thrust of the prosecutor's questioning was that because Appellant claimed to have written down the bus number, he could have produced the driver at trial if indeed there had been a bus at the site when Tuter stopped Appellant. The obvious implication is that no bus was there. It is thus arguable that the bus driver mentioned [\*\*22] by Appellant was not equally available to Respondent. However, we need not resolve that issue.

Appellant did not object to the prosecutor's questions which he now complains about in contention 6. Furthermore, [HN16] Rule 29.11(d) provides that in jury tried cases, allegations of error to be preserved for appellate review must be included in a motion for new trial, subject to certain exceptions which do not apply to contention 6. As explained below, Appellant failed to satisfy that requirement.

Immediately after the verdict, the trial court granted Appellant until January 28, 1994, to file a motion for a new trial. Appellant [\*508] filed several documents in the trial court within that deadline. The only one resembling a motion for a new trial was a four-page document captioned "Petition for Trial De Novo from Municipal Decision and for Relief from Imposition of Illegal and Unconstitutional Sentence and Fine." We need not decide whether it qualifies as a motion for new trial because even if it does, it fails to mention the alleged error presented by contention 6.

Because Appellant failed to object at trial to the prosecutor's questions regarding the bus driver and failed to

mention [\*\*23] the matter in a motion for new trial, contention 6 is not preserved for review. *State v. Maxwell*, 465 S.W.2d 562, 563[2] (Mo. 1971).

Contention 7 refers to both jury misconduct and witness misconduct at trial. We first address the alleged jury misconduct.

After Respondent rested its case, the trial court declared a recess, admonishing the jurors not to discuss the case among themselves or with others, or to permit anyone to discuss it in their hearing.

During the recess, Appellant moved for a mistrial because Tuter "was out there talking to the jurors." The prosecutor stated that because "this is a nonsmoking building," persons who smoke must do so outside, and Tuter (a smoker) was outside talking to someone.

In support of his motion for mistrial, Appellant presented testimony by Marbelene Pankey. She recounted she saw a police officer, identified to her as Tuter, talking to a female juror. Pankey "heard something in reference to a tuning fork." Pankey also heard the juror ask Tuter "how someone was" -- the name sounded like Kerry or Kenny. Pankey added that she saw Tuter talking to another woman whom she believed was a juror.

The trial court called Tuter into the courtroom [\*\*24] and questioned him. Tuter admitted talking to a juror but avowed he did not know her name. Tuter testified they talked three or four minutes while smoking, and the conversation did not pertain to the trial. Asked specifically whether he talked about tuning forks, Tuter replied, "No, sir."

Appellant then presented testimony by his wife in support of the motion for mistrial. She stated Tuter's conversation with the juror lasted "a good five, ten minutes."

Appellant asked the trial court whether it would be possible to call the juror as a witness on the motion for mistrial. The trial court told Appellant he could do so but it may or may not be in his best interest.

Appellant replied: "I see what you mean, Your Honor. No. I don't wish to call her."

The trial court thereupon denied the motion for mistrial.

As explained earlier, § 479.150.2(1) provides that jury trials in Respondent's municipal court shall be conducted "in accordance with procedures applicable before circuit courts." Section 494.495 provides a court may permit the jury to separate at any adjournment or recess during the trial and jury deliberation in all cases of misdemeanor or felony, except in capital cases. Consequently, [\*\*25] separation of the jurors during the recess in Appellant's trial was not error *per se*.

Appellant cites §§ 546.230 and 546.240, RSMo 1986, which formerly governed jury separation and sequestration; however, those statutes were repealed in 1989. Laws of Missouri 1989, S.B. Nos. 127 *et seq.*

[HN17] Where a motion for new trial is made on account of communications to the jury during the progress of the trial, there is a rebuttable legal presumption that they were prejudicial to the moving party, and where competent evidence is offered it is the duty of the trial court to hear and consider it; when the court does so, its decision is reviewable for abuse of discretion only. *State v. Evans*, 699 S.W.2d 514, 517[4] (Mo.App. S.D. 1985).

In our discussion of contention 6, we referred to a document filed by Appellant after the verdict which could arguably be considered a motion for new trial. In it, Appellant complained about Tuter's conversation with the juror. In adjudicating the claim of jury misconduct in contention 7, we shall assume -- without deciding -- that the document [\*509] qualifies as a motion for a new trial, thereby preserving that issue for review.

Appellant presented [\*\*26] no evidence regarding the claim of jury misconduct at the hearing on his post-verdict motions, thus all of the testimony regarding that issue was heard by the trial court before it denied the motion for

mistrial.

The truth or falsity of the testimony of Pankey, Tuter, and Appellant's wife on the issue of jury misconduct was for the trial court to determine in the exercise of sound judicial discretion. *State v. Stillings*, 882 S.W.2d 696, 700 (Mo. App. S.D. 1994); *State v. Duckett*, 849 S.W.2d 300, 305 (Mo.App. S.D. 1993). Tuter's testimony, if believed, was sufficient to rebut the presumption of prejudice. The trial court evidently found Tuter's testimony credible. On the record here, we cannot convict the trial court of abusing its discretion in that finding. Accordingly, we hold the trial court did not err in denying Appellant's motion for mistrial on the ground of jury misconduct.

Appellant complains that the trial court erroneously placed the burden of proof on him regarding jury misconduct. As we understand Appellant's brief, he bases this complaint on a statement to him by the trial court that he (Appellant) could call any witnesses he desired on the motion for mistrial. [\*\*27]

Nothing in the record indicates the trial court had the notion that it was Appellant's burden to prove Tuter's conversation with the juror was prejudicial. After Appellant presented Pankey's testimony about Tuter's conversation with the juror, it was the trial court who called Tuter into the courtroom and questioned him about the incident. After the trial court questioned Tuter, the court allowed Appellant to question him. Appellant's complaint about the burden of proof is unsupported by the record, and is denied.

We next address the complaint about witness misconduct in contention 7.

During the recess where Tuter talked to the juror, he also talked to witness Oliver who, it will be recalled "certified" Tuter's radar unit. Appellant moved for a mistrial because of that conversation, and presented testimony by Oliver and Tuter about it.

Oliver admitted talking to Tuter, but testified it was just "general conversation." Oliver denied any discussion with Tuter about Appellant's case.

Tuter admitted talking to Oliver, but avowed they were "talking about motorcycles." Tuter denied conversing with Oliver about tuning forks, radar certification, or anything else regarding Appellant's [\*\*28] case.

The testimony of Oliver and Tuter about their conversation was uncontradicted. The trial court denied the motion for mistrial.

The cases cited in our discussion of the jury misconduct issue establish that the credibility of the testimony of Oliver and Tuter about their conversation was for the trial court to determine. The trial court evidently found their testimony credible.

More importantly however, the conversation occurred *after* both of them had testified in front of the jury. Consequently, their testimony to the jury could not have been affected by their conversation. Appellant cites no case where a conviction by jury was reversed because two prosecution witnesses conversed with each other after presenting their testimony to the jury. We hold the trial court did not abuse its discretion in denying Appellant's motion for mistrial on the ground of witness misconduct.

This brings us to contention 8, Appellant's final claim of error: "seating of improper jury." Because contention 8 does not specify what was improper, we have endeavored to identify the alleged impropriety by probing the argument following contention 8.

According to the argument, an alternate juror had [\*\*29] to serve as an alternate on a jury in a case immediately after Appellant's case and was not asked whether that would be a problem. Appellant does not allege this alternate juror replaced a regular juror during his trial, and we find nothing in the record indicating that an alternate juror participated in the verdict. Furthermore, nothing in the record suggests this alternate juror was inconvenienced by serving in both

Appellant's case and the next case (if indeed that occurred), [\*510] and Appellant fails to explain how this could have been prejudicial to him.

The only other averment in the argument regarding the composition of the jury is an allegation that the jury pool "did not consist of impartial jury of the county and record shows that jury seated was biased, prejudiced, and tainted." Appellant does not explain how the record shows this, and cites nothing in the record substantiating the complaint. Contention 8 is denied.

In adjudicating this appeal, we resorted to the argument in Appellant's brief in an effort to discover the meaning of the eight numbered contentions in his point relied on. As noted early in this opinion, this is a task we were not obliged to undertake. [\*\*30] The argument contains a multitude of other complaints, accompanied by accusations of misconduct against the trial court, prosecutor and others. We have not addressed the matters referred to in the preceding sentence because we find no connection between them and anything in the point relied on. [HN18] Appellate review is limited to matters raised in the points relied on. *State v. Gooch*, 831 S.W.2d 277, 277[2] (Mo.App. S.D. 1992).

Judgment affirmed.

44 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**CITY OF BERKELEY, Respondent, v. JANET ROSE STRINGFELLOW,  
Appellant**

**No. 55347****Court of Appeals of Missouri, Eastern District, Division One***783 S.W.2d 501; 1990 Mo. App. LEXIS 162***January 30, 1990, Filed****PRIOR HISTORY:** [\*\*1]

Appeal from the Circuit Court of St. Louis County, Hon. Daniel J. O'Toole.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Circuit Court of St. Louis County (Missouri), which convicted her of exceeding the posted speed limit and resisting lawful arrest.

**OVERVIEW:** An officer stopped defendant's vehicle, which was clocked by radar equipment at 77 miles per hour in a 55 mile-per-hour zone. Defendant refused to sign a citation at the officer's request and the officer attempted to place her under arrest; defendant struggled and the officer had to physically drag her to his car. The trial court found defendant guilty of resisting lawful arrest in violation of a city ordinance and speeding. On appeal, the court reversed defendant's conviction for resisting a lawful arrest. The trial court lacked jurisdiction over the charge because the information failed to allege sufficient facts upon which a verdict could be predicated, in violation of Mo. Sup. Ct. R. 37.35. The information did not set forth an ordinance violated as required by Rule 37.35; nor did it allege any essential facts constituting a violation of the ordinance. In failing to raise the issue of the validity of the speeding ordinance at the first available opportunity, defendant waived it. The evidence was sufficient to support defendant's conviction of speeding.

**OUTCOME:** The court affirmed defendant's conviction of exceeding the posted speed limit. The court reversed defendant's conviction of resistance to lawful arrest.

**CORE TERMS:** ordinance, radar, lawful arrest, resisting, speed limit, posted, gun, speed, miles, exceeding, speeding, information charging, tuning, blue, police officer, refused to sign, essential facts, high rate, constituting, calibration, physically, monitoring, displayed, traveling, favorable, handcuff, checking, noticed, clocked, tested

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Elements  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Governments > Local Governments > Ordinances & Regulations***

[HN1] Mo. Sup. Ct. R. 37.34 requires all ordinance violations be prosecuted by information. Mo. Sup. Ct. R. 37.35 in part requires the information state the name of defendant, state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged, state the time and place of the ordinance violation charged, and cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment.

***Criminal Law & Procedure > Accusatory Instruments > Indictments  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Governments > Local Governments > Ordinances & Regulations***

[HN2] Although an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance. The test for sufficiency of an information is whether it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and whether final disposition of the charge will bar further prosecution for the same offense.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview  
Governments > Local Governments > Ordinances & Regulations***

[HN3] Challenges to the validity of an ordinance, like challenges to the constitutionality of an ordinance, must be raised at the first opportunity that good pleading and orderly procedure permit and if not so raised are deemed waived.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN4] The evidence must be construed most strongly in favor of the result reached in the trial court and the facts in evidence and all inferences reasonably to be drawn therefrom are to be considered in a light most favorable to the city and all evidence and inferences to the contrary are to be disregarded.

**JUDGES:**

Robert E. Crist, Judge. Gary M. Gaertner, P.J., and Reinhard, J., concur.

**OPINION BY:**

CRIST

**OPINION:**

[\*502] Defendant appeals her convictions of exceeding the posted speed limit and resisting lawful arrest. We affirm the speeding charge and reverse the resistance to lawful arrest charge.

Viewed in a light most favorable to the verdict, the evidence reveals on August 1, 1987, Police Officer Richard Sounders of the City of Berkeley police department noticed a blue Chevrolet Camero driven by defendant traveling at a high rate of speed on Interstate 170. Officer activated his radar equipment which clocked the blue Camero at 77 miles per hour. The posted speed limit on Interstate 170 is 55 miles per hour.

Officer attempted to pull the defendant over. The defendant exited the Highway at Scudder Road and stopped at the top of the ramp. Officer got out of his car and approached the defendant. Officer asked for defendant's driver's license. Defendant complied but denied any wrongdoing. Officer informed defendant his radar clocked her automobile's rate of speed at 77 miles per hour. Defendant demanded [\*\*2] to see his radar equipment and officer allowed her to view it.

Officer filled out a citation and asked defendant to sign it. Defendant refused. Officer explained that by signing the citation she was only promising to appear at the given court date, not admitting exceeding the posted speed limit. Defendant continued to refuse to sign the citation. Officer explained to defendant he would have to take her into custody if she refused to [503] sign the citation. Defendant still refused to sign the citation and told officer he would have to lock her up. Officer then informed her she was under arrest. He attempted to handcuff her and was able to get a handcuff over her right hand. Thereafter a fight ensued. Defendant turned to face officer, grabbed his left arm with her hand and began to scratch his arm with her fingernails. She continued struggling and officer could not get control of her. Finally, officer had to physically push her to the ground, put his weight on top of her, and bring her hands behind her back to get them cuffed together. She still continued to struggle refusing to stand and officer was only able to get her to his car by physically dragging her. Defendant was taken [\*\*3] to Christian Northwest Hospital for the purpose of having a blood sample drawn.

Defendant was charged by information with exceeding the posted speed limit, driving while intoxicated, assault third degree on a police officer, possession of a controlled substance, and resisting a lawful arrest. City of Berkeley's municipal judge found defendant guilty on all counts. Defendant subsequently petitioned the circuit court for trial de novo. The cause was heard on August 18, 1988. The circuit court found defendant guilty of resisting lawful arrest and speeding. Defendant was fined \$ 100 for the charge of resisting lawful arrest and \$ 25 for the charge of exceeding the posted speed limit. Defendant appeals. No brief was submitted by the respondent, City of Berkeley, nor did counsel for City of Berkeley appear for oral argument.

Defendant asserts the trial court lacked jurisdiction over the resisting lawful arrest charge because the information failed to allege sufficient facts upon which a verdict could be predicted. Rule 37.34 [HN1] requires all ordinance violations be prosecuted by information. Rule 37.35 in part requires "the information . . . state the name of defendant . . . state plainly, [\*\*4] concisely, and definitely the essential facts constituting the ordinance violation charged . . . state the time and place of the ordinance violation charged . . . cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment . . ."

The information charging defendant with resisting lawful arrest states only that on August 1, 1987, at Scudder and I-170 at 6:05 p.m., Janet Rose Stringfellow did unlawfully "resist a lawful arrest." The information is signed by the arresting officer and the City of Berkeley Prosecutor. No ordinance violation appears on the information.

[HN2] Although an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance. *City of Kansas City v. Harbin*, 600 S.W.2d 589, 592 [2-5] (Mo.App. 1980), citing *City of Kansas City v. Narron*, 493 S.W.2d 394, 398 [2-4] (Mo.App. 1973).

The test for sufficiency of an information is whether [\*\*5] it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and whether final disposition of the charge will bar further prosecution for the same offense. *City of Hermann v. Huxol*, 637 S.W.2d 89, 91 [3-5] (Mo.App. 1982).

The information charging defendant with resisting lawful arrest does not comply with Rule 37.35 nor does it comply with the test for sufficiency. It does not set forth an ordinance violated as required by the rule; it does not allege any essential facts constituting a violation of an ordinance; it does not allege any elements of the crime intended to be charged. The resisting arrest information was insufficient. Because of the disposition of this offense, we need not address any of defendant's other points of alleged error concerning the resisting lawful arrest charge.

Defendant next asserts the trial court erred in claiming jurisdiction over the speeding charge because the certified copy [\*504] of the ordinance presented by City of Berkeley at trial was an ordinance which was not in effect on August 1, 1987, the date of the occurrence. However, defendant failed to object when the prosecutor presented [\*\*6] the ordinance for admission by stipulation of the parties. [HN3] Challenges to the validity of an ordinance, like challenges to the constitutionality of an ordinance must be raised at the first opportunity that good pleading and orderly procedure permit and if not so raised are deemed waived. *City of St. Louis v. Aetna Casualty and Surety Co.*, 429 S.W.2d 252, 254 [1] (Mo. 1968); *see also McDonald v. Plas*, 401 S.W.2d 929, 935 [8, 9] (Mo.App. 1966); *City of Frankford v. Davis*, 348 S.W.2d 553, 554-555 [4, 5, 6] (Mo.App. 1961). In failing to raise the issue of the validity of the ordinance at the first available opportunity, she waived her right to challenge it. Point denied.

Finally defendant contends the trial court erred in finding defendant guilty of the charge of speeding because there was insufficient evidence to support the judgment. [HN4] The evidence must be construed most strongly in favor of the result reached in the trial court and the facts in evidence and all inferences reasonably to be drawn therefrom are to be considered in a light most favorable to the city and all evidence and inferences to the contrary are to be disregarded. *City of Jackson v. Rapp*, 700 [\*\*7] S.W.2d 498, 499 [1] (Mo.App. 1985).

Officer testified at trial that on August 1, 1987 at about 6 p.m. he was on duty monitoring the traffic flow on Interstate 170 southbound. He had his radar gun with him which he had tested himself just shortly before he began monitoring traffic. His tests, which included tuning the radar gun with two different tuning forks and checking of the internal calibration to assure all the diodes were properly working, resulted in an accurate display from the radar gun. Officer also testified he is a certified radar instructor. He testified that his particular radar gun had last been certified and calibrated on June 17, 1987.

Officer testified he noticed a blue Chevrolet Camero traveling at a "very high rate of speed." The posted speed limit on Interstate 170 is 55 miles per hour. Officer pointed the radar gun out through the rear window of his vehicle and was able to track defendant's vehicle approaching the rear of his vehicle. The radar reading initially displayed a speed of 77 miles per hour and then locked in on a speed of 76 miles per hour. Officer testified no other car interfered with the radar reading of the speed of defendant's car.

The speed [\*\*8] measuring accuracy of the radar gun was shown by evidence tending to prove it was tested and shown to be accurate by the use of two separate tuning forks and by checking the internal calibration. There was sufficient evidence to support a finding the radar gun accurately displayed defendant's automobile exceeded the posted speed limit. *State v. Guenther*, 744 S.W.2d 564, 565 [1,2] (Mo.App. 1988). This point is denied.

The judgment of guilty of resisting lawful arrest is reversed. The judgment of guilty of exceeding the posted speed limit is affirmed.

45 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**CITY OF BERKELEY, Respondent, v. JANET ROSE STRINGFELLOW,  
Appellant**

**No. 55347****Court of Appeals of Missouri, Eastern District, Division One***783 S.W.2d 501; 1990 Mo. App. LEXIS 162***January 30, 1990, Filed****PRIOR HISTORY:** [\*\*1]

Appeal from the Circuit Court of St. Louis County, Hon. Daniel J. O'Toole.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Circuit Court of St. Louis County (Missouri), which convicted her of exceeding the posted speed limit and resisting lawful arrest.

**OVERVIEW:** An officer stopped defendant's vehicle, which was clocked by radar equipment at 77 miles per hour in a 55 mile-per-hour zone. Defendant refused to sign a citation at the officer's request and the officer attempted to place her under arrest; defendant struggled and the officer had to physically drag her to his car. The trial court found defendant guilty of resisting lawful arrest in violation of a city ordinance and speeding. On appeal, the court reversed defendant's conviction for resisting a lawful arrest. The trial court lacked jurisdiction over the charge because the information failed to allege sufficient facts upon which a verdict could be predicated, in violation of Mo. Sup. Ct. R. 37.35. The information did not set forth an ordinance violated as required by Rule 37.35; nor did it allege any essential facts constituting a violation of the ordinance. In failing to raise the issue of the validity of the speeding ordinance at the first available opportunity, defendant waived it. The evidence was sufficient to support defendant's conviction of speeding.

**OUTCOME:** The court affirmed defendant's conviction of exceeding the posted speed limit. The court reversed defendant's conviction of resistance to lawful arrest.

**CORE TERMS:** ordinance, radar, lawful arrest, resisting, speed limit, posted, gun, speed, miles, exceeding, speeding, information charging, tuning, blue, police officer, refused to sign, essential facts, high rate, constituting, calibration, physically, monitoring, displayed, traveling, favorable, handcuff, checking, noticed, clocked, tested

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > Elements  
Criminal Law & Procedure > Accusatory Instruments > Informations  
Governments > Local Governments > Ordinances & Regulations***

[HN1] Mo. Sup. Ct. R. 37.34 requires all ordinance violations be prosecuted by information. Mo. Sup. Ct. R. 37.35 in part requires the information state the name of defendant, state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged, state the time and place of the ordinance violation charged, and cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment.

***Criminal Law & Procedure > Accusatory Instruments > Indictments  
Criminal Law & Procedure > Accusatory Instruments > Informations  
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[HN2] Although an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance. The test for sufficiency of an information is whether it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and whether final disposition of the charge will bar further prosecution for the same offense.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview  
Governments > Local Governments > Ordinances & Regulations***

[HN3] Challenges to the validity of an ordinance, like challenges to the constitutionality of an ordinance, must be raised at the first opportunity that good pleading and orderly procedure permit and if not so raised are deemed waived.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN4] The evidence must be construed most strongly in favor of the result reached in the trial court and the facts in evidence and all inferences reasonably to be drawn therefrom are to be considered in a light most favorable to the city and all evidence and inferences to the contrary are to be disregarded.

**JUDGES:**

Robert E. Crist, Judge. Gary M. Gaertner, P.J., and Reinhard, J., concur.

**OPINION BY:**

CRIST

**OPINION:**

[\*502] Defendant appeals her convictions of exceeding the posted speed limit and resisting lawful arrest. We affirm the speeding charge and reverse the resistance to lawful arrest charge.

Viewed in a light most favorable to the verdict, the evidence reveals on August 1, 1987, Police Officer Richard Sounders of the City of Berkeley police department noticed a blue Chevrolet Camero driven by defendant traveling at a high rate of speed on Interstate 170. Officer activated his radar equipment which clocked the blue Camero at 77 miles per hour. The posted speed limit on Interstate 170 is 55 miles per hour.

Officer attempted to pull the defendant over. The defendant exited the Highway at Scudder Road and stopped at the top of the ramp. Officer got out of his car and approached the defendant. Officer asked for defendant's driver's license. Defendant complied but denied any wrongdoing. Officer informed defendant his radar clocked her automobile's rate of speed at 77 miles per hour. Defendant demanded [\*\*2] to see his radar equipment and officer allowed her to view it.

Officer filled out a citation and asked defendant to sign it. Defendant refused. Officer explained that by signing the citation she was only promising to appear at the given court date, not admitting exceeding the posted speed limit. Defendant continued to refuse to sign the citation. Officer explained to defendant he would have to take her into custody if she refused to [503] sign the citation. Defendant still refused to sign the citation and told officer he would have to lock her up. Officer then informed her she was under arrest. He attempted to handcuff her and was able to get a handcuff over her right hand. Thereafter a fight ensued. Defendant turned to face officer, grabbed his left arm with her hand and began to scratch his arm with her fingernails. She continued struggling and officer could not get control of her. Finally, officer had to physically push her to the ground, put his weight on top of her, and bring her hands behind her back to get them cuffed together. She still continued to struggle refusing to stand and officer was only able to get her to his car by physically dragging her. Defendant was taken [\*\*3] to Christian Northwest Hospital for the purpose of having a blood sample drawn.

Defendant was charged by information with exceeding the posted speed limit, driving while intoxicated, assault third degree on a police officer, possession of a controlled substance, and resisting a lawful arrest. City of Berkeley's municipal judge found defendant guilty on all counts. Defendant subsequently petitioned the circuit court for trial de novo. The cause was heard on August 18, 1988. The circuit court found defendant guilty of resisting lawful arrest and speeding. Defendant was fined \$ 100 for the charge of resisting lawful arrest and \$ 25 for the charge of exceeding the posted speed limit. Defendant appeals. No brief was submitted by the respondent, City of Berkeley, nor did counsel for City of Berkeley appear for oral argument.

Defendant asserts the trial court lacked jurisdiction over the resisting lawful arrest charge because the information failed to allege sufficient facts upon which a verdict could be predicted. Rule 37.34 [HN1] requires all ordinance violations be prosecuted by information. Rule 37.35 in part requires "the information . . . state the name of defendant . . . state plainly, [\*\*4] concisely, and definitely the essential facts constituting the ordinance violation charged . . . state the time and place of the ordinance violation charged . . . cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment . . ."

The information charging defendant with resisting lawful arrest states only that on August 1, 1987, at Scudder and I-170 at 6:05 p.m., Janet Rose Stringfellow did unlawfully "resist a lawful arrest." The information is signed by the arresting officer and the City of Berkeley Prosecutor. No ordinance violation appears on the information.

[HN2] Although an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance. *City of Kansas City v. Harbin*, 600 S.W.2d 589, 592 [2-5] (Mo.App. 1980), citing *City of Kansas City v. Narron*, 493 S.W.2d 394, 398 [2-4] (Mo.App. 1973).

The test for sufficiency of an information is whether [\*\*5] it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and whether final disposition of the charge will bar further prosecution for the same offense. *City of Hermann v. Huxol*, 637 S.W.2d 89, 91 [3-5] (Mo.App. 1982).

The information charging defendant with resisting lawful arrest does not comply with Rule 37.35 nor does it comply with the test for sufficiency. It does not set forth an ordinance violated as required by the rule; it does not allege any essential facts constituting a violation of an ordinance; it does not allege any elements of the crime intended to be charged. The resisting arrest information was insufficient. Because of the disposition of this offense, we need not address any of defendant's other points of alleged error concerning the resisting lawful arrest charge.

Defendant next asserts the trial court erred in claiming jurisdiction over the speeding charge because the certified copy [\*504] of the ordinance presented by City of Berkeley at trial was an ordinance which was not in effect on August 1, 1987, the date of the occurrence. However, defendant failed to object when the prosecutor presented [\*\*6] the ordinance for admission by stipulation of the parties. [HN3] Challenges to the validity of an ordinance, like challenges to the constitutionality of an ordinance must be raised at the first opportunity that good pleading and orderly procedure permit and if not so raised are deemed waived. *City of St. Louis v. Aetna Casualty and Surety Co.*, 429 S.W.2d 252, 254 [1] (Mo. 1968); *see also McDonald v. Plas*, 401 S.W.2d 929, 935 [8, 9] (Mo.App. 1966); *City of Frankford v. Davis*, 348 S.W.2d 553, 554-555 [4, 5, 6] (Mo.App. 1961). In failing to raise the issue of the validity of the ordinance at the first available opportunity, she waived her right to challenge it. Point denied.

Finally defendant contends the trial court erred in finding defendant guilty of the charge of speeding because there was insufficient evidence to support the judgment. [HN4] The evidence must be construed most strongly in favor of the result reached in the trial court and the facts in evidence and all inferences reasonably to be drawn therefrom are to be considered in a light most favorable to the city and all evidence and inferences to the contrary are to be disregarded. *City of Jackson v. Rapp*, 700 [\*\*7] S.W.2d 498, 499 [1] (Mo.App. 1985).

Officer testified at trial that on August 1, 1987 at about 6 p.m. he was on duty monitoring the traffic flow on Interstate 170 southbound. He had his radar gun with him which he had tested himself just shortly before he began monitoring traffic. His tests, which included tuning the radar gun with two different tuning forks and checking of the internal calibration to assure all the diodes were properly working, resulted in an accurate display from the radar gun. Officer also testified he is a certified radar instructor. He testified that his particular radar gun had last been certified and calibrated on June 17, 1987.

Officer testified he noticed a blue Chevrolet Camero traveling at a "very high rate of speed." The posted speed limit on Interstate 170 is 55 miles per hour. Officer pointed the radar gun out through the rear window of his vehicle and was able to track defendant's vehicle approaching the rear of his vehicle. The radar reading initially displayed a speed of 77 miles per hour and then locked in on a speed of 76 miles per hour. Officer testified no other car interfered with the radar reading of the speed of defendant's car.

The speed [\*\*8] measuring accuracy of the radar gun was shown by evidence tending to prove it was tested and shown to be accurate by the use of two separate tuning forks and by checking the internal calibration. There was sufficient evidence to support a finding the radar gun accurately displayed defendant's automobile exceeded the posted speed limit. *State v. Guenther*, 744 S.W.2d 564, 565 [1,2] (Mo.App. 1988). This point is denied.

The judgment of guilty of resisting lawful arrest is reversed. The judgment of guilty of exceeding the posted speed limit is affirmed.

46 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**State of Missouri, Respondent, v. Ralph Weatherwax, Appellant**

**No. WD32358**

**Court of Appeals of Missouri, Western District**

*635 S.W.2d 34; 1982 Mo. App. LEXIS 3573*

**April 13, 1982**

**SUBSEQUENT HISTORY:** [\*\*1]

Motion for Rehearing Overruled, Transfer Denied June 1, 1982.

**PRIOR HISTORY:** From the Circuit Court of Platte County

Criminal Appeal

Judge Abe Shafer

**DISPOSITION:**

Reversed; Defendant Ordered Discharged.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant's appeal from a judgment of the Circuit Court of Platte County (Missouri), which convicted him of speeding and imposed a fine of \$ 35, was transferred from the Missouri Supreme Court because the constitutional issues attempted to be raised had not been presented at the first opportunity.

**OVERVIEW:** Defendant drove his vehicle past a parked trooper, who trained his radar unit on defendant's vehicle and got a reading of 69 miles per hour in a 55 mile per hour zone. The trooper testified that he tested the radar unit with tuning forks before going to work four hours before stopping defendant and again when he went off duty five hours later but did not test the unit at the location where he observed defendant. A highway patrol employee testified that such units can be affected by outside influences such as power lines and neon lights and inside influences such as the heater and radio. On appeal, the court reversed the conviction. The court noted that it had previously held that it was not unreasonable to require a test of a radar unit at the site reasonably close to the time of the arrest, based on the outside factors recited in the employee's testimony. Absent evidence of such a test, the radar result was inadmissible, and the State had not established a prima facie case.

**OUTCOME:** The court reversed the circuit court judgment and ordered defendant discharged.

**CORE TERMS:** radar, arrest, tested, speed, fork, tuning, site, accuracy, mile, trooper, highway, tuning fork, patrol car, stationary, recorded, patrol, legitimate inference, serial number, calibration, laboratory, speedgun, scene, patrolman, driver, mph, proper foundation, reasonable time, undue burden, found guilty, tour of duty

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview*

[HN1] The prosecution has the burden in a speeding case to adduce proof that the radar unit was operating properly at the site of the arrest and reasonably close in time to it.

**COUNSEL:**

H. William McIntosh, Kansas City, Missouri, Attorney for Appellant.

James A. Broshot, Kingston, Missouri, Attorney for Respondent.

**JUDGES:**

Turnage, J. Clark, J. concurs. Pritchard, P.J., dissents in separate dissenting opinion.

**OPINION BY:**

TURNAGE

**OPINION:**

[\*34] Ralph Weatherwax was found guilty by the court of speeding and assessed a fine of \$35. He appealed to the Supreme Court, but that court transferred the appeal here on the grounds that the constitutional issues attempted to be raised had not been presented at the first opportunity. *State v. Weatherwax*, 607 S.W.2d 692 (Mo. 1980). n1

n1 Weatherwax has filed a motion to transfer this case prior to opinion to the Supreme Court because a constitutional issue is involved. That contention has already been decided adversely to Weatherwax. The motion to transfer prior to opinion is overruled.

[\*\*2]

On this appeal the decisive issue is the failure of the patrolman to test the radar set at the site of the arrest and reasonably close to the time of the arrest. Reversed.

On December 4, 1978, Trooper Elliott of the Highway Patrol left his home at 7:00 A.M. to go on duty. While parked in his driveway, he tested his radar unit with two [\*35] tuning forks and found it to be operating properly. Shortly before 11:00 A.M., the trooper was parked beside Highway 36 when he observed an automobile driven by Weatherwax and trained his radar unit on that automobile. His radar unit indicated a reading of 69 mph in a 55 mph zone. The trooper stated he had not tested the unit since 7:00 A.M. and did not test it at the site of the arrest. He did test the unit about 4:00 P.M. on that same day when he went off duty and found it to be operating properly.

James Smith, an employee of the Highway Patrol assigned to radar repair and certification, testified. Smith testified to the tests performed on radar units to insure their accuracy. Smith testified that outside influences such as power lines

and neon lights can affect the readings obtained on the radar set used in this case. Smith also testified [\*\*3] that the operation of a heater fan in the trooper's automobile or the operation of two-way radio equipment could also affect the operation of the radar unit.

In *City of St. Louis v. Boecker*, 370 S.W.2d 731, 736[4] (Mo. App. 1963) the court reversed a conviction because the city failed to show that the radar unit had been tested at the site and reasonably close to the time of the arrest. The court stated that there could not be the slightest doubt as to the requirement for the test at the site of the arrest and reasonably close in time to that event. The basis of the court's ruling was the fact that outside factors can affect the operation of the radar unit as well as the fact that the unit can be affected by movement from place to place. At page 737[5] the court stated:

"But the requirement that proof be adduced that a radar speedmeter was tested and found to be operating properly at the site of and reasonably close to the time of an arrest should not place an undue burden on the prosecution, and should at the same time protect the rights of motorists against the possibility of error in this device which makes 'delicate measurements.' *State v. Graham, supra.*"

[\*\*4]

The State, in its brief, concedes that *Boecker* requires testing of the radar unit at the site of the arrest and reasonably close to that time, but urges this court to overrule *Boecker*. This court has no inclination to announce a rule contrary to that in *Boecker*. This for the very simple reason that the scientific evidence presented in *Boecker*, and also in this case, shows that outside factors, such as power lines, can affect the operation of a radar unit. If the rule in *Boecker* were to be abrogated, then a radar unit could be set up in any location whether or not there were outside factors which would give an incorrect reading, and the prosecution would have no burden to show that the radar unit was operating properly at the site of the arrest. As stated in *Boecker, State v. Graham*, 322 S.W.2d 188 (Mo. App. 1959) held that a radar unit is an extremely sensitive machine. As shown by the testimony in *Boecker*, and in this case, these units are sensitive to outside forces and must, therefore, be checked for accuracy at the site of the arrest. Further, as with any mechanical device, Smith testified in this case that radar units do malfunction. As stated in [\*\*5] *Boecker, supra*, [HN1] it is not an undue burden to place on the prosecution to adduce proof that the radar unit was operating properly at the site of the arrest and reasonably close in time to it.

Apparently, in an effort to overcome the failure to test the unit at the site of the arrest and reasonably close in time to that event, the State asked the trooper: "Based on your experience as a patrolman, as a driver, and your use of the radar device, did you also form an opinion as to the speed of this vehicle?" The trooper replied that by use of a combination of all three of those factors, he determined that the vehicle was traveling 69 mph. Because the radar evidence was inadmissible for failure to show that the unit was tested at the site of and reasonably close in time to the arrest, this opinion would likewise be inadmissible because the radar evidence was inextricably mingled with the other factors used by the trooper to determine speed.

It follows that the State failed to make a prima facie case when it failed to prove [\*\*36] that the radar unit was tested at the site of and reasonably close in time to the arrest.

The judgment is reversed and the defendant Weatherwax is ordered [\*\*6] discharged.

Clark, J. concurs

Pritchard, P.J., dissents in separate dissenting opinion

**DISSENT BY:**

PRITCHARD

**DISSENT:**

PRITCHARD, P.J.

Appellant was convicted of driving 69 miles per hour on U.S. Highway 36, a 55 mile per hour speed limit area. He was fined \$35.00 and costs.

The appeal was first lodged in the Supreme Court. That court held in *State v. Weatherwax*, 607 S.W.2d 692, 693 (Mo. 1980), that there was no proper raising of a constitutional question for the first time on a de novo appeal from a first trial wherein appellant was found guilty and fined \$25.00. Appellant has filed a motion in this court to retransfer his case to the Supreme Court, but that motion must be, and is, overruled because that court has already held that no timely presentation of any constitutional questions was made. The remaining issues, which are decided, relate to the admission of evidence of the result of the use of a speedgun light radar device for the contended reason that no proper foundation therefor had been laid. It is said that without that evidence, there would have been insufficient evidence for a conviction.

After this case was submitted in May, 1981, because certain findings of the trial [\*\*7] court referenced testimony of witnesses as to a foundation for the admission of the radar test results, and because that testimony was omitted from the abbreviated transcript of tape recordings, a further transcript was requested. Delay was occasioned in the further transcription of the trial tape, but it has now been received.

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James W. Smith had been employed 9-1/2 years by the communications division of the Missouri Highway Patrol, assigned exclusively to radar repair and certification. He tested and certified the accuracy of radar units used by the Patrol. His extensive [\*37] qualifications and experience in electronics and the radar field were unquestioned.

Smith testified in detail as to the procedures used by him to test radar units and tuning forks in the repair shop in Jefferson City. Radar units are by Patrol policy checked annually, but on the average, they will come in on a quarterly basis. Test equipment includes a microphone, audio amplifier, frequency counting device for vibrations or pitch of the tone, and a short wave receiver for radio station WWV, run by the U. S. Bureau of Standards, located at Fort Collins, Colorado, which insures the accuracy, by cancelling out pitch or tone, of the frequency counter, which, in turn, will test the accuracy of tuning forks. Radar units are tested by master tuning forks, which are calibrated the same as (field) tuning forks. After he has run tests on radar units and tuning forks, he issues certificates of accuracy on them. The radar

unit and [\*\*10] tuning forks used by Trooper Elliott were tested by Smith on November 29, 1978, and December 26, 1978, and were found to be accurate. His certificates of accuracy were received in evidence, and serial numbers thereon correspond to those testified to by Elliott.

The majority opinion rests upon a rigid application of *City of St. Louis v. Boecker*, 370 S.W.2d 731 (Mo. App. 1963) [in which this writer participated as special judge]. The real basis for that case is that the radar unit was not tested at the (stationary) site of the arrest, and there was no evidence of when or where a single prior tuning fork test was made, thus the conviction based upon a radar speed test on June 1, 1961 (almost 21 years ago) was properly reversed. The *Boecker* case had in it references to the conclusions and recommendations of a Doctor Kopper's 1955 law review article on "The Scientific Reliability of Radar Speedmeters", 33 N.C.L.R. 352, which may have been accurate at that time. That reference, however, was not necessary to the decision which rested upon the lack of proof that the radar unit was working properly at the scene of the arrest, and it is therefore dicta. It is not necessary to [\*\*11] "overrule" the *Boecker* case, nor to write in conflict with it, because it is distinguishable upon its facts from this case.

Here, there is evidence that the radar unit and tuning forks were tested in the Jefferson City laboratory on November 29, 1978, five days before appellant's arrest, and at the same laboratory on December 22, 1978, twenty-two days after the arrest. Both laboratory tests showed the unit and tuning forks were working properly. Elliott tested it some five hours prior to the arrest, and the unit properly registered 30 and 70 miles per hour by the use of the tuning forks, albeit that it was some five miles from the scene of the arrest. And, importantly, the radar unit was tested again by Elliott upon his leaving his tour of duty that day, with the same results of speed registry as of that morning. The existence of these same facts at different times and places, showing that at *all* times the radar unit and tuning forks were working properly, gives rise to a legitimate inference that they were working properly at the time of appellant's arrest. The rule is stated in 32 C.J.S. Evidence, § 585, p. 714, "Since there is a presumption, as discussed supra §§ 124(1)-124(5), [\*\*12] of the continued existence of a fact or condition of a continuous nature, it follows that such a fact may, within the limits of relevancy, be shown to have existed at a particular time by proof of its existence at a prior time; and its existence at a subsequent time may be shown where the interval is short as compared with the natural permanent nature of the fact or condition in question." See also the extensive discussion in II Wigmore on Evidence, § 436, p. 512, et seq.; and *City of Phoenix v. Boggs*, 1 Ariz. App. 370, 403 P.2d 305, 307[1-3] (1965), where evidence was received as to a condition of a roadway both immediately before and after an accident (to give the jury an inference as to its generally dangerous condition at the time of the accident and how it happened), the court saying, "The applicable general rule, in either setting, is well established that evidence of the existence of a particular fact before and after an act in question, \* \* \* may be shown to indicate the existence of [\*38] that same condition or happening at the time of the act or accident. (Citing Arizona cases.)" Note also the cases cited in the *Boggs* case, *Millman v. United States Mortgage* [\*\*13] & *Title Co. of New Jersey*, 121 N.J.L. 28, 1 A.2d 265, 267 (1938); and *Oklahoma Natural Gas Co. v. Ross*, 131 F.2d 238, 240 (10th Cir. 1942). See Anno. 7 A.L.R.3rd 1302, "Presumption -- Condition of Property", and particularly the cases in Missouri at § 4, p. 1311, noting the relaxation of the older rule that a presumption or inference does not run backward, for example, *Liebow v. Jones Store Co.*, 303 S.W.2d 660, 665 (Mo. 1957).

These following cases support the application of the rule of legitimate inference above set forth: *Thomas v. Norfolk*, 207 Va. 12, 147 S.E.2d 727 (1966), which held that proof that a radar set had been tested at 2:30 p.m. and at 9:30 p.m., showing accuracy both times, *in the absence of evidence to the contrary*, warranted the inference that the machine was operating accurately during the interim, or at 4:00 p.m., the time of defendant's arrest. *State v. Carta*, 2 Conn. Cir. 68, 194 A.2d 544, 546[1-5] (1963), cert. den. 150 Conn. 724, 197 A.2d 932, held "The speed recorded on a radar unit may be admissible in evidence provided the accuracy of the radar unit at the time in question is established by tests made within a reasonable time [\*\*14] before and after the speed was recorded and provided the speed recorded was for the defendant's automobile." In *People v. Maniscalco*, 94 Misc.2d 915, 405 N.Y.S.2d 888 (1978), the court affirmed a conviction based upon radar unit speed readout where the officer made calibration tests and tuning fork tests when he set up the unit and after his tour of duty. There was also evidence that the tuning forks had been tested by calibration both before and after defendant's infraction. [Contrast *People v. Cunha*, 93 Misc.2d 467, 402 N.Y.S.2d 925, 926 (1978), where it was held that the People had not met the standard of "reasonable proof of accuracy" where the officer had

tested the radar unit 3-1/2 hours prior to clocking defendant's speed, but there was no testimony of testing *subsequent* to the incident.] *State v. Trantolo*, 37 Conn. Supp. 601, 430 A.2d 465 (1981), held that the test of a radar device by the use of a tuning fork both a few days before and a few days after the arrest was strongly corroborative of the officer's testimony of his speedometer reading.

There is yet another facet to this case. Although appellant's speed at the time of his arrest was recorded from [\*\*15] the *stationary* position of the patrol car, there was testimony that the CMI Speedgun 8 radar unit was adaptable for use from a *moving* patrol car whereby the speed of an oncoming vehicle could be measured. Of what use then, in that circumstance, would an on-site, approximate-time test in accordance with the *Boecker* case be? How can radar equipment be tested "at the site" if the patrol car, and the target vehicle, are constantly moving over perhaps miles of highway? Could not a legitimate inference be drawn that the moving radar unit was working properly at any arrest scene by proof that it had been tested in a reasonable time prior to and after the arrest?

The state has made a *prima facie* case that the CMI Speedgun 8 radar unit was recording accurately at the time of appellant's arrest, as per the facts of prior and subsequent tests above set forth. That is all that it is required to do, and the burden of going forward with the evidence to show that some on-site condition, circumstance did interfere with its accuracy, was upon appellant, who produced no such evidence. Officer Smith's testimony that radar units *do* malfunction does not show that it was in fact malfunctioning [\*\*16] at the time in question -- the inference of fact is otherwise. Appellant's conviction should be affirmed, because the circle of proof of proper functioning of the radar unit is complete, and thus provides a proper foundation for the readout of his speed therefrom for it to be admitted into evidence.

For the foregoing reasons, I respectfully dissent.

47 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**State of Missouri, Respondent, v. Ralph Weatherwax, Appellant**

**No. WD32358**

**Court of Appeals of Missouri, Western District**

*635 S.W.2d 34; 1982 Mo. App. LEXIS 3573*

**April 13, 1982**

**SUBSEQUENT HISTORY:** [\*\*1]

Motion for Rehearing Overruled, Transfer Denied June 1, 1982.

**PRIOR HISTORY:** From the Circuit Court of Platte County

Criminal Appeal

Judge Abe Shafer

**DISPOSITION:**

Reversed; Defendant Ordered Discharged.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant's appeal from a judgment of the Circuit Court of Platte County (Missouri), which convicted him of speeding and imposed a fine of \$ 35, was transferred from the Missouri Supreme Court because the constitutional issues attempted to be raised had not been presented at the first opportunity.

**OVERVIEW:** Defendant drove his vehicle past a parked trooper, who trained his radar unit on defendant's vehicle and got a reading of 69 miles per hour in a 55 mile per hour zone. The trooper testified that he tested the radar unit with tuning forks before going to work four hours before stopping defendant and again when he went off duty five hours later but did not test the unit at the location where he observed defendant. A highway patrol employee testified that such units can be affected by outside influences such as power lines and neon lights and inside influences such as the heater and radio. On appeal, the court reversed the conviction. The court noted that it had previously held that it was not unreasonable to require a test of a radar unit at the site reasonably close to the time of the arrest, based on the outside factors recited in the employee's testimony. Absent evidence of such a test, the radar result was inadmissible, and the State had not established a prima facie case.

**OUTCOME:** The court reversed the circuit court judgment and ordered defendant discharged.

**CORE TERMS:** radar, arrest, tested, speed, fork, tuning, site, accuracy, mile, trooper, highway, tuning fork, patrol car, stationary, recorded, patrol, legitimate inference, serial number, calibration, laboratory, speedgun, scene, patrolman, driver, mph, proper foundation, reasonable time, undue burden, found guilty, tour of duty

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview*

[HN1] The prosecution has the burden in a speeding case to adduce proof that the radar unit was operating properly at the site of the arrest and reasonably close in time to it.

**COUNSEL:**

H. William McIntosh, Kansas City, Missouri, Attorney for Appellant.

James A. Broshot, Kingston, Missouri, Attorney for Respondent.

**JUDGES:**

Turnage, J. Clark, J. concurs. Pritchard, P.J., dissents in separate dissenting opinion.

**OPINION BY:**

TURNAGE

**OPINION:**

[\*34] Ralph Weatherwax was found guilty by the court of speeding and assessed a fine of \$35. He appealed to the Supreme Court, but that court transferred the appeal here on the grounds that the constitutional issues attempted to be raised had not been presented at the first opportunity. *State v. Weatherwax*, 607 S.W.2d 692 (Mo. 1980). n1

n1 Weatherwax has filed a motion to transfer this case prior to opinion to the Supreme Court because a constitutional issue is involved. That contention has already been decided adversely to Weatherwax. The motion to transfer prior to opinion is overruled.

[\*\*2]

On this appeal the decisive issue is the failure of the patrolman to test the radar set at the site of the arrest and reasonably close to the time of the arrest. Reversed.

On December 4, 1978, Trooper Elliott of the Highway Patrol left his home at 7:00 A.M. to go on duty. While parked in his driveway, he tested his radar unit with two [\*35] tuning forks and found it to be operating properly. Shortly before 11:00 A.M., the trooper was parked beside Highway 36 when he observed an automobile driven by Weatherwax and trained his radar unit on that automobile. His radar unit indicated a reading of 69 mph in a 55 mph zone. The trooper stated he had not tested the unit since 7:00 A.M. and did not test it at the site of the arrest. He did test the unit about 4:00 P.M. on that same day when he went off duty and found it to be operating properly.

James Smith, an employee of the Highway Patrol assigned to radar repair and certification, testified. Smith testified to the tests performed on radar units to insure their accuracy. Smith testified that outside influences such as power lines

and neon lights can affect the readings obtained on the radar set used in this case. Smith also testified [\*\*3] that the operation of a heater fan in the trooper's automobile or the operation of two-way radio equipment could also affect the operation of the radar unit.

In *City of St. Louis v. Boecker*, 370 S.W.2d 731, 736[4] (Mo. App. 1963) the court reversed a conviction because the city failed to show that the radar unit had been tested at the site and reasonably close to the time of the arrest. The court stated that there could not be the slightest doubt as to the requirement for the test at the site of the arrest and reasonably close in time to that event. The basis of the court's ruling was the fact that outside factors can affect the operation of the radar unit as well as the fact that the unit can be affected by movement from place to place. At page 737[5] the court stated:

"But the requirement that proof be adduced that a radar speedmeter was tested and found to be operating properly at the site of and reasonably close to the time of an arrest should not place an undue burden on the prosecution, and should at the same time protect the rights of motorists against the possibility of error in this device which makes 'delicate measurements.' *State v. Graham, supra.*"

[\*\*4]

The State, in its brief, concedes that *Boecker* requires testing of the radar unit at the site of the arrest and reasonably close to that time, but urges this court to overrule *Boecker*. This court has no inclination to announce a rule contrary to that in *Boecker*. This for the very simple reason that the scientific evidence presented in *Boecker*, and also in this case, shows that outside factors, such as power lines, can affect the operation of a radar unit. If the rule in *Boecker* were to be abrogated, then a radar unit could be set up in any location whether or not there were outside factors which would give an incorrect reading, and the prosecution would have no burden to show that the radar unit was operating properly at the site of the arrest. As stated in *Boecker, State v. Graham*, 322 S.W.2d 188 (Mo. App. 1959) held that a radar unit is an extremely sensitive machine. As shown by the testimony in *Boecker*, and in this case, these units are sensitive to outside forces and must, therefore, be checked for accuracy at the site of the arrest. Further, as with any mechanical device, Smith testified in this case that radar units do malfunction. As stated in [\*\*5] *Boecker, supra*, [HN1] it is not an undue burden to place on the prosecution to adduce proof that the radar unit was operating properly at the site of the arrest and reasonably close in time to it.

Apparently, in an effort to overcome the failure to test the unit at the site of the arrest and reasonably close in time to that event, the State asked the trooper: "Based on your experience as a patrolman, as a driver, and your use of the radar device, did you also form an opinion as to the speed of this vehicle?" The trooper replied that by use of a combination of all three of those factors, he determined that the vehicle was traveling 69 mph. Because the radar evidence was inadmissible for failure to show that the unit was tested at the site of and reasonably close in time to the arrest, this opinion would likewise be inadmissible because the radar evidence was inextricably mingled with the other factors used by the trooper to determine speed.

It follows that the State failed to make a prima facie case when it failed to prove [\*\*36] that the radar unit was tested at the site of and reasonably close in time to the arrest.

The judgment is reversed and the defendant Weatherwax is ordered [\*\*6] discharged.

Clark, J. concurs

Pritchard, P.J., dissents in separate dissenting opinion

**DISSENT BY:**

PRITCHARD

**DISSENT:**

PRITCHARD, P.J.

Appellant was convicted of driving 69 miles per hour on U.S. Highway 36, a 55 mile per hour speed limit area. He was fined \$35.00 and costs.

The appeal was first lodged in the Supreme Court. That court held in *State v. Weatherwax*, 607 S.W.2d 692, 693 (Mo. 1980), that there was no proper raising of a constitutional question for the first time on a de novo appeal from a first trial wherein appellant was found guilty and fined \$25.00. Appellant has filed a motion in this court to retransfer his case to the Supreme Court, but that motion must be, and is, overruled because that court has already held that no timely presentation of any constitutional questions was made. The remaining issues, which are decided, relate to the admission of evidence of the result of the use of a speedgun light radar device for the contended reason that no proper foundation therefor had been laid. It is said that without that evidence, there would have been insufficient evidence for a conviction.

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These following cases support the application of the rule of legitimate inference above set forth: *Thomas v. Norfolk*, 207 Va. 12, 147 S.E.2d 727 (1966), which held that proof that a radar set had been tested at 2:30 p.m. and at 9:30 p.m., showing accuracy both times, *in the absence of evidence to the contrary*, warranted the inference that the machine was operating accurately during the interim, or at 4:00 p.m., the time of defendant's arrest. *State v. Carta*, 2 Conn. Cir. 68, 194 A.2d 544, 546[1-5] (1963), cert. den. 150 Conn. 724, 197 A.2d 932, held "The speed recorded on a radar unit may be admissible in evidence provided the accuracy of the radar unit at the time in question is established by tests made within a reasonable time [\*\*14] before and after the speed was recorded and provided the speed recorded was for the defendant's automobile." In *People v. Maniscalco*, 94 Misc.2d 915, 405 N.Y.S.2d 888 (1978), the court affirmed a conviction based upon radar unit speed readout where the officer made calibration tests and tuning fork tests when he set up the unit and after his tour of duty. There was also evidence that the tuning forks had been tested by calibration both before and after defendant's infraction. [Contrast *People v. Cunha*, 93 Misc.2d 467, 402 N.Y.S.2d 925, 926 (1978), where it was held that the People had not met the standard of "reasonable proof of accuracy" where the officer had

tested the radar unit 3-1/2 hours prior to clocking defendant's speed, but there was no testimony of testing *subsequent* to the incident.] *State v. Trantolo*, 37 Conn. Supp. 601, 430 A.2d 465 (1981), held that the test of a radar device by the use of a tuning fork both a few days before and a few days after the arrest was strongly corroborative of the officer's testimony of his speedometer reading.

There is yet another facet to this case. Although appellant's speed at the time of his arrest was recorded from [\*\*15] the *stationary* position of the patrol car, there was testimony that the CMI Speedgun 8 radar unit was adaptable for use from a *moving* patrol car whereby the speed of an oncoming vehicle could be measured. Of what use then, in that circumstance, would an on-site, approximate-time test in accordance with the *Boecker* case be? How can radar equipment be tested "at the site" if the patrol car, and the target vehicle, are constantly moving over perhaps miles of highway? Could not a legitimate inference be drawn that the moving radar unit was working properly at any arrest scene by proof that it had been tested in a reasonable time prior to and after the arrest?

The state has made a *prima facie* case that the CMI Speedgun 8 radar unit was recording accurately at the time of appellant's arrest, as per the facts of prior and subsequent tests above set forth. That is all that it is required to do, and the burden of going forward with the evidence to show that some on-site condition, circumstance did interfere with its accuracy, was upon appellant, who produced no such evidence. Officer Smith's testimony that radar units *do* malfunction does not show that it was in fact malfunctioning [\*\*16] at the time in question -- the inference of fact is otherwise. Appellant's conviction should be affirmed, because the circle of proof of proper functioning of the radar unit is complete, and thus provides a proper foundation for the readout of his speed therefrom for it to be admitted into evidence.

For the foregoing reasons, I respectfully dissent.

48 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Jeffrey R. Lowrey, appellant****No. 90-959****SUPREME COURT OF NEBRASKA*****239 Neb. 343; 476 N.W.2d 540; 1991 Neb. LEXIS 349*****October 25, 1991, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from the District Court for Lancaster County, Bernard J. McGinn, Judge, on appeal thereto from the County Court for Lancaster County, Richard H. Williams, Judge.

**DISPOSITION:**

Judgment of District Court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the District Court for Lancaster County (Nebraska), which affirmed a county court's finding that he was guilty of operating a motor vehicle while under the influence of alcoholic liquor and of failure to yield the right-of-way.

**OVERVIEW:** Defendant caused an accident. The officer who arrived at the scene noticed that he had the odor of alcohol on his breath. A "testing officer" was dispatched to the scene to test the defendant. Defendant was arrested for drunk driving. The county court found him guilty, and the district court affirmed. The court held that Neb. Rev. Stat. § 39-669.08(3) (Reissue 1988) authorized an officer to require a driver to submit to a preliminary test of his or her breath if the officer had reasonable grounds to believe that such person had alcohol in his or her body, had committed a moving traffic violation, or had been involved in a traffic accident. There was insufficient evidence to support a finding that the officers had reasonable grounds to believe that defendant was under the influence of alcoholic liquor so as to justify them in requiring defendant to submit to a preliminary test of his breath. The evidence that defendant was under the influence of alcohol was overwhelming. The State met its burden in establishing the accuracy of the Intoxilyzer machine used to test defendant through independent sources and in showing reasonable proof that it was functioning accurately and properly.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** accuracy, machine, functioning, radar, breath, detoxification, testing, tested, attachment, reasonable grounds, attenuator, beam, personal knowledge, criminal case, certificate, calibration, calibrated, sufficient evidence to

support, influence of alcohol, alcoholic liquor, motor vehicle, right-of-way, administered, reliability, laboratories, pickup, driver, watery, scene, person responsible

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Trials > Bench Trials***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview***

[HN1] Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN2] Neb. Rev. Stat. § 39-669.08(3) (Reissue 1988) authorizes an officer to require a driver to submit to a preliminary test of his or her breath if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident.

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN3] In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, the Supreme Court of Nebraska does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN4] An appropriate method for testing the breath with an Intoxilyzer is found in attachment 3 to *177 Neb. Admin. Code, ch. 1, § 007.04A3* (1987). Attachment 3 is a checklist form which was used by the law enforcement officer and was introduced into evidence. *Neb. Admin. Code, ch. 1, § 007.05D* (1987) states that only simulator solutions can be used which have been prepared as shown by a certificate of chemical analysis, which certification shall be in the form of attachment 12.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN5] See *Neb. Admin. Code, ch. 1, § 007.06B* (1987).

#### ***Evidence > Demonstrative Evidence > Foundational Requirements***

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN6] Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

#### ***Evidence > Demonstrative Evidence > Foundational Requirements***

[HN7] To present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

**HEADNOTES:** 1. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

2. **Trial: Appeal and Error.** In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

3. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

**COUNSEL:**

Vincent M. Powers for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, [\*\*\*2] and Fahrbruch, JJ.

**OPINION BY:**

PER CURIAM

**OPINION:**

[\*344] [\*\*541] Defendant appeals from an order of the district court which affirmed a judgment of the county court finding defendant guilty of operating a motor vehicle while under the influence of alcoholic liquor and of failure to yield the right-of-way. We affirm.

Errors assigned by the defendant are that (1) the trial court erred in finding that there was sufficient evidence to support a finding of reasonable grounds to believe defendant was operating a motor vehicle while under the influence of alcoholic liquor, and (2) the trial court erred in determining that there was sufficient foundation to allow the introduction of the Intoxilyzer test results at trial.

[HN1] Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990).

On May 27, 1989, Lowrey caused an accident which occurred in the intersection at 27th Street and Highway 2 in Lincoln. Lowrey was heading east and turned left to go north on 27th Street when he failed to yield the right-of-way to another motorist, who [\*\*\*3] was driving his car westward on Highway 2.

Lincoln police officer Patrick Knopick arrived at the scene of the accident and approached Lowrey, who was standing in the open doorway of his pickup, leaning against the seat. The officer asked the defendant to show his driver's license, registration, and proof of insurance. Lowrey produced a driver's license, but was unable to locate the registration and proof of insurance, which were later found in Lowrey's pickup by the officer.

Knopick noticed that Lowrey was unstable on his feet, had bloodshot, watery eyes, and had the odor of alcoholic beverage [\*345] about his person and breath. Officer Knopick then asked Lowrey to step over to his police cruiser. When defendant exited his vehicle, he fell against the pickup's box. Knopick testified that Lowrey told him he would not be able to make it and that Lowrey had to hold onto the officer.

Officer Jeffrey Howard, a "testing officer," was dispatched to the scene to test the defendant. Howard determined that the defendant was not capable of participating in any field sobriety tests. He noticed that Lowrey's speech was slurred, his eyes were watery, and his eyelids were droopy. Furthermore, [\*\*\*4] he observed that defendant had a very red, flushed face; dry, smacking lips; and a staggering walk. When asked to repeat the alphabet, defendant slurred from *a* to *t*, then stopped and became confused. The officer next asked defendant to count backward from 100. Although told by the officer to stop counting at 60, Lowrey continued. Defendant was then administered an Alco-Sensor pretest, which he failed.

Defendant was then arrested for drunk driving and taken to the detoxification center for an Intoxilyzer test. After Lowrey signed the implied consent form, Officer Howard checked the maintenance, repair, and calibration of the Intoxilyzer Model 4011 AS machine. Lowrey blew into the mouthpiece attached to the machine, and the Intoxilyzer registered .157 of a gram of alcohol per 210 liters of breath. The officer then advised the defendant of his *Miranda* rights, and Lowrey confessed that he drank three bourbon and water drinks that evening.

Apparently, defendant's first argument is that there was insufficient evidence to support a finding that the officer had reasonable grounds to believe that defendant was under the influence of alcoholic liquor so as to justify him [\*\*\*5] in requiring defendant to submit to a preliminary test of his breath. See Neb. Rev. Stat. § 39-669.08 (Reissue 1988).

In the first place, defendant overlooks the fact that [HN2] § 39-669.08(3) authorizes an officer to require a driver to submit to a preliminary test of his or her breath "if the [\*\*542] officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident." Defendant was guilty of failing to yield the right-of-way and, inasmuch as the [\*346] accident caused \$ 9,000 damage to his vehicle, he was certainly involved in a traffic accident.

Be that as it may, the evidence that defendant was under the influence of alcohol was overwhelming. It seems to be the defendant's position that the officer made up his mind immediately upon arriving at the scene that the defendant was intoxicated. This is not true. Officer Knopick was asked by defendant's counsel, "[S]o the two factors upon which you based your opinion that the defendant who had been involved in a serious automobile accident was under the influence of alcohol was [sic] the odor of alcohol and bloodshot, watery [\*\*\*6] eyes alone? Correct?" To this the officer answered, "Correct." However, the decision to run a preliminary breath test was not made until after the defendant's condition seemed to be so hopeless that field sobriety tests could not be administered.

The trial court heard the evidence and made the determination that the officer had reasonable grounds to believe the defendant was intoxicated. [HN3] In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Id.* The testimony of the officers constitutes overwhelming evidence that they had reasonable grounds to believe that Lowrey was under the influence of alcohol before they administered the preliminary breath test and arrested him. There is no [\*\*\*7] merit to defendant's first assignment of error.

Defendant next attacks the accuracy of the Intoxilyzer machine used to test him.

Officer Howard testified that the machine was working properly. He also stated that the machine had been calibrated, noting that fact from the maintenance certificate that was right next to the cabinets and over the machine.

Rex Thompson, executive director of the detoxification center, is responsible for the maintenance and calibration of the [\*347] Intoxilyzer machine that was used to test the defendant. Thompson testified that he tests the Intoxilyzer regularly. He performed a "190 day check" before and after the machine was used to test the defendant, that is, 190-day checks on March 24 and August 10, 1989. The 190-day-check sample is used to show that the Intoxilyzer does not

239 Neb. 343, \*347; 476 N.W.2d 540, \*\*542;  
1991 Neb. LEXIS 349, \*\*\*7

deviate more than 10 percent, the maximum deviation allowed. According to Thompson, the Department of Health laboratories provide an unknown solution that the detoxification center runs through the Intoxilyzer. The detoxification center sends the results back to the Department of Health laboratories, which in turn inform the detoxification center whether the test met the [\*\*\*8] standards. Thompson agreed that he had no personal knowledge of whether the Department of Health performed its task accurately.

Thompson also performed a "40 day check," which is a maintenance check, before and after May 27, 1989, the day the machine was used to test Lowrey. The machine worked properly on both days.

Further, Thompson performed a beam attenuator test before and after May 27, 1989, that is, on December 14, 1988, and July 14, 1989. The tests met the required standards. Thompson testified that the beam attenuator uses a breath simulator solution and that the accuracy of the beam attenuator test relies on the accuracy of the solution that is used. Every solution is good for 1 year or 20 uses, whichever comes first. A solution No. 27 or a solution No. 14 was used around May 27, 1989. Those solutions were tested by Ted Koperski of the Department of Health on June 3, 1988, and on May 8, 1989. Thompson had [\*\*543] no personal knowledge of whether solutions Nos. 14 and 27 were accurate, and he had to rely on Koperski's tests for the accuracy of the certificates.

Defendant argues insufficient foundation for admission of the results of the Intoxilyzer test because Thompson [\*\*\*9] had no personal knowledge of the accuracy of the solutions used in the tests to check the reliability of the Intoxilyzer. It is defendant's position that without the testimony of Koperski, the State cannot prove that the Intoxilyzer was in operating order and complied with title 177 of the Nebraska Administrative Code, [\*348] which was received in evidence.

[HN4] An appropriate method for testing the breath with an Intoxilyzer is found in attachment 3 to *177 Neb. Admin. Code, ch. 1, § 007.04A3* (1987). Attachment 3 is a checklist form which was used by the law enforcement officer and was introduced into evidence. The officer completed all the steps set forth in that attachment.

Section 007.05D states that only simulator solutions can be used which have been prepared as shown by a certificate of chemical analysis, which certification shall be in the form of attachment 12. Two exhibits were introduced which conform with attachment 12: exhibits 14C and 14H, which are certified and sworn to by Koperski, certify the accuracy and integrity of solutions Nos. 27 and 14 respectively.

[HN5] It is provided by § 007.06B that "testing devices used for direct breath testing shall have been checked within [\*\*\*10] 190 days prior to an analysis by a person responsible for maintenance and calibration." Exhibits 14D and 14E are sworn certificates of "John Blosser, agency administrator of *177 NAC 1*," for the Department of Health laboratories, that the 190-day checks on the particular Intoxilyzer were performed.

In *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988), this court held that [HN6] reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. This holding was based on an earlier decision, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), regarding the test of radar equipment. The defendant's position in *Snyder* was that unless there is proof that the speedometers of the patrol cars and the calibrated tuning fork were accurate, there was insufficient proof that the radar equipment was accurate and functioning properly. In other words, the defendant argued that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves be proved to be accurate [\*\*\*11] and functioning properly. In *Snyder*, this court held that "such a chain of evidence might have to proceed ad infinitum." *Id. at 466, 168 N.W.2d at 531.*

Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and [\*349] functioning properly is all that is required. Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the

239 Neb. 343, \*349; 476 N.W.2d 540, \*\*543;  
1991 Neb. LEXIS 349, \*\*\*11

accuracy of the radar equipment.

*Id.* at 467, 168 N.W.2d at 532. See, also, *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990).

This court noted in *State v. Chambers*, 233 Neb. 235, 240, 444 N.W.2d 667, 670 (1989), "In *Snyder and Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an [\*\*\*12] appropriate testing device which itself has been tested for accuracy . . . ." However, this court added:

Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise. . . . In any event, we hold that [HN7] to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has [\*\*544] been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

*Chambers*, *supra* at 241, 444 N.W.2d at 671.

The evidence shows that the Intoxilyzer had been calibrated and that Thompson, the person responsible for its maintenance and calibration, tested the Intoxilyzer regularly. He performed the 190-day checks and the 40-day checks before and after the machine was used to test the defendant. The machine checked within the required standards every [\*\*\*13] time. Furthermore, Thompson performed a beam attenuator test on the Intoxilyzer before and after it was used on the defendant. Although the beam attenuator only needs to be checked once a year, the detoxification center performs the tests at a minimum of twice per year. Although Thompson had no personal knowledge of [\*350] whether the solutions Nos. 14 and 27 were accurate, there is evidence that the solutions were tested by Koperski of the Department of Health and were found to be within acceptable limits.

In accordance with *Snyder*, *Chambers*, *Kudlacek*, and *Kincaid*, the State met its burden in establishing the solutions' accuracy through independent sources and in showing reasonable proof that the Intoxilyzer was functioning accurately and properly. To require more would be to extend the chain of evidence requirement "ad infinitum."

The judgment is affirmed.

Affirmed.

49 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Jeffrey R. Lowrey, appellant****No. 90-959****SUPREME COURT OF NEBRASKA*****239 Neb. 343; 476 N.W.2d 540; 1991 Neb. LEXIS 349*****October 25, 1991, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from the District Court for Lancaster County, Bernard J. McGinn, Judge, on appeal thereto from the County Court for Lancaster County, Richard H. Williams, Judge.

**DISPOSITION:**

Judgment of District Court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the District Court for Lancaster County (Nebraska), which affirmed a county court's finding that he was guilty of operating a motor vehicle while under the influence of alcoholic liquor and of failure to yield the right-of-way.

**OVERVIEW:** Defendant caused an accident. The officer who arrived at the scene noticed that he had the odor of alcohol on his breath. A "testing officer" was dispatched to the scene to test the defendant. Defendant was arrested for drunk driving. The county court found him guilty, and the district court affirmed. The court held that Neb. Rev. Stat. § 39-669.08(3) (Reissue 1988) authorized an officer to require a driver to submit to a preliminary test of his or her breath if the officer had reasonable grounds to believe that such person had alcohol in his or her body, had committed a moving traffic violation, or had been involved in a traffic accident. There was insufficient evidence to support a finding that the officers had reasonable grounds to believe that defendant was under the influence of alcoholic liquor so as to justify them in requiring defendant to submit to a preliminary test of his breath. The evidence that defendant was under the influence of alcohol was overwhelming. The State met its burden in establishing the accuracy of the Intoxilyzer machine used to test defendant through independent sources and in showing reasonable proof that it was functioning accurately and properly.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** accuracy, machine, functioning, radar, breath, detoxification, testing, tested, attachment, reasonable grounds, attenuator, beam, personal knowledge, criminal case, certificate, calibration, calibrated, sufficient evidence to

support, influence of alcohol, alcoholic liquor, motor vehicle, right-of-way, administered, reliability, laboratories, pickup, driver, watery, scene, person responsible

### **LexisNexis(R) Headnotes**

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[HN1] Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

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[HN2] Neb. Rev. Stat. § 39-669.08(3) (Reissue 1988) authorizes an officer to require a driver to submit to a preliminary test of his or her breath if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident.

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[HN3] In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, the Supreme Court of Nebraska does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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[HN4] An appropriate method for testing the breath with an Intoxilyzer is found in attachment 3 to *177 Neb. Admin. Code, ch. 1, § 007.04A3* (1987). Attachment 3 is a checklist form which was used by the law enforcement officer and was introduced into evidence. *Neb. Admin. Code, ch. 1, § 007.05D* (1987) states that only simulator solutions can be used which have been prepared as shown by a certificate of chemical analysis, which certification shall be in the form of attachment 12.

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[HN5] See *Neb. Admin. Code, ch. 1, § 007.06B* (1987).

#### ***Evidence > Demonstrative Evidence > Foundational Requirements***

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN6] Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

#### ***Evidence > Demonstrative Evidence > Foundational Requirements***

[HN7] To present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

**HEADNOTES:** 1. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

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3. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

**COUNSEL:**

Vincent M. Powers for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, [\*\*\*2] and Fahrnbruch, JJ.

**OPINION BY:**

PER CURIAM

**OPINION:**

[\*344] [\*\*541] Defendant appeals from an order of the district court which affirmed a judgment of the county court finding defendant guilty of operating a motor vehicle while under the influence of alcoholic liquor and of failure to yield the right-of-way. We affirm.

Errors assigned by the defendant are that (1) the trial court erred in finding that there was sufficient evidence to support a finding of reasonable grounds to believe defendant was operating a motor vehicle while under the influence of alcoholic liquor, and (2) the trial court erred in determining that there was sufficient foundation to allow the introduction of the Intoxilyzer test results at trial.

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Knopick noticed that Lowrey was unstable on his feet, had bloodshot, watery eyes, and had the odor of alcoholic beverage [\*345] about his person and breath. Officer Knopick then asked Lowrey to step over to his police cruiser. When defendant exited his vehicle, he fell against the pickup's box. Knopick testified that Lowrey told him he would not be able to make it and that Lowrey had to hold onto the officer.

Officer Jeffrey Howard, a "testing officer," was dispatched to the scene to test the defendant. Howard determined that the defendant was not capable of participating in any field sobriety tests. He noticed that Lowrey's speech was slurred, his eyes were watery, and his eyelids were droopy. Furthermore, [\*\*\*4] he observed that defendant had a very red, flushed face; dry, smacking lips; and a staggering walk. When asked to repeat the alphabet, defendant slurred from *a* to *t*, then stopped and became confused. The officer next asked defendant to count backward from 100. Although told by the officer to stop counting at 60, Lowrey continued. Defendant was then administered an Alco-Sensor pretest, which he failed.

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Apparently, defendant's first argument is that there was insufficient evidence to support a finding that the officer had reasonable grounds to believe that defendant was under the influence of alcoholic liquor so as to justify him [\*\*\*5] in requiring defendant to submit to a preliminary test of his breath. See Neb. Rev. Stat. § 39-669.08 (Reissue 1988).

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Defendant argues insufficient foundation for admission of the results of the Intoxilyzer test because Thompson [\*\*\*9] had no personal knowledge of the accuracy of the solutions used in the tests to check the reliability of the Intoxilyzer. It is defendant's position that without the testimony of Koperski, the State cannot prove that the Intoxilyzer was in operating order and complied with title 177 of the Nebraska Administrative Code, [\*348] which was received in evidence.

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Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and [\*349] functioning properly is all that is required. Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the

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accuracy of the radar equipment.

*Id.* at 467, 168 N.W.2d at 532. See, also, *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990).

This court noted in *State v. Chambers*, 233 Neb. 235, 240, 444 N.W.2d 667, 670 (1989), "In *Snyder and Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an [\*\*\*12] appropriate testing device which itself has been tested for accuracy . . . ." However, this court added:

Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise. . . . In any event, we hold that [HN7] to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has [\*\*544] been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

*Chambers*, *supra* at 241, 444 N.W.2d at 671.

The evidence shows that the Intoxilyzer had been calibrated and that Thompson, the person responsible for its maintenance and calibration, tested the Intoxilyzer regularly. He performed the 190-day checks and the 40-day checks before and after the machine was used to test the defendant. The machine checked within the required standards every [\*\*\*13] time. Furthermore, Thompson performed a beam attenuator test on the Intoxilyzer before and after it was used on the defendant. Although the beam attenuator only needs to be checked once a year, the detoxification center performs the tests at a minimum of twice per year. Although Thompson had no personal knowledge of [\*350] whether the solutions Nos. 14 and 27 were accurate, there is evidence that the solutions were tested by Koperski of the Department of Health and were found to be within acceptable limits.

In accordance with *Snyder*, *Chambers*, *Kudlacek*, and *Kincaid*, the State met its burden in establishing the solutions' accuracy through independent sources and in showing reasonable proof that the Intoxilyzer was functioning accurately and properly. To require more would be to extend the chain of evidence requirement "ad infinitum."

The judgment is affirmed.

Affirmed.

50 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Timothy J. Kincaid, appellant****No. 89-730****SUPREME COURT OF NEBRASKA***235 Neb. 89; 453 N.W.2d 738; 1990 Neb. LEXIS 110***April 13, 1990, Filed****SUBSEQUENT HISTORY:** [\*\*\*1]

As amended May 30, 1990

**PRIOR HISTORY:**

Appeal from the District Court for Douglas County, Stephen A. Davis, Judge, on appeal thereto from the County Court for Douglas County, Richard M. Jones, Judge.

**DISPOSITION:**

Judgment of District Court affirmed as modified.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged the decision of the District Court for Douglas County (Nebraska) affirming a county court's judgment convicting defendant of speeding and sentencing him to pay a fine.

**OVERVIEW:** A police officer used radar equipment to determine that defendant's rate of speed was 75 miles per hour (mph). The officer ticketed defendant for exceeding the speed limit by 30 mph. On appeal, the court held that the State's proof that the officer tested the radar unit before the arrest using three different tests and after the arrest using a tuning fork test, all of which showed the radar was functioning properly, was sufficient proof under *Neb. Rev. Stat. § 39-664(1)* (Reissue 1988) that the radar equipment was functioning properly. The court concluded that defendant's interpretation of § 39-664(2) as requiring two officers to be present to arrest an individual for speeding was an unreasonable interpretation and that a reasonable interpretation was that there was an implied "or" between § 39-664(2)(a) and (b). The court agreed with defendant that the State failed to prove that the speed limit on the road upon which defendant was travelling was 45 mph. The court held that, under *Neb. Rev. Stat. § 39-662(2)(d)*, the speed limit was 55 mph. The court reduced defendant's fine accordingly.

**OUTCOME:** The court affirmed defendant's conviction. The court modified defendant's sentence by lowering the fine he was required to pay and affirmed the sentence as modified.

**CORE TERMS:** radar, speed, motor vehicle, functioning, radio, tuning fork, speed limit, apprehending, accuracy, recorded, calibrated, microwave, electronic device, apprehended, speedometer, measured, validly, message, arrest, tested, sensible, modified, absurd, measuring device, traveling, speeding, driving, displays, marking, driver

### LexisNexis(R) Headnotes

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Neb. Rev. Stat. § 39-664(1)* (Reissue 1988) provides in part that before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the measuring device was in proper working order at the time of conducting the measurement and the operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order. § 39-664(1)(a), (d).

***Evidence > Procedural Considerations > Weight & Sufficiency  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] *Neb. Rev. Stat. § 39-664(2)* provides that the driver of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended: (a) If the apprehending officer has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device; (b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed; and (c) If the apprehending officer is in uniform or displays his or her badge of authority.

***Governments > Legislation > Interpretation  
Governments > Legislation > Types of Statutes***

[HN4] The Supreme Court of Nebraska has often stated that while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. The court has also stated in numerous criminal cases that in construing a statute the court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results, and that a sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

**HEADNOTES:** 1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.

2. **Evidence: Motor Vehicles.** Evidence that radar equipment was tested within a few hours of its use by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly is sufficient evidence of the accuracy of the radar equipment.

**COUNSEL:**

Timothy J. Kincaid, pro se.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

**OPINION BY:**

WHITE

**OPINION:**

[\*90] [\*\*739] This is an appeal from an order of the [\*\*\*2] Douglas County District Court affirming defendant's conviction and sentence for speeding. We affirm the conviction, but reduce the fine to \$ 50.

On October 2, 1988, at approximately 3:35 p.m., Omaha Police Division Officer Brian Haskell was positioned at 110th and West Dodge Road in Omaha, conducting stationary radar checks from his marked police cruiser. He was observing traffic eastbound on Dodge when his radar sounded. Haskell observed a red Mercedes-Benz traveling at high speed in the center lane of West Dodge Road, pursued the Mercedes, and stopped it at approximately 96th and West Dodge Road. Defendant was cited for traveling 75 m.p.h. in a 45-m.p.h. zone.

Defendant pled not guilty, and the case was tried to the court without a jury. Evidence of the car's speed, as measured by the radar unit, was admitted over defendant's objection. At the close of defendant's case, the trial court found defendant guilty, fined him \$ 100, and ordered him to pay costs. He has appealed to this court, assigning several errors.

Defendant first contends, in sum, that the trial court erred in admitting into evidence the radar readout, when the foundational evidence was inadequate to establish [\*\*\*3] that the radar unit was functioning properly and adequately, as required by *Neb. Rev. Stat. § 39-664(1)*(Reissue 1988).

Section 39-664(1) provides in pertinent part:

[HN1] Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:

(a) The measuring device was in proper working order at the time of conducting the measurement;

....

(d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

In *State v. Kudlacek*, 229 Neb. 297, 298, 426 N.W.2d 289, [\*91] 291 (1988), we stated that

235 Neb. 89, \*91; 453 N.W.2d 738, \*\*739;  
1990 Neb. LEXIS 110, \*\*\*3

"[e]vidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation." . . . "Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that [\*\*\*4] is required."

In *Kudlacek*, the State presented evidence showing that a light test, an internal calibration test, and a tuning fork test were used to test the accuracy of the radar unit. We held this evidence was sufficient for the trial judge to conclude the radar unit was functioning properly.

[\*\*740] In *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), the defendant's speed was measured by a radar unit which was tested several hours earlier using a calibrated tuning fork and a speedometer check with another patrol car. The defendant argued on appeal to this court that in the absence of proof that the patrol car's speedometer was accurate and proof that the calibrated tuning fork was also accurate, there was insufficient proof that the radar equipment was accurate and working properly. We stated that "[i]n effect, the defendant's argument is that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves be proved accurate and functioning properly. We cannot agree. Such a chain of evidence might have to proceed ad infinitum." *Id. at 466, 168 N.W.2d at 531.* [\*\*\*5] We held that evidence of either test was sufficient to constitute adequate proof that the radar equipment was working properly.

[HN2] Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

*Id. at 467, 168 N.W.2d at 532.*

In the present case, Officer Haskell testified that prior to using the radar unit he performed an LED light segment test, an [\*92] internal circuitry test, and a tuning fork test, and concluded the radar was operating properly. He further testified that after issuing the citation, but prior to leaving the location, he performed the same tests and again concluded the radar unit was functioning properly. With regard to the tuning fork test, Haskell testified there were two forks, one stamped with a 35-m.p.h. marking and the other an 80-m.p.h. marking. The tuning forks were supplied by the manufacturer and were tested at the factory. He testified he struck each tuning fork, held it approximately [\*\*\*6] 1 inch in front of the radar antenna, and received a digital readout which correlated to the marking stamped on the fork. The radar unit was not calibrated using a test car. We conclude that this evidence, in light of *Kudlacek* and *Snyder*, was sufficient foundation to establish that the radar unit was operating properly.

Defendant next assigns as error the trial court's failure to dismiss the case when the State failed to prove that the arresting officer met the requirements of § 39-664(2) in apprehending him. This section provides:

[HN3] The driver of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:

(a) If the apprehending officer has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device;

(b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed; and

(c) If the apprehending officer is in uniform [\*\*\*7] or displays his or her badge of authority.

Defendant contends that because the conjunctive word "and" separates subparts (b) and (c), all three subparts are required before a speeder can be validly apprehended. In the present case, then, he could not have been validly apprehended because the arrest was effectuated by only one officer, where the statute requires at least two officers

acting in accordance [\*93] with the statute for a valid arrest.

We reject appellant's contention. [HN4] This court has often stated that while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. See, *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987); *State v. [\*\*741] Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Hicks*, 225 Neb. 322, 404 N.W.2d 923 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985); [\*\*\*8] *State v. Farr*, 209 Neb. 163, 306 N.W.2d 854 (1981). Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980); *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979). This court has also stated in numerous criminal cases that in construing a statute this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results, *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *State v. Bargaen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Farr, supra*; and *State v. Maez*, 204 Neb. 129, 281 N.W.2d 531 (1979), and that a sensible construction will be placed upon a statute to effectuate the object of [\*\*\*9] the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *State v. Farr, supra*; *State v. Maez, supra*.

In the present case, interpreting § 39-664(2) to require two officers who are using radar to act jointly when issuing a citation for speeding is absurd. Under this interpretation of the statute, a single officer, who determined by speed radar that a vehicle was traveling in excess of the speed limit, could not validly issue a speeding citation to the driver of that vehicle, but that same officer, who had probable cause and who was acting alone, could validly arrest a suspect on the most serious felony offenses. This interpretation does not effectuate the object of the legislation, and the result of such an interpretation is absurd, especially since the scientific principles underlying [\*94] speed radar devices are widely recognized and accepted in the legal community.

We believe a more reasonable construction of § 39-664(2) would require showing subparts (a) and (c), or showing subparts (b) and (c). Therefore, the statute should be construed as reading:

The driver [\*\*\*10] of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:

(a) If the apprehending officer, who is in uniform or displays his or her badge of authority, has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device; *OR*

(b) If the apprehending officer, who is in uniform or displays his or her badge of authority, has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed.

We believe that this construction, allowing officers using speed radar to act alone or in groups of two or more, best achieves the purpose of the statute. Defendant's contention is without merit.

Defendant next argues that the State failed to establish that the speed limit on West Dodge Road was 45 m.p.h. We agree. The complaint filed against defendant in the county court alleged a violation of *Neb. Rev. Stat. § 39-662(2)* (Reissue 1988), in that defendant was driving 75 [\*\*\*11] m.p.h. in a 45-m.p.h. zone. That section delineates the maximum speeds for particular types of roads.

The prosecution implicitly assumes that since *Neb. Rev. Stat. § 39-663(4)* (Reissue 1988) authorizes a municipality to lower the maximum speed set forth in § 39-662(2), a violation of the lower maximum speed is also a violation of § 39-662(2), and thus an offense against the State of Nebraska. We neither reject nor accept this assumption. The

235 Neb. 89, \*94; 453 N.W.2d 738, \*\*741;  
1990 Neb. LEXIS 110, \*\*\*11

prosecution offered no evidence of a municipal ordinance reflecting that the speed limit on West Dodge Road was 45 m.p.h. The speed limit for the area in [\*\*742] question is 55 m.p.h. under § 39-662(2)(d). The speed of [\*95] defendant's car was established by competent evidence to be 75 m.p.h. Pursuant to the Waiver/Fine Schedule for Nebraska County Courts (Dec. 1, 1989), defendant's \$ 100 fine is therefore modified to \$ 50 to reflect a 20-m.p.h. speed difference.

We have examined defendant's remaining assignment of error, and it is wholly without merit. Accordingly, defendant's conviction and sentence are affirmed as modified.

Affirmed as modified.

51 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Timothy J. Kincaid, appellant****No. 89-730****SUPREME COURT OF NEBRASKA***235 Neb. 89; 453 N.W.2d 738; 1990 Neb. LEXIS 110***April 13, 1990, Filed****SUBSEQUENT HISTORY:** [\*\*\*1]

As amended May 30, 1990

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Appeal from the District Court for Douglas County, Stephen A. Davis, Judge, on appeal thereto from the County Court for Douglas County, Richard M. Jones, Judge.

**DISPOSITION:**

Judgment of District Court affirmed as modified.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged the decision of the District Court for Douglas County (Nebraska) affirming a county court's judgment convicting defendant of speeding and sentencing him to pay a fine.

**OVERVIEW:** A police officer used radar equipment to determine that defendant's rate of speed was 75 miles per hour (mph). The officer ticketed defendant for exceeding the speed limit by 30 mph. On appeal, the court held that the State's proof that the officer tested the radar unit before the arrest using three different tests and after the arrest using a tuning fork test, all of which showed the radar was functioning properly, was sufficient proof under *Neb. Rev. Stat. § 39-664(1)* (Reissue 1988) that the radar equipment was functioning properly. The court concluded that defendant's interpretation of § 39-664(2) as requiring two officers to be present to arrest an individual for speeding was an unreasonable interpretation and that a reasonable interpretation was that there was an implied "or" between § 39-664(2)(a) and (b). The court agreed with defendant that the State failed to prove that the speed limit on the road upon which defendant was travelling was 45 mph. The court held that, under *Neb. Rev. Stat. § 39-662(2)(d)*, the speed limit was 55 mph. The court reduced defendant's fine accordingly.

**OUTCOME:** The court affirmed defendant's conviction. The court modified defendant's sentence by lowering the fine he was required to pay and affirmed the sentence as modified.

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### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Neb. Rev. Stat. § 39-664(1)* (Reissue 1988) provides in part that before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the measuring device was in proper working order at the time of conducting the measurement and the operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order. § 39-664(1)(a), (d).

***Evidence > Procedural Considerations > Weight & Sufficiency  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] *Neb. Rev. Stat. § 39-664(2)* provides that the driver of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended: (a) If the apprehending officer has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device; (b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed; and (c) If the apprehending officer is in uniform or displays his or her badge of authority.

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[HN4] The Supreme Court of Nebraska has often stated that while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. The court has also stated in numerous criminal cases that in construing a statute the court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results, and that a sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

**HEADNOTES:** 1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.

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**COUNSEL:**

Timothy J. Kincaid, pro se.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

**OPINION BY:**

WHITE

**OPINION:**

[\*90] [\*\*739] This is an appeal from an order of the [\*\*\*2] Douglas County District Court affirming defendant's conviction and sentence for speeding. We affirm the conviction, but reduce the fine to \$ 50.

On October 2, 1988, at approximately 3:35 p.m., Omaha Police Division Officer Brian Haskell was positioned at 110th and West Dodge Road in Omaha, conducting stationary radar checks from his marked police cruiser. He was observing traffic eastbound on Dodge when his radar sounded. Haskell observed a red Mercedes-Benz traveling at high speed in the center lane of West Dodge Road, pursued the Mercedes, and stopped it at approximately 96th and West Dodge Road. Defendant was cited for traveling 75 m.p.h. in a 45-m.p.h. zone.

Defendant pled not guilty, and the case was tried to the court without a jury. Evidence of the car's speed, as measured by the radar unit, was admitted over defendant's objection. At the close of defendant's case, the trial court found defendant guilty, fined him \$ 100, and ordered him to pay costs. He has appealed to this court, assigning several errors.

Defendant first contends, in sum, that the trial court erred in admitting into evidence the radar readout, when the foundational evidence was inadequate to establish [\*\*\*3] that the radar unit was functioning properly and adequately, as required by *Neb. Rev. Stat. § 39-664(1)*(Reissue 1988).

Section 39-664(1) provides in pertinent part:

[HN1] Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:

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[HN2] Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

*Id. at 467, 168 N.W.2d at 532.*

In the present case, Officer Haskell testified that prior to using the radar unit he performed an LED light segment test, an [\*92] internal circuitry test, and a tuning fork test, and concluded the radar was operating properly. He further testified that after issuing the citation, but prior to leaving the location, he performed the same tests and again concluded the radar unit was functioning properly. With regard to the tuning fork test, Haskell testified there were two forks, one stamped with a 35-m.p.h. marking and the other an 80-m.p.h. marking. The tuning forks were supplied by the manufacturer and were tested at the factory. He testified he struck each tuning fork, held it approximately [\*\*\*6] 1 inch in front of the radar antenna, and received a digital readout which correlated to the marking stamped on the fork. The radar unit was not calibrated using a test car. We conclude that this evidence, in light of *Kudlacek* and *Snyder*, was sufficient foundation to establish that the radar unit was operating properly.

Defendant next assigns as error the trial court's failure to dismiss the case when the State failed to prove that the arresting officer met the requirements of § 39-664(2) in apprehending him. This section provides:

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(b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed; and

(c) If the apprehending officer is in uniform [\*\*\*7] or displays his or her badge of authority.

Defendant contends that because the conjunctive word "and" separates subparts (b) and (c), all three subparts are required before a speeder can be validly apprehended. In the present case, then, he could not have been validly apprehended because the arrest was effectuated by only one officer, where the statute requires at least two officers

acting in accordance [\*93] with the statute for a valid arrest.

We reject appellant's contention. [HN4] This court has often stated that while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. See, *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987); *State v. [\*\*741] Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Hicks*, 225 Neb. 322, 404 N.W.2d 923 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985); [\*\*\*8] *State v. Farr*, 209 Neb. 163, 306 N.W.2d 854 (1981). Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980); *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979). This court has also stated in numerous criminal cases that in construing a statute this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results, *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *State v. Bargaen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Farr, supra*; and *State v. Maez*, 204 Neb. 129, 281 N.W.2d 531 (1979), and that a sensible construction will be placed upon a statute to effectuate the object of [\*\*\*9] the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *State v. Farr, supra*; *State v. Maez, supra*.

In the present case, interpreting § 39-664(2) to require two officers who are using radar to act jointly when issuing a citation for speeding is absurd. Under this interpretation of the statute, a single officer, who determined by speed radar that a vehicle was traveling in excess of the speed limit, could not validly issue a speeding citation to the driver of that vehicle, but that same officer, who had probable cause and who was acting alone, could validly arrest a suspect on the most serious felony offenses. This interpretation does not effectuate the object of the legislation, and the result of such an interpretation is absurd, especially since the scientific principles underlying [\*94] speed radar devices are widely recognized and accepted in the legal community.

We believe a more reasonable construction of § 39-664(2) would require showing subparts (a) and (c), or showing subparts (b) and (c). Therefore, the statute should be construed as reading:

The driver [\*\*\*10] of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:

(a) If the apprehending officer, who is in uniform or displays his or her badge of authority, has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device; *OR*

(b) If the apprehending officer, who is in uniform or displays his or her badge of authority, has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed.

We believe that this construction, allowing officers using speed radar to act alone or in groups of two or more, best achieves the purpose of the statute. Defendant's contention is without merit.

Defendant next argues that the State failed to establish that the speed limit on West Dodge Road was 45 m.p.h. We agree. The complaint filed against defendant in the county court alleged a violation of *Neb. Rev. Stat. § 39-662(2)* (Reissue 1988), in that defendant was driving 75 [\*\*\*11] m.p.h. in a 45-m.p.h. zone. That section delineates the maximum speeds for particular types of roads.

The prosecution implicitly assumes that since *Neb. Rev. Stat. § 39-663(4)* (Reissue 1988) authorizes a municipality to lower the maximum speed set forth in § 39-662(2), a violation of the lower maximum speed is also a violation of § 39-662(2), and thus an offense against the State of Nebraska. We neither reject nor accept this assumption. The

235 Neb. 89, \*94; 453 N.W.2d 738, \*\*741;  
1990 Neb. LEXIS 110, \*\*\*11

prosecution offered no evidence of a municipal ordinance reflecting that the speed limit on West Dodge Road was 45 m.p.h. The speed limit for the area in [\*\*742] question is 55 m.p.h. under § 39-662(2)(d). The speed of [\*95] defendant's car was established by competent evidence to be 75 m.p.h. Pursuant to the Waiver/Fine Schedule for Nebraska County Courts (Dec. 1, 1989), defendant's \$ 100 fine is therefore modified to \$ 50 to reflect a 20-m.p.h. speed difference.

We have examined defendant's remaining assignment of error, and it is wholly without merit. Accordingly, defendant's conviction and sentence are affirmed as modified.

Affirmed as modified.

52 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Rodney P. Kudlacek, appellant**

**No. 87-861**

**SUPREME COURT OF NEBRASKA**

*229 Neb. 297; 426 N.W.2d 289; 1988 Neb. LEXIS 276*

**July 22, 1988, Filed**

**PRIOR HISTORY:** [\*\*\*1]

Appeal from the District Court for Harlan County: Bernard Sprague, Judge.

**DISPOSITION:**

Affirmed.

**CORE TERMS:** radar, functioning, motion to suppress, machine, fork, patrol car, breath test, regulations, accuracy, tested, speed, probable cause, admissible, breath, admission of evidence, immediately prior, specific occasion, timely objection, findings of fact, administered, certificate, speedometer, calibration, correctness, calibrate, predicate, testing, tuning, uphold

**HEADNOTES:** 1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.

2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly wrong.

3. **Trial: Evidence: Appeal and Error.** A defendant may not predicate error on the admission of evidence to which a timely objection was not made.

4. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

**COUNSEL:**

John C. Person, of Person, Dier & Person, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, [\*\*\*2] Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

**OPINION BY:**

BOSLAUGH

**OPINION:**

[\*297] [\*\*290] The defendant, Rodney P. Kudlacek, was convicted of driving while intoxicated, first offense, and was placed on probation for 1 year and fined \$ 100, and his driver's license was suspended for 60 days. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends (1) that the trial court erred in overruling his motion to suppress and (2) that the trial court erred in receiving into evidence, without sufficient foundation, the results of the Alco-Sensor preliminary breath test and the Intoxilyzer test.

The record shows that on September 1, 1985, at approximately 11:30 p.m., the defendant was stopped by Nebraska State Patrol Officer Larry E. Williams at a location [\*298] approximately 3 miles east of Alma, Nebraska, on U.S. Highway 136. The defendant was stopped because the radar unit in Officer Williams' patrol car showed the defendant's vehicle traveling at 64 m.p.h. in a 55 m.p.h. zone. Officer Williams told the defendant of the reason for the stop and at that time noticed that the defendant had a light odor of alcohol on his breath, his eyes were bloodshot [\*\*\*3] and pupils contracted, and his face was flushed. Officer Williams placed the defendant in his patrol car and administered the horizontal gaze nystagmus test, which the defendant passed. The defendant was then required to perform the walk-and-turn test and the one-leg stand, both of which he failed. Officer Williams then administered the Alco-Sensor preliminary breath test, which the defendant failed. The defendant was placed under arrest and taken to the Harlan County sheriff's office in Alma, where a chemical [\*\*291] test of his breath indicated a blood alcohol level of .133 percent.

Prior to trial the defendant filed a motion to suppress the results of the Intoxilyzer Model 4011AS test and any equilibrium test because no probable cause had existed to stop the defendant's vehicle. The hearing on the motion to suppress was held simultaneously with the trial. The court denied the motion to suppress and found that there had been probable cause to stop. The defendant contends that there was insufficient foundation evidence to establish the accuracy of the radar unit, and, therefore, the radar reading was not admissible as evidence of probable cause to stop the defendant.

"Evidence of [\*\*\*4] the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation." *State v. Green*, 217 Neb. 70, 76, 348 N.W.2d 429, 433 (1984); *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957). "Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required." *State v. Snyder*, 184 Neb. 465, 467, 168 N.W.2d 530, 532 (1969).

We think the evidence was sufficient to show that the radar unit operated by Officer Williams was accurate and functioning properly. At 1:30 a.m. on September 1, 1985, Officer Williams [\*299] performed three tests on the model S-80 radar unit that was in his patrol car. The first test was the light test to determine that all light bars within the radar unit were operating. The second test involved the use of tuning forks to check the machine's calibration. Officer Williams explained that the radar unit comes with two tuning forks, one fork certified at 80 [\*\*\*5] m.p.h. and the other at 35 m.p.h. The machine is tested by turning on the radar and placing the fork in front of each radar antenna. The machine should record a reading of 80 m.p.h. for the 80 m.p.h. fork and a reading of 35 m.p.h. for the 35 m.p.h. fork.

Finally, an internal calibration test was performed by comparing the patrol window on the radar with the

229 Neb. 297, \*299; 426 N.W.2d 289, \*\*291;  
1988 Neb. LEXIS 276, \*\*\*5

speedometer in the patrol car. All three tests demonstrated that the unit was functioning properly.

The tests were performed at the end of Officer Williams' shift. Between that time and the time the defendant's vehicle was stopped, approximately 22 hours later, the radar unit was not used.

The defendant argues that because the unit was not tested immediately prior to the time the defendant's vehicle was stopped, the foundation evidence required to show the unit's accuracy was lacking.

Officer Williams testified that the State Patrol would like to have the officers calibrate the radar units at the beginning and end of each shift and that he in fact did not calibrate the unit at the beginning of the shift during which the defendant was stopped. However, he also testified that there are no regulations or procedures concerning [\*\*\*6] the testing of radar units and that the tests he performed were conducted pursuant to the normal practice in his district station. Under the facts in this case, the fact that the unit was not tested immediately prior to the time the defendant's vehicle was stopped did not create an inference that the unit was not functioning properly.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). The evidence was sufficient for the trial court to find that the radar unit was properly functioning.

[\*300] In his second assignment of error, the defendant contends the foundational evidence was not sufficient for the trial court to receive into evidence the results of the preliminary breath test and the Intoxilyzer breath test. He specifically contends that the results from both tests should not have been admitted because the State failed to prove that the tests were properly conducted in accordance with a method currently approved by the Nebraska Department of Health, as required by [\*\*\*7] *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

[\*\*292] The defendant's specific complaints go to the certificate attached to the copy of the rules and regulations of the Department of Health which was received in evidence and to the simulator solution used in the maintenance of the Intoxilyzer machine.

The certificate attached to the certified copy of Neb. Admin. Code tit. 77, ch. 1 (1985), which contains the rules and regulations relating to methods and techniques approved by the Department of Health, was dated January 28, 1985, and recited that the rules were in force "up to December 22, 1984." The defendant argues that the foundation evidence was deficient because there was no showing that the rules were in effect on September 2, 1985, the date on which the defendant's breath was tested. No contention is made and no evidence was offered to suggest that the rules or regulations had been amended during the intervening period.

At the time the exhibit was offered and received in evidence the defendant made no objection to the offer, and the exhibit was received in evidence without objection. Under these circumstances any objection to the exhibit was [\*\*\*8] waived. A defendant may not predicate error on the admission of evidence to which a timely objection was not made. *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988).

The defendant's second complaint relates to the certification of the beam attenuator reference standard which was performed by Deputy Christopher Becker on December 26, 1984. In that procedure, a solution, No. 65, supplied by the Department of Health is used. The solution has a known alcohol content value of .10 percent weight per volume at 34 degrees C.

[\*301] The argument is similar to that which was made in *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), regarding the test of radar equipment. In the *Snyder* case the defendant contended that it was not sufficient to test radar equipment with a calibrated tuning fork and by using a speedometer check with another patrol car unless there is additional evidence that the comparative testing devices were also proved to be accurate and functioning properly. In regard to that argument, we said, "We cannot agree. Such a chain of evidence might have to proceed ad infinitum." *Id.* at 466, 168 N.W.2d at 531. [\*\*\*9]

229 Neb. 297, \*301; 426 N.W.2d 289, \*\*292;  
1988 Neb. LEXIS 276, \*\*\*9

We then held that reasonable proof that the equipment was accurate and functioning properly was all that was required. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957).

We believe a similar rule is applicable in this case. Reasonable proof that the Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. The record in this case shows that requirement was satisfied.

The judgment of the district court is affirmed.

Affirmed.

53 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Rodney P. Kudlacek, appellant**

**No. 87-861**

**SUPREME COURT OF NEBRASKA**

*229 Neb. 297; 426 N.W.2d 289; 1988 Neb. LEXIS 276*

**July 22, 1988, Filed**

**PRIOR HISTORY:** [\*\*\*1]

Appeal from the District Court for Harlan County: Bernard Sprague, Judge.

**DISPOSITION:**

Affirmed.

**CORE TERMS:** radar, functioning, motion to suppress, machine, fork, patrol car, breath test, regulations, accuracy, tested, speed, probable cause, admissible, breath, admission of evidence, immediately prior, specific occasion, timely objection, findings of fact, administered, certificate, speedometer, calibration, correctness, calibrate, predicate, testing, tuning, uphold

**HEADNOTES:** 1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.

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3. **Trial: Evidence: Appeal and Error.** A defendant may not predicate error on the admission of evidence to which a timely objection was not made.

4. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

**COUNSEL:**

John C. Person, of Person, Dier & Person, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

**JUDGES:**

Hastings, C.J., Boslaugh, White, [\*\*\*2] Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

**OPINION BY:**

BOSLAUGH

**OPINION:**

[\*297] [\*\*290] The defendant, Rodney P. Kudlacek, was convicted of driving while intoxicated, first offense, and was placed on probation for 1 year and fined \$ 100, and his driver's license was suspended for 60 days. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends (1) that the trial court erred in overruling his motion to suppress and (2) that the trial court erred in receiving into evidence, without sufficient foundation, the results of the Alco-Sensor preliminary breath test and the Intoxilyzer test.

The record shows that on September 1, 1985, at approximately 11:30 p.m., the defendant was stopped by Nebraska State Patrol Officer Larry E. Williams at a location [\*298] approximately 3 miles east of Alma, Nebraska, on U.S. Highway 136. The defendant was stopped because the radar unit in Officer Williams' patrol car showed the defendant's vehicle traveling at 64 m.p.h. in a 55 m.p.h. zone. Officer Williams told the defendant of the reason for the stop and at that time noticed that the defendant had a light odor of alcohol on his breath, his eyes were bloodshot [\*\*\*3] and pupils contracted, and his face was flushed. Officer Williams placed the defendant in his patrol car and administered the horizontal gaze nystagmus test, which the defendant passed. The defendant was then required to perform the walk-and-turn test and the one-leg stand, both of which he failed. Officer Williams then administered the Alco-Sensor preliminary breath test, which the defendant failed. The defendant was placed under arrest and taken to the Harlan County sheriff's office in Alma, where a chemical [\*\*291] test of his breath indicated a blood alcohol level of .133 percent.

Prior to trial the defendant filed a motion to suppress the results of the Intoxilyzer Model 4011AS test and any equilibrium test because no probable cause had existed to stop the defendant's vehicle. The hearing on the motion to suppress was held simultaneously with the trial. The court denied the motion to suppress and found that there had been probable cause to stop. The defendant contends that there was insufficient foundation evidence to establish the accuracy of the radar unit, and, therefore, the radar reading was not admissible as evidence of probable cause to stop the defendant.

"Evidence of [\*\*\*4] the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation." *State v. Green*, 217 Neb. 70, 76, 348 N.W.2d 429, 433 (1984); *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957). "Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required." *State v. Snyder*, 184 Neb. 465, 467, 168 N.W.2d 530, 532 (1969).

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Finally, an internal calibration test was performed by comparing the patrol window on the radar with the

229 Neb. 297, \*299; 426 N.W.2d 289, \*\*291;  
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The tests were performed at the end of Officer Williams' shift. Between that time and the time the defendant's vehicle was stopped, approximately 22 hours later, the radar unit was not used.

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Officer Williams testified that the State Patrol would like to have the officers calibrate the radar units at the beginning and end of each shift and that he in fact did not calibrate the unit at the beginning of the shift during which the defendant was stopped. However, he also testified that there are no regulations or procedures concerning [\*\*\*6] the testing of radar units and that the tests he performed were conducted pursuant to the normal practice in his district station. Under the facts in this case, the fact that the unit was not tested immediately prior to the time the defendant's vehicle was stopped did not create an inference that the unit was not functioning properly.

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[\*300] In his second assignment of error, the defendant contends the foundational evidence was not sufficient for the trial court to receive into evidence the results of the preliminary breath test and the Intoxilyzer breath test. He specifically contends that the results from both tests should not have been admitted because the State failed to prove that the tests were properly conducted in accordance with a method currently approved by the Nebraska Department of Health, as required by [\*\*\*7] *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

[\*\*292] The defendant's specific complaints go to the certificate attached to the copy of the rules and regulations of the Department of Health which was received in evidence and to the simulator solution used in the maintenance of the Intoxilyzer machine.

The certificate attached to the certified copy of Neb. Admin. Code tit. 77, ch. 1 (1985), which contains the rules and regulations relating to methods and techniques approved by the Department of Health, was dated January 28, 1985, and recited that the rules were in force "up to December 22, 1984." The defendant argues that the foundation evidence was deficient because there was no showing that the rules were in effect on September 2, 1985, the date on which the defendant's breath was tested. No contention is made and no evidence was offered to suggest that the rules or regulations had been amended during the intervening period.

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[\*301] The argument is similar to that which was made in *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), regarding the test of radar equipment. In the *Snyder* case the defendant contended that it was not sufficient to test radar equipment with a calibrated tuning fork and by using a speedometer check with another patrol car unless there is additional evidence that the comparative testing devices were also proved to be accurate and functioning properly. In regard to that argument, we said, "We cannot agree. Such a chain of evidence might have to proceed ad infinitum." *Id.* at 466, 168 N.W.2d at 531. [\*\*\*9]

229 Neb. 297, \*301; 426 N.W.2d 289, \*\*292;  
1988 Neb. LEXIS 276, \*\*\*9

We then held that reasonable proof that the equipment was accurate and functioning properly was all that was required. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957).

We believe a similar rule is applicable in this case. Reasonable proof that the Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. The record in this case shows that requirement was satisfied.

The judgment of the district court is affirmed.

Affirmed.

54 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**Micheal L. Valasek, Jr., appellant, v. Beverly Neth, director, State of Nebraska,  
Department of Motor Vehicles, appellee.**

**No. A-05-387.**

**NEBRASKA COURT OF APPEALS**

*2006 Neb. App. LEXIS 123*

**July 11, 2006, Filed**

**PRIOR HISTORY:** [\*1] Appeal from the District Court for Custer County: Ronald D. Olberding, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver sought review of an order from the District Court for Custer County (Nebraska), which entered judgment in favor of appellee director of state motor vehicle department and upheld the director's revocation of the driver's motor vehicle operator's license for one year after the driver was stopped for speeding and arrested for operating a motor vehicle while intoxicated in violation of *Neb. Rev. Stat. § 60-6,196* (Supp. 2003).

**OVERVIEW:** After the driver was stopped for speeding, a blood test that confirmed that his blood alcohol level exceeded the legal limit. In affirming, the court first rejected the assertion that the director lacked jurisdiction to revoke the driver's privileges on the grounds that the officer had not forwarded his sworn report to the director as required by *Neb. Rev. Stat. § 60-498.01* (Supp. 2003). Instead, the court concluded that, whether it came from the officer or from the driver, the sworn report was sufficient to confer jurisdiction on the director. Next, the court found no abuse of discretion or due process implications in the failure to hold a hearing on a motion to compel a witness where the driver failed to request a hearing and failed to preserve the issue for review. Similarly, the court found that the denial of the motion to compel did not violate due process because the driver had ample opportunities to be heard. Finally, the court found that the driver failed to disprove the prima facie case for revocation by not offering evidence to rebut the testimony that the officer had probable cause to believe that the driver had operated his vehicle while impaired.

**OUTCOME:** The court affirmed the trial court's judgment upholding the revocation of the driver's operator's license.

**CORE TERMS:** sworn, subpoena, hearing officer, continuance, license, motion to compel, motor vehicle, alcohol, blood, arrest, blood test, message, regulation, revocation, driver, concentration, faxed, erroneous deprivation, probable cause, arresting, chemical test, peace officer, stamped, actual physical control, arresting officer, driving, administrative hearing, subpoena duces tecum, motion to dismiss, blood sample

**LexisNexis(R) Headnotes**

*Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review*

*Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review*

*Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures*

[HN1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

*Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN2] See *Neb. Rev. Stat. § 60-498.01(3)* (Supp. 2003).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

*Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN3] See *Neb. Rev. Stat. § 60-498.01(5)(a)* (Supp. 2003).

*Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

[HN4] In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.

*Administrative Law > Judicial Review > Standards of Review > General Overview*

[HN5] In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN6] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN7] Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN8] In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN9] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

***Transportation Law > Private Motor Vehicles > Operator Licenses***

[HN10] Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN11] A number of factors are to be considered in resolving an inquiry into the specific dictates of due process: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

***Administrative Law > Agency Adjudication > Prehearing Activity***

[HN12] In order to secure the testimony of witnesses with relevant information to offer at an administrative license revocation hearing, a motorist must, within 10 days of the receipt of the notice of revocation and prior to the completion of discovery, (1) identify and locate all potential witnesses, (2) determine the facts that those witnesses are expected to establish, and (3) secure or be denied the voluntary appearances of those witnesses at a hearing the time and place of which are still unknown.

***Governments > Courts > Authority to Adjudicate***

[HN13] See *Neb. Rev. Stat. § 25-21,208* (Reissue 1995).

***Administrative Law > Agency Adjudication > Hearings > General Overview***

***Administrative Law > Agency Adjudication > Prehearing Activity***

[HN14] See *247 Neb. Admin. Code, ch. 1, § 010* (2001).

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN15] Neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy. The concept of due process embodies the notion of fundamental fairness and defies precise definition. Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands.

***Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview  
Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting  
Transportation Law > Private Motor Vehicles > Operator Licenses***

[HN16] *Neb. Rev. Stat. § 60-498.01(7)* provides in part that, upon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity, and it becomes the petitioner's burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect.

**COUNSEL:** David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Edward G. Vierk for appellee.

**JUDGES:** Sievers, Moore, and Cassel, Judges.

**OPINION BY:** Moore

**OPINION:**

Moore, Judge.

INTRODUCTION

Micheal L. Valasek, Jr.'s motor vehicle operator's license was revoked after the director of the Nebraska Department of Motor Vehicles (Department) found that the arresting officer had probable cause to believe Valasek was operating a motor vehicle in violation of *Neb. Rev. Stat. § 60-6,196* (Supp. 2003). Valasek appealed to the district court for Custer County. The district court affirmed, and Valasek appealed that decision. We conclude that Valasek's assignments of error are without merit, and we affirm.

BACKGROUND

This appeal arises out of Valasek's arrest following a traffic stop on July 10, 2004. On that date, Sgt. Kirk Hansel of the Nebraska State Patrol stopped a motor vehicle for speeding. Hansel had obtained a radar reading which indicated that the vehicle had been traveling at 95 miles per hour. Hansel contacted the driver, [\*2] whom he identified as Valasek. Hansel noticed that Valasek had an odor of alcohol about his person. Hansel also observed that Valasek's eyes were bloodshot, that Valasek's face was flushed, and that Valasek's speech and actions were deliberate. Valasek refused to submit to most of the field sobriety tests requested by Hansel and failed a preliminary breath test. Hansel then arrested Valasek and transported him to a hospital in Broken Bow, Nebraska, where Valasek submitted to a blood test. The results of the test indicated that Valasek had a blood alcohol content of .163 grams of alcohol per 100 milliliters of blood.

On July 28, 2004, the Department received the "Notice/Sworn Report/Temporary License" (sworn report) completed by Hansel. The Department mailed a "Notice of Administrative License Revocation [and] Temporary License," dated August 3, 2004, to Valasek via certified mail. On August 11, the Department received a petition for administrative hearing from Valasek.

Due to continuances, three administrative license revocation (ALR) hearings were held in this matter. The first

hearing, on August 31, 2004, was continued upon the motion of the hearing officer in order to comply [\*3] with Valasek's discovery requests for his blood sample and in order for Valasek to subpoena the person responsible for testing his blood. The Department subsequently issued a subpoena duces tecum to Susan Rutledge, instructing Rutledge to appear by telephone at the ALR hearing scheduled for October 1. Rutledge did appear at the October 1 telephonic hearing; however, the October 1 hearing was continued on the Department's motion in order to facilitate independent testing of Valasek's blood sample.

On October 14, 2004, the Department received a fax message from Rutledge, the person responsible for testing Valasek's blood sample, regarding her unavailability for the third ALR hearing, scheduled for November 2. Rutledge's handwritten message stated, "Sorry but I will not be available for telephone conference hearing on 11/2/04. I have already received a subpoena from Otoe Co. that day." The fax message was stamped "RECEIVED" by the Department on October 14, was addressed to both the Department and Valasek's counsel, and bears a handwritten telephone number next to the name of Valasek's counsel. Although it is not clear whether Rutledge also faxed a copy to Valasek's counsel on October [\*4] 14, the record does show that the Department faxed a copy of Rutledge's message to Valasek's counsel on October 22.

On October 21, 2004, the Department received a praecipe for subpoena duces tecum from Valasek, asking that the Department issue a subpoena requiring Rutledge to appear at the upcoming third ALR hearing. The Department received a motion to compel from Valasek on October 22, asking the Department to compel the attendance of Rutledge at the November 2 ALR hearing. Valasek also stated in his motion that "[a] subpoena has been served on said witness and that she has written a memo to the attorney for [Valasek] indicating that she will not be available." On October 25, the director of the Department denied Valasek's motion to compel and sent a copy of the denial to Valasek on that date via regular first-class U.S. mail. The denial noted that Rutledge had already been subpoenaed to appear in another court on the day in question.

The third and final ALR hearing in this matter was held on November 2, 2004. The hearing officer received exhibits into evidence, including a copy of Hansel's sworn report, received by the hearing officer as exhibit 1. The hearing officer also [\*5] heard testimony from Hansel concerning his traffic stop and subsequent arrest of Valasek. In addition to the evidence outlined above concerning Hansel's stop and arrest of Valasek, Hansel testified that as a result of the arrest, he completed a sworn report to file with the Department. Hansel recognized exhibit 1 as the sworn report he filled out for Valasek. Hansel testified that he signed his sworn report in the presence of a notary and that exhibit 1 appeared to be a true and accurate copy of the document he filed. Valasek's attorney objected to the receipt of exhibit 1, stating:

I'll object to it on the reasons previously given. Further, I object on foundation, hearsay, not best evidence, no showing of compliance with 60-6,201, 60-6,197, or Title 177. I also object on the grounds that the director has not provided all of the discovery as requested, which does not allow me to maintain my burden of proof.

Earlier during the November 2 hearing, Valasek's attorney stated that he had no objections to the hearing officer's receiving all of the exhibits, "except those that are the exhibits for the sworn report and the transcript." The hearing officer overruled Valasek's [\*6] objections and received exhibit 1 into evidence.

On November 9, 2004, the director of the Department found that Hansel, the arresting officer, had probable cause to believe Valasek was operating or was in actual physical control of a motor vehicle while intoxicated, in violation of § 60-6,196, and that Valasek was operating or in actual physical control of a motor vehicle while having a blood alcohol content of .163 grams of alcohol per 100 milliliters of blood. The director revoked Valasek's operator's license for 1 year.

Valasek appealed to the district court, assigning errors similar to those assigned in this court. The only significant difference, for purposes of the present appeal, between the errors assigned to the district court and those assigned to this

court are discussed in the analysis section below. Following a hearing, the district court entered an order on March 21, 2005, agreeing with the findings of fact and conclusions of law set forth in the director's November 9, 2004, order and affirming the director's order in all respects. Valasek subsequently perfected his appeal to this court.

#### ASSIGNMENTS OF ERROR

Valasek asserts that the district court erred in (1) determining [\*7] that the director did not abuse her discretion in failing to hold a hearing on Valasek's motion to compel and determining that Valasek was not denied procedural due process as a result of this failure, (2) determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing and determining that Valasek was not denied procedural due process as a result of this failure, (3) finding that Hansel had probable cause to believe that Valasek was operating or in actual physical control of a motor vehicle in violation of § 60-6,196, and (4) finding that the director had jurisdiction to administratively revoke Valasek's driving privileges.

#### STANDARD OF REVIEW

[HN1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported [\*8] by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

#### ANALYSIS

##### *Jurisdiction.*

We first address Valasek's assertion that the district court erred in finding that the director had jurisdiction to administratively revoke Valasek's driving privileges. Valasek refers us to *Neb. Rev. Stat. § 60-498.01(3)* (Supp. 2003), which provides:

[HN2] If a person arrested pursuant to section 60-6,197 submits to the chemical test of blood or breath required by that section, the test discloses the presence of alcohol in any of the concentrations specified in section 60-6,196, and the test results are available to the arresting peace officer while the arrested person is still in custody, the arresting peace officer, as agent for the director, shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license [\*9] of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest as provided in subsection (6) of this section. The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested pursuant to section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

Because the results of Valasek's blood test were not available to Hansel while Valasek was in custody, § 60-498.01(5)(a) is also applicable:

[HN3] If the results of a chemical test indicate the presence of alcohol in a concentration specified in

section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn [\*10] report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn report is not received within ten days, the revocation shall not take effect.

Valasek argues that there is nothing in the record to show that Hansel forwarded the sworn report to the director as required. Valasek does not question the contents of the sworn report, but he argues that the mere fact that the director may have a copy of the sworn report does not indicate that the arresting officer complied with statutory requirements. Valasek observes that the petition for administrative hearing requires the driver to send a copy of the sworn report to the director, and Valasek suggests that the copy of the sworn report in the record may have been a copy furnished by Valasek, rather than by Hansel.

The Nebraska Supreme Court has held that [HN4] in an ALR proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). Exhibit 1, the sworn report received at the November 2, 2004, hearing, [\*11] provides that Valasek was arrested pursuant to *Neb. Rev. Stat. § 60-6,197* (Supp. 2003) and the reasons for his arrest, that Valasek was requested to submit to a chemical test, that Valasek submitted to a blood test, and that the blood test revealed the presence of alcohol in a concentration of .163 grams of alcohol per 100 milliliters of blood. Exhibit 1 also shows that the blood test results were received on July 21, 2004. Exhibit 1 was signed by Hansel and notarized on July 26 and stamped "RECEIVED" by the Department on July 28. Although Hansel did not explicitly testify at the November 2 hearing that he forwarded exhibit 1 to the Department, Hansel did identify exhibit 1 as the sworn report he filled out concerning Valasek and testified that exhibit 1 appeared "to be a true and accurate copy of the document [he] filed."

Valasek's claim that exhibit 1 might have been Valasek's copy of the sworn report is clearly without merit. The record shows that Valasek's petition for administrative hearing was stamped "RECEIVED" by the Department on August 11, 2004. It seems logical that any copies of the sworn report received by the Department with Valasek's petition [\*12] for administrative hearing would also have been stamped "RECEIVED" on August 11. Instead, exhibit 1 was stamped "RECEIVED" on July 28. Exhibit 1 contains the information specified in the applicable statute and was received by the Department within the time period specified by statute. We conclude that exhibit 1 was sufficient to confer jurisdiction on the director and that Valasek's assertions to the contrary are without merit.

#### *Hearing on Motion to Compel.*

With regard to his motion to compel, Valasek first asserts that the district court erred in determining that the director did not abuse her discretion in failing to hold a hearing on Valasek's motion to compel. Valasek also asserts that he was denied procedural due process as a result of this alleged failure. The record shows that Valasek did not request a hearing in the body of the motion itself and did not argue the issue of a hearing on his motion to compel before the hearing officer at any of the ALR hearings. Valasek did not assign the lack of a hearing as an issue in his appeal to the district court.

[HN5] In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not [\*13] as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). [HN6] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Metro. Utils. Dist. v. Neb. PSC (In re Metro. Utils. Dist.)*, 270 Neb. 494, 704 N.W.2d 237 (2005). Without having requested or raised the issue of such a hearing, Valasek may not argue that the issue was properly before either the hearing officer or the district court on appeal.

Likewise, the issue of the lack of a hearing on Valasek's motion to compel is not properly before this court. [HN7] Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only

issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. *Navrkal v. State*, 270 Neb. 391, 703 N.W.2d 247 (2005). [HN8] In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. [\*14] *Id.* Valasek's assignment of error is without merit.

*Denial of Motion to Compel.*

Valasek next asserts the district court erred in determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing and that Valasek was not denied procedural due process as a result of this failure.

[HN9] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the *Due Process Clause* and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Id.* The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Id.* [HN10] Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Id.* In such cases, the licenses are not to be taken away without that procedural [\*15] due process required by the *14th Amendment*. *Id.*

Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Marshall v. Wimes*, *supra*. Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court determined that [HN11] a number of factors are to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest [\*16] through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Marshall v. Wimes*, *supra*.

As to the first factor to be considered in a *Mathews* analysis, the private interest at issue in this case is Valasek's interest in continued possession of a motor vehicle operator's license. A driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes*, *supra*.

The second factor to be considered under a *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In *Marshall v. Wimes*, *supra*, the Department refused to issue a subpoena duces tecum directing the individual who tested Scott Marshall's [\*17] blood alcohol level to appear at the ALR hearing. After the Department filed its notice of hearing, Marshall immediately filed a praecipe for subpoena duces tecum, seeking a subpoena directing the individual who tested his blood to appear at the hearing and bring with her a sample of Marshall's blood in her possession, as well as records relating to the calibration of the testing equipment. Marshall also sought a subpoena to compel the witness to appear for a deposition prior to the hearing. The praecipe was denied by the Department because it did not comply with certain regulatory requirements. The deposition request was also denied on the basis that the applicable regulations did not provide for a subpoena to compel attendance at a deposition. Marshall argued before the hearing officer and the district court that the director's application of the regulatory requirements for

subpoenas violated his due process rights.

On appeal from the district court, the Nebraska Supreme Court determined that because Marshall had the burden of establishing that he did not have more than the allowable concentration of alcohol in his blood at the time he was operating a motor vehicle, it was clear [\*18] that limitations on Marshall's ability to present evidence relevant to that determination heightened the risk of an erroneous deprivation of Marshall's interest in his operator's license. See *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The Supreme Court also found it clear that permitting the introduction of relevant evidence has value in reducing the risk of error. *Id.* The court found this particularly true where Marshall's license was revoked primarily in reliance on the written report of the blood test that was performed and Marshall was precluded from examining the witness who performed the test to determine the test's reliability. The court determined that Marshall was entitled to inquire regarding the chain of custody of his blood sample and whether the individual who tested his blood, an employee of a State agency, complied with the relevant regulations. The court observed that the director did not refuse to issue the subpoena requested by Marshall because the evidence and testimony were irrelevant, but, rather, because of the timeliness of the praecipe. The court determined that pursuant to the relevant statutory and regulatory requirement, [\*19] [HN12] in order to secure the testimony of witnesses with relevant information to offer, a motorist must,

within 10 days of the receipt of the notice of revocation and prior to the completion of discovery, (a) identify and locate all potential witnesses, (b) determine the facts that those witnesses are expected to establish, and (c) secure or be denied the voluntary appearances of those witnesses at a hearing the time and place of which are still unknown.

*Id.* at 854-55, 626 N.W.2d at 237. See, also, § 60-498.01(6)(a); 247 Neb. Admin. Code, ch. 1, §§ 009.01 and 009.03D (2001). The court was not persuaded by the State's argument that the procedures available to Marshall in the established regulatory scheme were adequate to protect Marshall against the erroneous deprivation of his property interest.

In the present case, of course, any limitations on Valasek's ability to present evidence relevant to the determination of his blood alcohol content heighten the risk of an erroneous deprivation of Valasek's interest in his operator's license, and permitting introduction of such relevant evidence would have value in reducing the risk of [\*20] error. The present case is distinguishable, however, from *Marshall v. Wimes*, *supra*. The director in this case issued a subpoena for Rutledge which resulted in the fax message from Rutledge indicating that she would not be available for the November 2, 2004, hearing due to having received a subpoena to appear in a different court on that date. Rutledge faxed her message to the Department on October 14. The record is not clear as to whether Rutledge also faxed a copy to Valasek's counsel on October 14, but the record does show that the Department faxed a copy of Rutledge's message to Valasek's counsel on October 22. On that same date, Valasek filed his motion to compel. The Department sent the director's denial of Valasek's motion to Valasek via regular first-class U.S. mail on October 25. The denial was based on Rutledge's unavailability for the November 2 hearing.

The record does not show that Valasek took any further action to obtain Valasek's presence prior to the November 2, 2004, hearing. At the November 2 hearing, Valasek made a motion to dismiss based on Rutledge's absence from the hearing. Valasek's counsel argued that despite the subpoena requiring Rutledge's [\*21] presence in another court on that date, Rutledge had not shown that she could not appear by telephone for the 10 a.m. ALR hearing. Valasek's counsel argued further that Valasek was denied due process because he could not cross-examine a vital witness and maintain his burden of proof. The hearing officer observed that under the Department's rules and regulations, Valasek was entitled to enforce his subpoena through the district court if he so desired. The hearing officer denied Valasek's motion to dismiss and directed him to "that rule and regulation." Valasek's counsel discussed further with the hearing officer the difficulty of getting a district court to enforce the subpoena compelling Rutledge's appearance at 10 a.m. for the hearing, when it was already 10:20 a.m. Valasek's counsel stated, "I'll make my motion continually to dismiss for the reason of the denial of due process and that our participation in this hearing is not a waiver of that objection." The hearing officer

acknowledged Valasek's objection and indicated that he would issue his order denying the motion to dismiss "unless you tell me that you're going to attempt to . . . get the district court to enforce your subpoena. [\*22] " Valasek's counsel then inquired, "The mechanics, [hearing officer], though, if it was issued, how do we back date it so she can appear at this hearing?" The hearing officer indicated that such backdating was not possible, again stating that the motion to dismiss was denied and directing Valasek to use the district court to enforce the subpoena if he so desired.

We observe that *247 Neb. Admin. Code, ch. 1, § 009.07* (2001), provides that "[s]ubpoenas and orders may be enforced by the applicable district court." *Neb. Rev. Stat. § 25-21,208* (Reissue 1995) provides:

[HN13] Civil actions to which the state is a party shall, on motion of counsel on behalf of the state, have priority of trial over other civil actions; and the several district courts having jurisdiction to try actions to which the state is a party shall have power to compel attendance of witnesses, as is now had by such courts in other civil actions, and on payment of fees and mileage at the rate provided in section 81-1176 for state employees by the party desiring their attendance, may compel the attendance of witnesses from any county within the state.

We [\*23] also note the following regulations regarding continuances:

#### **010 CONTINUANCES.**

**010.01 Motions.** [HN14] Any party desiring a continuance of the hearing shall request the same in writing, stating the reasons for such request and, if required by the Director, submit proof of facts in support of such request in the time and manner specified. If a continuance is granted to either party, all persons who were served Notice of Hearing shall be notified of such continuance.

**010.02 Time.** Motions for continuance will not ordinarily be considered unless filed and received by the Director at least five (5) days prior to the time fixed for hearing.

. . . .

**010.04 Good Cause.** Continuances shall be granted only upon good cause shown.

**010.05 Content of Motion to Continue.** A timely request to change the hearing date or time must state all of the following to be considered:

**010.05A** The reason for not being able to appear at the time or date scheduled; and

**010.05B** Why that reason is beyond the requesting party's control; and

**010.05C** Any fact which establishes that the need to reschedule arose after the scheduling of the [\*24] hearing; and

**010.05D** The resulting specific undue hardship which would result if the request were to be denied.

**010.06 Failure to File Timely Motion or to State Grounds.** Any motion for continuance which is untimely filed or which fails to state facts sufficient to make a reasoned decision shall be denied unless substantial injustice would result.

*247 Neb. Admin. Code, ch. 1, § 010* (2001). "Substantial injustice" is defined as "actual violation of the right or rights of a party." *247 Neb. Admin. Code, ch. 1, § 002.09* (2001).

In the present case, there were procedures available to Valasek, beyond the subpoena for the November 2, 2004, hearing and the motion to compel, by which he could have obtained Rutledge's presence, if not at the November 2

hearing, then at a later continued hearing. Valasek may or may not have received the denial of his motion to compel in time to file a timely motion for continuance, but the regulations clearly provide a means for the director to grant a continuance in situations such as that presented by the present case. A continuance would have given Valasek the opportunity [\*25] to either obtain another subpoena or turn to the district court for assistance. We cannot say that the procedures available to Valasek in this instance were inadequate to protect him against the erroneous deprivation of his property interest.

The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). There is no doubt of a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Clearly, an administrative agency has the right to establish procedures for compelling testimony. *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). The issue here, of course, is not whether there is a government interest in strictly enforcing a particular regulation. Rather, the question is whether Valasek was denied due process when a witness with relevant [\*26] testimony, which testimony would reduce the risk of an erroneous determination, was unavailable at the ALR hearing and Valasek did not follow available alternative procedures. The government has an interest in ensuring that the hearing will proceed in an orderly manner. See § 60-498.01(7). Although there had been several continuances in this case prior to the November 2, 2004, hearing, under the circumstances presented, we can perceive no significant additional fiscal or administrative burden that would have been placed on the government by granting a further continuance to allow Valasek to obtain testimony from Rutledge. The difficulty is, of course, that Valasek filed no such motion. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Hass v. Neth*, *supra*.

[HN15] Neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* Due process is a flexible notion that must be [\*27] decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands. *Id.* We determine, based on the facts presented in this particular case, that Valasek's procedural due process rights were not violated by the director's denial of Valasek's motion to compel.

Valasek argues that the district court erred in determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing. The record shows that the director denied Valasek's motion to compel because Rutledge was not available on the date in question. Valasek argued before the hearing officer that it might have been possible for Rutledge to appear via telephone at the telephonic hearing, yet there is nothing in Rutledge's faxed message to suggest that this is so and Valasek made no offer of proof regarding this assertion. Further, Valasek did not take advantage of certain other procedural tools that were available to him. The district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). [\*28] Valasek's assignments of error regarding the denial of his motion to compel are without merit.

#### *Probable Cause.*

Valasek asserts that the district court erred in finding that Hansel had probable cause to believe that Valasek was operating or in actual physical control of a motor vehicle in violation of § 60-6,196. Section 60-498.01(7) [HN16] provides in relevant part that "[u]pon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity and it becomes the petitioner's burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect." As discussed above, Hansel's report contains the required recitations specified in § 60-498.01(3). Hansel's report shows that Valasek was arrested pursuant to § 60-6,197 after Valasek was stopped for speeding 95 miles per hour in a 60-mile-per-hour zone. The sworn report also shows that Hansel detected the odor of alcoholic beverage about Valasek's person and that Valasek refused to submit to a majority of field sobriety tests. The report shows that Valasek was requested to submit to a chemical test,

that Valasek submitted to [\*29] a blood test, and that the blood test revealed the presence of alcohol in a concentration of .163 grams of alcohol per 100 milliliters of blood. The sworn report was properly received in evidence by the hearing officer at the ALR hearing. Accordingly, the Department established a prima facie case for the revocation of Valasek's driver's license. Hansel testified at the November 2, 2004, ALR hearing, and Valasek's attorney took the opportunity to cross-examine Hansel regarding his traffic stop and arrest of Valasek. However, in the cross-examination of Hansel, Valasek did not adduce any evidence to show that he was not driving under the influence of alcohol, nor did Valasek otherwise meet his burden of disproving the Department's prima facie case. Valasek's assignment of error is without merit.

#### CONCLUSION

The district court did not err in affirming the revocation of Valasek's operator's license.

Affirmed.

55 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**Micheal L. Valasek, Jr., appellant, v. Beverly Neth, director, State of Nebraska,  
Department of Motor Vehicles, appellee.**

**No. A-05-387.**

**NEBRASKA COURT OF APPEALS**

***2006 Neb. App. LEXIS 123***

**July 11, 2006, Filed**

**PRIOR HISTORY:** [\*1] Appeal from the District Court for Custer County: Ronald D. Olberding, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver sought review of an order from the District Court for Custer County (Nebraska), which entered judgment in favor of appellee director of state motor vehicle department and upheld the director's revocation of the driver's motor vehicle operator's license for one year after the driver was stopped for speeding and arrested for operating a motor vehicle while intoxicated in violation of *Neb. Rev. Stat. § 60-6,196* (Supp. 2003).

**OVERVIEW:** After the driver was stopped for speeding, a blood test that confirmed that his blood alcohol level exceeded the legal limit. In affirming, the court first rejected the assertion that the director lacked jurisdiction to revoke the driver's privileges on the grounds that the officer had not forwarded his sworn report to the director as required by *Neb. Rev. Stat. § 60-498.01* (Supp. 2003). Instead, the court concluded that, whether it came from the officer or from the driver, the sworn report was sufficient to confer jurisdiction on the director. Next, the court found no abuse of discretion or due process implications in the failure to hold a hearing on a motion to compel a witness where the driver failed to request a hearing and failed to preserve the issue for review. Similarly, the court found that the denial of the motion to compel did not violate due process because the driver had ample opportunities to be heard. Finally, the court found that the driver failed to disprove the prima facie case for revocation by not offering evidence to rebut the testimony that the officer had probable cause to believe that the driver had operated his vehicle while impaired.

**OUTCOME:** The court affirmed the trial court's judgment upholding the revocation of the driver's operator's license.

**CORE TERMS:** sworn, subpoena, hearing officer, continuance, license, motion to compel, motor vehicle, alcohol, blood, arrest, blood test, message, regulation, revocation, driver, concentration, faxed, erroneous deprivation, probable cause, arresting, chemical test, peace officer, stamped, actual physical control, arresting officer, driving, administrative hearing, subpoena duces tecum, motion to dismiss, blood sample

**LexisNexis(R) Headnotes**

*Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review*

*Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review*

*Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures*

[HN1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

*Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN2] See *Neb. Rev. Stat. § 60-498.01(3)* (Supp. 2003).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

*Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN3] See *Neb. Rev. Stat. § 60-498.01(5)(a)* (Supp. 2003).

*Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

[HN4] In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.

*Administrative Law > Judicial Review > Standards of Review > General Overview*

[HN5] In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN6] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN7] Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN8] In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN9] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

***Transportation Law > Private Motor Vehicles > Operator Licenses***

[HN10] Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN11] A number of factors are to be considered in resolving an inquiry into the specific dictates of due process: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

***Administrative Law > Agency Adjudication > Prehearing Activity***

[HN12] In order to secure the testimony of witnesses with relevant information to offer at an administrative license revocation hearing, a motorist must, within 10 days of the receipt of the notice of revocation and prior to the completion of discovery, (1) identify and locate all potential witnesses, (2) determine the facts that those witnesses are expected to establish, and (3) secure or be denied the voluntary appearances of those witnesses at a hearing the time and place of which are still unknown.

***Governments > Courts > Authority to Adjudicate***

[HN13] See *Neb. Rev. Stat. § 25-21,208* (Reissue 1995).

***Administrative Law > Agency Adjudication > Hearings > General Overview***

***Administrative Law > Agency Adjudication > Prehearing Activity***

[HN14] See *247 Neb. Admin. Code, ch. 1, § 010* (2001).

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***

[HN15] Neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy. The concept of due process embodies the notion of fundamental fairness and defies precise definition. Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands.

***Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview  
Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting  
Transportation Law > Private Motor Vehicles > Operator Licenses***

[HN16] *Neb. Rev. Stat. § 60-498.01(7)* provides in part that, upon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity, and it becomes the petitioner's burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect.

**COUNSEL:** David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Edward G. Vierk for appellee.

**JUDGES:** Sievers, Moore, and Cassel, Judges.

**OPINION BY:** Moore

**OPINION:**

Moore, Judge.

**INTRODUCTION**

Micheal L. Valasek, Jr.'s motor vehicle operator's license was revoked after the director of the Nebraska Department of Motor Vehicles (Department) found that the arresting officer had probable cause to believe Valasek was operating a motor vehicle in violation of *Neb. Rev. Stat. § 60-6,196* (Supp. 2003). Valasek appealed to the district court for Custer County. The district court affirmed, and Valasek appealed that decision. We conclude that Valasek's assignments of error are without merit, and we affirm.

**BACKGROUND**

This appeal arises out of Valasek's arrest following a traffic stop on July 10, 2004. On that date, Sgt. Kirk Hansel of the Nebraska State Patrol stopped a motor vehicle for speeding. Hansel had obtained a radar reading which indicated that the vehicle had been traveling at 95 miles per hour. Hansel contacted the driver, [\*2] whom he identified as Valasek. Hansel noticed that Valasek had an odor of alcohol about his person. Hansel also observed that Valasek's eyes were bloodshot, that Valasek's face was flushed, and that Valasek's speech and actions were deliberate. Valasek refused to submit to most of the field sobriety tests requested by Hansel and failed a preliminary breath test. Hansel then arrested Valasek and transported him to a hospital in Broken Bow, Nebraska, where Valasek submitted to a blood test. The results of the test indicated that Valasek had a blood alcohol content of .163 grams of alcohol per 100 milliliters of blood.

On July 28, 2004, the Department received the "Notice/Sworn Report/Temporary License" (sworn report) completed by Hansel. The Department mailed a "Notice of Administrative License Revocation [and] Temporary License," dated August 3, 2004, to Valasek via certified mail. On August 11, the Department received a petition for administrative hearing from Valasek.

Due to continuances, three administrative license revocation (ALR) hearings were held in this matter. The first

hearing, on August 31, 2004, was continued upon the motion of the hearing officer in order to comply [\*3] with Valasek's discovery requests for his blood sample and in order for Valasek to subpoena the person responsible for testing his blood. The Department subsequently issued a subpoena duces tecum to Susan Rutledge, instructing Rutledge to appear by telephone at the ALR hearing scheduled for October 1. Rutledge did appear at the October 1 telephonic hearing; however, the October 1 hearing was continued on the Department's motion in order to facilitate independent testing of Valasek's blood sample.

On October 14, 2004, the Department received a fax message from Rutledge, the person responsible for testing Valasek's blood sample, regarding her unavailability for the third ALR hearing, scheduled for November 2. Rutledge's handwritten message stated, "Sorry but I will not be available for telephone conference hearing on 11/2/04. I have already received a subpoena from Otoe Co. that day." The fax message was stamped "RECEIVED" by the Department on October 14, was addressed to both the Department and Valasek's counsel, and bears a handwritten telephone number next to the name of Valasek's counsel. Although it is not clear whether Rutledge also faxed a copy to Valasek's counsel on October [\*4] 14, the record does show that the Department faxed a copy of Rutledge's message to Valasek's counsel on October 22.

On October 21, 2004, the Department received a praecipe for subpoena duces tecum from Valasek, asking that the Department issue a subpoena requiring Rutledge to appear at the upcoming third ALR hearing. The Department received a motion to compel from Valasek on October 22, asking the Department to compel the attendance of Rutledge at the November 2 ALR hearing. Valasek also stated in his motion that "[a] subpoena has been served on said witness and that she has written a memo to the attorney for [Valasek] indicating that she will not be available." On October 25, the director of the Department denied Valasek's motion to compel and sent a copy of the denial to Valasek on that date via regular first-class U.S. mail. The denial noted that Rutledge had already been subpoenaed to appear in another court on the day in question.

The third and final ALR hearing in this matter was held on November 2, 2004. The hearing officer received exhibits into evidence, including a copy of Hansel's sworn report, received by the hearing officer as exhibit 1. The hearing officer also [\*5] heard testimony from Hansel concerning his traffic stop and subsequent arrest of Valasek. In addition to the evidence outlined above concerning Hansel's stop and arrest of Valasek, Hansel testified that as a result of the arrest, he completed a sworn report to file with the Department. Hansel recognized exhibit 1 as the sworn report he filled out for Valasek. Hansel testified that he signed his sworn report in the presence of a notary and that exhibit 1 appeared to be a true and accurate copy of the document he filed. Valasek's attorney objected to the receipt of exhibit 1, stating:

I'll object to it on the reasons previously given. Further, I object on foundation, hearsay, not best evidence, no showing of compliance with 60-6,201, 60-6,197, or Title 177. I also object on the grounds that the director has not provided all of the discovery as requested, which does not allow me to maintain my burden of proof.

Earlier during the November 2 hearing, Valasek's attorney stated that he had no objections to the hearing officer's receiving all of the exhibits, "except those that are the exhibits for the sworn report and the transcript." The hearing officer overruled Valasek's [\*6] objections and received exhibit 1 into evidence.

On November 9, 2004, the director of the Department found that Hansel, the arresting officer, had probable cause to believe Valasek was operating or was in actual physical control of a motor vehicle while intoxicated, in violation of § 60-6,196, and that Valasek was operating or in actual physical control of a motor vehicle while having a blood alcohol content of .163 grams of alcohol per 100 milliliters of blood. The director revoked Valasek's operator's license for 1 year.

Valasek appealed to the district court, assigning errors similar to those assigned in this court. The only significant difference, for purposes of the present appeal, between the errors assigned to the district court and those assigned to this

court are discussed in the analysis section below. Following a hearing, the district court entered an order on March 21, 2005, agreeing with the findings of fact and conclusions of law set forth in the director's November 9, 2004, order and affirming the director's order in all respects. Valasek subsequently perfected his appeal to this court.

#### ASSIGNMENTS OF ERROR

Valasek asserts that the district court erred in (1) determining [\*7] that the director did not abuse her discretion in failing to hold a hearing on Valasek's motion to compel and determining that Valasek was not denied procedural due process as a result of this failure, (2) determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing and determining that Valasek was not denied procedural due process as a result of this failure, (3) finding that Hansel had probable cause to believe that Valasek was operating or in actual physical control of a motor vehicle in violation of § 60-6,196, and (4) finding that the director had jurisdiction to administratively revoke Valasek's driving privileges.

#### STANDARD OF REVIEW

[HN1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported [\*8] by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

#### ANALYSIS

##### *Jurisdiction.*

We first address Valasek's assertion that the district court erred in finding that the director had jurisdiction to administratively revoke Valasek's driving privileges. Valasek refers us to *Neb. Rev. Stat. § 60-498.01(3)* (Supp. 2003), which provides:

[HN2] If a person arrested pursuant to section 60-6,197 submits to the chemical test of blood or breath required by that section, the test discloses the presence of alcohol in any of the concentrations specified in section 60-6,196, and the test results are available to the arresting peace officer while the arrested person is still in custody, the arresting peace officer, as agent for the director, shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license [\*9] of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest as provided in subsection (6) of this section. The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested pursuant to section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

Because the results of Valasek's blood test were not available to Hansel while Valasek was in custody, § 60-498.01(5)(a) is also applicable:

[HN3] If the results of a chemical test indicate the presence of alcohol in a concentration specified in

section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn [\*10] report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn report is not received within ten days, the revocation shall not take effect.

Valasek argues that there is nothing in the record to show that Hansel forwarded the sworn report to the director as required. Valasek does not question the contents of the sworn report, but he argues that the mere fact that the director may have a copy of the sworn report does not indicate that the arresting officer complied with statutory requirements. Valasek observes that the petition for administrative hearing requires the driver to send a copy of the sworn report to the director, and Valasek suggests that the copy of the sworn report in the record may have been a copy furnished by Valasek, rather than by Hansel.

The Nebraska Supreme Court has held that [HN4] in an ALR proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). Exhibit 1, the sworn report received at the November 2, 2004, hearing, [\*11] provides that Valasek was arrested pursuant to *Neb. Rev. Stat. § 60-6,197* (Supp. 2003) and the reasons for his arrest, that Valasek was requested to submit to a chemical test, that Valasek submitted to a blood test, and that the blood test revealed the presence of alcohol in a concentration of .163 grams of alcohol per 100 milliliters of blood. Exhibit 1 also shows that the blood test results were received on July 21, 2004. Exhibit 1 was signed by Hansel and notarized on July 26 and stamped "RECEIVED" by the Department on July 28. Although Hansel did not explicitly testify at the November 2 hearing that he forwarded exhibit 1 to the Department, Hansel did identify exhibit 1 as the sworn report he filled out concerning Valasek and testified that exhibit 1 appeared "to be a true and accurate copy of the document [he] filed."

Valasek's claim that exhibit 1 might have been Valasek's copy of the sworn report is clearly without merit. The record shows that Valasek's petition for administrative hearing was stamped "RECEIVED" by the Department on August 11, 2004. It seems logical that any copies of the sworn report received by the Department with Valasek's petition [\*12] for administrative hearing would also have been stamped "RECEIVED" on August 11. Instead, exhibit 1 was stamped "RECEIVED" on July 28. Exhibit 1 contains the information specified in the applicable statute and was received by the Department within the time period specified by statute. We conclude that exhibit 1 was sufficient to confer jurisdiction on the director and that Valasek's assertions to the contrary are without merit.

#### *Hearing on Motion to Compel.*

With regard to his motion to compel, Valasek first asserts that the district court erred in determining that the director did not abuse her discretion in failing to hold a hearing on Valasek's motion to compel. Valasek also asserts that he was denied procedural due process as a result of this alleged failure. The record shows that Valasek did not request a hearing in the body of the motion itself and did not argue the issue of a hearing on his motion to compel before the hearing officer at any of the ALR hearings. Valasek did not assign the lack of a hearing as an issue in his appeal to the district court.

[HN5] In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not [\*13] as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). [HN6] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Metro. Utils. Dist. v. Neb. PSC (In re Metro. Utils. Dist.)*, 270 Neb. 494, 704 N.W.2d 237 (2005). Without having requested or raised the issue of such a hearing, Valasek may not argue that the issue was properly before either the hearing officer or the district court on appeal.

Likewise, the issue of the lack of a hearing on Valasek's motion to compel is not properly before this court. [HN7] Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only

issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. *Navrkal v. State*, 270 Neb. 391, 703 N.W.2d 247 (2005). [HN8] In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. [\*14] *Id.* Valasek's assignment of error is without merit.

*Denial of Motion to Compel.*

Valasek next asserts the district court erred in determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing and that Valasek was not denied procedural due process as a result of this failure.

[HN9] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the *Due Process Clause* and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Id.* The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Id.* [HN10] Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Id.* In such cases, the licenses are not to be taken away without that procedural [\*15] due process required by the *14th Amendment*. *Id.*

Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Marshall v. Wimes*, *supra*. Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court determined that [HN11] a number of factors are to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest [\*16] through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Marshall v. Wimes*, *supra*.

As to the first factor to be considered in a *Mathews* analysis, the private interest at issue in this case is Valasek's interest in continued possession of a motor vehicle operator's license. A driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes*, *supra*.

The second factor to be considered under a *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In *Marshall v. Wimes*, *supra*, the Department refused to issue a subpoena duces tecum directing the individual who tested Scott Marshall's [\*17] blood alcohol level to appear at the ALR hearing. After the Department filed its notice of hearing, Marshall immediately filed a praecipe for subpoena duces tecum, seeking a subpoena directing the individual who tested his blood to appear at the hearing and bring with her a sample of Marshall's blood in her possession, as well as records relating to the calibration of the testing equipment. Marshall also sought a subpoena to compel the witness to appear for a deposition prior to the hearing. The praecipe was denied by the Department because it did not comply with certain regulatory requirements. The deposition request was also denied on the basis that the applicable regulations did not provide for a subpoena to compel attendance at a deposition. Marshall argued before the hearing officer and the district court that the director's application of the regulatory requirements for

subpoenas violated his due process rights.

On appeal from the district court, the Nebraska Supreme Court determined that because Marshall had the burden of establishing that he did not have more than the allowable concentration of alcohol in his blood at the time he was operating a motor vehicle, it was clear [\*18] that limitations on Marshall's ability to present evidence relevant to that determination heightened the risk of an erroneous deprivation of Marshall's interest in his operator's license. See *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The Supreme Court also found it clear that permitting the introduction of relevant evidence has value in reducing the risk of error. *Id.* The court found this particularly true where Marshall's license was revoked primarily in reliance on the written report of the blood test that was performed and Marshall was precluded from examining the witness who performed the test to determine the test's reliability. The court determined that Marshall was entitled to inquire regarding the chain of custody of his blood sample and whether the individual who tested his blood, an employee of a State agency, complied with the relevant regulations. The court observed that the director did not refuse to issue the subpoena requested by Marshall because the evidence and testimony were irrelevant, but, rather, because of the timeliness of the praecipe. The court determined that pursuant to the relevant statutory and regulatory requirement, [\*19] [HN12] in order to secure the testimony of witnesses with relevant information to offer, a motorist must,

within 10 days of the receipt of the notice of revocation and prior to the completion of discovery, (a) identify and locate all potential witnesses, (b) determine the facts that those witnesses are expected to establish, and (c) secure or be denied the voluntary appearances of those witnesses at a hearing the time and place of which are still unknown.

*Id.* at 854-55, 626 N.W.2d at 237. See, also, § 60-498.01(6)(a); 247 Neb. Admin. Code, ch. 1, §§ 009.01 and 009.03D (2001). The court was not persuaded by the State's argument that the procedures available to Marshall in the established regulatory scheme were adequate to protect Marshall against the erroneous deprivation of his property interest.

In the present case, of course, any limitations on Valasek's ability to present evidence relevant to the determination of his blood alcohol content heighten the risk of an erroneous deprivation of Valasek's interest in his operator's license, and permitting introduction of such relevant evidence would have value in reducing the risk of [\*20] error. The present case is distinguishable, however, from *Marshall v. Wimes*, *supra*. The director in this case issued a subpoena for Rutledge which resulted in the fax message from Rutledge indicating that she would not be available for the November 2, 2004, hearing due to having received a subpoena to appear in a different court on that date. Rutledge faxed her message to the Department on October 14. The record is not clear as to whether Rutledge also faxed a copy to Valasek's counsel on October 14, but the record does show that the Department faxed a copy of Rutledge's message to Valasek's counsel on October 22. On that same date, Valasek filed his motion to compel. The Department sent the director's denial of Valasek's motion to Valasek via regular first-class U.S. mail on October 25. The denial was based on Rutledge's unavailability for the November 2 hearing.

The record does not show that Valasek took any further action to obtain Valasek's presence prior to the November 2, 2004, hearing. At the November 2 hearing, Valasek made a motion to dismiss based on Rutledge's absence from the hearing. Valasek's counsel argued that despite the subpoena requiring Rutledge's [\*21] presence in another court on that date, Rutledge had not shown that she could not appear by telephone for the 10 a.m. ALR hearing. Valasek's counsel argued further that Valasek was denied due process because he could not cross-examine a vital witness and maintain his burden of proof. The hearing officer observed that under the Department's rules and regulations, Valasek was entitled to enforce his subpoena through the district court if he so desired. The hearing officer denied Valasek's motion to dismiss and directed him to "that rule and regulation." Valasek's counsel discussed further with the hearing officer the difficulty of getting a district court to enforce the subpoena compelling Rutledge's appearance at 10 a.m. for the hearing, when it was already 10:20 a.m. Valasek's counsel stated, "I'll make my motion continually to dismiss for the reason of the denial of due process and that our participation in this hearing is not a waiver of that objection." The hearing officer

acknowledged Valasek's objection and indicated that he would issue his order denying the motion to dismiss "unless you tell me that you're going to attempt to . . . get the district court to enforce your subpoena. [\*22] " Valasek's counsel then inquired, "The mechanics, [hearing officer], though, if it was issued, how do we back date it so she can appear at this hearing?" The hearing officer indicated that such backdating was not possible, again stating that the motion to dismiss was denied and directing Valasek to use the district court to enforce the subpoena if he so desired.

We observe that *247 Neb. Admin. Code, ch. 1, § 009.07* (2001), provides that "[s]ubpoenas and orders may be enforced by the applicable district court." *Neb. Rev. Stat. § 25-21,208* (Reissue 1995) provides:

[HN13] Civil actions to which the state is a party shall, on motion of counsel on behalf of the state, have priority of trial over other civil actions; and the several district courts having jurisdiction to try actions to which the state is a party shall have power to compel attendance of witnesses, as is now had by such courts in other civil actions, and on payment of fees and mileage at the rate provided in section 81-1176 for state employees by the party desiring their attendance, may compel the attendance of witnesses from any county within the state.

We [\*23] also note the following regulations regarding continuances:

#### **010 CONTINUANCES.**

**010.01 Motions.** [HN14] Any party desiring a continuance of the hearing shall request the same in writing, stating the reasons for such request and, if required by the Director, submit proof of facts in support of such request in the time and manner specified. If a continuance is granted to either party, all persons who were served Notice of Hearing shall be notified of such continuance.

**010.02 Time.** Motions for continuance will not ordinarily be considered unless filed and received by the Director at least five (5) days prior to the time fixed for hearing.

. . . .

**010.04 Good Cause.** Continuances shall be granted only upon good cause shown.

**010.05 Content of Motion to Continue.** A timely request to change the hearing date or time must state all of the following to be considered:

**010.05A** The reason for not being able to appear at the time or date scheduled; and

**010.05B** Why that reason is beyond the requesting party's control; and

**010.05C** Any fact which establishes that the need to reschedule arose after the scheduling of the [\*24] hearing; and

**010.05D** The resulting specific undue hardship which would result if the request were to be denied.

**010.06 Failure to File Timely Motion or to State Grounds.** Any motion for continuance which is untimely filed or which fails to state facts sufficient to make a reasoned decision shall be denied unless substantial injustice would result.

*247 Neb. Admin. Code, ch. 1, § 010* (2001). "Substantial injustice" is defined as "actual violation of the right or rights of a party." *247 Neb. Admin. Code, ch. 1, § 002.09* (2001).

In the present case, there were procedures available to Valasek, beyond the subpoena for the November 2, 2004, hearing and the motion to compel, by which he could have obtained Rutledge's presence, if not at the November 2

hearing, then at a later continued hearing. Valasek may or may not have received the denial of his motion to compel in time to file a timely motion for continuance, but the regulations clearly provide a means for the director to grant a continuance in situations such as that presented by the present case. A continuance would have given Valasek the opportunity [\*25] to either obtain another subpoena or turn to the district court for assistance. We cannot say that the procedures available to Valasek in this instance were inadequate to protect him against the erroneous deprivation of his property interest.

The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). There is no doubt of a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Clearly, an administrative agency has the right to establish procedures for compelling testimony. *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). The issue here, of course, is not whether there is a government interest in strictly enforcing a particular regulation. Rather, the question is whether Valasek was denied due process when a witness with relevant [\*26] testimony, which testimony would reduce the risk of an erroneous determination, was unavailable at the ALR hearing and Valasek did not follow available alternative procedures. The government has an interest in ensuring that the hearing will proceed in an orderly manner. See § 60-498.01(7). Although there had been several continuances in this case prior to the November 2, 2004, hearing, under the circumstances presented, we can perceive no significant additional fiscal or administrative burden that would have been placed on the government by granting a further continuance to allow Valasek to obtain testimony from Rutledge. The difficulty is, of course, that Valasek filed no such motion. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Hass v. Neth*, *supra*.

[HN15] Neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* Due process is a flexible notion that must be [\*27] decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands. *Id.* We determine, based on the facts presented in this particular case, that Valasek's procedural due process rights were not violated by the director's denial of Valasek's motion to compel.

Valasek argues that the district court erred in determining that the director did not abuse her discretion in failing to enter an order compelling Rutledge to appear at the ALR hearing. The record shows that the director denied Valasek's motion to compel because Rutledge was not available on the date in question. Valasek argued before the hearing officer that it might have been possible for Rutledge to appear via telephone at the telephonic hearing, yet there is nothing in Rutledge's faxed message to suggest that this is so and Valasek made no offer of proof regarding this assertion. Further, Valasek did not take advantage of certain other procedural tools that were available to him. The district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). [\*28] Valasek's assignments of error regarding the denial of his motion to compel are without merit.

#### *Probable Cause.*

Valasek asserts that the district court erred in finding that Hansel had probable cause to believe that Valasek was operating or in actual physical control of a motor vehicle in violation of § 60-6,196. Section 60-498.01(7) [HN16] provides in relevant part that "[u]pon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity and it becomes the petitioner's burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect." As discussed above, Hansel's report contains the required recitations specified in § 60-498.01(3). Hansel's report shows that Valasek was arrested pursuant to § 60-6,197 after Valasek was stopped for speeding 95 miles per hour in a 60-mile-per-hour zone. The sworn report also shows that Hansel detected the odor of alcoholic beverage about Valasek's person and that Valasek refused to submit to a majority of field sobriety tests. The report shows that Valasek was requested to submit to a chemical test,

that Valasek submitted to [\*29] a blood test, and that the blood test revealed the presence of alcohol in a concentration of .163 grams of alcohol per 100 milliliters of blood. The sworn report was properly received in evidence by the hearing officer at the ALR hearing. Accordingly, the Department established a prima facie case for the revocation of Valasek's driver's license. Hansel testified at the November 2, 2004, ALR hearing, and Valasek's attorney took the opportunity to cross-examine Hansel regarding his traffic stop and arrest of Valasek. However, in the cross-examination of Hansel, Valasek did not adduce any evidence to show that he was not driving under the influence of alcohol, nor did Valasek otherwise meet his burden of disproving the Department's prima facie case. Valasek's assignment of error is without merit.

#### CONCLUSION

The district court did not err in affirming the revocation of Valasek's operator's license.

Affirmed.

56 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Sterling T. Huff, appellant.****No. A-03-788.****NEBRASKA COURT OF APPEALS*****2004 Neb. App. LEXIS 117*****May 18, 2004, Filed**

**PRIOR HISTORY:** [\*1] Appeal from the District Court for Banner County, Kristine R. Cecava, Judge, on appeal thereto from the County Court for Banner County, James T. Hansen, Judge.

**DISPOSITION:** Judgment of District Court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from an order of the District Court for Banner County (Nebraska), which affirmed his conviction and fine for speeding imposed in a county court.

**OVERVIEW:** A state patrol trooper issued defendant a citation for speeding, specifically for driving 78 miles per hour (mph) in a 65-mph zone. The court held that the information in the citation was sufficient to show that the maximum speed allowed for the vehicle defendant was driving and at the location where he was driving was 65 mph. Although the officer testified that there was a two mph margin of error when the radar unit was in its moving mode, the precise amount by which a speed was exceeded was not an essential element of the offense of speeding. It was necessary only that the evidence show the limit was exceeded. Despite the margin of error, the fine and the loss of points against defendant's driving record were the same whether defendant was traveling 76 or 80 mph. The officer's testimony showed that all of the necessary foundational requirements of *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998) had been met and that the radar unit was working properly. Sufficient evidence supported the conviction. There was no Brady violation because the radar unit's margin of error was not exculpatory evidence as it was neither favorable to defendant nor material to his guilt or punishment.

**OUTCOME:** The court affirmed the trial court's order finding defendant guilty of speeding.

**CORE TERMS:** radar, speed, driving, maximum speed, speeding, tuning, fork, margin of error, tuning fork, directed verdict, speed limit, accuracy, patrol car, measurement, guilt, calibration, self-test, fine, zone, electronic, mechanical, microwave, radio, essential element, working order, overruling, traveling, assigns, assignment of error, favorable

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

[HN1] A prosecution for a traffic infraction is a criminal proceeding.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Criminal Law & Procedure > Witnesses > Credibility***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

***Criminal Law & Procedure > Trials > Bench Trials***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview***

[HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN5] See *Neb. Rev. Stat. § 60-6,194* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN6] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show the limit was exceeded.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] *Neb. Rev. Stat. § 60-6,194* states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved.

***Governments > Legislation > Interpretation***

[HN8] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

***Governments > Legislation > Interpretation***

[HN9] is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN10] A conviction for speeding, pursuant to *Neb. Rev. Stat. § 60-6,194*, does not require the State to prove that the defendant had specific notice of the speed limit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections  
Evidence > Scientific Evidence > General Overview***

[HN11] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made. Section 60-6,192 specifies the requirements for admissibility of evidence from a radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN12] See *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN13] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required under *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998).

***Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts***

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN14] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Criminal Law & Procedure > Verdicts > General Overview***

[HN15] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***

[HN16] See *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995).

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN17] The suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant.

**COUNSEL:** Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

**JUDGES:** Carlson, Moore, and Cassel, Judges.

**OPINION BY:** Carlson

**OPINION:**

Carlson, Judge. INTRODUCTION

Sterling T. Huff appeals from an order of the district court for Banner County affirming his conviction and fine for speeding imposed in the county court for Banner County. We affirm.

BACKGROUND

On June 5, 2002, Nebraska State Patrol Trooper Manuel Jiminez issued Huff a citation for speeding, specifically for driving 78 m.p.h. in a 65-m.p.h. zone. Huff pled not guilty. On July 10, Huff filed a motion for *Brady* material, which motion was subsequently overruled. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A bench trial was held on September 19.

At trial, Jiminez was the only witness to testify. He was first called as a witness by the State, and after the State rested, he was recalled by Huff. Jiminez testified [\*2] that he has been a trooper with the State Patrol since July 1996. Jiminez testified that he has training in radar detection and has been operating radar equipment from the time he became a trooper up to the time of trial. Jiminez stated that he was certified in the proper use of radar equipment and that his certification was in effect on the date he stopped Huff. Jiminez testified that he was also trained to determine vehicle speeds by visual observation and trained to ascertain the speed of approaching vehicles based on Doppler sounds that emanate from the radar unit.

Jiminez testified that since he became a trooper, his patrol car has always been equipped with a Stalker Dual SL radar unit, and that that is what his car was equipped with on June 5, 2002. He testified that the radar unit in his patrol car and the tuning forks used to check the calibration of the unit had a certificate of calibration and accuracy to show that the unit itself and the tuning forks were in proper working order. He testified that a State Patrol technician checks the radar unit and the tuning forks for calibration and accuracy on a yearly basis and then issues a certificate indicating that it is all in [\*3] proper working order.

Jiminez testified that there are daily tests performed on the radar unit in his patrol car to determine whether the unit is in proper working order. He testified that at the beginning of his shift, he presses a button on the unit which causes the unit to conduct a "self-test." Jiminez stated that when the unit is done with the self-test, the unit indicates whether it passed or failed the test. He further testified that the unit automatically performs a self-test every 10 minutes and that it beeps four times if it passes the test. Jiminez testified that he also performs a "tuning fork test" using the two tuning forks that are a part of the radar unit in his patrol car. The tuning fork test checks the calibration of the radar unit. He testified that he performs the tuning fork test at the beginning and end of every shift.

Jiminez testified that at the beginning of his shift on June 5, 2002, he activated the radar unit's self-test and performed the tuning fork test. He testified that based on the results of the tests, the unit was working properly. Jiminez testified that on June 5, he also performed the tuning fork test at the end of his shift. He testified that [\*4] based on the results of the external tests of accuracy he performed on the radar unit both prior to and subsequent to issuing the citation to Huff, the radar unit was working properly.

Jiminez testified that on June 5, 2002, between the time he started his shift at 4 p.m. and the time he stopped Huff at 10:03 p.m., the radar unit was performing the self-test every 10 minutes, and that the tests gave no indication that the

unit was not working properly. Jiminez further testified that based on his background, training, and experience, at the time he activated the radar unit to determine Huff's speed, the radar unit was being operated in such a manner and under such conditions as to allow the minimum possibility of distortion and outside interference.

Jiminez testified that at about 10:03 p.m. on June 5, 2002, he was on duty and was patrolling near mile marker 47 on Highway 71, which marker is in Banner County, south of the city of Scottsbluff. Jiminez testified that at this time, he observed a red Chevrolet Corvette traveling in the opposite direction than he was going, and that he estimated the vehicle to be traveling faster than the speed limit. He testified that he also used the [\*5] Doppler sounds from the radar unit to ascertain the speed of the vehicle. Jiminez said that he then activated the "moving mode" of his radar unit to get a radar reading on the vehicle. Jiminez explained that the moving mode is used when the patrol car is moving rather than in a stationary position. Jiminez recalled that the radar unit indicated that the vehicle was traveling 78 m.p.h. Jiminez testified that he then turned his patrol car around and stopped the vehicle and that the driver identified himself as Huff. Jiminez further testified that the radar unit has a margin of error in the moving mode of plus or minus 2 m.p.h. He further testified that the radar unit automatically rounds the number it records down to the nearest whole number and that that is the number it displays.

Jiminez testified that since January 1997, he has patrolled the area where Huff was stopped. He testified that there are posted speed limit signs in the area and that the posted speed limit is 65 m.p.h.

At the end of the State's case, Huff moved for a directed verdict, and the trial court took the motion under advisement. At the conclusion of the evidence, Huff renewed his motion for directed verdict, and [\*6] the trial court again took the motion under advisement.

In an order dated December 3, 2002, the trial court overruled Huff's motion for directed verdict and found Huff guilty of speeding 78 m.p.h. in a 65-m.p.h. zone. Huff was ordered to pay a fine of \$ 75, plus court costs. Huff appealed to the district court, which affirmed the trial court's order.

#### ASSIGNMENTS OF ERROR

Huff assigns five errors, which we consolidate into three. Huff assigns that the trial court erred in (1) finding that the State presented sufficient evidence to support the conviction, (2) overruling his motion for directed verdict, and (3) overruling his motion for *Brady* material.

#### STANDARD OF REVIEW

[HN1] A prosecution for a traffic infraction is a criminal proceeding. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977).

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, [\*7] viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). [HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, *supra*; *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

#### ANALYSIS

Huff first assigns that the trial court erred in finding that the State presented sufficient evidence to support the conviction. Huff makes several arguments in support of this assignment of error. Huff first argues [\*8] that the citation issued by Jiminez did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). *Section 60-6,194* provides in part:

[HN5] (1) In every charge of violation of any speed regulation in the Nebraska Rules of the Road, the complaint and the summons or notice to appear shall specify the speed at which defendant is alleged to have driven and the maximum speed for the type of vehicle involved applicable within the district or at the location. The speed at which defendant is alleged to have driven and the maximum speed are essential elements of the offense and shall be proved by competent evidence.

Huff alleges that the citation fails to identify the model of his vehicle with any particularity, which model he claims would have bearing on the maximum speed allowed, and that the citation fails to identify the maximum speed allowed. We determine that this argument is without merit. The citation identifies the make, style, model, year, and color of Huff's vehicle and states that Huff was being cited for unlawfully committing the offense of speeding 78 m.p.h. in a 65-m.p.h. zone. We conclude that this information was sufficient [\*9] to show that the maximum speed allowed for the vehicle Huff was driving and at the location where he was driving was 65 m.p.h.

Huff next argues that the State failed to prove the maximum speed allowed at the location where Huff was stopped for speeding, which fact is an essential element of the offense of speeding. Jiminez testified that since January 1997, he has patrolled the area where Huff was stopped. He testified that there are posted speed limit signs in the area and that the posted speed limit is 65 m.p.h. We conclude that Jiminez' testimony was sufficient evidence to show the maximum speed allowed as required by *§ 60-6,194*.

Huff also argues that the State failed to present evidence to show what type of road Highway 71 is under *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), which evidence he alleges was necessary to support the maximum speed element. *Section 60-6,186* sets forth the maximum speed limits for different types or categories of roads. For example, *§ 60-6,186(1)(f)* states that the maximum speed limit is 65 m.p.h. upon an expressway that is part of the state highway system.

Pursuant to *§ 60-6,194*, the State had to prove the maximum speed [\*10] allowed at the location where Huff was stopped. As we previously concluded, the State proved the maximum speed allowed through Jiminez' testimony. Thus, it was not necessary for the State to present evidence as to what type of road Highway 71 is under *§ 60-6,186*.

Huff next argues that due to the margin of error in the radar reading, the State failed to prove the exact speed at which Huff was driving. Huff contends that because Jiminez testified that there is a 2-m.p.h. margin of error when the radar unit is in its moving mode and because the radar reading showed that Huff was driving 78 m.p.h., he could have been driving anywhere between 76 and 80 m.p.h. [HN6] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show the limit was exceeded. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). See *Melanson v. State*, 188 Neb. 446, 197 N.W.2d 401 (1972).

In addition, *§ 60-6,194* states that [HN7] the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved. [HN8] In [\*11] the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). It [HN9] is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *Id.*

Huff was charged with driving 78 m.p.h. in a 65-m.p.h. zone. Under *Neb. Rev. Stat. § 60-682.01* (Reissue 1998), a person convicted for traveling 11 to 15 m.p.h. over the speed limit is fined \$ 75. Thus, a conviction for driving 78 m.p.h.

in a 65-m.p.h. zone results in a \$ 75 fine. The minimum speed Huff could have possibly been driving was 76 m.p.h., which would result in the same \$ 75 fine as a conviction for driving 78 m.p.h. See § 60-682.01(1)(c). Similarly, the maximum speed Huff could have been driving was 80 m.p.h., which would also result in a \$ 75 fine. We also note that a conviction for [\*12] driving any speed between 76 and 80 m.p.h. in a 65-m.p.h. zone results in the same loss of points against a defendant's driving record. See *Neb. Rev. Stat. § 60-4,182(10)(c)* (Supp. 2001). We conclude that despite the margin of error, the State presented sufficient evidence to show the speed at which Huff's vehicle was traveling.

Huff next argues that the State failed to prove that he knew or should have known what the speed limit was at the location where he was cited for speeding. Huff contends that pursuant to § 60-6,186 and *Neb. Rev. Stat. § 60-6,190* (Reissue 1998), a driver is entitled to reasonable notice of the speed limit via signs erected by the Nebraska Department of Roads, and that there is no evidence Huff had such notice. [HN10] A conviction for speeding, pursuant to § 60-6,194, does not require the State to prove that the defendant had specific notice of the speed limit. This argument is without merit.

Huff also argues that the radar reading was inadmissible because it lacked sufficient foundation and that his objection to such evidence should have been sustained. [HN11] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* [\*13] (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). Section 60-6,192 specifies the requirements for admissibility of evidence from a radar device:

[HN12] (1) . . . Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:

- (a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;
- (b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so as to allow [\*14] a minimum possibility of distortion or outside interference;
- (c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; and
- (d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

[HN13] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required. *State v. Lomack, supra*; *State v. Kudlacek, supra*.

Huff relies on *State v. Lomack, supra*, which held that the evidence presented concerning the radar unit lacked the required indicia of accuracy. The Nebraska Supreme Court determined that the evidence failed to establish that the tuning fork used to test the radar unit was particularly designed and intended for testing the radar [\*15] unit in question and that the evidence thereby failed to show that the tuning fork was in any way associated with the radar unit tested. Further, there was no evidence that the tuning fork itself was in any way properly tested, calibrated, or certified as a

reliable gauge of a radar unit's accuracy. Huff argues that the present case is similar to *State v. Lomack, supra*, because Jiminez' testimony failed to establish that the tuning forks he used were designed and intended for testing the radar unit in his car. Huff further contends that there was no evidence that the tuning forks were properly tested, calibrated, or certified as a reliable gauge of the radar unit's accuracy.

Jiminez testified that the tuning forks he uses are part of the radar unit in his patrol car and that those particular tuning forks and his radar unit are always used together. Jiminez also testified that a certificate of calibration and accuracy was issued by a State Patrol technician for the radar unit in his patrol car and for the tuning forks used to check the calibration of the unit. Thus, the tuning forks had been tested and certified. The fact that the certificate was issued for the radar [\*16] unit and the tuning forks together demonstrates that the tuning forks are intended for that particular unit. This case is not similar to *State v. Lomack, supra*. Rather, Jiminez' testimony showed that all of the necessary foundational requirements of § 60-6,192 had been met. He testified that at the beginning of his shift, he activates a self-test on the radar unit, and that the unit indicates whether it has passed or failed the test. Jiminez further testified that the unit also runs an automatic self-test every 10 minutes. Finally, Jiminez testified that he performs a tuning fork test at the beginning and end of every shift, which test checks the calibration of the radar unit. Jiminez testified that on June 5, 2002, he performed the tuning fork test both prior to and subsequent to issuing Huff the citation, and that the unit was working properly. Accordingly, Huff's argument that there was insufficient foundation for evidence of the radar readout is without merit. We conclude that all of Huff's arguments in support of his first assignment of error alleging that the State presented insufficient evidence are without merit.

Huff also assigns that the trial court erred [\*17] in overruling his motion for directed verdict. [HN14] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[HN15] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

We have concluded [\*18] that there was sufficient evidence for the trial court to find beyond a reasonable doubt that Huff was guilty of speeding. Having so concluded, we cannot say that there is a complete failure of evidence to establish an essential element of the crime charged or that the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. As such, Huff's assignment of error regarding his motion for directed verdict is without merit.

Finally, Huff assigns that the trial court erred in overruling his motion for *Brady* material. In Huff's motion, he requested, among other things, that the court order the State to produce any information it had which was related to the margin of error of the radar unit. In Huff's brief, he contends that the margin of error is exculpatory evidence that the State should have disclosed prior to trial. However, Huff's motion does not mention "exculpatory evidence" and the motion appears to be a motion for discovery. We first note that because this case involves a traffic violation, Huff does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue [\*19] 1995) provides for pretrial discovery in criminal cases [HN16] "when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty . . . ." The traffic violation with which Huff was charged does not fit within the parameters of § 29-1912.

However, the U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that [HN17] the suppression by the State of

evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

"The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's [\*20] favorable character for the defense, and (c) the materiality of the evidence."

*State v. Phelps*, 241 Neb. at 730-31, 490 N.W.2d at 692, quoting *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

The radar unit's margin of error was not exculpatory evidence, because it was neither favorable to Huff nor material to his guilt or to his punishment. As stated previously, the radar unit showed that Huff was driving 78 m.p.h. Given the margin of error of plus or minus 2 m.p.h., the minimum speed at which Huff could have possibly been driving was 76 m.p.h. Assuming this to have been Huff's speed, Huff would still be guilty of speeding and would be subject to the same \$ 75 fine as if he had been driving 78 m.p.h. as alleged in the citation. The maximum speed at which Huff could have been driving, based on the margin of error, is 80 m.p.h., and a finding of guilt at this speed would also subject Huff to the same \$ 75 fine. Clearly, the evidence regarding the radar unit's margin of error was not exculpatory. Huff's assignment of error is without merit.

#### CONCLUSION

Based on the preceding analysis, we conclude that the State presented [\*21] sufficient evidence to support a finding of guilt on the charge of speeding. We further conclude that the trial court did not err in overruling Huff's motion for *Brady* material. Accordingly, we affirm the order of the district court affirming the trial court's order finding Huff guilty of speeding.

Affirmed.

57 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Sterling T. Huff, appellant.****No. A-03-788.****NEBRASKA COURT OF APPEALS*****2004 Neb. App. LEXIS 117*****May 18, 2004, Filed**

**PRIOR HISTORY:** [\*1] Appeal from the District Court for Banner County, Kristine R. Cecava, Judge, on appeal thereto from the County Court for Banner County, James T. Hansen, Judge.

**DISPOSITION:** Judgment of District Court affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from an order of the District Court for Banner County (Nebraska), which affirmed his conviction and fine for speeding imposed in a county court.

**OVERVIEW:** A state patrol trooper issued defendant a citation for speeding, specifically for driving 78 miles per hour (mph) in a 65-mph zone. The court held that the information in the citation was sufficient to show that the maximum speed allowed for the vehicle defendant was driving and at the location where he was driving was 65 mph. Although the officer testified that there was a two mph margin of error when the radar unit was in its moving mode, the precise amount by which a speed was exceeded was not an essential element of the offense of speeding. It was necessary only that the evidence show the limit was exceeded. Despite the margin of error, the fine and the loss of points against defendant's driving record were the same whether defendant was traveling 76 or 80 mph. The officer's testimony showed that all of the necessary foundational requirements of *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998) had been met and that the radar unit was working properly. Sufficient evidence supported the conviction. There was no Brady violation because the radar unit's margin of error was not exculpatory evidence as it was neither favorable to defendant nor material to his guilt or punishment.

**OUTCOME:** The court affirmed the trial court's order finding defendant guilty of speeding.

**CORE TERMS:** radar, speed, driving, maximum speed, speeding, tuning, fork, margin of error, tuning fork, directed verdict, speed limit, accuracy, patrol car, measurement, guilt, calibration, self-test, fine, zone, electronic, mechanical, microwave, radio, essential element, working order, overruling, traveling, assigns, assignment of error, favorable

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview***

[HN1] A prosecution for a traffic infraction is a criminal proceeding.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Criminal Law & Procedure > Witnesses > Credibility***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

***Criminal Law & Procedure > Trials > Bench Trials***

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview***

[HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN5] See *Neb. Rev. Stat. § 60-6,194* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN6] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show the limit was exceeded.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] *Neb. Rev. Stat. § 60-6,194* states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved.

***Governments > Legislation > Interpretation***

[HN8] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

***Governments > Legislation > Interpretation***

[HN9] is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN10] A conviction for speeding, pursuant to *Neb. Rev. Stat. § 60-6,194*, does not require the State to prove that the defendant had specific notice of the speed limit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections  
Evidence > Scientific Evidence > General Overview***

[HN11] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made. Section 60-6,192 specifies the requirements for admissibility of evidence from a radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN12] See *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN13] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required under *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998).

***Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts***

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN14] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Criminal Law & Procedure > Verdicts > General Overview***

[HN15] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***

[HN16] See *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995).

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN17] The suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant.

**COUNSEL:** Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

**JUDGES:** Carlson, Moore, and Cassel, Judges.

**OPINION BY:** Carlson

**OPINION:**

Carlson, Judge. INTRODUCTION

Sterling T. Huff appeals from an order of the district court for Banner County affirming his conviction and fine for speeding imposed in the county court for Banner County. We affirm.

BACKGROUND

On June 5, 2002, Nebraska State Patrol Trooper Manuel Jiminez issued Huff a citation for speeding, specifically for driving 78 m.p.h. in a 65-m.p.h. zone. Huff pled not guilty. On July 10, Huff filed a motion for *Brady* material, which motion was subsequently overruled. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A bench trial was held on September 19.

At trial, Jiminez was the only witness to testify. He was first called as a witness by the State, and after the State rested, he was recalled by Huff. Jiminez testified [\*2] that he has been a trooper with the State Patrol since July 1996. Jiminez testified that he has training in radar detection and has been operating radar equipment from the time he became a trooper up to the time of trial. Jiminez stated that he was certified in the proper use of radar equipment and that his certification was in effect on the date he stopped Huff. Jiminez testified that he was also trained to determine vehicle speeds by visual observation and trained to ascertain the speed of approaching vehicles based on Doppler sounds that emanate from the radar unit.

Jiminez testified that since he became a trooper, his patrol car has always been equipped with a Stalker Dual SL radar unit, and that that is what his car was equipped with on June 5, 2002. He testified that the radar unit in his patrol car and the tuning forks used to check the calibration of the unit had a certificate of calibration and accuracy to show that the unit itself and the tuning forks were in proper working order. He testified that a State Patrol technician checks the radar unit and the tuning forks for calibration and accuracy on a yearly basis and then issues a certificate indicating that it is all in [\*3] proper working order.

Jiminez testified that there are daily tests performed on the radar unit in his patrol car to determine whether the unit is in proper working order. He testified that at the beginning of his shift, he presses a button on the unit which causes the unit to conduct a "self-test." Jiminez stated that when the unit is done with the self-test, the unit indicates whether it passed or failed the test. He further testified that the unit automatically performs a self-test every 10 minutes and that it beeps four times if it passes the test. Jiminez testified that he also performs a "tuning fork test" using the two tuning forks that are a part of the radar unit in his patrol car. The tuning fork test checks the calibration of the radar unit. He testified that he performs the tuning fork test at the beginning and end of every shift.

Jiminez testified that at the beginning of his shift on June 5, 2002, he activated the radar unit's self-test and performed the tuning fork test. He testified that based on the results of the tests, the unit was working properly. Jiminez testified that on June 5, he also performed the tuning fork test at the end of his shift. He testified that [\*4] based on the results of the external tests of accuracy he performed on the radar unit both prior to and subsequent to issuing the citation to Huff, the radar unit was working properly.

Jiminez testified that on June 5, 2002, between the time he started his shift at 4 p.m. and the time he stopped Huff at 10:03 p.m., the radar unit was performing the self-test every 10 minutes, and that the tests gave no indication that the

unit was not working properly. Jiminez further testified that based on his background, training, and experience, at the time he activated the radar unit to determine Huff's speed, the radar unit was being operated in such a manner and under such conditions as to allow the minimum possibility of distortion and outside interference.

Jiminez testified that at about 10:03 p.m. on June 5, 2002, he was on duty and was patrolling near mile marker 47 on Highway 71, which marker is in Banner County, south of the city of Scottsbluff. Jiminez testified that at this time, he observed a red Chevrolet Corvette traveling in the opposite direction than he was going, and that he estimated the vehicle to be traveling faster than the speed limit. He testified that he also used the [\*5] Doppler sounds from the radar unit to ascertain the speed of the vehicle. Jiminez said that he then activated the "moving mode" of his radar unit to get a radar reading on the vehicle. Jiminez explained that the moving mode is used when the patrol car is moving rather than in a stationary position. Jiminez recalled that the radar unit indicated that the vehicle was traveling 78 m.p.h. Jiminez testified that he then turned his patrol car around and stopped the vehicle and that the driver identified himself as Huff. Jiminez further testified that the radar unit has a margin of error in the moving mode of plus or minus 2 m.p.h. He further testified that the radar unit automatically rounds the number it records down to the nearest whole number and that that is the number it displays.

Jiminez testified that since January 1997, he has patrolled the area where Huff was stopped. He testified that there are posted speed limit signs in the area and that the posted speed limit is 65 m.p.h.

At the end of the State's case, Huff moved for a directed verdict, and the trial court took the motion under advisement. At the conclusion of the evidence, Huff renewed his motion for directed verdict, and [\*6] the trial court again took the motion under advisement.

In an order dated December 3, 2002, the trial court overruled Huff's motion for directed verdict and found Huff guilty of speeding 78 m.p.h. in a 65-m.p.h. zone. Huff was ordered to pay a fine of \$ 75, plus court costs. Huff appealed to the district court, which affirmed the trial court's order.

#### ASSIGNMENTS OF ERROR

Huff assigns five errors, which we consolidate into three. Huff assigns that the trial court erred in (1) finding that the State presented sufficient evidence to support the conviction, (2) overruling his motion for directed verdict, and (3) overruling his motion for *Brady* material.

#### STANDARD OF REVIEW

[HN1] A prosecution for a traffic infraction is a criminal proceeding. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977).

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, [\*7] viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). [HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, *supra*; *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

#### ANALYSIS

Huff first assigns that the trial court erred in finding that the State presented sufficient evidence to support the conviction. Huff makes several arguments in support of this assignment of error. Huff first argues [\*8] that the citation issued by Jiminez did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). *Section 60-6,194* provides in part:

[HN5] (1) In every charge of violation of any speed regulation in the Nebraska Rules of the Road, the complaint and the summons or notice to appear shall specify the speed at which defendant is alleged to have driven and the maximum speed for the type of vehicle involved applicable within the district or at the location. The speed at which defendant is alleged to have driven and the maximum speed are essential elements of the offense and shall be proved by competent evidence.

Huff alleges that the citation fails to identify the model of his vehicle with any particularity, which model he claims would have bearing on the maximum speed allowed, and that the citation fails to identify the maximum speed allowed. We determine that this argument is without merit. The citation identifies the make, style, model, year, and color of Huff's vehicle and states that Huff was being cited for unlawfully committing the offense of speeding 78 m.p.h. in a 65-m.p.h. zone. We conclude that this information was sufficient [\*9] to show that the maximum speed allowed for the vehicle Huff was driving and at the location where he was driving was 65 m.p.h.

Huff next argues that the State failed to prove the maximum speed allowed at the location where Huff was stopped for speeding, which fact is an essential element of the offense of speeding. Jiminez testified that since January 1997, he has patrolled the area where Huff was stopped. He testified that there are posted speed limit signs in the area and that the posted speed limit is 65 m.p.h. We conclude that Jiminez' testimony was sufficient evidence to show the maximum speed allowed as required by *§ 60-6,194*.

Huff also argues that the State failed to present evidence to show what type of road Highway 71 is under *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), which evidence he alleges was necessary to support the maximum speed element. *Section 60-6,186* sets forth the maximum speed limits for different types or categories of roads. For example, *§ 60-6,186(1)(f)* states that the maximum speed limit is 65 m.p.h. upon an expressway that is part of the state highway system.

Pursuant to *§ 60-6,194*, the State had to prove the maximum speed [\*10] allowed at the location where Huff was stopped. As we previously concluded, the State proved the maximum speed allowed through Jiminez' testimony. Thus, it was not necessary for the State to present evidence as to what type of road Highway 71 is under *§ 60-6,186*.

Huff next argues that due to the margin of error in the radar reading, the State failed to prove the exact speed at which Huff was driving. Huff contends that because Jiminez testified that there is a 2-m.p.h. margin of error when the radar unit is in its moving mode and because the radar reading showed that Huff was driving 78 m.p.h., he could have been driving anywhere between 76 and 80 m.p.h. [HN6] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show the limit was exceeded. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). See *Melanson v. State*, 188 Neb. 446, 197 N.W.2d 401 (1972).

In addition, *§ 60-6,194* states that [HN7] the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved. [HN8] In [\*11] the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). It [HN9] is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *Id.*

Huff was charged with driving 78 m.p.h. in a 65-m.p.h. zone. Under *Neb. Rev. Stat. § 60-682.01* (Reissue 1998), a person convicted for traveling 11 to 15 m.p.h. over the speed limit is fined \$ 75. Thus, a conviction for driving 78 m.p.h.

in a 65-m.p.h. zone results in a \$ 75 fine. The minimum speed Huff could have possibly been driving was 76 m.p.h., which would result in the same \$ 75 fine as a conviction for driving 78 m.p.h. See § 60-682.01(1)(c). Similarly, the maximum speed Huff could have been driving was 80 m.p.h., which would also result in a \$ 75 fine. We also note that a conviction for [\*12] driving any speed between 76 and 80 m.p.h. in a 65-m.p.h. zone results in the same loss of points against a defendant's driving record. See *Neb. Rev. Stat. § 60-4,182(10)(c)* (Supp. 2001). We conclude that despite the margin of error, the State presented sufficient evidence to show the speed at which Huff's vehicle was traveling.

Huff next argues that the State failed to prove that he knew or should have known what the speed limit was at the location where he was cited for speeding. Huff contends that pursuant to § 60-6,186 and *Neb. Rev. Stat. § 60-6,190* (Reissue 1998), a driver is entitled to reasonable notice of the speed limit via signs erected by the Nebraska Department of Roads, and that there is no evidence Huff had such notice. [HN10] A conviction for speeding, pursuant to § 60-6,194, does not require the State to prove that the defendant had specific notice of the speed limit. This argument is without merit.

Huff also argues that the radar reading was inadmissible because it lacked sufficient foundation and that his objection to such evidence should have been sustained. [HN11] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* [\*13] (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). Section 60-6,192 specifies the requirements for admissibility of evidence from a radar device:

[HN12] (1) . . . Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:

- (a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;
- (b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so as to allow [\*14] a minimum possibility of distortion or outside interference;
- (c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; and
- (d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

[HN13] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required. *State v. Lomack, supra*; *State v. Kudlacek, supra*.

Huff relies on *State v. Lomack, supra*, which held that the evidence presented concerning the radar unit lacked the required indicia of accuracy. The Nebraska Supreme Court determined that the evidence failed to establish that the tuning fork used to test the radar unit was particularly designed and intended for testing the radar [\*15] unit in question and that the evidence thereby failed to show that the tuning fork was in any way associated with the radar unit tested. Further, there was no evidence that the tuning fork itself was in any way properly tested, calibrated, or certified as a

reliable gauge of a radar unit's accuracy. Huff argues that the present case is similar to *State v. Lomack, supra*, because Jiminez' testimony failed to establish that the tuning forks he used were designed and intended for testing the radar unit in his car. Huff further contends that there was no evidence that the tuning forks were properly tested, calibrated, or certified as a reliable gauge of the radar unit's accuracy.

Jiminez testified that the tuning forks he uses are part of the radar unit in his patrol car and that those particular tuning forks and his radar unit are always used together. Jiminez also testified that a certificate of calibration and accuracy was issued by a State Patrol technician for the radar unit in his patrol car and for the tuning forks used to check the calibration of the unit. Thus, the tuning forks had been tested and certified. The fact that the certificate was issued for the radar [\*16] unit and the tuning forks together demonstrates that the tuning forks are intended for that particular unit. This case is not similar to *State v. Lomack, supra*. Rather, Jiminez' testimony showed that all of the necessary foundational requirements of § 60-6,192 had been met. He testified that at the beginning of his shift, he activates a self-test on the radar unit, and that the unit indicates whether it has passed or failed the test. Jiminez further testified that the unit also runs an automatic self-test every 10 minutes. Finally, Jiminez testified that he performs a tuning fork test at the beginning and end of every shift, which test checks the calibration of the radar unit. Jiminez testified that on June 5, 2002, he performed the tuning fork test both prior to and subsequent to issuing Huff the citation, and that the unit was working properly. Accordingly, Huff's argument that there was insufficient foundation for evidence of the radar readout is without merit. We conclude that all of Huff's arguments in support of his first assignment of error alleging that the State presented insufficient evidence are without merit.

Huff also assigns that the trial court erred [\*17] in overruling his motion for directed verdict. [HN14] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[HN15] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

We have concluded [\*18] that there was sufficient evidence for the trial court to find beyond a reasonable doubt that Huff was guilty of speeding. Having so concluded, we cannot say that there is a complete failure of evidence to establish an essential element of the crime charged or that the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. As such, Huff's assignment of error regarding his motion for directed verdict is without merit.

Finally, Huff assigns that the trial court erred in overruling his motion for *Brady* material. In Huff's motion, he requested, among other things, that the court order the State to produce any information it had which was related to the margin of error of the radar unit. In Huff's brief, he contends that the margin of error is exculpatory evidence that the State should have disclosed prior to trial. However, Huff's motion does not mention "exculpatory evidence" and the motion appears to be a motion for discovery. We first note that because this case involves a traffic violation, Huff does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue [\*19] 1995) provides for pretrial discovery in criminal cases [HN16] "when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty . . . ." The traffic violation with which Huff was charged does not fit within the parameters of § 29-1912.

However, the U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that [HN17] the suppression by the State of

evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

"The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's [\*20] favorable character for the defense, and (c) the materiality of the evidence."

*State v. Phelps*, 241 Neb. at 730-31, 490 N.W.2d at 692, quoting *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

The radar unit's margin of error was not exculpatory evidence, because it was neither favorable to Huff nor material to his guilt or to his punishment. As stated previously, the radar unit showed that Huff was driving 78 m.p.h. Given the margin of error of plus or minus 2 m.p.h., the minimum speed at which Huff could have possibly been driving was 76 m.p.h. Assuming this to have been Huff's speed, Huff would still be guilty of speeding and would be subject to the same \$ 75 fine as if he had been driving 78 m.p.h. as alleged in the citation. The maximum speed at which Huff could have been driving, based on the margin of error, is 80 m.p.h., and a finding of guilt at this speed would also subject Huff to the same \$ 75 fine. Clearly, the evidence regarding the radar unit's margin of error was not exculpatory. Huff's assignment of error is without merit.

#### CONCLUSION

Based on the preceding analysis, we conclude that the State presented [\*21] sufficient evidence to support a finding of guilt on the charge of speeding. We further conclude that the trial court did not err in overruling Huff's motion for *Brady* material. Accordingly, we affirm the order of the district court affirming the trial court's order finding Huff guilty of speeding.

Affirmed.

58 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Clark G. Nichols, appellant.****No. A-03-787.****NEBRASKA COURT OF APPEALS****2004 Neb. App. LEXIS 95****April 20, 2004, Filed****NOTICE:** [\*1] NOT DESIGNATED FOR PERMANENT PUBLICATION**PRIOR HISTORY:** Appeal from the District Court for Banner County, Kristine R. Cecava, Judge, on appeal thereto from the County Court for Banner County, James T. Hansen, Judge.**DISPOSITION:** Judgment of district court affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** After denying defendant's motion for a directed verdict, the trial court found defendant guilty of speeding 75 m.p.h. in a 65 m.p.h. zone. Defendant was ordered to pay a fine of \$ 25, plus court costs. Defendant appealed to the District Court for Banner County (Nebraska), which affirmed the trial court's order. Defendant appealed.**OVERVIEW:** Defendant argued that his citation did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). Defendant alleged that the citation failed to identify the model of his vehicle with any particularity, which model he claimed would have had a bearing on the maximum speed allowed, and that it failed to identify the maximum speed allowed. The appellate court determined that argument was without merit. The citation identified the make, style, model, year, and color of defendant's vehicle and stated that defendant was being cited for unlawfully committing the offense of speeding 75 m.p.h. in a 65-m.p.h. zone. That information was sufficient to show that the maximum speed allowed for the vehicle defendant was driving and at the location where he was driving was 65 m.p.h. Defendant also claimed that the trial court erred in overruling his motion for Brady material. He requested that the court order the State to produce any information it had relating to the margin of error of the radar unit. The appellate court held that the radar unit's margin of error was not exculpatory evidence, as it was neither favorable to defendant nor material to his guilt or punishment.**OUTCOME:** The judgment of the trial court was affirmed.**CORE TERMS:** radar, speed, driving, speeding, maximum speed, tuning, fork, margin of error, directed verdict, accuracy, zone, speed limit, measurement, calibration, fine, guilt, self-test, traveling, tuning fork, electronic,

mechanical, microwave, radio, essential element, working order, certificate, overruling, tested, assigns, assignment of error

### **LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*  
*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

[HN1] A prosecution for a traffic infraction is a criminal proceeding.

*Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview*  
*Criminal Law & Procedure > Witnesses > Credibility*  
*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the state, is sufficient to support the conviction.

*Criminal Law & Procedure > Trials > Bench Trials*  
*Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview*

[HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*  
*Evidence > Procedural Considerations > Weight & Sufficiency*

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN5] See *Neb. Rev. Stat. § 60-6,194* (Reissue 1998).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN6] *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), sets forth the maximum speed limits for different types or categories of road.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*  
*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*

[HN7] Pursuant to *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), the state has to prove the maximum speed allowed at the location where a defendant is stopped.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*  
*Evidence > Procedural Considerations > Weight & Sufficiency*

[HN8] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show that the limit was exceeded.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN9] *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved.

***Governments > Legislation > Interpretation***

[HN10] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

***Governments > Legislation > Interpretation***

[HN11] It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Sentencing > Fines***

[HN12] A conviction for driving 75 m.p.h. in a 65-m.p.h. zone results in a \$ 25 fine, whereas a conviction for driving 76 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. *Neb. Rev. Stat. § 60-682.01* (Reissue 1998). Similarly, a conviction for driving 77 or 78 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN13] A conviction for driving 74 or 75 m.p.h. in a 65-m.p.h. zone results in the loss of 1 or 2 points against a defendant's driving record, whereas a conviction for driving 76 to 78 m.p.h. therein results in the loss of 2 points against a defendant's driving record. *Neb. Rev. Stat. § 60-4,182(10)(b) and (c)* (Supp. 2001).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN14] A conviction for speeding, pursuant to *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), does not require the state to prove that a defendant had specific notice of the speed limit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

[HN15] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the state, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN16] *Neb. Rev. Stat. § 60-6,192* (Reissue 1998), specifies the requirements for admissibility of evidence from a radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***  
[HN17] See *Neb. Rev. Stat. § 60-6,192* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***  
[HN18] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required for admissibility of evidence from a radar device.

***Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts  
Criminal Law & Procedure > Trials > Motions for Acquittal  
Criminal Law & Procedure > Appeals > Standards of Review > General Overview***  
[HN19] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

***Criminal Law & Procedure > Trials > Motions for Acquittal***  
[HN20] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

***Civil Procedure > Trials > Judgment as Matter of Law > General Overview  
Criminal Law & Procedure > Trials > Motions for Acquittal***  
[HN21] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Discovery & Inspection > Brady Materials  
Governments > Legislation > Statutory Remedies & Rights***  
[HN22] In cases involving traffic violations, a defendant does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995) provides for pretrial discovery in criminal cases when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty.

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***  
[HN23] The U.S. Constitution requires the state to disclose exculpatory material to an accused.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection  
Criminal Law & Procedure > Discovery & Inspection > Brady Materials  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***  
[HN24] The suppression by the state of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant.

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN25] The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are: (1) suppression by the prosecution after a request by the defense; (2) the evidence's favorable character for the defense; and (3) the materiality of the evidence.

**COUNSEL:** Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

**JUDGES:** Carlson, Moore, and Cassel, Judges.

**OPINION BY:** Carlson

**OPINION:**

Carlson, Judge. INTRODUCTION

Clark G. Nichols appeals from an order of the district court for Banner County affirming his conviction and fine for speeding imposed in the county court for Banner County. We affirm.

## BACKGROUND

On June 1, 2002, Nichols was traveling southbound on Highway 71 in Banner County and was stopped by Nebraska State Patrol Trooper Jeff Wallace. Wallace issued Nichols a citation for speeding, specifically for driving 75 m.p.h. in a 65-m.p.h. zone. Nichols pled not guilty. On July 10, Nichols filed a motion for *Brady* material, which motion was subsequently overruled. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A bench trial was held on September 19.

At trial, Wallace [\*2] was the only witness to testify. He was first called by the State, and after the State rested, he was recalled by Nichols. Wallace testified that he has been a trooper with the State Patrol since December 1995. Wallace testified that he has training in radar detection and has operated radar equipment for approximately the past 7 years in the course of his job. He testified that he is specifically tested and trained in the use of the Stalker radar unit. Wallace stated that he was certified in the proper use of radar equipment and that his certification was in effect on the date he stopped Nichols. Wallace testified that he was also trained to determine vehicle speeds by visual observation and trained to ascertain the speed of approaching vehicles based on Doppler sounds that emanate from the radar unit.

Wallace testified that the patrol car he drives has a Stalker radar unit. Wallace stated that on the day Nichols was cited for speeding, the radar unit in Wallace's car and the two tuning forks used to check the calibration of the radar unit had a certificate of calibration and accuracy showing their proper working order. Wallace testified that a technician within the State Patrol tests [\*3] the radar unit and the tuning forks to make sure they are working properly. A certificate of calibration and accuracy, Wallace testified, is then issued for that particular unit and for the two tuning forks to show that it is all in proper working order. Wallace testified that such certificate is necessary for the radar unit to be put into service.

Wallace testified that there are daily tests performed on the radar unit in his patrol car to determine whether it is in proper working order. He testified that when he turns on the radar unit at the beginning of his shift, the unit performs a "power-on test" in which it automatically checks all its indicator light segments to make sure they are working properly. Wallace testified that he next depresses a button on the unit which causes it to perform a "self-test" in which the unit goes through a series of tests. When the unit is done with the self-test, Wallace stated, it makes a distinctive tone to indicate that it passed the self-test. Wallace testified that he can also activate the self-test at any time during his shift.

Wallace testified that the unit also runs an automatic self-test every 10 minutes and, again, makes a distinctive [\*4] tone to indicate that it is working properly. Wallace testified that he also performs a "tuning fork test" using the two tuning forks that are included with his radar unit, which test checks the calibration of the radar unit. He testified that the radar unit would be immediately taken out of service if it did not produce readings in accordance with the tuning forks. Wallace testified that he calibrates his radar unit with the tuning forks at the beginning and end of every shift, including on the day he issued Nichols the citation for speeding. Wallace testified that based on the results of the tests of accuracy that he performed on the radar unit before and after he issued the citation to Nichols, the radar unit was working properly. Wallace further testified that based on his background, training, and experience, at the time he activated the radar unit to determine Nichols' speed, the radar unit was being operated in such manner and under such conditions as to allow the minimum possibility of distortion and interference.

Wallace testified that on June 1, 2002, at approximately 7:37 a.m., he was on duty and was traveling northbound on Highway 71 near mile marker 48 in Banner County. [\*5] He testified that at this time, he observed a maroon Oldsmobile 98 traveling southbound which appeared to be traveling over the speed limit. Wallace also testified that the Doppler sounds coming from the radar unit indicated that the vehicle was speeding. Wallace said that he then activated the "moving mode" of his radar unit to get a radar reading on the vehicle. Wallace explained that the moving mode is used when the patrol car is moving rather than parked. Wallace recalled that the radar unit indicated that the vehicle was traveling 76 m.p.h. Wallace said that he then stopped the vehicle and that the driver identified himself as Nichols. Wallace explained that although the radar had shown a reading of 76 m.p.h., he gave Nichols "a break" by writing the citation he issued for 75 m.p.h. Wallace further testified that the radar unit has a margin of error in the moving mode of plus or minus 2 m.p.h. He further testified that the radar unit automatically rounds the number it records down to the next whole number and that that is the number it displays.

Wallace further testified that he has patrolled the area in which Nichols was stopped for approximately 6 to 7 years and that he is [\*6] acquainted with the speed limit for that area. He testified that the posted speed limit in the area where he recorded the speed of Nichols' vehicle is 65 m.p.h.

At the end of the State's case, Nichols moved for a directed verdict but asked the court to refrain from ruling on the motion until after Nichols presented his evidence. The trial court granted such request and took the motion under advisement. At the conclusion of the evidence, Nichols renewed his motion for a directed verdict, and the trial court took the motion under advisement.

In an order dated December 3, 2002, the trial court overruled Nichols' motion for a directed verdict and found Nichols guilty of speeding 75 m.p.h. in a 65-m.p.h. zone. Nichols was ordered to pay a fine of \$ 25, plus court costs. Nichols appealed to the district court, which affirmed the trial court's order.

#### ASSIGNMENTS OF ERROR

Nichols assigns five errors, which we consolidate into three. Nichols assigns that the trial court erred in (1) finding that the State presented sufficient evidence to support the conviction, (2) overruling his motion for a directed verdict, and (3) overruling his motion for *Brady* material.

#### STANDARD OF REVIEW

[HN1] A [\*7] prosecution for a traffic infraction is a criminal proceeding. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977).

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). [HN3] In a bench trial of a criminal case, the trial court's findings have the effect

of a jury verdict and will not be set aside unless clearly erroneous. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, [\*8] after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, *supra*; *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

#### ANALYSIS

Nichols first assigns that the trial court erred in finding that the State presented sufficient evidence to support the conviction. Nichols makes several arguments in support of this assignment of error. Nichols first argues that the citation he was issued by Wallace did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). *Section 60-6,194* provides in part:

(1) [HN5] In every charge of violation of any speed regulation in the Nebraska Rules of the Road, the complaint and the summons or notice to appear shall specify the speed at which defendant is alleged to have driven and the maximum speed for the type of vehicle involved applicable within the district or at the location. The speed at which defendant is alleged to have driven and the maximum speed are essential elements of the offense and shall be proved by competent evidence.

[\*9]

Nichols alleges that the citation fails to identify the model of his vehicle with any particularity, which model he claims would have bearing on the maximum speed allowed, and that the citation fails to identify the maximum speed allowed. We determine that this argument is without merit. The citation identifies the make, style, model, year, and color of Nichols' vehicle and states that Nichols was being cited for unlawfully committing the offense of speeding 75 m.p.h. in a 65-m.p.h. zone. We conclude that this information was sufficient to show that the maximum speed allowed for the vehicle Nichols was driving and at the location where he was driving was 65 m.p.h.

Nichols next argues that the State failed to prove the maximum speed allowed at the location where he was stopped for speeding, which fact is an essential element of the offense of speeding. As noted above, Wallace testified that he has patrolled the area where Nichols was stopped for 6 to 7 years and that he is acquainted with the posted speed limit in that area. He testified that the posted speed limit is 65 m.p.h. We conclude that Wallace's testimony was sufficient evidence to show maximum speed as required by *§ 60-6,194*. [\*10]

Nichols also argues that the State failed to present evidence to show what type of road Highway 71 is under *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), which evidence he alleges was necessary to support the maximum speed element. *Section 60-6,186* [HN6] sets forth the maximum speed limits for different types or categories of road. For example, *§ 60-6,186(1)(f)* states that the maximum speed limit is 65 m.p.h. upon an expressway that is part of the state highway system.

[HN7] Pursuant to *§ 60-6,194*, the State had to prove the maximum speed allowed at the location where Nichols was stopped. As we previously concluded, the State proved the maximum speed through Wallace's testimony. Thus, it was not necessary for the State to present evidence as to what type of road Highway 71 is under *§ 60-6,186*.

Nichols next argues that due to the margin of error in the radar reading, the State failed to prove the exact speed at which Nichols was driving. Nichols contends that because Wallace testified that there is a 2-m.p.h. margin of error when the radar unit is in its moving mode and the radar reading showed that he was driving 76 m.p.h., he could have been driving anywhere between [\*11] 74 and 78 m.p.h. [HN8] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show that the limit was exceeded. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992); *Melanson v. State*, 188 Neb. 446, 197 N.W.2d 401

(1972).

In addition, § 60-6,194 [HN9] states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved. [HN10] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). [HN11] It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *State v. Burlison*, *supra*; *State v. Atkins*, *supra*.

Nichols [\*12] was charged with driving 75 m.p.h. in a 65-m.p.h. zone. Nichols was already given "a break" when Wallace issued the citation for driving 75 m.p.h., rather than 76 m.p.h. in accordance with the radar reading. [HN12] A conviction for driving 75 m.p.h. in a 65-m.p.h. zone results in a \$ 25 fine, whereas a conviction for driving 76 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. See *Neb. Rev. Stat. § 60-682.01* (Reissue 1998). Similarly, a conviction for driving 77 or 78 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. The minimum speed at which Nichols could have been driving was 74 m.p.h., which would result in the same fine as 75 m.p.h. See § 60-682.01. We also note that [HN13] a conviction for driving 74 or 75 m.p.h. in a 65-m.p.h. zone results in the loss of 1 or 2 points against a defendant's driving record, whereas a conviction for driving 76 to 78 m.p.h. therein results in the loss of 2 points against a defendant's driving record. See *Neb. Rev. Stat. § 60-4,182(10)(b) and (c)* (Supp. 2001). We conclude that despite the margin of error, the State presented sufficient evidence to show the speed at which Nichols' vehicle was traveling. [\*13]

Nichols next argues that the State failed to prove that he knew or should have known what the speed limit was at the location where he was cited for speeding. Nichols contends that under § 60-6,186 and *Neb. Rev. Stat. § 60-6,190* (Reissue 1998), a driver is entitled to reasonable notice of the speed limit via signs erected by the Nebraska Department of Roads and that there is no evidence that Nichols had such notice. [HN14] A conviction for speeding, pursuant to § 60-6,194, does not require the State to prove that the defendant had specific notice of the speed limit. This argument is without merit.

Nichols also argues that the radar reading was inadmissible because it lacked sufficient foundation and that his objection to such evidence should have been sustained. [HN15] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish [\*14] the equipment's accuracy when the determination of speed was made. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). Section 60-6,192 [HN16] specifies the requirements for admissibility of evidence from a radar device:

- (1) . . . [HN17] Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
  - (a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;
  - (b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so [sic] as to allow a minimum possibility of distortion or outside interference;
  - (c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; [\*15] and
  - (d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

[HN18] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required. *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988).

Nichols relies on *State v. Lomack*, *supra*, which held that the evidence presented concerning the radar unit lacked the required indicia of accuracy. The Nebraska Supreme Court determined that the evidence failed to establish that the tuning fork used to test the radar unit was particularly designed and intended for testing the radar unit in question and that the evidence thereby failed to show that the tuning fork was in any way associated with the radar unit tested. Next, there was no evidence that the tuning fork itself was in any way properly tested, calibrated, or certified as a reliable gauge of a radar [\*16] unit's accuracy. Nichols argues that the present case is similar to *State v. Lomack*, *supra*, because Wallace's testimony failed to establish that the tuning forks he used were designed and intended for testing the radar unit in Wallace's car. He further contends that there was no evidence that the tuning forks were properly tested, calibrated, or certified as a reliable gauge of the radar unit's accuracy.

Wallace testified that the radar unit in his car came with the two tuning forks he uses to check the calibration of the unit. Wallace also testified that a certificate of calibration and accuracy was issued for the radar unit in his patrol car and the tuning forks used to check the calibration of the unit. Thus, the tuning forks had been tested and certified. The fact that the certificate was issued for the radar unit and the tuning forks together demonstrates that the tuning forks are intended for that particular unit. This case is not similar to *State v. Lomack*, *supra*. Rather, Wallace's testimony showed that all of the necessary foundational requirements of § 60-6,192 had been met. As noted above, he testified that the radar unit performs a "power-on [\*17] test" when it is turned on which checks its indicator light segments. He testified that he next activates a "self-test" in which the unit goes through a series of tests. Wallace further testified that the unit also runs an automatic self-test every 10 minutes. Finally, Wallace testified that he performs a "tuning fork test" which checks the calibration of the radar unit. Wallace testified that on June 1, 2002, he performed the tuning fork test prior to and subsequently to issuing Nichols the citation, and that the unit was working properly. Accordingly, Nichols' argument that there was insufficient foundation for evidence of the radar readout is without merit. We conclude that all of Nichols' arguments in support of his first assignment of error alleging that the State presented insufficient evidence are without merit.

Nichols also assigns that the trial court erred in overruling his motion for directed verdict. [HN19] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, [\*18] and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[HN20] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). [HN21] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

We have concluded that there was sufficient evidence for the trial court to find beyond a reasonable doubt that Nichols was guilty of speeding. Having so concluded, we cannot say that there is a complete failure of evidence to establish an essential element of the crime charged or that the evidence is so doubtful in character, lacking [\*19] probative value, that a finding of guilt based on such evidence cannot be sustained. Therefore, Nichols' assignment of error regarding his motion for directed verdict is without merit.

Finally, Nichols assigns that the trial court erred in overruling his motion for *Brady* material. In his motion, Nichols requested, among other things, that the court order the State to produce any information it had related to the margin of

error of the radar unit. In his brief, Nichols contends that the margin of error is exculpatory evidence that the State should have disclosed prior to trial. However, Nichols' motion does not mention "exculpatory evidence" and the motion appears to be a motion for discovery. We first note that because this [HN22] case involves a traffic violation, Nichols does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995) provides for pretrial discovery in criminal cases "when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty . . . ." The traffic violation with which Nichols was charged does [\*20] not fit within the parameters of § 29-1912.

However, [HN23] the U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that [HN24] the suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

[HN25] "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

*State v. Phelps*, 241 Neb. at 730-31, 490 N.W.2d at 692, quoting *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

The radar unit's margin of error was not exculpatory [\*21] evidence, as it was neither favorable to Nichols nor material to his guilt or to his punishment. As stated previously, the radar unit showed that Nichols was driving 76 m.p.h. Given the margin of error of plus or minus 2 m.p.h. as testified to by Wallace, the minimum speed at which Nichols could have possibly been driving was 74 m.p.h. Assuming this to have been Nichols' speed, Nichols would still be guilty of speeding and would be subject to the same \$ 25 fine as if he had been driving 75 m.p.h. as alleged in the citation. The maximum speed at which Nichols could have been driving, based on the margin of error, is 78 m.p.h., and a finding of guilt of this speed would subject Nichols to a higher fine of \$ 75. Clearly, the evidence regarding the radar unit's margin of error was not exculpatory. Nichols' assignment of error is without merit.

## CONCLUSION

Based on the preceding analysis, we conclude that the State presented sufficient evidence to support a finding of guilt on the charge of speeding. We further conclude that the trial court did not err in overruling Nichols' motion for *Brady* material. Accordingly, we affirm the order of the district court affirming the trial court's [\*22] order finding Nichols guilty of speeding.

Affirmed.

59 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Nebraska, appellee, v. Clark G. Nichols, appellant.****No. A-03-787.****NEBRASKA COURT OF APPEALS****2004 Neb. App. LEXIS 95****April 20, 2004, Filed****NOTICE:** [\*1] NOT DESIGNATED FOR PERMANENT PUBLICATION**PRIOR HISTORY:** Appeal from the District Court for Banner County, Kristine R. Cecava, Judge, on appeal thereto from the County Court for Banner County, James T. Hansen, Judge.**DISPOSITION:** Judgment of district court affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** After denying defendant's motion for a directed verdict, the trial court found defendant guilty of speeding 75 m.p.h. in a 65 m.p.h. zone. Defendant was ordered to pay a fine of \$ 25, plus court costs. Defendant appealed to the District Court for Banner County (Nebraska), which affirmed the trial court's order. Defendant appealed.**OVERVIEW:** Defendant argued that his citation did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). Defendant alleged that the citation failed to identify the model of his vehicle with any particularity, which model he claimed would have had a bearing on the maximum speed allowed, and that it failed to identify the maximum speed allowed. The appellate court determined that argument was without merit. The citation identified the make, style, model, year, and color of defendant's vehicle and stated that defendant was being cited for unlawfully committing the offense of speeding 75 m.p.h. in a 65-m.p.h. zone. That information was sufficient to show that the maximum speed allowed for the vehicle defendant was driving and at the location where he was driving was 65 m.p.h. Defendant also claimed that the trial court erred in overruling his motion for Brady material. He requested that the court order the State to produce any information it had relating to the margin of error of the radar unit. The appellate court held that the radar unit's margin of error was not exculpatory evidence, as it was neither favorable to defendant nor material to his guilt or punishment.**OUTCOME:** The judgment of the trial court was affirmed.**CORE TERMS:** radar, speed, driving, speeding, maximum speed, tuning, fork, margin of error, directed verdict, accuracy, zone, speed limit, measurement, calibration, fine, guilt, self-test, traveling, tuning fork, electronic,

mechanical, microwave, radio, essential element, working order, certificate, overruling, tested, assigns, assignment of error

### **LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > General Overview*

[HN1] A prosecution for a traffic infraction is a criminal proceeding.

*Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview*

*Criminal Law & Procedure > Witnesses > Credibility*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the state, is sufficient to support the conviction.

*Criminal Law & Procedure > Trials > Bench Trials*

*Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview*

[HN3] In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

*Evidence > Procedural Considerations > Weight & Sufficiency*

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN5] See *Neb. Rev. Stat. § 60-6,194* (Reissue 1998).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN6] *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), sets forth the maximum speed limits for different types or categories of road.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*

[HN7] Pursuant to *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), the state has to prove the maximum speed allowed at the location where a defendant is stopped.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

*Evidence > Procedural Considerations > Weight & Sufficiency*

[HN8] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show that the limit was exceeded.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN9] *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved.

***Governments > Legislation > Interpretation***

[HN10] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

***Governments > Legislation > Interpretation***

[HN11] It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Sentencing > Fines***

[HN12] A conviction for driving 75 m.p.h. in a 65-m.p.h. zone results in a \$ 25 fine, whereas a conviction for driving 76 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. *Neb. Rev. Stat. § 60-682.01* (Reissue 1998). Similarly, a conviction for driving 77 or 78 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN13] A conviction for driving 74 or 75 m.p.h. in a 65-m.p.h. zone results in the loss of 1 or 2 points against a defendant's driving record, whereas a conviction for driving 76 to 78 m.p.h. therein results in the loss of 2 points against a defendant's driving record. *Neb. Rev. Stat. § 60-4,182(10)(b) and (c)* (Supp. 2001).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN14] A conviction for speeding, pursuant to *Neb. Rev. Stat. § 60-6,194* (Reissue 1998), does not require the state to prove that a defendant had specific notice of the speed limit.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

[HN15] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the state, as required by § 60-6,192(1)(d), must establish the equipment's accuracy when the determination of speed was made.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN16] *Neb. Rev. Stat. § 60-6,192* (Reissue 1998), specifies the requirements for admissibility of evidence from a radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***  
[HN17] See *Neb. Rev. Stat. § 60-6,192* (Reissue 1998).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***  
[HN18] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required for admissibility of evidence from a radar device.

***Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts  
Criminal Law & Procedure > Trials > Motions for Acquittal  
Criminal Law & Procedure > Appeals > Standards of Review > General Overview***  
[HN19] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

***Criminal Law & Procedure > Trials > Motions for Acquittal***  
[HN20] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

***Civil Procedure > Trials > Judgment as Matter of Law > General Overview  
Criminal Law & Procedure > Trials > Motions for Acquittal***  
[HN21] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Discovery & Inspection > Brady Materials  
Governments > Legislation > Statutory Remedies & Rights***  
[HN22] In cases involving traffic violations, a defendant does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995) provides for pretrial discovery in criminal cases when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty.

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***  
[HN23] The U.S. Constitution requires the state to disclose exculpatory material to an accused.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection  
Criminal Law & Procedure > Discovery & Inspection > Brady Materials  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***  
[HN24] The suppression by the state of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant.

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN25] The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are: (1) suppression by the prosecution after a request by the defense; (2) the evidence's favorable character for the defense; and (3) the materiality of the evidence.

**COUNSEL:** Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

**JUDGES:** Carlson, Moore, and Cassel, Judges.

**OPINION BY:** Carlson

**OPINION:**

Carlson, Judge. INTRODUCTION

Clark G. Nichols appeals from an order of the district court for Banner County affirming his conviction and fine for speeding imposed in the county court for Banner County. We affirm.

**BACKGROUND**

On June 1, 2002, Nichols was traveling southbound on Highway 71 in Banner County and was stopped by Nebraska State Patrol Trooper Jeff Wallace. Wallace issued Nichols a citation for speeding, specifically for driving 75 m.p.h. in a 65-m.p.h. zone. Nichols pled not guilty. On July 10, Nichols filed a motion for *Brady* material, which motion was subsequently overruled. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A bench trial was held on September 19.

At trial, Wallace [\*2] was the only witness to testify. He was first called by the State, and after the State rested, he was recalled by Nichols. Wallace testified that he has been a trooper with the State Patrol since December 1995. Wallace testified that he has training in radar detection and has operated radar equipment for approximately the past 7 years in the course of his job. He testified that he is specifically tested and trained in the use of the Stalker radar unit. Wallace stated that he was certified in the proper use of radar equipment and that his certification was in effect on the date he stopped Nichols. Wallace testified that he was also trained to determine vehicle speeds by visual observation and trained to ascertain the speed of approaching vehicles based on Doppler sounds that emanate from the radar unit.

Wallace testified that the patrol car he drives has a Stalker radar unit. Wallace stated that on the day Nichols was cited for speeding, the radar unit in Wallace's car and the two tuning forks used to check the calibration of the radar unit had a certificate of calibration and accuracy showing their proper working order. Wallace testified that a technician within the State Patrol tests [\*3] the radar unit and the tuning forks to make sure they are working properly. A certificate of calibration and accuracy, Wallace testified, is then issued for that particular unit and for the two tuning forks to show that it is all in proper working order. Wallace testified that such certificate is necessary for the radar unit to be put into service.

Wallace testified that there are daily tests performed on the radar unit in his patrol car to determine whether it is in proper working order. He testified that when he turns on the radar unit at the beginning of his shift, the unit performs a "power-on test" in which it automatically checks all its indicator light segments to make sure they are working properly. Wallace testified that he next depresses a button on the unit which causes it to perform a "self-test" in which the unit goes through a series of tests. When the unit is done with the self-test, Wallace stated, it makes a distinctive tone to indicate that it passed the self-test. Wallace testified that he can also activate the self-test at any time during his shift.

Wallace testified that the unit also runs an automatic self-test every 10 minutes and, again, makes a distinctive [\*4] tone to indicate that it is working properly. Wallace testified that he also performs a "tuning fork test" using the two tuning forks that are included with his radar unit, which test checks the calibration of the radar unit. He testified that the radar unit would be immediately taken out of service if it did not produce readings in accordance with the tuning forks. Wallace testified that he calibrates his radar unit with the tuning forks at the beginning and end of every shift, including on the day he issued Nichols the citation for speeding. Wallace testified that based on the results of the tests of accuracy that he performed on the radar unit before and after he issued the citation to Nichols, the radar unit was working properly. Wallace further testified that based on his background, training, and experience, at the time he activated the radar unit to determine Nichols' speed, the radar unit was being operated in such manner and under such conditions as to allow the minimum possibility of distortion and interference.

Wallace testified that on June 1, 2002, at approximately 7:37 a.m., he was on duty and was traveling northbound on Highway 71 near mile marker 48 in Banner County. [\*5] He testified that at this time, he observed a maroon Oldsmobile 98 traveling southbound which appeared to be traveling over the speed limit. Wallace also testified that the Doppler sounds coming from the radar unit indicated that the vehicle was speeding. Wallace said that he then activated the "moving mode" of his radar unit to get a radar reading on the vehicle. Wallace explained that the moving mode is used when the patrol car is moving rather than parked. Wallace recalled that the radar unit indicated that the vehicle was traveling 76 m.p.h. Wallace said that he then stopped the vehicle and that the driver identified himself as Nichols. Wallace explained that although the radar had shown a reading of 76 m.p.h., he gave Nichols "a break" by writing the citation he issued for 75 m.p.h. Wallace further testified that the radar unit has a margin of error in the moving mode of plus or minus 2 m.p.h. He further testified that the radar unit automatically rounds the number it records down to the next whole number and that that is the number it displays.

Wallace further testified that he has patrolled the area in which Nichols was stopped for approximately 6 to 7 years and that he is [\*6] acquainted with the speed limit for that area. He testified that the posted speed limit in the area where he recorded the speed of Nichols' vehicle is 65 m.p.h.

At the end of the State's case, Nichols moved for a directed verdict but asked the court to refrain from ruling on the motion until after Nichols presented his evidence. The trial court granted such request and took the motion under advisement. At the conclusion of the evidence, Nichols renewed his motion for a directed verdict, and the trial court took the motion under advisement.

In an order dated December 3, 2002, the trial court overruled Nichols' motion for a directed verdict and found Nichols guilty of speeding 75 m.p.h. in a 65-m.p.h. zone. Nichols was ordered to pay a fine of \$ 25, plus court costs. Nichols appealed to the district court, which affirmed the trial court's order.

#### ASSIGNMENTS OF ERROR

Nichols assigns five errors, which we consolidate into three. Nichols assigns that the trial court erred in (1) finding that the State presented sufficient evidence to support the conviction, (2) overruling his motion for a directed verdict, and (3) overruling his motion for *Brady* material.

#### STANDARD OF REVIEW

[HN1] A [\*7] prosecution for a traffic infraction is a criminal proceeding. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977).

[HN2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). [HN3] In a bench trial of a criminal case, the trial court's findings have the effect

of a jury verdict and will not be set aside unless clearly erroneous. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[HN4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, [\*8] after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, *supra*; *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

#### ANALYSIS

Nichols first assigns that the trial court erred in finding that the State presented sufficient evidence to support the conviction. Nichols makes several arguments in support of this assignment of error. Nichols first argues that the citation he was issued by Wallace did not meet the requirements of *Neb. Rev. Stat. § 60-6,194* (Reissue 1998). *Section 60-6,194* provides in part:

(1) [HN5] In every charge of violation of any speed regulation in the Nebraska Rules of the Road, the complaint and the summons or notice to appear shall specify the speed at which defendant is alleged to have driven and the maximum speed for the type of vehicle involved applicable within the district or at the location. The speed at which defendant is alleged to have driven and the maximum speed are essential elements of the offense and shall be proved by competent evidence.

[\*9]

Nichols alleges that the citation fails to identify the model of his vehicle with any particularity, which model he claims would have bearing on the maximum speed allowed, and that the citation fails to identify the maximum speed allowed. We determine that this argument is without merit. The citation identifies the make, style, model, year, and color of Nichols' vehicle and states that Nichols was being cited for unlawfully committing the offense of speeding 75 m.p.h. in a 65-m.p.h. zone. We conclude that this information was sufficient to show that the maximum speed allowed for the vehicle Nichols was driving and at the location where he was driving was 65 m.p.h.

Nichols next argues that the State failed to prove the maximum speed allowed at the location where he was stopped for speeding, which fact is an essential element of the offense of speeding. As noted above, Wallace testified that he has patrolled the area where Nichols was stopped for 6 to 7 years and that he is acquainted with the posted speed limit in that area. He testified that the posted speed limit is 65 m.p.h. We conclude that Wallace's testimony was sufficient evidence to show maximum speed as required by *§ 60-6,194*. [\*10]

Nichols also argues that the State failed to present evidence to show what type of road Highway 71 is under *Neb. Rev. Stat. § 60-6,186* (Reissue 1998), which evidence he alleges was necessary to support the maximum speed element. *Section 60-6,186* [HN6] sets forth the maximum speed limits for different types or categories of road. For example, *§ 60-6,186(1)(f)* states that the maximum speed limit is 65 m.p.h. upon an expressway that is part of the state highway system.

[HN7] Pursuant to *§ 60-6,194*, the State had to prove the maximum speed allowed at the location where Nichols was stopped. As we previously concluded, the State proved the maximum speed through Wallace's testimony. Thus, it was not necessary for the State to present evidence as to what type of road Highway 71 is under *§ 60-6,186*.

Nichols next argues that due to the margin of error in the radar reading, the State failed to prove the exact speed at which Nichols was driving. Nichols contends that because Wallace testified that there is a 2-m.p.h. margin of error when the radar unit is in its moving mode and the radar reading showed that he was driving 76 m.p.h., he could have been driving anywhere between [\*11] 74 and 78 m.p.h. [HN8] The precise amount by which a speed was exceeded is not an essential element of the offense of speeding; it is necessary only that the evidence show that the limit was exceeded. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992); *Melanson v. State*, 188 Neb. 446, 197 N.W.2d 401

(1972).

In addition, § 60-6,194 [HN9] states that the speed at which a defendant is alleged to have driven is an essential element of the offense. The statute does not require that the defendant's "exact" speed be proved. [HN10] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). [HN11] It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *State v. Burlison*, *supra*; *State v. Atkins*, *supra*.

Nichols [\*12] was charged with driving 75 m.p.h. in a 65-m.p.h. zone. Nichols was already given "a break" when Wallace issued the citation for driving 75 m.p.h., rather than 76 m.p.h. in accordance with the radar reading. [HN12] A conviction for driving 75 m.p.h. in a 65-m.p.h. zone results in a \$ 25 fine, whereas a conviction for driving 76 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. See *Neb. Rev. Stat. § 60-682.01* (Reissue 1998). Similarly, a conviction for driving 77 or 78 m.p.h. in a 65-m.p.h. zone results in a \$ 75 fine. The minimum speed at which Nichols could have been driving was 74 m.p.h., which would result in the same fine as 75 m.p.h. See § 60-682.01. We also note that [HN13] a conviction for driving 74 or 75 m.p.h. in a 65-m.p.h. zone results in the loss of 1 or 2 points against a defendant's driving record, whereas a conviction for driving 76 to 78 m.p.h. therein results in the loss of 2 points against a defendant's driving record. See *Neb. Rev. Stat. § 60-4,182(10)(b) and (c)* (Supp. 2001). We conclude that despite the margin of error, the State presented sufficient evidence to show the speed at which Nichols' vehicle was traveling. [\*13]

Nichols next argues that the State failed to prove that he knew or should have known what the speed limit was at the location where he was cited for speeding. Nichols contends that under § 60-6,186 and *Neb. Rev. Stat. § 60-6,190* (Reissue 1998), a driver is entitled to reasonable notice of the speed limit via signs erected by the Nebraska Department of Roads and that there is no evidence that Nichols had such notice. [HN14] A conviction for speeding, pursuant to § 60-6,194, does not require the State to prove that the defendant had specific notice of the speed limit. This argument is without merit.

Nichols also argues that the radar reading was inadmissible because it lacked sufficient foundation and that his objection to such evidence should have been sustained. [HN15] Pursuant to *Neb. Rev. Stat. § 60-6,192(1)* (Reissue 1998), a radar readout may be accepted as competent evidence of the speed of a motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. However, before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by § 60-6,192(1)(d), must establish [\*14] the equipment's accuracy when the determination of speed was made. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). Section 60-6,192 [HN16] specifies the requirements for admissibility of evidence from a radar device:

- (1) . . . [HN17] Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
  - (a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;
  - (b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so [sic] as to allow a minimum possibility of distortion or outside interference;
  - (c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; [\*15] and
  - (d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

[HN18] Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required. *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988).

Nichols relies on *State v. Lomack*, *supra*, which held that the evidence presented concerning the radar unit lacked the required indicia of accuracy. The Nebraska Supreme Court determined that the evidence failed to establish that the tuning fork used to test the radar unit was particularly designed and intended for testing the radar unit in question and that the evidence thereby failed to show that the tuning fork was in any way associated with the radar unit tested. Next, there was no evidence that the tuning fork itself was in any way properly tested, calibrated, or certified as a reliable gauge of a radar [\*16] unit's accuracy. Nichols argues that the present case is similar to *State v. Lomack*, *supra*, because Wallace's testimony failed to establish that the tuning forks he used were designed and intended for testing the radar unit in Wallace's car. He further contends that there was no evidence that the tuning forks were properly tested, calibrated, or certified as a reliable gauge of the radar unit's accuracy.

Wallace testified that the radar unit in his car came with the two tuning forks he uses to check the calibration of the unit. Wallace also testified that a certificate of calibration and accuracy was issued for the radar unit in his patrol car and the tuning forks used to check the calibration of the unit. Thus, the tuning forks had been tested and certified. The fact that the certificate was issued for the radar unit and the tuning forks together demonstrates that the tuning forks are intended for that particular unit. This case is not similar to *State v. Lomack*, *supra*. Rather, Wallace's testimony showed that all of the necessary foundational requirements of § 60-6,192 had been met. As noted above, he testified that the radar unit performs a "power-on [\*17] test" when it is turned on which checks its indicator light segments. He testified that he next activates a "self-test" in which the unit goes through a series of tests. Wallace further testified that the unit also runs an automatic self-test every 10 minutes. Finally, Wallace testified that he performs a "tuning fork test" which checks the calibration of the radar unit. Wallace testified that on June 1, 2002, he performed the tuning fork test prior to and subsequently to issuing Nichols the citation, and that the unit was working properly. Accordingly, Nichols' argument that there was insufficient foundation for evidence of the radar readout is without merit. We conclude that all of Nichols' arguments in support of his first assignment of error alleging that the State presented insufficient evidence are without merit.

Nichols also assigns that the trial court erred in overruling his motion for directed verdict. [HN19] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, [\*18] and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[HN20] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). [HN21] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

We have concluded that there was sufficient evidence for the trial court to find beyond a reasonable doubt that Nichols was guilty of speeding. Having so concluded, we cannot say that there is a complete failure of evidence to establish an essential element of the crime charged or that the evidence is so doubtful in character, lacking [\*19] probative value, that a finding of guilt based on such evidence cannot be sustained. Therefore, Nichols' assignment of error regarding his motion for directed verdict is without merit.

Finally, Nichols assigns that the trial court erred in overruling his motion for *Brady* material. In his motion, Nichols requested, among other things, that the court order the State to produce any information it had related to the margin of

error of the radar unit. In his brief, Nichols contends that the margin of error is exculpatory evidence that the State should have disclosed prior to trial. However, Nichols' motion does not mention "exculpatory evidence" and the motion appears to be a motion for discovery. We first note that because this [HN22] case involves a traffic violation, Nichols does not have a statutory right to discovery. *Neb. Rev. Stat. § 29-1912(1)* (Reissue 1995) provides for pretrial discovery in criminal cases "when a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty . . . ." The traffic violation with which Nichols was charged does [\*20] not fit within the parameters of § 29-1912.

However, [HN23] the U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that [HN24] the suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

[HN25] "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

*State v. Phelps*, 241 Neb. at 730-31, 490 N.W.2d at 692, quoting *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

The radar unit's margin of error was not exculpatory [\*21] evidence, as it was neither favorable to Nichols nor material to his guilt or to his punishment. As stated previously, the radar unit showed that Nichols was driving 76 m.p.h. Given the margin of error of plus or minus 2 m.p.h. as testified to by Wallace, the minimum speed at which Nichols could have possibly been driving was 74 m.p.h. Assuming this to have been Nichols' speed, Nichols would still be guilty of speeding and would be subject to the same \$ 25 fine as if he had been driving 75 m.p.h. as alleged in the citation. The maximum speed at which Nichols could have been driving, based on the margin of error, is 78 m.p.h., and a finding of guilt of this speed would subject Nichols to a higher fine of \$ 75. Clearly, the evidence regarding the radar unit's margin of error was not exculpatory. Nichols' assignment of error is without merit.

## CONCLUSION

Based on the preceding analysis, we conclude that the State presented sufficient evidence to support a finding of guilt on the charge of speeding. We further conclude that the trial court did not err in overruling Nichols' motion for *Brady* material. Accordingly, we affirm the order of the district court affirming the trial court's [\*22] order finding Nichols guilty of speeding.

Affirmed.

60 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**Virginia J. Haghighi, Personal Representative of the Estate of Shahrokh H.  
Haghighi, deceased, appellant, v. State of Nebraska et al., appellees.**

**No. A-01-275.**

**NEBRASKA COURT OF APPEALS**

*2002 Neb. App. LEXIS 226*

**August 27, 2002, Filed**

**NOTICE:** [\*1] NOT DESIGNATED FOR PERMANENT PUBLICATION.

**PRIOR HISTORY:** Appeal from the District Court for Hamilton County: Michael Owens, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff, decedent's wife and his estate's personal representative, sued defendants, the State, its highway construction contractor, and its subcontractor, for wrongful death under the State Tort Claims Act. The jury returned a verdict for the contractor and subcontractor, and the District Court for Hamilton County, Nebraska, entered judgment for the State and dismissed the wife's amended petition. The wife appealed as to all defendants.

**OVERVIEW:** The suit arose out of a two-vehicle accident on a temporary road diverting traffic from a state highway. The wife alleged defendants were negligent in planning and building the temporary road, and in choosing and maintaining the traffic control devices used to warn motorists of the diversion from the highway. The wife's principal issues on appeal concerned the district court's denial of a motion for mistrial made during jury selection, the admissibility of expert and lay witness testimony, and certain jury instructions. During voir dire a potential juror responded to a question by counsel by stating that he was familiar with the case because he had been the insurance agent for the driver that collided with the decedent. The wife asserted that the failure to give the jury a limiting instruction to disregard the juror's comment was grounds for a mistrial. The appellate court disagreed, finding that the prospective juror's statement was not clearly a violation of the rule against mentioning liability insurance in a personal injury action, that the wife did not request a limiting instruction, and that the district court had expeditiously excused the potential juror without further ado.

**OUTCOME:** The court affirmed the jury's verdict for the contractor and the subcontractor, as well as the district court's order finding for the State and dismissing the wife's amended petition.

**CORE TERMS:** shoofly, curve, speed, radius, trooper, fog, barricade, driver, juror, collision, highway, speed limit,

measurement, calculation, interrogatory, mistrial, traffic, traffic control, disclosure, speeding, driving, posted, visibility, prejudiced, weather, abuse of discretion, driven, track, relevancy, objected

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

[HN1] On an appeal from a judgment rendered in an action brought under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.

#### ***Civil Procedure > Trials > Bench Trials***

#### ***Civil Procedure > Judgments > General Overview***

#### ***Civil Procedure > Appeals > Standards of Review > General Overview***

[HN2] In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party.

#### ***Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN3] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

#### ***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

#### ***Civil Procedure > Trials > Motions for Mistrial***

#### ***Criminal Law & Procedure > Trials > Motions for Mistrial***

[HN4] A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.

#### ***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN5] A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.

#### ***Civil Procedure > Trials > Motions for Mistrial***

[HN6] Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. But, it is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially on the facts and circumstances peculiar to the case under consideration.

#### ***Civil Procedure > Trials > Jury Trials > Jurors > General Overview***

#### ***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN7] On appeal, the party asserting an abuse of discretion has the burden of proving that claim.

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN8] In proceedings where the Nebraska Rules of Evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.

***Civil Procedure > Judicial Officers > Judges > Discretion******Evidence > Procedural Considerations > Rulings on Evidence***

[HN9] Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

***Evidence > Testimony > Experts > Helpfulness***

[HN10] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Neb. Rev. Stat. § 27-702* (Reissue 1995).

***Civil Procedure > Discovery > Misconduct******Civil Procedure > Appeals > Standards of Review > Abuse of Discretion******Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct***

[HN11] Determination of an appropriate sanction for failure to comply with a discovery request rests with the trial court's discretion, which will not be disturbed on appeal absent a showing of an abuse of that discretion. Preclusion of an expert witness' testimony (or a portion thereof), as a sanction for noncompliance with the discovery rules, may be an appropriate sanction.

***Civil Procedure > Trials > Closing Arguments > Improper Remarks******Civil Procedure > Trials > Closing Arguments > Objections******Civil Procedure > Appeals > Reviewability > Preservation for Review***

[HN12] In order to preserve, as ground for appeal, opponent's misconduct during closing argument, an aggrieved party must have objected to the allegedly improper remarks no later than the conclusion of argument.

***Evidence > Relevance > Relevant Evidence***

[HN13] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Neb. Rev. Stat. § 27-401* (Reissue 1995)

***Civil Procedure > Appeals > Standards of Review > Reversible Errors******Evidence > Procedural Considerations > Rulings on Evidence***

[HN14] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review******Evidence > Procedural Considerations > Rulings on Evidence******Evidence > Testimony > Experts > General Overview***

[HN15] There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding

that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous.

***Evidence > Testimony > Experts > General Overview***

[HN16] Whether one qualifies as an expert depends on the factual basis or reality underlying the witness's title or claim to expertise. Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Evidence > Testimony > Examination > General Overview***

[HN17] Proof of speed for purposes besides a criminal conviction for speeding can be by other means such as visual observations.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN18] See *Neb. Rev. Stat. § 60-6,185* (Reissue 1998).

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN19] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Civil Procedure > Appeals > Standards of Review > Reversible Errors***

[HN20] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

***Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Prejudicial Errors***

***Criminal Law & Procedure > Appeals > Reversible Errors > Evidence***

***Criminal Law & Procedure > Appeals > Reversible Errors > Jury Instructions***

[HN21] In the context of a claim of reversible error from a trial court's refusal to give a requested instruction, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.

**COUNSEL:** Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

Jeffrey H. Jacobsen and Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee All Road Barricades.

Robert S. Keith and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee United Contractors, Inc.

Don Stenberg, Attorney General, and Matthew F. Gaffey for appellee State of Nebraska.

**JUDGES:** Hannon, Sievers, and Moore, Judges.

**OPINION BY:** Sievers

**OPINION:**

Sievers, Judge.

This wrongful death action against the State, its highway construction contractor, and its subcontractor stems from a two-vehicle accident on a temporary road diverting traffic from a state highway. The operative petition alleged the defendants were negligent in planning and building the temporary road, referred to as a "shoofly," as well as in choosing and maintaining the traffic control devices used to warn motorists of the diversion from the highway. The main issues are the overruling of a motion for mistrial made during jury selection, [\*2] the admissibility of expert and lay witness testimony, and certain jury instructions.

#### FACTUAL BACKGROUND

Shahrokh H. Haghighi (Haghighi) was driving five passengers in a 1991 Plymouth Voyager van eastbound from Grand Island to Aurora, Nebraska, on U.S. Highway 34 on the morning of September 14, 1997. Vicki Schwaninger, a nurse who regularly commuted to Grand Island to work, left Aurora for Grand Island in her 1984 Pontiac Bonneville, also driving on Highway 34. Although the sun had risen, fog reduced visibility to between 50 and 100 yards in the area. About 4 miles west of Aurora, the temporary "shoofly" road diverted traffic away from and then back onto Highway 34. It was constructed north of the highway in May 1997 during a railroad overpass project called the Aurora West Viaduct.

At about 8:45 a.m., as she approached the "shoofly" from the east, Schwaninger encountered at least seven signs at different points along the highway warning of the construction zone and diversion of traffic from Highway 34. A reverse curve sign that advised of a 45-m.p.h. speed limit was posted near the "shoofly" entrance. The established highway was blocked by barrels and three barricades where the [\*3] "shoofly" began on the east end of the project. The barricades were "staggered" along the inner edge of the curve, directing traffic from Highway 34 so as to "channel" traffic onto the "shoofly." Each barricade was topped by a yellow "Type A" light which was not on at that time because "Type A" lights are designed to flash only at night regardless of the weather conditions, such as fog. Although she was supposed to move to the right, off the highway and onto the "shoofly," Schwaninger's car proceeded straight, crossed the yellow, solid, double centerline of the road, and entered the eastbound lane. Her car collided with Haghighi's eastbound van as it was about to exit the "shoofly" by turning left to reenter the permanent highway. As a result of the collision, Haghighi and Schwaninger both were killed.

#### PROCEDURAL BACKGROUND

Virginia J. Haghighi (Virginia), Haghighi's wife and his estate's personal representative, filed an amended petition in Hamilton County District Court against the State, pursuant to the State Tort Claims Act, as well as against the project contractor, United Contractors, Inc. (United), and the project subcontractor, All Road Barricades, Inc. (All Road) (collectively [\*4] the defendants), alleging Haghighi's wrongful death. The court reported in a pretrial order that all matters would be tried to a jury but that the jury's verdict with respect to the State would be only advisory. Virginia's amended petition included 13 allegations that the defendants negligently designed and built the "shoofly." The allegations relevant to this appeal are: (1) The "reverse turns" located at the east end of the "shoofly" were built with "turn radii" smaller than provided for by the project's specifications and plans, (2) there was a failure to properly calculate the safe speed for negotiating turns to enter and leave the "shoofly," (3) there were not "steady or flashing burn" lights on the barricades that were properly maintained and operating at the time of the accident, and (4) there was a failure to properly paint appropriate lines, including edge lines and fog lines, on the highway in the area where the

Schwaninger-Haghighi collision occurred.

In her "Answers to Interrogatories," Virginia identified as an expert witness James Summers, a consulting engineer she hired to perform "accident reconstruction," which Summers characterized as "Documenting that site." Virginia [\*5] said that Summers would testify to how far each vehicle skidded before impact, the speed of each vehicle at the start of its respective skid, and the vehicles' speeds at the time of impact. In response to a query about the substance of the facts and opinions to which her experts were expected to testify, Virginia wrote, "Mr. Summers' opinions are based on his education and experience; measurements and observations made at the accident site . . ." Virginia's "Answers to Interrogatories" also mentioned James Loumiet, whose curriculum vitae identified him as a Missouri-based accident reconstructionist who possesses a mechanical engineering degree but who is unlicensed as an engineer. According to Virginia, Loumiet would testify "that the safe design speed of the turn where the accident occurred was 21 miles per hour and that given the difference between the safe speed of the turn and a speed limit of the roadway, the turn was hazardous to the motoring public."

During jury selection, the trial court asked whether any of the prospective jurors were familiar with the case. One juror stated he knew of the case because he had been Schwaninger's insurance agent. The court excused this juror [\*6] without further questioning. At the conclusion of voir dire, Virginia did not pass the jury for cause and moved for a mistrial. The trial judge said, "I tried to handle that as quickly as I could by getting [the juror] in the back of the courtroom, and I guess I just don't see that there was any real violation of the insurance rule." Finding that the juror's statement did not prejudice Virginia, the court overruled her motion for mistrial.

United moved to have Summers' testimony limited to his previously disclosed opinions. United's motion noted that Virginia's opening statement alluded to the fact that Summers would testify to the degree of curvature of the road where the Schwaninger-Haghighi collision occurred. United pointed out that Virginia had not disclosed in her "Answers to Interrogatories" that Summers would testify to the curve radius and that in Summers' deposition, he specifically stated he would offer no opinion of the "geometry." United also introduced two opinion letters from Summers, neither of which included an indication that he was going to testify to the curve radius. The trial court found that Summers' testimony would be limited to the issues addressed in Virginia's [\*7] "Answers to Interrogatories," a prior deposition of Summers, and his letters. According to the court, the defendants would be prejudiced by Summers' testimony about his calculated curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred because it constituted expert testimony that Virginia failed to disclose in her "Answers to Interrogatories."

Later at trial, Summers explained how he took measurements at the scene and several diagrams of the scene drawn from his measurements and observations were admitted as evidence. Virginia attempted to elicit testimony from him about whether one needed to be an engineer to calculate a curve's radius. The State and United objected on the basis of foundation, the court sustained the objection, and Virginia made an offer of proof. Outside the jury's presence, Summers testified that his calculations showed that the curve radius where the Schwaninger-Haghighi accident occurred measured 198 feet although it was intended to measure 1,909 feet or 582 meters, according to the construction plans. After the offer of proof, the defendants renewed their objection, which the trial court sustained. In short, according to Summers, the curve [\*8] as built was much sharper than the plans called for.

Loumiet testified before the jury that the plans showed that the radius of the first curve on the east end of the "shoofly," where the Schwaninger-Haghighi accident occurred, was to be 582 meters, or 1,910 feet. He said that he reviewed the survey, Summers' diagrams, and photographs of the site to determine that the radius of the curve where the collision occurred was only 205 feet. According to Loumiet, the safe speed to drive the "shoofly," regardless of the weather conditions, was 23 m.p.h. Further, he said that a vehicle driven faster than 45 m.p.h. would lose traction on the curves and its tires would slide. Loumiet also said that in his opinion, the lack of a continuous fog line between Highway 34 and the "shoofly" would confuse drivers, and that such lack, considered together with the other "inadequacies of the work zone," was a proximate cause of the Schwaninger-Haghighi accident.

John Martin, United's supervisor at the time of the Aurora West Viaduct project, testified that he had driven

through the "shoofly" at a speed of 45 m.p.h. or faster without any problems. Martin also testified that he had driven through the construction [\*9] zone during the daytime when visibility was low--and probably while fog was present--and that the traffic control devices were visible. He said he had observed traffic flow through the "shoofly" and that nothing indicated that 45 m.p.h. was an unsafe speed. Russel Higgins, the district construction engineer for the Nebraska Department of Roads at that time, said he drove through the "shoofly" at 55 m.p.h. and experienced no problem keeping his car within its own lane. Higgins also said that the 2-year project was designed in anticipation that inclement weather, including fog, would occur at some time. Martin further testified that the State "staked" the "shoofly" and that United did not doublecheck the measurements because it was the State's responsibility to correctly follow the construction plan. However, he admitted that it was United's responsibility to ensure that the "staking" conformed to the plans, although he observed that surveying was not a bid item in United's contract with the State.

Ross Lyon, a Nebraska State Patrol trooper, testified that he investigated the Schwaninger-Haghighi collision. He said that he had worked as a trooper since 1989 and had investigated traffic [\*10] accidents between that time and the accident at issue here. During direct examination, Virginia established Trooper Lyon's position as an accident investigator for this particular collision and asked him about the tire marks he measured and his testing of the barricade lights. Trooper Lyon testified that it was foggy at the scene of the accident and that he tested at least one of the lights on the three barricades blocking access to the old highway. He noted that when he covered the light with a firefighter's coat in order to simulate darkness, the light did not activate.

On cross-examination, after Virginia's foundation objection was overruled, Trooper Lyon stated that he examined Schwaninger's car after the accident. He testified that he determined from the filaments in her undamaged headlight and taillights that they were not on at the time of the collision. On redirect, Trooper Lyon responded to Virginia's question about examining the headlight filaments at the accident scene by stating that he was trained to conduct such an analysis.

Kevin Brewer, a professor of civil engineering and a consulting engineer specializing in traffic engineering, testified that he had conducted studies [\*11] involving human interaction with traffic control devices. The State asked Brewer whether he was familiar with studies and technical literature showing how drivers "track through curves." Virginia objected that it had not been disclosed that Brewer would opine about how drivers react to traffic control devices, but the court decided the question was within the disclosure made and overruled Virginia's objection. Brewer testified that drivers negotiating curves relied on the centerline of the road for guidance more than the fog line. Brewer also testified that even under low visibility conditions during the day, the reflectivity of the traffic control devices is more useful to drivers than the low-level illumination provided by flashing lights.

Nebraska State Patrol Trooper Dan Bartling testified that he stopped Schwaninger for speeding through the east end of the "shoofly" on August 18, 1997, although he did not testify to the speed at which she was clocked, as the trial court agreed with Virginia that insufficient foundation had been laid concerning the calibration of his radar unit. We do not repeat the details of the attempt to lay foundation.

Richard Kwiatkowski, the Department [\*12] of Roads' manager for the Aurora West Viaduct project, testified that he was required to follow § 422.02 of the "1996 Metric Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," published by the Nebraska Department of Roads and dealing with temporary traffic control devices. He later referred to that manual as containing only "guidelines," but then again confirmed that he was required to follow § 422.02. Section 422.02(9)(b) provides, "All lights shall be turned on from sunset to sunrise or when visibility is less than 400 m." But Kwiatkowski also testified that United recommended the "Type A" lights which operate only at night regardless of the presence of fog, that these lights are on an approved products list, and that United's recommendation was submitted to the materials and test division of the Department of Roads. Daniel Waddle, a signing and marking engineer in the traffic engineering division of the Department of Roads, testified that the State no longer used "Type C" steady-burning lights because it was difficult to ensure batteries in them were functioning and because the lights were only marginally effective. Kwiatkowski further [\*13] testified that All Road was responsible for locating the traffic control devices and maintaining them, but that All Road cooperated with United to ensure the traffic control devices stayed in the proper position.

At the jury instruction conference, Virginia proposed the addition of two paragraphs to her allegations of negligence against United in instruction No. 6. One paragraph alleged the building of the reverse turns at the east end of the "shoofly" with a smaller radius than provided for in the project's plans and specifications. The other paragraph alleged a failure to equip the barricades with lights activated and operating at the time of the Schwaninger-Haghighi accident. Virginia also proposed including this paragraph in her allegations of negligence against All Road. The trial court included the first paragraph in instruction No. 6 but did not adopt the second paragraph alleging negligence by United and All Road concerning the lights on the barricades.

During closing arguments, United speculated that Summers did not testify to the length of the curve radius of the "shoofly" where the Schwaninger-Haghighi collision occurred either because Summers lacked confidence in making [\*14] that calculation from the measurements he provided in his diagrams or because Virginia did not like the result of his curve radius calculation. Virginia did not object to this characterization of the evidence. In its closing argument, the State said that the contract between it and a contractor may be modified. Virginia objected that the State was not properly characterizing the evidence, but the trial court allowed the State to continue. The State alleged that the contract between it and United was changed to reflect that United would choose the type of lights to use on the barricades and that the State approved the choice of the "Type A" lights, which do not function in the fog except at night.

The jury returned a verdict for United and All Road, and the trial court entered judgment for those defendants. As to the State, the court found that Virginia alleged that it failed to properly design the "shoofly" and improperly determined the safe speed for motorists approaching and driving through the "shoofly." The trial court reviewed the evidence and determined that the State was not negligent in any of the respects alleged by Virginia. The trial court entered judgment for the State [\*15] and dismissed Virginia's amended petition. Virginia appeals as to all defendants.

#### ASSIGNMENTS OF ERROR

Virginia assigns error, restated and reordered as follows, to the trial court's (1) overruling her motion for mistrial made during jury selection; (2) failing to admit Summers' testimony concerning his measurements and calculations of the radius of the curve where the Schwaninger-Haghighi accident occurred; (3) admitting without proper foundation testimony that others had driven through the "shoofly" at 45 m.p.h. or faster without incident; (4) receiving expert testimony from Trooper Lyon regarding his opinion that neither the van's nor the car's headlights were on at the time of the collision; (5) admitting Brewer's opinion of how drivers "track through curves"; (6) admitting Trooper Bartling's testimony that he stopped Schwaninger in the east end of the "shoofly" for exceeding the posted speed limit when there was no established foundation for the traffic stop, i.e., that the radar device was properly calibrated and operating correctly and that the conditions existing at the time of that stop were the same as those that existed the morning of the accident; (7) overruling Virginia's [\*16] objection to the State's comment during closing argument that it had modified its contract with United, on the ground that the statement was not supported by the evidence or pleadings; and (8) failing to instruct the jury on all the theories alleged by Virginia against the defendants when they were supported by the evidence.

#### STANDARD OF REVIEW

With respect to the judgment for the State, [HN1] on an appeal from a judgment rendered in an action brought under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). [HN2] In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). [HN3] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996). In determining [\*17] the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Id.* Other applicable standards of review will be set forth as

necessary.

#### ANALYSIS

##### *Overruling Motion for Mistrial Made During Voir Dire.*

During jury selection, the court asked, "Do any of you know anything about this case either by talking to someone or reading about it in the newspaper?" One prospective juror said, "Well, I was the insurance agent for Vicki Schwaninger." The court excused the juror without further questioning, but Virginia asserts that the failure to give the jury a limiting instruction to disregard the juror's comment was grounds for a mistrial. She also asserts that the suggestion that Schwaninger possessed "liability coverage is almost certain to be incapable of being removed once the suggestion is set in place." Brief for appellant at 28. Virginia notes that the defendants argued that Schwaninger's negligence was the sole, proximate cause of the collision. She concludes that [\*18] because Schwaninger was not a party to the lawsuit, the juror's comment greatly prejudiced her in that the jury panel had information that a person not present in the lawsuit and whom the defendants blamed for the accident had insurance.

[HN4] A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. *State v. Harker*, 1 Neb. App. 438, 498 N.W.2d 345 (1993). [HN5] A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). [HN6] Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. *Stumpf v. Nintendo of America*, 257 Neb. 920, 601 N.W.2d 735 (1999). But, it is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. *Id.* See *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). [\*19] Whether the disclosure is such as to constitute error depends essentially on the facts and circumstances peculiar to the case under consideration. *Stumpf v. Nintendo of America*, *supra*.

Typically, in cases in which insurance is mentioned and a motion for mistrial follows, the defendant or plaintiff questioned a witness who responded by mentioning the presence or absence of insurance. See, *Lange Bldg. & Farm Supply v. Open Circle "R"*, *supra*; *Stumpf v. Nintendo of America*, *supra*. Here, "insurance" was unexpectedly mentioned during voir dire when the court inquired of the potential jurors' knowledge of the Schwaninger-Haghighi case. It would be difficult to predict that the judge's completely proper question would elicit such a response. In *Bergendahl v. Rabeler*, 131 Neb. 538, 268 N.W. 459 (1936), the Nebraska Supreme Court held that during a proceeding to impanel a jury in an action to recover damages alleged to have arisen from negligence, counsel should scrupulously avoid any act, statement, or question of such a nature as might inform the jurors as to whether or not the defendant is indemnified by one not a party [\*20] to the action against having to pay any verdict the jury may render against him. That holding influenced the decision in *Nama v. Shada*, 150 Neb. 362, 34 N.W.2d 650 (1948), an action for personal injuries and property damage resulting from an automobile accident. But, in *Nama*, the court found that a prospective juror's reference to the defendant's insurance coverage pertained to life, rather than automobile, insurance and that thus, the jury was not misled to believe that the defendant was indemnified against paying damages if a verdict was entered against him.

In the instant case, it was not counsel but the trial judge who asked the question that elicited a response indicating that Schwaninger had an "insurance agent." The prospective juror's response does not inform whether Schwaninger had either liability insurance on her automobile or a possible settlement between Schwaninger's insurance company and Virginia. What one derives from the juror's volunteered statement is open to speculation. The court's phrasing of the question asking whether any of the prospective jurors knew "anything about this case" does not necessarily imply that the insurance agent knew of [\*21] the case because Schwaninger acquired automobile accident insurance through him. It is equally possible that he was Schwaninger's life insurance agent or handled her medical insurance. [HN7] On appeal, the party asserting an abuse of discretion has the burden of proving that claim. *Bailey v. AMISUB*, 1 Neb. App. 56, 489 N.W.2d 323 (1992). The prospective juror's statement is not such that the other prospective jurors could only conclude from it that Schwaninger had automobile liability insurance that had inured to Virginia's benefit. The

prospective juror's statement is not clearly a violation of the rule against mentioning liability insurance in a personal injury action.

The court could have instructed the jury to disregard the mention of Schwaninger's insurance, but Virginia did not request such a limiting instruction. Further, such an instruction obviously runs the risk of calling attention to a matter which may not have been noticed or heard by all prospective jurors. And, the court handled the matter expeditiously by excusing the potential juror without further ado. The trial judge was in the unique position to observe the matter firsthand. On the basis of the record [\*22] before us, we cannot say that the trial court abused its discretion by handling this matter quickly and without fanfare, and we find no basis to say now that a mistrial should have been declared.

*Excluding Testimony of Calculation of "Shoofly" Curve Radius.*

The trial court's decision to limit Summers' testimony to the facts and opinions provided in Virginia's "Answers to Interrogatories" precluded him from testifying to his calculation of the curve radius of the "shoofly" where the Schwaninger-Haghighi collision occurred. Virginia argues that Summers' testimony was not expert opinion testimony, but even if the testimony was so characterized, the defendants would not have been surprised or prejudiced by the admission of Summers' calculation of the curve radius.

[HN8] In proceedings where the Nebraska Rules of Evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000); *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). [HN9] Admission of expert witness testimony is ordinarily [\*23] within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Id.* See *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holden v. Wal-Mart Stores, supra*.

[HN10] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Neb. Rev. Stat. § 27-702* (Reissue 1995). Virginia disputes that Summers' calculation of the curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred from his admissible measurements is an expert opinion such that she needed to disclose it on her "Answers to Interrogatories." She claims it is merely a calculation from known facts.

Virginia failed to specifically reveal in her "Answers to Interrogatories" [\*24] that Summers would testify to the curve radius in response to the defendants' specific request. Subpart "c" of "Interrogatory No. 15" asks for "the substance of the *facts* and the opinions to which the expert is expected to testify." (Emphasis supplied.) Here, the assertion--be it fact, opinion, or some combination thereof--that the curve radius was too short, making the curve too sharp, which in turn made the posted speed limit too high, is the core of Virginia's claim and her expert's supporting testimony. We have no trouble in concluding that disclosure of the radius of the curve should have been made.

Virginia also argues that the defendants would not have been prejudiced by this evidence from Summers. But, the allegedly "too short" radius of the curve was the key to Virginia's case, and failing to disclose it cannot help but prejudice the defendant's trial preparation. While she contends that her "Answers to Interrogatories" disclosed that Summers made observations and measurements at the accident site, we think that the request for "[a] summary of the grounds of each opinion" mandates disclosure of why the speed limit was too high, which requires disclosure of the curve [\*25] radius. Virginia should have disclosed this expected testimony.

She also contends that Summers' diagrams necessarily incorporating the curve's radius were disclosed before trial and admitted into evidence. But, nowhere on the diagrams admitted into evidence do we see Summers' calculation of the curve's radius. Virginia further contends that her other expert, Loumiet, used this information to calculate the curve radius; that the defendants knew this calculation was a key issue of the case; and that they were prepared to address it

via their own experts' testimony.

But, the point here is that "trial by ambush and surprise" has been replaced by disclosure, and disclosure of this key portion of Summers' findings, regardless of whether it was a fact he found or an opinion he held, was not made. [HN11] Determination of an appropriate sanction for failure to comply with a discovery request rests with the trial court's discretion, which will not be disturbed on appeal absent a showing of an abuse of that discretion. *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994). Preclusion of an expert witness' testimony (or a portion thereof), as a sanction for noncompliance [\*26] with the discovery rules, may be an appropriate sanction. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

Moreover, Loumiet testified that he used Summers' measurements to determine the calculation of the curve radius, and he testified to that result. Notably, Loumiet's measurement of the curve radius corroborated the measurement Summers would have testified to, had he been permitted to do so by the court. Thus, Virginia was able to get Summers' curve radius number before the jury and judge, albeit by her other expert.

Nonetheless, Virginia contends that exclusion of Summers' findings actually prejudiced her because it gave the appearance that his findings differed from Loumiet's results. Virginia supports this last contention by pointing out that United mentioned during closing arguments that Virginia did not ask Summers about the curve radius for fear that his opinion would contradict Loumiet's opinion based on Summers' measurements. While the comments of counsel for United do not properly reflect why Summers did not testify on this point and constitute an inaccurate and improper commentary on the evidence, the record shows that Virginia [\*27] did not object; nor is this matter assigned and argued as error. Thus, while the comment was improper, as counsel knew that Summers' testimony had been restricted by the court's ruling, the matter was not preserved for appellate review. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (objection made to opposing counsel's argument after jury has retired generally is not timely and will not be reviewed on appeal); *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998) [HN12] (in order to preserve, as ground for appeal, opponent's misconduct during closing argument, aggrieved party must have objected to improper remarks no later than at conclusion of argument). In conclusion, the remarks made during closing do not make the trial court's ruling excluding Summers' testimony of the curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred an abuse of its discretion.

#### *Admissibility of Testimony of Speeds Driven Through "Shoofly."*

Virginia asserts that the trial court abused its discretion by admitting the testimony of Martin and Higgins that they had driven the "shoofly" at speeds of or exceeding 45 m.p.h. and had seen others driving [\*28] the "shoofly" without incident, because the defendants failed to establish the proper foundation and relevance of this testimony. She claims this testimony was unreliable, inadmissible, and prejudicial. Virginia bases this assertion on the fact that the witnesses did not testify that the weather and traffic conditions existing at the time they passed through the "shoofly" were substantially similar to the conditions existing at the time of the Schwaninger-Haghighi collision.

Martin testified that he drove through the "shoofly" several times a day during the construction period when visibility was low--and probably while fog was present--and that he could see the traffic control devices. Further, he testified that he observed others drive through the "shoofly" without problem and that 45 m.p.h. did not appear to be an unsafe speed. Higgins said he drove through the "shoofly" on a weekly basis and experienced no problem keeping his car in its lane while driving 55 m.p.h. Higgins added that the 2-year construction project was designed with the knowledge that inclement weather, including fog, would occur during that span of time.

We analyze Virginia's argument about this evidence from [\*29] the standpoint of relevancy. [HN13] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Neb. Rev. Stat. § 27-401* (Reissue 1995). [HN14] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Sacco v. Carothers*, 257 Neb.

672, 601 N.W.2d 493 (1999). To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Id.*

One of Virginia's allegations is that the defendants were negligent in setting a 45-m.p.h. speed limit for the "shoofly" because it was an unsafe speed given her experts' calculation of the radius of the curve. Loumiet testified that the speed at which the "shoofly" curve could be driven without feeling excessive amounts of discomfort that would prompt the driver to take some "evasive" action, such as braking or flattening the [\*30] path of the curve, was 23 m.p.h. He also testified that the critical speed for that curve was 45 m.p.h. Loumiet defined critical speed as the speed above which a vehicle's tires lose traction on the roadway and the vehicle begins to slide. Loumiet ultimately concluded that the advisory speed limit for the curve should have been 20 m.p.h. The defendants' witnesses, Martin and Higgins, testified that they drove through the "shoofly" at 45 m.p.h. or faster on a regular basis and did not feel discomfort. Neither did their vehicles skid sideways, as Loumiet's testimony would have them doing at that speed. Their testimony was relevant to determining whether the defendants were negligent in approving a 45-m.p.h. advisory speed limit for the "shoofly." Additionally, the testimony rebutted Loumiet's testimony that the advisory speed limit should have been 20 m.p.h., regardless of the weather conditions. Martin and Higgins were closely acquainted with the "shoofly" and had driven it many times, and as mentioned above, their personal experience was relevant. It was not reversible error for the trial court to admit their testimony as to this issue.

*Admissibility of Opinion of Each Vehicle's [\*31] Use of Headlights.*

Trooper Lyon testified over Virginia's objection that his examination of both vehicles' headlight and taillight filaments revealed that neither vehicle's lights were on at the time of the Schwaninger-Haghighi collision. Virginia argues that the trial court should have sustained her objection to his testimony because the defendants failed to establish Trooper Lyon's expertise in this area.

[HN15] There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). [HN16] Whether one qualifies as an expert depends on the factual basis or reality underlying the witness' title or claim to expertise. *Id.* Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993).

In the [\*32] instant case, the day after Trooper Lyon testified, Virginia made a motion to strike all of his testimony because he was not qualified as an "expert filament reader." But, the trial court agreed with the defendants' argument that Virginia had qualified Trooper Lyon as such an expert when she asked on redirect examination whether he performed the analysis at the accident site and he replied that he "had some training on that." Therefore, the court overruled Virginia's motion to strike. We note that Virginia also qualified Trooper Lyon as an accident reconstruction expert during her direct examination of him in order to elicit his testimony as to the length of tire marks at the scene. In our opinion, headlight filament analysis is part of accident reconstruction and Trooper Lyon's opinion on this issue was relevant and of some probative value. Therefore, we find that the trial court did not clearly err in determining that Virginia herself qualified Trooper Lyon as an expert whose opinion as to whether the Schwaninger car's and Haghighi van's lights were on or off at the time of the accident should be admitted. Virginia also argues that the admission of Trooper Lyon's testimony prejudiced [\*33] her because it was offered to rebut her evidence that fog severely restricted the drivers' visibility or to demonstrate Schwaninger's negligence. However, the evidence was admitted without limitation, and the jury was free to use it for any purpose--including reasoning that if the vision of the drivers was restricted by the fog, they would have had their lights on.

*Expert's Testimony Regarding How Drivers "Track Through Curves."*

Over Virginia's objection, Brewer testified concerning various studies and technical literature on which he based

his opinion of how drivers "track through curves." Virginia alleges a lack of evidence that the driving conditions analyzed in the "studies and technical literature" were similar to those existing at the time of the Schwaninger-Haghighi collision.

We again begin with the proposition that the admissibility of this testimony is determined by its relevance. See § 27-401. The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999).

In the instant case, [\*34] Loumiet testified that the fog line as it existed before construction of the "shoofly" had not been completely obliterated as required and that a gap existed between the old and new fog lines. According to Loumiet, pavement markings in areas of poor visibility are critical for drivers to maintain their position on the road. He opined that the failure to erase the old fog line and create a continuous fog line between Highway 34 and the "shoofly" was evidence of negligence. He further opined that the "inadequacies of the work zone" were a causative factor in the Schwaninger-Haghighi collision. Therefore, Brewer's testimony that drivers "track through curves" by relying on the centerline rather than the fog line was offered to rebut Loumiet's testimony and was relevant. It is, of course, not for us to choose between the two witnesses.

Virginia further alleges that Brewer's opinions were not revealed by the State in its pretrial disclosures. She concludes that because the court sustained the defendants' objections to Summers' testimony, the trial court abused its discretion by failing to rule consistently concerning the admissibility of expert testimony, thereby prejudicing Virginia. [\*35] We observe that the State revealed that "Dr. Brewer is expected to render the following opinions: 1. The roadway containing the location where the collision occurred was properly signed, marked and maintained under generally accepted engineering standards." If, as Brewer opined, drivers "track through curves" using the centerline, then the "shoofly" was at least arguably properly marked as set forth in the "defendant's third supplemental answer to plaintiff's interrogatories." This testimony contrasts with Loumiet's testimony that a continuous fog line was needed to qualify the "shoofly" as properly marked.

Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). See *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). We find no abuse of discretion in the trial court's admission of Brewer's testimony, because the State's disclosure of Brewer's expected opinions was sufficiently broad to include his testimony that drivers "track through curves" by using the centerline rather than the [\*36] fog line.

*Testimony Schwaninger Was Previously Stopped for Exceeding Speed Limit.*

Following her voir dire examination of Trooper Bartling, Virginia objected to further testimony from him because he was not able to provide sufficient foundation to show that his radar unit was properly calibrated when he stopped Schwaninger on August 18, 1997. The problem was that Trooper Bartling was unable to say that the tuning forks used to check the accuracy of the radar unit had been calibrated within the preceding year. The trial court sustained Virginia's objection to the extent that Trooper Bartling was not allowed to testify to the speed at which he clocked Schwaninger on August 18. After the ruling on this objection, Trooper Bartling did testify, without objection, that he issued Schwaninger a citation for speeding in the "shoofly" where the posted speed limit was 45 m.p.h.

Virginia cites *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991), for the proposition that a lack of foundation establishing that the radar device used by Trooper Bartling to clock Schwaninger was calibrated and operating properly precludes testimony that Schwaninger had been stopped for [\*37] speeding. We do not disagree with this broad proposition because *Neb. Rev. Stat. § 60-6,192* (Reissue 1998) provides that "the results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue" when the equipment is properly

calibrated. Here, proper calibration was not shown and the trial court did not let in the evidence of the speed at which Schwaninger was clocked. However, the question largely involves whether her actual speed on August 18, 1997, was "in issue." *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998), is an example of where speed is not at issue. There, the court said that where the evidence of speed was not to establish a driver's rate of travel on a speeding charge, but was introduced as one piece of evidence tending to establish that the driver operated a vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property, that speed was not "at issue" under § 60-6,192 and therefore did not need to be corroborated [\*38] by a microwave, mechanical, or electronic speed measurement device. 254 Neb. at 465, 577 N.W.2d at 264. [HN17] Clearly, proof of speed for purposes besides a criminal conviction for speeding can be by other means such as visual observations. *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001).

Here, the matter at issue was not whether Schwaninger had committed a crime on August 18, 1997, by driving at a particular speed. Therefore, her actual speed on August 18 was not in issue. Instead, the evidence of the prior speeding ticket went to the issue of whether she had knowledge or notice of the posted speed limit in the "shoofly." The issuance of the speeding ticket, regardless of how fast she was clocked, tends to prove her knowledge of the speed limit. Additionally, it is of no small significance that Trooper Bartling testified without objection that he wrote Schwaninger a citation for speeding.

As part of this assignment of error, Virginia again argues the defendants' failure to establish that the conditions existing on the date of Trooper Bartling's stop of Schwaninger were the same conditions as existed at the time of the Schwaninger-Haghighi accident. [\*39] While Virginia repeatedly advances what we take to be a foundational argument that the defendants' evidence failed to show the same conditions as those that existed the morning of the accident, our basic difficulty with this argument is that the core of Virginia's case does not depend on the weather or lighting conditions. Instead, her case rests on the premise that the curve was built too sharp, making the posted speed limit of 45 m.p.h. the crucial speed at which a vehicle could not hold to its lane in the curve--regardless of conditions. Thus, the conditions at the time of the accident play little or no role in Virginia's proof of negligence. And, we might add that even if such conditions were at issue, it was Schwaninger's duty as the driver of a vehicle to take the conditions into account in determining the speed she would drive the "shoofly." [HN18] *Neb. Rev. Stat., § 60-6,185* (Reissue 1998) provides:

No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. A person shall drive at a safe and appropriate speed when approaching and [\*40] crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions. Virginia characterizes Trooper Bartling's testimony that Schwaninger was exceeding the posted advisory speed limit of 45 m.p.h. while driving through the "shoofly" a month before the collision between her car and the Haghighi van as evidence of a similar occurrence.

But, in addition to proof of notice of the posted speed limit, it is also evidence introduced to rebut Loumiet's testimony that a vehicle traveling in its own lane could not navigate through the eastern end of the "shoofly" at a speed exceeding 45 m.p.h. without the driver's losing control--regardless of the environmental conditions. The admission of Trooper Bartling's testimony without proof of the same conditions as existed the morning of the accident does not render his testimony inadmissible on the basis of foundation or relevancy, given the absolute position of Virginia's experts that this curve could not be driven at 45 [\*41] m.p.h. In conclusion, the trial court did not abuse its discretion by admitting the testimony from Trooper Bartling that he issued a speeding citation to Schwaninger on August 18, 1997, while she was driving in the "shoofly" which had a posted speed limit of 45 m.p.h.

*Contract Modification Alleged by  
State in its Closing Argument.*

Virginia notes that neither the State nor United ever alleged in their pleadings a modification of the contract between them or an agreement not to enforce certain contractual provisions. Virginia referred specifically to § 422.02(9)(b) of the "1996 Metric Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," published by the Nebraska Department of Roads, which provides, "All lights shall be turned on from sunset to sunrise or when visibility is less than 400 m." She points out that Kwiatkowski testified that these standard specifications became part of every construction contract in the state and were in force at the time of this construction project. Kwiatkowski also testified that he was required to follow § 422.02. But, the State said during closing arguments that it and United agreed not to enforce [\*42] a provision of the contract, which agreement shifted the burden of proposing the type of lights used to United, subject to the State's approval of that recommendation. Virginia objected, citing mischaracterization of the evidence, but the trial court allowed the State to "continue." She argues that she was prejudiced by the State's closing statement.

[HN19] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999); *Bailey v. AMISUB*, 1 Neb. App. 56, 489 N.W.2d 323 (1992). Our review of the record shows that Kwiatkowski testified that United recommended "Type A" lights for use on the barricades although they do not meet the requirement of activating when visibility is less than 400 meters because they flash only at night. And, Kwiatkowski testified that these lights were on the State's approved products list and that United's recommendation to use "Type A" lights was submitted to the materials and test division of the Department of Roads for the State's approval. Clearly, there was [\*43] evidence of a contractual modification from Kwiatkowski's uncontroverted testimony that United was allowed to recommend the type of lights used on the barricades, albeit subject to the State's approval. Thus, this assignment of error is without merit.

*Statement of Case: Content of Jury Instruction No. 6.*

Virginia asserts that at the jury instruction conference, she requested the addition of two paragraphs to her allegations of negligence against United set forth in instruction No. 6, and that the court erred by not including these paragraphs in that instruction. One paragraph reads, "In building the reverse turns at the east edge of the construction site with a radius smaller than that provided for in the plans and specifications in the project." Our review of the record shows that the trial court used this precise language. Thus, this assignment of error lacks merit.

The other requested paragraph reads, "In failing to equip the barricades of the subject work zone with lights activated and operating at the time of the accident." Virginia also requested that the court add this paragraph to the allegations of negligence made against All Road. Virginia argues that because she presented [\*44] evidence of these defendants' duties to ensure light activation and operation, as found in the "1996 Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," the court's failure to instruct the jury on this theory prevented the jury from considering the evidence against either of these defendants.

[HN20] Whether a jury instruction given by a trial court is correct is a question of law. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.* To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal [\*45] to give the tendered instruction. *Id.*; *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

The evidence shows that United recommended the "Type A" lights used on the barricades and had some responsibility for maintaining the position of the barricades. The evidence also shows that All Road was responsible for maintaining the lights, i.e., ensuring their functioning. And, although it was foggy the morning of the

Schwaninger-Haghighi accident, the lights were not meant to be activated during the day even by fog. Trooper Lyon's testimony was that a light on a barricade failed to activate when he tested it by draping a firefighter's coat over it. Thus, there was evidence that the lights may not have been functioning as intended, but the lights used would not have been on at the time of the accident in any event because it was daylight.

The court did not give a specific instruction about the lights, but, rather, instructed the jury that Virginia claimed that United and All Road were negligent "in erecting and maintaining signs, barricades, lights, and pavement markings in such a manner as to confuse or disorient motorists traveling around [\*46] and through the construction site." Thus, the matter of whether the lights were proper was clearly before the jury for its consideration.

[HN21] Moreover, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). The trial court's broad instruction on signage and lights certainly includes Virginia's allegation that United and All Road failed to equip the barricades with lights which should have been operating at the time of the accident. The instruction encompasses Virginia's allegation that the lights on the barricades were not the proper type of light and did not function as would be expected at the time of the accident. Therefore, we conclude that this assignment of error is without merit.

#### CONCLUSION

We have considered the entire record in light of the assignments of error and find no error. Thus, we affirm the jury's verdict for United [\*47] and All Road, as well as the court's order finding for the State and dismissing Virginia's amended petition.

Affirmed.

61 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**Virginia J. Haghighi, Personal Representative of the Estate of Shahrokh H.  
Haghighi, deceased, appellant, v. State of Nebraska et al., appellees.**

**No. A-01-275.**

**NEBRASKA COURT OF APPEALS**

*2002 Neb. App. LEXIS 226*

**August 27, 2002, Filed**

**NOTICE:** [\*1] NOT DESIGNATED FOR PERMANENT PUBLICATION.

**PRIOR HISTORY:** Appeal from the District Court for Hamilton County: Michael Owens, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff, decedent's wife and his estate's personal representative, sued defendants, the State, its highway construction contractor, and its subcontractor, for wrongful death under the State Tort Claims Act. The jury returned a verdict for the contractor and subcontractor, and the District Court for Hamilton County, Nebraska, entered judgment for the State and dismissed the wife's amended petition. The wife appealed as to all defendants.

**OVERVIEW:** The suit arose out of a two-vehicle accident on a temporary road diverting traffic from a state highway. The wife alleged defendants were negligent in planning and building the temporary road, and in choosing and maintaining the traffic control devices used to warn motorists of the diversion from the highway. The wife's principal issues on appeal concerned the district court's denial of a motion for mistrial made during jury selection, the admissibility of expert and lay witness testimony, and certain jury instructions. During voir dire a potential juror responded to a question by counsel by stating that he was familiar with the case because he had been the insurance agent for the driver that collided with the decedent. The wife asserted that the failure to give the jury a limiting instruction to disregard the juror's comment was grounds for a mistrial. The appellate court disagreed, finding that the prospective juror's statement was not clearly a violation of the rule against mentioning liability insurance in a personal injury action, that the wife did not request a limiting instruction, and that the district court had expeditiously excused the potential juror without further ado.

**OUTCOME:** The court affirmed the jury's verdict for the contractor and the subcontractor, as well as the district court's order finding for the State and dismissing the wife's amended petition.

**CORE TERMS:** shoofly, curve, speed, radius, trooper, fog, barricade, driver, juror, collision, highway, speed limit,

measurement, calculation, interrogatory, mistrial, traffic, traffic control, disclosure, speeding, driving, posted, visibility, prejudiced, weather, abuse of discretion, driven, track, relevancy, objected

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review***

[HN1] On an appeal from a judgment rendered in an action brought under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.

#### ***Civil Procedure > Trials > Bench Trials***

#### ***Civil Procedure > Judgments > General Overview***

#### ***Civil Procedure > Appeals > Standards of Review > General Overview***

[HN2] In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party.

#### ***Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN3] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

#### ***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

#### ***Civil Procedure > Trials > Motions for Mistrial***

#### ***Criminal Law & Procedure > Trials > Motions for Mistrial***

[HN4] A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.

#### ***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN5] A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.

#### ***Civil Procedure > Trials > Motions for Mistrial***

[HN6] Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. But, it is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially on the facts and circumstances peculiar to the case under consideration.

#### ***Civil Procedure > Trials > Jury Trials > Jurors > General Overview***

#### ***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN7] On appeal, the party asserting an abuse of discretion has the burden of proving that claim.

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN8] In proceedings where the Nebraska Rules of Evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.

***Civil Procedure > Judicial Officers > Judges > Discretion******Evidence > Procedural Considerations > Rulings on Evidence***

[HN9] Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

***Evidence > Testimony > Experts > Helpfulness***

[HN10] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Neb. Rev. Stat. § 27-702* (Reissue 1995).

***Civil Procedure > Discovery > Misconduct******Civil Procedure > Appeals > Standards of Review > Abuse of Discretion******Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct***

[HN11] Determination of an appropriate sanction for failure to comply with a discovery request rests with the trial court's discretion, which will not be disturbed on appeal absent a showing of an abuse of that discretion. Preclusion of an expert witness' testimony (or a portion thereof), as a sanction for noncompliance with the discovery rules, may be an appropriate sanction.

***Civil Procedure > Trials > Closing Arguments > Improper Remarks******Civil Procedure > Trials > Closing Arguments > Objections******Civil Procedure > Appeals > Reviewability > Preservation for Review***

[HN12] In order to preserve, as ground for appeal, opponent's misconduct during closing argument, an aggrieved party must have objected to the allegedly improper remarks no later than the conclusion of argument.

***Evidence > Relevance > Relevant Evidence***

[HN13] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Neb. Rev. Stat. § 27-401* (Reissue 1995)

***Civil Procedure > Appeals > Standards of Review > Reversible Errors******Evidence > Procedural Considerations > Rulings on Evidence***

[HN14] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review******Evidence > Procedural Considerations > Rulings on Evidence******Evidence > Testimony > Experts > General Overview***

[HN15] There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding

that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous.

***Evidence > Testimony > Experts > General Overview***

[HN16] Whether one qualifies as an expert depends on the factual basis or reality underlying the witness's title or claim to expertise. Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Evidence > Testimony > Examination > General Overview***

[HN17] Proof of speed for purposes besides a criminal conviction for speeding can be by other means such as visual observations.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN18] See *Neb. Rev. Stat. § 60-6,185* (Reissue 1998).

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN19] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Civil Procedure > Appeals > Standards of Review > Reversible Errors***

[HN20] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

***Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Prejudicial Errors***

***Criminal Law & Procedure > Appeals > Reversible Errors > Evidence***

***Criminal Law & Procedure > Appeals > Reversible Errors > Jury Instructions***

[HN21] In the context of a claim of reversible error from a trial court's refusal to give a requested instruction, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.

**COUNSEL:** Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

Jeffrey H. Jacobsen and Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee All Road Barricades.

Robert S. Keith and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee United Contractors, Inc.

Don Stenberg, Attorney General, and Matthew F. Gaffey for appellee State of Nebraska.

**JUDGES:** Hannon, Sievers, and Moore, Judges.

**OPINION BY:** Sievers

**OPINION:**

Sievers, Judge.

This wrongful death action against the State, its highway construction contractor, and its subcontractor stems from a two-vehicle accident on a temporary road diverting traffic from a state highway. The operative petition alleged the defendants were negligent in planning and building the temporary road, referred to as a "shoofly," as well as in choosing and maintaining the traffic control devices used to warn motorists of the diversion from the highway. The main issues are the overruling of a motion for mistrial made during jury selection, [\*2] the admissibility of expert and lay witness testimony, and certain jury instructions.

#### FACTUAL BACKGROUND

Shahrokh H. Haghighi (Haghighi) was driving five passengers in a 1991 Plymouth Voyager van eastbound from Grand Island to Aurora, Nebraska, on U.S. Highway 34 on the morning of September 14, 1997. Vicki Schwaninger, a nurse who regularly commuted to Grand Island to work, left Aurora for Grand Island in her 1984 Pontiac Bonneville, also driving on Highway 34. Although the sun had risen, fog reduced visibility to between 50 and 100 yards in the area. About 4 miles west of Aurora, the temporary "shoofly" road diverted traffic away from and then back onto Highway 34. It was constructed north of the highway in May 1997 during a railroad overpass project called the Aurora West Viaduct.

At about 8:45 a.m., as she approached the "shoofly" from the east, Schwaninger encountered at least seven signs at different points along the highway warning of the construction zone and diversion of traffic from Highway 34. A reverse curve sign that advised of a 45-m.p.h. speed limit was posted near the "shoofly" entrance. The established highway was blocked by barrels and three barricades where the [\*3] "shoofly" began on the east end of the project. The barricades were "staggered" along the inner edge of the curve, directing traffic from Highway 34 so as to "channel" traffic onto the "shoofly." Each barricade was topped by a yellow "Type A" light which was not on at that time because "Type A" lights are designed to flash only at night regardless of the weather conditions, such as fog. Although she was supposed to move to the right, off the highway and onto the "shoofly," Schwaninger's car proceeded straight, crossed the yellow, solid, double centerline of the road, and entered the eastbound lane. Her car collided with Haghighi's eastbound van as it was about to exit the "shoofly" by turning left to reenter the permanent highway. As a result of the collision, Haghighi and Schwaninger both were killed.

#### PROCEDURAL BACKGROUND

Virginia J. Haghighi (Virginia), Haghighi's wife and his estate's personal representative, filed an amended petition in Hamilton County District Court against the State, pursuant to the State Tort Claims Act, as well as against the project contractor, United Contractors, Inc. (United), and the project subcontractor, All Road Barricades, Inc. (All Road) (collectively [\*4] the defendants), alleging Haghighi's wrongful death. The court reported in a pretrial order that all matters would be tried to a jury but that the jury's verdict with respect to the State would be only advisory. Virginia's amended petition included 13 allegations that the defendants negligently designed and built the "shoofly." The allegations relevant to this appeal are: (1) The "reverse turns" located at the east end of the "shoofly" were built with "turn radii" smaller than provided for by the project's specifications and plans, (2) there was a failure to properly calculate the safe speed for negotiating turns to enter and leave the "shoofly," (3) there were not "steady or flashing burn" lights on the barricades that were properly maintained and operating at the time of the accident, and (4) there was a failure to properly paint appropriate lines, including edge lines and fog lines, on the highway in the area where the

Schwaninger-Haghighi collision occurred.

In her "Answers to Interrogatories," Virginia identified as an expert witness James Summers, a consulting engineer she hired to perform "accident reconstruction," which Summers characterized as "Documenting that site." Virginia [\*5] said that Summers would testify to how far each vehicle skidded before impact, the speed of each vehicle at the start of its respective skid, and the vehicles' speeds at the time of impact. In response to a query about the substance of the facts and opinions to which her experts were expected to testify, Virginia wrote, "Mr. Summers' opinions are based on his education and experience; measurements and observations made at the accident site . . ." Virginia's "Answers to Interrogatories" also mentioned James Loumiet, whose curriculum vitae identified him as a Missouri-based accident reconstructionist who possesses a mechanical engineering degree but who is unlicensed as an engineer. According to Virginia, Loumiet would testify "that the safe design speed of the turn where the accident occurred was 21 miles per hour and that given the difference between the safe speed of the turn and a speed limit of the roadway, the turn was hazardous to the motoring public."

During jury selection, the trial court asked whether any of the prospective jurors were familiar with the case. One juror stated he knew of the case because he had been Schwaninger's insurance agent. The court excused this juror [\*6] without further questioning. At the conclusion of voir dire, Virginia did not pass the jury for cause and moved for a mistrial. The trial judge said, "I tried to handle that as quickly as I could by getting [the juror] in the back of the courtroom, and I guess I just don't see that there was any real violation of the insurance rule." Finding that the juror's statement did not prejudice Virginia, the court overruled her motion for mistrial.

United moved to have Summers' testimony limited to his previously disclosed opinions. United's motion noted that Virginia's opening statement alluded to the fact that Summers would testify to the degree of curvature of the road where the Schwaninger-Haghighi collision occurred. United pointed out that Virginia had not disclosed in her "Answers to Interrogatories" that Summers would testify to the curve radius and that in Summers' deposition, he specifically stated he would offer no opinion of the "geometry." United also introduced two opinion letters from Summers, neither of which included an indication that he was going to testify to the curve radius. The trial court found that Summers' testimony would be limited to the issues addressed in Virginia's [\*7] "Answers to Interrogatories," a prior deposition of Summers, and his letters. According to the court, the defendants would be prejudiced by Summers' testimony about his calculated curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred because it constituted expert testimony that Virginia failed to disclose in her "Answers to Interrogatories."

Later at trial, Summers explained how he took measurements at the scene and several diagrams of the scene drawn from his measurements and observations were admitted as evidence. Virginia attempted to elicit testimony from him about whether one needed to be an engineer to calculate a curve's radius. The State and United objected on the basis of foundation, the court sustained the objection, and Virginia made an offer of proof. Outside the jury's presence, Summers testified that his calculations showed that the curve radius where the Schwaninger-Haghighi accident occurred measured 198 feet although it was intended to measure 1,909 feet or 582 meters, according to the construction plans. After the offer of proof, the defendants renewed their objection, which the trial court sustained. In short, according to Summers, the curve [\*8] as built was much sharper than the plans called for.

Loumiet testified before the jury that the plans showed that the radius of the first curve on the east end of the "shoofly," where the Schwaninger-Haghighi accident occurred, was to be 582 meters, or 1,910 feet. He said that he reviewed the survey, Summers' diagrams, and photographs of the site to determine that the radius of the curve where the collision occurred was only 205 feet. According to Loumiet, the safe speed to drive the "shoofly," regardless of the weather conditions, was 23 m.p.h. Further, he said that a vehicle driven faster than 45 m.p.h. would lose traction on the curves and its tires would slide. Loumiet also said that in his opinion, the lack of a continuous fog line between Highway 34 and the "shoofly" would confuse drivers, and that such lack, considered together with the other "inadequacies of the work zone," was a proximate cause of the Schwaninger-Haghighi accident.

John Martin, United's supervisor at the time of the Aurora West Viaduct project, testified that he had driven

through the "shoofly" at a speed of 45 m.p.h. or faster without any problems. Martin also testified that he had driven through the construction [\*9] zone during the daytime when visibility was low--and probably while fog was present--and that the traffic control devices were visible. He said he had observed traffic flow through the "shoofly" and that nothing indicated that 45 m.p.h. was an unsafe speed. Russel Higgins, the district construction engineer for the Nebraska Department of Roads at that time, said he drove through the "shoofly" at 55 m.p.h. and experienced no problem keeping his car within its own lane. Higgins also said that the 2-year project was designed in anticipation that inclement weather, including fog, would occur at some time. Martin further testified that the State "staked" the "shoofly" and that United did not doublecheck the measurements because it was the State's responsibility to correctly follow the construction plan. However, he admitted that it was United's responsibility to ensure that the "staking" conformed to the plans, although he observed that surveying was not a bid item in United's contract with the State.

Ross Lyon, a Nebraska State Patrol trooper, testified that he investigated the Schwaninger-Haghighi collision. He said that he had worked as a trooper since 1989 and had investigated traffic [\*10] accidents between that time and the accident at issue here. During direct examination, Virginia established Trooper Lyon's position as an accident investigator for this particular collision and asked him about the tire marks he measured and his testing of the barricade lights. Trooper Lyon testified that it was foggy at the scene of the accident and that he tested at least one of the lights on the three barricades blocking access to the old highway. He noted that when he covered the light with a firefighter's coat in order to simulate darkness, the light did not activate.

On cross-examination, after Virginia's foundation objection was overruled, Trooper Lyon stated that he examined Schwaninger's car after the accident. He testified that he determined from the filaments in her undamaged headlight and taillights that they were not on at the time of the collision. On redirect, Trooper Lyon responded to Virginia's question about examining the headlight filaments at the accident scene by stating that he was trained to conduct such an analysis.

Kevin Brewer, a professor of civil engineering and a consulting engineer specializing in traffic engineering, testified that he had conducted studies [\*11] involving human interaction with traffic control devices. The State asked Brewer whether he was familiar with studies and technical literature showing how drivers "track through curves." Virginia objected that it had not been disclosed that Brewer would opine about how drivers react to traffic control devices, but the court decided the question was within the disclosure made and overruled Virginia's objection. Brewer testified that drivers negotiating curves relied on the centerline of the road for guidance more than the fog line. Brewer also testified that even under low visibility conditions during the day, the reflectivity of the traffic control devices is more useful to drivers than the low-level illumination provided by flashing lights.

Nebraska State Patrol Trooper Dan Bartling testified that he stopped Schwaninger for speeding through the east end of the "shoofly" on August 18, 1997, although he did not testify to the speed at which she was clocked, as the trial court agreed with Virginia that insufficient foundation had been laid concerning the calibration of his radar unit. We do not repeat the details of the attempt to lay foundation.

Richard Kwiatkowski, the Department [\*12] of Roads' manager for the Aurora West Viaduct project, testified that he was required to follow § 422.02 of the "1996 Metric Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," published by the Nebraska Department of Roads and dealing with temporary traffic control devices. He later referred to that manual as containing only "guidelines," but then again confirmed that he was required to follow § 422.02. Section 422.02(9)(b) provides, "All lights shall be turned on from sunset to sunrise or when visibility is less than 400 m." But Kwiatkowski also testified that United recommended the "Type A" lights which operate only at night regardless of the presence of fog, that these lights are on an approved products list, and that United's recommendation was submitted to the materials and test division of the Department of Roads. Daniel Waddle, a signing and marking engineer in the traffic engineering division of the Department of Roads, testified that the State no longer used "Type C" steady-burning lights because it was difficult to ensure batteries in them were functioning and because the lights were only marginally effective. Kwiatkowski further [\*13] testified that All Road was responsible for locating the traffic control devices and maintaining them, but that All Road cooperated with United to ensure the traffic control devices stayed in the proper position.

At the jury instruction conference, Virginia proposed the addition of two paragraphs to her allegations of negligence against United in instruction No. 6. One paragraph alleged the building of the reverse turns at the east end of the "shoofly" with a smaller radius than provided for in the project's plans and specifications. The other paragraph alleged a failure to equip the barricades with lights activated and operating at the time of the Schwaninger-Haghighi accident. Virginia also proposed including this paragraph in her allegations of negligence against All Road. The trial court included the first paragraph in instruction No. 6 but did not adopt the second paragraph alleging negligence by United and All Road concerning the lights on the barricades.

During closing arguments, United speculated that Summers did not testify to the length of the curve radius of the "shoofly" where the Schwaninger-Haghighi collision occurred either because Summers lacked confidence in making [\*14] that calculation from the measurements he provided in his diagrams or because Virginia did not like the result of his curve radius calculation. Virginia did not object to this characterization of the evidence. In its closing argument, the State said that the contract between it and a contractor may be modified. Virginia objected that the State was not properly characterizing the evidence, but the trial court allowed the State to continue. The State alleged that the contract between it and United was changed to reflect that United would choose the type of lights to use on the barricades and that the State approved the choice of the "Type A" lights, which do not function in the fog except at night.

The jury returned a verdict for United and All Road, and the trial court entered judgment for those defendants. As to the State, the court found that Virginia alleged that it failed to properly design the "shoofly" and improperly determined the safe speed for motorists approaching and driving through the "shoofly." The trial court reviewed the evidence and determined that the State was not negligent in any of the respects alleged by Virginia. The trial court entered judgment for the State [\*15] and dismissed Virginia's amended petition. Virginia appeals as to all defendants.

#### ASSIGNMENTS OF ERROR

Virginia assigns error, restated and reordered as follows, to the trial court's (1) overruling her motion for mistrial made during jury selection; (2) failing to admit Summers' testimony concerning his measurements and calculations of the radius of the curve where the Schwaninger-Haghighi accident occurred; (3) admitting without proper foundation testimony that others had driven through the "shoofly" at 45 m.p.h. or faster without incident; (4) receiving expert testimony from Trooper Lyon regarding his opinion that neither the van's nor the car's headlights were on at the time of the collision; (5) admitting Brewer's opinion of how drivers "track through curves"; (6) admitting Trooper Bartling's testimony that he stopped Schwaninger in the east end of the "shoofly" for exceeding the posted speed limit when there was no established foundation for the traffic stop, i.e., that the radar device was properly calibrated and operating correctly and that the conditions existing at the time of that stop were the same as those that existed the morning of the accident; (7) overruling Virginia's [\*16] objection to the State's comment during closing argument that it had modified its contract with United, on the ground that the statement was not supported by the evidence or pleadings; and (8) failing to instruct the jury on all the theories alleged by Virginia against the defendants when they were supported by the evidence.

#### STANDARD OF REVIEW

With respect to the judgment for the State, [HN1] on an appeal from a judgment rendered in an action brought under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). [HN2] In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). [HN3] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996). In determining [\*17] the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Id.* Other applicable standards of review will be set forth as

necessary.

#### ANALYSIS

##### *Overruling Motion for Mistrial Made During Voir Dire.*

During jury selection, the court asked, "Do any of you know anything about this case either by talking to someone or reading about it in the newspaper?" One prospective juror said, "Well, I was the insurance agent for Vicki Schwaninger." The court excused the juror without further questioning, but Virginia asserts that the failure to give the jury a limiting instruction to disregard the juror's comment was grounds for a mistrial. She also asserts that the suggestion that Schwaninger possessed "liability coverage is almost certain to be incapable of being removed once the suggestion is set in place." Brief for appellant at 28. Virginia notes that the defendants argued that Schwaninger's negligence was the sole, proximate cause of the collision. She concludes that [\*18] because Schwaninger was not a party to the lawsuit, the juror's comment greatly prejudiced her in that the jury panel had information that a person not present in the lawsuit and whom the defendants blamed for the accident had insurance.

[HN4] A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. *State v. Harker*, 1 Neb. App. 438, 498 N.W.2d 345 (1993). [HN5] A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). [HN6] Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. *Stumpf v. Nintendo of America*, 257 Neb. 920, 601 N.W.2d 735 (1999). But, it is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. *Id.* See *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). [\*19] Whether the disclosure is such as to constitute error depends essentially on the facts and circumstances peculiar to the case under consideration. *Stumpf v. Nintendo of America*, *supra*.

Typically, in cases in which insurance is mentioned and a motion for mistrial follows, the defendant or plaintiff questioned a witness who responded by mentioning the presence or absence of insurance. See, *Lange Bldg. & Farm Supply v. Open Circle "R"*, *supra*; *Stumpf v. Nintendo of America*, *supra*. Here, "insurance" was unexpectedly mentioned during voir dire when the court inquired of the potential jurors' knowledge of the Schwaninger-Haghighi case. It would be difficult to predict that the judge's completely proper question would elicit such a response. In *Bergendahl v. Rabeler*, 131 Neb. 538, 268 N.W. 459 (1936), the Nebraska Supreme Court held that during a proceeding to impanel a jury in an action to recover damages alleged to have arisen from negligence, counsel should scrupulously avoid any act, statement, or question of such a nature as might inform the jurors as to whether or not the defendant is indemnified by one not a party [\*20] to the action against having to pay any verdict the jury may render against him. That holding influenced the decision in *Nama v. Shada*, 150 Neb. 362, 34 N.W.2d 650 (1948), an action for personal injuries and property damage resulting from an automobile accident. But, in *Nama*, the court found that a prospective juror's reference to the defendant's insurance coverage pertained to life, rather than automobile, insurance and that thus, the jury was not misled to believe that the defendant was indemnified against paying damages if a verdict was entered against him.

In the instant case, it was not counsel but the trial judge who asked the question that elicited a response indicating that Schwaninger had an "insurance agent." The prospective juror's response does not inform whether Schwaninger had either liability insurance on her automobile or a possible settlement between Schwaninger's insurance company and Virginia. What one derives from the juror's volunteered statement is open to speculation. The court's phrasing of the question asking whether any of the prospective jurors knew "anything about this case" does not necessarily imply that the insurance agent knew of [\*21] the case because Schwaninger acquired automobile accident insurance through him. It is equally possible that he was Schwaninger's life insurance agent or handled her medical insurance. [HN7] On appeal, the party asserting an abuse of discretion has the burden of proving that claim. *Bailey v. AMISUB*, 1 Neb. App. 56, 489 N.W.2d 323 (1992). The prospective juror's statement is not such that the other prospective jurors could only conclude from it that Schwaninger had automobile liability insurance that had inured to Virginia's benefit. The

prospective juror's statement is not clearly a violation of the rule against mentioning liability insurance in a personal injury action.

The court could have instructed the jury to disregard the mention of Schwaninger's insurance, but Virginia did not request such a limiting instruction. Further, such an instruction obviously runs the risk of calling attention to a matter which may not have been noticed or heard by all prospective jurors. And, the court handled the matter expeditiously by excusing the potential juror without further ado. The trial judge was in the unique position to observe the matter firsthand. On the basis of the record [\*22] before us, we cannot say that the trial court abused its discretion by handling this matter quickly and without fanfare, and we find no basis to say now that a mistrial should have been declared.

*Excluding Testimony of Calculation of "Shoofly" Curve Radius.*

The trial court's decision to limit Summers' testimony to the facts and opinions provided in Virginia's "Answers to Interrogatories" precluded him from testifying to his calculation of the curve radius of the "shoofly" where the Schwaninger-Haghighi collision occurred. Virginia argues that Summers' testimony was not expert opinion testimony, but even if the testimony was so characterized, the defendants would not have been surprised or prejudiced by the admission of Summers' calculation of the curve radius.

[HN8] In proceedings where the Nebraska Rules of Evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000); *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). [HN9] Admission of expert witness testimony is ordinarily [\*23] within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Id.* See *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holden v. Wal-Mart Stores, supra*.

[HN10] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Neb. Rev. Stat. § 27-702* (Reissue 1995). Virginia disputes that Summers' calculation of the curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred from his admissible measurements is an expert opinion such that she needed to disclose it on her "Answers to Interrogatories." She claims it is merely a calculation from known facts.

Virginia failed to specifically reveal in her "Answers to Interrogatories" [\*24] that Summers would testify to the curve radius in response to the defendants' specific request. Subpart "c" of "Interrogatory No. 15" asks for "the substance of the *facts* and the opinions to which the expert is expected to testify." (Emphasis supplied.) Here, the assertion--be it fact, opinion, or some combination thereof--that the curve radius was too short, making the curve too sharp, which in turn made the posted speed limit too high, is the core of Virginia's claim and her expert's supporting testimony. We have no trouble is concluding that disclosure of the radius of the curve should have been made.

Virginia also argues that the defendants would not have been prejudiced by this evidence from Summers. But, the allegedly "too short" radius of the curve was the key to Virginia's case, and failing to disclose it cannot help but prejudice the defendant's trial preparation. While she contends that her "Answers to Interrogatories" disclosed that Summers made observations and measurements at the accident site, we think that the request for "[a] summary of the grounds of each opinion" mandates disclosure of why the speed limit was too high, which requires disclosure of the curve [\*25] radius. Virginia should have disclosed this expected testimony.

She also contends that Summers' diagrams necessarily incorporating the curve's radius were disclosed before trial and admitted into evidence. But, nowhere on the diagrams admitted into evidence do we see Summers' calculation of the curve's radius. Virginia further contends that her other expert, Loumiet, used this information to calculate the curve radius; that the defendants knew this calculation was a key issue of the case; and that they were prepared to address it

via their own experts' testimony.

But, the point here is that "trial by ambush and surprise" has been replaced by disclosure, and disclosure of this key portion of Summers' findings, regardless of whether it was a fact he found or an opinion he held, was not made. [HN11] Determination of an appropriate sanction for failure to comply with a discovery request rests with the trial court's discretion, which will not be disturbed on appeal absent a showing of an abuse of that discretion. *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994). Preclusion of an expert witness' testimony (or a portion thereof), as a sanction for noncompliance [\*26] with the discovery rules, may be an appropriate sanction. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

Moreover, Loumiet testified that he used Summers' measurements to determine the calculation of the curve radius, and he testified to that result. Notably, Loumiet's measurement of the curve radius corroborated the measurement Summers would have testified to, had he been permitted to do so by the court. Thus, Virginia was able to get Summers' curve radius number before the jury and judge, albeit by her other expert.

Nonetheless, Virginia contends that exclusion of Summers' findings actually prejudiced her because it gave the appearance that his findings differed from Loumiet's results. Virginia supports this last contention by pointing out that United mentioned during closing arguments that Virginia did not ask Summers about the curve radius for fear that his opinion would contradict Loumiet's opinion based on Summers' measurements. While the comments of counsel for United do not properly reflect why Summers did not testify on this point and constitute an inaccurate and improper commentary on the evidence, the record shows that Virginia [\*27] did not object; nor is this matter assigned and argued as error. Thus, while the comment was improper, as counsel knew that Summers' testimony had been restricted by the court's ruling, the matter was not preserved for appellate review. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (objection made to opposing counsel's argument after jury has retired generally is not timely and will not be reviewed on appeal); *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998) [HN12] (in order to preserve, as ground for appeal, opponent's misconduct during closing argument, aggrieved party must have objected to improper remarks no later than at conclusion of argument). In conclusion, the remarks made during closing do not make the trial court's ruling excluding Summers' testimony of the curve radius of the "shoofly" where the Schwaninger-Haghighi accident occurred an abuse of its discretion.

#### *Admissibility of Testimony of Speeds Driven Through "Shoofly."*

Virginia asserts that the trial court abused its discretion by admitting the testimony of Martin and Higgins that they had driven the "shoofly" at speeds of or exceeding 45 m.p.h. and had seen others driving [\*28] the "shoofly" without incident, because the defendants failed to establish the proper foundation and relevance of this testimony. She claims this testimony was unreliable, inadmissible, and prejudicial. Virginia bases this assertion on the fact that the witnesses did not testify that the weather and traffic conditions existing at the time they passed through the "shoofly" were substantially similar to the conditions existing at the time of the Schwaninger-Haghighi collision.

Martin testified that he drove through the "shoofly" several times a day during the construction period when visibility was low--and probably while fog was present--and that he could see the traffic control devices. Further, he testified that he observed others drive through the "shoofly" without problem and that 45 m.p.h. did not appear to be an unsafe speed. Higgins said he drove through the "shoofly" on a weekly basis and experienced no problem keeping his car in its lane while driving 55 m.p.h. Higgins added that the 2-year construction project was designed with the knowledge that inclement weather, including fog, would occur during that span of time.

We analyze Virginia's argument about this evidence from [\*29] the standpoint of relevancy. [HN13] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Neb. Rev. Stat. § 27-401* (Reissue 1995). [HN14] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Sacco v. Carothers*, 257 Neb.

672, 601 N.W.2d 493 (1999). To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Id.*

One of Virginia's allegations is that the defendants were negligent in setting a 45-m.p.h. speed limit for the "shoofly" because it was an unsafe speed given her experts' calculation of the radius of the curve. Loumiet testified that the speed at which the "shoofly" curve could be driven without feeling excessive amounts of discomfort that would prompt the driver to take some "evasive" action, such as braking or flattening the [\*30] path of the curve, was 23 m.p.h. He also testified that the critical speed for that curve was 45 m.p.h. Loumiet defined critical speed as the speed above which a vehicle's tires lose traction on the roadway and the vehicle begins to slide. Loumiet ultimately concluded that the advisory speed limit for the curve should have been 20 m.p.h. The defendants' witnesses, Martin and Higgins, testified that they drove through the "shoofly" at 45 m.p.h. or faster on a regular basis and did not feel discomfort. Neither did their vehicles skid sideways, as Loumiet's testimony would have them doing at that speed. Their testimony was relevant to determining whether the defendants were negligent in approving a 45-m.p.h. advisory speed limit for the "shoofly." Additionally, the testimony rebutted Loumiet's testimony that the advisory speed limit should have been 20 m.p.h., regardless of the weather conditions. Martin and Higgins were closely acquainted with the "shoofly" and had driven it many times, and as mentioned above, their personal experience was relevant. It was not reversible error for the trial court to admit their testimony as to this issue.

*Admissibility of Opinion of Each Vehicle's [\*31] Use of Headlights.*

Trooper Lyon testified over Virginia's objection that his examination of both vehicles' headlight and taillight filaments revealed that neither vehicle's lights were on at the time of the Schwaninger-Haghighi collision. Virginia argues that the trial court should have sustained her objection to his testimony because the defendants failed to establish Trooper Lyon's expertise in this area.

[HN15] There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). [HN16] Whether one qualifies as an expert depends on the factual basis or reality underlying the witness' title or claim to expertise. *Id.* Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993).

In the [\*32] instant case, the day after Trooper Lyon testified, Virginia made a motion to strike all of his testimony because he was not qualified as an "expert filament reader." But, the trial court agreed with the defendants' argument that Virginia had qualified Trooper Lyon as such an expert when she asked on redirect examination whether he performed the analysis at the accident site and he replied that he "had some training on that." Therefore, the court overruled Virginia's motion to strike. We note that Virginia also qualified Trooper Lyon as an accident reconstruction expert during her direct examination of him in order to elicit his testimony as to the length of tire marks at the scene. In our opinion, headlight filament analysis is part of accident reconstruction and Trooper Lyon's opinion on this issue was relevant and of some probative value. Therefore, we find that the trial court did not clearly err in determining that Virginia herself qualified Trooper Lyon as an expert whose opinion as to whether the Schwaninger car's and Haghighi van's lights were on or off at the time of the accident should be admitted. Virginia also argues that the admission of Trooper Lyon's testimony prejudiced [\*33] her because it was offered to rebut her evidence that fog severely restricted the drivers' visibility or to demonstrate Schwaninger's negligence. However, the evidence was admitted without limitation, and the jury was free to use it for any purpose--including reasoning that if the vision of the drivers was restricted by the fog, they would have had their lights on.

*Expert's Testimony Regarding How Drivers "Track Through Curves."*

Over Virginia's objection, Brewer testified concerning various studies and technical literature on which he based

his opinion of how drivers "track through curves." Virginia alleges a lack of evidence that the driving conditions analyzed in the "studies and technical literature" were similar to those existing at the time of the Schwaninger-Haghighi collision.

We again begin with the proposition that the admissibility of this testimony is determined by its relevance. See § 27-401. The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999).

In the instant case, [\*34] Loumiet testified that the fog line as it existed before construction of the "shoofly" had not been completely obliterated as required and that a gap existed between the old and new fog lines. According to Loumiet, pavement markings in areas of poor visibility are critical for drivers to maintain their position on the road. He opined that the failure to erase the old fog line and create a continuous fog line between Highway 34 and the "shoofly" was evidence of negligence. He further opined that the "inadequacies of the work zone" were a causative factor in the Schwaninger-Haghighi collision. Therefore, Brewer's testimony that drivers "track through curves" by relying on the centerline rather than the fog line was offered to rebut Loumiet's testimony and was relevant. It is, of course, not for us to choose between the two witnesses.

Virginia further alleges that Brewer's opinions were not revealed by the State in its pretrial disclosures. She concludes that because the court sustained the defendants' objections to Summers' testimony, the trial court abused its discretion by failing to rule consistently concerning the admissibility of expert testimony, thereby prejudicing Virginia. [\*35] We observe that the State revealed that "Dr. Brewer is expected to render the following opinions: 1. The roadway containing the location where the collision occurred was properly signed, marked and maintained under generally accepted engineering standards." If, as Brewer opined, drivers "track through curves" using the centerline, then the "shoofly" was at least arguably properly marked as set forth in the "defendant's third supplemental answer to plaintiff's interrogatories." This testimony contrasts with Loumiet's testimony that a continuous fog line was needed to qualify the "shoofly" as properly marked.

Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). See *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). We find no abuse of discretion in the trial court's admission of Brewer's testimony, because the State's disclosure of Brewer's expected opinions was sufficiently broad to include his testimony that drivers "track through curves" by using the centerline rather than the [\*36] fog line.

*Testimony Schwaninger Was Previously Stopped for Exceeding Speed Limit.*

Following her voir dire examination of Trooper Bartling, Virginia objected to further testimony from him because he was not able to provide sufficient foundation to show that his radar unit was properly calibrated when he stopped Schwaninger on August 18, 1997. The problem was that Trooper Bartling was unable to say that the tuning forks used to check the accuracy of the radar unit had been calibrated within the preceding year. The trial court sustained Virginia's objection to the extent that Trooper Bartling was not allowed to testify to the speed at which he clocked Schwaninger on August 18. After the ruling on this objection, Trooper Bartling did testify, without objection, that he issued Schwaninger a citation for speeding in the "shoofly" where the posted speed limit was 45 m.p.h.

Virginia cites *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991), for the proposition that a lack of foundation establishing that the radar device used by Trooper Bartling to clock Schwaninger was calibrated and operating properly precludes testimony that Schwaninger had been stopped for [\*37] speeding. We do not disagree with this broad proposition because *Neb. Rev. Stat. § 60-6,192* (Reissue 1998) provides that "the results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue" when the equipment is properly

calibrated. Here, proper calibration was not shown and the trial court did not let in the evidence of the speed at which Schwaninger was clocked. However, the question largely involves whether her actual speed on August 18, 1997, was "in issue." *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998), is an example of where speed is not at issue. There, the court said that where the evidence of speed was not to establish a driver's rate of travel on a speeding charge, but was introduced as one piece of evidence tending to establish that the driver operated a vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property, that speed was not "at issue" under § 60-6,192 and therefore did not need to be corroborated [\*38] by a microwave, mechanical, or electronic speed measurement device. 254 Neb. at 465, 577 N.W.2d at 264. [HN17] Clearly, proof of speed for purposes besides a criminal conviction for speeding can be by other means such as visual observations. *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001).

Here, the matter at issue was not whether Schwaninger had committed a crime on August 18, 1997, by driving at a particular speed. Therefore, her actual speed on August 18 was not in issue. Instead, the evidence of the prior speeding ticket went to the issue of whether she had knowledge or notice of the posted speed limit in the "shoofly." The issuance of the speeding ticket, regardless of how fast she was clocked, tends to prove her knowledge of the speed limit. Additionally, it is of no small significance that Trooper Bartling testified without objection that he wrote Schwaninger a citation for speeding.

As part of this assignment of error, Virginia again argues the defendants' failure to establish that the conditions existing on the date of Trooper Bartling's stop of Schwaninger were the same conditions as existed at the time of the Schwaninger-Haghighi accident. [\*39] While Virginia repeatedly advances what we take to be a foundational argument that the defendants' evidence failed to show the same conditions as those that existed the morning of the accident, our basic difficulty with this argument is that the core of Virginia's case does not depend on the weather or lighting conditions. Instead, her case rests on the premise that the curve was built too sharp, making the posted speed limit of 45 m.p.h. the crucial speed at which a vehicle could not hold to its lane in the curve--regardless of conditions. Thus, the conditions at the time of the accident play little or no role in Virginia's proof of negligence. And, we might add that even if such conditions were at issue, it was Schwaninger's duty as the driver of a vehicle to take the conditions into account in determining the speed she would drive the "shoofly." [HN18] *Neb. Rev. Stat., § 60-6,185* (Reissue 1998) provides:

No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. A person shall drive at a safe and appropriate speed when approaching and [\*40] crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions. Virginia characterizes Trooper Bartling's testimony that Schwaninger was exceeding the posted advisory speed limit of 45 m.p.h. while driving through the "shoofly" a month before the collision between her car and the Haghighi van as evidence of a similar occurrence.

But, in addition to proof of notice of the posted speed limit, it is also evidence introduced to rebut Loumiet's testimony that a vehicle traveling in its own lane could not navigate through the eastern end of the "shoofly" at a speed exceeding 45 m.p.h. without the driver's losing control--regardless of the environmental conditions. The admission of Trooper Bartling's testimony without proof of the same conditions as existed the morning of the accident does not render his testimony inadmissible on the basis of foundation or relevancy, given the absolute position of Virginia's experts that this curve could not be driven at 45 [\*41] m.p.h. In conclusion, the trial court did not abuse its discretion by admitting the testimony from Trooper Bartling that he issued a speeding citation to Schwaninger on August 18, 1997, while she was driving in the "shoofly" which had a posted speed limit of 45 m.p.h.

*Contract Modification Alleged by  
State in its Closing Argument.*

Virginia notes that neither the State nor United ever alleged in their pleadings a modification of the contract between them or an agreement not to enforce certain contractual provisions. Virginia referred specifically to § 422.02(9)(b) of the "1996 Metric Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," published by the Nebraska Department of Roads, which provides, "All lights shall be turned on from sunset to sunrise or when visibility is less than 400 m." She points out that Kwiatkowski testified that these standard specifications became part of every construction contract in the state and were in force at the time of this construction project. Kwiatkowski also testified that he was required to follow § 422.02. But, the State said during closing arguments that it and United agreed not to enforce [\*42] a provision of the contract, which agreement shifted the burden of proposing the type of lights used to United, subject to the State's approval of that recommendation. Virginia objected, citing mischaracterization of the evidence, but the trial court allowed the State to "continue." She argues that she was prejudiced by the State's closing statement.

[HN19] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999); *Bailey v. AMISUB*, 1 Neb. App. 56, 489 N.W.2d 323 (1992). Our review of the record shows that Kwiatkowski testified that United recommended "Type A" lights for use on the barricades although they do not meet the requirement of activating when visibility is less than 400 meters because they flash only at night. And, Kwiatkowski testified that these lights were on the State's approved products list and that United's recommendation to use "Type A" lights was submitted to the materials and test division of the Department of Roads for the State's approval. Clearly, there was [\*43] evidence of a contractual modification from Kwiatkowski's uncontroverted testimony that United was allowed to recommend the type of lights used on the barricades, albeit subject to the State's approval. Thus, this assignment of error is without merit.

*Statement of Case: Content of Jury Instruction No. 6.*

Virginia asserts that at the jury instruction conference, she requested the addition of two paragraphs to her allegations of negligence against United set forth in instruction No. 6, and that the court erred by not including these paragraphs in that instruction. One paragraph reads, "In building the reverse turns at the east edge of the construction site with a radius smaller than that provided for in the plans and specifications in the project." Our review of the record shows that the trial court used this precise language. Thus, this assignment of error lacks merit.

The other requested paragraph reads, "In failing to equip the barricades of the subject work zone with lights activated and operating at the time of the accident." Virginia also requested that the court add this paragraph to the allegations of negligence made against All Road. Virginia argues that because she presented [\*44] evidence of these defendants' duties to ensure light activation and operation, as found in the "1996 Supplemental Specifications to Standard Specifications for Highway Construction, Series 1985," the court's failure to instruct the jury on this theory prevented the jury from considering the evidence against either of these defendants.

[HN20] Whether a jury instruction given by a trial court is correct is a question of law. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.* To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal [\*45] to give the tendered instruction. *Id.*; *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

The evidence shows that United recommended the "Type A" lights used on the barricades and had some responsibility for maintaining the position of the barricades. The evidence also shows that All Road was responsible for maintaining the lights, i.e., ensuring their functioning. And, although it was foggy the morning of the

Schwaninger-Haghighi accident, the lights were not meant to be activated during the day even by fog. Trooper Lyon's testimony was that a light on a barricade failed to activate when he tested it by draping a firefighter's coat over it. Thus, there was evidence that the lights may not have been functioning as intended, but the lights used would not have been on at the time of the accident in any event because it was daylight.

The court did not give a specific instruction about the lights, but, rather, instructed the jury that Virginia claimed that United and All Road were negligent "in erecting and maintaining signs, barricades, lights, and pavement markings in such a manner as to confuse or disorient motorists traveling around [\*46] and through the construction site." Thus, the matter of whether the lights were proper was clearly before the jury for its consideration.

[HN21] Moreover, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997). The trial court's broad instruction on signage and lights certainly includes Virginia's allegation that United and All Road failed to equip the barricades with lights which should have been operating at the time of the accident. The instruction encompasses Virginia's allegation that the lights on the barricades were not the proper type of light and did not function as would be expected at the time of the accident. Therefore, we conclude that this assignment of error is without merit.

#### CONCLUSION

We have considered the entire record in light of the assignments of error and find no error. Thus, we affirm the jury's verdict for United [\*47] and All Road, as well as the court's order finding for the State and dismissing Virginia's amended petition.

Affirmed.

62 of 195 DOCUMENTS



Questioned

As of: Jan 31, 2007

**State of Nebraska, Appellee, v. Russell J. Hiemstra, Appellant.****No. A-97-526.****NEBRASKA COURT OF APPEALS*****6 Neb. App. 940; 579 N.W.2d 550; 1998 Neb. App. LEXIS 72*****May 5, 1998, Filed**

**PRIOR HISTORY:** [\*\*\*1] Appeal from the District Court for Buffalo County, John P. Icenogle, Judge, on appeal thereto from the County Court for Buffalo County, Graten D. Beavers, Judge.

**DISPOSITION:** AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed an order from the District Court for Buffalo County (Nebraska), which denied his motion to suppress and affirmed a trial court's order convicting him of driving under the influence (DUI) of an alcoholic liquor or drug.

**OVERVIEW:** Defendant was convicted in the trial court following a jury trial of DUI. Defendant appealed to the district court, which affirmed the trial court's judgment of conviction. On further appeal, defendant argued that his constitutional rights were violated when his vehicle was stopped for speeding and that the trial court erred in admitting the results of his blood test and in instructing the jury as to the meaning of "driving under the influence." The court affirmed in part and in part reversed and remanded for a new trial. The court concluded that an initial stop did not violate defendant's constitutional rights and that defendant was not prejudiced by the trial court's refusal to give his suggested jury instruction. The court found, however, that the trial court erred in admitting defendant's blood test results because the state failed to show that a qualified person, pursuant to *Neb. Rev. Stat. § 60-6,201*, drew defendant's blood. The court concluded that when read in their entirety, the jury instructions accurately and fairly presented the law of DUI.

**OUTCOME:** The court affirmed the district court's ruling denying defendant's motion to suppress, but reversed the district court's judgment affirming defendant's conviction for DUI and remanded the cause for a new trial.

**CORE TERMS:** blood, blood test, machine, probable cause, driving, speed, urine test, alcohol, motion to suppress, jury instruction, admitting, correctly, testing, breath, drawing, prejudiced, speeding, tendered, foot, motor vehicle, speed limit, jury trial, corroborated, licensed, miles, electronic, mechanical, microwave, reagent, ampoule

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses******Criminal Law & Procedure > Witnesses > Credibility******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the state, there is sufficient evidence to support it. With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review******Civil Procedure > Appeals > Standards of Review > De Novo Review******Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact***

[HN2] Regarding motions to suppress, the Nebraska Supreme Court has recently held that ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN3] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved. In addition, when an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] Neb. Rev. Stat. § 60-6, 192 (Reissue 1993) states: Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN5] When testimony regarding speed is used to establish some charge other than speeding, an officer's testimony need not be corroborated.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility******Evidence > Scientific Evidence > Blood Alcohol******Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN6] The drawing of blood and the admissibility of test results are controlled by Neb. Rev. Stat. § 60-6, 201 (Reissue 1993), which provides in part:(3) To be considered valid, tests of blood shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in Neb. Rev. Stat. § 71-2017.01 may withdraw blood for the purpose of a test to determine the

alcohol concentration.

***Evidence > Testimony > Lay Witnesses > Personal Knowledge***

[HN7] Pursuant to Neb. Evid. R. 602, a witness may not testify to something of which the witness has no personal knowledge. *Neb. Rev. Stat. § 27-602* (Reissue 1995).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Blood & Bodily Fluids***

[HN8] While the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.

***Evidence > Scientific Evidence > Blood Alcohol***

[HN9] The fact that the sealed ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is sufficient prima facie proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion.

***Civil Procedure > Appeals > Standards of Review > Reversible Errors***

***Criminal Law & Procedure > Jury Instructions > Requests to Charge***

***Criminal Law & Procedure > Appeals > Reversible Errors > General Overview***

[HN10] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence***

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***

[HN11] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Warning Requirements***

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN12] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the state demonstrates that the error was harmless beyond a reasonable doubt. An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant.

**HEADNOTES: 1. Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Probable Cause: Appeal and Error.** Determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Motions to Suppress: Appeal and Error.** In reviewing the trial [\*\*\*2] court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion.
5. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved.
6. **Motor Vehicles: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** When an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle.
7. **Criminal Law: Motor Vehicles: Police Officers and Sheriffs: Testimony: Corroboration.** When testimony regarding speed is used to establish some charge other than speeding, the officer's testimony need not be corroborated.
8. **Trial: Evidence: Blood, Breath, and Urine Tests.** The drawing of blood and the admissibility of test results are controlled by *Neb. Rev. Stat. § 60-6,201* (Reissue 1993).
9. **Administrative Law: Licenses and Permits: Health [\*\*\*3] Care Providers: Blood, Breath, and Urine Tests.** To be considered valid, tests of blood shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is statutorily defined may withdraw blood for the purpose of a test to determine the alcohol concentration.
10. **Rules of Evidence: Witnesses: Testimony.** Pursuant to Neb. Evid. R. 602, *Neb. Rev. Stat. § 27-602* (Reissue 1995), a witness may not testify to something of which the witness has no personal knowledge.
11. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** While the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.
12. **Blood, Breath, and Urine Tests: Witnesses: Testimony.** A competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came [\*\*\*4] from, how it was received, under what conditions it was kept and preserved, and what spot checks were made to determine its validity.
13. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
14. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
15. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law

so that the jury could not be misled, there is no prejudicial error.

**16. Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State [\*\*\*5] demonstrates that the error was harmless beyond a reasonable doubt.

**17. Criminal Law: Trial: Juries: Evidence: Convictions: Appeal and Error.** After a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed.

**COUNSEL:** David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

**JUDGES:** HANNON, IRWIN, and MUES, Judges.

**OPINION BY:** HANNON

**OPINION:** [\*942]

[\*\*554] HANNON, Judge.

The appellant, Russell J. Hiemstra, was convicted following a jury trial in Buffalo County Court of driving under the influence (DUI) of an alcoholic liquor or drug. The county court sentenced Hiemstra to 6 months' probation, fined him \$ 250, ordered him to pay court costs, suspended his driving privileges for 60 days, and ordered him to provide the court with written proof of his attendance at an alcohol education class and three Alcoholics Anonymous classes. Hiemstra appealed to the district court, which affirmed the county court's judgment of conviction. Hiemstra [\*\*\*6] now appeals to this court, arguing that his constitutional rights were violated when his vehicle was stopped for speeding and that the trial court erred in admitting the results of his blood test and in instructing the jury as to the meaning of "driving under the influence." We conclude that the initial stop did not violate Hiemstra's constitutional rights and that Hiemstra was not prejudiced by the trial court's refusal to give his suggested jury instruction. However, we find that the trial court erred in admitting the blood test results. Therefore, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the conviction and remand the cause for a new trial.

#### I. FACTUAL BACKGROUND

The following evidence was presented at the hearing on Hiemstra's motion to suppress. At approximately 1:10 a.m. on August 25, 1996, Officer Kevin Thompson, who testified he was trained to visually estimate speed, was patrolling the downtown Kearney, Nebraska, area when he visually observed Hiemstra's vehicle going too fast. Thompson then followed Hiemstra's vehicle, and Thompson's speedometer indicated Hiemstra was driving faster than 45 miles per hour. Thompson estimated [\*\*\*7] that both his and Hiemstra's vehicles were traveling approximately 20 miles over the speed limit.

Thompson testified that he stopped the vehicle and that when he first made contact with Hiemstra, he detected the odor of alcohol and saw beer cans throughout the vehicle as well as two [\*943] coolers. Thompson also noticed that Hiemstra's speech was slurred. Thompson gave the following testimony:

Q- When you first initiated the traffic stop and approached the vehicle, what did you say to the driver?

A- I asked him if he knew why he was being pulled over.

Q- And how did he respond?

A- He just said that he was being stupid.

Q- And did he say anything further?

A- And I asked him if -- what he meant by that and he said because he was speeding.

Both Thompson and Hiemstra returned to the police car, where Hiemstra performed several sobriety tests. Hiemstra was instructed to repeat the letters of the alphabet. Thompson testified that Hiemstra did not commit any letter errors but that there were slurs in his speech. Hiemstra was then asked to count from 20 to 39 and then from 39 back down to 20. Thompson testified there were no numerical errors from 20 to 39, just slurs in Hiemstra's speech. [\*\*\*8] When counting from 39 to 20, Hiemstra stopped at 25, asked Thompson if that was sufficient, and was told to continue as instructed.

Hiemstra was then instructed to stand and raise either foot approximately 3 to 6 inches off the ground and count from 1,001 to 1,030. Thompson told Hiemstra that after completing the test, he was to put his foot down and say "stop." Thompson testified that on his first attempt, Hiemstra put his foot down on the count of 3. On his second attempt, Hiemstra put his foot down on the count of 3, continued, and then put his foot down on the count of 9. On the third attempt, Hiemstra put his foot down on the count of 12. Finally, Hiemstra was instructed to perform the walk-and-turn sobriety test. Thompson testified that Hiemstra missed three heel-to-toe steps on the first set of nine, missed seven of the second set of nine, and did not count out loud as instructed.

Thompson testified that Hiemstra smelled of alcohol and that his eyes were bloodshot, his speech was slurred at times, and his balance and mental state were impaired. Thompson testified that based on his experience [\*\*555] as an officer, his training in DUI investigations, and his personal experience with [\*\*\*9] alcohol, he [\*944] believed that Hiemstra was an impaired driver when he was stopped.

Thompson arrested Hiemstra and drove him to the Good Samaritan Hospital for a blood test. Thompson testified that he read a *Miranda* form to Hiemstra and asked him if he understood his rights, and that Hiemstra then signed the form. The court received a document showing Thompson's signature as the witnessing officer and Hiemstra's signatures indicating that he both understood and waived his *Miranda* rights. Thompson testified he asked Hiemstra how much he had to drink and Hiemstra told him he drank four to five cans of beer. Thompson also testified that Hiemstra stated "[he had] been drinking for two hours from 10 o'clock until 11 o'clock [sic]" but then stated he had his last drink at 1 o'clock.

In his motion to suppress, Hiemstra alleged that all the evidence obtained should be suppressed because the initial stop violated the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution. Hiemstra also moved the court to suppress any statements made while he was in custody but before the *Miranda* warnings were given. Hiemstra alleged that such [\*\*\*10] statements violated his Fifth Amendment guarantee against self-incrimination. Finally, Hiemstra requested that the court suppress the results of the blood test because Thompson did not have probable cause to request the test. The court overruled Hiemstra's motion.

At trial, Thompson testified to essentially the same version of the facts as during the hearing on the motion to suppress. Thompson stated that Hiemstra was under the influence when he was arrested. Thompson testified that after arresting Hiemstra, Thompson read him a post arrest chemical advisement form, which Hiemstra signed.

The court received a "Post Arrest Chemical Test Advisement" form signed by Thompson which was marked to read, "I hereby direct a test of your X blood \_ breath X urine to determine the X alcohol \_ drug content." Thompson testified he did not give Hiemstra a urine test or the opportunity to take a urine test. Outside the presence of the jury, Hiemstra's attorney claimed that Thompson's marks directing both a urine and a blood test were inconsistent with Nebraska statutes and asked the court to [\*945] suppress any testimony regarding the blood test. The court denied this request.

Thompson explained [\*\*\*11] why he did not give Hiemstra a speeding citation: "The main reason is because I didn't have a radar lock on the defendant in this case and the second reason for not giving him a ticket is he's already -- he already has a DUI pending. I didn't feel the need to hammer the guy."

Tyler Schwartz, a medical technologist employed by Good Samaritan Hospital, testified that he did not recall drawing blood from Hiemstra on August 25, 1996. However, the court received a document identified by Schwartz as a "Legal Alcohol on Body Fluid" form. Schwartz testified he signed and dated the document and wrote down a time. "Russell J. Hiemstra" is listed on the document as the "Subject Name," and the document shows that blood was obtained by Schwartz at "0150" on August 25. Additional facts regarding Schwartz' testimony will be discussed later in this opinion.

Diane Stevens, a medical technologist employed by Good Samaritan Hospital, testified that she tests blood for legal blood alcohol content using a machine called the Abbott TDx. The court received Stevens' Class A permit, which allows her to perform testing for body fluid alcohol content. Stevens testified, over objection, that Hiemstra's body [\*\*\*12] fluid alcohol content was .18 of 1 gram per 100 milliliters. Additional facts regarding the blood test will be discussed later in this opinion.

Hiemstra's motions to dismiss or, in the alternative, for a directed verdict at the conclusion of the State's evidence and at the conclusion of Hiemstra's evidence were denied. Hiemstra was convicted of DUI, and he appealed to the district court. The district court for Buffalo County affirmed the trial court's judgment of conviction.

## II. ASSIGNMENTS OF ERROR

Hiemstra claims the trial court erred (1) in failing to find that the stop of his vehicle [\*\*556] violated the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution; (2) in receiving the blood test results even though the person drawing the blood was not qualified; (3) in receiving the blood test results even though the arresting officer did not [\*946] provide Hiemstra a urine test; (4) in receiving the blood test results even though the person testing his blood did not conform to title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) requirements; and (5) in instructing the jury as to the definition of "driving under the influence."

## III. STANDARD [\*\*\*13] OF REVIEW

[1] [HN1] In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996).

[2] With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

## IV. ANALYSIS

### 1. VEHICLE STOP

[3,4] Hiemstra claims the trial court erred in overruling his motion to suppress. Specifically, Hiemstra contends the trial court erred in failing to find that the stop of his vehicle violated his constitutional rights. [HN2] Regarding motions to suppress, the Nebraska Supreme Court has recently held that "ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences [\*\*\*14] drawn from those facts by the trial judge." *State v. McCleery*, 251 Neb. 940, 942, 560 N.W.2d 789, 790 (1997). In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion. *State v. Case*, 4 Neb. App. 885, 553 N.W.2d 173 (1996).

6 Neb. App. 940, \*946; 579 N.W.2d 550, \*\*556;  
1998 Neb. App. LEXIS 72, \*\*\*14

[5, 6] [HN3] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect [\*947] might be involved. See, *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995). In addition, "when an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle." *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990), cert. denied 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991).

Hiemstra argues that "at no time was there ever any evidence offered to show whether or not Hiemstra was in fact exceeding [\*\*\*15] any speed limit or violating any law." Brief for appellant at 12. Thompson's stop was based on his visual observation that Hiemstra was traveling in excess of the speed limit. Thompson testified that the speed limit in the area ranged from 20 to 25 miles per hour. Thompson stated that when following Hiemstra, he was driving in excess of 45 miles per hour. As such, Thompson had probable cause to stop Hiemstra because Hiemstra was violating the speed limit.

[7] Hiemstra also argues that "no testimony was offered to show that Thompson's estimation was corroborated with mechanical, electronic or radio microwave devices." Brief for appellant at 13. This argument is similar to that used in *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). In *Howard*, the defendant argued that officer's testimony that the defendant was driving over 100 miles per hour had to be corroborated by a radio microwave, mechanical, or electronic speed measurement device in accordance with Neb. Rev. Stat. § 60-6, 192 (Reissue 1993). [HN4] Section 60-6, 192 states:

Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being [\*557] competent evidence [\*\*\*16] for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the *speed of the vehicle is at issue*.

(Emphasis supplied.) The court held that [HN5] when testimony regarding speed is used to establish some charge other than [\*948] speeding, the officer's testimony need not be corroborated. *State v. Howard, supra*.

As in *Howard*, the actual speed of Hiemstra's vehicle is not at issue. Hiemstra was not charged with speeding. Thompson's estimate was used to establish that he had probable cause for stopping Hiemstra. Hiemstra's first assignment of error is without merit.

## 2. INADMISSIBILITY OF BLOOD TEST RESULTS

Hiemstra argues the trial court erred in admitting his blood test results for three reasons. First, the person who drew Hiemstra's blood was not qualified under *Neb. Rev. Stat. § 60-6,201* (Reissue 1993). Second, the arresting officer failed to provide Hiemstra a urine test. Third, the State failed to show the [\*\*\*17] requirements of title 177 (*177 Neb. Admin. Code, ch. 1, § 006.04D* (1990)) were complied with. We will address each argument in turn.

### (a) Qualifications of Person Drawing Blood

[8,9] Hiemstra argues the trial court erred in receiving Hiemstra's blood test results because the person drawing Hiemstra's blood was not qualified. [HN6] The drawing of blood and the admissibility of test results are controlled by § 60-6,201, which provides in pertinent part:

(3) To be considered valid, tests of blood . . . shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, *except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in section 71-2017.01 . . . may withdraw blood for the purpose of a*

test to determine the alcohol concentration . . . .  
(Emphasis supplied.)

In the instant case, Schwartz drew Hiemstra's blood and had no valid permit to do so. Schwartz was asked the following questions: "Q- And to the best of your knowledge, is Good Samaritan Hospital a certified hospital? A- Yes. . . . Q- Do you know [\*\*\*18] if the State of Nebraska requires a certification or permit for one who draws blood? A- I don't know."

[\*949] [10] [HN7] Pursuant to Neb. Evid. R. 602, a witness may not testify to something of which the witness has no personal knowledge. See, *Neb. Rev. Stat. § 27-602* (Reissue 1995); *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996). Schwartz' testimony did not evidence that he possessed personal knowledge that Good Samaritan Hospital was or was not a certified hospital or that he even knew the significance of "certified." Indeed, the question was framed so that Schwartz could answer in the affirmative even if he did not know whether the hospital was licensed. As such, Schwartz' statements did not demonstrate that Good Samaritan Hospital is a licensed institution or facility as required by § 60-6,201(3).

We also note that on September 15, 1997, the State filed a "Suggestion of Remand" stating that remand to the district court for a new trial was appropriate because "the State failed to present evidence that the person drawing Hiemstra's blood was employed by a 'licensed institution or facility' as required by *Neb. [\*\*\*19] Rev. Stat. § 60-6,201(3)* (1993)." Nonetheless, in its brief, the State argued that Hiemstra's failure "to object to Schwartz' testimony that Schwartz had drawn a blood sample from Hiemstra" was "a waiver of his right to now raise the issue on appeal." Brief for appellee at 10-11.

The argument in the State's brief is without merit. The State argues Hiemstra needed to object when Schwartz testified that he drew Hiemstra's blood. The evidence shows that Schwartz did, in fact, draw a blood [\*\*558] sample from Hiemstra; thus, an objection at that time was unwarranted. Instead, Hiemstra objected on the basis of insufficient foundation when the blood test results were offered. Hiemstra's objection was timely.

Based on the evidence, the trial court erred in admitting the results of Hiemstra's blood test because the State failed to show that a qualified person, pursuant to § 60-6,201, drew Hiemstra's blood.

(b) Failure to Provide Urine Test

The court received a "Post Arrest Chemical Test Advisement" form which had "Russell J. Hiemstra" listed at the top. Thompson testified, and the evidence shows that he placed checkmarks on the form, causing it to read, "I hereby direct a [\*950] test of your X [\*\*\*20] blood [and] X urine to determine the X alcohol . . . content." The form was signed by Thompson as the "Advising Officer" and was also signed by Hiemstra. Only Hiemstra's blood was tested. Hiemstra argues:

Section 60-6, 199 Neb. R.R.S. generally provides that an arrested person, when advised that they will have a chemical test of their blood, breath or urine test performed, may *request* a second test, and if the second test is not provided then the first test would be inadmissible. . . . Because of the failure of the arresting officer to *provide* the second test, the first test should not have been received as evidence.  
(Emphasis supplied.) Brief for appellant at 23.

[11] Hiemstra notes the statute states an arrested person may *request* a second test. See *Neb. Rev. Stat. § 60-6, 199* (Reissue 1993). Hiemstra then argues the blood test is inadmissible because a second test was not *provided*. There is no evidence Hiemstra requested a urine test. The Supreme Court has stated that [HN8] "while . . . the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls [\*\*\*21] to secure the test." *State v. Dake*, 247 Neb. 579, 584, 529 N.W.2d 46, 49 (1995). Therefore, Thompson had no duty to *provide* a urine test for Hiemstra. In addition, the fact that no urine test was performed does not affect the admissibility of the blood test, and Hiemstra provides us with no law to the contrary.

6 Neb. App. 940, \*950; 579 N.W.2d 550, \*\*558;  
1998 Neb. App. LEXIS 72, \*\*\*21

There is no evidence this error misled Hiemstra to his prejudice or somehow caused him to not request a urine test. Hiemstra's third assignment of error is without merit.

(c) Failure to Show Abbott TDx Was Working as Required by Title 177

Hiemstra argues the trial court erroneously admitted the blood test results because the requirements of title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) were not satisfied. Specifically, Hiemstra argues that "the use of a known substance to obtain a low, medium and high control and the use of refrigerated reagent packs" are required by title 177. Brief for appellant at 28. Title 177 was entered into evidence and lists the following requirements under the heading "Radiative Energy Attenuation Utilizing The Abbott TDx Analyzer:"

[\*951] 006.04D1 The radiative energy attenuation method . . . must be performed in a manner to [\*\*\*22] include at least the following technique:

. . . .

006.04D1g Also upon completion of analysis, remove the carousel and discard its contents. If the reagent pack is not to be used immediately again, remove and store it at 2 to 8 degrees C.

. . . .

006.04D1j Each test run shall include a low, medium, and high control. If runs contain more than twelve specimens, the controls shall be placed after the last specimens for a chemical test on the carousel.

Hiemstra's argument is twofold. First, the State failed to prove the reagent pack was properly refrigerated. Second, the State failed to identify or verify the contents of the control used to demonstrate the Abbott TDx was working properly.

Stevens testified generally that she followed all of the policies and procedures of title 177. Such general testimony is a conclusion and is insufficient to show that title 177 requirements were complied with. Specifically, the State failed to question Stevens [\*559] about the refrigeration of the reagent pack. Therefore, the State failed to prove that title 177 was complied with, and the trial court erred in admitting the blood test results.

Hiemstra also contends his blood test results were [\*\*\*23] erroneously admitted because the State failed to verify the contents of the control used to demonstrate the Abbott TDx was working properly. Hiemstra's argument is very similar to that in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), overruled on other grounds, *State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992). In *Gerber*, the defendant was convicted of driving under the influence and claimed the lower court erred in admitting the results of his Breathalyzer test. The officer who administered the test testified that an ampul containing an amount of ethyl alcohol, referred to as a "NALCO standard," *id.* at 79, 291 N.W.2d at 406, is used to determine if the machine is operating correctly. (An ampule, ampul, or ampoule is "a sealed glass or plastic bulb containing solutions for hypodermic injection." Webster's Encyclopedic Unabridged Dictionary of the [\*952] English Language 51 (1989).) The NALCO standard is attached to the machine, and if operating correctly, the machine registers a number that matches the number on the ampul. The officer conceded that determining whether the machine is working depends on whether the alcohol content of the NALCO standard is, in fact, [\*\*\*24] as reflected on the ampul.

[12] The officer in *Gerber* testified that he did not know who prepared the NALCO standard and did not know where the NALCO standard came from or its actual alcohol content. The officer admitted he did not know if the machine was operating correctly at the time the defendant was tested. The *Gerber* court held that a competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came from, how it was received, under what conditions it was kept and preserved, and what spot checks were

6 Neb. App. 940, \*952; 579 N.W.2d 550, \*\*559;  
1998 Neb. App. LEXIS 72, \*\*\*24

made to determine its validity. The court quoted the following statement with approval:

[HN9] "The fact that the *sealed* ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is, in our opinion, sufficient *prima facie* proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion."

(Emphasis in original.) 206 Neb. at 90, 291 N.W.2d at 411 (quoting *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960)). The *Gerber* court held [\*\*\*25] the test inadmissible because the State failed to prove the necessary requirements were met.

In the instant case, Stevens testified that a known substance, called a control, is very important in determining whether the machine is working properly. Stevens testified that she receives a known substance, in a vial or a tube, from a manufacturer. Included with the substance is a certificate from the manufacturer stating the bottle contains a certain amount of ethanol. The bill of exceptions contains the following testimony:

Q- . . . You get this known substance and my only question is, before you use it in the machine, what do you do to make sure that the known substance is what it purports to be?

[\*953] A- Okay, the known substance has a known value on it. So I run it and if I get the known value on it, I assume that it's what it's supposed to be because I got the value they told me I would get.

Q- And that's based not upon your test, but what some piece of paper says?

A- They ran it and got this answer, I rerun it, get the same answer.

Stevens also testified that Good Samaritan Hospital did not have a policy or procedure of periodically testing blood kits to make sure that the [\*\*\*26] contents of the test tubes were what they purported to be.

Based on *Gerber*, *supra*, we find that the trial court erred in admitting the results of Hiemstra's blood test because there was no testimony or evidence identifying the contents of the control, showing how the control was received, detailing under what conditions the control was kept and preserved, and identifying what spot checks were made to determine the validity of the control.

### [\*\*560] 3. JURY INSTRUCTIONS

Hiemstra argues that "the definition of under the influence as given by the Court is not appropriate and is an incorrect statement of the law. The problem with the Court's instruction is that it causes the jury to try to guess at what Hiemstra's normal body or mental faculties would be." Brief for appellant at 29. Over objection, the trial court gave the following instruction defining "under the influence:"

A person is under the influence of alcoholic liquor if such person is impaired because of his or her[]consumption of alcohol in the capacity to think and act correctly and efficiently, to the extent as to have lost an appreciable degree of the normal control of his or her body or mental faculties.

Hiemstra [\*\*\*27] proposed the following instruction: "The phrase 'under the influence of alcoholic liquor' means the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner."

[\*954] [13, 14] [HN10] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In an appeal based on the claim of an erroneous

6 Neb. App. 940, \*954; 579 N.W.2d 550, \*\*560;  
1998 Neb. App. LEXIS 72, \*\*\*27

instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996).

[15] The language of Hiemstra's proposed jury instruction is very similar to that of NJI2d Crim. 7.52. We conclude that Hiemstra's proposed instruction is a correct statement of the law and note [\*\*\*28] that the court's instruction seems to require evidence of the individual defendant's "normal control of his or her body," whereas the NJI2d Crim. 7.52 instruction does not contain this weakness. Hiemstra also satisfies the second requirement that the instruction must be warranted by the evidence. Since Hiemstra was charged with "driving under the influence," a jury instruction defining that term was certainly warranted. However, Hiemstra fails to establish that his rights were prejudiced by the court's failure to give the suggested jury instruction. We assume that Hiemstra is arguing his rights were prejudiced because the given jury instruction is an incorrect statement of the law. We recognize that the given jury instruction contains the weakness cited above and is therefore somewhat confusing, while the language of NJI2d Crim. 7.52 is considerably clearer. However, the Supreme Court has stated that [HN11] jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

We must examine the jury instructions in their entirety. Jury instruction No. 4 [\*\*\*29] generally explains the material elements of driving under the influence; specifically, that the defendant was in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1 [\*955] gram or more of alcohol per 100 milliliters of his blood. Jury instruction No. 5 explains that Neb. Rev. Stat. § 60-6, 196 (Reissue 1993) makes it unlawful for any person to operate or be in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1 gram of alcohol or more per 100 milliliters of his or her blood.

When read in their entirety, the jury instructions accurately and fairly present the law of DUI. Therefore, Hiemstra has failed to meet his burden and demonstrate that his rights were prejudiced by the court's failure to give the suggested jury instruction. Hiemstra's final assignment of error is without merit. However, upon remand, we remind the trial court that as long as there is a Nebraska jury instruction that accurately states the law and applies to the case, it is the instruction which should be given. *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995), *aff'd* [\*\*\*30] *as modified* 248 Neb. 255, 533 N.W.2d 913.

#### [\*\*561] 4. EFFECT OF ERRORS

[16] Hiemstra urges that the admission of the blood test results necessitates the dismissal of his case. However, in *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997), the Supreme Court reached a different conclusion in a factually similar case. In *Hingst*, the defendant was also convicted of DUI. On appeal, the court held that the trial court committed plain error when it failed to exclude the chemical test results because the defendant was not properly advised before the test was taken. However, the State argued that the record contained other evidence sufficient to sustain the conviction. On further review, the Supreme Court stated, [HN12] "In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *Id.* at 537, 557 N.W.2d at 683. "An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant." *Id.* at 538, 557 N.W.2d at 683.

[17] The Supreme Court noted the record contained [\*\*\*31] evidence that at the time of arrest, the defendant's eyes were bloodshot, he smelled of alcohol, his speech was slurred, and he failed twice to correctly recite the alphabet. However, the Supreme [\*956] Court was unable to determine which evidence the jury relied on in convicting the defendant. The Supreme Court held that after a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed. The Supreme Court found that sufficient evidence existed upon which a jury could, on remand, find the defendant guilty of DUI; accordingly, the Supreme Court affirmed this court's

6 Neb. App. 940, \*956; 579 N.W.2d 550, \*\*561;  
1998 Neb. App. LEXIS 72, \*\*\*31

decision reversing the conviction and remanding the cause for a new trial.

#### V. CONCLUSION

As in *Hingst*, in this case, the trial court erred in admitting Hiemstra's blood test results, as determined above. We cannot say that this error was harmless beyond a reasonable doubt. However, the record contains independent evidence to support Hiemstra's conviction. Thompson's testimony establishes that Hiemstra was driving under the influence. Thus, we find [\*\*\*32] that there is sufficient evidence to support the conviction. Accordingly, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the judgment of conviction and remand the cause for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

63 of 195 DOCUMENTS



Questioned

As of: Jan 31, 2007

**State of Nebraska, Appellee, v. Russell J. Hiemstra, Appellant.****No. A-97-526.****NEBRASKA COURT OF APPEALS*****6 Neb. App. 940; 579 N.W.2d 550; 1998 Neb. App. LEXIS 72*****May 5, 1998, Filed**

**PRIOR HISTORY:** [\*\*\*1] Appeal from the District Court for Buffalo County, John P. Icenogle, Judge, on appeal thereto from the County Court for Buffalo County, Graten D. Beavers, Judge.

**DISPOSITION:** AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed an order from the District Court for Buffalo County (Nebraska), which denied his motion to suppress and affirmed a trial court's order convicting him of driving under the influence (DUI) of an alcoholic liquor or drug.

**OVERVIEW:** Defendant was convicted in the trial court following a jury trial of DUI. Defendant appealed to the district court, which affirmed the trial court's judgment of conviction. On further appeal, defendant argued that his constitutional rights were violated when his vehicle was stopped for speeding and that the trial court erred in admitting the results of his blood test and in instructing the jury as to the meaning of "driving under the influence." The court affirmed in part and in part reversed and remanded for a new trial. The court concluded that an initial stop did not violate defendant's constitutional rights and that defendant was not prejudiced by the trial court's refusal to give his suggested jury instruction. The court found, however, that the trial court erred in admitting defendant's blood test results because the state failed to show that a qualified person, pursuant to *Neb. Rev. Stat. § 60-6,201*, drew defendant's blood. The court concluded that when read in their entirety, the jury instructions accurately and fairly presented the law of DUI.

**OUTCOME:** The court affirmed the district court's ruling denying defendant's motion to suppress, but reversed the district court's judgment affirming defendant's conviction for DUI and remanded the cause for a new trial.

**CORE TERMS:** blood, blood test, machine, probable cause, driving, speed, urine test, alcohol, motion to suppress, jury instruction, admitting, correctly, testing, breath, drawing, prejudiced, speeding, tendered, foot, motor vehicle, speed limit, jury trial, corroborated, licensed, miles, electronic, mechanical, microwave, reagent, ampoule

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses******Criminal Law & Procedure > Witnesses > Credibility******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the state, there is sufficient evidence to support it. With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review******Civil Procedure > Appeals > Standards of Review > De Novo Review******Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact***

[HN2] Regarding motions to suppress, the Nebraska Supreme Court has recently held that ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN3] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved. In addition, when an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] Neb. Rev. Stat. § 60-6, 192 (Reissue 1993) states: Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN5] When testimony regarding speed is used to establish some charge other than speeding, an officer's testimony need not be corroborated.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility******Evidence > Scientific Evidence > Blood Alcohol******Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN6] The drawing of blood and the admissibility of test results are controlled by Neb. Rev. Stat. § 60-6, 201 (Reissue 1993), which provides in part:(3) To be considered valid, tests of blood shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in Neb. Rev. Stat. § 71-2017.01 may withdraw blood for the purpose of a test to determine the

alcohol concentration.

***Evidence > Testimony > Lay Witnesses > Personal Knowledge***

[HN7] Pursuant to Neb. Evid. R. 602, a witness may not testify to something of which the witness has no personal knowledge. *Neb. Rev. Stat. § 27-602* (Reissue 1995).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Blood & Bodily Fluids***

[HN8] While the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.

***Evidence > Scientific Evidence > Blood Alcohol***

[HN9] The fact that the sealed ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is sufficient prima facie proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion.

***Civil Procedure > Appeals > Standards of Review > Reversible Errors***

***Criminal Law & Procedure > Jury Instructions > Requests to Charge***

***Criminal Law & Procedure > Appeals > Reversible Errors > General Overview***

[HN10] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence***

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***

[HN11] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Warning Requirements***

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN12] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the state demonstrates that the error was harmless beyond a reasonable doubt. An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant.

**HEADNOTES: 1. Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

6 Neb. App. 940, \*; 579 N.W.2d 550, \*\*;  
1998 Neb. App. LEXIS 72, \*\*\*1

2. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Probable Cause: Appeal and Error.** Determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Motions to Suppress: Appeal and Error.** In reviewing the trial [\*\*\*2] court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion.
5. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved.
6. **Motor Vehicles: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** When an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle.
7. **Criminal Law: Motor Vehicles: Police Officers and Sheriffs: Testimony: Corroboration.** When testimony regarding speed is used to establish some charge other than speeding, the officer's testimony need not be corroborated.
8. **Trial: Evidence: Blood, Breath, and Urine Tests.** The drawing of blood and the admissibility of test results are controlled by *Neb. Rev. Stat. § 60-6,201* (Reissue 1993).
9. **Administrative Law: Licenses and Permits: Health [\*\*\*3] Care Providers: Blood, Breath, and Urine Tests.** To be considered valid, tests of blood shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is statutorily defined may withdraw blood for the purpose of a test to determine the alcohol concentration.
10. **Rules of Evidence: Witnesses: Testimony.** Pursuant to Neb. Evid. R. 602, *Neb. Rev. Stat. § 27-602* (Reissue 1995), a witness may not testify to something of which the witness has no personal knowledge.
11. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** While the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.
12. **Blood, Breath, and Urine Tests: Witnesses: Testimony.** A competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came [\*\*\*4] from, how it was received, under what conditions it was kept and preserved, and what spot checks were made to determine its validity.
13. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
14. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
15. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law

so that the jury could not be misled, there is no prejudicial error.

**16. Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State [\*\*\*5] demonstrates that the error was harmless beyond a reasonable doubt.

**17. Criminal Law: Trial: Juries: Evidence: Convictions: Appeal and Error.** After a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed.

**COUNSEL:** David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

**JUDGES:** HANNON, IRWIN, and MUES, Judges.

**OPINION BY:** HANNON

**OPINION:** [\*942]

[\*\*554] HANNON, Judge.

The appellant, Russell J. Hiemstra, was convicted following a jury trial in Buffalo County Court of driving under the influence (DUI) of an alcoholic liquor or drug. The county court sentenced Hiemstra to 6 months' probation, fined him \$ 250, ordered him to pay court costs, suspended his driving privileges for 60 days, and ordered him to provide the court with written proof of his attendance at an alcohol education class and three Alcoholics Anonymous classes. Hiemstra appealed to the district court, which affirmed the county court's judgment of conviction. Hiemstra [\*\*\*6] now appeals to this court, arguing that his constitutional rights were violated when his vehicle was stopped for speeding and that the trial court erred in admitting the results of his blood test and in instructing the jury as to the meaning of "driving under the influence." We conclude that the initial stop did not violate Hiemstra's constitutional rights and that Hiemstra was not prejudiced by the trial court's refusal to give his suggested jury instruction. However, we find that the trial court erred in admitting the blood test results. Therefore, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the conviction and remand the cause for a new trial.

#### I. FACTUAL BACKGROUND

The following evidence was presented at the hearing on Hiemstra's motion to suppress. At approximately 1:10 a.m. on August 25, 1996, Officer Kevin Thompson, who testified he was trained to visually estimate speed, was patrolling the downtown Kearney, Nebraska, area when he visually observed Hiemstra's vehicle going too fast. Thompson then followed Hiemstra's vehicle, and Thompson's speedometer indicated Hiemstra was driving faster than 45 miles per hour. Thompson estimated [\*\*\*7] that both his and Hiemstra's vehicles were traveling approximately 20 miles over the speed limit.

Thompson testified that he stopped the vehicle and that when he first made contact with Hiemstra, he detected the odor of alcohol and saw beer cans throughout the vehicle as well as two [\*943] coolers. Thompson also noticed that Hiemstra's speech was slurred. Thompson gave the following testimony:

Q- When you first initiated the traffic stop and approached the vehicle, what did you say to the driver?

A- I asked him if he knew why he was being pulled over.

Q- And how did he respond?

A- He just said that he was being stupid.

Q- And did he say anything further?

A- And I asked him if -- what he meant by that and he said because he was speeding.

Both Thompson and Hiemstra returned to the police car, where Hiemstra performed several sobriety tests. Hiemstra was instructed to repeat the letters of the alphabet. Thompson testified that Hiemstra did not commit any letter errors but that there were slurs in his speech. Hiemstra was then asked to count from 20 to 39 and then from 39 back down to 20. Thompson testified there were no numerical errors from 20 to 39, just slurs in Hiemstra's speech. [\*\*\*8] When counting from 39 to 20, Hiemstra stopped at 25, asked Thompson if that was sufficient, and was told to continue as instructed.

Hiemstra was then instructed to stand and raise either foot approximately 3 to 6 inches off the ground and count from 1,001 to 1,030. Thompson told Hiemstra that after completing the test, he was to put his foot down and say "stop." Thompson testified that on his first attempt, Hiemstra put his foot down on the count of 3. On his second attempt, Hiemstra put his foot down on the count of 3, continued, and then put his foot down on the count of 9. On the third attempt, Hiemstra put his foot down on the count of 12. Finally, Hiemstra was instructed to perform the walk-and-turn sobriety test. Thompson testified that Hiemstra missed three heel-to-toe steps on the first set of nine, missed seven of the second set of nine, and did not count out loud as instructed.

Thompson testified that Hiemstra smelled of alcohol and that his eyes were bloodshot, his speech was slurred at times, and his balance and mental state were impaired. Thompson testified that based on his experience [\*\*555] as an officer, his training in DUI investigations, and his personal experience with [\*\*\*9] alcohol, he [\*944] believed that Hiemstra was an impaired driver when he was stopped.

Thompson arrested Hiemstra and drove him to the Good Samaritan Hospital for a blood test. Thompson testified that he read a *Miranda* form to Hiemstra and asked him if he understood his rights, and that Hiemstra then signed the form. The court received a document showing Thompson's signature as the witnessing officer and Hiemstra's signatures indicating that he both understood and waived his *Miranda* rights. Thompson testified he asked Hiemstra how much he had to drink and Hiemstra told him he drank four to five cans of beer. Thompson also testified that Hiemstra stated "[he had] been drinking for two hours from 10 o'clock until 11 o'clock [sic]" but then stated he had his last drink at 1 o'clock.

In his motion to suppress, Hiemstra alleged that all the evidence obtained should be suppressed because the initial stop violated the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution. Hiemstra also moved the court to suppress any statements made while he was in custody but before the *Miranda* warnings were given. Hiemstra alleged that such [\*\*\*10] statements violated his Fifth Amendment guarantee against self-incrimination. Finally, Hiemstra requested that the court suppress the results of the blood test because Thompson did not have probable cause to request the test. The court overruled Hiemstra's motion.

At trial, Thompson testified to essentially the same version of the facts as during the hearing on the motion to suppress. Thompson stated that Hiemstra was under the influence when he was arrested. Thompson testified that after arresting Hiemstra, Thompson read him a post arrest chemical advisement form, which Hiemstra signed.

The court received a "Post Arrest Chemical Test Advisement" form signed by Thompson which was marked to read, "I hereby direct a test of your X blood \_ breath X urine to determine the X alcohol \_ drug content." Thompson testified he did not give Hiemstra a urine test or the opportunity to take a urine test. Outside the presence of the jury, Hiemstra's attorney claimed that Thompson's marks directing both a urine and a blood test were inconsistent with Nebraska statutes and asked the court to [\*945] suppress any testimony regarding the blood test. The court denied this request.

Thompson explained [\*\*\*11] why he did not give Hiemstra a speeding citation: "The main reason is because I didn't have a radar lock on the defendant in this case and the second reason for not giving him a ticket is he's already -- he already has a DUI pending. I didn't feel the need to hammer the guy."

Tyler Schwartz, a medical technologist employed by Good Samaritan Hospital, testified that he did not recall drawing blood from Hiemstra on August 25, 1996. However, the court received a document identified by Schwartz as a "Legal Alcohol on Body Fluid" form. Schwartz testified he signed and dated the document and wrote down a time. "Russell J. Hiemstra" is listed on the document as the "Subject Name," and the document shows that blood was obtained by Schwartz at "0150" on August 25. Additional facts regarding Schwartz' testimony will be discussed later in this opinion.

Diane Stevens, a medical technologist employed by Good Samaritan Hospital, testified that she tests blood for legal blood alcohol content using a machine called the Abbott TDx. The court received Stevens' Class A permit, which allows her to perform testing for body fluid alcohol content. Stevens testified, over objection, that Hiemstra's body [\*\*\*12] fluid alcohol content was .18 of 1 gram per 100 milliliters. Additional facts regarding the blood test will be discussed later in this opinion.

Hiemstra's motions to dismiss or, in the alternative, for a directed verdict at the conclusion of the State's evidence and at the conclusion of Hiemstra's evidence were denied. Hiemstra was convicted of DUI, and he appealed to the district court. The district court for Buffalo County affirmed the trial court's judgment of conviction.

## II. ASSIGNMENTS OF ERROR

Hiemstra claims the trial court erred (1) in failing to find that the stop of his vehicle [\*\*556] violated the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution; (2) in receiving the blood test results even though the person drawing the blood was not qualified; (3) in receiving the blood test results even though the arresting officer did not [\*946] provide Hiemstra a urine test; (4) in receiving the blood test results even though the person testing his blood did not conform to title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) requirements; and (5) in instructing the jury as to the definition of "driving under the influence."

## III. STANDARD [\*\*\*13] OF REVIEW

[1] [HN1] In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996).

[2] With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

## IV. ANALYSIS

### 1. VEHICLE STOP

[3,4] Hiemstra claims the trial court erred in overruling his motion to suppress. Specifically, Hiemstra contends the trial court erred in failing to find that the stop of his vehicle violated his constitutional rights. [HN2] Regarding motions to suppress, the Nebraska Supreme Court has recently held that "ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences [\*\*\*14] drawn from those facts by the trial judge." *State v. McCleery*, 251 Neb. 940, 942, 560 N.W.2d 789, 790 (1997). In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion. *State v. Case*, 4 Neb. App. 885, 553 N.W.2d 173 (1996).

6 Neb. App. 940, \*946; 579 N.W.2d 550, \*\*556;  
1998 Neb. App. LEXIS 72, \*\*\*14

[5, 6] [HN3] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect [\*947] might be involved. See, *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995). In addition, "when an officer observes a traffic offense -- however minor -- he has probable cause to stop the driver of the vehicle." *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990), cert. denied 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991).

Hiemstra argues that "at no time was there ever any evidence offered to show whether or not Hiemstra was in fact exceeding [\*\*\*15] any speed limit or violating any law." Brief for appellant at 12. Thompson's stop was based on his visual observation that Hiemstra was traveling in excess of the speed limit. Thompson testified that the speed limit in the area ranged from 20 to 25 miles per hour. Thompson stated that when following Hiemstra, he was driving in excess of 45 miles per hour. As such, Thompson had probable cause to stop Hiemstra because Hiemstra was violating the speed limit.

[7] Hiemstra also argues that "no testimony was offered to show that Thompson's estimation was corroborated with mechanical, electronic or radio microwave devices." Brief for appellant at 13. This argument is similar to that used in *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). In *Howard*, the defendant argued that officer's testimony that the defendant was driving over 100 miles per hour had to be corroborated by a radio microwave, mechanical, or electronic speed measurement device in accordance with Neb. Rev. Stat. § 60-6, 192 (Reissue 1993). [HN4] Section 60-6, 192 states:

Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being [\*557] competent evidence [\*\*\*16] for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the *speed of the vehicle is at issue*.

(Emphasis supplied.) The court held that [HN5] when testimony regarding speed is used to establish some charge other than [\*948] speeding, the officer's testimony need not be corroborated. *State v. Howard, supra*.

As in *Howard*, the actual speed of Hiemstra's vehicle is not at issue. Hiemstra was not charged with speeding. Thompson's estimate was used to establish that he had probable cause for stopping Hiemstra. Hiemstra's first assignment of error is without merit.

## 2. INADMISSIBILITY OF BLOOD TEST RESULTS

Hiemstra argues the trial court erred in admitting his blood test results for three reasons. First, the person who drew Hiemstra's blood was not qualified under *Neb. Rev. Stat. § 60-6,201* (Reissue 1993). Second, the arresting officer failed to provide Hiemstra a urine test. Third, the State failed to show the [\*\*\*17] requirements of title 177 (*177 Neb. Admin. Code, ch. 1, § 006.04D* (1990)) were complied with. We will address each argument in turn.

### (a) Qualifications of Person Drawing Blood

[8,9] Hiemstra argues the trial court erred in receiving Hiemstra's blood test results because the person drawing Hiemstra's blood was not qualified. [HN6] The drawing of blood and the admissibility of test results are controlled by § 60-6,201, which provides in pertinent part:

(3) To be considered valid, tests of blood . . . shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, *except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in section 71-2017.01 . . . may withdraw blood for the purpose of a*

test to determine the alcohol concentration . . . .  
(Emphasis supplied.)

In the instant case, Schwartz drew Hiemstra's blood and had no valid permit to do so. Schwartz was asked the following questions: "Q- And to the best of your knowledge, is Good Samaritan Hospital a certified hospital? A- Yes. . . . Q- Do you know [\*\*\*18] if the State of Nebraska requires a certification or permit for one who draws blood? A- I don't know."

[\*949] [10] [HN7] Pursuant to Neb. Evid. R. 602, a witness may not testify to something of which the witness has no personal knowledge. See, *Neb. Rev. Stat. § 27-602* (Reissue 1995); *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996). Schwartz' testimony did not evidence that he possessed personal knowledge that Good Samaritan Hospital was or was not a certified hospital or that he even knew the significance of "certified." Indeed, the question was framed so that Schwartz could answer in the affirmative even if he did not know whether the hospital was licensed. As such, Schwartz' statements did not demonstrate that Good Samaritan Hospital is a licensed institution or facility as required by § 60-6,201(3).

We also note that on September 15, 1997, the State filed a "Suggestion of Remand" stating that remand to the district court for a new trial was appropriate because "the State failed to present evidence that the person drawing Hiemstra's blood was employed by a 'licensed institution or facility' as required by *Neb. [\*\*\*19] Rev. Stat. § 60-6,201(3)* (1993)." Nonetheless, in its brief, the State argued that Hiemstra's failure "to object to Schwartz' testimony that Schwartz had drawn a blood sample from Hiemstra" was "a waiver of his right to now raise the issue on appeal." Brief for appellee at 10-11.

The argument in the State's brief is without merit. The State argues Hiemstra needed to object when Schwartz testified that he drew Hiemstra's blood. The evidence shows that Schwartz did, in fact, draw a blood [\*\*558] sample from Hiemstra; thus, an objection at that time was unwarranted. Instead, Hiemstra objected on the basis of insufficient foundation when the blood test results were offered. Hiemstra's objection was timely.

Based on the evidence, the trial court erred in admitting the results of Hiemstra's blood test because the State failed to show that a qualified person, pursuant to § 60-6,201, drew Hiemstra's blood.

#### (b) Failure to Provide Urine Test

The court received a "Post Arrest Chemical Test Advisement" form which had "Russell J. Hiemstra" listed at the top. Thompson testified, and the evidence shows that he placed checkmarks on the form, causing it to read, "I hereby direct a [\*950] test of your X [\*\*\*20] blood [and] X urine to determine the X alcohol . . . content." The form was signed by Thompson as the "Advising Officer" and was also signed by Hiemstra. Only Hiemstra's blood was tested. Hiemstra argues:

Section 60-6, 199 Neb. R.R.S. generally provides that an arrested person, when advised that they will have a chemical test of their blood, breath or urine test performed, may *request* a second test, and if the second test is not provided then the first test would be inadmissible. . . . Because of the failure of the arresting officer to *provide* the second test, the first test should not have been received as evidence.  
(Emphasis supplied.) Brief for appellant at 23.

[11] Hiemstra notes the statute states an arrested person may *request* a second test. See *Neb. Rev. Stat. § 60-6, 199* (Reissue 1993). Hiemstra then argues the blood test is inadmissible because a second test was not *provided*. There is no evidence Hiemstra requested a urine test. The Supreme Court has stated that [HN8] "while . . . the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls [\*\*\*21] to secure the test." *State v. Dake*, 247 Neb. 579, 584, 529 N.W.2d 46, 49 (1995). Therefore, Thompson had no duty to *provide* a urine test for Hiemstra. In addition, the fact that no urine test was performed does not affect the admissibility of the blood test, and Hiemstra provides us with no law to the contrary.

6 Neb. App. 940, \*950; 579 N.W.2d 550, \*\*558;  
1998 Neb. App. LEXIS 72, \*\*\*21

There is no evidence this error misled Hiemstra to his prejudice or somehow caused him to not request a urine test. Hiemstra's third assignment of error is without merit.

(c) Failure to Show Abbott TDx Was Working as Required by Title 177

Hiemstra argues the trial court erroneously admitted the blood test results because the requirements of title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) were not satisfied. Specifically, Hiemstra argues that "the use of a known substance to obtain a low, medium and high control and the use of refrigerated reagent packs" are required by title 177. Brief for appellant at 28. Title 177 was entered into evidence and lists the following requirements under the heading "Radiative Energy Attenuation Utilizing The Abbott TDx Analyzer:"

[\*951] 006.04D1 The radiative energy attenuation method . . . must be performed in a manner to [\*\*\*22] include at least the following technique:

. . . .

006.04D1g Also upon completion of analysis, remove the carousel and discard its contents. If the reagent pack is not to be used immediately again, remove and store it at 2 to 8 degrees C.

. . . .

006.04D1j Each test run shall include a low, medium, and high control. If runs contain more than twelve specimens, the controls shall be placed after the last specimens for a chemical test on the carousel.

Hiemstra's argument is twofold. First, the State failed to prove the reagent pack was properly refrigerated. Second, the State failed to identify or verify the contents of the control used to demonstrate the Abbott TDx was working properly.

Stevens testified generally that she followed all of the policies and procedures of title 177. Such general testimony is a conclusion and is insufficient to show that title 177 requirements were complied with. Specifically, the State failed to question Stevens [\*559] about the refrigeration of the reagent pack. Therefore, the State failed to prove that title 177 was complied with, and the trial court erred in admitting the blood test results.

Hiemstra also contends his blood test results were [\*\*\*23] erroneously admitted because the State failed to verify the contents of the control used to demonstrate the Abbott TDx was working properly. Hiemstra's argument is very similar to that in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), overruled on other grounds, *State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992). In *Gerber*, the defendant was convicted of driving under the influence and claimed the lower court erred in admitting the results of his Breathalyzer test. The officer who administered the test testified that an ampul containing an amount of ethyl alcohol, referred to as a "NALCO standard," *id.* at 79, 291 N.W.2d at 406, is used to determine if the machine is operating correctly. (An ampule, ampul, or ampoule is "a sealed glass or plastic bulb containing solutions for hypodermic injection." Webster's Encyclopedic Unabridged Dictionary of the [\*952] English Language 51 (1989).) The NALCO standard is attached to the machine, and if operating correctly, the machine registers a number that matches the number on the ampul. The officer conceded that determining whether the machine is working depends on whether the alcohol content of the NALCO standard is, in fact, [\*\*\*24] as reflected on the ampul.

[12] The officer in *Gerber* testified that he did not know who prepared the NALCO standard and did not know where the NALCO standard came from or its actual alcohol content. The officer admitted he did not know if the machine was operating correctly at the time the defendant was tested. The *Gerber* court held that a competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came from, how it was received, under what conditions it was kept and preserved, and what spot checks were

6 Neb. App. 940, \*952; 579 N.W.2d 550, \*\*559;  
1998 Neb. App. LEXIS 72, \*\*\*24

made to determine its validity. The court quoted the following statement with approval:

[HN9] "The fact that the *sealed* ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is, in our opinion, sufficient *prima facie* proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion."

(Emphasis in original.) 206 Neb. at 90, 291 N.W.2d at 411 (quoting *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960)). The *Gerber* court held [\*\*\*25] the test inadmissible because the State failed to prove the necessary requirements were met.

In the instant case, Stevens testified that a known substance, called a control, is very important in determining whether the machine is working properly. Stevens testified that she receives a known substance, in a vial or a tube, from a manufacturer. Included with the substance is a certificate from the manufacturer stating the bottle contains a certain amount of ethanol. The bill of exceptions contains the following testimony:

Q- . . . You get this known substance and my only question is, before you use it in the machine, what do you do to make sure that the known substance is what it purports to be?

[\*953] A- Okay, the known substance has a known value on it. So I run it and if I get the known value on it, I assume that it's what it's supposed to be because I got the value they told me I would get.

Q- And that's based not upon your test, but what some piece of paper says?

A- They ran it and got this answer, I rerun it, get the same answer.

Stevens also testified that Good Samaritan Hospital did not have a policy or procedure of periodically testing blood kits to make sure that the [\*\*\*26] contents of the test tubes were what they purported to be.

Based on *Gerber*, *supra*, we find that the trial court erred in admitting the results of Hiemstra's blood test because there was no testimony or evidence identifying the contents of the control, showing how the control was received, detailing under what conditions the control was kept and preserved, and identifying what spot checks were made to determine the validity of the control.

### [\*\*560] 3. JURY INSTRUCTIONS

Hiemstra argues that "the definition of under the influence as given by the Court is not appropriate and is an incorrect statement of the law. The problem with the Court's instruction is that it causes the jury to try to guess at what Hiemstra's normal body or mental faculties would be." Brief for appellant at 29. Over objection, the trial court gave the following instruction defining "under the influence:"

A person is under the influence of alcoholic liquor if such person is impaired because of his or her[]consumption of alcohol in the capacity to think and act correctly and efficiently, to the extent as to have lost an appreciable degree of the normal control of his or her body or mental faculties.

Hiemstra [\*\*\*27] proposed the following instruction: "The phrase 'under the influence of alcoholic liquor' means the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner."

[\*954] [13, 14] [HN10] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In an appeal based on the claim of an erroneous

6 Neb. App. 940, \*954; 579 N.W.2d 550, \*\*560;  
1998 Neb. App. LEXIS 72, \*\*\*27

instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996).

[15] The language of Hiemstra's proposed jury instruction is very similar to that of NJI2d Crim. 7.52. We conclude that Hiemstra's proposed instruction is a correct statement of the law and note [\*\*\*28] that the court's instruction seems to require evidence of the individual defendant's "normal control of his or her body," whereas the NJI2d Crim. 7.52 instruction does not contain this weakness. Hiemstra also satisfies the second requirement that the instruction must be warranted by the evidence. Since Hiemstra was charged with "driving under the influence," a jury instruction defining that term was certainly warranted. However, Hiemstra fails to establish that his rights were prejudiced by the court's failure to give the suggested jury instruction. We assume that Hiemstra is arguing his rights were prejudiced because the given jury instruction is an incorrect statement of the law. We recognize that the given jury instruction contains the weakness cited above and is therefore somewhat confusing, while the language of NJI2d Crim. 7.52 is considerably clearer. However, the Supreme Court has stated that [HN11] jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

We must examine the jury instructions in their entirety. Jury instruction No. 4 [\*\*\*29] generally explains the material elements of driving under the influence; specifically, that the defendant was in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1 [\*955] gram or more of alcohol per 100 milliliters of his blood. Jury instruction No. 5 explains that Neb. Rev. Stat. § 60-6, 196 (Reissue 1993) makes it unlawful for any person to operate or be in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1 gram of alcohol or more per 100 milliliters of his or her blood.

When read in their entirety, the jury instructions accurately and fairly present the law of DUI. Therefore, Hiemstra has failed to meet his burden and demonstrate that his rights were prejudiced by the court's failure to give the suggested jury instruction. Hiemstra's final assignment of error is without merit. However, upon remand, we remind the trial court that as long as there is a Nebraska jury instruction that accurately states the law and applies to the case, it is the instruction which should be given. *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995), *aff'd* [\*\*\*30] *as modified* 248 Neb. 255, 533 N.W.2d 913.

#### [\*\*561] 4. EFFECT OF ERRORS

[16] Hiemstra urges that the admission of the blood test results necessitates the dismissal of his case. However, in *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997), the Supreme Court reached a different conclusion in a factually similar case. In *Hingst*, the defendant was also convicted of DUI. On appeal, the court held that the trial court committed plain error when it failed to exclude the chemical test results because the defendant was not properly advised before the test was taken. However, the State argued that the record contained other evidence sufficient to sustain the conviction. On further review, the Supreme Court stated, [HN12] "In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *Id.* at 537, 557 N.W.2d at 683. "An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant." *Id.* at 538, 557 N.W.2d at 683.

[17] The Supreme Court noted the record contained [\*\*\*31] evidence that at the time of arrest, the defendant's eyes were bloodshot, he smelled of alcohol, his speech was slurred, and he failed twice to correctly recite the alphabet. However, the Supreme [\*956] Court was unable to determine which evidence the jury relied on in convicting the defendant. The Supreme Court held that after a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed. The Supreme Court found that sufficient evidence existed upon which a jury could, on remand, find the defendant guilty of DUI; accordingly, the Supreme Court affirmed this court's

6 Neb. App. 940, \*956; 579 N.W.2d 550, \*\*561;  
1998 Neb. App. LEXIS 72, \*\*\*31

decision reversing the conviction and remanding the cause for a new trial.

#### V. CONCLUSION

As in *Hingst*, in this case, the trial court erred in admitting Hiemstra's blood test results, as determined above. We cannot say that this error was harmless beyond a reasonable doubt. However, the record contains independent evidence to support Hiemstra's conviction. Thompson's testimony establishes that Hiemstra was driving under the influence. Thus, we find [\*\*\*32] that there is sufficient evidence to support the conviction. Accordingly, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the judgment of conviction and remand the cause for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

64 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**IN THE MATTER OF THE ADMISSIBILITY OF MOTOR VEHICLE SPEED  
READINGS PRODUCED BY THE LTI MARKSMAN 20-20 LASER SPEED  
DETECTION SYSTEM.**

**Appeal No. 96-029**

**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY**

*314 N.J. Super. 211; 714 A.2d 370; 1996 N.J. Super. LEXIS 533*

**June 13, 1996, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1]

APPROVED FOR PUBLICATION MAY 27, 1998. As Corrected June 14, 1996. As Corrected June 20, 1996.

Supplementary Proceedings of March 20, 1998, Reported at: *314 N.J. Super. 233, 714 A.2d 381, 1998 N.J. Super. LEXIS 329.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants with speeding violations pending in the municipal courts of Rockaway Township and Parsippany-Troy Hills Township (New Jersey) and the prosecutor for those townships requested the court to conduct a comprehensive evidentiary hearing pertaining to the admissibility of speed readings produced by a laser speed detector.

**OVERVIEW:** Several defendants with speeding violation cases pending in municipal court filed motions challenging the admissibility of speed readings produced by laser speed detectors that state police had recently begun to use. The court conducted a comprehensive evidentiary hearing on all the municipal cases and heard all pending evidentiary motions. The court found that although the general concept of using lasers to measure speed was widely accepted in the scientific community and was valid, evidence did not show that the laser speed detector was accurate and reliable enough to be used for law enforcement purposes. No one other than the manufacturer knew how the detector's error trapping device functioned and consequently the error trapping could not be evaluated. Moreover, there was a lack of acceptable performance testing of the detector. The court prohibited the use of speed readings obtained by the laser speed detector, as well as evidence based on those readings, in the pending municipal cases.

**OUTCOME:** The court prohibited the use of speed readings obtained by laser speed detectors and the evidence based on those readings in the pending municipal cases. Although the concept of using lasers to measure speed was widely accepted in the scientific community and was valid, the detectors' error trapping device could not be properly evaluated and there was a lack of acceptable performance testing.

314 N.J. Super. 211, \*; 714 A.2d 370, \*\*;  
1996 N.J. Super. LEXIS 533, \*\*\*1

**CORE TERMS:** detector, speed, laser, pulse, testing, target, mile, highway, trapping, reliable, motor vehicle, measurement, distance, manufacturer, municipal, state police, accuracy, message, radar, lane, feet, reliability, velocity, targeted, beam, motor vehicles, traffic, range-finder, motorist, compute

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard*

[HN1] A belief that a laser speed detector device is broadly accurate is not sufficient.

**COUNSEL:** *Michael M. Rubbinaccio*, for the State.

*Alfred V. Gellene, Steven K. Greene, Joseph T. Maccarone and Sohail Mohammed*, for various defendants.

**JUDGES:** STANTON, A.J.S.C.

**OPINION BY:** REGINALD STANTON

**OPINION:**

[\*212] [\*\*\*371] STANTON, A.J.S.C.

This proceeding involves the reliability of a device known as the LTI Marksman 20-20 Laser Speed Detection System manufactured by Laser Technology, Inc. For ease of expression, I shall hereafter usually refer to this device as the "laser speed detector" or the "detector". The New Jersey State Police have recently purchased 23 of the detectors and have begun to deploy them in their motor vehicle law enforcement operations. More particularly, a number of the detectors have been used along Interstate Route 80 in the Township of Rockaway and in the Township of Parsippany-Troy Hills in Morris County and numerous speeding tickets have been issued based upon readings produced by the detectors.

Because the laser speed detector has only recently been put into use in New Jersey, its reliability in establishing the speed of a motor vehicle [\*\*\*2] has not been adjudicated in any New Jersey court. A number of defendants in speeding violation cases pending in the Municipal Court of Rockaway Township and in the Municipal Court of Parsippany-Troy Hills Township have filed motions challenging the admissibility of speed readings produced by the [\*213] detector. Approximately 30 pending municipal court cases are affected by those motions. In an effort to avoid numerous separate evidentiary hearings in the municipal courts and in an effort to obtain a comprehensive ruling that would bind a large number of municipal courts, various defense attorneys and Michael M. Rubbinaccio, who is the municipal prosecutor for both Rockaway Township and Parsippany-Troy Hills Township, have requested the Law Division of the Superior Court for Morris County to conduct a comprehensive evidentiary hearing including all of the evidentiary motions presently pending in the two municipal courts. I agreed to conduct such an evidentiary hearing in the Superior Court. Because of the potentially widespread implications of any ruling which might be made, the Attorney General of New Jersey was invited to participate in the hearing. The Attorney General decided not to participate [\*\*\*3] formally in the hearing, apparently because she was satisfied that Mr. Rubbinaccio would adequately represent the interest of the State in the proceeding, but her office has given significant informal assistance to Mr. Rubbinaccio, as have the State Police. I conducted an extensive evidentiary hearing on five court days from May 20 to June 4, 1996. On June 5, with the consent of all counsel, I went with State Police Sergeant Robert Ricker to a site on Interstate Route 287 south of Morristown and observed him while he operated the laser speed detector. I also spent some time operating the detector myself.

The laser speed detector is a compact, hand-held device which is covered by United States Patent Number 5,359,404. The patent gives the following summary of the invention embodied in the laserspeed detector:

The invention comprises a laser speed detector comprising a laser range-finder, a sighting scope for a user to visually select a target with an operably-disposed trigger for triggering operation of the detector upon the selected target, and a microprocessor-based microcontroller which is controllingly and communicatively interconnected to the laser range-finder. In a highly [\*\*\*4] preferred embodiment, the instrument is small enough to be easily hand-held.

The laser range-finder, under the supervision of the controller, fires a series of laser pulses at a selected remote target at [\*\*372] known time intervals, and detects reflected laser light from each pulse. Preferably, the pulses are fired at equally-spaced intervals. The laser range-finder further determines count data reflective of the [\*214] time-of-flight of each pulse to the target and back, and provides these data to the control means. These count data comprise the respective arrival times of a REF (reference) pulse representing the firing time of the laser pulse, and an RX pulse representing reflected laser pulse light.

The microcontroller is configured to read these count values and to compute from them, the time-of-flight of the laser pulse and in turn, the distance to the target. The controller then computes the velocity of the target relative to the speed detector from the change in distance to the target divided by the known elapsed time between firing of the pulses.

The laser range-finder has several notable features which provide significant improvement in accuracy and reliability (not necessarily [\*\*\*5] listed in order of importance). First, a crystal clock-based timing analysis circuit including a gating circuit which is a digital logic, edge-sensitive gate for which both the "opening" and the "closing" of the time window can be selectably set by the microcontroller. In a preferred embodiment, the microcontroller is configured to alternately widen and narrow the window to selectively lock on "true" RX pulses and exclude pulses due to noise or other factors.

Second, the timing analysis circuitry is constructed to generate self-calibration pulses and to process them in the same manner as the REF and RX pulses, thereby producing a set of calibration interpolation counts. The controller uses these calibration interpolation counts along with the REF and RX interpolation counts to compute self-calibrated values of the respective fractional portions of the clock periods at which the REF and RX pulses arrived. The self-calibration pulses comprise a pair of pulses, referred to for simplicity as TMIN and TMAX, which differ by a known integral number of clock periods (with neither TMIN nor TMAX being zero). Together, TMIN and TMAX define an expanded interpolation interval within which [\*\*\*6] the fractional portions of the RX and REF arrival times are interpolated. This self-calibrating interpolation provides greatly enhanced resolution and accuracy of distance measurements based on elapsed time.

Third, the laser range-finder has a first collimator which directs a major portion of an outgoing laser pulse toward the selected target, and a second collimator which redirects a minor portion of the laser pulse to produce a timing reference signal. In one embodiment, the minor portion of the laser pulse is sent to a second light detector separate from a first light detector (here embodied as a silicon avalanche photodiode detector or "APD") which focusses and receives reflected laser light. Alternatively, the minor portion of the laser pulse is sent to the same detector which detects the returned laser light.

Dr. Daniel Y. Gezari, an astro-physicist who has been employed at the National Aeronautics and Space Administration Space Flight Center for the past 18 years, testified with respect to the general scientific concepts involved in the use of lasers to measure distance and, derivatively, speed. Lasers have been used as a standard tool for the measurement of distances [\*\*\*7] by astro-physicists and other space scientists for a number of years. Mr. Jeremy [\*215] Dunne, a vice president of Laser Technology, Inc. and the designer and inventor of the laser speed detector in question, testified extensively about the scientific concepts involved and about the design and practical operation of the detector. New Jersey State Police Sergeant Robert Ricker, testified about the training of State Police officers in the use of the laser speed detector and about the experience which he and other officers have had with the detector in the field. Mr. Walter Smith, an employee of the Office of the New Jersey State Superintendent of Weights and Measures testified

about testing of the laser speed detector which had been done by his agency. Mr. Bryan Traynor, an official of the National Highway Traffic and Safety Administration, an agency of the United States Department of Transportation, testified [\*\*373] about testing of the laser speed detector which had been done under the auspices of his agency.

A laser is an artificially generated and amplified light which is in the infrared light section of the electromagnetic wave spectrum. It is not visible to the naked eye. It is very concentrated. [\*\*\*8] The laser speed detector fires a series of laser pulses at a selected remote target. When the laser light strikes the target, a portion of the light is reflected back to the detector. Since the speed of light is a known constant, by measuring the time which it takes for the laser pulse to travel to the target and back, the detector is able to calculate the distance between the detector and the target. Each laser pulse which is fired and reflected back establishes one distance reading. The laser speed detector fires 43 laser pulses every time the trigger on the detector is squeezed. These 43 pulses are fired in a total period of approximately one-third of a second. If the target at which the laser pulses are fired is a stationary target, each of the 43 pulses will give the same distance reading to the target, and distance will be the only thing that the detector can tell us about the target. However, if the target is moving, each of the 43 pulses will give a slightly different distance reading and the detector can then compute the velocity or speed of the target from the changes in distance divided by the known elapsed time between the firing of each of the laser pulses. In [\*216] simplest [\*\*\*9] terms, this is the basic theory underlying the use of lasers to calculate speed, and there can be no dispute about its fundamental validity.

There are, however, both conceptual and practical problems which have to be overcome in designing and constructing a reliable laser speed detector. The detector works by measuring the time it takes a laser pulse which it transmits to go out to a target and come back. However, there are many other pulses in the environment of the detector which can interact upon it, and the detector must be programmed to distinguish between those "false" pulses and the "true" pulses which it has transmitted.

As mentioned above, the laser is very concentrated and has a characteristically narrow beam. At a point 1,000 feet away from the detector, a laser beam is about three to three and one-half feet wide and has a height of about three feet. This may be contrasted with the beam of radar which is about 320 feet wide at a point 1,000 feet away from the radar transmitter. Although the laser beam is much more concentrated than the radar beam, it is far from being a true pinpoint. As the three by three and one-half foot laser beam strikes the very irregular surface [\*\*\*10] of a moving motor vehicle, it does not hit a single, highly-reflective point on the vehicle. In effect, it splashes over a portion of the vehicle. This is true even though operators are trained to fire at the front license plate area of the vehicle, because the beam is considerably larger than the license plate. Indeed, depending upon the angle at which the beam hits a vehicle, and depending upon the vehicle's location with respect to other vehicles on the highway, particularly a multi-lane highway, it is conceivable that a portion of the beam splashes onto another vehicle. For reasons which will become apparent when I discuss possible sweep error, there is a sense in which it is important for the detector to be programmed so that it can distinguish the point on a vehicle from which the return impulse is coming.

It is important for the laser detection device to measure distances between it and a motor vehicle at the same point on the [\*217] motor vehicle. In traffic law enforcement, the ultimate use of the detector is to fix the speed of a vehicle. However, the primary measurement made by the detector is distance. (In this respect, the detector contrasts with the Doppler radar units employed [\*\*\*11] in police work. The Doppler radar units compute speed from differences in frequency between microwaves. For them, distance is not significant.) This distinction is important, because, although the entire vehicle travels at the same speed, not every point on the vehicle is the same distance away from the detector. A vehicle traveling along a highway at 60 miles per hour travels 88 feet in a second. In the one-third second which elapses while the laser speed detector is firing 43 pulses at the vehicle, the vehicle will travel 29.33 feet. If the laser pulses being fired by the detector were allowed to sweep [\*\*374] from the front grille of the vehicle to the windshield of the vehicle during the one-third of the second the pulses were being fired, the pulses reflecting back from the windshield would be four feet farther away than the pulses reflecting back from the front grille. Unless the detector has an appropriate error trapping program built into it, the detector would conclude that the vehicle traveled 33.33 feet instead of the 29.33 feet which it actually traveled, and the detector would show the speed of the vehicle as being 68 miles per hour instead of the correct 60 miles per hour. This [\*\*\*12] would be what is known as "sweep" error. If the

detector were allowed to sweep for ten feet along a vehicle, that would lead to about 20 miles per hour being erroneously added to the calculation of the vehicle's speed. If the detector were allowed somehow to pan from one vehicle to another vehicle in a way which would lead to a distance differential of 30 feet, that would convert to a speed reading 60 miles per hour too high.

The inventor of the laser speed detector is clearly aware of many of the conceptual and practical problems involved and has designed computer programs and hardware mechanisms designed to trap a variety of errors. The State's expert, Dr. Gezari, submitted a report which had this to say on the subject of error trapping:

[\*218] One of the basic operating features of the LTI 20-20 is an error trapping algorithm which tests the integrity of the received data. Thirty to forty data pulses received must have the correct pulse shape, rise time, duration, color and basic time sequence to be considered valid data fit for analysis. If at least thirty received impulses do not fit the criteria the data is rejected and no velocity is calculated. Other criteria are also used [\*\*\*13] by the manufacturer to identify valid pulses having to do with actual vehicle characteristics--acceleration/deceleration parameters, change in target direction, etc. The LTI 20-20 speed gun will display error messages if no velocity is calculated informing the operator as to the reason no answer was given or no velocity was calculated. These error messages do not indicate errors were made; they simply identify the reason that no calculation was made. The error trapping approach used in data analysis further insures that factors such as steadiness of the gun during the measurement, weather conditions, motion of other objects nearby, etc. do not affect the accuracy of the speed reading calculated.

The electrocomputer circuitry of the LTI 20-20 speed gun uses sophisticated techniques including pulse stretching algorithm, statistical data analysis techniques, etc. to provide fully adequate timing accuracy in the generation and detection of laser pulses resulting in typical velocity measurement accuracies of +/- 1 mile per hour or better for typical highway speed measurements.

The inventor and designer of the detector, also testified fairly extensively with respect to his efforts [\*\*\*14] to eliminate inconsistent data and to trap error. One of the mathematical techniques to screen out inconsistent and erroneous readings is a procedure called the "average of least squares". That procedure was discussed at some length by Mr. Dunne and by three of the defense experts, and an exhibit setting forth a partial test program for least square speed error was admitted in evidence. The average of least squares is a common procedure which can eliminate inconsistency and error in a variety of applications, but it is only a limited part of the error trapping techniques which are purportedly built into the laser speed detector.

At this point, it is important to note a very significant difficulty. That difficulty lies in the fact that Laser Technology, Inc., the manufacturer of the laser speed detector, is unwilling to disclose the details of the error trapping programs and devices built into the detector on the ground that such information is proprietary information which gives it an important competitive advantage which it should not be required to disclose. The result is that no one outside of the employ of the manufacturer knows the details of [\*219] the error trapping techniques which [\*\*\*15] are being employed in the detector. This means that there is no way for any independent expert to test the adequacy of the procedures or the internal logic of any of the programs being employed.

[\*\*375] I can understand why the manufacturer would be reluctant to disclose its proprietary information to experts retained by defendants, even under a strong and tightly drawn protective order. But, surely, techniques could be developed for disclosure to governmental agencies or to non-governmental independent testing institutions which would protect the manufacturer from any misappropriation of its intellectual property by a competitor. I note that I myself do not have the ability to analyze and evaluate the error trapping techniques involved in the detector, and I myself would not be able to do anything useful with the details of the techniques if they were disclosed to me. However, there are many experts available to government agencies and to non-governmental testing organizations who could effectively evaluate those techniques and tell us whether they appear to be adequate and have good internal logic. Under the total circumstances of this case, I have not thought it appropriate to order disclosure [\*\*\*16] of the proprietary data involved. This leaves the data securely intact in terms of the proprietary interests of the manufacturer, but it also places

the manufacturer in the position of losing the probative advantage of having its methodology validated by reliable experts not in the employ of the manufacturer.

Three expert witnesses testified for the defendants. They were Mr. Henry Roberts, a retired electrical engineer, Mr. Jim Coleman, an engineer who works for a defense contractor and has considerable experience with the design of electronic appliances used to measure velocity, and Mr. Paul S. Greenberg, an employee of the National Aeronautics and Space Administration who has considerable experience working with lasers to measure velocity in space applications. Each of these experts testified at considerable length with respect to a variety of conceptual and practical problems which they found with the application of laser technology [\*220] to the measurement of speed in motor vehicles. Unfortunately, none of the defense experts had the advantage of having worked with the laser speed detector involved in our case and none had conducted any testing of this detector.

The State presented [\*\*\*17] documentary evidence and testimony to the effect that the laser speed detector has been approved for use by law enforcement agencies in the United Kingdom, Sweden, Germany and Austria. It has also been approved for use by the Royal Canadian Mounted Police. The detector is being used by state and local law enforcement agencies in a fairly large number of states. In *Goldstein v. State of Maryland*, 339 Md. 563, 664 A.2d 375 (1995), Maryland's highest court has approved the general concept of admitting laser speed measurements into evidence in judicial proceedings in a case in which the LTI 20-20 Laser Speed Detection System was involved. The Court of Appeals did not reach the issue of the reliability of the particular device.

The State produced a certificate issued by the Office of the New Jersey State Superintendent of Weights and Measures which reads: "This certifies that Laser Speed Detection Instrument Serial Number 008999 has been compared with standards of the State of New Jersey in possession of the State Superintendent of Weights and Measures. The error found in the time base component will result in an error of less than 0.030 MPH at any speed. [\*\*\*18] Agency certified for New Jersey State Police."

The State has also presented a final report issued by the National Highway Traffic Safety Administration of the United States Department of Transportation, issued in February, 1995, establishing "Model Minimum Performance specifications for Lidar Speed Measurement Devices". (The laser speed detector is a lidar speed measurement device.) The Model Minimum Performance Specifications were developed in response to a request for standards made by the International Association of Chiefs of Police. Purportedly, the laser speed detector meets the standards embodied in the Model Minimum Performance Specifications and [\*221] it appears to have been recommended for inclusion on a list of products suitable for purchase by law enforcement agencies.

At first glance, the list of foreign governments which have in some way approved the laser speed detector for use by their law enforcement agencies, the list of states of the [\*\*376] United States which have allowed the detector to be used by law enforcement agencies, the certification issued by the New Jersey Superintendent of Weights and Measures, the issuance of Model Minimum Performance Specifications by the National [\*\*\*19] Highway Traffic Safety Administration and the approval of the general validity of using laser speed measurements in judicial proceedings by the Court of Appeals of Maryland appear to constitute a rather strong endorsement of the validity of the laser speed detector. However, on closer examination, the endorsements appear to be somewhat hollow in terms of using them to make a realistic assessment of the reliability of the detector. A number of American and foreign governmental agencies (or testing organizations working with them) have subjected mechanical components of the laser speed detector to limited testing and there has been some limited testing under conditions not reflective of actual highway circumstances of the detector's ability to measure the speed of a motor vehicle which was actually being driven towards the detector. There was also very limited testing in Colorado by two state police sergeants of the laser speed detector and a similar device made by a competitor under actual highway conditions. The officers tracked the same vehicles with competing laser speed measurement devices and compared the results. Less than 100 vehicles were tracked by the officers. The competing [\*\*\*20] laser speed measurement devices produced results which were roughly consistent with each other, although a few readings were widely inconsistent. The Colorado study is not particularly useful because the actual speeds of the vehicles were not known and they were not measured by any device other than the two competing laser

speed measurement devices.

[\*222] The certificate issued by the New Jersey State Superintendent of Weights and Measures quoted above on its face seems impressive. On analysis, the certification does not actually say much about the reliability of the detector. The testimony of Mr. Smith during our hearings established that what actually occurred was that the frequency of the time base component of the detector was measured and was found to be as stated. This means that the time base component of the detector is functioning as specified, and, *if every other component and program of the detector is functioning as it is supposed to*, then there will be no error greater than 0.030 MPH at any speed. The time base component is an important element in the detector. If it were not functioning properly, the results produced by the detector would be unreliable. However, the fact [\*\*\*21] that it is found to be functioning properly does not mean that the results produced by the detector are reliable, unless everything else works as it is supposed to, and no effort was made to test whether everything else did work as it was supposed to. In short, the certification turns out to be a very limited one.

The Model Minimum Performance Specifications issued by the National Highway Safety Administration also end up not being as impressive as they appear to be at first blush. One obvious deficiency is that the speed accuracy test called for by the Specifications does not approach the conditions which exist on real highways. The testing of the speed of actual vehicles contemplated by the Specifications is really testing under closed circuit test track conditions. A tripod is used to hold the device steady and retro-reflective areas may be temporarily affixed to the vehicle to increase the amplitude of the laser pulse echoes. The testing procedures involved might be a useful first step in a more comprehensive testing program, but the reality is that vehicles do not travel along our highways one at a time, tripods are not used and retro-reflective areas are not attached to vehicles [\*\*\*22] being driven along the highways. The reality is that the shape of motor vehicles is highly irregular and their surfaces reflect pulses off at many angles, with the result that most of the incoming pulse is not [\*223] sent back towards the detector. The challenge is to devise a program for the detector which can capture reliable pulses off the irregular shape of an actual motor vehicle. If the motor vehicle is equipped with a retro-reflective area which is affixed to the vehicle for the explicit purpose of making it more likely that a larger part of the incoming pulse will be reflected straight back at the detector, that renders the test largely meaningless in terms of the ability to [\*\*377] recapture and identify pulses reliably from motor vehicles as they are actually driven along our highways. The Model Minimum Performance Specifications also suffer from the serious deficiency that they do not require the manufacturer of the device to disclose the actual error trapping programs and mechanisms contained in its device.

Some of the objections posed by the defense experts, particularly by Mr. Roberts, seem to me to have been somewhat overstated. The defense experts appropriately pointed to many possible [\*\*\*23] errors in the application of laser to the measurement of motor vehicle speed, but they suggested at times that it was almost conceptually impossible for those errors to be overcome. I think it is fairly clear that at least the most egregious errors have probably been eliminated from the laser speed detector. In this regard, it is important to take note of the experience which members of the New Jersey State Police have had with the use of the laser speed detector on our highways.

Sergeant Ricker testified about the classroom training and field training which State Police officers receive before they are certified as being qualified to use the laser speed detector. He also testified about the field practice which they must have with the detector before they are able to issue summonses. He detailed the operational checks which are made on each individual laser speed detector every day by an officer before the unit is used. He also spoke of the experience which he and other members of the State Police have had in the months during which they have been using the detector. I note that Sergeant Ricker's testimony about the training of members of the State Police who use the detector [\*224] satisfies [\*\*\*24] me that the members of the State Police are adequately trained in the use of the detector and that it is not likely that errors will be made in its use because of lack of training or skill in the operator of the individual laser speed detector.

By this time, officers of the State Police operating under normal traffic enforcement conditions have obtained speed readings with the laser speed detector on thousands of motor vehicles. They do not keep comprehensive data with

314 N.J. Super. 211, \*224; 714 A.2d 370, \*\*377;  
1996 N.J. Super. LEXIS 533, \*\*\*24

respect to the conditions under which they are obtaining the readings, and they are not simultaneously taking readings on targeted vehicles with other kinds of devices which have previously been found to be reliable. Accordingly, the experience of the State Police does not establish the degree of accuracy of the laser speed detector. However, it seems clear to me that the State Police are getting readings from the detector which are at least broadly sensible. State Police officers who take readings on a target vehicle on an interstate highway where their experience leads them to believe that the flow of traffic is probably moving in the 65 to 75 mile an hour range and where their visual observation leads them to believe [\*\*\*25] that a particular vehicle is probably going around 70 miles an hour are not getting bizarre readings. They are not firing the laser speed detector device at a vehicle which they think is going around 70 miles an hour and getting readings in the range of 40 miles an hour or readings in the range of 95 miles an hour. They are getting readings which are fairly close to where they expect them to be. They are also not encountering many motorists who claim that the speeds being attributed to them are way out of line. This leads me to conclude that the error trapping mechanisms and programs contained in the laser speed detector are eliminating the most serious potential errors.

My own limited experience in observing Sergeant Ricker use the laser speed detector and my own limited experience in using it myself reinforced the view that the error trapping is in fact getting rid of at least the worst errors.

[\*225] The field view of the operation of the operation of the laser detector which I conducted on June 5 took place on Interstate Route 287 at a location a little south of Morristown. We were located in the center median of the highway and were taking readings on motor vehicles traveling in the [\*\*\*26] three northbound lanes. Sergeant Ricker and I used the same unit in succession. He was able to get a much higher percentage of speed readings from vehicles which he targeted than I was able to get from vehicles which I targeted. I frequently got an error [\*\*378] message from the detector when I targeted a vehicle. As noted in the report of Dr. Gezari quoted above, an error message does not mean that the detector has made an erroneous calculation of speed. It means that the detector does not make a calculation of speed because something has occurred (usually a mistake by the operator) which makes it impossible for the detector to compute the speed correctly. My getting frequent error messages was, of course, highly consistent with the fact that I had had no formal training in the operation of the device and no experience in using it. Also, the particular error messages which I got were consistent with my sense of what was occurring around me. For example, I found it much easier to get a speed reading on vehicles traveling in the left lane of the highway than on vehicles traveling in the center lane or the right lane. The relative ease of getting readings on vehicles in the left lane was what [\*\*\*27] I expected based on the testimony in this case, because I was able to get a much clearer and unobstructed shot on those vehicles, given the fact that I was standing in the center median of the highway. When I did get an error reading on a targeted vehicle in the left lane, it was usually "E03" which indicated poor aiming or panning, and when I got such a message I was frequently conscious of having been unsteady when I depressed the trigger. Although I was successful in getting some speed readings on vehicles in the right lane, I very frequently got error messages when I attempted to target them, and the message was usually "E02" which indicated that another vehicle intruded between me and the targeted vehicle. When I got such an error message, I was usually conscious of [\*226] the fact that I had mistimed my depression of the trigger in the sense that I was aware that an intervening vehicle in the center lane or left lane was closely crowding my line of sight to the targeted vehicle. I also notice that the speed readings which I did obtain were consistent with what I expected them to be based on my experience as a motorist and based on what I was observing with respect to the traffic moving [\*\*\*28] in front of me.

In urging me to find that the laser speed detector is a reliable device for measuring the speed of motor vehicles and in urging me to rule that the defendants may be convicted of motor vehicle violations based upon readings produced by the detector, the State points to the various approvals which have been granted to the detector by the agencies and organizations mentioned earlier in this opinion. The State has also pointed to the moderately widespread use of the detector in a number of state and local police departments in this country and in a number of law enforcement agencies in foreign countries. The State also urges me to take notice of the fact that the principle of using lasers to measure speed is broadly accepted as being scientifically sound.

The State has called my attention to cases such as *State v. Wojtkowiak*, 170 N.J. Super. 44, 405 A.2d 477 (Law Div.1979), reversed, 174 N.J. Super. 460, 416 A.2d 975 (App. Div.1980) (approving use of K-55 Doppler Radar device),

314 N.J. Super. 211, \*226; 714 A.2d 370, \*\*378;  
1996 N.J. Super. LEXIS 533, \*\*\*28

and *Romano v. Kimmelman*, 96 N.J. 66, 474 A.2d 1 (1984). It is argued that there has been wide acceptance of the scientific techniques involved in the laser speed detector [\*\*\*29] and there has been wide approval of the detector itself and that the Court should accept the detector as being a reliable device for measuring speed when used by a properly trained police officer. *State v. Wojtkowiak* and *Romano v. Kimmelman* can be read in a way which is broadly supportive of the State's position in the present case, but my view of those cases and others cited in the State's brief is that they do not require me to accept the laser speed detector as being reliable, given the proofs and analysis which have been presented in our present case.

[\*227] After considering all of the proofs and the analysis and the argument presented, I am satisfied that the general concept of using lasers to measure speed is widely accepted in the relevant scientific communities and is valid. I am, however, not satisfied that the laser speed detector device is accurate and reliable enough to be used for law enforcement purposes. Accordingly, I will not permit speed readings obtained by the use of the laser speed detector to be used in any of the motor vehicle law violation cases pending in the municipal courts of the Township of Rockaway and the Township of Parsippany-Troy Hills, and I will [\*\*\*30] also order that evidence [\*\*379] based on such speed readings may not be presented in any municipal court in the County of Morris or the County of Sussex at the present time.

I reach the conclusion just stated with considerable reluctance. If the laser speed detector were known to be accurate and reliable, it would, in my judgment, be markedly superior to radar in many situations that exist on the highways, roads and streets of New Jersey. New Jersey is a very densely populated state and its highways, roads and streets are crowded with traffic. Traffic flow along our interstate routes tends to be dense with traffic flow tending to be heavy in all lanes at almost all times. Wide beam radar under those circumstances requires the exercise of considerable skill and judgment by the operator in order to identify a speeding vehicle. The laser speed detector (assuming its accuracy and reliability) can much more readily target an individual vehicle in a heavy traffic flow than can radar. I am also aware of the fact that radar detectors are in very wide use among motorists, particularly among truckers, and they make it possible for chronic and persistent speeders to frustrate detection by radar. I [\*\*\*31] see the laser speed detector as being potentially an extremely useful tool in enforcing speed laws in New Jersey.

My frustration is deepened by the fact that I suspect that the laser speed detector may be accurate and reliable. The problem is that I cannot be reasonably sure that it is accurate and reliable under the proofs and analysis which have been presented in this [\*228] case. As I see it, there are two major obstacles to the acceptance of the laser speed detector as being accurate and reliable at the present time. The first obstacle is that no one other than the manufacturer knows the details of how the error trapping in the detector works. As noted above, the manufacturer has declined to release the details on the ground that this would compromise the confidentiality of proprietary information which is essential to its maintaining its business advantage over competitors. The lack of access to detailed information about error trapping is important because there are many factors which could interfere with an accurate calculation of speed by the laser speed detector. Error trapping programs must comprehensively deal with the wide range of potential sources of error and they must deal [\*\*\*32] with those potential errors pursuant to programs whose inner logic is sound. If no one other than the manufacturer knows the details of the error trapping mechanics and programs, there is no way of evaluating their conceptual validity through intellectual evaluation.

The absence of detailed knowledge about the workings of the error trapping procedures in the laser speed detector is not necessarily an insurmountable obstacle to accepting the detector as being accurate and reliable. Even if we did know all the details of the error trapping procedures and could subject them to thorough intellectual analysis, and even if that analysis showed that they were conceptually sound, we would still need to have adequate performance testing of the laser speed detector under conditions which exist on our highways before we could accept it as reliable. Indeed, if we had adequate operational testing of the laser speed detector under actual highway conditions, we might be able to accept the detector as being reliable even though we did not have complete details about the way in which the error trapping procedures are designed and programmed. Good performance testing might conceivably put us in a position [\*\*\*33] of being sure that the detector in fact worked reliably, although we were not sure precisely how it managed to achieve its results. This leads us to the lack of acceptable performance testing in this case.

314 N.J. Super. 211, \*228; 714 A.2d 370, \*\*379;  
1996 N.J. Super. LEXIS 533, \*\*\*33

[\*229] We know that there are many factors which could affect the accuracy of the laser speed reading. There is no way of knowing whether the laser speed detector successfully copes with those problems in the absence of detailed performance tests which deal rather comprehensively with potential error producing factors and which record results in a way which makes it possible for other persons to evaluate the tests and to replicate them.

In principle, it should be relatively easy to design performance tests which would let independent observers know how accurate the laser detector device truly is. The tests [\*\*380] would have to include vehicles of varying sizes and shapes. They would have to be conducted under various conditions of traffic flow along actual highways and roads. They would have to be conducted at different times of the day under varying climatic conditions. They would have to involve target vehicles whose speed was reliably established either by controlling the driver of the vehicle [\*\*\*34] or through simultaneous measurement of its speed by a reliable device other than the laser speed detector. The test data would have to be accurately recorded and reproduced for examination, analysis and replication by other persons and agencies. The factors that I have mentioned are illustrative, not exhaustive. Absent this kind of testing, I do not see how we can have any real confidence that the detector is sufficiently accurate.

I note that the Model Minimum Performance Specifications for Lidar Speed Measurement Devices issued by the National Highway Traffic Safety Administration in February 1995 state that the standard for speed measurement accuracy should be that the device would be within a tolerance of no more than one mile per hour in excess of the true speed and no more than two miles an hour below the true speed. The manufacturer in our case, Laser Technology, Inc., claims that the laser speed detector meets that standard. But there is no way in which we can be sure of that, in my judgment, under the present proofs. I do not think we can even be sure that the device is accurate over a wide range of conditions and with respect to a wide range of vehicles within a tolerance [\*\*\*35] of plus or minus five miles per hour. I suspect that the device is probably measuring speed within a [\*230] tolerance of plus or minus ten miles per hour, or we would be getting much more negative feedback from police officers and from motorists than has thus far been obtained.

The fundamental point is that there is no way of being sure under the present state of the proofs and analysis how accurate the detector is. I point out that [HN1] a belief that the device is broadly accurate is not sufficient. If I were presented with a reading in a particular case indicating that a motorist was traveling 72 miles an hour in a 55 mile an hour zone, I would feel quite confident that the motorist was exceeding the 55 mile an hour speed limit. I would not feel confident that he was going 72 miles an hour. I would not feel confident that he was going 70 miles an hour. I could probably satisfy myself that he was going at least 65 miles an hour, but I might have some slight reservation about that. Under the laws of our state (and under the laws of many states) the degree to which somebody is exceeding the speed limit is important. The penalties both in terms of fines and points against one's license increase [\*\*\*36] with the increase of speed in excess of the limit. If police officers and municipal court judges do not have a good handle on the range of accuracy of the detector, it becomes difficult to enforce the speeding laws in a way which is predictable, uniform and fair. I do not think it would be necessary to have a range as tight as the plus one mile minus two mile range of the Model Minimum Performance Specifications. Perhaps a range as wide as plus or minus five miles per hour would be sufficient. We do need to know what the range is.

I recognize that courts should not routinely require thorough performance testing of every conceivable device that might be used in the course of law enforcement, or of every conceivable device whose efficacy comes into question in civil litigation. Frequently, common knowledge or the rather conclusory testimony of informed experts might be sufficient. But we are dealing here with a major innovation in law enforcement techniques. We are [\*231] dealing here with something that could readily be tested in ways which would satisfy most reasonable observers that the device was reliable or not. Although I think there should be a number of comprehensive performance testing [\*\*\*37] programs carried out with respect to a device like the laser speed detector, I do not suggest that performance tests need be conducted by every state, much less by every local police department that might want to use the laser speed detector. If adequate tests were conducted by an agency or agencies outside of New Jersey, and if the detailed data with respect to those tests were published and were available for analysis and replication, there is no reason why [\*\*381] New Jersey or any other state or entity would have to conduct repetitious and expensive tests once there had been sufficient testing

314 N.J. Super. 211, \*231; 714 A.2d 370, \*\*381;  
1996 N.J. Super. LEXIS 533, \*\*\*37

to establish the reliability of the detector. I note that it probably is fair to expect the manufacturer itself to conduct performance testing and to have detailed data with respect to it. Laser Technology, Inc. has no recorded data.

I realize that courts should be hesitant about rulings which impose costs and burdens on litigants. However, it is important to note that highway safety and the fair and efficient enforcement of motor vehicle laws which are designed to promote highway safety are matters of very great concern and they are matters which involve enormous expenditures every year in this [\*\*\*38] country. In 1994, 40,676 lives were lost on the highways, roads and streets of the United States. I do not know what the exact figures are, but I am sure that in any given year various governmental entities in the United States spend billions of dollars on the enforcement of motor vehicle laws, health insurance companies pay billions of dollars to pay for the injuries received by people in motor vehicle accidents and casualty insurance companies pay billions of dollars for such injuries and for property loss. Surely, a society such as ours can figure out some way to come up with the very modest amount of money which would be involved in subjecting an important device such as the laser speed detector to adequate performance testing.

[\*232] I think it slightly ironic that at one point during the trial of the present case the State suggested that the defendants were somehow remiss for not having conducted adequate tests on the laser speed detector. That suggestion was made when I asked the prosecutor about the absence of meaningful performance testing by the manufacturer or by some governmental entity or some public interest testing group. The defendants in this case are people who are charged [\*\*\*39] with relatively minor traffic violations which would, if they were found guilty, result in modest fines, points against their licenses, insurance surcharges and, perhaps, in some cases, loss of a motor vehicle driver's license. The defendants, of course, have an interest in this case, but they do not begin to have an economic stake which would justify the kind of expenditures which would be involved, and they do not have the resources of time, talent and personnel to conduct the testing. There should be adequate performancetesting, but it would not be reasonable to expect it to come from the defendants or from people broadly situated as they are.

#### *ORDER*

For the reasons expressed in the foregoing Opinion, speed readings produced by the LTI Marksman 20-20 Laser Speed Detection System shall not be used in the prosecution of any case arising under the motor vehicle laws now pending in the Municipal Court of the Township of Rockaway or in the Municipal Court of the Township of Parsippany-Troy Hills.

IT IS FURTHER ORDERED that, until further Order of the Superior Court, no municipal court in Morris County and no municipal court in Sussex County shall receive in evidence a speed [\*\*\*40] reading generated by the LTI Marksman 20-20 Laser Speed Detection System in connection with any prosecution arising under the motor vehicle laws.

65 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**IN THE MATTER OF THE ADMISSIBILITY OF MOTOR VEHICLE SPEED  
READINGS PRODUCED BY THE LTI MARKSMAN 20-20 LASER SPEED  
DETECTION SYSTEM.**

**Appeal No. 96-029**

**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY**

*314 N.J. Super. 211; 714 A.2d 370; 1996 N.J. Super. LEXIS 533*

**June 13, 1996, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1]

APPROVED FOR PUBLICATION MAY 27, 1998. As Corrected June 14, 1996. As Corrected June 20, 1996.

Supplementary Proceedings of March 20, 1998, Reported at: *314 N.J. Super. 233, 714 A.2d 381, 1998 N.J. Super. LEXIS 329.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants with speeding violations pending in the municipal courts of Rockaway Township and Parsippany-Troy Hills Township (New Jersey) and the prosecutor for those townships requested the court to conduct a comprehensive evidentiary hearing pertaining to the admissibility of speed readings produced by a laser speed detector.

**OVERVIEW:** Several defendants with speeding violation cases pending in municipal court filed motions challenging the admissibility of speed readings produced by laser speed detectors that state police had recently begun to use. The court conducted a comprehensive evidentiary hearing on all the municipal cases and heard all pending evidentiary motions. The court found that although the general concept of using lasers to measure speed was widely accepted in the scientific community and was valid, evidence did not show that the laser speed detector was accurate and reliable enough to be used for law enforcement purposes. No one other than the manufacturer knew how the detector's error trapping device functioned and consequently the error trapping could not be evaluated. Moreover, there was a lack of acceptable performance testing of the detector. The court prohibited the use of speed readings obtained by the laser speed detector, as well as evidence based on those readings, in the pending municipal cases.

**OUTCOME:** The court prohibited the use of speed readings obtained by laser speed detectors and the evidence based on those readings in the pending municipal cases. Although the concept of using lasers to measure speed was widely accepted in the scientific community and was valid, the detectors' error trapping device could not be properly evaluated and there was a lack of acceptable performance testing.

314 N.J. Super. 211, \*; 714 A.2d 370, \*\*;  
1996 N.J. Super. LEXIS 533, \*\*\*1

**CORE TERMS:** detector, speed, laser, pulse, testing, target, mile, highway, trapping, reliable, motor vehicle, measurement, distance, manufacturer, municipal, state police, accuracy, message, radar, lane, feet, reliability, velocity, targeted, beam, motor vehicles, traffic, range-finder, motorist, compute

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard*

[HN1] A belief that a laser speed detector device is broadly accurate is not sufficient.

**COUNSEL:** *Michael M. Rubbinaccio*, for the State.

*Alfred V. Gellene, Steven K. Greene, Joseph T. Maccarone and Sohail Mohammed*, for various defendants.

**JUDGES:** STANTON, A.J.S.C.

**OPINION BY:** REGINALD STANTON

**OPINION:**

[\*212] [\*\*\*371] STANTON, A.J.S.C.

This proceeding involves the reliability of a device known as the LTI Marksman 20-20 Laser Speed Detection System manufactured by Laser Technology, Inc. For ease of expression, I shall hereafter usually refer to this device as the "laser speed detector" or the "detector". The New Jersey State Police have recently purchased 23 of the detectors and have begun to deploy them in their motor vehicle law enforcement operations. More particularly, a number of the detectors have been used along Interstate Route 80 in the Township of Rockaway and in the Township of Parsippany-Troy Hills in Morris County and numerous speeding tickets have been issued based upon readings produced by the detectors.

Because the laser speed detector has only recently been put into use in New Jersey, its reliability in establishing the speed of a motor vehicle [\*\*\*2] has not been adjudicated in any New Jersey court. A number of defendants in speeding violation cases pending in the Municipal Court of Rockaway Township and in the Municipal Court of Parsippany-Troy Hills Township have filed motions challenging the admissibility of speed readings produced by the [\*213] detector. Approximately 30 pending municipal court cases are affected by those motions. In an effort to avoid numerous separate evidentiary hearings in the municipal courts and in an effort to obtain a comprehensive ruling that would bind a large number of municipal courts, various defense attorneys and Michael M. Rubbinaccio, who is the municipal prosecutor for both Rockaway Township and Parsippany-Troy Hills Township, have requested the Law Division of the Superior Court for Morris County to conduct a comprehensive evidentiary hearing including all of the evidentiary motions presently pending in the two municipal courts. I agreed to conduct such an evidentiary hearing in the Superior Court. Because of the potentially widespread implications of any ruling which might be made, the Attorney General of New Jersey was invited to participate in the hearing. The Attorney General decided not to participate [\*\*\*3] formally in the hearing, apparently because she was satisfied that Mr. Rubbinaccio would adequately represent the interest of the State in the proceeding, but her office has given significant informal assistance to Mr. Rubbinaccio, as have the State Police. I conducted an extensive evidentiary hearing on five court days from May 20 to June 4, 1996. On June 5, with the consent of all counsel, I went with State Police Sergeant Robert Ricker to a site on Interstate Route 287 south of Morristown and observed him while he operated the laser speed detector. I also spent some time operating the detector myself.

The laser speed detector is a compact, hand-held device which is covered by United States Patent Number 5,359,404. The patent gives the following summary of the invention embodied in the laserspeed detector:

The invention comprises a laser speed detector comprising a laser range-finder, a sighting scope for a user to visually select a target with an operably-disposed trigger for triggering operation of the detector upon the selected target, and a microprocessor-based microcontroller which is controllingly and communicatively interconnected to the laser range-finder. In a highly [\*\*\*4] preferred embodiment, the instrument is small enough to be easily hand-held.

The laser range-finder, under the supervision of the controller, fires a series of laser pulses at a selected remote target at [\*\*372] known time intervals, and detects reflected laser light from each pulse. Preferably, the pulses are fired at equally-spaced intervals. The laser range-finder further determines count data reflective of the [\*214] time-of-flight of each pulse to the target and back, and provides these data to the control means. These count data comprise the respective arrival times of a REF (reference) pulse representing the firing time of the laser pulse, and an RX pulse representing reflected laser pulse light.

The microcontroller is configured to read these count values and to compute from them, the time-of-flight of the laser pulse and in turn, the distance to the target. The controller then computes the velocity of the target relative to the speed detector from the change in distance to the target divided by the known elapsed time between firing of the pulses.

The laser range-finder has several notable features which provide significant improvement in accuracy and reliability (not necessarily [\*\*\*5] listed in order of importance). First, a crystal clock-based timing analysis circuit including a gating circuit which is a digital logic, edge-sensitive gate for which both the "opening" and the "closing" of the time window can be selectably set by the microcontroller. In a preferred embodiment, the microcontroller is configured to alternately widen and narrow the window to selectively lock on "true" RX pulses and exclude pulses due to noise or other factors.

Second, the timing analysis circuitry is constructed to generate self-calibration pulses and to process them in the same manner as the REF and RX pulses, thereby producing a set of calibration interpolation counts. The controller uses these calibration interpolation counts along with the REF and RX interpolation counts to compute self-calibrated values of the respective fractional portions of the clock periods at which the REF and RX pulses arrived. The self-calibration pulses comprise a pair of pulses, referred to for simplicity as TMIN and TMAX, which differ by a known integral number of clock periods (with neither TMIN nor TMAX being zero). Together, TMIN and TMAX define an expanded interpolation interval within which [\*\*\*6] the fractional portions of the RX and REF arrival times are interpolated. This self-calibrating interpolation provides greatly enhanced resolution and accuracy of distance measurements based on elapsed time.

Third, the laser range-finder has a first collimator which directs a major portion of an outgoing laser pulse toward the selected target, and a second collimator which redirects a minor portion of the laser pulse to produce a timing reference signal. In one embodiment, the minor portion of the laser pulse is sent to a second light detector separate from a first light detector (here embodied as a silicon avalanche photodiode detector or "APD") which focusses and receives reflected laser light. Alternatively, the minor portion of the laser pulse is sent to the same detector which detects the returned laser light.

Dr. Daniel Y. Gezari, an astro-physicist who has been employed at the National Aeronautics and Space Administration Space Flight Center for the past 18 years, testified with respect to the general scientific concepts involved in the use of lasers to measure distance and, derivatively, speed. Lasers have been used as a standard tool for the measurement of distances [\*\*\*7] by astro-physicists and other space scientists for a number of years. Mr. Jeremy [\*215] Dunne, a vice president of Laser Technology, Inc. and the designer and inventor of the laser speed detector in question, testified extensively about the scientific concepts involved and about the design and practical operation of the detector. New Jersey State Police Sergeant Robert Ricker, testified about the training of State Police officers in the use of the laser speed detector and about the experience which he and other officers have had with the detector in the field. Mr. Walter Smith, an employee of the Office of the New Jersey State Superintendent of Weights and Measures testified

about testing of the laser speed detector which had been done by his agency. Mr. Bryan Traynor, an official of the National Highway Traffic and Safety Administration, an agency of the United States Department of Transportation, testified [\*\*373] about testing of the laser speed detector which had been done under the auspices of his agency.

A laser is an artificially generated and amplified light which is in the infrared light section of the electromagnetic wave spectrum. It is not visible to the naked eye. It is very concentrated. [\*\*\*8] The laser speed detector fires a series of laser pulses at a selected remote target. When the laser light strikes the target, a portion of the light is reflected back to the detector. Since the speed of light is a known constant, by measuring the time which it takes for the laser pulse to travel to the target and back, the detector is able to calculate the distance between the detector and the target. Each laser pulse which is fired and reflected back establishes one distance reading. The laser speed detector fires 43 laser pulses every time the trigger on the detector is squeezed. These 43 pulses are fired in a total period of approximately one-third of a second. If the target at which the laser pulses are fired is a stationary target, each of the 43 pulses will give the same distance reading to the target, and distance will be the only thing that the detector can tell us about the target. However, if the target is moving, each of the 43 pulses will give a slightly different distance reading and the detector can then compute the velocity or speed of the target from the changes in distance divided by the known elapsed time between the firing of each of the laser pulses. In [\*216] simplest [\*\*\*9] terms, this is the basic theory underlying the use of lasers to calculate speed, and there can be no dispute about its fundamental validity.

There are, however, both conceptual and practical problems which have to be overcome in designing and constructing a reliable laser speed detector. The detector works by measuring the time it takes a laser pulse which it transmits to go out to a target and come back. However, there are many other pulses in the environment of the detector which can interact upon it, and the detector must be programmed to distinguish between those "false" pulses and the "true" pulses which it has transmitted.

As mentioned above, the laser is very concentrated and has a characteristically narrow beam. At a point 1,000 feet away from the detector, a laser beam is about three to three and one-half feet wide and has a height of about three feet. This may be contrasted with the beam of radar which is about 320 feet wide at a point 1,000 feet away from the radar transmitter. Although the laser beam is much more concentrated than the radar beam, it is far from being a true pinpoint. As the three by three and one-half foot laser beam strikes the very irregular surface [\*\*\*10] of a moving motor vehicle, it does not hit a single, highly-reflective point on the vehicle. In effect, it splashes over a portion of the vehicle. This is true even though operators are trained to fire at the front license plate area of the vehicle, because the beam is considerably larger than the license plate. Indeed, depending upon the angle at which the beam hits a vehicle, and depending upon the vehicle's location with respect to other vehicles on the highway, particularly a multi-lane highway, it is conceivable that a portion of the beam splashes onto another vehicle. For reasons which will become apparent when I discuss possible sweep error, there is a sense in which it is important for the detector to be programmed so that it can distinguish the point on a vehicle from which the return impulse is coming.

It is important for the laser detection device to measure distances between it and a motor vehicle at the same point on the [\*217] motor vehicle. In traffic law enforcement, the ultimate use of the detector is to fix the speed of a vehicle. However, the primary measurement made by the detector is distance. (In this respect, the detector contrasts with the Doppler radar units employed [\*\*\*11] in police work. The Doppler radar units compute speed from differences in frequency between microwaves. For them, distance is not significant.) This distinction is important, because, although the entire vehicle travels at the same speed, not every point on the vehicle is the same distance away from the detector. A vehicle traveling along a highway at 60 miles per hour travels 88 feet in a second. In the one-third second which elapses while the laser speed detector is firing 43 pulses at the vehicle, the vehicle will travel 29.33 feet. If the laser pulses being fired by the detector were allowed to sweep [\*\*374] from the front grille of the vehicle to the windshield of the vehicle during the one-third of the second the pulses were being fired, the pulses reflecting back from the windshield would be four feet farther away than the pulses reflecting back from the front grille. Unless the detector has an appropriate error trapping program built into it, the detector would conclude that the vehicle traveled 33.33 feet instead of the 29.33 feet which it actually traveled, and the detector would show the speed of the vehicle as being 68 miles per hour instead of the correct 60 miles per hour. This [\*\*\*12] would be what is known as "sweep" error. If the

detector were allowed to sweep for ten feet along a vehicle, that would lead to about 20 miles per hour being erroneously added to the calculation of the vehicle's speed. If the detector were allowed somehow to pan from one vehicle to another vehicle in a way which would lead to a distance differential of 30 feet, that would convert to a speed reading 60 miles per hour too high.

The inventor of the laser speed detector is clearly aware of many of the conceptual and practical problems involved and has designed computer programs and hardware mechanisms designed to trap a variety of errors. The State's expert, Dr. Gezari, submitted a report which had this to say on the subject of error trapping:

[\*218] One of the basic operating features of the LTI 20-20 is an error trapping algorithm which tests the integrity of the received data. Thirty to forty data pulses received must have the correct pulse shape, rise time, duration, color and basic time sequence to be considered valid data fit for analysis. If at least thirty received impulses do not fit the criteria the data is rejected and no velocity is calculated. Other criteria are also used [\*\*\*13] by the manufacturer to identify valid pulses having to do with actual vehicle characteristics--acceleration/deceleration parameters, change in target direction, etc. The LTI 20-20 speed gun will display error messages if no velocity is calculated informing the operator as to the reason no answer was given or no velocity was calculated. These error messages do not indicate errors were made; they simply identify the reason that no calculation was made. The error trapping approach used in data analysis further insures that factors such as steadiness of the gun during the measurement, weather conditions, motion of other objects nearby, etc. do not affect the accuracy of the speed reading calculated.

The electrocomputer circuitry of the LTI 20-20 speed gun uses sophisticated techniques including pulse stretching algorithm, statistical data analysis techniques, etc. to provide fully adequate timing accuracy in the generation and detection of laser pulses resulting in typical velocity measurement accuracies of +/- 1 mile per hour or better for typical highway speed measurements.

The inventor and designer of the detector, also testified fairly extensively with respect to his efforts [\*\*\*14] to eliminate inconsistent data and to trap error. One of the mathematical techniques to screen out inconsistent and erroneous readings is a procedure called the "average of least squares". That procedure was discussed at some length by Mr. Dunne and by three of the defense experts, and an exhibit setting forth a partial test program for least square speed error was admitted in evidence. The average of least squares is a common procedure which can eliminate inconsistency and error in a variety of applications, but it is only a limited part of the error trapping techniques which are purportedly built into the laser speed detector.

At this point, it is important to note a very significant difficulty. That difficulty lies in the fact that Laser Technology, Inc., the manufacturer of the laser speed detector, is unwilling to disclose the details of the error trapping programs and devices built into the detector on the ground that such information is proprietary information which gives it an important competitive advantage which it should not be required to disclose. The result is that no one outside of the employ of the manufacturer knows the details of [\*219] the error trapping techniques which [\*\*\*15] are being employed in the detector. This means that there is no way for any independent expert to test the adequacy of the procedures or the internal logic of any of the programs being employed.

[\*\*375] I can understand why the manufacturer would be reluctant to disclose its proprietary information to experts retained by defendants, even under a strong and tightly drawn protective order. But, surely, techniques could be developed for disclosure to governmental agencies or to non-governmental independent testing institutions which would protect the manufacturer from any misappropriation of its intellectual property by a competitor. I note that I myself do not have the ability to analyze and evaluate the error trapping techniques involved in the detector, and I myself would not be able to do anything useful with the details of the techniques if they were disclosed to me. However, there are many experts available to government agencies and to non-governmental testing organizations who could effectively evaluate those techniques and tell us whether they appear to be adequate and have good internal logic. Under the total circumstances of this case, I have not thought it appropriate to order disclosure [\*\*\*16] of the proprietary data involved. This leaves the data securely intact in terms of the proprietary interests of the manufacturer, but it also places

the manufacturer in the position of losing the probative advantage of having its methodology validated by reliable experts not in the employ of the manufacturer.

Three expert witnesses testified for the defendants. They were Mr. Henry Roberts, a retired electrical engineer, Mr. Jim Coleman, an engineer who works for a defense contractor and has considerable experience with the design of electronic appliances used to measure velocity, and Mr. Paul S. Greenberg, an employee of the National Aeronautics and Space Administration who has considerable experience working with lasers to measure velocity in space applications. Each of these experts testified at considerable length with respect to a variety of conceptual and practical problems which they found with the application of laser technology [\*220] to the measurement of speed in motor vehicles. Unfortunately, none of the defense experts had the advantage of having worked with the laser speed detector involved in our case and none had conducted any testing of this detector.

The State presented [\*\*\*17] documentary evidence and testimony to the effect that the laser speed detector has been approved for use by law enforcement agencies in the United Kingdom, Sweden, Germany and Austria. It has also been approved for use by the Royal Canadian Mounted Police. The detector is being used by state and local law enforcement agencies in a fairly large number of states. In *Goldstein v. State of Maryland*, 339 Md. 563, 664 A.2d 375 (1995), Maryland's highest court has approved the general concept of admitting laser speed measurements into evidence in judicial proceedings in a case in which the LTI 20-20 Laser Speed Detection System was involved. The Court of Appeals did not reach the issue of the reliability of the particular device.

The State produced a certificate issued by the Office of the New Jersey State Superintendent of Weights and Measures which reads: "This certifies that Laser Speed Detection Instrument Serial Number 008999 has been compared with standards of the State of New Jersey in possession of the State Superintendent of Weights and Measures. The error found in the time base component will result in an error of less than 0.030 MPH at any speed. [\*\*\*18] Agency certified for New Jersey State Police."

The State has also presented a final report issued by the National Highway Traffic Safety Administration of the United States Department of Transportation, issued in February, 1995, establishing "Model Minimum Performance specifications for Lidar Speed Measurement Devices". (The laser speed detector is a lidar speed measurement device.) The Model Minimum Performance Specifications were developed in response to a request for standards made by the International Association of Chiefs of Police. Purportedly, the laser speed detector meets the standards embodied in the Model Minimum Performance Specifications and [\*221] it appears to have been recommended for inclusion on a list of products suitable for purchase by law enforcement agencies.

At first glance, the list of foreign governments which have in some way approved the laser speed detector for use by their law enforcement agencies, the list of states of the [\*\*376] United States which have allowed the detector to be used by law enforcement agencies, the certification issued by the New Jersey Superintendent of Weights and Measures, the issuance of Model Minimum Performance Specifications by the National [\*\*\*19] Highway Traffic Safety Administration and the approval of the general validity of using laser speed measurements in judicial proceedings by the Court of Appeals of Maryland appear to constitute a rather strong endorsement of the validity of the laser speed detector. However, on closer examination, the endorsements appear to be somewhat hollow in terms of using them to make a realistic assessment of the reliability of the detector. A number of American and foreign governmental agencies (or testing organizations working with them) have subjected mechanical components of the laser speed detector to limited testing and there has been some limited testing under conditions not reflective of actual highway circumstances of the detector's ability to measure the speed of a motor vehicle which was actually being driven towards the detector. There was also very limited testing in Colorado by two state police sergeants of the laser speed detector and a similar device made by a competitor under actual highway conditions. The officers tracked the same vehicles with competing laser speed measurement devices and compared the results. Less than 100 vehicles were tracked by the officers. The competing [\*\*\*20] laser speed measurement devices produced results which were roughly consistent with each other, although a few readings were widely inconsistent. The Colorado study is not particularly useful because the actual speeds of the vehicles were not known and they were not measured by any device other than the two competing laser

speed measurement devices.

[\*222] The certificate issued by the New Jersey State Superintendent of Weights and Measures quoted above on its face seems impressive. On analysis, the certification does not actually say much about the reliability of the detector. The testimony of Mr. Smith during our hearings established that what actually occurred was that the frequency of the time base component of the detector was measured and was found to be as stated. This means that the time base component of the detector is functioning as specified, and, *if every other component and program of the detector is functioning as it is supposed to*, then there will be no error greater than 0.030 MPH at any speed. The time base component is an important element in the detector. If it were not functioning properly, the results produced by the detector would be unreliable. However, the fact [\*\*\*21] that it is found to be functioning properly does not mean that the results produced by the detector are reliable, unless everything else works as it is supposed to, and no effort was made to test whether everything else did work as it was supposed to. In short, the certification turns out to be a very limited one.

The Model Minimum Performance Specifications issued by the National Highway Safety Administration also end up not being as impressive as they appear to be at first blush. One obvious deficiency is that the speed accuracy test called for by the Specifications does not approach the conditions which exist on real highways. The testing of the speed of actual vehicles contemplated by the Specifications is really testing under closed circuit test track conditions. A tripod is used to hold the device steady and retro-reflective areas may be temporarily affixed to the vehicle to increase the amplitude of the laser pulse echoes. The testing procedures involved might be a useful first step in a more comprehensive testing program, but the reality is that vehicles do not travel along our highways one at a time, tripods are not used and retro-reflective areas are not attached to vehicles [\*\*\*22] being driven along the highways. The reality is that the shape of motor vehicles is highly irregular and their surfaces reflect pulses off at many angles, with the result that most of the incoming pulse is not [\*223] sent back towards the detector. The challenge is to devise a program for the detector which can capture reliable pulses off the irregular shape of an actual motor vehicle. If the motor vehicle is equipped with a retro-reflective area which is affixed to the vehicle for the explicit purpose of making it more likely that a larger part of the incoming pulse will be reflected straight back at the detector, that renders the test largely meaningless in terms of the ability to [\*\*377] recapture and identify pulses reliably from motor vehicles as they are actually driven along our highways. The Model Minimum Performance Specifications also suffer from the serious deficiency that they do not require the manufacturer of the device to disclose the actual error trapping programs and mechanisms contained in its device.

Some of the objections posed by the defense experts, particularly by Mr. Roberts, seem to me to have been somewhat overstated. The defense experts appropriately pointed to many possible [\*\*\*23] errors in the application of laser to the measurement of motor vehicle speed, but they suggested at times that it was almost conceptually impossible for those errors to be overcome. I think it is fairly clear that at least the most egregious errors have probably been eliminated from the laser speed detector. In this regard, it is important to take note of the experience which members of the New Jersey State Police have had with the use of the laser speed detector on our highways.

Sergeant Ricker testified about the classroom training and field training which State Police officers receive before they are certified as being qualified to use the laser speed detector. He also testified about the field practice which they must have with the detector before they are able to issue summonses. He detailed the operational checks which are made on each individual laser speed detector every day by an officer before the unit is used. He also spoke of the experience which he and other members of the State Police have had in the months during which they have been using the detector. I note that Sergeant Ricker's testimony about the training of members of the State Police who use the detector [\*224] satisfies [\*\*\*24] me that the members of the State Police are adequately trained in the use of the detector and that it is not likely that errors will be made in its use because of lack of training or skill in the operator of the individual laser speed detector.

By this time, officers of the State Police operating under normal traffic enforcement conditions have obtained speed readings with the laser speed detector on thousands of motor vehicles. They do not keep comprehensive data with

314 N.J. Super. 211, \*224; 714 A.2d 370, \*\*377;  
1996 N.J. Super. LEXIS 533, \*\*\*24

respect to the conditions under which they are obtaining the readings, and they are not simultaneously taking readings on targeted vehicles with other kinds of devices which have previously been found to be reliable. Accordingly, the experience of the State Police does not establish the degree of accuracy of the laser speed detector. However, it seems clear to me that the State Police are getting readings from the detector which are at least broadly sensible. State Police officers who take readings on a target vehicle on an interstate highway where their experience leads them to believe that the flow of traffic is probably moving in the 65 to 75 mile an hour range and where their visual observation leads them to believe [\*\*\*25] that a particular vehicle is probably going around 70 miles an hour are not getting bizarre readings. They are not firing the laser speed detector device at a vehicle which they think is going around 70 miles an hour and getting readings in the range of 40 miles an hour or readings in the range of 95 miles an hour. They are getting readings which are fairly close to where they expect them to be. They are also not encountering many motorists who claim that the speeds being attributed to them are way out of line. This leads me to conclude that the error trapping mechanisms and programs contained in the laser speed detector are eliminating the most serious potential errors.

My own limited experience in observing Sergeant Ricker use the laser speed detector and my own limited experience in using it myself reinforced the view that the error trapping is in fact getting rid of at least the worst errors.

[\*225] The field view of the operation of the operation of the laser detector which I conducted on June 5 took place on Interstate Route 287 at a location a little south of Morristown. We were located in the center median of the highway and were taking readings on motor vehicles traveling in the [\*\*\*26] three northbound lanes. Sergeant Ricker and I used the same unit in succession. He was able to get a much higher percentage of speed readings from vehicles which he targeted than I was able to get from vehicles which I targeted. I frequently got an error [\*\*378] message from the detector when I targeted a vehicle. As noted in the report of Dr. Gezari quoted above, an error message does not mean that the detector has made an erroneous calculation of speed. It means that the detector does not make a calculation of speed because something has occurred (usually a mistake by the operator) which makes it impossible for the detector to compute the speed correctly. My getting frequent error messages was, of course, highly consistent with the fact that I had had no formal training in the operation of the device and no experience in using it. Also, the particular error messages which I got were consistent with my sense of what was occurring around me. For example, I found it much easier to get a speed reading on vehicles traveling in the left lane of the highway than on vehicles traveling in the center lane or the right lane. The relative ease of getting readings on vehicles in the left lane was what [\*\*\*27] I expected based on the testimony in this case, because I was able to get a much clearer and unobstructed shot on those vehicles, given the fact that I was standing in the center median of the highway. When I did get an error reading on a targeted vehicle in the left lane, it was usually "E03" which indicated poor aiming or panning, and when I got such a message I was frequently conscious of having been unsteady when I depressed the trigger. Although I was successful in getting some speed readings on vehicles in the right lane, I very frequently got error messages when I attempted to target them, and the message was usually "E02" which indicated that another vehicle intruded between me and the targeted vehicle. When I got such an error message, I was usually conscious of [\*226] the fact that I had mistimed my depression of the trigger in the sense that I was aware that an intervening vehicle in the center lane or left lane was closely crowding my line of sight to the targeted vehicle. I also notice that the speed readings which I did obtain were consistent with what I expected them to be based on my experience as a motorist and based on what I was observing with respect to the traffic moving [\*\*\*28] in front of me.

In urging me to find that the laser speed detector is a reliable device for measuring the speed of motor vehicles and in urging me to rule that the defendants may be convicted of motor vehicle violations based upon readings produced by the detector, the State points to the various approvals which have been granted to the detector by the agencies and organizations mentioned earlier in this opinion. The State has also pointed to the moderately widespread use of the detector in a number of state and local police departments in this country and in a number of law enforcement agencies in foreign countries. The State also urges me to take notice of the fact that the principle of using lasers to measure speed is broadly accepted as being scientifically sound.

The State has called my attention to cases such as *State v. Wojtkowiak*, 170 N.J. Super. 44, 405 A.2d 477 (*Law Div.*1979), *reversed*, 174 N.J. Super. 460, 416 A.2d 975 (*App. Div.*1980) (approving use of K-55 Doppler Radar device),

314 N.J. Super. 211, \*226; 714 A.2d 370, \*\*378;  
1996 N.J. Super. LEXIS 533, \*\*\*28

and *Romano v. Kimmelman*, 96 N.J. 66, 474 A.2d 1 (1984). It is argued that there has been wide acceptance of the scientific techniques involved in the laser speed detector [\*\*\*29] and there has been wide approval of the detector itself and that the Court should accept the detector as being a reliable device for measuring speed when used by a properly trained police officer. *State v. Wojtkowiak* and *Romano v. Kimmelman* can be read in a way which is broadly supportive of the State's position in the present case, but my view of those cases and others cited in the State's brief is that they do not require me to accept the laser speed detector as being reliable, given the proofs and analysis which have been presented in our present case.

[\*227] After considering all of the proofs and the analysis and the argument presented, I am satisfied that the general concept of using lasers to measure speed is widely accepted in the relevant scientific communities and is valid. I am, however, not satisfied that the laser speed detector device is accurate and reliable enough to be used for law enforcement purposes. Accordingly, I will not permit speed readings obtained by the use of the laser speed detector to be used in any of the motor vehicle law violation cases pending in the municipal courts of the Township of Rockaway and the Township of Parsippany-Troy Hills, and I will [\*\*\*30] also order that evidence [\*\*379] based on such speed readings may not be presented in any municipal court in the County of Morris or the County of Sussex at the present time.

I reach the conclusion just stated with considerable reluctance. If the laser speed detector were known to be accurate and reliable, it would, in my judgment, be markedly superior to radar in many situations that exist on the highways, roads and streets of New Jersey. New Jersey is a very densely populated state and its highways, roads and streets are crowded with traffic. Traffic flow along our interstate routes tends to be dense with traffic flow tending to be heavy in all lanes at almost all times. Wide beam radar under those circumstances requires the exercise of considerable skill and judgment by the operator in order to identify a speeding vehicle. The laser speed detector (assuming its accuracy and reliability) can much more readily target an individual vehicle in a heavy traffic flow than can radar. I am also aware of the fact that radar detectors are in very wide use among motorists, particularly among truckers, and they make it possible for chronic and persistent speeders to frustrate detection by radar. I [\*\*\*31] see the laser speed detector as being potentially an extremely useful tool in enforcing speed laws in New Jersey.

My frustration is deepened by the fact that I suspect that the laser speed detector may be accurate and reliable. The problem is that I cannot be reasonably sure that it is accurate and reliable under the proofs and analysis which have been presented in this [\*228] case. As I see it, there are two major obstacles to the acceptance of the laser speed detector as being accurate and reliable at the present time. The first obstacle is that no one other than the manufacturer knows the details of how the error trapping in the detector works. As noted above, the manufacturer has declined to release the details on the ground that this would compromise the confidentiality of proprietary information which is essential to its maintaining its business advantage over competitors. The lack of access to detailed information about error trapping is important because there are many factors which could interfere with an accurate calculation of speed by the laser speed detector. Error trapping programs must comprehensively deal with the wide range of potential sources of error and they must deal [\*\*\*32] with those potential errors pursuant to programs whose inner logic is sound. If no one other than the manufacturer knows the details of the error trapping mechanics and programs, there is no way of evaluating their conceptual validity through intellectual evaluation.

The absence of detailed knowledge about the workings of the error trapping procedures in the laser speed detector is not necessarily an insurmountable obstacle to accepting the detector as being accurate and reliable. Even if we did know all the details of the error trapping procedures and could subject them to thorough intellectual analysis, and even if that analysis showed that they were conceptually sound, we would still need to have adequate performance testing of the laser speed detector under conditions which exist on our highways before we could accept it as reliable. Indeed, if we had adequate operational testing of the laser speed detector under actual highway conditions, we might be able to accept the detector as being reliable even though we did not have complete details about the way in which the error trapping procedures are designed and programmed. Good performance testing might conceivably put us in a position [\*\*\*33] of being sure that the detector in fact worked reliably, although we were not sure precisely how it managed to achieve its results. This leads us to the lack of acceptable performance testing in this case.

314 N.J. Super. 211, \*228; 714 A.2d 370, \*\*379;  
1996 N.J. Super. LEXIS 533, \*\*\*33

[\*229] We know that there are many factors which could affect the accuracy of the laser speed reading. There is no way of knowing whether the laser speed detector successfully copes with those problems in the absence of detailed performance tests which deal rather comprehensively with potential error producing factors and which record results in a way which makes it possible for other persons to evaluate the tests and to replicate them.

In principle, it should be relatively easy to design performance tests which would let independent observers know how accurate the laser detector device truly is. The tests [\*\*380] would have to include vehicles of varying sizes and shapes. They would have to be conducted under various conditions of traffic flow along actual highways and roads. They would have to be conducted at different times of the day under varying climatic conditions. They would have to involve target vehicles whose speed was reliably established either by controlling the driver of the vehicle [\*\*\*34] or through simultaneous measurement of its speed by a reliable device other than the laser speed detector. The test data would have to be accurately recorded and reproduced for examination, analysis and replication by other persons and agencies. The factors that I have mentioned are illustrative, not exhaustive. Absent this kind of testing, I do not see how we can have any real confidence that the detector is sufficiently accurate.

I note that the Model Minimum Performance Specifications for Lidar Speed Measurement Devices issued by the National Highway Traffic Safety Administration in February 1995 state that the standard for speed measurement accuracy should be that the device would be within a tolerance of no more than one mile per hour in excess of the true speed and no more than two miles an hour below the true speed. The manufacturer in our case, Laser Technology, Inc., claims that the laser speed detector meets that standard. But there is no way in which we can be sure of that, in my judgment, under the present proofs. I do not think we can even be sure that the device is accurate over a wide range of conditions and with respect to a wide range of vehicles within a tolerance [\*\*\*35] of plus or minus five miles per hour. I suspect that the device is probably measuring speed within a [\*230] tolerance of plus or minus ten miles per hour, or we would be getting much more negative feedback from police officers and from motorists than has thus far been obtained.

The fundamental point is that there is no way of being sure under the present state of the proofs and analysis how accurate the detector is. I point out that [HN1] a belief that the device is broadly accurate is not sufficient. If I were presented with a reading in a particular case indicating that a motorist was traveling 72 miles an hour in a 55 mile an hour zone, I would feel quite confident that the motorist was exceeding the 55 mile an hour speed limit. I would not feel confident that he was going 72 miles an hour. I would not feel confident that he was going 70 miles an hour. I could probably satisfy myself that he was going at least 65 miles an hour, but I might have some slight reservation about that. Under the laws of our state (and under the laws of many states) the degree to which somebody is exceeding the speed limit is important. The penalties both in terms of fines and points against one's license increase [\*\*\*36] with the increase of speed in excess of the limit. If police officers and municipal court judges do not have a good handle on the range of accuracy of the detector, it becomes difficult to enforce the speeding laws in a way which is predictable, uniform and fair. I do not think it would be necessary to have a range as tight as the plus one mile minus two mile range of the Model Minimum Performance Specifications. Perhaps a range as wide as plus or minus five miles per hour would be sufficient. We do need to know what the range is.

I recognize that courts should not routinely require thorough performance testing of every conceivable device that might be used in the course of law enforcement, or of every conceivable device whose efficacy comes into question in civil litigation. Frequently, common knowledge or the rather conclusory testimony of informed experts might be sufficient. But we are dealing here with a major innovation in law enforcement techniques. We are [\*231] dealing here with something that could readily be tested in ways which would satisfy most reasonable observers that the device was reliable or not. Although I think there should be a number of comprehensive performance testing [\*\*\*37] programs carried out with respect to a device like the laser speed detector, I do not suggest that performance tests need be conducted by every state, much less by every local police department that might want to use the laser speed detector. If adequate tests were conducted by an agency or agencies outside of New Jersey, and if the detailed data with respect to those tests were published and were available for analysis and replication, there is no reason why [\*\*381] New Jersey or any other state or entity would have to conduct repetitious and expensive tests once there had been sufficient testing

314 N.J. Super. 211, \*231; 714 A.2d 370, \*\*381;  
1996 N.J. Super. LEXIS 533, \*\*\*37

to establish the reliability of the detector. I note that it probably is fair to expect the manufacturer itself to conduct performance testing and to have detailed data with respect to it. Laser Technology, Inc. has no recorded data.

I realize that courts should be hesitant about rulings which impose costs and burdens on litigants. However, it is important to note that highway safety and the fair and efficient enforcement of motor vehicle laws which are designed to promote highway safety are matters of very great concern and they are matters which involve enormous expenditures every year in this [\*\*\*38] country. In 1994, 40,676 lives were lost on the highways, roads and streets of the United States. I do not know what the exact figures are, but I am sure that in any given year various governmental entities in the United States spend billions of dollars on the enforcement of motor vehicle laws, health insurance companies pay billions of dollars to pay for the injuries received by people in motor vehicle accidents and casualty insurance companies pay billions of dollars for such injuries and for property loss. Surely, a society such as ours can figure out some way to come up with the very modest amount of money which would be involved in subjecting an important device such as the laser speed detector to adequate performance testing.

[\*232] I think it slightly ironic that at one point during the trial of the present case the State suggested that the defendants were somehow remiss for not having conducted adequate tests on the laser speed detector. That suggestion was made when I asked the prosecutor about the absence of meaningful performance testing by the manufacturer or by some governmental entity or some public interest testing group. The defendants in this case are people who are charged [\*\*\*39] with relatively minor traffic violations which would, if they were found guilty, result in modest fines, points against their licenses, insurance surcharges and, perhaps, in some cases, loss of a motor vehicle driver's license. The defendants, of course, have an interest in this case, but they do not begin to have an economic stake which would justify the kind of expenditures which would be involved, and they do not have the resources of time, talent and personnel to conduct the testing. There should be adequate performancetesting, but it would not be reasonable to expect it to come from the defendants or from people broadly situated as they are.

#### *ORDER*

For the reasons expressed in the foregoing Opinion, speed readings produced by the LTI Marksman 20-20 Laser Speed Detection System shall not be used in the prosecution of any case arising under the motor vehicle laws now pending in the Municipal Court of the Township of Rockaway or in the Municipal Court of the Township of Parsippany-Troy Hills.

IT IS FURTHER ORDERED that, until further Order of the Superior Court, no municipal court in Morris County and no municipal court in Sussex County shall receive in evidence a speed [\*\*\*40] reading generated by the LTI Marksman 20-20 Laser Speed Detection System in connection with any prosecution arising under the motor vehicle laws.

66 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. DOUGLAS  
WOJTKOWIAK, DEFENDANT-APPELLANT**

**APP. 81-78**

**Superior Court of New Jersey, Law Division (Criminal), Burlington County**

*170 N.J. Super. 44; 405 A.2d 477; 1979 N.J. Super. LEXIS 887*

**August 2, 1979**

**PRIOR HISTORY:** [\*\*\*1]

On appeal from Burlington Township Municipal Court.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a decision of the Burlington Township Municipal Court (New Jersey) that convicted defendant of speeding 68 miles per hour in a 55 miles per hour zone. Before the court was the scientific reliability of the K55 Radar Speed Detection Device a state trooper used to cite defendant for speeding.

**OVERVIEW:** Defendant challenged a trial court's decision that convicted defendant of speeding 68 miles per hour in a 55 miles per hour zone. The issue of the scientific reliability of the K55 Radar Speed Detection Device (K55) was before the court for a plenary trial de novo without a jury based on the trial judge's unchallenged assumption of reliability of the K55. The court held that a properly calibrated K55 installed in a car with a calibrated speedometer had a high degree of scientific and operational reliability when used in either stationary or moving mode and when used in the manual position by a person having at least three hours of classroom training and two to three hours of practical instruction together with some minimum experience prior to use in actual law enforcement. The court determined that the state trooper's 80 hours of experience was sufficient beyond doubt. If the trooper had operated the K55 in the automatic position, the K55's operational reliability would have been subject to greater question, and acceptance of readings while in that position would have hinged on detailed examination of the surrounding circumstances as well as the trooper's experience and training.

**OUTCOME:** The court held that there was a high probability that the K55 Radar Speed Detection Device a state trooper operated was scientifically and operationally reliable when used in stationary or moving mode and in the manual position. The trooper had at least three hours of classroom training and at least two to three hours of practical instruction. The trooper's 80 hours of experience prior to use in actual law enforcement was sufficient beyond doubt.

**CORE TERMS:** speed, frequency, target, signal, patrol car, radar, reliability, microwave, lock, processing, circuitry, trooper, transmitted, electronic, stationary, traffic, training, approaching, transmitter, automatic, distance, energy, high

frequency, identification, centerline, strongest, display, manual, cosine, radio

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***

[HN1] *N.J. Ct. R. 3:23-8(a)* authorizes the appellate court to hold a plenary trial de novo without a jury where the rights of defendant were prejudiced below.

#### ***Evidence > Scientific Evidence > General Overview***

[HN2] Before the results of any scientific test may be admitted in evidence it must be shown that the equipment or the methodology used has a high degree of scientific reliability and that the test is performed by qualified persons.

#### ***Evidence > Scientific Evidence > General Overview***

[HN3] The operational reliability of the K55 Radar Speed Detection Device is largely dependent upon the training and experience of the policemen who use it. The average person engaged in traffic control work can learn to use the radar speedometer after about one and one-half hours of instruction.

### **COUNSEL:**

*Mr. George Ciszak* for respondent (*Mr. John J. Degnan*, Attorney General of New Jersey, attorney).

*Mr. Allen Etish* for appellant (*Messrs. Greenberg, Shmerelson, Weinroth and Etish*, attorneys).

### **JUDGES:**

Wells, J.S.C.

### **OPINION BY:**

WELLS

### **OPINION:**

[\*45] [\*\*478] This is an appeal from defendant's municipal court conviction for speeding 68 m.p.h. in a 55 m.p.h. zone. At the request of defendant, and with the State's consent, the court opened the record below for the sole purpose of determining the scientific reliability of the K55 Radar Speed Detection Device. Defendant's conviction rests on a speed reading displayed by the K55 in State Trooper Albert J. Dempster's troop car as he and defendant approached one another, Trooper Dempster in a northbound lane and defendant in a southbound lane, on Route 295.

Because defendant, unrepresented below, did not raise it, and because both defendant and the State, on this appeal, advised the court that questions about the reliability of the K55 were affecting the administration of justice in the municipal courts, the court believed limited reopening of the record was warranted. [HN1] [\*\*\*2] *R. 3:23-8(a)* authorizes the appellate court to hold a "plenary trial *de novo* without a jury" where "the rights of defendant were prejudiced below." Because prejudice to defendant could only have arisen from the municipal judge's unchallenged assumption of reliability of the K55, the trial *de novo* is limited to that issue. All other matters will be decided on the record below.

Further authority, by analogy, is found in two recent instances in which the Appellate Division, itself, returned

170 N.J. Super. 44, \*45; 405 A.2d 477, \*\*478;  
1979 N.J. Super. LEXIS 887, \*\*\*2

cases to the [\*46] trial court for plenary hearings on the scientific reliability of devices used in law enforcement. *State v. Hibbs*, 123 N.J. Super. 108 (App.Div.1972), on remand 123 N.J. Super. 152 (Cty.Ct.1972), aff'd 123 N.J. Super. 124 (App.Div.1973); *State v. Boyington*, 153 N.J. Super. 252 (App.Div.1977).

The legal criteria to be applied in admitting scientific evidence are well established. [HN2] Before the results of any scientific test may be admitted in evidence it must be shown that the equipment or the methodology used has a high degree of scientific reliability and that the test is performed by qualified persons. *State v. Chatman*, 156 [\*\*\*3] N.J. Super. 35, 38 (App.Div.1978).

Speed-measuring radar in various forms has been accepted since *State v. Dantonio*, 18 N.J. 570 (1955). See *State v. Overton*, 135 N.J. Super. 443 (Cty.Ct.1975) (Mark VIA), and *State v. Boyington*, [\*\*479] 159 N.J. Super. 426 (Law Div.1978) (Decatur Ra-gun); *State v. Musgrave*, 169 N.J. Super. 204 (Law Div.1979) (K55 Speed Detection Device held reliable). This last decision is, of course, entitled to, and has received, great respect as that of a court of coordinate jurisdiction, but it does not appear that Judge Wichman heard conflicting expert testimony and, accordingly, this court offers its opinion on the same issue to analyze the reliability of the K55 in light of expert criticism.

Four experts, two called by each side, testified. In addition, the State called Trooper Dempster. The State's witnesses were principals of MPH Industries, manufacturer and distributor of the K55. The first witness, Robert E. Patterson, who built a crystal radio at age 10, is "entirely responsible for the total technical design and construction and manufacture of the K55 radar." He is a high school graduate with two years of [\*\*\*4] college, graduated from the Army's Signal School at Fort Monmouth and ended his military career as head of maintenance of school equipment at the Missile Guidance School at Redstone Arsenal. This military career gave Patterson extensive theoretical and [\*47] practical knowledge of radar of all types. Patterson, after his military discharge, held successive jobs as chief electrical engineer at several companies in the electronics and radar industry in each of which degreed engineers reported to him. He holds five patents in various types of electronic circuitry design and built the first solid state cardiac monitors; he has also designed or contributed to the design of music amplification equipment, police radar (before the K55) and cardiac telemetry equipment. These devices depend on a common thread of theory and practical technology applicable to radar-informed speed measuring equipment and, in several instances, Patterson was in the forefront of the developing technology which finally emerged in various speed measuring radar devices.

The second State's witness was Edward Walker Sergeant. His qualifications are detailed in *State v. Musgrave*, *supra*. In this case Sergeant [\*\*\*5] testified solely about the training programs offered by MPH, and, in particular, about the one he gave to a class of New Jersey State Troopers among whom was Trooper Dempster.

The defense's experts were Andrew L. Soccio and Dr. Leo Nichols. Soccio's qualifications are outlined later in this opinion. Dr. Nichols possesses a B.S. in Electrical Engineering from Virginia Military Institute, a Master of Science in Electrical Engineering from Ohio State and a Ph.D. in the same subject from Virginia Polytechnic Institute. Although Dr. Nichols holds a license as a professional engineer in Virginia, his primary profession is that of teacher, having risen from an instructor to his present position as head of the Department of Electrical Engineering at Virginia Military Institute, a job he has held for 11 years. He has taught basic electric circuits, thermodynamics and microwave theory and techniques. He has testified as an expert many times in several states on the theory and operation of traffic radar.

It is from the testimony of these witnesses, and Trooper Dempster, that the court makes its findings on all aspects of the [\*48] theory and operational characteristics of the K55 [\*\*\*6] and, finally evaluates its reliability.

#### *Principles of Doppler Radar*

It is necessary to review certain basic ideas in order to understand the K55 and to describe its limitations.

Engineers generally depict radiant energy as moving in an undulating wave form pattern called "cycles." The number of cycles passing a given point in a given period of time is called "frequency." In music, the frequency at which sound reaches the ear determines the pitch people hear. Middle C on the piano, for example, when played, produces a

sound wave at a frequency of X cycles a second, and the C one octave above middle C will generate a sound wave at 2X cycles a second. The higher the frequency, the higher the pitch will be. Note at the outset that this relationship between frequency and pitch is direct and not affected [\*\*480] by other factors. For instance, it makes no difference how loudly or how softly you play middle C, or if you play it loudly and the octave C softly, the two sound waves produced will still reach the ear at the same frequency, X and 2X cycles a second. Nor does distance from the source of the sound make a difference. If a pianist in a concert hall plays middle [\*\*\*7] C, that note is heard as middle C whether a listener is in the front row or in the last balcony row.

So far, we have considered a stationary source of sound waves. Let us now take a moving source. Assume a passenger at a station awaiting a train. Down track the train approaches at 50 m.p.h. The engineer blows his whistle, which sounds a single high-pitched note. The awaiting passenger will hear that single note slide up the scale or, as we have just learned, its frequency increases. This natural phenomenon, imparting the vaguely romantic wailing sound of approaching or receding train whistles, is the Doppler effect (or "shift") at an audible frequency. Note once again the strength of the source (*i.e.*, [\*49] whether the whistle blows loudly or softly) or its distance from the listener has no bearing on the effect -- the pitch will slide up the scale, regardless of these factors as the train approaches. Furthermore, by definition, the Doppler effect cannot be heard from a stationary source. The frequency changes only with movement of the source.

All radar, including the K55, transmit or broadcast high frequency microwave energy which emanates from the transmitter [\*\*\*8] in the cycle pattern and "echoes" back to the source. Sound, of course, does this too, but the reflector must be quite large whereas, with microwaves, small objects can and do reflect them.

If either the source of the microwave transmission is moving or a reflecting object is moving, the Doppler shift occurs. Thus if a person sitting in the moving source could "hear" microwaves, he would note a change in frequency of the returning cycles: increased frequency if the reflector is moving toward him (as in the case of the road or an approaching car) and decreased frequency if the reflector is moving away. Physicists have measured the frequency change and expressed the measurements in one of those simple, elegant formulae to which all nature appears ultimately reducible:

$$f[\text{dop}] = 2vf/c$$

where f[dop] is the frequency of the returning microwaves, v is the velocity (speed) of the reflector, f is the transmitted frequency from the microwave source and c is the speed of light. Since c is always constant and the transmitter sends out microwaves of a known f, the only variable in this formula is v. Note, once again, that distance between source and reflector is absent from the [\*\*\*9] formula as is any factor for the strength of either the transmitted or echoed energy.

[\*50] *Description of the K55 -- Its Implementation of Doppler Principles*

The K55 unit is a small rectangular instrument which resembles a digital clock radio with switches, buttons and two windows on its face, one for patrol car speed and one for target vehicle speed. These readings appear as lighted, red digital numbers on a black background much as a digital clock or modern calculator. When no readings are being displayed, only the black background can be seen. The set is secured to the dashboard of the patrol car directly behind the steering wheel and can be readily seen either over or through the wheel. It is so small that it cannot obstruct the driver's vision through the windshield. The set can be plugged into the vehicle's power source in several ways, one of which is through the cigarette lighter, and it comes with an antenna and transmitter-receiver which is secured to the center of the dashboard.

The transmitter-receiver and antenna are constructed of standard components based on well known and accepted technology for the transmission and reception of high-frequency energy. [\*\*\*10] The K55 does not use any experimental, new or patentable component or process in the antenna or transmitter-receiver. [\*\*481] Every transmitter is factory-tested with instruments which derive their accuracy from the National Bureau of Standards in

170 N.J. Super. 44, \*50; 405 A.2d 477, \*\*481;  
1979 N.J. Super. LEXIS 887, \*\*\*10

Washington, D.C. The transmitter-receiver has also been tested by an independent concern to verify that it transmits at the frequency assigned to enforcement radar by the F.C.C.

When the set is turned on and calibrated n1 it may be operated in two modes: stationary and moving. n2 Each mode may be [\*51] controlled in either manual or automatic position. n3 With the antenna pointed straight out the windshield over the imaginary centerline of the patrol car and the power on, the transmitter will emanate a large lobe of high frequency microwave energy down the road. The set may be adjusted to give audible warning of a motorist approaching in excess of a predetermined speed; but the warning signal is not a prerequisite to reliable operation. The machine displays readings continuously for speeds between 20 m.p.h. and 99 m.p.h.

n1 Calibration is accomplished with the use of two tuning forks, the accuracy of which must be the subject of documentary proof. Use of the K55 does not eliminate the need for such proof. *Cf. State v. Overton, 135 N.J. Super. 443 (Ct.1975).*

[\*\*\*11]

n2 The "mode" of operation refers to what the patrol car does. In the stationary mode, the car is parked roughly parallel to the road directed at oncoming traffic. In the moving mode the patrol car operates in traffic and tracks vehicles approaching it in the opposite lane. All findings herein apply *equally* to both modes of operation.

n3 The difference is important and is explained in the text at pages 52-54.

As the patrol car moves over the road, the microwaves reflected from the road will arrive back at the receiver at a frequency, predicted by the Doppler formula, varying with the speed of the patrol car. Let us call that frequency, frequency "X". Now assume a target vehicle approaches the patrol car. Microwaves reflected from the target vehicle will arrive back at the receiver at a frequency predicted by the Doppler formula varying with the sum of the speeds of both cars. Let us call that frequency, frequency "Y". Virtually by definition, frequency X will always be less than frequency Y. In the stationary mode only the high frequency "Y" is received and computed into [\*\*\*12] a readable speed.

Thus, in the case of vehicles approaching one another ("closing") there are two returning frequencies, X and Y, both higher than the frequency originally transmitted, but Y always being greater than X. Because the transmitted frequency is constant, it can be dropped from further consideration and attention focused on the difference between X and Y, and they can now be called the low frequency (X) and high frequency (Y) returns.

We are now finished with the Doppler effect. All the rest of the K55 is devoted to processing the low and high frequency [\*52] return signals into a readable speed in miles per hour of the patrol car and target vehicle. But review what has been accomplished: Because of a single variable, speed, in one case relative to the road and, in another case, relative to a closing vehicle, two completely distinct frequencies have been generated, which can be computed into the speeds that generated them.

#### *Description of the K55 -- Signal Processing & Digital Units*

The high and low frequency returns from the receiver flow into the signal processing and digital unit of the K55. A precise technical description of the components and circuitry [\*\*\*13] of the signal processor would take hundreds of pages, but the court finds that all of its individual components are standard and used in the K55 within their respective design limitations. The components are manufactured by reputable concerns such as RCA and Texas Instruments and

are available generally on the wholesale or retail market for a wide variety of uses in electronic circuits, from radios and pacemakers to satellite telemetry. They all have known and accepted parameters of performance and durability in the industry.

Although the exact combination of components comprising the circuitry of the signal processing unit may be unique to the [\*\*482] K55 (in one case a patent is pending with respect thereto), the overall circuitry design is also within industry-known, and accepted, electronic theory and practice. Neither the function nor the efficiency of any component is frustrated by its particular use or placement within the design of the signal processing unit.

The signal processing unit has ten functions, all of which it performs more or less simultaneously and in milliseconds: (1) it amplifies the high and low frequency returns from the receiver; (2) it filters out [\*\*\*14] frequencies resulting in patrol car speed of less than 20 m.p.h.; (3) it separates the signal into low and high [\*53] frequency channels of parallel design, and as to each channel, (4) it filters random frequencies (commonly referred to as "noise") from the Doppler frequency being returned; (5) it tracks and locks on the Doppler frequencies and verifies them as the frequencies to be computed into vehicle speeds and, in the case of the high frequency channel; (6) it passes the now clear and verified signal into a subtractor, and in the case of the low frequency channel; (7) it passes one part of the signal directly to a digital computer unit which computes and displays patrol car speed in miles per hour; meanwhile (8) it passes the other part of the low frequency signal into the subtractor where, (9) it subtracts the high and low frequency signals and (10) it computes and displays the target speed in miles per hour.

The processing unit sweeps through these functions so quickly that a newly computed reading arrives at the viewing window about 15 times a second. In the manual mode the reverification and computing process is continuous throughout the time and distance the vehicles [\*\*\*15] are closing and thus permits the officer to lock in a reading manually when, in his judgment, the target has been properly identified and the reading stabilizes. In contrast, in the automatic mode, the K55 itself, automatically, locks in the first reading computed from a discerned signal. MPH does not recommend the use of this position and present State Police policy forbids it.

One of the most important overall operations of the machine that emerges from the ten-step process described above causes it to focus on or to tune to, precisely and automatically, the strongest frequencies being passed to it by the receiver. To use a mundane simile, also from the law enforcement field, the K55 acts like a well-trained bloodhound, who once given an example of the target scent, wants to, and can, filter out or discriminate between all the other distracting scents its nose senses and track the target scent. This simile, however, should not be misunderstood. The "strongest" signal to a radar may not mean the [\*54] fastest car. Thus, as we shall see, signal strength depends on proximity to the transmitter and thus a slower target may well dominate the radar to the exclusion of a faster, [\*\*\*16] but more distant, target.

#### *The Technical Challenge*

After extensive direct and *voir dire* examination, Andrew L. Soccio was permitted to testify for the defense as a highly experienced technician in the field of electronic circuits. Soccio is not a physicist, scientist or engineer; he has not designed a radar-informed speed measuring device from scratch. But he is entirely familiar with electronic circuitry, the various components that comprise modern circuitry and the various methods common in testing such circuitry. Soccio can build a complex electronic circuit from a schematic diagram; he can analyze its function; test performance of that function and evaluate its performance. The court believes that in certain cases Soccio has the experience to design or redesign electronic circuitry to improve its intended function or increase its efficiency. After a wide variety of experience in various jobs in the electronics industry, Soccio opened his own business which is devoted to troubleshooting and repair of traffic radars in South Jersey. He has not, under contract or otherwise, serviced the K55.

Soccio's qualifications did not include extensive or intimate knowledge [\*\*\*17] of the K55. He disassembled one in Florida this winter and examined certain parts of its signal processing unit for about an hour; he observed [\*\*483]

K55s in operation on police cars for about six hours, and he obtained and copied a partial schematic diagram of the signal processing unit issued by MPH to police departments for making repairs. Using this schematic, Soccio built, in his home laboratory, out of standard components, two elements of the circuitry in the signal processing unit and tested them. These elements were the "phase lock loops" and [\*55] related components used in the high and low frequency channels. (See step 5, pages 52-53, *supra*). Based on these tests it was Soccio's opinion that the phase lock loops in both the high and low frequency channels possessed too wide a latitude in which to monitor and lock on an incoming frequency. Depending on minute transient errors in voltage, the phase lock loops operating in such a latitude could lock on a wrong frequency and pass it through to be computed.

Patterson, called in rebuttal, challenged both the design of Soccio's home-made circuits because the schematic was incomplete, and his tests because they [\*\*\*18] were inadequate. It was his view that the overall design of components aligned after the phase lock loops in the circuit functioned together to nullify both the underlying assumptions of the Soccio tests and the test methods and equipment used.

Thus was framed the most important and difficult single issue in this case: to believe the architect of the K55 or the technically astute opposing witness. After due consideration the court is satisfied that the Soccio tests do not raise a reasonable doubt as to the technical capability of the signal processing unit of the K55 to turn the high and low Doppler frequencies into accurate readings of patrol car and target speeds. The court is not satisfied that there was sufficient similarity in all necessary respect between the Soccio prototypes and the actual, complete circuitry of the K55. Furthermore, the court does not believe the test methods used by Soccio were sufficiently accurate to ground the broad opinion he gave on the K55's potential for displaying undetected, erroneous readings to a reasonably skilled operator.

#### *The Operational Challenge*

The operational challenge to the K55 was grounded in the testimony of Dr. Nichols. [\*\*\*19] He highway-tested the K55 in both Ohio and Florida for about 20 hours altogether. On these occasions, accompanied by others, he operated the K55 himself [\*56] and observed others do so. All the participants were civilians with engineering training and experience. No K55-trained policemen assisted, nor had anyone performing the tests received training from MPH. In at least one instance the test was financed by Fuzzbuster, a manufacturer of traffic radar countermeasures.

In Florida six makes of radar were operated in a single vehicle, calibrated and tested for interference with internal noises such as generators, fans and the like. Then the vehicle, with the radars switched on in pairs, was driven on randomly selected highways in Miami and its environs. No written record of the tests were made, nor were any targets of known speed run through the radars. The radars were operated in both stationary and moving modes and in manual and automatic positions. Based on this experience and his own academic background Nichols' thoughts fell into four general problem areas: (1) problems of target identification where there were several possible targets approaching; (2) problems of [\*\*\*20] cosine error resulting in computation of lower-than-actual patrol car speed; (3) problems of internal and external mechanical, radio or microwave frequency interference, and (4) problems of a subjective nature. In all of these areas the K55 seemed to be most prone to potential error where it was switched to the automatic position.

Dr. Nichols identified two sources of difficulty relating to target identification. Both problems arise from the necessity to decide which of several possible targets is actually generating the speed readout.

As indicated on pages 53-54, one of the design characteristics of the K55 is to track, hold and verify the [\*\*\*484] strongest frequency being echoed to it. In practice, the strongest return frequency is usually that which is closest to the receiver. Thus, MPH in its Operator's Manual directs:

Care should be taken by the operator that he recognize the violator is traveling at a higher rate of speed than the norm, *that the vehicle is out in front, by itself, nearest the radar.* [Emphasis supplied]

[\*57] But Nichols testified that a large target, rather than one closer to the patrol car, may actually be reflecting

the strongest [\*\*\*21] signal. Thus, if a truck is following a Volkswagen the K55 may compute the truck's speed rather than the Volkswagen's, contrary to the above-quoted identification rule. He also pointed out that some materials and shapes are better reflectors than others and could result in a more distant target, producing the reading, if made of such materials or in such shapes.

The court is satisfied that this problem could and probably does occur in a very close-following situation, and policemen should be alerted to the possibility of an incorrect identification. But Dr. Nichols gave no guidance whatsoever as to what was "close following." He apparently could not and did not say whether at 50 feet, 25 feet or at what distance between the approaching truck or Volkswagen, the rearward truck would begin to produce the stronger signal. Thus, the court finds the above-quoted rule a reasonably reliable guide on which to base identifications in the situation described.

Dr. Nichols also sought to describe target-identification problems where a possible violator was closer to the centerline of the transmitted microwaves than a target nearer in distance to the transmitter. He (as well as other witnesses) [\*\*\*22] described the imaginary extended centerline of the patrol car (with the antenna so aligned) as the line of maximum transmitted power, and suggested that a return signal along that line would also be strongest. He pointed out that signal strength falls off far less as one moves away from that centerline than it does as one moves away from the transmitter. It has been found that one-half of the energy transmitted lies within an angle of 8 degree on either side of the centerline and, Dr. Nichols estimated, if the sides of that angle are carried out as much as 1500 feet from the patrol car, 85% of all the transmitted energy would lie within it. According, to Dr. Nichols, therefore, a target physically closer to the centerline, but more distant from the patrol car than the target nearest the patrol car, *might* produce a reading. An [\*58] unwary policeman *might* attribute that reading to the vehicle closest to the patrol car, thus resulting in an unjust arrest.

But Dr. Nichols' views in this respect were unsupported by any precise measurements or detailed tests. None of his highway tests was performed under controlled conditions. No experimental results or theoretical [\*\*\*23] models were adduced to demonstrate Dr. Nichols' theories, to any degree of scientific probability, that a nearer target would produce a signal less strong than a more distant one, notwithstanding such distant target's proximity to the centerline of the micro-move-energy lobe. In fact, in most situations presented him, Dr. Nichols appeared to believe the nearest vehicle to the patrol car would generate the reading. Because it is true that signal strength (not frequency and hence not accuracy of a reading) falls off by the square of the distance from the transmitter, the court finds it more probable that that distance is, in fact, the key one, and therefor, once again, finds the quoted rule of identification reasonably reliable.

Dr. Nichols described cosine error as that error in target speed, which results from the fact that the Doppler frequency reflects along the line between the target to the patrol car, whereas the target is actually moving, not straight at the patrol car, but at an angle to it. Because of the trigonometric function of the cosine, which is always less than 1, the error always favors the target, i.e., displayed target speed is less than the actual target speed. [\*\*\*24] But Dr. Nichols also theorized cosine error could reduce the display of patrol car speed. This is, potentially, a serious matter since reduced patrol car speed would result in false, [\*\*485] higher target speed readings. Thus, if a huge sign or a long building with a long reflective surface on the side of the road reflected a signal stronger than that of the road and thereby generated the low frequency return for computing the patrol car's speed, the angle of such an object relative to the motion of the car might theoretically reduce the patrol car's speed reading by the cosine error.

[\*59] However, the court determines such situation would be necessarily rare, and the reading generated, transitory. Moreover, an alert officer, checking his patrol car readout against his speedometer, should note dropping speed and reject any target speeds obtained in that situation. Accordingly, the court determines that while cosine error as it affects patrol car readout may be a theoretical problem, its significance in routine traffic situations is not such as to raise a reasonable doubt as to the reliability of the K55 when operated by a trained and experienced officer.

Dr. Nichols [\*\*\*25] also testified to internal and external sources of interference with the K55 which can produce spurious speed readings. The K55 possesses circuitry designed to filter out most internal and some external

interference. Like all radar devices, the K55 can, and does, receive signals other than that which it originally transmitted. A wide variety of devices in relatively common use transmit electromagnetic energy at frequencies at or close to those assigned by the F.C.C. to police radar. Depending on the strength of these signals, which again depends on how close the source is to the K55, a speed reading can appear.

The signal processing unit may itself reject the signal and cause the reading to go blank, or the reading will be erratic, or so high or low as to tip the operator off at once that electronic interference may be present. Nonetheless, troopers are trained not to use their own radios when patrolling for speeders and to be mindful of the use of CB radios in the vicinity of the patrol area. Airports and even low strung high tension wires may also be common trouble spots. State and local police may well be advised to begin to catalog, within their respective jurisdictions, [\*\*\*26] the existing sources, strength, frequency, range and direction of radiated energy which might intersect with or flow over the roads and highways. Armed with such information, tests could be run to determine the effect, if any, on the K55.

By so suggesting, however, the court does not wish to leave the impression that external radio or microwave interference [\*60] seriously detracts from the reliability of the K55. The court is satisfied that the chance of an undetected interference increasing a speed reading, to the detriment of a motorist, is so remote as not to raise a reasonable doubt under the "high degree" of reliability standard here at issue. Absolute perfection, of course, is not required.

As a result of his Florida tests, Dr. Nichols expressed certain subjective reservations about the K55. He expressed concern over the practical difficulties of target identification in the multiple-lane, heavy traffic situation, and surprise at the variety of response times in the various radars and the differences between them in the speed with which they repeated their readings. He stated the K55 did not give him "the personal satisfaction that it was as stable and as reliable [\*\*\*27] in the quickness with which it reached a reading that seemed to satisfy the physical situation as the others." He also stated, "it seemed to be more erratic to me. It went up too far or down too far. The swings were more violent. Ultimately it would stabilize and come back and give an adequate and satisfactory reading."

Considering the qualifications of Dr. Nichols, these observations are entitled to respect. In fact, to the extent he notes that the K55 did come to an "acceptable" reading as compared with other radars, he points to the sensitivity of the K55 in the manual position in rejecting spurious readings or other transitory phenomenon. Since Dr. Nichols was as critical of the automatic position, with its ability to lock in a transitory reading, as Patterson, the court finds it difficult to understand his subjective feeling about the K55. In any event, such feelings do not raise a reasonable doubt in [\*\*486] the court's mind as to the reliability of the K55 when operated in the manual position.

#### *Ghosts and Shadows*

Every law enforcement tool, whether it be a radar set or a bloodhound, must be understood and used within its inherent [\*61] limitations. The [\*\*\*28] K55, as all radar, has such limitations. Transmitted signals echo randomly from anything the microwaves reach and sometimes that signal, echoed from a tree, fence or billboard, will a second time be reflected from a moving object out of the trooper's visual range and be received and processed as a speed reading. These are "ghost" readings -- spurious speed readings of unseen vehicles or stationary objects. He who seriously reports tracking speeding trees with the K55 is either a fool or a knave, since such a report presents an inherent conflict with the underlying Doppler principle.

Such ghosts will be either so transitory or display such erratic readings that any experienced operator will at once recognize them. Moreover, ghosts will always be banished by a stronger signal because the K55 functions to find the lock on the strongest signal returning to it. Ghost readings cannot add to or detract from the speed of a real target. None of the experts challenged its reliability in that respect.

"Shadowing" occurs when the patrol car closely follows or is overtaken by a truck or large car with the K55 on in the moving mode. The signal usually returning from the road surface may [\*\*\*29] now be temporarily supplanted by

the stronger signal returning from the vehicle in front. Since that vehicle is traveling slower relative to the patrol car than the road was, the viewer will notice an apparent decrease in the speed reading of the patrol car. Any reading taken on a target vehicle under such conditions would be inaccurate. n4 But the evidence is clear that State Troopers are trained to check continually, while in the moving mode, the K55 display of patrol car speed with the speedometer. Any difference between the K55's reading and the speedometer is a trouble sign that will suggest caution on the part of the trooper in relying on a target speed reading.

n4 See, also, the discussion, at 58, regarding reduced patrol car speed as the result of cosine error.

#### [\*62] *Training*

The court finds that [HN3] the operational reliability of the K55 is largely dependent upon the training and experience of the policemen who use it. In *State v. Dantonio*, 18 N.J. 570, 573-574 (1955), the court [\*\*\*30] quotes a law review article stating that "the average person engaged in traffic control work can learn to use the radar speedometer after about one and one-half hours of instruction." Judged by that standard, the State Police get ample instruction in theory and practice on the K55. Trooper Dempster, for instance, received a full day of classroom and "hands on" practical instruction from MPH, Inc., representatives, and then "practiced" with the machine in his own patrol car 80 hours before he arrested violators. Such a level of instruction and experience acquaints the officers with the technical capability of radar as well as practical use in everyday traffic situations. For instance, like our bloodhound who cannot, having found the source of the scent, identify it as a vicious criminal or a lost child, so also cannot the K55 identify the speeding vehicle: the officer using it must do that. Troopers are taught a three-step procedure when the K55 displays a target speed: (1) identify the probable target producing the reading; (2) lock in the speed, and (3) compare visually the speed displayed with the officer's own estimate of the target's speed. This must be a complex procedure [\*\*\*31] requiring well-coordinated eye and hand movement as well as the exercise of quick judgment. The officer must, also, be monitoring his own speedometer with that of the K55's readout on patrol car speed and driving his car with safety. With some traffic patterns, such as heavy approaching traffic in multiple lanes where no [\*\*487] one car is clearly in front, it will always be difficult if not impossible to identify a target. But experience should quickly expose such situations.

In view of the above, however, and the high degree of skill and judgment required to operate the K55 reliably, it is the [\*63] court's view that periodic follow-up training be instituted in order to verify continuing qualification as a K55 operator. Moreover, the skill and judgment of troopers who themselves instruct in its use should be most carefully evaluated.

Finally, it is clear from the testimony of all the witnesses, that the K55 should not be operated in the "automatic" position in either the moving or stationary mode. That is present State Police policy and should remain so. By "automatic" in the sense used here, is meant that position on the K55 which "automatically" locks on the [\*\*\*32] first echo it receives and processes that echo to a readout and will not then process further echoes. Thus may be instantaneously captured an interfering signal or a ghost which would not be reflected from the visible target.

#### *Conclusion*

For all the reasons stated above the court determines that a properly calibrated K55 Speed Detection Device installed in a car with a calibrated speedometer has a high degree of scientific and operational reliability when used in either stationary or moving mode, in the manual position by a person having at least three hours of classroom training and two to three hours of practical instruction together with some minimum experience prior to use in actual law enforcement. The court, on the record before it, cannot specify what the minimum experience should be but holds that 80 hours is, beyond doubt, sufficient.

When operated in the automatic position the operational reliability of the K55 is subject to greater question, and

170 N.J. Super. 44, \*63; 405 A.2d 477, \*\*487;  
1979 N.J. Super. LEXIS 887, \*\*\*32

acceptance of readings while in that position must hinge to a far greater extent on detailed examination of the surrounding circumstances as well as the experience and training of the operator.

[\*64] In view of [\*\*\*33] the holding above, the court will shortly schedule argument on any and all other issues defendant may choose to raise on the record below relevant to his conviction.

67 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. DOUGLAS  
WOJTKOWIAK, DEFENDANT-APPELLANT**

**APP. 81-78**

**Superior Court of New Jersey, Law Division (Criminal), Burlington County**

*170 N.J. Super. 44; 405 A.2d 477; 1979 N.J. Super. LEXIS 887*

**August 2, 1979**

**PRIOR HISTORY:** [\*\*\*1]

On appeal from Burlington Township Municipal Court.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a decision of the Burlington Township Municipal Court (New Jersey) that convicted defendant of speeding 68 miles per hour in a 55 miles per hour zone. Before the court was the scientific reliability of the K55 Radar Speed Detection Device a state trooper used to cite defendant for speeding.

**OVERVIEW:** Defendant challenged a trial court's decision that convicted defendant of speeding 68 miles per hour in a 55 miles per hour zone. The issue of the scientific reliability of the K55 Radar Speed Detection Device (K55) was before the court for a plenary trial de novo without a jury based on the trial judge's unchallenged assumption of reliability of the K55. The court held that a properly calibrated K55 installed in a car with a calibrated speedometer had a high degree of scientific and operational reliability when used in either stationary or moving mode and when used in the manual position by a person having at least three hours of classroom training and two to three hours of practical instruction together with some minimum experience prior to use in actual law enforcement. The court determined that the state trooper's 80 hours of experience was sufficient beyond doubt. If the trooper had operated the K55 in the automatic position, the K55's operational reliability would have been subject to greater question, and acceptance of readings while in that position would have hinged on detailed examination of the surrounding circumstances as well as the trooper's experience and training.

**OUTCOME:** The court held that there was a high probability that the K55 Radar Speed Detection Device a state trooper operated was scientifically and operationally reliable when used in stationary or moving mode and in the manual position. The trooper had at least three hours of classroom training and at least two to three hours of practical instruction. The trooper's 80 hours of experience prior to use in actual law enforcement was sufficient beyond doubt.

**CORE TERMS:** speed, frequency, target, signal, patrol car, radar, reliability, microwave, lock, processing, circuitry, trooper, transmitted, electronic, stationary, traffic, training, approaching, transmitter, automatic, distance, energy, high

frequency, identification, centerline, strongest, display, manual, cosine, radio

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***

[HN1] *N.J. Ct. R. 3:23-8(a)* authorizes the appellate court to hold a plenary trial de novo without a jury where the rights of defendant were prejudiced below.

#### ***Evidence > Scientific Evidence > General Overview***

[HN2] Before the results of any scientific test may be admitted in evidence it must be shown that the equipment or the methodology used has a high degree of scientific reliability and that the test is performed by qualified persons.

#### ***Evidence > Scientific Evidence > General Overview***

[HN3] The operational reliability of the K55 Radar Speed Detection Device is largely dependent upon the training and experience of the policemen who use it. The average person engaged in traffic control work can learn to use the radar speedometer after about one and one-half hours of instruction.

### **COUNSEL:**

*Mr. George Ciszak* for respondent (*Mr. John J. Degnan*, Attorney General of New Jersey, attorney).

*Mr. Allen Etish* for appellant (*Messrs. Greenberg, Shmerelson, Weinroth and Etish*, attorneys).

### **JUDGES:**

Wells, J.S.C.

### **OPINION BY:**

WELLS

### **OPINION:**

[\*45] [\*\*478] This is an appeal from defendant's municipal court conviction for speeding 68 m.p.h. in a 55 m.p.h. zone. At the request of defendant, and with the State's consent, the court opened the record below for the sole purpose of determining the scientific reliability of the K55 Radar Speed Detection Device. Defendant's conviction rests on a speed reading displayed by the K55 in State Trooper Albert J. Dempster's troop car as he and defendant approached one another, Trooper Dempster in a northbound lane and defendant in a southbound lane, on Route 295.

Because defendant, unrepresented below, did not raise it, and because both defendant and the State, on this appeal, advised the court that questions about the reliability of the K55 were affecting the administration of justice in the municipal courts, the court believed limited reopening of the record was warranted. [HN1] [\*\*\*2] *R. 3:23-8(a)* authorizes the appellate court to hold a "plenary trial *de novo* without a jury" where "the rights of defendant were prejudiced below." Because prejudice to defendant could only have arisen from the municipal judge's unchallenged assumption of reliability of the K55, the trial *de novo* is limited to that issue. All other matters will be decided on the record below.

Further authority, by analogy, is found in two recent instances in which the Appellate Division, itself, returned

170 N.J. Super. 44, \*45; 405 A.2d 477, \*\*478;  
1979 N.J. Super. LEXIS 887, \*\*\*2

cases to the [\*46] trial court for plenary hearings on the scientific reliability of devices used in law enforcement. *State v. Hibbs*, 123 N.J. Super. 108 (App.Div.1972), on remand 123 N.J. Super. 152 (Cty.Ct.1972), aff'd 123 N.J. Super. 124 (App.Div.1973); *State v. Boyington*, 153 N.J. Super. 252 (App.Div.1977).

The legal criteria to be applied in admitting scientific evidence are well established. [HN2] Before the results of any scientific test may be admitted in evidence it must be shown that the equipment or the methodology used has a high degree of scientific reliability and that the test is performed by qualified persons. *State v. Chatman*, 156 [\*\*\*3] N.J. Super. 35, 38 (App.Div.1978).

Speed-measuring radar in various forms has been accepted since *State v. Dantonio*, 18 N.J. 570 (1955). See *State v. Overton*, 135 N.J. Super. 443 (Cty.Ct.1975) (Mark VIA), and *State v. Boyington*, [\*\*479] 159 N.J. Super. 426 (Law Div.1978) (Decatur Ra-gun); *State v. Musgrave*, 169 N.J. Super. 204 (Law Div.1979) (K55 Speed Detection Device held reliable). This last decision is, of course, entitled to, and has received, great respect as that of a court of coordinate jurisdiction, but it does not appear that Judge Wichman heard conflicting expert testimony and, accordingly, this court offers its opinion on the same issue to analyze the reliability of the K55 in light of expert criticism.

Four experts, two called by each side, testified. In addition, the State called Trooper Dempster. The State's witnesses were principals of MPH Industries, manufacturer and distributor of the K55. The first witness, Robert E. Patterson, who built a crystal radio at age 10, is "entirely responsible for the total technical design and construction and manufacture of the K55 radar." He is a high school graduate with two years of [\*\*\*4] college, graduated from the Army's Signal School at Fort Monmouth and ended his military career as head of maintenance of school equipment at the Missile Guidance School at Redstone Arsenal. This military career gave Patterson extensive theoretical and [\*47] practical knowledge of radar of all types. Patterson, after his military discharge, held successive jobs as chief electrical engineer at several companies in the electronics and radar industry in each of which degreed engineers reported to him. He holds five patents in various types of electronic circuitry design and built the first solid state cardiac monitors; he has also designed or contributed to the design of music amplification equipment, police radar (before the K55) and cardiac telemetry equipment. These devices depend on a common thread of theory and practical technology applicable to radar-informed speed measuring equipment and, in several instances, Patterson was in the forefront of the developing technology which finally emerged in various speed measuring radar devices.

The second State's witness was Edward Walker Sergeant. His qualifications are detailed in *State v. Musgrave*, *supra*. In this case Sergeant [\*\*\*5] testified solely about the training programs offered by MPH, and, in particular, about the one he gave to a class of New Jersey State Troopers among whom was Trooper Dempster.

The defense's experts were Andrew L. Soccio and Dr. Leo Nichols. Soccio's qualifications are outlined later in this opinion. Dr. Nichols possesses a B.S. in Electrical Engineering from Virginia Military Institute, a Master of Science in Electrical Engineering from Ohio State and a Ph.D. in the same subject from Virginia Polytechnic Institute. Although Dr. Nichols holds a license as a professional engineer in Virginia, his primary profession is that of teacher, having risen from an instructor to his present position as head of the Department of Electrical Engineering at Virginia Military Institute, a job he has held for 11 years. He has taught basic electric circuits, thermodynamics and microwave theory and techniques. He has testified as an expert many times in several states on the theory and operation of traffic radar.

It is from the testimony of these witnesses, and Trooper Dempster, that the court makes its findings on all aspects of the [\*48] theory and operational characteristics of the K55 [\*\*\*6] and, finally evaluates its reliability.

#### *Principles of Doppler Radar*

It is necessary to review certain basic ideas in order to understand the K55 and to describe its limitations.

Engineers generally depict radiant energy as moving in an undulating wave form pattern called "cycles." The number of cycles passing a given point in a given period of time is called "frequency." In music, the frequency at which sound reaches the ear determines the pitch people hear. Middle C on the piano, for example, when played, produces a

sound wave at a frequency of X cycles a second, and the C one octave above middle C will generate a sound wave at 2X cycles a second. The higher the frequency, the higher the pitch will be. Note at the outset that this relationship between frequency and pitch is direct and not affected [\*\*480] by other factors. For instance, it makes no difference how loudly or how softly you play middle C, or if you play it loudly and the octave C softly, the two sound waves produced will still reach the ear at the same frequency, X and 2X cycles a second. Nor does distance from the source of the sound make a difference. If a pianist in a concert hall plays middle [\*\*\*7] C, that note is heard as middle C whether a listener is in the front row or in the last balcony row.

So far, we have considered a stationary source of sound waves. Let us now take a moving source. Assume a passenger at a station awaiting a train. Down track the train approaches at 50 m.p.h. The engineer blows his whistle, which sounds a single high-pitched note. The awaiting passenger will hear that single note slide up the scale or, as we have just learned, its frequency increases. This natural phenomenon, imparting the vaguely romantic wailing sound of approaching or receding train whistles, is the Doppler effect (or "shift") at an audible frequency. Note once again the strength of the source (*i.e.*, [\*49] whether the whistle blows loudly or softly) or its distance from the listener has no bearing on the effect -- the pitch will slide up the scale, regardless of these factors as the train approaches. Furthermore, by definition, the Doppler effect cannot be heard from a stationary source. The frequency changes only with movement of the source.

All radar, including the K55, transmit or broadcast high frequency microwave energy which emanates from the transmitter [\*\*\*8] in the cycle pattern and "echoes" back to the source. Sound, of course, does this too, but the reflector must be quite large whereas, with microwaves, small objects can and do reflect them.

If either the source of the microwave transmission is moving or a reflecting object is moving, the Doppler shift occurs. Thus if a person sitting in the moving source could "hear" microwaves, he would note a change in frequency of the returning cycles: increased frequency if the reflector is moving toward him (as in the case of the road or an approaching car) and decreased frequency if the reflector is moving away. Physicists have measured the frequency change and expressed the measurements in one of those simple, elegant formulae to which all nature appears ultimately reducible:

$$f[\text{dop}] = 2vf/c$$

where f[dop] is the frequency of the returning microwaves, v is the velocity (speed) of the reflector, f is the transmitted frequency from the microwave source and c is the speed of light. Since c is always constant and the transmitter sends out microwaves of a known f, the only variable in this formula is v. Note, once again, that distance between source and reflector is absent from the [\*\*\*9] formula as is any factor for the strength of either the transmitted or echoed energy.

[\*50] *Description of the K55 -- Its Implementation of Doppler Principles*

The K55 unit is a small rectangular instrument which resembles a digital clock radio with switches, buttons and two windows on its face, one for patrol car speed and one for target vehicle speed. These readings appear as lighted, red digital numbers on a black background much as a digital clock or modern calculator. When no readings are being displayed, only the black background can be seen. The set is secured to the dashboard of the patrol car directly behind the steering wheel and can be readily seen either over or through the wheel. It is so small that it cannot obstruct the driver's vision through the windshield. The set can be plugged into the vehicle's power source in several ways, one of which is through the cigarette lighter, and it comes with an antenna and transmitter-receiver which is secured to the center of the dashboard.

The transmitter-receiver and antenna are constructed of standard components based on well known and accepted technology for the transmission and reception of high-frequency energy. [\*\*\*10] The K55 does not use any experimental, new or patentable component or process in the antenna or transmitter-receiver. [\*\*481] Every transmitter is factory-tested with instruments which derive their accuracy from the National Bureau of Standards in

170 N.J. Super. 44, \*50; 405 A.2d 477, \*\*481;  
1979 N.J. Super. LEXIS 887, \*\*\*10

Washington, D.C. The transmitter-receiver has also been tested by an independent concern to verify that it transmits at the frequency assigned to enforcement radar by the F.C.C.

When the set is turned on and calibrated n1 it may be operated in two modes: stationary and moving. n2 Each mode may be [\*51] controlled in either manual or automatic position. n3 With the antenna pointed straight out the windshield over the imaginary centerline of the patrol car and the power on, the transmitter will emanate a large lobe of high frequency microwave energy down the road. The set may be adjusted to give audible warning of a motorist approaching in excess of a predetermined speed; but the warning signal is not a prerequisite to reliable operation. The machine displays readings continuously for speeds between 20 m.p.h. and 99 m.p.h.

n1 Calibration is accomplished with the use of two tuning forks, the accuracy of which must be the subject of documentary proof. Use of the K55 does not eliminate the need for such proof. *Cf. State v. Overton, 135 N.J. Super. 443 (Ct.1975).*

[\*\*\*11]

n2 The "mode" of operation refers to what the patrol car does. In the stationary mode, the car is parked roughly parallel to the road directed at oncoming traffic. In the moving mode the patrol car operates in traffic and tracks vehicles approaching it in the opposite lane. All findings herein apply *equally* to both modes of operation.

n3 The difference is important and is explained in the text at pages 52-54.

As the patrol car moves over the road, the microwaves reflected from the road will arrive back at the receiver at a frequency, predicted by the Doppler formula, varying with the speed of the patrol car. Let us call that frequency, frequency "X". Now assume a target vehicle approaches the patrol car. Microwaves reflected from the target vehicle will arrive back at the receiver at a frequency predicted by the Doppler formula varying with the sum of the speeds of both cars. Let us call that frequency, frequency "Y". Virtually by definition, frequency X will always be less than frequency Y. In the stationary mode only the high frequency "Y" is received and computed into [\*\*\*12] a readable speed.

Thus, in the case of vehicles approaching one another ("closing") there are two returning frequencies, X and Y, both higher than the frequency originally transmitted, but Y always being greater than X. Because the transmitted frequency is constant, it can be dropped from further consideration and attention focused on the difference between X and Y, and they can now be called the low frequency (X) and high frequency (Y) returns.

We are now finished with the Doppler effect. All the rest of the K55 is devoted to processing the low and high frequency [\*52] return signals into a readable speed in miles per hour of the patrol car and target vehicle. But review what has been accomplished: Because of a single variable, speed, in one case relative to the road and, in another case, relative to a closing vehicle, two completely distinct frequencies have been generated, which can be computed into the speeds that generated them.

#### *Description of the K55 -- Signal Processing & Digital Units*

The high and low frequency returns from the receiver flow into the signal processing and digital unit of the K55. A precise technical description of the components and circuitry [\*\*\*13] of the signal processor would take hundreds of pages, but the court finds that all of its individual components are standard and used in the K55 within their respective design limitations. The components are manufactured by reputable concerns such as RCA and Texas Instruments and

are available generally on the wholesale or retail market for a wide variety of uses in electronic circuits, from radios and pacemakers to satellite telemetry. They all have known and accepted parameters of performance and durability in the industry.

Although the exact combination of components comprising the circuitry of the signal processing unit may be unique to the [\*\*482] K55 (in one case a patent is pending with respect thereto), the overall circuitry design is also within industry-known, and accepted, electronic theory and practice. Neither the function nor the efficiency of any component is frustrated by its particular use or placement within the design of the signal processing unit.

The signal processing unit has ten functions, all of which it performs more or less simultaneously and in milliseconds: (1) it amplifies the high and low frequency returns from the receiver; (2) it filters out [\*\*\*14] frequencies resulting in patrol car speed of less than 20 m.p.h.; (3) it separates the signal into low and high [\*53] frequency channels of parallel design, and as to each channel, (4) it filters random frequencies (commonly referred to as "noise") from the Doppler frequency being returned; (5) it tracks and locks on the Doppler frequencies and verifies them as the frequencies to be computed into vehicle speeds and, in the case of the high frequency channel; (6) it passes the now clear and verified signal into a subtractor, and in the case of the low frequency channel; (7) it passes one part of the signal directly to a digital computer unit which computes and displays patrol car speed in miles per hour; meanwhile (8) it passes the other part of the low frequency signal into the subtractor where, (9) it subtracts the high and low frequency signals and (10) it computes and displays the target speed in miles per hour.

The processing unit sweeps through these functions so quickly that a newly computed reading arrives at the viewing window about 15 times a second. In the manual mode the reverification and computing process is continuous throughout the time and distance the vehicles [\*\*\*15] are closing and thus permits the officer to lock in a reading manually when, in his judgment, the target has been properly identified and the reading stabilizes. In contrast, in the automatic mode, the K55 itself, automatically, locks in the first reading computed from a discerned signal. MPH does not recommend the use of this position and present State Police policy forbids it.

One of the most important overall operations of the machine that emerges from the ten-step process described above causes it to focus on or to tune to, precisely and automatically, the strongest frequencies being passed to it by the receiver. To use a mundane simile, also from the law enforcement field, the K55 acts like a well-trained bloodhound, who once given an example of the target scent, wants to, and can, filter out or discriminate between all the other distracting scents its nose senses and track the target scent. This simile, however, should not be misunderstood. The "strongest" signal to a radar may not mean the [\*54] fastest car. Thus, as we shall see, signal strength depends on proximity to the transmitter and thus a slower target may well dominate the radar to the exclusion of a faster, [\*\*\*16] but more distant, target.

#### *The Technical Challenge*

After extensive direct and *voir dire* examination, Andrew L. Soccio was permitted to testify for the defense as a highly experienced technician in the field of electronic circuits. Soccio is not a physicist, scientist or engineer; he has not designed a radar-informed speed measuring device from scratch. But he is entirely familiar with electronic circuitry, the various components that comprise modern circuitry and the various methods common in testing such circuitry. Soccio can build a complex electronic circuit from a schematic diagram; he can analyze its function; test performance of that function and evaluate its performance. The court believes that in certain cases Soccio has the experience to design or redesign electronic circuitry to improve its intended function or increase its efficiency. After a wide variety of experience in various jobs in the electronics industry, Soccio opened his own business which is devoted to troubleshooting and repair of traffic radars in South Jersey. He has not, under contract or otherwise, serviced the K55.

Soccio's qualifications did not include extensive or intimate knowledge [\*\*\*17] of the K55. He disassembled one in Florida this winter and examined certain parts of its signal processing unit for about an hour; he observed [\*\*483]

K55s in operation on police cars for about six hours, and he obtained and copied a partial schematic diagram of the signal processing unit issued by MPH to police departments for making repairs. Using this schematic, Soccio built, in his home laboratory, out of standard components, two elements of the circuitry in the signal processing unit and tested them. These elements were the "phase lock loops" and [\*55] related components used in the high and low frequency channels. (See step 5, pages 52-53, *supra*). Based on these tests it was Soccio's opinion that the phase lock loops in both the high and low frequency channels possessed too wide a latitude in which to monitor and lock on an incoming frequency. Depending on minute transient errors in voltage, the phase lock loops operating in such a latitude could lock on a wrong frequency and pass it through to be computed.

Patterson, called in rebuttal, challenged both the design of Soccio's home-made circuits because the schematic was incomplete, and his tests because they [\*\*\*18] were inadequate. It was his view that the overall design of components aligned after the phase lock loops in the circuit functioned together to nullify both the underlying assumptions of the Soccio tests and the test methods and equipment used.

Thus was framed the most important and difficult single issue in this case: to believe the architect of the K55 or the technically astute opposing witness. After due consideration the court is satisfied that the Soccio tests do not raise a reasonable doubt as to the technical capability of the signal processing unit of the K55 to turn the high and low Doppler frequencies into accurate readings of patrol car and target speeds. The court is not satisfied that there was sufficient similarity in all necessary respect between the Soccio prototypes and the actual, complete circuitry of the K55. Furthermore, the court does not believe the test methods used by Soccio were sufficiently accurate to ground the broad opinion he gave on the K55's potential for displaying undetected, erroneous readings to a reasonably skilled operator.

#### *The Operational Challenge*

The operational challenge to the K55 was grounded in the testimony of Dr. Nichols. [\*\*\*19] He highway-tested the K55 in both Ohio and Florida for about 20 hours altogether. On these occasions, accompanied by others, he operated the K55 himself [\*56] and observed others do so. All the participants were civilians with engineering training and experience. No K55-trained policemen assisted, nor had anyone performing the tests received training from MPH. In at least one instance the test was financed by Fuzzbuster, a manufacturer of traffic radar countermeasures.

In Florida six makes of radar were operated in a single vehicle, calibrated and tested for interference with internal noises such as generators, fans and the like. Then the vehicle, with the radars switched on in pairs, was driven on randomly selected highways in Miami and its environs. No written record of the tests were made, nor were any targets of known speed run through the radars. The radars were operated in both stationary and moving modes and in manual and automatic positions. Based on this experience and his own academic background Nichols' thoughts fell into four general problem areas: (1) problems of target identification where there were several possible targets approaching; (2) problems of [\*\*\*20] cosine error resulting in computation of lower-than-actual patrol car speed; (3) problems of internal and external mechanical, radio or microwave frequency interference, and (4) problems of a subjective nature. In all of these areas the K55 seemed to be most prone to potential error where it was switched to the automatic position.

Dr. Nichols identified two sources of difficulty relating to target identification. Both problems arise from the necessity to decide which of several possible targets is actually generating the speed readout.

As indicated on pages 53-54, one of the design characteristics of the K55 is to track, hold and verify the [\*\*\*484] strongest frequency being echoed to it. In practice, the strongest return frequency is usually that which is closest to the receiver. Thus, MPH in its Operator's Manual directs:

Care should be taken by the operator that he recognize the violator is traveling at a higher rate of speed than the norm, *that the vehicle is out in front, by itself, nearest the radar.* [Emphasis supplied]

[\*57] But Nichols testified that a large target, rather than one closer to the patrol car, may actually be reflecting

170 N.J. Super. 44, \*57; 405 A.2d 477, \*\*484;  
1979 N.J. Super. LEXIS 887, \*\*\*20

the strongest [\*\*\*21] signal. Thus, if a truck is following a Volkswagen the K55 may compute the truck's speed rather than the Volkswagen's, contrary to the above-quoted identification rule. He also pointed out that some materials and shapes are better reflectors than others and could result in a more distant target, producing the reading, if made of such materials or in such shapes.

The court is satisfied that this problem could and probably does occur in a very close-following situation, and policemen should be alerted to the possibility of an incorrect identification. But Dr. Nichols gave no guidance whatsoever as to what was "close following." He apparently could not and did not say whether at 50 feet, 25 feet or at what distance between the approaching truck or Volkswagen, the rearward truck would begin to produce the stronger signal. Thus, the court finds the above-quoted rule a reasonably reliable guide on which to base identifications in the situation described.

Dr. Nichols also sought to describe target-identification problems where a possible violator was closer to the centerline of the transmitted microwaves than a target nearer in distance to the transmitter. He (as well as other witnesses) [\*\*\*22] described the imaginary extended centerline of the patrol car (with the antenna so aligned) as the line of maximum transmitted power, and suggested that a return signal along that line would also be strongest. He pointed out that signal strength falls off far less as one moves away from that centerline than it does as one moves away from the transmitter. It has been found that one-half of the energy transmitted lies within an angle of 8 degree on either side of the centerline and, Dr. Nichols estimated, if the sides of that angle are carried out as much as 1500 feet from the patrol car, 85% of all the transmitted energy would lie within it. According, to Dr. Nichols, therefore, a target physically closer to the centerline, but more distant from the patrol car than the target nearest the patrol car, *might* produce a reading. An [\*58] unwary policeman *might* attribute that reading to the vehicle closest to the patrol car, thus resulting in an unjust arrest.

But Dr. Nichols' views in this respect were unsupported by any precise measurements or detailed tests. None of his highway tests was performed under controlled conditions. No experimental results or theoretical [\*\*\*23] models were adduced to demonstrate Dr. Nichols' theories, to any degree of scientific probability, that a nearer target would produce a signal less strong than a more distant one, notwithstanding such distant target's proximity to the centerline of the micro-move-energy lobe. In fact, in most situations presented him, Dr. Nichols appeared to believe the nearest vehicle to the patrol car would generate the reading. Because it is true that signal strength (not frequency and hence not accuracy of a reading) falls off by the square of the distance from the transmitter, the court finds it more probable that that distance is, in fact, the key one, and therefor, once again, finds the quoted rule of identification reasonably reliable.

Dr. Nichols described cosine error as that error in target speed, which results from the fact that the Doppler frequency reflects along the line between the target to the patrol car, whereas the target is actually moving, not straight at the patrol car, but at an angle to it. Because of the trigonometric function of the cosine, which is always less than 1, the error always favors the target, i.e., displayed target speed is less than the actual target speed. [\*\*\*24] But Dr. Nichols also theorized cosine error could reduce the display of patrol car speed. This is, potentially, a serious matter since reduced patrol car speed would result in false, [\*\*485] higher target speed readings. Thus, if a huge sign or a long building with a long reflective surface on the side of the road reflected a signal stronger than that of the road and thereby generated the low frequency return for computing the patrol car's speed, the angle of such an object relative to the motion of the car might theoretically reduce the patrol car's speed reading by the cosine error.

[\*59] However, the court determines such situation would be necessarily rare, and the reading generated, transitory. Moreover, an alert officer, checking his patrol car readout against his speedometer, should note dropping speed and reject any target speeds obtained in that situation. Accordingly, the court determines that while cosine error as it affects patrol car readout may be a theoretical problem, its significance in routine traffic situations is not such as to raise a reasonable doubt as to the reliability of the K55 when operated by a trained and experienced officer.

Dr. Nichols [\*\*\*25] also testified to internal and external sources of interference with the K55 which can produce spurious speed readings. The K55 possesses circuitry designed to filter out most internal and some external

interference. Like all radar devices, the K55 can, and does, receive signals other than that which it originally transmitted. A wide variety of devices in relatively common use transmit electromagnetic energy at frequencies at or close to those assigned by the F.C.C. to police radar. Depending on the strength of these signals, which again depends on how close the source is to the K55, a speed reading can appear.

The signal processing unit may itself reject the signal and cause the reading to go blank, or the reading will be erratic, or so high or low as to tip the operator off at once that electronic interference may be present. Nonetheless, troopers are trained not to use their own radios when patrolling for speeders and to be mindful of the use of CB radios in the vicinity of the patrol area. Airports and even low strung high tension wires may also be common trouble spots. State and local police may well be advised to begin to catalog, within their respective jurisdictions, [\*\*\*26] the existing sources, strength, frequency, range and direction of radiated energy which might intersect with or flow over the roads and highways. Armed with such information, tests could be run to determine the effect, if any, on the K55.

By so suggesting, however, the court does not wish to leave the impression that external radio or microwave interference [\*60] seriously detracts from the reliability of the K55. The court is satisfied that the chance of an undetected interference increasing a speed reading, to the detriment of a motorist, is so remote as not to raise a reasonable doubt under the "high degree" of reliability standard here at issue. Absolute perfection, of course, is not required.

As a result of his Florida tests, Dr. Nichols expressed certain subjective reservations about the K55. He expressed concern over the practical difficulties of target identification in the multiple-lane, heavy traffic situation, and surprise at the variety of response times in the various radars and the differences between them in the speed with which they repeated their readings. He stated the K55 did not give him "the personal satisfaction that it was as stable and as reliable [\*\*\*27] in the quickness with which it reached a reading that seemed to satisfy the physical situation as the others." He also stated, "it seemed to be more erratic to me. It went up too far or down too far. The swings were more violent. Ultimately it would stabilize and come back and give an adequate and satisfactory reading."

Considering the qualifications of Dr. Nichols, these observations are entitled to respect. In fact, to the extent he notes that the K55 did come to an "acceptable" reading as compared with other radars, he points to the sensitivity of the K55 in the manual position in rejecting spurious readings or other transitory phenomenon. Since Dr. Nichols was as critical of the automatic position, with its ability to lock in a transitory reading, as Patterson, the court finds it difficult to understand his subjective feeling about the K55. In any event, such feelings do not raise a reasonable doubt in [\*\*486] the court's mind as to the reliability of the K55 when operated in the manual position.

#### *Ghosts and Shadows*

Every law enforcement tool, whether it be a radar set or a bloodhound, must be understood and used within its inherent [\*61] limitations. The [\*\*\*28] K55, as all radar, has such limitations. Transmitted signals echo randomly from anything the microwaves reach and sometimes that signal, echoed from a tree, fence or billboard, will a second time be reflected from a moving object out of the trooper's visual range and be received and processed as a speed reading. These are "ghost" readings -- spurious speed readings of unseen vehicles or stationary objects. He who seriously reports tracking speeding trees with the K55 is either a fool or a knave, since such a report presents an inherent conflict with the underlying Doppler principle.

Such ghosts will be either so transitory or display such erratic readings that any experienced operator will at once recognize them. Moreover, ghosts will always be banished by a stronger signal because the K55 functions to find the lock on the strongest signal returning to it. Ghost readings cannot add to or detract from the speed of a real target. None of the experts challenged its reliability in that respect.

"Shadowing" occurs when the patrol car closely follows or is overtaken by a truck or large car with the K55 on in the moving mode. The signal usually returning from the road surface may [\*\*\*29] now be temporarily supplanted by

the stronger signal returning from the vehicle in front. Since that vehicle is traveling slower relative to the patrol car than the road was, the viewer will notice an apparent decrease in the speed reading of the patrol car. Any reading taken on a target vehicle under such conditions would be inaccurate. n4 But the evidence is clear that State Troopers are trained to check continually, while in the moving mode, the K55 display of patrol car speed with the speedometer. Any difference between the K55's reading and the speedometer is a trouble sign that will suggest caution on the part of the trooper in relying on a target speed reading.

n4 See, also, the discussion, at 58, regarding reduced patrol car speed as the result of cosine error.

#### [\*62] *Training*

The court finds that [HN3] the operational reliability of the K55 is largely dependent upon the training and experience of the policemen who use it. In *State v. Dantonio*, 18 N.J. 570, 573-574 (1955), the court [\*\*\*30] quotes a law review article stating that "the average person engaged in traffic control work can learn to use the radar speedometer after about one and one-half hours of instruction." Judged by that standard, the State Police get ample instruction in theory and practice on the K55. Trooper Dempster, for instance, received a full day of classroom and "hands on" practical instruction from MPH, Inc., representatives, and then "practiced" with the machine in his own patrol car 80 hours before he arrested violators. Such a level of instruction and experience acquaints the officers with the technical capability of radar as well as practical use in everyday traffic situations. For instance, like our bloodhound who cannot, having found the source of the scent, identify it as a vicious criminal or a lost child, so also cannot the K55 identify the speeding vehicle: the officer using it must do that. Troopers are taught a three-step procedure when the K55 displays a target speed: (1) identify the probable target producing the reading; (2) lock in the speed, and (3) compare visually the speed displayed with the officer's own estimate of the target's speed. This must be a complex procedure [\*\*\*31] requiring well-coordinated eye and hand movement as well as the exercise of quick judgment. The officer must, also, be monitoring his own speedometer with that of the K55's readout on patrol car speed and driving his car with safety. With some traffic patterns, such as heavy approaching traffic in multiple lanes where no [\*\*487] one car is clearly in front, it will always be difficult if not impossible to identify a target. But experience should quickly expose such situations.

In view of the above, however, and the high degree of skill and judgment required to operate the K55 reliably, it is the [\*63] court's view that periodic follow-up training be instituted in order to verify continuing qualification as a K55 operator. Moreover, the skill and judgment of troopers who themselves instruct in its use should be most carefully evaluated.

Finally, it is clear from the testimony of all the witnesses, that the K55 should not be operated in the "automatic" position in either the moving or stationary mode. That is present State Police policy and should remain so. By "automatic" in the sense used here, is meant that position on the K55 which "automatically" locks on the [\*\*\*32] first echo it receives and processes that echo to a readout and will not then process further echoes. Thus may be instantaneously captured an interfering signal or a ghost which would not be reflected from the visible target.

#### *Conclusion*

For all the reasons stated above the court determines that a properly calibrated K55 Speed Detection Device installed in a car with a calibrated speedometer has a high degree of scientific and operational reliability when used in either stationary or moving mode, in the manual position by a person having at least three hours of classroom training and two to three hours of practical instruction together with some minimum experience prior to use in actual law enforcement. The court, on the record before it, cannot specify what the minimum experience should be but holds that 80 hours is, beyond doubt, sufficient.

When operated in the automatic position the operational reliability of the K55 is subject to greater question, and

170 N.J. Super. 44, \*63; 405 A.2d 477, \*\*487;  
1979 N.J. Super. LEXIS 887, \*\*\*32

acceptance of readings while in that position must hinge to a far greater extent on detailed examination of the surrounding circumstances as well as the experience and training of the operator.

[\*64] In view of [\*\*\*33] the holding above, the court will shortly schedule argument on any and all other issues defendant may choose to raise on the record below relevant to his conviction.

68 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Jamie J. Correia, Defendant**

[NO NUMBER IN ORIGINAL]

**Justice Court of New York, Village of Muttontown, Nassau County***140 Misc. 2d 813; 531 N.Y.S.2d 998; 1988 N.Y. Misc. LEXIS 488***July 21, 1988****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant contended that, where radar evidence was nonprobative, and where a police officer's independent estimate of defendant's speed occurred as a result of a faulty radar clocking and while the officer was in a stationary position, that estimate was necessarily tainted by the faulty radar reading, and was insufficient to sustain defendant's conviction for speeding.

**OVERVIEW:** Defendant challenged the sufficiency of the evidence after he was charged with speeding. The court held noted a speeding conviction could, but need not, result from a police officer's independent estimate, whether it occurred before or after a radar clocking, and whether the officer made his estimate while in a stationary as opposed to a pacing mode. The sufficiency of such evidence was to be determined on a case-by-case basis, in light of and considering the particular facts and circumstances presented. While the sequence of a faulty radar clocking and an officer's independent estimate of speed could affect the weight to be given to the officer's independent estimate, it did not necessarily render the independent estimate insufficient as a matter of law. However, in defendant's case where it was impossible to determine whether the officer was influenced by the faulty radar readout, the court could not say that the police officer's testimony alone was sufficient to prove defendant's guilt beyond a reasonable doubt.

**OUTCOME:** Defendant was found not guilty, because the evidence was insufficient where it was impossible to determine whether the police officer's independent estimate of defendant's vehicle's speed was influenced by a faulty radar readout.

**CORE TERMS:** estimate, speed, radar, police officer, clocking, readout, stationary, qualification, summons, miles, speeding, speedometer, unreliable, mechanical, faulty, tested, observance, testing, pacing, reliability, accuracy, traffic, matter of law, speed limit, case-by-case, estimating, training, verify, novel, beyond a reasonable doubt

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] Either a radar or other mechanical clocking or the police officer's independent estimate of a defendant's speed alone can suffice to produce and sustain a conviction. Both forms of evidence are not necessary for a conviction.

***Civil Procedure > Pleading & Practice > Service of Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN2] Doppler radar devices have been judicially accepted as probative evidence of speed provided they are properly used and are tested within a reasonable time period both before and after the summons in question is issued. However, not all uses of such equipment and not all radar or other speed measuring devices are, as yet, accepted as reliable.

***Civil Procedure > Pleading & Practice > Service of Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] Proper testing of radar generally consists of a series of tests with tuning forks and internal calibration devices within reasonable time periods both before and after the summons at issue was issued, sometimes coupled with verification against the speedometer of a companion police vehicle or the testing officer's own vehicle. Testing of a mechanical speed device requires similar before and after testing by the police officer within reasonable proximity to the incident in question, as well as outside verification of the reliability of the device. Where the radar or other mechanical speed device involved is not shown to have been properly or reliably tested, evidence based upon or generated from it is inadmissible and, even if admitted, is legally insufficient to sustain a conviction. In that circumstance, for a conviction to result, the People must prove their case, or at least corroborate the proffered radar or mechanical evidence, with other independent, legally sufficient evidence, that is, the police officer's estimate of speed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] Where the People are relying upon an estimate, that is, opinion evidence, of the defendant's speed, the police officer must be shown to be qualified to make such an estimate. Proper qualification of the police officer requires evidence of his training to make such an estimate, his prior experience in doing so, and his established margin of accuracy or error.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN5] The mere fact that the defendant's alleged rate of speed may be extraordinarily high will not lessen the People's burden of proving the police officer's qualifications. However, the degree of excessiveness in speed may bear upon the weight to be given to the officer's opinion.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] How much experience and what amount of evidence are necessary to qualify an officer to give his estimate has not been definitively decreed, but rather is a matter for the court to decide on a case-by-case basis. Evidence that the police officer received proper training at the police academy and on the road, that he has spent considerable time on road patrol, that he has experience estimating speed and comparing his estimates against radar or mechanically calibrated speed readings, and that he has a historically established margin of error of only a few miles per hour, has often been held to be sufficient.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] Qualifying the police officer is only the first step in the court's review and consideration of his evidence. The defendant is entitled to challenge the police officer's qualifications, and the defendant may obtain pretrial disclosure thereof via a proper discovery request for that purpose. Where no objection is made to the admissibility of the police

officer's qualifications, his opinion must be considered by the court, but it can be given little weight. The court must weigh all circumstances of the case, including the nature and extent of the opportunity which the officer had to view the moving vehicle and the relative positions of the policemen and the approaching car. Thus, the court may reject or discount the police officer's evidence on the basis of the other facts and circumstances of the case, that is, where he was situated in relation to the defendant's vehicle, how long he observed the defendant, the nature of his observance, and how he went about estimating the defendant's speed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN8] Where it is impossible for the court to determine whether a police officer was influenced, albeit unintentionally and perhaps only subconsciously, by the radar readout, the court cannot say that the police officer's testimony alone proves the defendant's guilt beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN9] Clocking on a speedometer while pacing the subject vehicle is considered sufficient to prove excessive speed if the police officer's experience and qualifications are established.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN10] The test in a traffic case is proof beyond a reasonable doubt. By contrast, in a license revocation proceeding, the test is merely proof by clear and convincing evidence.

**HEADNOTES: [\*\*\*1] Motor Vehicles -- Speeding -- Police Officer's Independent Estimate of Speed**

A police officer's independent estimate of speed is not insufficient, as a matter of law, to sustain a speeding conviction (*Vehicle and Traffic Law* § 1180 [b]) where that estimate was made following the officer's observance of a faulty or unreliable radar clocking of the defendant's speed, regardless of whether the officer made his estimate while in a stationary position, rather than while pacing the defendant's vehicle. The sufficiency of such evidence must be determined on a case-by-case basis in light of and considering the particular facts and circumstances presented including "the nature and extent of the opportunity which the officer had to view the moving vehicle", and the relative positions of the officer and the approaching car. Accordingly, although the ticketing officer is sufficiently qualified to estimate the speed of a vehicle, since he made a spur-of-the-moment estimate from a stationary position after being alerted by an unreliable radar readout, it is impossible to determine whether the officer was influenced by the radar readout and, thus, it cannot be said that the officer's testimony [\*\*\*2] alone proves defendant's guilt of speeding beyond a reasonable doubt.

**COUNSEL:**

*Joseph R. Carrieri* for plaintiff.

*David A. Mansfield* for defendant.

**JUDGES:**

Martin I. Kaminsky, J.

**OPINION BY:**

KAMINSKY

**OPINION:**

[\*813] [\*\*998] **OPINION OF THE COURT**

After trial of this traffic speeding case, novel questions are [\*814] presented regarding the legal sufficiency of a police officer's independent estimate of the defendant's speed, since the officer's estimate was made following and as the result of an unreliable and possibly inaccurate radar clocking of the defendant's speed and while the officer was in a stationary position, observing the defendant drive past him.

Defendant Jamie J. Correia was ticketed on the morning of April 3, 1987 for alleged speeding on Route 25A in the Village of Muttontown. Defendant is alleged to have been driving at 81 miles per hour in a 55 mile-per-hour zone, in violation of *section 1180 (b) of the Vehicle and Traffic Law*. Police Officer Peter Cusak, who issued the summons, first clocked the defendant on a Doppler radar unit in his police car, and then made an independent [\*\*999] estimate of the defendant's speed. Officer Cusak was monitoring traffic while in a stationary position, off the roadway. [\*\*\*3] He was alerted to the defendant's presence by the sound of the radar unit's readout. Officer Cusak looked down to see the radar readout. Then, Officer Cusak looked up, saw the defendant and made his own estimate of the defendant's speed, as the defendant crossed his field of vision.

Officer Cusak's testimony established that he has expertise in the use of Doppler radar equipment and extensive experience in making independent estimates of the speed of moving vehicles. He has had police academy and on-the-road training, and has been on road and traffic patrol for some years. Officer Cusak has regularly worked with and tested radar units, and has made hundreds or even thousands of independent estimates of speed. Checks of his independent estimates against radar units and his speedometer indicate that Officer Cusak's independent estimates are generally within about three miles of those readouts.

Officer Cusak tested the radar unit he was using twice on the day in question. He did so both before and after he issued a summons to the defendant. Officer Cusak checked the unit's readouts against two tuning forks and made internal calibration checks, noting the test results in a written [\*\*\*4] log which his department maintains with respect to the unit. The test results from one of the tuning fork tests conducted after the summons was issued, at least as recorded by the police officer, showed speed readouts outside the range permissible to verify the accuracy and reliability of the unit.

Defendant contends that (a) the radar unit in question was not properly or reliably tested, rendering the radar evidence [\*815] nonprobative, and (b) since Officer Cusak's independent estimate of the defendant's speed occurred after (indeed as a result of) the radar clocking and while the officer was in a stationary position, that estimate was necessarily tainted by the radar reading and is insufficient to sustain a conviction. In so arguing, defendant has presented a novel question, viz., is a police officer's independent estimate of speed insufficient, as a matter of law, to sustain a conviction where that estimate was made following the officer's observance of a faulty or unreliable radar clocking of the defendant's speed? A corollary novel question is whether the fact that the police officer's independent estimate was made while he was in a stationary position, rather than while [\*\*\*5] pacing the defendant's vehicle, necessarily affects the result.

Neither counsel nor the court have found a case directly in point on these issues. Based upon analogous authority (discussed below), the court holds that a conviction can, but need not, result from a police officer's independent estimate in these circumstances, i.e., regardless of whether that occurred before or after a radar clocking and whether the officer made his estimate while in a stationary as opposed to a pacing mode. The sufficiency of such evidence must be determined on a case-by-case basis, in light of and considering the particular facts and circumstances presented. In other words, while the sequence of a faulty radar clocking and an officer's independent estimate of speed may affect the weight to be given to the independent estimate, it does not necessarily render the independent estimate insufficient as a matter of law. The same is true with respect to the police officer's position relative to the defendant.

Generally, the court in a speeding case is presented with a combination of a radar or other mechanical (e.g., speedometer) clocking of the defendant's speed, corroborated by a Trooper's or police [\*\*\*6] officer's estimate (i.e.,

140 Misc. 2d 813, \*815; 531 N.Y.S.2d 998, \*\*999;  
1988 N.Y. Misc. LEXIS 488, \*\*\*6

opinion evidence) of the defendant's speed. (See, e.g., *People v Magri*, 3 NY2d 562, 564-565 [1958]; *People v Maniscalco*, 94 Misc 2d 915, 917-918; see also, *People v Smalley*, 64 Misc 2d 363, 364-365.) However, [HN1] both forms of evidence are not necessary for there to be a conviction. Either (a) a radar or other mechanical clocking (*People v Magri*, supra; *People v Perlman*, 89 Misc 2d 973, 977-978) or (b) the [\*\*1000] police officer's independent estimate of the defendant's speed (*People v Olsen*, 22 NY2d 230, 231; *Matter of Graf v Foschio*, 102 AD2d 891, 892; *People v Jeck-Tisch*, 133 Misc 2d 1090, 1091) [\*816] alone can suffice to produce and sustain a conviction.

[HN2] Doppler radar devices have been judicially accepted as probative evidence of speed for over 30 years (*People v Magri*, 3 NY2d 562, supra), provided they are properly used and were tested within a reasonable time period both before and after the summons in question was issued. (*People v Perlman*, supra, 89 Misc 2d, at 977-978.) [\*\*\*7] However, not all uses of such equipment and not all radar or other speed measuring devices are, as yet, accepted as reliable. For example, in *People v Conlon* (109 Misc 2d 729, 731-732), the court rejected evidence of an MR-9 radar clocking made while the police officer was "in a moving or verifying mode", on the ground that the reliability of "moving radar" has not yet been scientifically established to warrant the court's taking judicial notice thereof. In *People v Leatherbarrow* (69 Misc 2d 563, 566) the court rejected Vascar speed measurements altogether.

[HN3] Proper testing of radar generally consists of a series of tests with tuning forks and internal calibration devices within reasonable time periods both before and after the summons at issue was issued, sometimes coupled with verification against the speedometer of a companion police vehicle or the testing officer's own vehicle. (*People v Maniscalco*, supra, 94 Misc 2d, at 916; *People v Lynch*, 61 Misc 117, 119; *People v Stephens*, 52 Misc 2d 1070, 1072; see also, *Matter of Lovenheim v Foschio*, 93 AD2d 986, 987.) [\*\*\*8] Testing of a mechanical speed device requires similar before and after testing by the police officer within reasonable proximity to the incident in question, as well as outside verification of the reliability of the device. (*Government of Virgin Is. v Rodriguez*, 300 F Supp 909, 910 [New York law applied]; *People v Marsellus*, 2 NY2d 653; see also, *People v Cunha*, 93 Misc 2d 467, 469, affd 96 Misc 2d 522 [App Term, 2d Dept].) Where the radar or other mechanical speed device involved is not shown to have been properly or reliably tested, evidence based upon or generated from it is inadmissible and, even if admitted, is legally insufficient to sustain a conviction. (*People v Cunha*, 93 Misc 2d 467, 468-469, affd 96 Misc 2d 522 [App Term, 2d Dept], supra.) In that circumstance, for a conviction to result, the People must prove their case, or at least corroborate the proffered radar or mechanical evidence, with other independent, legally sufficient evidence (e.g., the police officer's estimate of speed). (*People v Heyser*, 2 NY2d 390, 393; *People v Higley*, 55 Misc 2d 460, 461-462.)

[\*817] [\*\*\*9] Here, as noted earlier, the results of the tuning fork tests after the summons was issued exceeded the tolerances permissible to verify the accuracy of the unit. Whether that is because the unit was faulty or the tester made an error (either in conducting the test or recording its results) is irrelevant. Regardless of the reason, the test evidence does not and cannot provide assurance of the reliability of the radar unit at the time of the clocking of the defendant's vehicle. Although the defendant did not move to strike the faulty radar evidence, he argued that it should be disregarded as unreliable. The court agrees and finds that evidence to be nonprobative and insufficient to prove the People's case. Hence, the People's case depends upon the sufficiency of Officer Cusak's estimate of the defendant's speed.

[HN4] Where, as here, the People are relying upon an estimate (i.e., opinion evidence) of the defendant's speed, the police officer must be shown to be qualified to make such an estimate. Proper qualification of the police officer requires evidence of his training to make such an estimate, his prior [\*\*1001] experience in doing so, and his established margin of accuracy or [\*\*\*10] error. (*People v Olsen*, supra, 22 NY2d, at 231-232; *People v Cunha*, supra, 93 Misc 2d, at 470-471.) Thus, in *Leatherbarrow* (supra, 69 Misc 2d, at 565), the defendant was acquitted when the Trooper "failed to specifically indicate or particularize his experience and accuracy in judging the speed of moving vehicles". However, as the court explained, if the Trooper had "properly established his qualifications with regard to estimating speed", his testimony alone would have sufficed to result in a conviction. n1

n1 [HN5] The mere fact that the defendant's alleged rate of speed may be extraordinarily high will not

140 Misc. 2d 813, \*817; 531 N.Y.S.2d 998, \*\*1001;  
1988 N.Y. Misc. LEXIS 488, \*\*\*10

lessen the People's burden of proving the police officer's qualifications. In *People v Leatherbarrow* (69 Misc 2d 563, 565), for example, the alleged speed was 90 miles per hour, demonstrably in excess of the speed limit. But compare *People v Olsen* (22 NY2d 230, 231) where the Court of Appeals observed that the degree of excessiveness in speed (i.e., number of miles over the speed limit) may bear upon the weight to be given to the officer's opinion. (See also, *People v Cunha*, 93 Misc 2d 467, 470 ["the variance of 40 to 45 miles over the speed limit of 30 miles per hour was clearly sufficient for the court to give it the weight necessary to establish the People's case"].)

[\*\*11] [HN6] How much experience and what amount of evidence are necessary to qualify an officer to give his estimate has not been definitively decreed, but rather is a matter for the court to decide on a case-by-case basis. Evidence that the police officer received proper training at the police academy and on [\*818] the road, that he has spent considerable time on road patrol, that he has experience estimating speed and comparing his estimates against radar or mechanically calibrated speed readings, and that he has a historically established margin of error of only a few miles per hour, such as the People have introduced here, has often been held to be sufficient. (*People v Higley*, supra, 55 Misc 2d, at 461; *People v Wimmer*, 15 Misc 2d 568, 569; compare, *People v Page*, 32 Misc 2d 179, 180-181.) Indeed, it seems apparent that a great deal of proof in this regard is not required. For example, in *People v Dusing* (5 NY2d 126, 127 [1959]), a conviction was sustained on the basis of conclusory testimony by a motorcycle officer that he had two years' experience, had arrested drivers for speeding "many times", and [\*\*12] was able to estimate speed on the basis of his experience as a policeman and a driver. n2

n2 The rule is the same in civil cases. For example, in *Senecal v Drollette* (304 NY 446 [1952]), a 12-year-old boy was permitted, in a civil tort case, to give an estimate of speed based on his having ridden in automobiles and having observed speedometers. But compare *Swoboda v We Try Harder* (128 AD2d 862, 863) where a lay opinion on speed was held to be inadmissible because the witness's qualifications were not established.

[HN7] Qualifying the police officer is only the first step in the court's review and consideration of his evidence. The defendant is entitled to challenge the police officer's qualifications, and the defendant may obtain pretrial disclosure thereof (via proper discovery request) for that purpose. (*People v Gutterson*, 93 Misc 2d 1105, 1108-1109.) Where no objection is made to the admissibility of the police officer's qualifications, his opinion must be [\*\*13] considered by the court, but it can be given little weight. (*People v Cunha*, supra, 93 Misc 2d, at 470.) The court must weigh all circumstances of the case, including "the nature and extent of the opportunity which the officer had to view the moving vehicle" (*People v Olsen*, supra, 22 NY2d, at 232) and "[the] relative positions of the policemen and the approaching car" (*People v Dusing*, supra, 5 NY2d, at 128). Thus, the court may reject or discount the police officer's evidence on the basis of the other facts and circumstances of the case, e.g., where he was situated in relation to the defendant's vehicle, how long he observed the defendant, the nature of his observance, and how he went about estimating the defendant's speed. Credibility is, of course, also a factor to be taken into account. (*People v Clark*, 33 Misc 2d 390, 393.)

[\*\*1002] In this case, Officer Cusak was a forthright and credible witness, both in his demeanor and the clarity of his recitation [\*819] of the facts. However, the police officer was situated in a stationary position when he first observed the defendant; and he saw the potentially [\*\*14] inaccurate radar readout before he even observed the defendant, much less made his independent estimate of speed. Indeed, it was the radar readout which called the police officer's attention to the defendant in the first place. Officer Cusak did not pace the defendant, and, thus, did not verify his estimate on his speedometer or by an extended or continued observance. (Compare, *People v Conlon*, supra, 109 Misc 2d, at 733-734.) n3 Rather he made essentially a spur-of-the-moment estimate, relatively in an instant, as the defendant proceeded by him. [HN8] It is impossible for the court to determine whether, in doing so, the police officer was influenced, albeit unintentionally and perhaps only subconsciously, by the radar readout. In these circumstances,

140 Misc. 2d 813, \*819; 531 N.Y.S.2d 998, \*\*1002;  
1988 N.Y. Misc. LEXIS 488, \*\*\*14

the court cannot say that the police officer's testimony alone proves the defendant's guilt beyond a reasonable doubt. n4 (See, e.g., *People v Perlman*, 89 Misc 2d 973, 980-981, *supra*, overruled on other grounds in *Matter of Graf v Foschio*, 102 AD2d 891; *People v Greenhouse*, 4 Misc 2d 692, 693; compare, *People v Clark*, *supra*, 33 Misc 2d, at 393.)

n3 [HN9] Clocking on a speedometer while "pacing" the subject vehicle is considered sufficient to prove excessive speed if the police officer's experience and qualifications are established. ( *People v Heyser*, 2 NY2d 390, 394; *People v Conlon*, 109 Misc 2d 729, 733-734.)

n4 [HN10] The test in a traffic case is proof "beyond a reasonable doubt". ( *People v Cunha*, 96 Misc 2d 522, 523; *People v Baker*, 2 Misc 2d 600, 602 [Ct Spec Sess, App Part, 1st Dept].) By contrast, in a license revocation proceeding, the test is merely proof by "clear and convincing evidence". ( *Vehicle and Traffic Law* § 227 [1]; *Silver v State of New York Dept. of Motor Vehicles*, 108 AD2d 848, 849; *Matter of Graf v Foschio*, 102 AD2d 891, 892.)

[\*\*\*15] Accordingly, the court finds the defendant not guilty. The clerk of the court is directed to enter judgment dismissing the summons.

69 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Jamie J. Correia, Defendant**

[NO NUMBER IN ORIGINAL]

**Justice Court of New York, Village of Muttontown, Nassau County***140 Misc. 2d 813; 531 N.Y.S.2d 998; 1988 N.Y. Misc. LEXIS 488***July 21, 1988****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant contended that, where radar evidence was nonprobative, and where a police officer's independent estimate of defendant's speed occurred as a result of a faulty radar clocking and while the officer was in a stationary position, that estimate was necessarily tainted by the faulty radar reading, and was insufficient to sustain defendant's conviction for speeding.

**OVERVIEW:** Defendant challenged the sufficiency of the evidence after he was charged with speeding. The court held noted a speeding conviction could, but need not, result from a police officer's independent estimate, whether it occurred before or after a radar clocking, and whether the officer made his estimate while in a stationary as opposed to a pacing mode. The sufficiency of such evidence was to be determined on a case-by-case basis, in light of and considering the particular facts and circumstances presented. While the sequence of a faulty radar clocking and an officer's independent estimate of speed could affect the weight to be given to the officer's independent estimate, it did not necessarily render the independent estimate insufficient as a matter of law. However, in defendant's case where it was impossible to determine whether the officer was influenced by the faulty radar readout, the court could not say that the police officer's testimony alone was sufficient to prove defendant's guilt beyond a reasonable doubt.

**OUTCOME:** Defendant was found not guilty, because the evidence was insufficient where it was impossible to determine whether the police officer's independent estimate of defendant's vehicle's speed was influenced by a faulty radar readout.

**CORE TERMS:** estimate, speed, radar, police officer, clocking, readout, stationary, qualification, summons, miles, speeding, speedometer, unreliable, mechanical, faulty, tested, observance, testing, pacing, reliability, accuracy, traffic, matter of law, speed limit, case-by-case, estimating, training, verify, novel, beyond a reasonable doubt

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] Either a radar or other mechanical clocking or the police officer's independent estimate of a defendant's speed alone can suffice to produce and sustain a conviction. Both forms of evidence are not necessary for a conviction.

***Civil Procedure > Pleading & Practice > Service of Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN2] Doppler radar devices have been judicially accepted as probative evidence of speed provided they are properly used and are tested within a reasonable time period both before and after the summons in question is issued. However, not all uses of such equipment and not all radar or other speed measuring devices are, as yet, accepted as reliable.

***Civil Procedure > Pleading & Practice > Service of Process > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] Proper testing of radar generally consists of a series of tests with tuning forks and internal calibration devices within reasonable time periods both before and after the summons at issue was issued, sometimes coupled with verification against the speedometer of a companion police vehicle or the testing officer's own vehicle. Testing of a mechanical speed device requires similar before and after testing by the police officer within reasonable proximity to the incident in question, as well as outside verification of the reliability of the device. Where the radar or other mechanical speed device involved is not shown to have been properly or reliably tested, evidence based upon or generated from it is inadmissible and, even if admitted, is legally insufficient to sustain a conviction. In that circumstance, for a conviction to result, the People must prove their case, or at least corroborate the proffered radar or mechanical evidence, with other independent, legally sufficient evidence, that is, the police officer's estimate of speed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] Where the People are relying upon an estimate, that is, opinion evidence, of the defendant's speed, the police officer must be shown to be qualified to make such an estimate. Proper qualification of the police officer requires evidence of his training to make such an estimate, his prior experience in doing so, and his established margin of accuracy or error.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN5] The mere fact that the defendant's alleged rate of speed may be extraordinarily high will not lessen the People's burden of proving the police officer's qualifications. However, the degree of excessiveness in speed may bear upon the weight to be given to the officer's opinion.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] How much experience and what amount of evidence are necessary to qualify an officer to give his estimate has not been definitively decreed, but rather is a matter for the court to decide on a case-by-case basis. Evidence that the police officer received proper training at the police academy and on the road, that he has spent considerable time on road patrol, that he has experience estimating speed and comparing his estimates against radar or mechanically calibrated speed readings, and that he has a historically established margin of error of only a few miles per hour, has often been held to be sufficient.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] Qualifying the police officer is only the first step in the court's review and consideration of his evidence. The defendant is entitled to challenge the police officer's qualifications, and the defendant may obtain pretrial disclosure thereof via a proper discovery request for that purpose. Where no objection is made to the admissibility of the police

officer's qualifications, his opinion must be considered by the court, but it can be given little weight. The court must weigh all circumstances of the case, including the nature and extent of the opportunity which the officer had to view the moving vehicle and the relative positions of the policemen and the approaching car. Thus, the court may reject or discount the police officer's evidence on the basis of the other facts and circumstances of the case, that is, where he was situated in relation to the defendant's vehicle, how long he observed the defendant, the nature of his observance, and how he went about estimating the defendant's speed.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN8] Where it is impossible for the court to determine whether a police officer was influenced, albeit unintentionally and perhaps only subconsciously, by the radar readout, the court cannot say that the police officer's testimony alone proves the defendant's guilt beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN9] Clocking on a speedometer while pacing the subject vehicle is considered sufficient to prove excessive speed if the police officer's experience and qualifications are established.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN10] The test in a traffic case is proof beyond a reasonable doubt. By contrast, in a license revocation proceeding, the test is merely proof by clear and convincing evidence.

**HEADNOTES: [\*\*\*1] Motor Vehicles -- Speeding -- Police Officer's Independent Estimate of Speed**

A police officer's independent estimate of speed is not insufficient, as a matter of law, to sustain a speeding conviction (*Vehicle and Traffic Law* § 1180 [b]) where that estimate was made following the officer's observance of a faulty or unreliable radar clocking of the defendant's speed, regardless of whether the officer made his estimate while in a stationary position, rather than while pacing the defendant's vehicle. The sufficiency of such evidence must be determined on a case-by-case basis in light of and considering the particular facts and circumstances presented including "the nature and extent of the opportunity which the officer had to view the moving vehicle", and the relative positions of the officer and the approaching car. Accordingly, although the ticketing officer is sufficiently qualified to estimate the speed of a vehicle, since he made a spur-of-the-moment estimate from a stationary position after being alerted by an unreliable radar readout, it is impossible to determine whether the officer was influenced by the radar readout and, thus, it cannot be said that the officer's testimony [\*\*\*2] alone proves defendant's guilt of speeding beyond a reasonable doubt.

**COUNSEL:**

*Joseph R. Carrieri* for plaintiff.

*David A. Mansfield* for defendant.

**JUDGES:**

Martin I. Kaminsky, J.

**OPINION BY:**

KAMINSKY

**OPINION:**

[\*813] [\*\*998] **OPINION OF THE COURT**

After trial of this traffic speeding case, novel questions are [\*814] presented regarding the legal sufficiency of a police officer's independent estimate of the defendant's speed, since the officer's estimate was made following and as the result of an unreliable and possibly inaccurate radar clocking of the defendant's speed and while the officer was in a stationary position, observing the defendant drive past him.

Defendant Jamie J. Correia was ticketed on the morning of April 3, 1987 for alleged speeding on Route 25A in the Village of Muttontown. Defendant is alleged to have been driving at 81 miles per hour in a 55 mile-per-hour zone, in violation of *section 1180 (b) of the Vehicle and Traffic Law*. Police Officer Peter Cusak, who issued the summons, first clocked the defendant on a Doppler radar unit in his police car, and then made an independent [\*\*999] estimate of the defendant's speed. Officer Cusak was monitoring traffic while in a stationary position, off the roadway. [\*\*\*3] He was alerted to the defendant's presence by the sound of the radar unit's readout. Officer Cusak looked down to see the radar readout. Then, Officer Cusak looked up, saw the defendant and made his own estimate of the defendant's speed, as the defendant crossed his field of vision.

Officer Cusak's testimony established that he has expertise in the use of Doppler radar equipment and extensive experience in making independent estimates of the speed of moving vehicles. He has had police academy and on-the-road training, and has been on road and traffic patrol for some years. Officer Cusak has regularly worked with and tested radar units, and has made hundreds or even thousands of independent estimates of speed. Checks of his independent estimates against radar units and his speedometer indicate that Officer Cusak's independent estimates are generally within about three miles of those readouts.

Officer Cusak tested the radar unit he was using twice on the day in question. He did so both before and after he issued a summons to the defendant. Officer Cusak checked the unit's readouts against two tuning forks and made internal calibration checks, noting the test results in a written [\*\*\*4] log which his department maintains with respect to the unit. The test results from one of the tuning fork tests conducted after the summons was issued, at least as recorded by the police officer, showed speed readouts outside the range permissible to verify the accuracy and reliability of the unit.

Defendant contends that (a) the radar unit in question was not properly or reliably tested, rendering the radar evidence [\*815] nonprobative, and (b) since Officer Cusak's independent estimate of the defendant's speed occurred after (indeed as a result of) the radar clocking and while the officer was in a stationary position, that estimate was necessarily tainted by the radar reading and is insufficient to sustain a conviction. In so arguing, defendant has presented a novel question, viz., is a police officer's independent estimate of speed insufficient, as a matter of law, to sustain a conviction where that estimate was made following the officer's observance of a faulty or unreliable radar clocking of the defendant's speed? A corollary novel question is whether the fact that the police officer's independent estimate was made while he was in a stationary position, rather than while [\*\*\*5] pacing the defendant's vehicle, necessarily affects the result.

Neither counsel nor the court have found a case directly in point on these issues. Based upon analogous authority (discussed below), the court holds that a conviction can, but need not, result from a police officer's independent estimate in these circumstances, i.e., regardless of whether that occurred before or after a radar clocking and whether the officer made his estimate while in a stationary as opposed to a pacing mode. The sufficiency of such evidence must be determined on a case-by-case basis, in light of and considering the particular facts and circumstances presented. In other words, while the sequence of a faulty radar clocking and an officer's independent estimate of speed may affect the weight to be given to the independent estimate, it does not necessarily render the independent estimate insufficient as a matter of law. The same is true with respect to the police officer's position relative to the defendant.

Generally, the court in a speeding case is presented with a combination of a radar or other mechanical (e.g., speedometer) clocking of the defendant's speed, corroborated by a Trooper's or police [\*\*\*6] officer's estimate (i.e.,

140 Misc. 2d 813, \*815; 531 N.Y.S.2d 998, \*\*999;  
1988 N.Y. Misc. LEXIS 488, \*\*\*6

opinion evidence) of the defendant's speed. (See, e.g., *People v Magri*, 3 NY2d 562, 564-565 [1958]; *People v Maniscalco*, 94 Misc 2d 915, 917-918; see also, *People v Smalley*, 64 Misc 2d 363, 364-365.) However, [HN1] both forms of evidence are not necessary for there to be a conviction. Either (a) a radar or other mechanical clocking (*People v Magri*, supra; *People v Perlman*, 89 Misc 2d 973, 977-978) or (b) the [\*\*1000] police officer's independent estimate of the defendant's speed (*People v Olsen*, 22 NY2d 230, 231; *Matter of Graf v Foschio*, 102 AD2d 891, 892; *People v Jeck-Tisch*, 133 Misc 2d 1090, 1091) [\*816] alone can suffice to produce and sustain a conviction.

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n2 The rule is the same in civil cases. For example, in *Senecal v Drollette* (304 NY 446 [1952]), a 12-year-old boy was permitted, in a civil tort case, to give an estimate of speed based on his having ridden in automobiles and having observed speedometers. But compare *Swoboda v We Try Harder* (128 AD2d 862, 863) where a lay opinion on speed was held to be inadmissible because the witness's qualifications were not established.

[HN7] Qualifying the police officer is only the first step in the court's review and consideration of his evidence. The defendant is entitled to challenge the police officer's qualifications, and the defendant may obtain pretrial disclosure thereof (via proper discovery request) for that purpose. (*People v Gutterson*, 93 Misc 2d 1105, 1108-1109.) Where no objection is made to the admissibility of the police officer's qualifications, his opinion must be [\*\*13] considered by the court, but it can be given little weight. (*People v Cunha*, supra, 93 Misc 2d, at 470.) The court must weigh all circumstances of the case, including "the nature and extent of the opportunity which the officer had to view the moving vehicle" (*People v Olsen*, supra, 22 NY2d, at 232) and "[the] relative positions of the policemen and the approaching car" (*People v Dusing*, supra, 5 NY2d, at 128). Thus, the court may reject or discount the police officer's evidence on the basis of the other facts and circumstances of the case, e.g., where he was situated in relation to the defendant's vehicle, how long he observed the defendant, the nature of his observance, and how he went about estimating the defendant's speed. Credibility is, of course, also a factor to be taken into account. (*People v Clark*, 33 Misc 2d 390, 393.)

[\*\*1002] In this case, Officer Cusak was a forthright and credible witness, both in his demeanor and the clarity of his recitation [\*819] of the facts. However, the police officer was situated in a stationary position when he first observed the defendant; and he saw the potentially [\*\*14] inaccurate radar readout before he even observed the defendant, much less made his independent estimate of speed. Indeed, it was the radar readout which called the police officer's attention to the defendant in the first place. Officer Cusak did not pace the defendant, and, thus, did not verify his estimate on his speedometer or by an extended or continued observance. (Compare, *People v Conlon*, supra, 109 Misc 2d, at 733-734.) n3 Rather he made essentially a spur-of-the-moment estimate, relatively in an instant, as the defendant proceeded by him. [HN8] It is impossible for the court to determine whether, in doing so, the police officer was influenced, albeit unintentionally and perhaps only subconsciously, by the radar readout. In these circumstances,

140 Misc. 2d 813, \*819; 531 N.Y.S.2d 998, \*\*1002;  
1988 N.Y. Misc. LEXIS 488, \*\*\*14

the court cannot say that the police officer's testimony alone proves the defendant's guilt beyond a reasonable doubt. n4 (See, e.g., *People v Perlman*, 89 Misc 2d 973, 980-981, *supra*, overruled on other grounds in *Matter of Graf v Foschio*, 102 AD2d 891; *People v Greenhouse*, 4 Misc 2d 692, 693; compare, *People v Clark*, *supra*, 33 Misc 2d, at 393.)

n3 [HN9] Clocking on a speedometer while "pacing" the subject vehicle is considered sufficient to prove excessive speed if the police officer's experience and qualifications are established. ( *People v Heyser*, 2 NY2d 390, 394; *People v Conlon*, 109 Misc 2d 729, 733-734.)

n4 [HN10] The test in a traffic case is proof "beyond a reasonable doubt". ( *People v Cunha*, 96 Misc 2d 522, 523; *People v Baker*, 2 Misc 2d 600, 602 [Ct Spec Sess, App Part, 1st Dept].) By contrast, in a license revocation proceeding, the test is merely proof by "clear and convincing evidence". ( *Vehicle and Traffic Law* § 227 [1]; *Silver v State of New York Dept. of Motor Vehicles*, 108 AD2d 848, 849; *Matter of Graf v Foschio*, 102 AD2d 891, 892.)

[\*\*\*15] Accordingly, the court finds the defendant not guilty. The clerk of the court is directed to enter judgment dismissing the summons.

70 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Jose Cancel, Defendant****[NO NUMBER IN ORIGINAL]****Criminal Court of the City of New York, New York County*****137 Misc. 2d 260; 520 N.Y.S.2d 509; 1987 N.Y. Misc. LEXIS 2683*****October 15, 1987****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, charged with driving while intoxicated, moved for a trial order of dismissal pursuant to *N.Y. Crim. Proc. Law § 290.10* at the conclusion of the prosecution's case and at the close of all the evidence.

**OVERVIEW:** Defendant, in his motion for a trial order of dismissal, argued that because his breathalyzer test reading was .10, and the breathalyzer machine had a margin of error of plus or minus .001, there was a reasonable doubt which precluded a jury verdict of guilty. The court reserved decision and defendant was found guilty. In ruling on defendant's motion, the court found that the jury's resolution of the issue against defendant was amply supported by the other evidence in the case regarding the accuracy and reliability of the breathalyzer machine together with the arresting officers' eyewitness testimony of defendant's intoxication. The prosecution presented documentary evidence demonstrating that the breathalyzer machine had been tested and calibrated shortly before it was used on defendant, and there was testimony that defendant swerved from lane to lane without signaling and smelled of alcohol from five feet away.

**OUTCOME:** The court denied defendant's motion for a trial order of dismissal in a prosecution for driving while intoxicated and held that the breathalyzer machine provided an accurate reading of his blood alcohol level.

**CORE TERMS:** breathalyzer, machine, reasonable doubt, margin of error, intoxication, lane, intoxicated, driving, alcohol, feet, evidence of intoxication, documentary evidence, unreliable, arrested, tested, guilt, minus, blood alcohol, signalling, bloodshot, ampoule, necessary to support, eyewitness testimony, prima facie evidence, legislative history, attempt to prove, amply supported, proof beyond, jury verdict, machine used

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General***

**Overview**

[HN1] The sole burden placed upon the people is to place into evidence legally probative breathalyzer or other chemical test results, in compliance with *N.Y. Veh. & Traf. Law § 1194*, evidencing a breathalyzer count of .10 or more.

**Criminal Law & Procedure > Appeals > Standards of Review > General Overview**

[HN2] A jury's verdict will not be set aside on the grounds of reasonable doubt so long as the evidence in the case is sufficient to support the jury's conclusion.

**HEADNOTES:** [\*\*\*1]**Motor Vehicles -- Chemical Tests**

Defendant's breathalyzer test reading of .10 of 1% by weight of alcohol in his blood, given the breathalyzer machine's margin of error of plus or minus .001, did not create a reasonable doubt which precluded a jury verdict of guilty of driving while intoxicated pursuant to *Vehicle and Traffic Law § 1192 (2)*. If the breathalyzer test was the sole evidence utilized to attempt to prove defendant's guilt, and the machine was demonstrated to be unreliable, then reasonable doubt would exist. When a violation of section 1192 (2) is at issue, defendant's behavior and physical condition is irrelevant, the sole evidence necessary to support a conviction under that statute being a breathalyzer reading of .10 or more. Here, the jury's conclusion that the breathalyzer reading of .10 was accurate, given the margin of error, is amply supported by both documentary evidence that the machine had been tested and calibrated shortly before its use on defendant and that it was working properly, and the arresting officers' eyewitness testimony of defendant's intoxication.

**COUNSEL:**

*Caesar Cirigliano* and *Andria Leeds*, for defendant.

*Robert M. Morgenthau*, [\*\*\*2] *District Attorney (Maggie Pasquale* of counsel), for plaintiff.

**JUDGES:**

Michael A. Gary, J.

**OPINION BY:**

GARY

**OPINION:**[\*261] **OPINION OF THE COURT**

[\*\*509] Defendant Jose Cancel was arrested and charged with driving while intoxicated pursuant to *Vehicle and Traffic Law § 1192 (2)* and (3). In a jury trial held before me, at the conclusion of the People's case and at the close of all the evidence, defendant moved for a trial order of dismissal pursuant to *CPL 290.10*. [\*\*510] Defendant contended the evidence was legally insufficient to establish the charge of *Vehicle and Traffic Law § 1192 (2)*. Defendant argued that since his breathalyzer test and reading was .10 of 1% by weight of alcohol in his blood, hereinafter .10, and the breathalyzer machine had a margin of error of plus or minus .001, there was a reasonable doubt which precluded a jury verdict of guilty of this charge. This court reserved decision and defendant was convicted of violating *Vehicle and Traffic Law § 1192 (1)*, as a lesser included offense of section 1192 (3), and section 1192 (2). For the reasons stated herein, defendant's motion for a trial order of dismissal is denied.

TRIAL EVIDENCE

Police Officers [\*\*\*3] Palladino and Hernandez, experienced officers assigned to Highway 1, testified they were patrolling 125th Street on a driving-while-intoxicated assignment on December 22, 1986. They observed defendant, operating a tan Dodge station wagon east on 125th Street at approximately 30 miles per hour, change from the right to left lanes, then back to the right lane, without signalling. Approximately 500 feet later, defendant repeated this swerving motion without signalling. The police patrol followed defendant for a five-minute period about 1 to 1 1/2 car lengths behind defendant in the right lane, observing defendant drive several hundred feet. No cars obstructed their view of defendant's car. Traffic was very light and defendant did not cut off any other cars when changing lanes.

The officers directed defendant to pull over. Police Officer Palladino testified defendant readily complied, parking his car at a bus stop, in a smooth, steady manner. Police Officer Palladino approached defendant's car on the driver's side, at which time defendant exited the vehicle. Police Officer Palladino testified he smelled alcohol on defendant from a distance of five feet, defendant's eyes were watery, [\*\*\*4] red and bloodshot. He requested defendant to walk to the adjacent sidewalk and [\*262] observed defendant using the car to support himself. Defendant walked in an unsteady manner. Under cross-examination, Police Officer Palladino testified he did not request defendant perform any coordination tests because he was sure defendant was driving while under the influence of alcohol. Police Officer Hernandez testified he observed defendant leaning on the car to support himself. He described defendant's gait as uncoordinated and staggering, that defendant had a strong odor of alcohol, watery and bloodshot eyes and his clothing was slightly disarrayed.

Police Officer Palladino further testified defendant indicated he had had a few beers and was going to Connecticut. Defendant understood Police Officer Palladino's directions, had a Spanish accent and exhibited slurred speech. Upon request, defendant produced a class 4 chauffeur's license and registration for the car. Defendant is not the owner of the car. Police Officer Hernandez testified he moved defendant's vehicle into a legal parking space and that no search of the car was made.

Defendant was arrested at approximately 7:30 [\*\*\*5] p.m. He was driven to the 25th Precinct. Police Officer Palladino read defendant the *Miranda* rights en route. At the 25th Precinct, Police Officer Palladino completed pedigree forms with the assistance of defendant, defendant's personal property was vouchered, and he was transported to the 28th Precinct for the breathalyzer test. At the 28th Precinct, defendant informed Police Officer Palladino he had consumed two 16-ounce beers around 5 o'clock and stopped drinking at 6 o'clock.

Police Officer Palladino testified he observed defendant from the time of arrest until their arrival at central booking and did not see him belch, hiccup, regurgitate or eat during that period of time. Police Officer Hernandez similarly testified he observed defendant from his arrest until their arrival at the 28th Precinct and did not see him belch, hiccup, smoke or place any foreign substance in his mouth.

The People submitted documentary evidence that the breathalyzer machine and ampoule were in proper working condition and thus able to accurately reflect the [\*\*511] blood alcohol level of defendant. The certificate of breathalyzer analysis documents the fact that the test ampoules were checked [\*\*\*6] and found to contain the proper chemical solution. The police department maintenance unit performed calibration tests at intervals of 41 days and 3 days prior to the date defendant's breath was tested and determined the machine was functioning [\*263] properly. Simulator tests were run 126 days prior to defendant's breath test and 4 days afterward and the machine was found to be working properly.

Police Officer Delgado, a Highway 1 officer, radar section, administered the breathalyzer test to defendant at approximately 8:30 p.m. This witness is a certified breathalyzer operator with 50-60 hours of training who was recertified in February 1985. He has administered approximately 100 breathalyzer tests. Police Officer Delgado testified he informed defendant of his right to refuse to take the breathalyzer test and the consequences thereof under *Vehicle and Traffic Law § 1194*. Defendant agreed to submit to the test but refused to take a coordination test. Defendant was videotaped before and after the breathalyzer test. This videotape was shown to the jury.

137 Misc. 2d 260, \*263; 520 N.Y.S.2d 509, \*\*511;  
1987 N.Y. Misc. LEXIS 2683, \*\*\*6

Prior to administering the test, Police Officer Delgado ascertained all radios on that floor of the building were turned [\*\*\*7] off to prevent any interference with the functioning of the breathalyzer. This witness, using a picture of the breathalyzer as a visual aid, explained how to administer the breathalyzer test and the New York City Police Department procedures that must be followed. He testified he complied with all departmental requirements; that the breathalyzer machine is always left on (to avoid delays caused by the need to warm up the machine) so he did not have to turn it on. Police Officer Delgado is not responsible for or involved in the maintenance of the machine and has no expertise in that area.

In answer to the court's question, Police Officer Delgado testified the margin of error for this unit is .001. Moreover, he testified that hiccupping, belching, smoking or placing any foreign substance in defendant's mouth could affect the test results. The breathalyzer result might register a blood alcohol content, hereinafter BAC, of .099 or .101. Defendant's breathalyzer test result was .10. In this witness's opinion, defendant was intoxicated.

The defendant presented no evidence.

#### LEGAL ANALYSIS

The results of scientific tests for alcohol content have been admissible since 1941 to prove [\*\*\*8] driving while intoxicated. (*See, People v Cruz*, 48 NY2d 419 [1979].) However, the legislative history of *Vehicle and Traffic Law* § 1192 (2) begins in 1960 and is cogently set forth in *People v Schmidt* (124 Misc 2d 102 [\*264] [Crim Ct, NY County 1984]) and *People v Fox* (87 Misc 2d 210, 214-220 [North Castle Justice Ct, Westchester County 1976]). This court has read the legislative history of the statute and agrees with the court in *Fox* that: "The Legislature has been most concerned with evidence as to the effect that large quantities of alcohol have on a driver. Accordingly, the Legislature has increased the scope of the Judge's power to punish for such offense. It also has provided that the offense is a per se offense, so as to eliminate the uncertainty that prima facie tests invariably create. Originally, the per se offense was established only by a relatively high level of blood-alcohol, but the Legislature has repeatedly lowered the alcohol level requisite for conviction." (*People v Fox, supra, at 220.*) It should be noted that when the New York Legislature set the present level of .10 of blood alcohol content for intoxication, it was reacting [\*\*\*9] to the fact that by 1972 that was the standard recommended by the National Highway Safety Bureau after extensive testing. Moreover, 42 States had already enacted legislation which reduced the blood alcohol level to .10 or less and 2 States had even lowered it to .08. (1972 NY Legis Ann, at 289.)

[\*\*512] Defendant cites two decisions for the proposition that the breathalyzer reading of .10, given the machine's margin of error, does not constitute proof beyond a reasonable doubt. In *People v Hellwig* (22 Misc 2d 286 [Schenectady County Ct 1960]), the County Court, acting as an appeals court, reversed the conviction of a defendant found to have had a blood alcohol content of .16 at a time when the statute provided that a reading of .15 was prima facie evidence of intoxication. *Hellwig* is easily distinguished on the law and on the facts as well. First, as to the applicable law, defendant concedes that, in 1960, *Vehicle and Traffic Law* § 1192 (2) provided that the test results were only prima facie evidence not per se evidence of intoxication, as has been the case since 1971. Second, the court in *Hellwig* specifically found that the prima facie value of the blood [\*\*\*10] test was contradicted by other evidence which showed defendant had operated his car safely through congested traffic before the accident and that his unsteady walk may have been the result of an arthritic condition. Given the conflicting factual inferences presented from the test results and the other evidence of the defendant's intoxication, the court accorded the benefit of the doubt to the defendant.

In the recently reported decision of *People v Schaefer* (135 Misc 2d 554 [Yonkers City Ct, Westchester County 1987]), the [\*265] defendant was found not guilty after a bench trial of violating *Vehicle and Traffic Law* § 1192 (2). The prosecution arose out of an accident in which the defendant's car struck and killed a young child and the Grand Jury returned a no true bill on a reckless assault charge (Penal Law § 120.05 [2]). The breathalyzer reading was .10 on the Smith and Wesson Model 900A, the same machine used in the instant case. The court credited a defense expert's testimony that the breathalyzer machine has an error factor of .001, plus or minus. Defendant points to certain language

in *Schaefer* that he urges should be dispositive of the facts before this [\*\*\*11] court: "This [a breathalyzer reading of precisely .10] is the lowest possible reading one must have in his system in order to be convicted of the crime charged. If the machine is susceptible to the slightest error, the benefit of the error must inure to the defendant. If there is the slightest possibility of human error in the operation of the instrument, that error must inure to the benefit of the defendant." ( *People v Schaefer, supra, at 555.* )

This court does not reach this same conclusion for the reasons cited below. Moreover, a thorough examination of *Schaefer (supra)* reveals a radically different set of facts than the case at bar.

To begin with, the *Schaefer* court emphasized that "the breathalyzer test was the sole evidence utilized to attempt to prove the defendant's guilt" ( *People v Schaefer, supra, at 555* ). Except for a slight smell of alcoholic beverage, the investigating detective at the accident scene testified that the defendant exhibited none of the usual indicia of intoxication, i.e., slurred speech, glassy eyes or unsteadiness on his feet. In fact, the witness stated the defendant appeared "fine in all respects" ( *People v Schaefer, supra, [\*\*\*12] at 556* ).

In sharp contrast to the *Schaefer* court's finding that there was no evidence of intoxication besides the unreliable breath test result, the evidence of intoxication before this jury included the following: testimony of the arresting officers that the defendant swerved from lane to lane without signalling; that he smelled of alcohol from five feet away; that he staggered and had bloodshot eyes; and, in the opinion of Police Officer Delgado, that he appeared intoxicated nearly two hours after being arrested. Indeed, the jury found by its verdict that there was proof beyond a reasonable doubt that the defendant was driving while impaired.

However, a subjective analysis of defendant's behavior and [\*266] condition is irrelevant when a violation of *Vehicle and Traffic Law § 1192 (2)* is at issue. Although critical elements of *Vehicle and Traffic Law § 1192 (1)* and (3) crimes, the legislative intent behind enacting *Vehicle and Traffic Law § 1192 (2)* was to create a crime provable solely by objective scientific criteria. ( *People v [\*\*513] Schmidt, supra, at 108.* ) [HN1] The sole burden placed upon the People is to place into evidence legally probative breathalyzer [\*\*\*13] or other chemical test results, in compliance with *Vehicle and Traffic Law § 1194*, evidencing a breathalyzer count of .10 or more.

Equally important, the *Schaefer* court found that the particular breathalyzer machine used to test the defendant had been sent to Albany for a major overhaul twice; the first time a little over a year before defendant's test and, significantly, just 18 days afterwards. Both times the machine was found to be in terrible condition; acid stained and filthy ( *People v Schaefer, supra, at 557-558* ). The defense expert testified that because the machine had to be rebuilt twice in a period of slightly more than one year, this indicated it had been abused and the reading could not possibly be true. In his uncontradicted opinion, the internal damage reflected in the machine's records was the result of the mishandling of the test ampoule, permitting some of its fluid to escape and drip into the machine. ( *People v Schaefer, supra, at 558.* )

Not surprisingly on this set of facts, the *Schaefer* court found that it was dealing not so much with the issue of the margin of error's significance on a true reading of .10, but rather with a totally unreliable [\*\*\*14] machine: "The reported condition of the machine is such that no reasonable person could give it any credence whatsoever. In the condition that the machine was reported to be in, it is doubtful that its reliability could be useful in a DWI prosecution with readings of .15 or .20, much less for a reading of .10. This is not the quality of evidence necessary to support a criminal conviction." ( *People v Schaefer, supra, at 559.* )

The court goes on to list six reasons for its finding of reasonable doubt as to the defendant's guilt, including the breathalyzer machine's margin of error. It also opines that any of the six reasons standing alone is sufficient to establish reasonable doubt. This court regards the actual holding of *Schaefer (supra)*, as limited by its facts, to be contained in the above-quoted finding that the evidence was insufficient due to the breathalyzer's proven unreliability. All else is mere dicta.

137 Misc. 2d 260, \*266; 520 N.Y.S.2d 509, \*\*513;  
1987 N.Y. Misc. LEXIS 2683, \*\*\*14

[\*267] A BAC of .10 represents a significant loss of one's ability to safely operate a motor vehicle. In this case, the People's documentary evidence demonstrated, to the obvious satisfaction of the jury, that the breathalyzer machine here had been tested [\*\*\*15] and calibrated shortly before its use on defendant and that it was working properly. [HN2] A jury's verdict will not be set aside on the grounds of reasonable doubt so long as the evidence in the case is sufficient to support the jury's conclusion. Here, the jury was clearly confronted with the issue of whether the breathalyzer reading, given the possibility that the margin of error came into play, was really .10, .099, or even .101. This court finds the jury's resolution of this issue against the defendant is amply supported by the other evidence in the case regarding the accuracy and reliability of the breathalyzer machine together with the above-mentioned eyewitness testimony of defendant's intoxication.

71 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Jose Cancel, Defendant****[NO NUMBER IN ORIGINAL]****Criminal Court of the City of New York, New York County*****137 Misc. 2d 260; 520 N.Y.S.2d 509; 1987 N.Y. Misc. LEXIS 2683*****October 15, 1987****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, charged with driving while intoxicated, moved for a trial order of dismissal pursuant to *N.Y. Crim. Proc. Law § 290.10* at the conclusion of the prosecution's case and at the close of all the evidence.

**OVERVIEW:** Defendant, in his motion for a trial order of dismissal, argued that because his breathalyzer test reading was .10, and the breathalyzer machine had a margin of error of plus or minus .001, there was a reasonable doubt which precluded a jury verdict of guilty. The court reserved decision and defendant was found guilty. In ruling on defendant's motion, the court found that the jury's resolution of the issue against defendant was amply supported by the other evidence in the case regarding the accuracy and reliability of the breathalyzer machine together with the arresting officers' eyewitness testimony of defendant's intoxication. The prosecution presented documentary evidence demonstrating that the breathalyzer machine had been tested and calibrated shortly before it was used on defendant, and there was testimony that defendant swerved from lane to lane without signaling and smelled of alcohol from five feet away.

**OUTCOME:** The court denied defendant's motion for a trial order of dismissal in a prosecution for driving while intoxicated and held that the breathalyzer machine provided an accurate reading of his blood alcohol level.

**CORE TERMS:** breathalyzer, machine, reasonable doubt, margin of error, intoxication, lane, intoxicated, driving, alcohol, feet, evidence of intoxication, documentary evidence, unreliable, arrested, tested, guilt, minus, blood alcohol, signalling, bloodshot, ampoule, necessary to support, eyewitness testimony, prima facie evidence, legislative history, attempt to prove, amply supported, proof beyond, jury verdict, machine used

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General***

**Overview**

[HN1] The sole burden placed upon the people is to place into evidence legally probative breathalyzer or other chemical test results, in compliance with *N.Y. Veh. & Traf. Law § 1194*, evidencing a breathalyzer count of .10 or more.

**Criminal Law & Procedure > Appeals > Standards of Review > General Overview**

[HN2] A jury's verdict will not be set aside on the grounds of reasonable doubt so long as the evidence in the case is sufficient to support the jury's conclusion.

**HEADNOTES:** [\*\*\*1]**Motor Vehicles -- Chemical Tests**

Defendant's breathalyzer test reading of .10 of 1% by weight of alcohol in his blood, given the breathalyzer machine's margin of error of plus or minus .001, did not create a reasonable doubt which precluded a jury verdict of guilty of driving while intoxicated pursuant to *Vehicle and Traffic Law § 1192 (2)*. If the breathalyzer test was the sole evidence utilized to attempt to prove defendant's guilt, and the machine was demonstrated to be unreliable, then reasonable doubt would exist. When a violation of section 1192 (2) is at issue, defendant's behavior and physical condition is irrelevant, the sole evidence necessary to support a conviction under that statute being a breathalyzer reading of .10 or more. Here, the jury's conclusion that the breathalyzer reading of .10 was accurate, given the margin of error, is amply supported by both documentary evidence that the machine had been tested and calibrated shortly before its use on defendant and that it was working properly, and the arresting officers' eyewitness testimony of defendant's intoxication.

**COUNSEL:**

*Caesar Cirigliano* and *Andria Leeds*, for defendant.

*Robert M. Morgenthau*, [\*\*\*2] *District Attorney (Maggie Pasquale* of counsel), for plaintiff.

**JUDGES:**

Michael A. Gary, J.

**OPINION BY:**

GARY

**OPINION:**[\*261] **OPINION OF THE COURT**

[\*\*509] Defendant Jose Cancel was arrested and charged with driving while intoxicated pursuant to *Vehicle and Traffic Law § 1192 (2)* and (3). In a jury trial held before me, at the conclusion of the People's case and at the close of all the evidence, defendant moved for a trial order of dismissal pursuant to *CPL 290.10*. [\*\*510] Defendant contended the evidence was legally insufficient to establish the charge of *Vehicle and Traffic Law § 1192 (2)*. Defendant argued that since his breathalyzer test and reading was .10 of 1% by weight of alcohol in his blood, hereinafter .10, and the breathalyzer machine had a margin of error of plus or minus .001, there was a reasonable doubt which precluded a jury verdict of guilty of this charge. This court reserved decision and defendant was convicted of violating *Vehicle and Traffic Law § 1192 (1)*, as a lesser included offense of section 1192 (3), and section 1192 (2). For the reasons stated herein, defendant's motion for a trial order of dismissal is denied.

TRIAL EVIDENCE

Police Officers [\*\*\*3] Palladino and Hernandez, experienced officers assigned to Highway 1, testified they were patrolling 125th Street on a driving-while-intoxicated assignment on December 22, 1986. They observed defendant, operating a tan Dodge station wagon east on 125th Street at approximately 30 miles per hour, change from the right to left lanes, then back to the right lane, without signalling. Approximately 500 feet later, defendant repeated this swerving motion without signalling. The police patrol followed defendant for a five-minute period about 1 to 1 1/2 car lengths behind defendant in the right lane, observing defendant drive several hundred feet. No cars obstructed their view of defendant's car. Traffic was very light and defendant did not cut off any other cars when changing lanes.

The officers directed defendant to pull over. Police Officer Palladino testified defendant readily complied, parking his car at a bus stop, in a smooth, steady manner. Police Officer Palladino approached defendant's car on the driver's side, at which time defendant exited the vehicle. Police Officer Palladino testified he smelled alcohol on defendant from a distance of five feet, defendant's eyes were watery, [\*\*\*4] red and bloodshot. He requested defendant to walk to the adjacent sidewalk and [\*262] observed defendant using the car to support himself. Defendant walked in an unsteady manner. Under cross-examination, Police Officer Palladino testified he did not request defendant perform any coordination tests because he was sure defendant was driving while under the influence of alcohol. Police Officer Hernandez testified he observed defendant leaning on the car to support himself. He described defendant's gait as uncoordinated and staggering, that defendant had a strong odor of alcohol, watery and bloodshot eyes and his clothing was slightly disarrayed.

Police Officer Palladino further testified defendant indicated he had had a few beers and was going to Connecticut. Defendant understood Police Officer Palladino's directions, had a Spanish accent and exhibited slurred speech. Upon request, defendant produced a class 4 chauffeur's license and registration for the car. Defendant is not the owner of the car. Police Officer Hernandez testified he moved defendant's vehicle into a legal parking space and that no search of the car was made.

Defendant was arrested at approximately 7:30 [\*\*\*5] p.m. He was driven to the 25th Precinct. Police Officer Palladino read defendant the *Miranda* rights en route. At the 25th Precinct, Police Officer Palladino completed pedigree forms with the assistance of defendant, defendant's personal property was vouchered, and he was transported to the 28th Precinct for the breathalyzer test. At the 28th Precinct, defendant informed Police Officer Palladino he had consumed two 16-ounce beers around 5 o'clock and stopped drinking at 6 o'clock.

Police Officer Palladino testified he observed defendant from the time of arrest until their arrival at central booking and did not see him belch, hiccup, regurgitate or eat during that period of time. Police Officer Hernandez similarly testified he observed defendant from his arrest until their arrival at the 28th Precinct and did not see him belch, hiccup, smoke or place any foreign substance in his mouth.

The People submitted documentary evidence that the breathalyzer machine and ampoule were in proper working condition and thus able to accurately reflect the [\*\*511] blood alcohol level of defendant. The certificate of breathalyzer analysis documents the fact that the test ampoules were checked [\*\*\*6] and found to contain the proper chemical solution. The police department maintenance unit performed calibration tests at intervals of 41 days and 3 days prior to the date defendant's breath was tested and determined the machine was functioning [\*263] properly. Simulator tests were run 126 days prior to defendant's breath test and 4 days afterward and the machine was found to be working properly.

Police Officer Delgado, a Highway 1 officer, radar section, administered the breathalyzer test to defendant at approximately 8:30 p.m. This witness is a certified breathalyzer operator with 50-60 hours of training who was recertified in February 1985. He has administered approximately 100 breathalyzer tests. Police Officer Delgado testified he informed defendant of his right to refuse to take the breathalyzer test and the consequences thereof under *Vehicle and Traffic Law § 1194*. Defendant agreed to submit to the test but refused to take a coordination test. Defendant was videotaped before and after the breathalyzer test. This videotape was shown to the jury.

Prior to administering the test, Police Officer Delgado ascertained all radios on that floor of the building were turned [\*\*\*7] off to prevent any interference with the functioning of the breathalyzer. This witness, using a picture of the breathalyzer as a visual aid, explained how to administer the breathalyzer test and the New York City Police Department procedures that must be followed. He testified he complied with all departmental requirements; that the breathalyzer machine is always left on (to avoid delays caused by the need to warm up the machine) so he did not have to turn it on. Police Officer Delgado is not responsible for or involved in the maintenance of the machine and has no expertise in that area.

In answer to the court's question, Police Officer Delgado testified the margin of error for this unit is .001. Moreover, he testified that hiccupping, belching, smoking or placing any foreign substance in defendant's mouth could affect the test results. The breathalyzer result might register a blood alcohol content, hereinafter BAC, of .099 or .101. Defendant's breathalyzer test result was .10. In this witness's opinion, defendant was intoxicated.

The defendant presented no evidence.

#### LEGAL ANALYSIS

The results of scientific tests for alcohol content have been admissible since 1941 to prove [\*\*\*8] driving while intoxicated. (*See, People v Cruz*, 48 NY2d 419 [1979].) However, the legislative history of *Vehicle and Traffic Law* § 1192 (2) begins in 1960 and is cogently set forth in *People v Schmidt* (124 Misc 2d 102 [\*264] [Crim Ct, NY County 1984]) and *People v Fox* (87 Misc 2d 210, 214-220 [North Castle Justice Ct, Westchester County 1976]). This court has read the legislative history of the statute and agrees with the court in *Fox* that: "The Legislature has been most concerned with evidence as to the effect that large quantities of alcohol have on a driver. Accordingly, the Legislature has increased the scope of the Judge's power to punish for such offense. It also has provided that the offense is a per se offense, so as to eliminate the uncertainty that prima facie tests invariably create. Originally, the per se offense was established only by a relatively high level of blood-alcohol, but the Legislature has repeatedly lowered the alcohol level requisite for conviction." (*People v Fox, supra*, at 220.) It should be noted that when the New York Legislature set the present level of .10 of blood alcohol content for intoxication, it was reacting [\*\*\*9] to the fact that by 1972 that was the standard recommended by the National Highway Safety Bureau after extensive testing. Moreover, 42 States had already enacted legislation which reduced the blood alcohol level to .10 or less and 2 States had even lowered it to .08. (1972 NY Legis Ann, at 289.)

[\*\*512] Defendant cites two decisions for the proposition that the breathalyzer reading of .10, given the machine's margin of error, does not constitute proof beyond a reasonable doubt. In *People v Hellwig* (22 Misc 2d 286 [Schenectady County Ct 1960]), the County Court, acting as an appeals court, reversed the conviction of a defendant found to have had a blood alcohol content of .16 at a time when the statute provided that a reading of .15 was prima facie evidence of intoxication. *Hellwig* is easily distinguished on the law and on the facts as well. First, as to the applicable law, defendant concedes that, in 1960, *Vehicle and Traffic Law* § 1192 (2) provided that the test results were only prima facie evidence not per se evidence of intoxication, as has been the case since 1971. Second, the court in *Hellwig* specifically found that the prima facie value of the blood [\*\*\*10] test was contradicted by other evidence which showed defendant had operated his car safely through congested traffic before the accident and that his unsteady walk may have been the result of an arthritic condition. Given the conflicting factual inferences presented from the test results and the other evidence of the defendant's intoxication, the court accorded the benefit of the doubt to the defendant.

In the recently reported decision of *People v Schaefer* (135 Misc 2d 554 [Yonkers City Ct, Westchester County 1987]), the [\*265] defendant was found not guilty after a bench trial of violating *Vehicle and Traffic Law* § 1192 (2). The prosecution arose out of an accident in which the defendant's car struck and killed a young child and the Grand Jury returned a no true bill on a reckless assault charge (Penal Law § 120.05 [2]). The breathalyzer reading was .10 on the Smith and Wesson Model 900A, the same machine used in the instant case. The court credited a defense expert's testimony that the breathalyzer machine has an error factor of .001, plus or minus. Defendant points to certain language

in *Schaefer* that he urges should be dispositive of the facts before this [\*\*\*11] court: "This [a breathalyzer reading of precisely .10] is the lowest possible reading one must have in his system in order to be convicted of the crime charged. If the machine is susceptible to the slightest error, the benefit of the error must inure to the defendant. If there is the slightest possibility of human error in the operation of the instrument, that error must inure to the benefit of the defendant." ( *People v Schaefer, supra, at 555.* )

This court does not reach this same conclusion for the reasons cited below. Moreover, a thorough examination of *Schaefer (supra)* reveals a radically different set of facts than the case at bar.

To begin with, the *Schaefer* court emphasized that "the breathalyzer test was the sole evidence utilized to attempt to prove the defendant's guilt" ( *People v Schaefer, supra, at 555* ). Except for a slight smell of alcoholic beverage, the investigating detective at the accident scene testified that the defendant exhibited none of the usual indicia of intoxication, i.e., slurred speech, glassy eyes or unsteadiness on his feet. In fact, the witness stated the defendant appeared "fine in all respects" ( *People v Schaefer, supra, [\*\*\*12] at 556* ).

In sharp contrast to the *Schaefer* court's finding that there was no evidence of intoxication besides the unreliable breath test result, the evidence of intoxication before this jury included the following: testimony of the arresting officers that the defendant swerved from lane to lane without signalling; that he smelled of alcohol from five feet away; that he staggered and had bloodshot eyes; and, in the opinion of Police Officer Delgado, that he appeared intoxicated nearly two hours after being arrested. Indeed, the jury found by its verdict that there was proof beyond a reasonable doubt that the defendant was driving while impaired.

However, a subjective analysis of defendant's behavior and [\*266] condition is irrelevant when a violation of *Vehicle and Traffic Law § 1192 (2)* is at issue. Although critical elements of *Vehicle and Traffic Law § 1192 (1)* and (3) crimes, the legislative intent behind enacting *Vehicle and Traffic Law § 1192 (2)* was to create a crime provable solely by objective scientific criteria. ( *People v [\*\*513] Schmidt, supra, at 108.* ) [HN1] The sole burden placed upon the People is to place into evidence legally probative breathalyzer [\*\*\*13] or other chemical test results, in compliance with *Vehicle and Traffic Law § 1194*, evidencing a breathalyzer count of .10 or more.

Equally important, the *Schaefer* court found that the particular breathalyzer machine used to test the defendant had been sent to Albany for a major overhaul twice; the first time a little over a year before defendant's test and, significantly, just 18 days afterwards. Both times the machine was found to be in terrible condition; acid stained and filthy ( *People v Schaefer, supra, at 557-558* ). The defense expert testified that because the machine had to be rebuilt twice in a period of slightly more than one year, this indicated it had been abused and the reading could not possibly be true. In his uncontradicted opinion, the internal damage reflected in the machine's records was the result of the mishandling of the test ampoule, permitting some of its fluid to escape and drip into the machine. ( *People v Schaefer, supra, at 558.* )

Not surprisingly on this set of facts, the *Schaefer* court found that it was dealing not so much with the issue of the margin of error's significance on a true reading of .10, but rather with a totally unreliable [\*\*\*14] machine: "The reported condition of the machine is such that no reasonable person could give it any credence whatsoever. In the condition that the machine was reported to be in, it is doubtful that its reliability could be useful in a DWI prosecution with readings of .15 or .20, much less for a reading of .10. This is not the quality of evidence necessary to support a criminal conviction." ( *People v Schaefer, supra, at 559.* )

The court goes on to list six reasons for its finding of reasonable doubt as to the defendant's guilt, including the breathalyzer machine's margin of error. It also opines that any of the six reasons standing alone is sufficient to establish reasonable doubt. This court regards the actual holding of *Schaefer (supra)*, as limited by its facts, to be contained in the above-quoted finding that the evidence was insufficient due to the breathalyzer's proven unreliability. All else is mere dicta.

137 Misc. 2d 260, \*266; 520 N.Y.S.2d 509, \*\*513;  
1987 N.Y. Misc. LEXIS 2683, \*\*\*14

[\*267] A BAC of .10 represents a significant loss of one's ability to safely operate a motor vehicle. In this case, the People's documentary evidence demonstrated, to the obvious satisfaction of the jury, that the breathalyzer machine here had been tested [\*\*\*15] and calibrated shortly before its use on defendant and that it was working properly. [HN2] A jury's verdict will not be set aside on the grounds of reasonable doubt so long as the evidence in the case is sufficient to support the jury's conclusion. Here, the jury was clearly confronted with the issue of whether the breathalyzer reading, given the possibility that the margin of error came into play, was really .10, .099, or even .101. This court finds the jury's resolution of this issue against the defendant is amply supported by the other evidence in the case regarding the accuracy and reliability of the breathalyzer machine together with the above-mentioned eyewitness testimony of defendant's intoxication.

72 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Robert S. Gutterson, Defendant**

[NO NUMBER IN ORIGINAL]

**Justice Court of New York, Village of Lattingtown, Nassau County***93 Misc. 2d 1105; 403 N.Y.S.2d 998; 1978 N.Y. Misc. LEXIS 2182***April 6, 1978****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant filed a written application, on notice to the People, requesting information, documents, etc., that he deemed necessary for his defense to the charge of operating his motor vehicle within a village at a speed of 52 miles per hour in a 40 mile per hour zone in violation of Village of Lattingtown, N.Y., Ordinances, art. 2, § 230.02.

**OVERVIEW:** Defendant sought information to aid him in his defense against a speeding charge. He requested a bill of particulars specifically stating the means by which the officer determined that defendant exceeded the speed limit, service and maintenance records on any radar unit used, and personnel records of the arresting officer. The court found that defendant was entitled to a supporting deposition under *N.Y. Crim. Proc. Law § 100.25(2)*, by the officer containing factual allegations of an evidentiary character that supplemented the simplified traffic information and supported the belief that defendant committed the offense. The court found that defendant was entitled to the manufacturer and model name and number of any radar device used, but was not entitled to maintenance and calibration records. The court held that the officer's personnel records bearing on the officers' ability to estimate speeds of moving vehicles was not protected.

**OUTCOME:** The court ordered the police officer to file a supporting deposition and the prosecuting attorney to serve a bill of particulars upon defendant specifying the means by which the officer determined the defendant exceeded the speed limit. The court denied defendant's request for maintenance and calibration information for any radar used. The court ordered the officer's personnel records to be produced to the court for inspection.

**CORE TERMS:** speed, personnel, disclosure, police officer, estimate, traffic, speeding, detection, motor vehicles, deposition, simplified, prepare, prosecuting attorney, speed limit, cross-examination, manufacturer, calibration, exceeded, radar, patrolman, Freedom of Information Law, continued employment, issue of credibility, public disclosure, absolute right, personnel file, final arbiter, lawful rate, cross-examine, materiality

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests***

[HN1] A defendant must be fully apprised of the facts and law which he is being accused of having violated. In a traffic matter, the defendant is entitled to receive, in addition to the simplified traffic information with which he was served, a supporting deposition, *N.Y. Crim. Proc. Law § 100.25(2)*, by the police officer containing factual allegations of an evidentiary character which supplements the simplified traffic information and supports the belief that defendant committed the offense charged. The defendant has an absolute right to a supporting deposition before the commencement of trial.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN2] The opinion evidence of police officers, uncorroborated by mechanical devices, will be sufficient to sustain a speeding conviction. A police officer's estimate of speeds based upon his experience may be one means therefore of demonstrating that a defendant has been guilty of speeding. In order for the trier of the facts to be fully cognizant of all factors relevant to the patrolman's experience and ability to estimate the speeds of moving vehicles, a defendant may properly present evidence or cross-examine the officer in relation to his training, etc. In addition, in order to obtain a fair trial, the defendant should be prepared to cross-examine the police officer on his ability to estimate the speed of moving vehicles and the requested information is germane to that ability.

***Governments > Local Governments > Police Power******Governments > State & Territorial Governments > Employees & Officials***

[HN3] The Civil Rights Law provides a means to obtain all personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof as may be mandated by lawful court order. *N.Y. Civ. Rights Law § 50-a*. This legislation establishes a uniform rule in relation to the production of police personnel records. The enactment further provides certain procedural safeguards to protect against the unbridled disclosure of said personnel records.

**HEADNOTES: [\*\*\*1]****Motor Vehicles -- Speeding**

1. Defendant has an absolute right to receive a supporting deposition by the complainant police officer ( *CPL 100.25*, subd 2) prior to trial containing factual allegations of an evidentiary character which supplements the simplified traffic information charging him with speeding and supports the belief that defendant committed the offense. In addition, since a statement that defendant was traveling a certain speed above the designated lawful rate is insufficient to inform the defendant so that he may be able to properly prepare and conduct his defense, the prosecuting attorney is directed to serve a bill of particulars upon the defendant specifying the means by which the police officer determined that defendant exceeded the speed limit and, if a speed detection device was employed to clock defendant's speed, the name of the manufacturer, model and number of said device. There is no need to disclose to defendant the maintenance and calibration records of such speed detection device.

**Motor Vehicles -- Speeding**

2. A defendant charged with a speeding traffic violation is entitled to disclosure of certain personnel records of the arresting [\*\*\*2] police officer relating to the officer's ability to use radar equipment and to visually estimate the speed of moving vehicles as an aid in cross-examination on the issue of credibility. The information sought by defendant in the officer's personnel records is properly discoverable under *section 50-a of the Civil Rights Law*, which provides a means to obtain all "personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department", and is not exempted from public disclosure under any provisions of the Freedom of Information Law (Public Officers Law, art 6). To protect against the unbridled disclosure of police personnel records, each determination of applications for disclosure must be made on an *ad hoc* basis with the court

being the final arbiter as to whether the defendant has demonstrated the relevancy and materiality of the information in the personnel records to warrant disclosure.

**COUNSEL:**

*Matthew P. Brady* for plaintiff.

*Robert S. Gutterson*, defendant *pro se*.

**JUDGES:**

William R. Humburg, J.

**OPINION BY:**

HUMBURG

**OPINION:**

[\*1106] **OPINION OF THE COURT**

[\*\*999] On February 25, 1977, the defendant, [\*\*\*3] Robert S. Gutterson, was issued a uniform traffic summons by a member of the Nassau County Police Department which charged said defendant with a violation of section 230.02 of article 2 of the Ordinances of the Village of Lattingtown in that he allegedly operated his motor vehicle within the Village of Lattingtown at a speed of 52 miles per hour in a 40 mile per hour zone.

The defendant appeared *pro se* before the Village Court in Lattingtown and requested certain documents from the Nassau County Police Department which he believed would aid him in the preparation of his defense to the alleged violation. This court advised the defendant to make a written application to the court, on notice to the People, requesting the information, documents, etc., which the defendant deemed necessary for his defense. The defendant has complied with the court's directive by serving his requests and the reasons therefor on the prosecuting attorney for the village. The defendant's requests are as follows:

1. A bill of particulars specifically stating the means by which the police officer arrived at the determination that the defendant exceeded the speed limit.

[\*\*1000] 2. If a radar unit [\*\*\*4] was used to measure the speed of defendant's automobile, defendant seeks to obtain service records for said unit and when it was last calibrated before February 25, 1977, as well as records for maintenance and calibration thereafter.

3. Finally, defendant requests personnel records of the arresting officer, i.e., test scores or grades in determining or measuring his ability to use equipment for recording the speed of motor vehicles, test scores or grades measuring his ability to visually estimate the speed of motor vehicles, the deficiencies [\*1107] and margins of error therein and the dates when said patrolman was given refresher or training courses in the use of such equipment and/or his ability to estimate speeds of moving vehicles.

It is fundamental to our system of justice that [HN1] a defendant must be fully apprised of the facts and law which he is being accused of having violated. In this matter, the defendant is entitled to receive, in addition to the simplified traffic information with which he was served on February 25, 1977, a supporting deposition ( *CPL 100.25*, subd 2) by the police officer containing factual allegations of an evidentiary character which supplements the [\*\*\*5] simplified traffic information and supports the belief that defendant committed the offense charged ( *CPL 100.20*, *100.25*, subd 2). The defendant has an absolute right to a supporting deposition before the commencement of trial. ( *People v De Feo*,

93 Misc. 2d 1105, \*1107; 403 N.Y.S.2d 998, \*\*1000;  
1978 N.Y. Misc. LEXIS 2182, \*\*\*5

77 Misc 2d 523, 524.) Accordingly, the complainant police officer is directed to file a supporting deposition with this court and cause a copy thereof to be served upon the defendant.

In addition, in order that the defendant may be able to properly prepare and conduct his defense in this matter (see *CPL 100.45, 200.90*), this court is satisfied that defendant is entitled to more particularization about his alleged violation than is contained in the simplified traffic information. Therefore, the prosecuting attorney is directed to serve a bill of particulars upon the defendant specifying the means by which the police officer determined the defendant exceeded the speed limit. Simply to state that a defendant was traveling a certain speed above the designated lawful rate is insufficient to inform the defendant so that he may prepare his defense. In addition to a police officer's independent estimate of the defendant's speed, there are [\*\*\*6] a number of instruments or devices which may be employed to accomplish the same objective. As Judge Namm noted in *People v Perlman (89 Misc 2d 973, 976)*, radar detection of speed has made great advances and various types of "radar devices have gained wide acceptance in all courts". If a speed detection device was employed to clock defendant's speed, he should be apprised of the manufacturer and model name and number of said device in the bill of particulars. This is at least necessary in keeping with the spirit of affording a defendant an adequate opportunity to prepare for his defense. In order to properly defend himself, is a defendant in a traffic matter required to bear the unreasonable burden of coming to [\*1108] court prepared to try his case, anticipating every available device on the market employed by the police departments to detect speeds of motor vehicles?

Defendant's request for information relative to the maintenance and calibration records of a speed detection device, if one was used to measure defendant's speed, is denied. The previous direction to provide defendant with the name of the manufacturer, model and number of said device is ample disclosure [\*\*\*7] to assist defendant in preparing his defense.

Finally, defendant requests disclosure of certain personnel records of the arresting officer in the custody of the Nassau County Police Department which would bear on the officer's ability to estimate the speeds of moving vehicles. It is well settled in this State that [HN2] the opinion evidence of police officers, "uncorroborated by mechanical devices, will be sufficient to sustain a speeding conviction." (*People v Olsen, 22 NY2d 230, 231*; see, also, *Matter of Sulli v Appeals Bd. of Admin. Adjudication Bur., 55 AD2d 457, 461.*) A police officer's estimate [\*\*1001] of speeds based upon his experience may be one means therefore of demonstrating that a defendant has been guilty of speeding. In order for the trier of the facts to be fully cognizant of all factors relevant to the patrolman's experience and ability to estimate the speeds of moving vehicles, a defendant may properly present evidence or cross-examine the officer in relation to his training, etc. In addition, in order to obtain a fair trial, the defendant should be prepared to cross-examine the police officer on his ability to estimate the speed of moving vehicles and [\*\*\*8] the requested information is germane to that ability.

There has been no demonstration that the records requested, if they exist, constitute investigatory files compiled for law enforcement purposes and which thereby would be exempt from disclosure (*Marshall v New York State Police, 89 Misc 2d 529*). Traditionally, records of law enforcement agencies have been exempted from public disclosure and only recently through the "Freedom of Information Law" (Public Officers Law, art 6) has that restriction been relaxed. However, access to an agency's records under this law is not without limitation (*Public Officers Law, § 87, subd 2*; see *Matter of Westchester Rockland Newspapers v Mosczydlowski, 58 AD2d 234*). The information sought by the defendant in this action does not fall within any of the protected areas under this statute.

Courts have recently permitted disclosure of records of the [\*1109] complaints and investigations of civilian complaints against a police officer (*Walker v City of New York, 90 Misc 2d 565*); a copy of the "rap sheet" or arrest record in respect to the People's witnesses (*People v Howard, 89 Misc 2d 911*); and "a number of courts have granted [\*\*\*9] discovery of a wide range of official documents, including police arrest, investigative and incident reports [cases cited]" (*People v Simone, 92 Misc 2d 306, 312*).

In addition, the Legislature in 1976 amended [HN3] the Civil Rights Law so as to provide a means to obtain "[all]

93 Misc. 2d 1105, \*1109; 403 N.Y.S.2d 998, \*\*1001;  
1978 N.Y. Misc. LEXIS 2182, \*\*\*9

personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof \* \* \* as may be mandated by lawful court order" (*Civil Rights Law*, § 50-a). This legislation established a uniform rule in relation to the production of police personnel records. ( *Guzman v City of New York*, 91 Misc 2d 270, 271.) The enactment further provides certain procedural safeguards to protect against the unbridled disclosure of said personnel records.

An ample opportunity has been afforded the People to be heard on defendant's application. This court is satisfied that information relative to the patrolman's ability to estimate the speeds of moving vehicles which may be contained in the officer's personnel file is material which may be necessary for the defense during the trial of this matter and to aid [\*\*\*10] in cross-examination on the issue of credibility. (See *People v Sumpter*, 75 Misc 2d 55.) This decision is not a license nor shall it serve as an authorization that in every instance a defendant will be permitted to conduct an unfettered or untrammelled search of a police officer's personnel file. The determination of such applications must be made on an *ad hoc* basis with the court being the final arbiter as to whether the defendant has demonstrated the relevancy or materiality of the information in the personnel records to warrant disclosure (cf. *People v Lugo*, 93 Misc 2d 195).

Accordingly, the Nassau County Police Department is directed to produce the personnel records of the officer involved to the Trial Judge sealed, for examination and determination by said Judge as to whether any information contained in such records should be made available to defendant to aid in cross-examination or for other use at the time of trial. (See *People v Sumpter*, *supra*, p 61; *People v Simone*, *supra*, p 315.)

73 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Robert S. Gutterson, Defendant**

[NO NUMBER IN ORIGINAL]

**Justice Court of New York, Village of Lattingtown, Nassau County***93 Misc. 2d 1105; 403 N.Y.S.2d 998; 1978 N.Y. Misc. LEXIS 2182***April 6, 1978****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant filed a written application, on notice to the People, requesting information, documents, etc., that he deemed necessary for his defense to the charge of operating his motor vehicle within a village at a speed of 52 miles per hour in a 40 mile per hour zone in violation of Village of Lattingtown, N.Y., Ordinances, art. 2, § 230.02.

**OVERVIEW:** Defendant sought information to aid him in his defense against a speeding charge. He requested a bill of particulars specifically stating the means by which the officer determined that defendant exceeded the speed limit, service and maintenance records on any radar unit used, and personnel records of the arresting officer. The court found that defendant was entitled to a supporting deposition under *N.Y. Crim. Proc. Law § 100.25(2)*, by the officer containing factual allegations of an evidentiary character that supplemented the simplified traffic information and supported the belief that defendant committed the offense. The court found that defendant was entitled to the manufacturer and model name and number of any radar device used, but was not entitled to maintenance and calibration records. The court held that the officer's personnel records bearing on the officers' ability to estimate speeds of moving vehicles was not protected.

**OUTCOME:** The court ordered the police officer to file a supporting deposition and the prosecuting attorney to serve a bill of particulars upon defendant specifying the means by which the officer determined the defendant exceeded the speed limit. The court denied defendant's request for maintenance and calibration information for any radar used. The court ordered the officer's personnel records to be produced to the court for inspection.

**CORE TERMS:** speed, personnel, disclosure, police officer, estimate, traffic, speeding, detection, motor vehicles, deposition, simplified, prepare, prosecuting attorney, speed limit, cross-examination, manufacturer, calibration, exceeded, radar, patrolman, Freedom of Information Law, continued employment, issue of credibility, public disclosure, absolute right, personnel file, final arbiter, lawful rate, cross-examine, materiality

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests***

[HN1] A defendant must be fully apprised of the facts and law which he is being accused of having violated. In a traffic matter, the defendant is entitled to receive, in addition to the simplified traffic information with which he was served, a supporting deposition, *N.Y. Crim. Proc. Law § 100.25(2)*, by the police officer containing factual allegations of an evidentiary character which supplements the simplified traffic information and supports the belief that defendant committed the offense charged. The defendant has an absolute right to a supporting deposition before the commencement of trial.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN2] The opinion evidence of police officers, uncorroborated by mechanical devices, will be sufficient to sustain a speeding conviction. A police officer's estimate of speeds based upon his experience may be one means therefore of demonstrating that a defendant has been guilty of speeding. In order for the trier of the facts to be fully cognizant of all factors relevant to the patrolman's experience and ability to estimate the speeds of moving vehicles, a defendant may properly present evidence or cross-examine the officer in relation to his training, etc. In addition, in order to obtain a fair trial, the defendant should be prepared to cross-examine the police officer on his ability to estimate the speed of moving vehicles and the requested information is germane to that ability.

***Governments > Local Governments > Police Power******Governments > State & Territorial Governments > Employees & Officials***

[HN3] The Civil Rights Law provides a means to obtain all personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof as may be mandated by lawful court order. *N.Y. Civ. Rights Law § 50-a*. This legislation establishes a uniform rule in relation to the production of police personnel records. The enactment further provides certain procedural safeguards to protect against the unbridled disclosure of said personnel records.

**HEADNOTES: [\*\*\*1]****Motor Vehicles -- Speeding**

1. Defendant has an absolute right to receive a supporting deposition by the complainant police officer ( *CPL 100.25*, subd 2) prior to trial containing factual allegations of an evidentiary character which supplements the simplified traffic information charging him with speeding and supports the belief that defendant committed the offense. In addition, since a statement that defendant was traveling a certain speed above the designated lawful rate is insufficient to inform the defendant so that he may be able to properly prepare and conduct his defense, the prosecuting attorney is directed to serve a bill of particulars upon the defendant specifying the means by which the police officer determined that defendant exceeded the speed limit and, if a speed detection device was employed to clock defendant's speed, the name of the manufacturer, model and number of said device. There is no need to disclose to defendant the maintenance and calibration records of such speed detection device.

**Motor Vehicles -- Speeding**

2. A defendant charged with a speeding traffic violation is entitled to disclosure of certain personnel records of the arresting [\*\*\*2] police officer relating to the officer's ability to use radar equipment and to visually estimate the speed of moving vehicles as an aid in cross-examination on the issue of credibility. The information sought by defendant in the officer's personnel records is properly discoverable under *section 50-a of the Civil Rights Law*, which provides a means to obtain all "personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department", and is not exempted from public disclosure under any provisions of the Freedom of Information Law (Public Officers Law, art 6). To protect against the unbridled disclosure of police personnel records, each determination of applications for disclosure must be made on an *ad hoc* basis with the court

being the final arbiter as to whether the defendant has demonstrated the relevancy and materiality of the information in the personnel records to warrant disclosure.

**COUNSEL:**

*Matthew P. Brady* for plaintiff.

*Robert S. Gutterson*, defendant *pro se*.

**JUDGES:**

William R. Humburg, J.

**OPINION BY:**

HUMBURG

**OPINION:**[\*1106] **OPINION OF THE COURT**

[\*\*999] On February 25, 1977, the defendant, [\*\*\*3] Robert S. Gutterson, was issued a uniform traffic summons by a member of the Nassau County Police Department which charged said defendant with a violation of section 230.02 of article 2 of the Ordinances of the Village of Lattingtown in that he allegedly operated his motor vehicle within the Village of Lattingtown at a speed of 52 miles per hour in a 40 mile per hour zone.

The defendant appeared *pro se* before the Village Court in Lattingtown and requested certain documents from the Nassau County Police Department which he believed would aid him in the preparation of his defense to the alleged violation. This court advised the defendant to make a written application to the court, on notice to the People, requesting the information, documents, etc., which the defendant deemed necessary for his defense. The defendant has complied with the court's directive by serving his requests and the reasons therefor on the prosecuting attorney for the village. The defendant's requests are as follows:

1. A bill of particulars specifically stating the means by which the police officer arrived at the determination that the defendant exceeded the speed limit.

[\*\*1000] 2. If a radar unit [\*\*\*4] was used to measure the speed of defendant's automobile, defendant seeks to obtain service records for said unit and when it was last calibrated before February 25, 1977, as well as records for maintenance and calibration thereafter.

3. Finally, defendant requests personnel records of the arresting officer, i.e., test scores or grades in determining or measuring his ability to use equipment for recording the speed of motor vehicles, test scores or grades measuring his ability to visually estimate the speed of motor vehicles, the deficiencies [\*1107] and margins of error therein and the dates when said patrolman was given refresher or training courses in the use of such equipment and/or his ability to estimate speeds of moving vehicles.

It is fundamental to our system of justice that [HN1] a defendant must be fully apprised of the facts and law which he is being accused of having violated. In this matter, the defendant is entitled to receive, in addition to the simplified traffic information with which he was served on February 25, 1977, a supporting deposition ( *CPL 100.25*, subd 2) by the police officer containing factual allegations of an evidentiary character which supplements the [\*\*\*5] simplified traffic information and supports the belief that defendant committed the offense charged ( *CPL 100.20*, *100.25*, subd 2). The defendant has an absolute right to a supporting deposition before the commencement of trial. ( *People v De Feo*,

93 Misc. 2d 1105, \*1107; 403 N.Y.S.2d 998, \*\*1000;  
1978 N.Y. Misc. LEXIS 2182, \*\*\*5

77 Misc 2d 523, 524.) Accordingly, the complainant police officer is directed to file a supporting deposition with this court and cause a copy thereof to be served upon the defendant.

In addition, in order that the defendant may be able to properly prepare and conduct his defense in this matter (see *CPL 100.45, 200.90*), this court is satisfied that defendant is entitled to more particularization about his alleged violation than is contained in the simplified traffic information. Therefore, the prosecuting attorney is directed to serve a bill of particulars upon the defendant specifying the means by which the police officer determined the defendant exceeded the speed limit. Simply to state that a defendant was traveling a certain speed above the designated lawful rate is insufficient to inform the defendant so that he may prepare his defense. In addition to a police officer's independent estimate of the defendant's speed, there are [\*\*\*6] a number of instruments or devices which may be employed to accomplish the same objective. As Judge Namm noted in *People v Perlman (89 Misc 2d 973, 976)*, radar detection of speed has made great advances and various types of "radar devices have gained wide acceptance in all courts". If a speed detection device was employed to clock defendant's speed, he should be apprised of the manufacturer and model name and number of said device in the bill of particulars. This is at least necessary in keeping with the spirit of affording a defendant an adequate opportunity to prepare for his defense. In order to properly defend himself, is a defendant in a traffic matter required to bear the unreasonable burden of coming to [\*1108] court prepared to try his case, anticipating every available device on the market employed by the police departments to detect speeds of motor vehicles?

Defendant's request for information relative to the maintenance and calibration records of a speed detection device, if one was used to measure defendant's speed, is denied. The previous direction to provide defendant with the name of the manufacturer, model and number of said device is ample disclosure [\*\*\*7] to assist defendant in preparing his defense.

Finally, defendant requests disclosure of certain personnel records of the arresting officer in the custody of the Nassau County Police Department which would bear on the officer's ability to estimate the speeds of moving vehicles. It is well settled in this State that [HN2] the opinion evidence of police officers, "uncorroborated by mechanical devices, will be sufficient to sustain a speeding conviction." (*People v Olsen, 22 NY2d 230, 231*; see, also, *Matter of Sulli v Appeals Bd. of Admin. Adjudication Bur., 55 AD2d 457, 461.*) A police officer's estimate [\*\*1001] of speeds based upon his experience may be one means therefore of demonstrating that a defendant has been guilty of speeding. In order for the trier of the facts to be fully cognizant of all factors relevant to the patrolman's experience and ability to estimate the speeds of moving vehicles, a defendant may properly present evidence or cross-examine the officer in relation to his training, etc. In addition, in order to obtain a fair trial, the defendant should be prepared to cross-examine the police officer on his ability to estimate the speed of moving vehicles and [\*\*\*8] the requested information is germane to that ability.

There has been no demonstration that the records requested, if they exist, constitute investigatory files compiled for law enforcement purposes and which thereby would be exempt from disclosure (*Marshall v New York State Police, 89 Misc 2d 529*). Traditionally, records of law enforcement agencies have been exempted from public disclosure and only recently through the "Freedom of Information Law" (Public Officers Law, art 6) has that restriction been relaxed. However, access to an agency's records under this law is not without limitation (*Public Officers Law, § 87, subd 2*; see *Matter of Westchester Rockland Newspapers v Mosczydlowski, 58 AD2d 234*). The information sought by the defendant in this action does not fall within any of the protected areas under this statute.

Courts have recently permitted disclosure of records of the [\*1109] complaints and investigations of civilian complaints against a police officer (*Walker v City of New York, 90 Misc 2d 565*); a copy of the "rap sheet" or arrest record in respect to the People's witnesses (*People v Howard, 89 Misc 2d 911*); and "a number of courts have granted [\*\*\*9] discovery of a wide range of official documents, including police arrest, investigative and incident reports [cases cited]" (*People v Simone, 92 Misc 2d 306, 312*).

In addition, the Legislature in 1976 amended [HN3] the Civil Rights Law so as to provide a means to obtain "[all]

93 Misc. 2d 1105, \*1109; 403 N.Y.S.2d 998, \*\*1001;  
1978 N.Y. Misc. LEXIS 2182, \*\*\*9

personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof \* \* \* as may be mandated by lawful court order" (*Civil Rights Law*, § 50-a). This legislation established a uniform rule in relation to the production of police personnel records. ( *Guzman v City of New York*, 91 Misc 2d 270, 271.) The enactment further provides certain procedural safeguards to protect against the unbridled disclosure of said personnel records.

An ample opportunity has been afforded the People to be heard on defendant's application. This court is satisfied that information relative to the patrolman's ability to estimate the speeds of moving vehicles which may be contained in the officer's personnel file is material which may be necessary for the defense during the trial of this matter and to aid [\*\*\*10] in cross-examination on the issue of credibility. (See *People v Sumpter*, 75 Misc 2d 55.) This decision is not a license nor shall it serve as an authorization that in every instance a defendant will be permitted to conduct an unfettered or untrammelled search of a police officer's personnel file. The determination of such applications must be made on an *ad hoc* basis with the court being the final arbiter as to whether the defendant has demonstrated the relevancy or materiality of the information in the personnel records to warrant disclosure (cf. *People v Lugo*, 93 Misc 2d 195).

Accordingly, the Nassau County Police Department is directed to produce the personnel records of the officer involved to the Trial Judge sealed, for examination and determination by said Judge as to whether any information contained in such records should be made available to defendant to aid in cross-examination or for other use at the time of trial. (See *People v Sumpter*, *supra*, p 61; *People v Simone*, *supra*, p 315.)

74 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**The People of the State of New York, Respondent, v. William H. Meikrantz,  
Appellant. The People of the State of New York, Respondent, v. Joseph W. Kopesky,  
Appellant**

[NO NUMBER IN ORIGINAL]

County Court of New York, Broome County

*77 Misc. 2d 892; 351 N.Y.S.2d 549; 1974 N.Y. Misc. LEXIS 1267*

January 8, 1974

**DISPOSITION:** [\*\*\*1]

In conclusion, for the above reasons, the convictions of both defendants are reversed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants appealed from a judgment of the Justice Court, Town of Union, New York, and the Justice Court, Town of Vestal, New York, which convicted defendants under *N.Y. Veh. & Traf. Law § 1192* for driving while under the influence of alcohol.

**OVERVIEW:** The appeals presented the issues of whether a breath test, to be considered valid in the State, was required to be performed according to certain Department of Health rules and regulations, and whether the testing and equilibration of a breathalyzer machine was adequate to prove the validity of a breath test result where no competent evidence was presented at trial to establish the alcoholic content of the reference solution used to test and equilibrate the machine. The court noted, in the case of one defendant, evidence at trial revealed that the result of the analysis of the reference sample immediately following the analysis of defendant's breath differed from the purported reference solution value by .03 percent weight per volume. Regarding the other defendant, the variance was .02 percent weight per volume. The convictions were reversed, because in neither case was the standards stipulated in 10 *N.Y. Comp. Codes R. & Regs. tit. 10, § 59.5(d)* met.

**OUTCOME:** The court reversed the judgment.

**CORE TERMS:** breathalyzer, breath, analyses, weekly, machine, department of health, violation of subdivision, driving, alcoholic content, breath test, regulations, testing, chemical, alcohol, purported, blood, intoxicated, calibration, motorist, certificate, immediately following, competent evidence, equilibrate, alcoholic, volume, laboratory, deviation, reliable, working order, simplified

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Toxicology***

[HN1] *N.Y. Veh. & Traf. Law* § 1192(2) states that: no person shall operate a motor vehicle while he has .12 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of § 1194.

***Evidence > Scientific Evidence > Blood & Bodily Fluids***

***Evidence > Scientific Evidence > Toxicology***

***Governments > Legislation > Interpretation***

[HN2] *N.Y. Comp. Codes R. & Regs. tit. 10, § 1194* reads: the department of health shall issue and file rules and regulations approving satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination was properly given. The provisions § 1194 do not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the department of health.

***Evidence > Scientific Evidence > Toxicology***

***Governments > Legislation > Interpretation***

[HN3] *10 N.Y. Comp. Codes R. & Regs. tit. 10, § 59.1(a)* defines "techniques or methods" as used in *N.Y. Veh. & Traf. Law* § 1194(5), as the collection, processing and determination of the alcoholic content of body fluids such as human blood or urine as well as methods for the determination of the alcoholic content of breath or alveolar air by approved methods.

***Governments > Legislation > Interpretation***

[HN4] *10 N.Y. Comp. Codes R. & Regs. tit. 10, § 59.5* provides that: breath testing techniques and methods must meet the following criteria: (d) the result of an analysis of a suitable reference sample, such as air equilibrated with a reference solution of alcoholic content of greater than 0.08 percent weight per volume at a known temperature, must agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the State Commissioner of Health. This analysis shall immediately follow the analysis of the breath of the subject and shall be recorded.

***Constitutional Law > Separation of Powers***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

***Governments > Legislation > Interpretation***

[HN5] In making a determination as to the meaning of a statute, the court must construe the language of the statute as the court finds it, or as it is written not as the court believes it should have been written. Under the doctrine of separation of powers, it is fundamental that courts may not legislate, nor may they change legislation. Freedom to construe a statute is not freedom to amend it. In determining legislative intent, the court may interpret the law in the light of its historical background or the circumstances leading to its enactment. The court may consider the objects and purposes which the Legislature sought to accomplish by such legislation and the policy which induced its enactment. Also, as an aid to statutory construction, the court may resort to decisions of courts of other states construing language of similar import.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Defenses > Intoxication***

***Governments > Legislation > Interpretation***

[HN6] *N.Y. Veh. & Traf. Law § 1194(5)* was enacted to provide that the Department of Health would establish qualifications for the certification of operators and analysts to assure that tests would be properly conducted and analyzed and that such persons would be competent to testify as to the procedures followed. The issuance of a permit by the Department of Health presumptively qualifies such person and his testimony.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Scientific Evidence > Toxicology***

[HN7] Absent a provision of *N.Y. Veh. & Traf. Law § 1194* excluding the evidence in criminal prosecutions, or absent an express provision at least requiring compliance with the Department of Health regulations, and in view of the circumstances and policy considerations which prompted the statute's passage, the Legislature did not intend *N.Y. Veh. & Traf. Law § 1194(5)* to make the validity of breath test results depend upon, or to condition the admission in evidence of test results upon, compliance with 10 N.Y. Comp. Codes R. & Regs. Tit. 59.5(d). The validity of such tests is to be determined in accordance with medical and scientific standards generally and that intrinsic evidence, rather than standards fixed by departmental rules, properly measures reliability and accuracy of test results.

***Evidence > Demonstrative Evidence > Foundational Requirements***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Sobriety Tests***

[HN8] At the outset the court notes that the admissibility in evidence of any breath test result depends upon presenting an adequate foundation. It further appears that the elements of a necessary foundation are: (1) that there was compliance with any statutory requirement, *N.Y. Veh. & Traf. Law §§ 1193-a* and 1194; (2) that a specified type of breath testing device was used to analyze a breath sample and that such device is scientifically reliable for measuring the percent of alcohol in the blood through a chemical analysis of a subject's breath, unless such reliability has been judicially recognized; (3) that the testing device was in proper working order; (4) that the person giving and interpreting the test was properly qualified; (5) that the chemicals used in the test were of the proper kind and mixed in the proper proportions. In this regard the court notes that a random sampling of the particular lot the ampoules were from is probably sufficient to show such propriety; (6) that the test was properly conducted.

***Evidence > Scientific Evidence > Toxicology***

[HN9] A determination regarding the proper functioning of a breathalyzer must be made on a case-by-case basis and must rely on the intrinsic evidence presented at trial. Each case must be looked at anew and each must stand or fall on its own facts and no judicial formula can be conjured up to supplant what appears on the face of the record of an individual case.

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Toxicology***

[HN10] The court recognizes that the breathalyzer is scientifically reliable for determining the percentage of alcohol in the blood if tests are conducted in accordance with proper procedures.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

**Evidence > Scientific Evidence > Toxicology**

[HN11] Even a reading from an untested breathalyzer machine is admissible in a prosecution for driving while ability impaired or driving while intoxicated in violation of *N.Y. Veh. & Traf. Law* §§ 1192(1) or 1192(3). However, such evidence cannot alone be sufficient for conviction under §§ 1192(1) or 1192(3), and the deficiency in proof can be supplied by the opinion testimony of qualified observers of the defendant's conduct, speech and demeanor to establish the fact of the defendant's impaired ability or intoxication.

**Criminal Law & Procedure > Guilty Pleas > General Overview****Criminal Law & Procedure > Trials > Judicial Discretion****Criminal Law & Procedure > Sentencing > Concurrent Sentences**

[HN12] *N.Y. Veh. & Traf. Law* § 1196 reads: a driver may be convicted of a violation of § 1192(1), (2) or (3), notwithstanding that the charge laid before the court alleged a violation of § 1192(2) or (3), and regardless of whether or not such conviction is based on a plea of guilty. *N.Y. Veh. & Traf. Law* § 1192(2) and (3) were intended to be separate crimes, neither mutually inclusive nor exclusive. Moreover, they may be joined as multiple counts in one indictment since they are based upon the same criminal transaction. After the trial of a multiple count indictment containing concurrent counts only those on which only concurrent sentences could be imposed and if those counts are noninclusory when the offense charged is not one greater than any of those charged in the others and when the latter are not all lesser offenses included within the greater, the court may in its discretion submit one or more or all thereof to the jury.

**HEADNOTES: Motor vehicles -- driving under influence of alcohol -- if only evidence is breathalyzer reading, breathalyzer must be proved to have been in proper working order when it was used to test accused motorist's breath -- when motorist is accused of driving while intoxicated, he cannot lawfully be convicted of violating more than one of three subdivisions (*Vehicle and Traffic Law*, § 1192, subds. 1, 2, 3).**

1. Evidence that a motorist was driving while he was intoxicated or while his ability was impaired by the consumption of alcohol (*Vehicle and Traffic Law*, § 1192 *et seq.*) may consist of the testimony of qualified observers of his conduct, speech and demeanor, plus a reading from even an untested breathalyzer or other breath-analyzing machine or device. But, if the only evidence offered is a reading from such a machine or device, then proof is required that medical and scientific standards were complied with in the method or technique which was used to test this particular motorist's breath. The method or technique need not be the one which has been promulgated by the State Department [\*\*\*2] of Health (in *10 NYCRR* 59.5 [d]); nor need there be competent evidence of the percentage of the alcoholic content of the reference solution which was used to test and equilibrate the breathalyzer or other breath-analysis device; nevertheless, there must be competent proof that the breathalyzer or other breath-analysis device was in proper working order when it was used to test this particular motorist's breath.

2. When the accusatory instrument is only one simplified traffic information charging intoxication only (*Vehicle and Traffic Law*, § 1192, subd. 3), the accused motorist can be convicted of violating either subdivision 1 or subdivision 2 or subdivision 3 of said section 1192 (cf. § 1196), but he cannot lawfully be convicted of violating more than one of those three subdivisions.

**COUNSEL:**

*Richard A. Battaglini* for William H. Meikrantz, appellant.

*Scanlon, Vetrano & Ringwood* (*Vincent P. Vetrano* of counsel), for Joseph W. Kopesky, appellant.

*Patrick D. Monserrate*, District Attorney (*Jon S. Blechman* of counsel), for respondent.

**JUDGES:**

Stephen Smyk, J.

**OPINION BY:**

SMYK

**OPINION:**

[\*892] [\*552] Appeals (1) by defendant William H. Meikrantz from the judgment of [\*\*\*3] the Justice Court, Town of Union, New York, convicting him of a violation of subdivision 2 of *section 1192 of the Vehicle and Traffic Law*; [\*553] and (2) by defendant Joseph W. Kopesky from the judgment of the Justice Court, Town of Vestal, New York, convicting him of a violation of subdivisions 1, 2, and 3 of *section 1192 of the Vehicle and Traffic Law*.

These appeals present three questions of first impression. First, whether a breath test, to be considered valid in this State, must be performed according to certain Department of Health [\*893] rules and regulations. Second, are the testing and equilibration of a breathalyzer machine adequate to prove the validity of a breath test result where no competent evidence is presented at trial to establish the alcoholic content of the reference solution used to test and equilibrate the machine. Finally, can a defendant charged only with a violation of subdivision 3 of *section 1192 of the Vehicle and Traffic Law* be properly convicted, pursuant to section 1196 of that law, of violations of subdivisions 1, 2, and 3 of section 1192. Because these and other cases not yet ready for decision call for a thorough evaluation of the procedure [\*\*\*4] which should be followed in traffic cases involving the use of breath testing instruments, we take occasion to write at some length on all three points.

In considering the first issue, we must examine relevant sections of the Vehicle and Traffic Law and look to pertinent provisions of part 59 of the Administrative Rules and Regulations of the New York State Department of Health, in title 10 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (*10 NYCRR 59.1 et seq.*).

[HN1] Subdivision 2 of *section 1192 of the Vehicle and Traffic Law* states: "No person shall operate a motor vehicle while he has [.12] \* .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter."

\* Chapters 450 and 451 of the Laws of 1972, eff. Jan. 1, 1973. Note: Material bracketed [] was in effect until Dec. 31, 1972.

[HN2] Subdivision 5 of section 1194 [\*\*\*5] (L. 1971, ch. 928) reads: "The department of health shall issue and file rules and regulations approving satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination was properly given. The provisions of this subdivision do not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the department of health."

[\*554] [HN3] Section 59.1(a) (*10 NYCRR 59.1[a]*) defines "techniques or methods" as used in subdivision 5 of section 1194 (L. 1971, ch. 928) of the Vehicle and Traffic Law, as "the collection, processing and determination of the alcoholic content of body fluids such as human blood or urine as well as methods for the determination [\*894] of the alcoholic content of breath or alveolar air by approved methods."

[HN4] Section 59.5 (*10 NYCRR 59.5*) provides, in relevant part: "Breath testing techniques and methods must meet the following [\*\*\*6] criteria: \* \* \* (d) the result of an analysis of a suitable reference sample, such as air equilibrated with a reference solution of alcoholic content of greater than 0.08 percent weight per volume at a known temperature, must agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume, or such

limits as set by the State Commissioner of Health. This analysis shall immediately follow the analysis of the breath of the subject and shall be recorded."

In the case of defendant Meikrantz, evidence at trial revealed that the result of the analysis of the reference sample immediately following the analysis of defendant's breath differed from the purported reference solution value by .03 percent weight per volume. Regarding defendant Kopesky, the variance was .02 percent weight per volume. Hence, in neither case were the standards stipulated in *10 NYCRR 59.5(d)* met.

The defendants argue that the Legislature, in enacting subdivision 5 of section 1194 (L. 1971, ch. 928) of the Vehicle and Traffic Law, conferred upon the New York State Department of Health the authority to promulgate approved "techniques or methods" for determining the alcoholic [\*\*\*7] content of breath. They contend that *10 NYCRR 59.5* was the result of this delegation of authority. They further maintain that pursuant to subdivision 5 of section 1194 (L. 1971, ch. 928), a chemical analysis of a person's breath, to be considered valid, must be performed according to those "techniques or methods." In other words, they contend that the Legislature intended subdivision 5 of section 1194 (L. 1971, ch. 928) to condition the admission in evidence of breath test results upon compliance with *10 NYCRR 59.5(d)*. We disagree.

At the outset, there can be no serious dispute that the language of subdivision 5 of section 1194 (L. 1971, ch. 928) is somewhat ambiguous and inarticulate. However, where there is doubt as to the meaning intended to be expressed by a statute, resort may be had to various rules for determining such meaning.

[HN5] In making such a determination, we must construe the language of the statute as we find it, or as it is written (*People v. Friedman*, 302 N. Y. 75; *People v. Kupprat*, 6 N Y 2d 88), not as we believe it should have been written (*People v. Olah*, 300 N. Y. 96). Under the [\*\*555] doctrine of separation of powers, it is fundamental [\*\*\*8] that courts may not legislate, nor may they change [\*895] legislation. Freedom to construe a statute is not freedom to amend it (*Sexauer & Lemke v. Burke & Sons Co.*, 228 N. Y. 341).

In determining legislative intent, we may interpret the law in the light of its historical background or the circumstances leading to its enactment (*Matter of Stupack*, 274 N. Y. 198). We may consider the objects and purposes which the Legislature sought to accomplish by such legislation (*Matter of Hogan v. Culkin*, 18 N Y 2d 330), and the policy which induced its enactment (*MVAIC v. Eisenberg*, 18 N Y 2d 1). Also, as an aid to statutory construction, we may resort to decisions of courts of other States construing language of similar import (*Williams v. Tompkins, Inc.*, 208 App. Div. 574).

Aside from the question of whether subdivision 5 of section 1194 (L. 1971, ch. 928) properly delegates authority to the Department of Health to establish rules and regulations approving satisfactory techniques or methods governing the conduct of chemical analyses, the People argue that, had the Legislature intended to make the validity of breath test results depend upon compliance [\*\*\*9] with such techniques or methods, it could easily have found apt words to express it (*Hennessy v. Walker*, 279 N. Y. 94). We note in this regard that the North Carolina Legislature apparently had no difficulty expressing itself in a similar statute which reads: "Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose. The State Board of Health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Board of Health; provided, that in no case shall the arresting officer or officers administer said test." (*N. C. Gen. Stat.*, § 20-139.1, subd. [b], cited in *People v. Powell*, 279 N. C. 608, 610-611, 184 S. E. 2d 243, 244; see, also, W. Va. Code, ch. 17C, art. 5A, §§ 1-5 cited in *People v. Hood*, 184 S. E. 2d 334, 336-337.) Certainly, [\*\*\*10] no language is present in said subdivision 5 of section 1194 which even remotely suggests such import. Furthermore, said subdivision 5 of section 1194, unlike a similar California statute, fails to even expressly require that chemical tests be performed according to rules and regulations adopted by the Department of Health [\*\*556] (see Cal. Codes, Health and Safety [\*896] Code, § 436.52 cited in *People v. Foulger*, 26 Cal. App. 3d

*Supp. 1, 3).*

On its face, said subdivision 5 of section 1194 provides for the issuance of permits by the Department of Health to persons deemed competent to conduct chemical tests for alcohol, and further provides that if such an analysis is made by a person possessing such a permit, it shall be presumptive evidence that such a test was properly given. The statute also provides that the Department of Health shall issue and file rules and regulations approving satisfactory methods to ascertain the competence of individuals to conduct and supervise chemical analyses for alcohol. It specifically allows the introduction of test results made by persons not holding permits, but in such cases the presumption of propriety does not apply.

Prior [\*\*\*11] to the passage of the section, the qualification of persons who conduct chemical tests for intoxication in charges of violations of *section 1192 of the Vehicle and Traffic Law* often resulted in long drawn-out testimony and cross-examination, sometimes distracting from the main issue of the trial, the alcoholic content of the defendant's breath. In some areas, the court's insistence upon expert testimony of what is described as a routine procedure (*People v. Donaldson, 36 A D 2d 37*) resulted in the clogging of court calendars and a reluctance to proceed to trial in these cases. Also, some operators of chemical test devices did not have sufficient training to be able to provide sound testimony as to the validity of the procedures which they followed. [HN6] Hence, we are persuaded that subdivision 5 of section 1194 was enacted to provide that the Department of Health would establish qualifications for the certification of operators and analysts to assure that tests would be properly conducted and analyzed and that such persons would be competent to testify as to the procedures followed. The issuance of a permit by the Department of Health presumptively qualifies such person and [\*\*\*12] his testimony. We feel the intended result, therefore, was the more expeditious and proper handling of driving-while-intoxicated cases. However, the defense is still able to introduce evidence in a situation in which the test may not, in fact, have been properly given.

Accordingly, [HN7] absent a provision of the statute excluding the evidence in criminal prosecutions, or absent an express provision at least requiring compliance with the Department of Health regulations, and in view of the circumstances and policy considerations which prompted the statute's passage, we do not believe the Legislature intended said subdivision 5 of section [\*897] 1194 to make the validity of breath test results depend upon, or to condition the admission in evidence of test results upon, compliance with *10 NYCRR 59.5(d)*. We further believe that the validity of such tests is to be determined in accordance with medical and scientific standards generally and that [\*\*557] intrinsic evidence, rather than standards fixed by departmental rules, properly measures reliability and accuracy of test results (*People v. Monahan, 25 N Y 2d 378*).

However, the result we reach does not affect defense counsel's [\*\*\*13] right to make any proper use of the noncompliance of a given breath test with the Department of Health rules and regulations in an attempt to persuade the trier of fact that the test result was invalid. We note in this regard that it may even be proper for defense counsel to read pertinent provisions of the regulations in evidence (*Executive Law, § 106*).

We turn now to the question of whether it is a necessary foundation, for the admission in evidence of breath test results, to prove by competent evidence the alcoholic content of the reference solution used to test and equilibrate breath testing instruments. By "testing" and "equilibrating" we mean both the weekly testing of breathalyzers by local police forces and the analysis of a reference sample which immediately follows the analysis of a subject's breath pursuant to current police procedure.

In testing and equilibrating, analyses are conducted using a suitable reference sample, such as air equilibrated with an alcoholic reference solution (usually 0.15% weight per volume at a known temperature). The reference solution is delivered monthly in a sealed bottle to local police stations directly from the manufacturer. Upon its [\*\*\*14] arrival, the reference solution is poured into an electric simulator assembly resembling a canning jar, and the assembly is plugged in to warm the solution to the proper temperature (usually 34 degrees C). Accompanying the reference solution is a manufacturer's laboratory certificate of analysis showing that the lot from which the bottled solution was taken was random sampled with stated results, and that the alcohol and water used in the solution were found to be free of any

interfering substances. A label showing the alcoholic content or value of the new reference solution as found by the laboratory is also enclosed and is affixed to the front of the simulator assembly at the station. A reference sample, vapor from the predetermined alcoholic solution simulating breath, is then passed through the breathalyzer machine [\*898] in order to obtain a reading on the gauge and verify the reference solution value.

A weekly test is actually comprised of several successive analyses using reference samples. Between each test the breathalyzer machine is flushed or purged with clear air. The test conducted immediately following the subject's test is a single analysis and is preceded [\*\*\*15] by a similar purge of the machine. The result of each analysis should equal or closely approximate the purported value of the reference solution and the result of the analyses comprising a weekly test should be identical. In this way, the breathalyzer operator can determine if [\*\*558] a breathalyzer machine is functioning properly and the results it yields are accurate and reliable.

Defendants argue, and the People concede, that at neither of these trials was competent evidence adduced to establish the alcoholic content of the reference solution used to test and equilibrate their breathalyzers. The defendants contend that this lack of proof renders the breath test invalid and that, consequently, the admission of the test results in evidence was reversible error. Hence, they maintain that unless it is clearly demonstrated that the reference solution is of the value it purports to be it cannot be scientifically determined if a breath testing instrument is functioning properly or the test results it renders are accurate and reliable.

The point raised is well taken, but we do not believe it necessary for the People to prove by competent evidence the value of the reference solution [\*\*\*16] in all breathalyzer cases.

[HN8] At the outset we note that the admissibility in evidence of any breath test result depends upon presenting an adequate foundation. It further appears that the elements of a necessary foundation are:

- (1) that there was compliance with any statutory requirement (see *Vehicle and Traffic Law*, §§ 1193-a and 1194);
- (2) that a specified type of breath testing device was used to analyze a breath sample and that such device is scientifically reliable for measuring the percent of alcohol in the blood through a chemical analysis of a subject's breath, *unless* such reliability has been judicially recognized (e.g., *People v. Donaldson*, 36 A D 2d 37, *supra* [the breathalyzer]);
- (3) that the testing device was in proper working order;
- (4) that the person giving and interpreting the test was properly qualified (e.g., *People v. Donaldson*, *supra*);
- (5) that the chemicals used in the test (i.e., the ampoules used in a breathalyzer) were of the proper kind and mixed in the [\*899] proper proportions (*People v. Donaldson*, *supra*). In this regard we note that random sampling of the particular lot the ampoules were from is probably sufficient [\*\*\*17] to show such propriety (see *People v. Coffman*, 502 P. 2d 605 [Ore.]; *State v. Baker*, 56 Wn. 2d 846);
- (6) that the test was properly conducted.

All elements of a proper foundation must be met and each is aimed to insure that the results of a given subject's breath test are accurate and reliable. The present allegation of error is directed toward the third element alone, namely, and more particularly, whether the breathalyzer used in the defendants' tests was proven to be in proper working order. We feel this element has special significance in regard to the validity of test results.

[\*\*559] [HN9] A determination regarding the proper functioning of a breathalyzer must be made on a case-by-case basis and must rely on the intrinsic evidence presented at trial. Each case must be looked at anew and each must stand or fall on its own facts and no judicial formula can be conjured up to supplant what appears on the face of the record of an individual case. With this in mind, we turn to the records of the instant cases.

At the trial of defendant Meikrantz, the prosecution offered and the court admitted into evidence, presumably under *CPLR 4518* (subd. [c]), two photocopies [\*\*\*18] of calibration records (certificates of calibration) made by the New York State Police laboratory in Albany. The term "calibration" refers to an adjustment of the breathalyzer machine as distinguished from a mere test of the machine. If a weekly test at the station indicates a machine malfunction, it is sent to the laboratory to be calibrated. However, one of the certificates therein was dated two and one-quarter years before the defendant's test, while the other was made three months thereafter. Consequently, the defendant's specific objections on the grounds of remoteness on the one hand and irrelevancy on the other should have been sustained and the records suppressed.

Two weekly test records (alcohol breath simulator records) were then introduced, as a business records exception to the hearsay rule. These records apparently showed the results of two weekly tests conducted three days prior to the defendants' test and four days subsequent thereto. However, the results of these weekly tests are not set forth on the record.

Finally, the analysis immediately following the defendant's test was testified to. The witness police officer stated that the value of the alcoholic reference [\*\*\*19] solution was 0.15% while the [\*900] result obtained was 0.12%. The witness never adequately explained the reason for the deviation of 0.03%.

On the other hand, in the case of defendant Kopesky, two separate breathalyzer tests were conducted and the results of both tests were identical, 0.19%.

Testimony was admitted that the reference solution used to test and equilibrate the breathalyzer in question was prepared by a private hospital laboratory and that its purported value was 0.15%. The probability of deterioration of the alcoholic reference solution over a period of time was amply covered in the testimony, as was the consequence that the weekly test results were slightly lower than the purported value of such solution. In this regard, an alcohol breath simulator record was admitted in evidence showing the results of weekly tests conducted at the police station for the six weeks immediately prior to the defendant's tests and for the five weeks immediately following them. The results of the successive [\*560] analyses comprising each weekly test were demonstrated to be nearly identical. The same exhibit also showed that an analysis of the reference sample was conducted [\*\*\*20] immediately following each of the defendant's tests, with the same results.

Finally, testimony revealed that a certificate of calibration made by the manufacturer of the breathalyzer was delivered with the machine in question when it was purchased nine months prior to the defendant's tests.

We note that in *Kopesky* a recorded history of the results of weekly tests conducted within a reasonable time before and after the defendant's test was compiled and introduced, while in *Meikrantz* evidence of only two such weekly tests was introduced, one of which was conducted after the fact.

In both cases, the results of the analyses which follow the subjects' breath test were admitted and in each instance there was a deviation from the purported value of the reference solution. Only in *Kopesky*, however, were the deviations adequately explained in terms of the probable deterioration of the alcoholic solution.

Furthermore, in *Kopesky* the results of all tests and equilibrations, both before and after the defendant's tests, were demonstrated to have closely approximated the purported reference solution value (with any deviation accounted for) and the results of the analyses comprising [\*\*\*21] each weekly test were shown to be nearly identical. No such showing was made on the record in *Meikrantz*.

[\*901] Finally, at defendant *Kopesky's* trial testimony was admitted concerning a manufacturer's certificate of calibration dated nine months before defendant's test while the calibration certificates introduced in *Meikrantz* were remote.

While our higher courts have not spelled out the exact limits to which an accused drunken driver may go to plumb

the accuracy of the testing devices and solutions, we are not prepared to cast the burden on the People in all cases of offering proof of the accuracy of the reference solution's value, beyond the comparative analyses made in *Kopesky*. We are persuaded that in *Kopesky* there was "reasonable proof" of the reliability of the reference solution and the accuracy of the breathalyzer itself. Such proof was lacking in the case of defendant *Meikrantz*.

Accordingly, at this point the conviction of defendant *Meikrantz* is reversed, since the proper functioning of the breathalyzer was not sufficiently shown.

We feel that the conclusion we have reached regarding defendant *Kopesky*'s case is well-grounded in reason. [\*\*\*22] [HN10] We recognize that the breathalyzer is scientifically reliable for determining the percentage of alcohol in the blood if tests are conducted in accordance with [\*\*561] proper procedures ( *People v. Donaldson*, 36 A D 2d 37, *supra*). Furthermore, in *Kopesky* we believe it to be more than coincidental that the results of the several analyses comprising each weekly test were nearly identical and that the results of all tests and equilibrations closely approximated the purported value of the reference solution with deviations explained on the record. To us it is inconceivable how the breathalyzer and the reference solution could both be inaccurate to the same degree (cf. *People v. Stephens*, 52 Misc 2d 1070).

We further believe that in view of the possible presumption of propriety applicable in breathalyzer cases under the aforesaid subdivision 5 of section 1194 and in light of previous Court of Appeals opinions regarding untested speedometers and radar devices ( *People v. Magri*, 3 N Y 2d 562 and *People v. Dusing*, 5 N Y 2d 126), that [HN11] even a reading from an untested breathalyzer machine is admissible in a prosecution for driving while ability impaired [\*\*\*23] or driving while intoxicated in violation of subdivision 1 of section 1192 or subdivision 3 of *section 1192 of the Vehicle and Traffic Law*. However, such evidence cannot alone be sufficient for conviction under these sections, and the deficiency in proof can be supplied by the opinion testimony of qualified observers of the defendant's conduct, speech and [\*902] demeanor to establish the fact of the defendant's impaired ability or intoxication (see *People v. Morris*, 63 Misc 2d 124, 127).

The third and final issue for consideration, is raised on behalf of *Kopesky* alone. He contends that his conviction must be reversed because of an erroneous jury charge at his trial. We agree.

The defendant was arrested and charged with driving while intoxicated in violation of subdivision 3 of *section 1192 of the Vehicle and Traffic Law*. At his trial on that charge, the court instructed the jury that the defendant could be found guilty of one or more of the following: driving while ability impaired in violation of subdivision 1 of section 1192, driving with .12 of one percentum or more by weight of alcohol in his blood in violation of subdivision 2 of section 1192 and driving while [\*\*\*24] intoxicated in violation of subdivision 3 of section 1192. The defendant was subsequently found guilty of violating all three of the subdivisions.

[HN12] Section 1196 reads: "A driver may be convicted of a violation of subdivisions one, two *or* three of section eleven hundred ninety-two, notwithstanding that the charge laid before the court alleged a violation of subdivision two *or* three of section eleven hundred ninety-two, and regardless of whether or not such *conviction* is based on a plea of guilty." (Emphasis ours.)

Subdivisions 2 and 3 of section 1192 were intended to be separate crimes, neither mutually inclusive nor exclusive ( *People v. McDonough*, 39 A D 2d 188; *People v. Rudd*, 41 A D 2d 875). Moreover, they may be joined as [\*\*562] multiple counts in one indictment since they are based upon the same criminal transaction ( *CPL 200.20*, subd. 2, par. [a]; *People v. Rudd*, *supra*). As the court said in *Rudd*, *supra*, p. 876: "After the trial of a multiple count indictment containing concurrent counts only (those [on] which only concurrent sentences could be imposed) and if those counts are noninclusory (when the offense charged is not one greater [\*\*\*25] than any of those charged in the others and when the latter are not all lesser offenses included within the greater), the court may in its discretion submit one or more or all thereof to the jury ( *CPL 300.40*, subd. 3, par. [a])."

Our examination of the *Rudd* decision persuades us that, for a defendant to be convicted of both driving under the influence of alcohol in violation of subdivision 2 of section 1192 and driving while intoxicated in violation of subdivision 3 of section 1192, it is necessary for the police to serve two uniform traffic tickets and file two simplified informations or otherwise follow [\*903] a procedure having the effect of a multicount indictment. Where, however, only one uniform traffic ticket is served and one simplified information is filed, for example, charging a violation of subdivision 3 of section 1192, section 1196 provides that a defendant may be found guilty of but one of the enumerated subdivisions of section 1192 (see *People v. Kaepfel*, 74 Misc 2d 220, 222).

Nevertheless, at least one lower court in New York has indicated that even this restricted interpretation of section 1196 violates the United States Constitution, Sixth Amendment [\*\*\*26] and *section 6 of article I of the New York State Constitution* (*People v. Fielder*, 75 Misc 2d 446). For this reason we believe the safer course for the People to follow in driving-while-intoxicated cases is either:

(1) Immediately file an information charging subdivision 3 of section 1192. When the necessary additional factual allegations become available to support subdivision 2, a second information may be filed charging subdivision 2 of section 1192, and thereafter an application can be made to consolidate both informations pursuant to *CPL 200.20* (subd. 4) and *CPL 100.45*. Under such circumstances the court should have no difficulty in exercising its discretion in granting said application as provided in *CPL 200.20* (subd. 5); or

(2) immediately filing a misdemeanor complaint charging violation of both subdivisions 2 and 3 of section 1192 (*CPL 100.05*, subd. 4) and then subsequently filing a supporting deposition supplying the necessary factual allegations to support the charge of subdivision 2 of section 1192 (*CPL 170.65*, subs. 1 and 2).

Incidentally, it may be stated that subdivision 1 of section 1192 need not be included in the information, in that the same would be [\*\*\*27] a lesser included charge (*CPL 360.50*).

[\*\*563] In the case of defendant *Kopesky*, we find that, because only one simplified information was filed -- that charging a violation of subdivision 3 of section 1192 -- the charge below was erroneous and improper. Further, we cannot say that such error was merely technical and did not affect the substantial rights of the defendant (see *CPL 470.05*, subd. 1). Accordingly, defendant *Kopesky's* conviction is set aside.

In conclusion, for the above reasons, the convictions of both defendants are reversed.

75 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**The People of the State of New York, Respondent, v. William H. Meikrantz,  
Appellant. The People of the State of New York, Respondent, v. Joseph W. Kopesky,  
Appellant**

[NO NUMBER IN ORIGINAL]

County Court of New York, Broome County

*77 Misc. 2d 892; 351 N.Y.S.2d 549; 1974 N.Y. Misc. LEXIS 1267*

January 8, 1974

**DISPOSITION:** [\*\*\*1]

In conclusion, for the above reasons, the convictions of both defendants are reversed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants appealed from a judgment of the Justice Court, Town of Union, New York, and the Justice Court, Town of Vestal, New York, which convicted defendants under *N.Y. Veh. & Traf. Law § 1192* for driving while under the influence of alcohol.

**OVERVIEW:** The appeals presented the issues of whether a breath test, to be considered valid in the State, was required to be performed according to certain Department of Health rules and regulations, and whether the testing and equilibration of a breathalyzer machine was adequate to prove the validity of a breath test result where no competent evidence was presented at trial to establish the alcoholic content of the reference solution used to test and equilibrate the machine. The court noted, in the case of one defendant, evidence at trial revealed that the result of the analysis of the reference sample immediately following the analysis of defendant's breath differed from the purported reference solution value by .03 percent weight per volume. Regarding the other defendant, the variance was .02 percent weight per volume. The convictions were reversed, because in neither case was the standards stipulated in 10 *N.Y. Comp. Codes R. & Regs. tit. 10, § 59.5(d)* met.

**OUTCOME:** The court reversed the judgment.

**CORE TERMS:** breathalyzer, breath, analyses, weekly, machine, department of health, violation of subdivision, driving, alcoholic content, breath test, regulations, testing, chemical, alcohol, purported, blood, intoxicated, calibration, motorist, certificate, immediately following, competent evidence, equilibrate, alcoholic, volume, laboratory, deviation, reliable, working order, simplified

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Toxicology***

[HN1] *N.Y. Veh. & Traf. Law* § 1192(2) states that: no person shall operate a motor vehicle while he has .12 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of § 1194.

***Evidence > Scientific Evidence > Blood & Bodily Fluids***

***Evidence > Scientific Evidence > Toxicology***

***Governments > Legislation > Interpretation***

[HN2] *N.Y. Comp. Codes R. & Regs. tit. 10, § 1194* reads: the department of health shall issue and file rules and regulations approving satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination was properly given. The provisions § 1194 do not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the department of health.

***Evidence > Scientific Evidence > Toxicology***

***Governments > Legislation > Interpretation***

[HN3] *10 N.Y. Comp. Codes R. & Regs. tit. 10, § 59.1(a)* defines "techniques or methods" as used in *N.Y. Veh. & Traf. Law* § 1194(5), as the collection, processing and determination of the alcoholic content of body fluids such as human blood or urine as well as methods for the determination of the alcoholic content of breath or alveolar air by approved methods.

***Governments > Legislation > Interpretation***

[HN4] *10 N.Y. Comp. Codes R. & Regs. tit. 10, § 59.5* provides that: breath testing techniques and methods must meet the following criteria: (d) the result of an analysis of a suitable reference sample, such as air equilibrated with a reference solution of alcoholic content of greater than 0.08 percent weight per volume at a known temperature, must agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the State Commissioner of Health. This analysis shall immediately follow the analysis of the breath of the subject and shall be recorded.

***Constitutional Law > Separation of Powers***

***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

***Governments > Legislation > Interpretation***

[HN5] In making a determination as to the meaning of a statute, the court must construe the language of the statute as the court finds it, or as it is written not as the court believes it should have been written. Under the doctrine of separation of powers, it is fundamental that courts may not legislate, nor may they change legislation. Freedom to construe a statute is not freedom to amend it. In determining legislative intent, the court may interpret the law in the light of its historical background or the circumstances leading to its enactment. The court may consider the objects and purposes which the Legislature sought to accomplish by such legislation and the policy which induced its enactment. Also, as an aid to statutory construction, the court may resort to decisions of courts of other states construing language of similar import.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Defenses > Intoxication***

***Governments > Legislation > Interpretation***

[HN6] *N.Y. Veh. & Traf. Law § 1194(5)* was enacted to provide that the Department of Health would establish qualifications for the certification of operators and analysts to assure that tests would be properly conducted and analyzed and that such persons would be competent to testify as to the procedures followed. The issuance of a permit by the Department of Health presumptively qualifies such person and his testimony.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Scientific Evidence > Toxicology***

[HN7] Absent a provision of *N.Y. Veh. & Traf. Law § 1194* excluding the evidence in criminal prosecutions, or absent an express provision at least requiring compliance with the Department of Health regulations, and in view of the circumstances and policy considerations which prompted the statute's passage, the Legislature did not intend *N.Y. Veh. & Traf. Law § 1194(5)* to make the validity of breath test results depend upon, or to condition the admission in evidence of test results upon, compliance with 10 N.Y. Comp. Codes R. & Regs. Tit. 59.5(d). The validity of such tests is to be determined in accordance with medical and scientific standards generally and that intrinsic evidence, rather than standards fixed by departmental rules, properly measures reliability and accuracy of test results.

***Evidence > Demonstrative Evidence > Foundational Requirements***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Sobriety Tests***

[HN8] At the outset the court notes that the admissibility in evidence of any breath test result depends upon presenting an adequate foundation. It further appears that the elements of a necessary foundation are: (1) that there was compliance with any statutory requirement, *N.Y. Veh. & Traf. Law §§ 1193-a* and 1194; (2) that a specified type of breath testing device was used to analyze a breath sample and that such device is scientifically reliable for measuring the percent of alcohol in the blood through a chemical analysis of a subject's breath, unless such reliability has been judicially recognized; (3) that the testing device was in proper working order; (4) that the person giving and interpreting the test was properly qualified; (5) that the chemicals used in the test were of the proper kind and mixed in the proper proportions. In this regard the court notes that a random sampling of the particular lot the ampoules were from is probably sufficient to show such propriety; (6) that the test was properly conducted.

***Evidence > Scientific Evidence > Toxicology***

[HN9] A determination regarding the proper functioning of a breathalyzer must be made on a case-by-case basis and must rely on the intrinsic evidence presented at trial. Each case must be looked at anew and each must stand or fall on its own facts and no judicial formula can be conjured up to supplant what appears on the face of the record of an individual case.

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Toxicology***

[HN10] The court recognizes that the breathalyzer is scientifically reliable for determining the percentage of alcohol in the blood if tests are conducted in accordance with proper procedures.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

**Evidence > Scientific Evidence > Toxicology**

[HN11] Even a reading from an untested breathalyzer machine is admissible in a prosecution for driving while ability impaired or driving while intoxicated in violation of *N.Y. Veh. & Traf. Law* §§ 1192(1) or 1192(3). However, such evidence cannot alone be sufficient for conviction under §§ 1192(1) or 1192(3), and the deficiency in proof can be supplied by the opinion testimony of qualified observers of the defendant's conduct, speech and demeanor to establish the fact of the defendant's impaired ability or intoxication.

**Criminal Law & Procedure > Guilty Pleas > General Overview****Criminal Law & Procedure > Trials > Judicial Discretion****Criminal Law & Procedure > Sentencing > Concurrent Sentences**

[HN12] *N.Y. Veh. & Traf. Law* § 1196 reads: a driver may be convicted of a violation of § 1192(1), (2) or (3), notwithstanding that the charge laid before the court alleged a violation of § 1192(2) or (3), and regardless of whether or not such conviction is based on a plea of guilty. *N.Y. Veh. & Traf. Law* § 1192(2) and (3) were intended to be separate crimes, neither mutually inclusive nor exclusive. Moreover, they may be joined as multiple counts in one indictment since they are based upon the same criminal transaction. After the trial of a multiple count indictment containing concurrent counts only those on which only concurrent sentences could be imposed and if those counts are noninclusory when the offense charged is not one greater than any of those charged in the others and when the latter are not all lesser offenses included within the greater, the court may in its discretion submit one or more or all thereof to the jury.

**HEADNOTES: Motor vehicles -- driving under influence of alcohol -- if only evidence is breathalyzer reading, breathalyzer must be proved to have been in proper working order when it was used to test accused motorist's breath -- when motorist is accused of driving while intoxicated, he cannot lawfully be convicted of violating more than one of three subdivisions (*Vehicle and Traffic Law*, § 1192, subds. 1, 2, 3).**

1. Evidence that a motorist was driving while he was intoxicated or while his ability was impaired by the consumption of alcohol (*Vehicle and Traffic Law*, § 1192 *et seq.*) may consist of the testimony of qualified observers of his conduct, speech and demeanor, plus a reading from even an untested breathalyzer or other breath-analyzing machine or device. But, if the only evidence offered is a reading from such a machine or device, then proof is required that medical and scientific standards were complied with in the method or technique which was used to test this particular motorist's breath. The method or technique need not be the one which has been promulgated by the State Department [\*\*\*2] of Health (in *10 NYCRR* 59.5 [d]); nor need there be competent evidence of the percentage of the alcoholic content of the reference solution which was used to test and equilibrate the breathalyzer or other breath-analysis device; nevertheless, there must be competent proof that the breathalyzer or other breath-analysis device was in proper working order when it was used to test this particular motorist's breath.

2. When the accusatory instrument is only one simplified traffic information charging intoxication only (*Vehicle and Traffic Law*, § 1192, subd. 3), the accused motorist can be convicted of violating either subdivision 1 or subdivision 2 or subdivision 3 of said section 1192 (cf. § 1196), but he cannot lawfully be convicted of violating more than one of those three subdivisions.

**COUNSEL:**

*Richard A. Battaglini* for William H. Meikrantz, appellant.

*Scanlon, Vetrano & Ringwood* (*Vincent P. Vetrano* of counsel), for Joseph W. Kopesky, appellant.

*Patrick D. Monserrate*, District Attorney (*Jon S. Blechman* of counsel), for respondent.

**JUDGES:**

Stephen Smyk, J.

**OPINION BY:**

SMYK

**OPINION:**

[\*892] [\*552] Appeals (1) by defendant William H. Meikrantz from the judgment of [\*\*\*3] the Justice Court, Town of Union, New York, convicting him of a violation of subdivision 2 of *section 1192 of the Vehicle and Traffic Law*; [\*553] and (2) by defendant Joseph W. Kopesky from the judgment of the Justice Court, Town of Vestal, New York, convicting him of a violation of subdivisions 1, 2, and 3 of *section 1192 of the Vehicle and Traffic Law*.

These appeals present three questions of first impression. First, whether a breath test, to be considered valid in this State, must be performed according to certain Department of Health [\*893] rules and regulations. Second, are the testing and equilibration of a breathalyzer machine adequate to prove the validity of a breath test result where no competent evidence is presented at trial to establish the alcoholic content of the reference solution used to test and equilibrate the machine. Finally, can a defendant charged only with a violation of subdivision 3 of *section 1192 of the Vehicle and Traffic Law* be properly convicted, pursuant to section 1196 of that law, of violations of subdivisions 1, 2, and 3 of section 1192. Because these and other cases not yet ready for decision call for a thorough evaluation of the procedure [\*\*\*4] which should be followed in traffic cases involving the use of breath testing instruments, we take occasion to write at some length on all three points.

In considering the first issue, we must examine relevant sections of the Vehicle and Traffic Law and look to pertinent provisions of part 59 of the Administrative Rules and Regulations of the New York State Department of Health, in title 10 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (*10 NYCRR 59.1 et seq.*).

[HN1] Subdivision 2 of *section 1192 of the Vehicle and Traffic Law* states: "No person shall operate a motor vehicle while he has [.12] \* .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter."

\* Chapters 450 and 451 of the Laws of 1972, eff. Jan. 1, 1973. Note: Material bracketed [] was in effect until Dec. 31, 1972.

[HN2] Subdivision 5 of section 1194 [\*\*\*5] (L. 1971, ch. 928) reads: "The department of health shall issue and file rules and regulations approving satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination was properly given. The provisions of this subdivision do not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the department of health."

[\*\*554] [HN3] Section 59.1(a) (*10 NYCRR 59.1[a]*) defines "techniques or methods" as used in subdivision 5 of section 1194 (L. 1971, ch. 928) of the Vehicle and Traffic Law, as "the collection, processing and determination of the alcoholic content of body fluids such as human blood or urine as well as methods for the determination [\*894] of the alcoholic content of breath or alveolar air by approved methods."

[HN4] Section 59.5 (*10 NYCRR 59.5*) provides, in relevant part: "Breath testing techniques and methods must meet the following [\*\*\*6] criteria: \* \* \* (d) the result of an analysis of a suitable reference sample, such as air equilibrated with a reference solution of alcoholic content of greater than 0.08 percent weight per volume at a known temperature, must agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume, or such

limits as set by the State Commissioner of Health. This analysis shall immediately follow the analysis of the breath of the subject and shall be recorded."

In the case of defendant Meikrantz, evidence at trial revealed that the result of the analysis of the reference sample immediately following the analysis of defendant's breath differed from the purported reference solution value by .03 percent weight per volume. Regarding defendant Kopesky, the variance was .02 percent weight per volume. Hence, in neither case were the standards stipulated in *10 NYCRR 59.5(d)* met.

The defendants argue that the Legislature, in enacting subdivision 5 of section 1194 (L. 1971, ch. 928) of the Vehicle and Traffic Law, conferred upon the New York State Department of Health the authority to promulgate approved "techniques or methods" for determining the alcoholic [\*\*\*7] content of breath. They contend that *10 NYCRR 59.5* was the result of this delegation of authority. They further maintain that pursuant to subdivision 5 of section 1194 (L. 1971, ch. 928), a chemical analysis of a person's breath, to be considered valid, must be performed according to those "techniques or methods." In other words, they contend that the Legislature intended subdivision 5 of section 1194 (L. 1971, ch. 928) to condition the admission in evidence of breath test results upon compliance with *10 NYCRR 59.5(d)*. We disagree.

At the outset, there can be no serious dispute that the language of subdivision 5 of section 1194 (L. 1971, ch. 928) is somewhat ambiguous and inarticulate. However, where there is doubt as to the meaning intended to be expressed by a statute, resort may be had to various rules for determining such meaning.

[HN5] In making such a determination, we must construe the language of the statute as we find it, or as it is written (*People v. Friedman*, 302 N. Y. 75; *People v. Kupprat*, 6 N Y 2d 88), not as we believe it should have been written (*People v. Olah*, 300 N. Y. 96). Under the [\*\*555] doctrine of separation of powers, it is fundamental [\*\*\*8] that courts may not legislate, nor may they change [\*895] legislation. Freedom to construe a statute is not freedom to amend it (*Sexauer & Lemke v. Burke & Sons Co.*, 228 N. Y. 341).

In determining legislative intent, we may interpret the law in the light of its historical background or the circumstances leading to its enactment (*Matter of Stupack*, 274 N. Y. 198). We may consider the objects and purposes which the Legislature sought to accomplish by such legislation (*Matter of Hogan v. Culkin*, 18 N Y 2d 330), and the policy which induced its enactment (*MVAIC v. Eisenberg*, 18 N Y 2d 1). Also, as an aid to statutory construction, we may resort to decisions of courts of other States construing language of similar import (*Williams v. Tompkins, Inc.*, 208 App. Div. 574).

Aside from the question of whether subdivision 5 of section 1194 (L. 1971, ch. 928) properly delegates authority to the Department of Health to establish rules and regulations approving satisfactory techniques or methods governing the conduct of chemical analyses, the People argue that, had the Legislature intended to make the validity of breath test results depend upon compliance [\*\*\*9] with such techniques or methods, it could easily have found apt words to express it (*Hennessy v. Walker*, 279 N. Y. 94). We note in this regard that the North Carolina Legislature apparently had no difficulty expressing itself in a similar statute which reads: "Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose. The State Board of Health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Board of Health; provided, that in no case shall the arresting officer or officers administer said test." (*N. C. Gen. Stat.*, § 20-139.1, subd. [b], cited in *People v. Powell*, 279 N. C. 608, 610-611, 184 S. E. 2d 243, 244; see, also, W. Va. Code, ch. 17C, art. 5A, §§ 1-5 cited in *People v. Hood*, 184 S. E. 2d 334, 336-337.) Certainly, [\*\*\*10] no language is present in said subdivision 5 of section 1194 which even remotely suggests such import. Furthermore, said subdivision 5 of section 1194, unlike a similar California statute, fails to even expressly require that chemical tests be performed according to rules and regulations adopted by the Department of Health [\*\*556] (see Cal. Codes, Health and Safety [\*896] Code, § 436.52 cited in *People v. Foulger*, 26 Cal. App. 3d

*Supp. 1, 3).*

On its face, said subdivision 5 of section 1194 provides for the issuance of permits by the Department of Health to persons deemed competent to conduct chemical tests for alcohol, and further provides that if such an analysis is made by a person possessing such a permit, it shall be presumptive evidence that such a test was properly given. The statute also provides that the Department of Health shall issue and file rules and regulations approving satisfactory methods to ascertain the competence of individuals to conduct and supervise chemical analyses for alcohol. It specifically allows the introduction of test results made by persons not holding permits, but in such cases the presumption of propriety does not apply.

Prior [\*\*\*11] to the passage of the section, the qualification of persons who conduct chemical tests for intoxication in charges of violations of *section 1192 of the Vehicle and Traffic Law* often resulted in long drawn-out testimony and cross-examination, sometimes distracting from the main issue of the trial, the alcoholic content of the defendant's breath. In some areas, the court's insistence upon expert testimony of what is described as a routine procedure (*People v. Donaldson, 36 A D 2d 37*) resulted in the clogging of court calendars and a reluctance to proceed to trial in these cases. Also, some operators of chemical test devices did not have sufficient training to be able to provide sound testimony as to the validity of the procedures which they followed. [HN6] Hence, we are persuaded that subdivision 5 of section 1194 was enacted to provide that the Department of Health would establish qualifications for the certification of operators and analysts to assure that tests would be properly conducted and analyzed and that such persons would be competent to testify as to the procedures followed. The issuance of a permit by the Department of Health presumptively qualifies such person and [\*\*\*12] his testimony. We feel the intended result, therefore, was the more expeditious and proper handling of driving-while-intoxicated cases. However, the defense is still able to introduce evidence in a situation in which the test may not, in fact, have been properly given.

Accordingly, [HN7] absent a provision of the statute excluding the evidence in criminal prosecutions, or absent an express provision at least requiring compliance with the Department of Health regulations, and in view of the circumstances and policy considerations which prompted the statute's passage, we do not believe the Legislature intended said subdivision 5 of section [\*897] 1194 to make the validity of breath test results depend upon, or to condition the admission in evidence of test results upon, compliance with *10 NYCRR 59.5(d)*. We further believe that the validity of such tests is to be determined in accordance with medical and scientific standards generally and that [\*\*\*557] intrinsic evidence, rather than standards fixed by departmental rules, properly measures reliability and accuracy of test results (*People v. Monahan, 25 N Y 2d 378*).

However, the result we reach does not affect defense counsel's [\*\*\*13] right to make any proper use of the noncompliance of a given breath test with the Department of Health rules and regulations in an attempt to persuade the trier of fact that the test result was invalid. We note in this regard that it may even be proper for defense counsel to read pertinent provisions of the regulations in evidence (*Executive Law, § 106*).

We turn now to the question of whether it is a necessary foundation, for the admission in evidence of breath test results, to prove by competent evidence the alcoholic content of the reference solution used to test and equilibrate breath testing instruments. By "testing" and "equilibrating" we mean both the weekly testing of breathalyzers by local police forces and the analysis of a reference sample which immediately follows the analysis of a subject's breath pursuant to current police procedure.

In testing and equilibrating, analyses are conducted using a suitable reference sample, such as air equilibrated with an alcoholic reference solution (usually 0.15% weight per volume at a known temperature). The reference solution is delivered monthly in a sealed bottle to local police stations directly from the manufacturer. Upon its [\*\*\*14] arrival, the reference solution is poured into an electric simulator assembly resembling a canning jar, and the assembly is plugged in to warm the solution to the proper temperature (usually 34 degrees C). Accompanying the reference solution is a manufacturer's laboratory certificate of analysis showing that the lot from which the bottled solution was taken was random sampled with stated results, and that the alcohol and water used in the solution were found to be free of any

interfering substances. A label showing the alcoholic content or value of the new reference solution as found by the laboratory is also enclosed and is affixed to the front of the simulator assembly at the station. A reference sample, vapor from the predetermined alcoholic solution simulating breath, is then passed through the breathalyzer machine [\*898] in order to obtain a reading on the gauge and verify the reference solution value.

A weekly test is actually comprised of several successive analyses using reference samples. Between each test the breathalyzer machine is flushed or purged with clear air. The test conducted immediately following the subject's test is a single analysis and is preceded [\*\*\*15] by a similar purge of the machine. The result of each analysis should equal or closely approximate the purported value of the reference solution and the result of the analyses comprising a weekly test should be identical. In this way, the breathalyzer operator can determine if [\*\*558] a breathalyzer machine is functioning properly and the results it yields are accurate and reliable.

Defendants argue, and the People concede, that at neither of these trials was competent evidence adduced to establish the alcoholic content of the reference solution used to test and equilibrate their breathalyzers. The defendants contend that this lack of proof renders the breath test invalid and that, consequently, the admission of the test results in evidence was reversible error. Hence, they maintain that unless it is clearly demonstrated that the reference solution is of the value it purports to be it cannot be scientifically determined if a breath testing instrument is functioning properly or the test results it renders are accurate and reliable.

The point raised is well taken, but we do not believe it necessary for the People to prove by competent evidence the value of the reference solution [\*\*\*16] in all breathalyzer cases.

[HN8] At the outset we note that the admissibility in evidence of any breath test result depends upon presenting an adequate foundation. It further appears that the elements of a necessary foundation are:

- (1) that there was compliance with any statutory requirement (see *Vehicle and Traffic Law*, §§ 1193-a and 1194);
- (2) that a specified type of breath testing device was used to analyze a breath sample and that such device is scientifically reliable for measuring the percent of alcohol in the blood through a chemical analysis of a subject's breath, *unless* such reliability has been judicially recognized (e.g., *People v. Donaldson*, 36 A D 2d 37, *supra* [the breathalyzer]);
- (3) that the testing device was in proper working order;
- (4) that the person giving and interpreting the test was properly qualified (e.g., *People v. Donaldson*, *supra*);
- (5) that the chemicals used in the test (i.e., the ampoules used in a breathalyzer) were of the proper kind and mixed in the [\*899] proper proportions (*People v. Donaldson*, *supra*). In this regard we note that random sampling of the particular lot the ampoules were from is probably sufficient [\*\*\*17] to show such propriety (see *People v. Coffman*, 502 P. 2d 605 [Ore.]; *State v. Baker*, 56 Wn. 2d 846);
- (6) that the test was properly conducted.

All elements of a proper foundation must be met and each is aimed to insure that the results of a given subject's breath test are accurate and reliable. The present allegation of error is directed toward the third element alone, namely, and more particularly, whether the breathalyzer used in the defendants' tests was proven to be in proper working order. We feel this element has special significance in regard to the validity of test results.

[\*\*559] [HN9] A determination regarding the proper functioning of a breathalyzer must be made on a case-by-case basis and must rely on the intrinsic evidence presented at trial. Each case must be looked at anew and each must stand or fall on its own facts and no judicial formula can be conjured up to supplant what appears on the face of the record of an individual case. With this in mind, we turn to the records of the instant cases.

At the trial of defendant Meikrantz, the prosecution offered and the court admitted into evidence, presumably under CPLR 4518 (subd. [c]), two photocopies [\*\*\*18] of calibration records (certificates of calibration) made by the New York State Police laboratory in Albany. The term "calibration" refers to an adjustment of the breathalyzer machine as distinguished from a mere test of the machine. If a weekly test at the station indicates a machine malfunction, it is sent to the laboratory to be calibrated. However, one of the certificates therein was dated two and one-quarter years before the defendant's test, while the other was made three months thereafter. Consequently, the defendant's specific objections on the grounds of remoteness on the one hand and irrelevancy on the other should have been sustained and the records suppressed.

Two weekly test records (alcohol breath simulator records) were then introduced, as a business records exception to the hearsay rule. These records apparently showed the results of two weekly tests conducted three days prior to the defendants' test and four days subsequent thereto. However, the results of these weekly tests are not set forth on the record.

Finally, the analysis immediately following the defendant's test was testified to. The witness police officer stated that the value of the alcoholic reference [\*\*\*19] solution was 0.15% while the [\*900] result obtained was 0.12%. The witness never adequately explained the reason for the deviation of 0.03%.

On the other hand, in the case of defendant Kopesky, two separate breathalyzer tests were conducted and the results of both tests were identical, 0.19%.

Testimony was admitted that the reference solution used to test and equilibrate the breathalyzer in question was prepared by a private hospital laboratory and that its purported value was 0.15%. The probability of deterioration of the alcoholic reference solution over a period of time was amply covered in the testimony, as was the consequence that the weekly test results were slightly lower than the purported value of such solution. In this regard, an alcohol breath simulator record was admitted in evidence showing the results of weekly tests conducted at the police station for the six weeks immediately prior to the defendant's tests and for the five weeks immediately following them. The results of the successive [\*560] analyses comprising each weekly test were demonstrated to be nearly identical. The same exhibit also showed that an analysis of the reference sample was conducted [\*\*\*20] immediately following each of the defendant's tests, with the same results.

Finally, testimony revealed that a certificate of calibration made by the manufacturer of the breathalyzer was delivered with the machine in question when it was purchased nine months prior to the defendant's tests.

We note that in *Kopesky* a recorded history of the results of weekly tests conducted within a reasonable time before and after the defendant's test was compiled and introduced, while in *Meikrantz* evidence of only two such weekly tests was introduced, one of which was conducted after the fact.

In both cases, the results of the analyses which follow the subjects' breath test were admitted and in each instance there was a deviation from the purported value of the reference solution. Only in *Kopesky*, however, were the deviations adequately explained in terms of the probable deterioration of the alcoholic solution.

Furthermore, in *Kopesky* the results of all tests and equilibrations, both before and after the defendant's tests, were demonstrated to have closely approximated the purported reference solution value (with any deviation accounted for) and the results of the analyses comprising [\*\*\*21] each weekly test were shown to be nearly identical. No such showing was made on the record in *Meikrantz*.

[\*901] Finally, at defendant *Kopesky's* trial testimony was admitted concerning a manufacturer's certificate of calibration dated nine months before defendant's test while the calibration certificates introduced in *Meikrantz* were remote.

While our higher courts have not spelled out the exact limits to which an accused drunken driver may go to plumb

the accuracy of the testing devices and solutions, we are not prepared to cast the burden on the People in all cases of offering proof of the accuracy of the reference solution's value, beyond the comparative analyses made in *Kopesky*. We are persuaded that in *Kopesky* there was "reasonable proof" of the reliability of the reference solution and the accuracy of the breathalyzer itself. Such proof was lacking in the case of defendant *Meikrantz*.

Accordingly, at this point the conviction of defendant *Meikrantz* is reversed, since the proper functioning of the breathalyzer was not sufficiently shown.

We feel that the conclusion we have reached regarding defendant *Kopesky*'s case is well-grounded in reason. [\*\*\*22] [HN10] We recognize that the breathalyzer is scientifically reliable for determining the percentage of alcohol in the blood if tests are conducted in accordance with [\*\*561] proper procedures ( *People v. Donaldson*, 36 A D 2d 37, *supra*). Furthermore, in *Kopesky* we believe it to be more than coincidental that the results of the several analyses comprising each weekly test were nearly identical and that the results of all tests and equilibrations closely approximated the purported value of the reference solution with deviations explained on the record. To us it is inconceivable how the breathalyzer and the reference solution could both be inaccurate to the same degree (cf. *People v. Stephens*, 52 Misc 2d 1070).

We further believe that in view of the possible presumption of propriety applicable in breathalyzer cases under the aforesaid subdivision 5 of section 1194 and in light of previous Court of Appeals opinions regarding untested speedometers and radar devices ( *People v. Magri*, 3 N Y 2d 562 and *People v. Dusing*, 5 N Y 2d 126), that [HN11] even a reading from an untested breathalyzer machine is admissible in a prosecution for driving while ability impaired [\*\*\*23] or driving while intoxicated in violation of subdivision 1 of section 1192 or subdivision 3 of *section 1192 of the Vehicle and Traffic Law*. However, such evidence cannot alone be sufficient for conviction under these sections, and the deficiency in proof can be supplied by the opinion testimony of qualified observers of the defendant's conduct, speech and [\*902] demeanor to establish the fact of the defendant's impaired ability or intoxication (see *People v. Morris*, 63 Misc 2d 124, 127).

The third and final issue for consideration, is raised on behalf of *Kopesky* alone. He contends that his conviction must be reversed because of an erroneous jury charge at his trial. We agree.

The defendant was arrested and charged with driving while intoxicated in violation of subdivision 3 of *section 1192 of the Vehicle and Traffic Law*. At his trial on that charge, the court instructed the jury that the defendant could be found guilty of one or more of the following: driving while ability impaired in violation of subdivision 1 of section 1192, driving with .12 of one percentum or more by weight of alcohol in his blood in violation of subdivision 2 of section 1192 and driving while [\*\*\*24] intoxicated in violation of subdivision 3 of section 1192. The defendant was subsequently found guilty of violating all three of the subdivisions.

[HN12] Section 1196 reads: "A driver may be convicted of a violation of subdivisions one, two *or* three of section eleven hundred ninety-two, notwithstanding that the charge laid before the court alleged a violation of subdivision two *or* three of section eleven hundred ninety-two, and regardless of whether or not such *conviction* is based on a plea of guilty." (Emphasis ours.)

Subdivisions 2 and 3 of section 1192 were intended to be separate crimes, neither mutually inclusive nor exclusive ( *People v. McDonough*, 39 A D 2d 188; *People v. Rudd*, 41 A D 2d 875). Moreover, they may be joined as [\*\*562] multiple counts in one indictment since they are based upon the same criminal transaction ( *CPL 200.20*, subd. 2, par. [a]; *People v. Rudd*, *supra*). As the court said in *Rudd*, *supra*, p. 876: "After the trial of a multiple count indictment containing concurrent counts only (those [on] which only concurrent sentences could be imposed) and if those counts are noninclusory (when the offense charged is not one greater [\*\*\*25] than any of those charged in the others and when the latter are not all lesser offenses included within the greater), the court may in its discretion submit one or more or all thereof to the jury ( *CPL 300.40*, subd. 3, par. [a])."

Our examination of the *Rudd* decision persuades us that, for a defendant to be convicted of both driving under the influence of alcohol in violation of subdivision 2 of section 1192 and driving while intoxicated in violation of subdivision 3 of section 1192, it is necessary for the police to serve two uniform traffic tickets and file two simplified informations or otherwise follow [\*903] a procedure having the effect of a multicount indictment. Where, however, only one uniform traffic ticket is served and one simplified information is filed, for example, charging a violation of subdivision 3 of section 1192, section 1196 provides that a defendant may be found guilty of but one of the enumerated subdivisions of section 1192 (see *People v. Kaepfel*, 74 Misc 2d 220, 222).

Nevertheless, at least one lower court in New York has indicated that even this restricted interpretation of section 1196 violates the United States Constitution, Sixth Amendment [\*\*\*26] and *section 6 of article I of the New York State Constitution* (*People v. Fielder*, 75 Misc 2d 446). For this reason we believe the safer course for the People to follow in driving-while-intoxicated cases is either:

(1) Immediately file an information charging subdivision 3 of section 1192. When the necessary additional factual allegations become available to support subdivision 2, a second information may be filed charging subdivision 2 of section 1192, and thereafter an application can be made to consolidate both informations pursuant to *CPL 200.20* (subd. 4) and *CPL 100.45*. Under such circumstances the court should have no difficulty in exercising its discretion in granting said application as provided in *CPL 200.20* (subd. 5); or

(2) immediately filing a misdemeanor complaint charging violation of both subdivisions 2 and 3 of section 1192 (*CPL 100.05*, subd. 4) and then subsequently filing a supporting deposition supplying the necessary factual allegations to support the charge of subdivision 2 of section 1192 (*CPL 170.65*, subs. 1 and 2).

Incidentally, it may be stated that subdivision 1 of section 1192 need not be included in the information, in that the same would be [\*\*\*27] a lesser included charge (*CPL 360.50*).

[\*\*563] In the case of defendant *Kopesky*, we find that, because only one simplified information was filed -- that charging a violation of subdivision 3 of section 1192 -- the charge below was erroneous and improper. Further, we cannot say that such error was merely technical and did not affect the substantial rights of the defendant (see *CPL 470.05*, subd. 1). Accordingly, defendant *Kopesky's* conviction is set aside.

In conclusion, for the above reasons, the convictions of both defendants are reversed.

76 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Respondent, v. Paul Skupien, Appellant**

[NO NUMBER IN ORIGINAL]

County Court of New York, Orleans County

*33 Misc. 2d 908; 227 N.Y.S.2d 165; 1962 N.Y. Misc. LEXIS 3475*

April 20, 1962

**DISPOSITION:** [\*\*\*1]

The judgment of conviction is reversed, the fine remitted, and the information dismissed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his conviction from the Court of Special Sessions in the Town of Barre, Orleans County, New York for speeding in violation of *N.Y. Veh. & Traf. Law § 1180(b)(2)*.

**OVERVIEW:** The arresting officer allegedly observed defendant speeding. The officer testified that when he saw defendant's car, he believed it to be travelling at 70 miles per hour. When the officer "clocked" defendant later, he was traveling at a rate of 60 miles per hour. Defendant alleged that he slowed down in a restricted speed zone to below 50 miles per hour and then accelerated to 50 miles per hour after leaving the restricted zone. Based on evidence relating to the accuracy of the officer's speedometer and the officer's observations, defendant was convicted of speeding. He was fined and his license was suspended. Defendant appealed. The court reversed, holding that the proof was insufficient to support defendant's conviction. The court explained that there was not a proper foundation for admitting evidence of a speed deviation record, which related to the accuracy of the officer's speedometer. The person who tested the accuracy of the speedometer was never called as a witness. Further, the officer failed to qualify himself as a person able to judge and estimate speed of motor vehicles. Thus, he was an unqualified observer of defendant's speed.

**OUTCOME:** The court reversed defendant's conviction for speeding. The court ordered that the fine be remitted and the information be dismissed.

**CORE TERMS:** speed, speedometer, deviation, observer, arresting officer, accuracy, miles, speeding, untested, radar, qualify, proper foundation, estimating, signature, arresting, zone, motor vehicles, estimation, Traffic Law, personal observation, burden of proving, motor vehicle, particularize, unqualified, calibration, introduce, witnessed, remitted, supplied, clocking

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Demonstrative Evidence > Admissibility  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*  
[HN1] Evidence of a reading in an untested speedometer is admissible, but is not, without more, sufficient for a speeding conviction. Additional proof can be supplied by the testimony of qualified observers.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Testimony > Experts > General Overview*  
[HN2] A witness should particularize his experience in judging and estimating the speed of moving vehicles so the trier of the facts can determine as to whether or not such witness is a qualified observer.

**HEADNOTES: Motor vehicles -- speeding -- defendant's conviction for speeding was reversed where there was reading of untested speedometer plus opinion of nonqualified observer as to speed.**

Defendant's conviction for speeding in violation of section 1180 (subd. [b], par. 2) of the Vehicle and Traffic Law was reversed, the fine was remitted and the information was dismissed. A speed deviation record of the speedometer on the arresting officer's automobile was received in evidence without the laying of a proper foundation therefor. The arresting officer's testimony as to testing the speedometer by radar did not establish the accuracy thereof. The speedometer was considered an untested speedometer requiring additional testimony by qualified observers to support the conviction and such evidence was not here supplied. The arresting officer failed to particularize his experience in judging and estimating the speed of moving vehicles and was therefore an unqualified observer. The People failed to meet the burden of proving defendant's guilt.

**COUNSEL:**

*Ellsworth M. Murray* for appellant.

*Franklin [\*\*\*2] B. Cropsey, District Attorney*, for respondent.

**JUDGES:**

J. Kenneth Serve, J.

**OPINION BY:**

SERVE

**OPINION:**

[\*908] [\*\*166] On February 13, 1962, the defendant was convicted by a Court of Special Sessions in the Town of Barre, Orleans County, New York (Alvin G. Peglow, J), of speeding, in violation of section 1180 (subd. [b], par. 2) of the Vehicle and Traffic Law, and was fined \$ 100 and his license suspended.

Upon this appeal, the defendant claims that substantial errors were committed at his trial in that evidence was admitted as to the "clocking" of the defendant without proper proof of the accuracy of the speedometer in the car of the arresting officer, and further that the witness, who testified as to the speed of the defendant's car, was not a qualified observer.

[\*\*167] The arresting officer, who was the sole witness for the People, testified that, based upon his personal observation of the defendant's car, it was his opinion that the defendant was operating [\*909] the same at 70 miles per hour, and that when he clocked the defendant, the defendant was traveling at a rate of 60 miles per hour. The officer's opinion as to the speed of defendant's car was based on his [\*\*\*3] observation north of the hamlet of Barre Center, while the alleged violation for which the defendant was arrested and tried occurred south of Barre Center, and several miles distant from the place where the officer estimated the defendant's speed to be 70 miles per hour.

It is important to note that the officer testified that Barre Center constituted a restricted speed zone, and that the defendant slowed down in such speed zone, and after the defendant left Barre Center, the officer started, for the first time, to clock the defendant. The defendant testified he reduced his speed below 50 miles per hour in the Barre Center restricted speed zone, and then increased the speed of his vehicle to 50 miles per hour after he left and travelled south of Barre Center. The defendant's testimony on this point was uncontradicted and in fact the arresting officer also testified that the defendant reduced speed through the hamlet of Barre Center. The arrest was based on the speed that the defendant allegedly operated his motor vehicle at while the officer clocked him. The officer did not testify as to his personal opinion of the speed of the defendant's car for the period and in the location [\*\*\*4] while the clocking was being done.

In an effort to prove the accuracy of the speedometer on the car of the arresting officer, there was received in evidence, over the defendant's objection, an exhibit entitled "Speed Deviation Record". On this exhibit appeared a signature over a line, which was apparently that of the arresting officer, and indicated such officer to be the driver of the car at the time of the test, and also the signature of an officer over a line which identified such officer as the "Observer". No testimony was offered as to the validity of either signature. In reference to the deviation record, the witness testified that he witnessed the calibration test. The witness did not state what he observed nor how the speedometer deviation test was made. Neither did he state, from his own personal observation of the test, what the results of the test were. The witness merely stated that "This car being calibrated on the 26th day of November, 1961, myself being the witness to calibration and driver of the car, I would like to introduce in evidence a speed deviation record, which I witnessed as an observer to the visual meter." Based on such testimony, the speed deviation [\*\*\*5] record was admitted into evidence. The last-quoted testimony does not constitute a proper foundation for the admission into evidence of the [\*910] speed deviation record. At no time was the person who conducted such test called as a witness. Based upon the testimony [\*\*168] in this case, it was error to admit into evidence the speed deviation record.

No effort was made to lay a proper foundation to introduce the speed deviation record into evidence under the provisions of section 374-a of the Civil Practice Act.

The arresting officer also testified that "Just prior to using that car, that car was tested by myself on radar on which I was radar pick-up man. No difference in tally of speed." This testimony does not meet the standard of establishing the accuracy of the speedometer in the officer's car.

Without the speed deviation record, and there being no other competent evidence as to the accuracy of the speedometer in the arresting officer's car, for the purposes of this case such speedometer must be considered an untested speedometer or at most a speedometer which had been tested but with no results of the test being properly received in evidence.

[HN1] Evidence of the reading [\*\*\*6] in an untested speedometer is admissible, but is not, without more, sufficient for a speeding conviction (*People v. Heyser*, 2 N Y 2d 390). The additional proof can be supplied by the testimony of qualified observers (*People v. Magri*, 3 N Y 2d 562).

The arresting officer attempted to qualify himself as a person competent to judge the speed of a moving automobile by testifying as follows: "I based the estimation of speed on the fact that I had 4 years and 10 months as a member of the State Police, I drive a motor vehicle 50,000 miles a year, 30,000 of that mileage on Division of State Police cars and I am ruled experienced on speed by the New York Traffic Division. A radar operator for a length of time on the job and

33 Misc. 2d 908, \*910; 227 N.Y.S.2d 165, \*\*168;  
1962 N.Y. Misc. LEXIS 3475, \*\*\*6

have had a number of occasions to judge the accuracy and establishment of speed while observing cars from off road parking and use of radar." By such testimony, the witness has established that he has had ample opportunity to observe motor vehicles, but he has failed to testify as to the nature of the observations in the field of estimating speed; and further, if he did make observations of motor vehicles in order to estimate their speed, he has omitted [\*\*\*7] to state what the results of his observations were and if his estimation of speed at such times was substantially correct when checked against recognized devices for measuring speed. No other testimony was offered to qualify the witness to render an opinion as to speed of moving vehicles. [HN2] The witness should particularize his experience in judging and estimating [\*911] the speed of moving vehicles so the trier of the facts can determine as to whether or not such witness is a qualified observer. The witness in this case has failed to properly qualify himself as a person able to judge speed of moving automobiles, and his opinion of the speed of the defendant's automobile should be disregarded. (*People v. Tanner*, 6 Misc 2d 1007.)

[\*\*169] Leaving out the speed deviation record, which was erroneously received in evidence, the only evidence in the record is the testimony of the reading of an untested speedometer, plus the opinion of an unqualified observer as to the speed. This amount of proof is clearly insufficient to sustain the People's burden of proving the defendant's [\*\*\*8] guilt.

The judgment of conviction is reversed, the fine remitted, and the information dismissed.

77 of 195 DOCUMENTS



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**The People of the State of New York, Respondent, v. Paul Skupien, Appellant**

[NO NUMBER IN ORIGINAL]

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**COUNSEL:**

*Ellsworth M. Murray* for appellant.

*Franklin [\*\*\*2] B. Cropsey, District Attorney*, for respondent.

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33 Misc. 2d 908, \*908; 227 N.Y.S.2d 165, \*\*166;  
1962 N.Y. Misc. LEXIS 3475, \*\*\*2

[\*\*167] The arresting officer, who was the sole witness for the People, testified that, based upon his personal observation of the defendant's car, it was his opinion that the defendant was operating [\*909] the same at 70 miles per hour, and that when he clocked the defendant, the defendant was traveling at a rate of 60 miles per hour. The officer's opinion as to the speed of defendant's car was based on his [\*\*\*3] observation north of the hamlet of Barre Center, while the alleged violation for which the defendant was arrested and tried occurred south of Barre Center, and several miles distant from the place where the officer estimated the defendant's speed to be 70 miles per hour.

It is important to note that the officer testified that Barre Center constituted a restricted speed zone, and that the defendant slowed down in such speed zone, and after the defendant left Barre Center, the officer started, for the first time, to clock the defendant. The defendant testified he reduced his speed below 50 miles per hour in the Barre Center restricted speed zone, and then increased the speed of his vehicle to 50 miles per hour after he left and travelled south of Barre Center. The defendant's testimony on this point was uncontradicted and in fact the arresting officer also testified that the defendant reduced speed through the hamlet of Barre Center. The arrest was based on the speed that the defendant allegedly operated his motor vehicle at while the officer clocked him. The officer did not testify as to his personal opinion of the speed of the defendant's car for the period and in the location [\*\*\*4] while the clocking was being done.

In an effort to prove the accuracy of the speedometer on the car of the arresting officer, there was received in evidence, over the defendant's objection, an exhibit entitled "Speed Deviation Record". On this exhibit appeared a signature over a line, which was apparently that of the arresting officer, and indicated such officer to be the driver of the car at the time of the test, and also the signature of an officer over a line which identified such officer as the "Observer". No testimony was offered as to the validity of either signature. In reference to the deviation record, the witness testified that he witnessed the calibration test. The witness did not state what he observed nor how the speedometer deviation test was made. Neither did he state, from his own personal observation of the test, what the results of the test were. The witness merely stated that "This car being calibrated on the 26th day of November, 1961, myself being the witness to calibration and driver of the car, I would like to introduce in evidence a speed deviation record, which I witnessed as an observer to the visual meter." Based on such testimony, the speed deviation [\*\*\*5] record was admitted into evidence. The last-quoted testimony does not constitute a proper foundation for the admission into evidence of the [\*910] speed deviation record. At no time was the person who conducted such test called as a witness. Based upon the testimony [\*\*168] in this case, it was error to admit into evidence the speed deviation record.

No effort was made to lay a proper foundation to introduce the speed deviation record into evidence under the provisions of section 374-a of the Civil Practice Act.

The arresting officer also testified that "Just prior to using that car, that car was tested by myself on radar on which I was radar pick-up man. No difference in tally of speed." This testimony does not meet the standard of establishing the accuracy of the speedometer in the officer's car.

Without the speed deviation record, and there being no other competent evidence as to the accuracy of the speedometer in the arresting officer's car, for the purposes of this case such speedometer must be considered an untested speedometer or at most a speedometer which had been tested but with no results of the test being properly received in evidence.

[HN1] Evidence of the reading [\*\*\*6] in an untested speedometer is admissible, but is not, without more, sufficient for a speeding conviction (*People v. Heyser*, 2 N Y 2d 390). The additional proof can be supplied by the testimony of qualified observers (*People v. Magri*, 3 N Y 2d 562).

The arresting officer attempted to qualify himself as a person competent to judge the speed of a moving automobile by testifying as follows: "I based the estimation of speed on the fact that I had 4 years and 10 months as a member of the State Police, I drive a motor vehicle 50,000 miles a year, 30,000 of that mileage on Division of State Police cars and I am ruled experienced on speed by the New York Traffic Division. A radar operator for a length of time on the job and

33 Misc. 2d 908, \*910; 227 N.Y.S.2d 165, \*\*168;  
1962 N.Y. Misc. LEXIS 3475, \*\*\*6

have had a number of occasions to judge the accuracy and establishment of speed while observing cars from off road parking and use of radar." By such testimony, the witness has established that he has had ample opportunity to observe motor vehicles, but he has failed to testify as to the nature of the observations in the field of estimating speed; and further, if he did make observations of motor vehicles in order to estimate their speed, he has omitted [\*\*\*7] to state what the results of his observations were and if his estimation of speed at such times was substantially correct when checked against recognized devices for measuring speed. No other testimony was offered to qualify the witness to render an opinion as to speed of moving vehicles. [HN2] The witness should particularize his experience in judging and estimating [\*911] the speed of moving vehicles so the trier of the facts can determine as to whether or not such witness is a qualified observer. The witness in this case has failed to properly qualify himself as a person able to judge speed of moving automobiles, and his opinion of the speed of the defendant's automobile should be disregarded. (*People v. Tanner*, 6 Misc 2d 1007.)

[\*\*169] Leaving out the speed deviation record, which was erroneously received in evidence, the only evidence in the record is the testimony of the reading of an untested speedometer, plus the opinion of an unqualified observer as to the speed. This amount of proof is clearly insufficient to sustain the People's burden of proving the defendant's [\*\*\*8] guilt.

The judgment of conviction is reversed, the fine remitted, and the information dismissed.

78 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Edmund Sarver, Defendant****[NO NUMBER IN ORIGINAL]****City Court of New York, New Rochelle, Sitting as Court of Special Sessions*****205 Misc. 523; 129 N.Y.S.2d 9; 1954 N.Y. Misc. LEXIS 2346*****March 31, 1954****PRIOR HISTORY:** [\*\*\*1]

Prosecution for speeding in violation of ordinance.

**DISPOSITION:**

Defendant's motions to dismiss are denied and the defendant is found guilty as charged.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant moved to dismiss the prosecution against him for operating a motor truck at a rate of speed of 36 miles per hour in violation of an ordinance which fixed the maximum rate of speed at 25 miles per hour.**OVERVIEW:** Defendant was charged with operating a motor vehicle at a rate of speed higher than the maximum speed allowed under an ordinance. In support of the charge of violation of the ordinance made by a police officer, the city offered a graph recording made on a radar-type device which purported to measure the speed of vehicles. Defendant contended that the ordinance in question required the speed limit to be exceeded for a distance of one eighth of a mile before a conviction could be had and he also contended that the speed meter was inaccurate and unreliable and the evidence of the graph output could not be used to sustain the charge against him. The court denied defendant's motion to dismiss the charge and the court found defendant guilty as charged. The court concluded that the radar device was sufficiently accurate to make admissible the recording made by it. The testimony of an engineering expert and the tests and calibrations performed by the police conclusively showed that the radar or electromagnetic speed meter was an accurate and reliable instrument for the measurement of a vehicle's velocity. As such, the evidence was sufficient to support the charge against defendant.**OUTCOME:** The court denied defendant's motion to dismiss the prosecution against him for speeding and the court found defendant guilty as charged.**CORE TERMS:** speed meter, speed, radar, electromatic, graph, mile, approaching, truck, wave, ordinance, zone, feet,

police car, frequency, transmitter, approached, arresting officer, recording, electrical engineering, conclusively, speedometer, radar-type, measuring, accuracy, oncoming, reliable, velocity, meter, scientific, information charging

### LexisNexis(R) Headnotes

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview*

[HN1] The use of ordinary speedometers or other scientific devices for determining the speed of motor vehicles has long been accepted in this and other States.

*Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Scientific Evidence > General Overview*

[HN2] The radar speed meter is no different than any other scientific device. Admissibility of tests made by it depends entirely on its accuracy and reliability.

**HEADNOTES: Motor vehicles -- speeding -- radar speed-checking device -- (1) radar-type instrument known as electromatic speed meter shown to be accurate and reliable instrument for measurement of velocity of motor vehicles; graph recording made thereon admissible in evidence in prosecution for speeding; defendant found guilty -- (2) operation of electromatic speed meter explained; "zone of influence" of meter extends for thirty feet; contention that wording of ordinance of City of New Rochelle under which prosecution was had required speed limit to be exceeded for one eighth of mile disposed of adversely to defendant on motion to dismiss information made prior to trial -- (3) officer in "radar car" notified arresting officer ahead that green truck traveling at excessive speed had approached and passed his car; circumstances conclusively established defendant's identity and no further identification necessary -- (4) information charging defendant properly sworn to by arresting officer, who testified that defendant's car approached him at [\*\*\*2] stated speed in excess of permissible limit; were city's evidence of speed confined solely to speed meter graph, officer operating speed meter would have been logical person to swear to information.**

1. A radar-type instrument known as an electromatic speed meter having been shown to be an accurate and reliable instrument for the measurement of velocity of motor vehicles, a graph recording made thereon was admissible in evidence in a prosecution for speeding. Defendant was found guilty as charged.

2. The electromatic speed meter operates in this fashion: A police car from which the radar speed meter operates parks alongside the road. A transmitter in the shape of a box is placed at the rear of the car or on the ground facing oncoming traffic. This transmitter sends out sound waves that strike the oncoming cars and return to a receiver which is part of the speed meter. By measuring the change in frequency in these sound waves as they return compared with their frequency when sent out, the device is able to record the speed of an approaching car. The "zone of influence", the zone through which the speed of the car is measured, extends for approximately 30 feet and is approximately [\*\*\*3] 175 feet away from the speed meter device. When the approaching car reaches a point about 175 feet away from the transmitter, the sound waves returning after hitting the approaching car are permanently recorded on a graph and in this way record the speed of the approaching car as it passes through the "zone of influence". As the defendant's green truck went by the parked police car from which the speed meter was operated, an officer therein notified an officer in a police car parked a quarter of a mile ahead, and the officer in that car stopped the truck and issued a summons to the defendant. The contention that the wording of the ordinance of the City of New Rochelle charged to have been violated required the speed limit to be exceeded for a distance of one eighth of a mile before a conviction might be had, was disposed of adversely to the defendant on a motion to dismiss the information made prior to the trial.

3. The officer in the "radar car" notified the arresting officer ahead that a green truck traveling at an excessvie speed

had approached and passed his car. The circumstances conclusively established the defendant's identity and no further identification was necessary. [\*\*\*4]

4. The information charging the defendant was properly sworn to by the arresting officer, who testified that the defendant's car approached him at a stated speed in excess of the limit prescribed by the ordinance. *It seems*, that were the city's evidence of speed confined solely to the speed meter graph, the officer who was operating the speed meter would have been the logical person to swear to the information.

#### **COUNSEL:**

*Murray C. Fuerst, Corporation Counsel (John A. Bodmer of counsel), for plaintiff.*

*Frank J. Nardozzi for defendant.*

*Joseph E. Deady, amicus curiae.*

#### **JUDGES:**

Kennedy, Acting City Judge.

#### **OPINION BY:**

KENNEDY

#### **OPINION:**

[\*524] [\*\*10] The defendant, Edmund Sarver, is charged with operating a motor truck along Wilmot Road in the city of New Rochelle at a rate of speed of thirty-six miles per hour on July 30, 1953, in violation of an ordinance [\*525] which fixes the maximum rate of speed at twenty-five miles an hour.

In support of the charge of violation of the ordinance made by a police officer of the City of New Rochelle, the city has offered a graph recording made on a radar-type device which purports to measure the speed of vehicles. This device is [\*\*\*5] known as an electromatic speed meter and is manufactured by the automatic signal division of Eastern Industries, Inc., at Norwalk, Connecticut. The city offered evidence as to the manner in which the electromatic speed meter operated and as to its accuracy.

As an expert witness, Dr. John Kopper of the faculty of Johns Hopkins University was called by the city. The witness stated that he received a Doctor's degree in Electrical Engineering from Johns Hopkins University in 1944, that he practiced electrical engineering for over twenty years, and that he taught courses in electrical engineering at Johns Hopkins for twelve years. He stated the electromatic speed recorder was a radar-type of instrument which measured velocity by a radar method.

Simplifying the substance of his testimony, it may be said that the electromatic speed recorder operates in this manner: The police car from which the radar speed meter operates parks alongside of the road. A transmitter in the shape of a box is placed at the rear of the car or on the ground in back of the car facing the oncoming traffic. This transmitter sends out sound waves that strike the oncoming cars and return to a receiver which is part [\*\*\*6] of the speed meter. By measuring the change in frequency in these sound waves as they return compared with their frequency when sent out, the device is able to record the speed of an approaching car. The "zone of influence" or the zone through which the speed of the car is measured extends for approximately 30 feet and is approximately 175 feet away from the speed meter device. In other words, when the approaching car reaches a point about 175 feet away from the transmitter, the sound waves returning after hitting the approaching car, are recorded on a graph and in this way record the speed of [\*\*11] the approaching car as it passes through the "zone of influence" a distance of approximately 30 feet.

205 Misc. 523, \*525; 129 N.Y.S.2d 9, \*\*11;  
1954 N.Y. Misc. LEXIS 2346, \*\*\*6

If the oncoming car had been stopped in the "zone of influence" there would be no change in the wave frequency between transmission and reception. However, there is always a change or frequency shift between transmission and reception when the oncoming car is moving.

[\*526] The moving car coming into the stream of sound waves, makes the waves bounce back to the receiver, something in the manner in which an echo is produced. The change in their frequency indicates the rate of [\*\*\*7] speed of the approaching automobile.

A permanent record of the speed is made on a graph by the electromatic speed meter.

The city called three police officers who were used in apprehending the defendant. Officer Thomas Rabbitt had charge of operating the electric speed meter itself. He holds the United States Government Radio Telephone Operator's License First Class, and was a chief radioman in the Navy, and studied electrical engineering for two years at New York University.

As the defendant's green truck went by the parked car in which Thomas Rabbitt was seated operating the electromatic speed meter, Rabbitt noticed the graph indicated excessive speed. He called and motioned to officer Barnett seated in the same car that the defendant's green truck should be stopped. Officer Barnett called by telephone to officer William Burkhardt who was in another police car a quarter of a mile ahead. Officer Burkhardt stopped the defendant's green truck and issued a summons to the defendant.

At the conclusion of the city's case and at the end of the trial, the defendant moved to dismiss the information on various grounds. In support of his contentions, defendant's counsel has submitted a [\*\*\*8] brief which extensively covers the authorities on the points raised.

The argument that the wording of the ordinance in question requires the speed limit to be exceeded for a distance of one eighth of a mile before a conviction may be had was first made on a motion to dismiss the information prior to the trial. In deciding this motion the court ruled otherwise. The defendant's contentions in this respect have been disposed of in the court's opinion on the preliminary motion. No further comment is necessary here.

Defendant contends that officer Rabbitt, who directed the arrest, could not identify the defendant. The testimony showed that officer Rabbitt saw a green truck which approached and passed him at an excessive rate of speed as recorded on the speed meter's graph. This information was passed on to officer Burkhardt, who arrested the driver of the green truck, who is the defendant. The circumstances conclusively established the defendant's identity. No further identification is necessary.

[\*527] [\*\*12] Defendant's contention that the speed meter was inaccurate and unreliable is not sustained by the evidence. Dr. Kopper testified that the electromatic speed meter was [\*\*\*9] accurate to within a possible variation of one or two miles per hour. In an extreme case a diathermy machine in the immediate vicinity of the speed meter could be responsible for an error of from three or four miles per hour.

The evidence shows that the meter was calibrated or tested on the morning of the day when the defendant was ticketed by the police officers using it. A police car was run past the radar car. The reading on the speedometer of this car was compared with the recording on the graph of the electromatic speed meter. The speed meter was found to be accurate when compared with the conventional speedometer in the police car. The electromatic speed meter had been acquired some six months before the day in question by the New Rochelle police department. It had been frequently tested during the six months' period and found to be accurate.

In this case the information charging the defendant with violation of the ordinance was sworn to by the arresting officer, officer Burkhardt. He testified that the defendant's car approached him at a speed of approximately thirty-five miles per hour, so that he could be said to have personal knowledge of the violation. If the city's evidence [\*\*\*10] of speed was solely confined to the speed meter graph, it would seem that officer Rabbitt, who was operating the speed

meter, would be the logical person to swear to the information.

[HN1] The use of ordinary speedometers or other scientific devices for determining the speed of motor vehicles has long been accepted in this and other States. (*City of Spokane v. Knight*, 96 Wash. 403, 165 P. 105; *Commonwealth v. Buxton*, 205 Mass. 49, 91 N.E. 128; *Carrier v. Commonwealth*, 242 S.W.2d 633 [Ky].)

Speaking of radar speed meter in *City of Rochester v. Torpey* (204 Misc. 1023, 1026, 128 N.Y.S.2d 864), the Monroe County Court said: "The use of radar is comparatively new as a means of bringing about the arrest of violators of ordinances pertaining to the speed of automobiles and until such time as the courts recognize radar equipment as a method of accurately measuring the speed of automobiles in those cases in which The People rely solely upon the speed indicator of the radar equipment, it will be necessary to establish by expert testimony the accuracy of radar for the purpose of measuring speed."

[\*528] In *People v. Offermann* (204 Misc. 769, 125 N.Y.S.2d [\*\*\*11] 179), an Erie County Special Term reversed a judgment of conviction because there was no competent evidence as to the accuracy and reliability of the radar speed meter. Such is not the case here. On the other hand, the City Court of Yonkers in *People v. Katz* (205 Misc. 522), recently found defendant guilty on evidence [\*13] supplied by a radar or electromatic speed meter, holding the speed meter to be "a scientifically reliable device which if properly operated and properly functioning falls in the category of recognized instruments used to determine the speed of moving vehicles."

On the evidence before the court, it conclusively appears that the radar or electromatic speed meter is an accurate and reliable instrument for the measurement of velocity. It must take its place along with the ordinary mechanical speedometer as a device which accurately measures the speed of a moving vehicle. Over the years the courts have accepted the use of many scientific instruments and devices. Recently the use of a machine known as the "drunkometer" designed to measure the sobriety of those tested by it has been upheld by this court. (*People v. Spears*, 201 Misc. 666, 114 N.Y.S.2d [\*\*\*12] 869.) [HN2] The radar speed meter is no different than any other scientific device. Admissibility of tests made by it depends entirely on its accuracy and reliability.

On all the evidence, the court is convinced that the device is sufficiently accurate to make admissible the recordings made by it.

Defendant's motions to dismiss are denied and the defendant is found guilty as charged.

79 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**The People of the State of New York, Plaintiff, v. Edmund Sarver, Defendant****[NO NUMBER IN ORIGINAL]****City Court of New York, New Rochelle, Sitting as Court of Special Sessions*****205 Misc. 523; 129 N.Y.S.2d 9; 1954 N.Y. Misc. LEXIS 2346*****March 31, 1954****PRIOR HISTORY:** [\*\*\*1]

Prosecution for speeding in violation of ordinance.

**DISPOSITION:**

Defendant's motions to dismiss are denied and the defendant is found guilty as charged.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant moved to dismiss the prosecution against him for operating a motor truck at a rate of speed of 36 miles per hour in violation of an ordinance which fixed the maximum rate of speed at 25 miles per hour.**OVERVIEW:** Defendant was charged with operating a motor vehicle at a rate of speed higher than the maximum speed allowed under an ordinance. In support of the charge of violation of the ordinance made by a police officer, the city offered a graph recording made on a radar-type device which purported to measure the speed of vehicles. Defendant contended that the ordinance in question required the speed limit to be exceeded for a distance of one eighth of a mile before a conviction could be had and he also contended that the speed meter was inaccurate and unreliable and the evidence of the graph output could not be used to sustain the charge against him. The court denied defendant's motion to dismiss the charge and the court found defendant guilty as charged. The court concluded that the radar device was sufficiently accurate to make admissible the recording made by it. The testimony of an engineering expert and the tests and calibrations performed by the police conclusively showed that the radar or electromagnetic speed meter was an accurate and reliable instrument for the measurement of a vehicle's velocity. As such, the evidence was sufficient to support the charge against defendant.**OUTCOME:** The court denied defendant's motion to dismiss the prosecution against him for speeding and the court found defendant guilty as charged.**CORE TERMS:** speed meter, speed, radar, electromatic, graph, mile, approaching, truck, wave, ordinance, zone, feet,

police car, frequency, transmitter, approached, arresting officer, recording, electrical engineering, conclusively, speedometer, radar-type, measuring, accuracy, oncoming, reliable, velocity, meter, scientific, information charging

### LexisNexis(R) Headnotes

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > General Overview*

[HN1] The use of ordinary speedometers or other scientific devices for determining the speed of motor vehicles has long been accepted in this and other States.

*Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Scientific Evidence > General Overview*

[HN2] The radar speed meter is no different than any other scientific device. Admissibility of tests made by it depends entirely on its accuracy and reliability.

**HEADNOTES: Motor vehicles -- speeding -- radar speed-checking device -- (1) radar-type instrument known as electromatic speed meter shown to be accurate and reliable instrument for measurement of velocity of motor vehicles; graph recording made thereon admissible in evidence in prosecution for speeding; defendant found guilty -- (2) operation of electromatic speed meter explained; "zone of influence" of meter extends for thirty feet; contention that wording of ordinance of City of New Rochelle under which prosecution was had required speed limit to be exceeded for one eighth of mile disposed of adversely to defendant on motion to dismiss information made prior to trial -- (3) officer in "radar car" notified arresting officer ahead that green truck traveling at excessive speed had approached and passed his car; circumstances conclusively established defendant's identity and no further identification necessary -- (4) information charging defendant properly sworn to by arresting officer, who testified that defendant's car approached him at [\*\*\*2] stated speed in excess of permissible limit; were city's evidence of speed confined solely to speed meter graph, officer operating speed meter would have been logical person to swear to information.**

1. A radar-type instrument known as an electromatic speed meter having been shown to be an accurate and reliable instrument for the measurement of velocity of motor vehicles, a graph recording made thereon was admissible in evidence in a prosecution for speeding. Defendant was found guilty as charged.

2. The electromatic speed meter operates in this fashion: A police car from which the radar speed meter operates parks alongside the road. A transmitter in the shape of a box is placed at the rear of the car or on the ground facing oncoming traffic. This transmitter sends out sound waves that strike the oncoming cars and return to a receiver which is part of the speed meter. By measuring the change in frequency in these sound waves as they return compared with their frequency when sent out, the device is able to record the speed of an approaching car. The "zone of influence", the zone through which the speed of the car is measured, extends for approximately 30 feet and is approximately [\*\*\*3] 175 feet away from the speed meter device. When the approaching car reaches a point about 175 feet away from the transmitter, the sound waves returning after hitting the approaching car are permanently recorded on a graph and in this way record the speed of the approaching car as it passes through the "zone of influence". As the defendant's green truck went by the parked police car from which the speed meter was operated, an officer therein notified an officer in a police car parked a quarter of a mile ahead, and the officer in that car stopped the truck and issued a summons to the defendant. The contention that the wording of the ordinance of the City of New Rochelle charged to have been violated required the speed limit to be exceeded for a distance of one eighth of a mile before a conviction might be had, was disposed of adversely to the defendant on a motion to dismiss the information made prior to the trial.

3. The officer in the "radar car" notified the arresting officer ahead that a green truck traveling at an excessvie speed

had approached and passed his car. The circumstances conclusively established the defendant's identity and no further identification was necessary. [\*\*\*4]

4. The information charging the defendant was properly sworn to by the arresting officer, who testified that the defendant's car approached him at a stated speed in excess of the limit prescribed by the ordinance. *It seems*, that were the city's evidence of speed confined solely to the speed meter graph, the officer who was operating the speed meter would have been the logical person to swear to the information.

#### **COUNSEL:**

*Murray C. Fuerst, Corporation Counsel (John A. Bodmer of counsel), for plaintiff.*

*Frank J. Nardozzi for defendant.*

*Joseph E. Deady, amicus curiae.*

#### **JUDGES:**

Kennedy, Acting City Judge.

#### **OPINION BY:**

KENNEDY

#### **OPINION:**

[\*524] [\*\*10] The defendant, Edmund Sarver, is charged with operating a motor truck along Wilmot Road in the city of New Rochelle at a rate of speed of thirty-six miles per hour on July 30, 1953, in violation of an ordinance [\*525] which fixes the maximum rate of speed at twenty-five miles an hour.

In support of the charge of violation of the ordinance made by a police officer of the City of New Rochelle, the city has offered a graph recording made on a radar-type device which purports to measure the speed of vehicles. This device is [\*\*\*5] known as an electromatic speed meter and is manufactured by the automatic signal division of Eastern Industries, Inc., at Norwalk, Connecticut. The city offered evidence as to the manner in which the electromatic speed meter operated and as to its accuracy.

As an expert witness, Dr. John Kopper of the faculty of Johns Hopkins University was called by the city. The witness stated that he received a Doctor's degree in Electrical Engineering from Johns Hopkins University in 1944, that he practiced electrical engineering for over twenty years, and that he taught courses in electrical engineering at Johns Hopkins for twelve years. He stated the electromatic speed recorder was a radar-type of instrument which measured velocity by a radar method.

Simplifying the substance of his testimony, it may be said that the electromatic speed recorder operates in this manner: The police car from which the radar speed meter operates parks alongside of the road. A transmitter in the shape of a box is placed at the rear of the car or on the ground in back of the car facing the oncoming traffic. This transmitter sends out sound waves that strike the oncoming cars and return to a receiver which is part [\*\*\*6] of the speed meter. By measuring the change in frequency in these sound waves as they return compared with their frequency when sent out, the device is able to record the speed of an approaching car. The "zone of influence" or the zone through which the speed of the car is measured extends for approximately 30 feet and is approximately 175 feet away from the speed meter device. In other words, when the approaching car reaches a point about 175 feet away from the transmitter, the sound waves returning after hitting the approaching car, are recorded on a graph and in this way record the speed of [\*\*11] the approaching car as it passes through the "zone of influence" a distance of approximately 30 feet.

205 Misc. 523, \*525; 129 N.Y.S.2d 9, \*\*11;  
1954 N.Y. Misc. LEXIS 2346, \*\*\*6

If the oncoming car had been stopped in the "zone of influence" there would be no change in the wave frequency between transmission and reception. However, there is always a change or frequency shift between transmission and reception when the oncoming car is moving.

[\*526] The moving car coming into the stream of sound waves, makes the waves bounce back to the receiver, something in the manner in which an echo is produced. The change in their frequency indicates the rate of [\*\*\*7] speed of the approaching automobile.

A permanent record of the speed is made on a graph by the electromatic speed meter.

The city called three police officers who were used in apprehending the defendant. Officer Thomas Rabbitt had charge of operating the electric speed meter itself. He holds the United States Government Radio Telephone Operator's License First Class, and was a chief radioman in the Navy, and studied electrical engineering for two years at New York University.

As the defendant's green truck went by the parked car in which Thomas Rabbitt was seated operating the electromatic speed meter, Rabbitt noticed the graph indicated excessive speed. He called and motioned to officer Barnett seated in the same car that the defendant's green truck should be stopped. Officer Barnett called by telephone to officer William Burkhardt who was in another police car a quarter of a mile ahead. Officer Burkhardt stopped the defendant's green truck and issued a summons to the defendant.

At the conclusion of the city's case and at the end of the trial, the defendant moved to dismiss the information on various grounds. In support of his contentions, defendant's counsel has submitted a [\*\*\*8] brief which extensively covers the authorities on the points raised.

The argument that the wording of the ordinance in question requires the speed limit to be exceeded for a distance of one eighth of a mile before a conviction may be had was first made on a motion to dismiss the information prior to the trial. In deciding this motion the court ruled otherwise. The defendant's contentions in this respect have been disposed of in the court's opinion on the preliminary motion. No further comment is necessary here.

Defendant contends that officer Rabbitt, who directed the arrest, could not identify the defendant. The testimony showed that officer Rabbitt saw a green truck which approached and passed him at an excessive rate of speed as recorded on the speed meter's graph. This information was passed on to officer Burkhardt, who arrested the driver of the green truck, who is the defendant. The circumstances conclusively established the defendant's identity. No further identification is necessary.

[\*527] [\*\*12] Defendant's contention that the speed meter was inaccurate and unreliable is not sustained by the evidence. Dr. Kopper testified that the electromatic speed meter was [\*\*\*9] accurate to within a possible variation of one or two miles per hour. In an extreme case a diathermy machine in the immediate vicinity of the speed meter could be responsible for an error of from three or four miles per hour.

The evidence shows that the meter was calibrated or tested on the morning of the day when the defendant was ticketed by the police officers using it. A police car was run past the radar car. The reading on the speedometer of this car was compared with the recording on the graph of the electromatic speed meter. The speed meter was found to be accurate when compared with the conventional speedometer in the police car. The electromatic speed meter had been acquired some six months before the day in question by the New Rochelle police department. It had been frequently tested during the six months' period and found to be accurate.

In this case the information charging the defendant with violation of the ordinance was sworn to by the arresting officer, officer Burkhardt. He testified that the defendant's car approached him at a speed of approximately thirty-five miles per hour, so that he could be said to have personal knowledge of the violation. If the city's evidence [\*\*\*10] of speed was solely confined to the speed meter graph, it would seem that officer Rabbitt, who was operating the speed

205 Misc. 523, \*527; 129 N.Y.S.2d 9, \*\*12;  
1954 N.Y. Misc. LEXIS 2346, \*\*\*10

meter, would be the logical person to swear to the information.

[HN1] The use of ordinary speedometers or other scientific devices for determining the speed of motor vehicles has long been accepted in this and other States. (*City of Spokane v. Knight*, 96 Wash. 403, 165 P. 105; *Commonwealth v. Buxton*, 205 Mass. 49, 91 N.E. 128; *Carrier v. Commonwealth*, 242 S.W.2d 633 [Ky].)

Speaking of radar speed meter in *City of Rochester v. Torpey* (204 Misc. 1023, 1026, 128 N.Y.S.2d 864), the Monroe County Court said: "The use of radar is comparatively new as a means of bringing about the arrest of violators of ordinances pertaining to the speed of automobiles and until such time as the courts recognize radar equipment as a method of accurately measuring the speed of automobiles in those cases in which The People rely solely upon the speed indicator of the radar equipment, it will be necessary to establish by expert testimony the accuracy of radar for the purpose of measuring speed."

[\*528] In *People v. Offermann* (204 Misc. 769, 125 N.Y.S.2d [\*\*\*11] 179), an Erie County Special Term reversed a judgment of conviction because there was no competent evidence as to the accuracy and reliability of the radar speed meter. Such is not the case here. On the other hand, the City Court of Yonkers in *People v. Katz* (205 Misc. 522), recently found defendant guilty on evidence [\*\*13] supplied by a radar or electromatic speed meter, holding the speed meter to be "a scientifically reliable device which if properly operated and properly functioning falls in the category of recognized instruments used to determine the speed of moving vehicles."

On the evidence before the court, it conclusively appears that the radar or electromatic speed meter is an accurate and reliable instrument for the measurement of velocity. It must take its place along with the ordinary mechanical speedometer as a device which accurately measures the speed of a moving vehicle. Over the years the courts have accepted the use of many scientific instruments and devices. Recently the use of a machine known as the "drunkometer" designed to measure the sobriety of those tested by it has been upheld by this court. (*People v. Spears*, 201 Misc. 666, 114 N.Y.S.2d [\*\*\*12] 869.) [HN2] The radar speed meter is no different than any other scientific device. Admissibility of tests made by it depends entirely on its accuracy and reliability.

On all the evidence, the court is convinced that the device is sufficiently accurate to make admissible the recordings made by it.

Defendant's motions to dismiss are denied and the defendant is found guilty as charged.

80 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**State of Ohio, Appellee v. Kenneth R. Cook, Jr., Appellant****Court of Appeals No. WD-04-029****COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY***2006 Ohio 6062; 2006 Ohio App. LEXIS 6006***November 17, 2006, Decided**

**PRIOR HISTORY:** [\*\*1] Trial Court No. TRC-0311259A. *State v. Cook, 2005 Ohio 1550, 2005 Ohio App. LEXIS 1514 (Ohio Ct. App., Wood County, Mar. 31, 2005)*

**DISPOSITION:** JUDGMENT AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant's motion to reopen his appeal was granted by the court after it affirmed his conviction for driving with a prohibited alcohol level (DUI) and his sentence thereon. The court rendered its decision upon reopening.

**OVERVIEW:** Defendant was charged with DUI, speeding, and weaving. His motion to suppress the results of his field sobriety tests (FSTs) and BAC DataMaster test (BACD) results was denied. The trial court had determined that the police officer had correctly administered the FSTs, that the BACD machine was in proper working order, and that the officer had probable cause to arrest defendant based either on the results of the FSTs or upon the officer's own observations of defendant. Defendant thereafter entered a no contest plea and he was convicted of DUI. The first appeal resulted in an affirmance, in part, based on the presumption of regularity of the suppression proceedings, as no transcript was submitted. The court granted defendant's reopening request and the suppression transcript was filed. The court held that the trial court did not err in finding substantial compliance by the police officers involved with the applicable regulations for purposes of conducting the FSTs and the BACD. The State met its burden on a number of issues of showing proper administration and maintenance of the tests, the machinery, and the records. There was probable cause to arrest in the circumstances.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** administered, sobriety, motion to suppress, manual, probable cause to arrest, regulation, testing, calibration, machine, breath, influence of alcohol, driving, assignments of error, assignment of error, breath test, substantially complied, judicial notice, administering, standardized, alcohol, substantial compliance, strict compliance, admissible, admitting, lung, deep, packet, arrest, minute, air

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Trials > Burdens of Proof > Defense******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN1] The law applicable to a motion to suppress is as follows. A motion to suppress must provide a prosecutor with notice of the basis for the challenge. However, the basis need not be set forth with minute detail, only with sufficient particularity to put the prosecution on notice of the nature of the challenge. Once a defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the State to demonstrate proper compliance with the regulations involved.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause******Evidence > Scientific Evidence > Sobriety Tests***

[HN3] The Supreme Court of Ohio has held that in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures. Subsequently, by amending *R.C. § 4511.19(D)(4)*, the Ohio General Assembly mandated a "substantial compliance" standard for the admission of field sobriety test results and their use as evidence of probable cause. The Supreme Court of Ohio has acknowledged that "substantial compliance" is now the standard.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview******Evidence > Judicial Notice > Scientific & Technical Facts******Evidence > Scientific Evidence > Sobriety Tests***

[HN4] The Ohio Second District Court of Appeals has recognized that trial courts may take judicial notice of the National Highway Traffic and Safety Administration (NHTSA) manual. A trial court may take judicial notice of the NHTSA standards governing the administration of field sobriety tests, including the horizontal gaze nystagmus (HGN) test. The applicable testing procedures in Ohio are set forth in the DWI Detection Standardized Field Sobriety Testing Student Manual published by NHTSA. These standards are not subject to reasonable dispute because they are capable of accurate and ready determination by reference to the NHTSA manual itself, a source whose accuracy cannot be questioned given its status as the seminal authority in this area. As a result, NHTSA standards governing the administration of the HGN test are subject to judicial notice under *Evid. R. 201(B)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause******Criminal Law & Procedure > Arrests > Warrantless Arrest***

[HN5] The United States Supreme Court has held that probable cause for a warrantless arrest is based on whether, at a particular moment, the facts and circumstances within a police officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant a prudent man in believing that a petitioner had committed an offense. In making this determination, the Ohio Supreme Court in Homan noted that while field sobriety tests must be administered in strict (now substantial) compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where the test results must be excluded for lack of strict (now substantial) compliance.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN6] Pursuant to the decision of the Supreme Court of Ohio in Edwards, judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Ohio Director of Health, even though that evidence would not be admissible at trial.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN7] It is well-established that before the results of a breathalyzer test can be admitted into evidence to establish alcohol concentration under a *R.C. § 4511.19* prosecution, the State must show that it substantially complied with the methods approved by the Ohio Director of Health (ODH) in the administration of the test. Those methods approved by the ODH are set forth in the Ohio Administrative Code. Once the State introduces evidence of substantial compliance with the applicable regulations, the burden shifts to the defendant to show that he was prejudiced by anything less than complete technical compliance with the challenged regulation.

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***  
***Evidence > Authentication > Chain of Custody***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN8] Ohio Admin. Code 3702:53-06(A) and (B) address chain of custody issues and the requirement that laboratories successfully complete a national proficiency testing program. It is well-settled that the prosecution is not required to affirmatively demonstrate substantial compliance with every Ohio Department of Health regulation as a precondition to admitting alcohol concentration results. The prosecution's burden arises when a defendant has placed the operator's compliance with a particular regulation at issue.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN9] See Ohio Admin. Code 3701:53-02(C).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN10] As the Ohio Supreme Court has noted, the reason for waiting 20 minutes before testing a suspect with an

alcohol breath test is to eliminate the possibility that the test result is a product of anything other than the suspect's deep lung breath. Because the accuracy of the test results can be adversely affected if the suspect either ingests material orally, like food or drink, or regurgitates material internally, by belching or vomiting, the suspect must be observed for 20 minutes to verify that no external or internal material may cause a false reading. Where the testing officer waits the mandatory time period before administering the breath test, observes the suspect during that time period, and receives no indication that the breath testing device was malfunctioning, a trial court does not err in concluding that the State substantially complied with the Ohio Department of Health regulation requiring testing of deep lung breath.

**COUNSEL:** Kevin A. Heban and Gerald E. Galernik, for appellee.

Mark Gardner, for appellant.

**JUDGES:** PIETRYKOWSKI, J. Peter M. Handwork, J., Mark L. Pietrykowski, J., Dennis M. Parish, J., CONCUR.

**OPINION BY:** Mark L. Pietrykowski

**OPINION:**

#### **DECISION AND JUDGMENT ENTRY**

PIETRYKOWSKI, J.

[\*P1] This case is before the court following our decision and judgment entry of August 10, 2005, granting the motion of defendant-appellant, Kenneth R. Cook, Jr., to reopen his appeal from a judgment of the Perrysburg Municipal Court. That judgment of conviction and sentence was entered after appellant entered a plea of no contest to a charge of driving with a prohibited alcohol level.

[\*P2] The facts of this case were set forth in our decision and judgment entry of March 31, 2005, in which we affirmed appellant's conviction and sentence. See *State v. Cook, 6th Dist. No. WD-04-029, 2005 Ohio 1550*. For purposes of this reopening, however, we will restate them as follows.

[\*P3] In December 2003, appellant was charged with driving with a prohibited alcohol level ("DUI"), speeding and weaving. Appellant filed a combined motion [\*\*2] in limine, to dismiss, and to suppress on the following grounds: (1) the officer had no lawful basis to stop him and no probable cause to arrest him; (2) he was coerced into submitting to alcohol testing; (3) the alcohol testing was not conducted in accordance with applicable statutes and regulations; (4) the officer obtained statements from him in violation of his *Fifth* and *Sixth Amendment* rights; and (5) the field sobriety tests were not conducted in strict compliance with applicable standards. Appellee, the state of Ohio, opposed the motions.

[\*P4] Following a hearing, the trial court issued a decision and judgment entry denying the motion to suppress. Regarding the field sobriety tests, the court held that the arresting officer, Officer Randall Baker, administered the horizontal gaze nystagmus test and the walk and turn test in strict compliance with the standards approved by the National Highway Traffic and Safety Administration ("NHTSA") and that probable cause to arrest appellant for DUI could have been based on the results of these tests alone. Nevertheless, the court further concluded that probable cause to arrest appellant was warranted under the totality of the circumstances [\*\*3] given appellant's erratic driving, the odor of alcohol about his person, and Officer Baker's own observations of appellant's behavior, including appellant's performance on non-standardized tests. Regarding appellant's challenge to the BAC DataMaster test results, the court held that evidence admitted at the hearing demonstrated that the machine was in proper working order when the test was administered to appellant. After the lower court denied the motion to suppress, appellant pled no contest to and was convicted of the DUI charge.

[\*P5] Appellant subsequently appealed his conviction and sentence to this court in which he raised four assignments of error challenging various aspects of the trial court's denial of his motion to suppress. Under his first assignment of error, appellant challenged the trial court's admission of State's Exhibit 1 into evidence. That exhibit is a packet of documents certifying that the breath test machine (the BAC DataMaster) was functioning properly and that the officer performing the test was certified to do so. The packet also contained appellant's breath test results. The entire packet was accompanied by the affidavit of Detective Franklin Shinaver, [\*\*4] who averred that the records were true copies of documents made and kept in the ordinary course of business and were public records. Appellant argued that the lower court erred in admitting State's Exhibit 1 into evidence because admitting such evidence without live testimony violated his rights under the *confrontation clause of the Sixth and Fourteenth Amendments to the United States Constitution* and because the affidavit was not admissible under the Ohio Rules of Evidence. In our review of this assignment of error, we rejected appellant's arguments and held that the exhibit was admissible. Appellant also raised three additional assignments of error: that the state failed to introduce evidence that the breath test was properly conducted or that the machine had its calibration properly checked as required by Department of Health requirements; and that the state failed to establish probable cause to arrest appellant for driving under the influence of alcohol; and that the court erred in finding probable cause to believe that appellant was operating a vehicle under the influence of alcohol. Because the remaining assignments of error were dependent upon the transcript from the hearing [\*\*5] on the motion to suppress for resolution, and because appellant failed to file a transcript from that hearing, we presumed the regularity of the proceedings below, rejected the three assignments of error and affirmed the trial court's denial of appellant's motion to suppress.

[\*P6] In a decision and judgment entry of August 10, 2005, we granted appellant's motion to reopen his appeal for the purpose of considering the original second, third and fourth assignments of error. Appellant filed the transcript from the suppression hearing and now articulates his assignments of error as follows:

[\*P7] "Error I. The court committed substantial prejudicial error by finding that the breath testing machine was properly checked for calibration.

[\*P8] "Error II. The state failed to establish probable cause to arrest the defendant for driving under the influence of alcohol."

[\*P9] We will first address the second assignment of error in which appellant asserts that the state failed to establish that Officer Randall Baker had probable cause to arrest him for driving under the influence of alcohol and, as such, the lower court erred in denying his motion to suppress.

[\*P10] [\*\*6] [HN1] The law applicable to a motion to suppress is as follows. A motion to suppress must provide a prosecutor with notice of the basis for the challenge. *Xenia v. Wallace (1988)*, 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph one of the syllabus. However, the basis need not be set forth with minute detail, only with sufficient particularity to put the prosecution on notice of the nature of the challenge. *State v. Shindler (1994)*, 70 Ohio St.3d 54, 57-58, 1994 Ohio 452, 636 N.E.2d 319. Once a defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *State v. Johnson (2000)*, 137 Ohio App.3d 847, 851, 739 N.E.2d 1249, citing *State v. Plummer (1986)*, 22 Ohio St.3d 292, 294, 22 Ohio B. 461, 490 N.E.2d 902.

[\*P11] [HN2] When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger (1993)*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable [\*\*7] standard. *State v. Klein (1991)*, 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

[\*P12] In support of his assertion that Officer Baker lacked probable cause to arrest him for DUI, appellant contends that Officer Baker relied on two non-standardized field sobriety tests in determining appellant's level of

intoxication and that the state failed to establish that the standardized field sobriety tests that Officer Baker administered to him were conducted in compliance with the NHTSA standards. As such, appellant asserts that the tests could not be relied upon as a basis for establishing probable cause to arrest him for DUI.

[\*P13] In *State v. Homan (2000)*, 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952, at paragraph one of the syllabus, [HN3] the Supreme Court of Ohio held "[i]n order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures." Subsequently, by amending *R.C. 4511.19(D)(4)*, the General Assembly mandated a "substantial compliance" standard for the admission of field sobriety test results and their use as evidence of probable cause. The Supreme Court of Ohio has acknowledged that "substantial compliance" is now the standard. *State v. Schmitt, 101 Ohio St.3d 79, 2004 Ohio 37, at P 9, 801 N.E.2d 446*.

[\*P14] At the hearing on the motion to suppress, Officer Baker of the Rossford Police Department testified as follows. On December 4, 2003, at approximately 3:30 a.m., he was on standard patrol on I-75 in Wood County, Ohio when he observed a car traveling southbound at a high rate of speed. He then activated his radar unit and followed the car for approximately one-half to three-quarters of a mile. The radar unit indicated that the car Officer Baker was following was traveling at 77 m.p.h. in a 65 m.p.h. zone. Also over that distance, Officer Baker saw the car weave within its lane three times. Officer Baker then activated his overhead lights and pulled over the vehicle. Officer Baker approached the driver's side of the car and asked the driver, appellant, for his driver's license. As he spoke to appellant, Officer Baker noticed an odor of alcohol about appellant's person and appellant admitted that he had been drinking. While appellant remained seated in the car, Officer Baker conducted an initial horizontal gaze nystagmus ("HGN") test on him, which indicated that appellant was under the influence of alcohol. Officer Baker then removed appellant from the vehicle and readministered the HGN test while appellant was standing straight up with his head looking straight forward. Officer Baker testified that he administered the test twice on each eye, that he instructed appellant to watch his pen as he moved it in front of his eyes and that he watched appellant's eyes as appellant tried to track the pen. Officer Baker stated that in administering the test, he observed appellant's eyes drifting, that there was a lack of smooth pursuit, and that they demonstrated a nystagmus before reaching the 45 degree mark. Officer Baker also administered the portion of the test dealing with the nystagmus at maximum deviation. He testified that appellant registered all six clues on the HGN test and that based on his training and experience, he believed that appellant was under the influence of alcohol at the time he was detained.

[\*P15] Officer Baker also asked appellant to perform the walk and turn test. Officer Baker told appellant to imagine a line on the road, explained how to do the test and demonstrated the test. In performing this test, appellant went off balance when pivoting and raised his arms from his sides six inches. The impaired driver report that Officer Baker completed to document appellant's performance of the standardized tests also indicates that appellant did not touch his heel to his toe and that he stepped off of the line while walking. He did not ask appellant to perform the one legged stand test after learning that appellant had a knee problem. Finally, Officer Baker administered two non-standardized field sobriety tests, the alphabet test and the finger test. He asked appellant to recite the alphabet from A to Z. Three times, appellant stopped at the letter W and could not continue. Officer Baker demonstrated the finger test for appellant but appellant could not pass the test. Officer Baker then placed appellant under arrest for operating a motor vehicle while under the influence of alcohol.

[\*P16] Officer Baker testified that he was trained in alcohol detection at the Toledo Police Academy as well as through other courses and that in administering the field sobriety tests to appellant, he complied with those training requirements. Officer Baker further testified that the Alcohol Detention Apprehension and Prosecution ("ADAP") manual under which he was trained was consistent with the NHTSA manual. Officer Baker, however, never testified as to the NHTSA requirements, or for that matter the ADAP requirements, for the field sobriety tests that he administered, and neither manual was admitted into evidence at the hearing below. Nevertheless, during Officer Baker's testimony, appellant's counsel asked the court to take judicial notice of the NHTSA manual. After discussing the issue with the parties, the court stated that it needed to research the issue.

[\*P17] In his decision and judgment entry ruling on appellant's motion to suppress, the lower court determined that Officer Baker administered the HGN and walk and turn tests in strict compliance with the NHTSA testing methods. It therefore appears that the trial court took judicial notice of the requirements of the NHTSA manual. [HN4] The Ohio Second District Court of Appeals has recognized that trial court's may take judicial notice of the NHTSA manual. In *State v. Stritch*, 2d Dist. No. 20759, 2005 Ohio 1376, at P 16, the court held:

[\*P18] "Upon review, we now agree that [\*\*12] a trial court may take judicial notice of the NHTSA standards governing the administration of field sobriety tests, including the HGN test. In [*State v.*] *Shepard* [2d Dist. No. 2001-CA-34, 2002 Ohio 1817], we recognized that the applicable testing procedures in Ohio are set forth in the DWI Detection Standardized Field Sobriety Testing Student Manual published by NHTSA. These standards are not subject to reasonable dispute because they are capable of accurate and ready determination by reference to the NHTSA manual itself, a source whose accuracy cannot be questioned given its status as the seminal authority in this area. As a result, NHTSA standards governing the administration of the HGN test are subject to judicial notice under *Evid.R. 201(B)*."

[\*P19] See, also, *State v. Knox*, 2d Dist. No. 2005-CA-74, 2006 Ohio 3039; *State v. Radford*, 2d Dist. No. 2005-CA-58, 2006 Ohio 1610.

[\*P20] This case differs from our earlier decision in *State v. Nickelson* (July 20, 2001), 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261, in which we found that field sobriety tests should have been suppressed. In that case, the state introduced [\*\*13] testimony of officers as to which tests were conducted and how they were conducted but it did not introduce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, no witness testified as to those guidelines, and the manual itself was not admitted. Similarly, in *State v. Purdy*, 6th Dist. No. H-04-008, 2004 Ohio 7069, we held that where an officer only testified that the field sobriety tests were conducted in accordance with his training, and the manual was not admitted into evidence to document the NHTSA guidelines, the results of the field sobriety tests should have been suppressed. The courts, however, in those cases neither expressly nor impliedly took judicial notice of the NHTSA guidelines.

[\*P21] In the present case, Officer Baker testified that he administered the standardized field sobriety tests in conformance with his training, that the manual under which he was trained was consistent with the NHTSA manual and the trial court appears to have taken judicial notice of the manual. Under these circumstances, we find that the court did not err in finding that Officer Baker substantially complied with the NHTSA [\*\*14] requirements in administering the field sobriety tests and did not err in relying on the results of those tests to find that Officer Baker had probable cause to arrest appellant for DUI.

[\*P22] Assuming arguendo that the court should have suppressed the results of the field sobriety tests, we further find that Officer Baker had probable cause to arrest appellant for DUI. In [HN5] *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142, the United States Supreme Court held that probable cause for a warrantless arrest is based on " \* \* \* whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed the offense." In making this determination, the court in *Homan*, *supra* at 427, noted: "[w]hile field sobriety tests must be administered in strict [now substantial] compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding [\*\*15] of probable cause to arrest even where no field sobriety tests were administered or where \* \* \* the test results must be excluded for lack of strict [now substantial] compliance."

[\*P23] Officer Baker testified that his decision to arrest appellant was based on all of the facts and circumstances present at that time. Those facts included that appellant was driving erratically (speeding and weaving within his lane), that appellant had an odor of alcohol about his person and admitted to drinking, and Officer Baker's general observations of appellant as appellant attempted to perform the field sobriety tests administered. Based the facts and circumstances surrounding appellant's arrest, we conclude that Officer Baker had probable cause to arrest him for DUI

and the second assignment of error is not well-taken.

[\*P24] In his first assignment of error, appellant challenges the validity of the breath test administered to him after he was arrested, and the trial court's denial of his motion to suppress the results of that test. Appellant first asserts that the documents admitted into evidence at the hearing below failed to establish that the BAC DataMaster was properly checked [\*\*16] for calibration as required by the Ohio Department of Health Regulations. More specifically, appellant asserts that State's Exhibit 1 was not certified by proper affidavit or attested to by a representative of the Ohio Department of Health and therefore should not have been given any weight by the trial court in its determination as to whether the state's chemical tests complied with the methods approved by the Director of Health.

[\*P25] Initially, we note that in our prior decision of March 31, 2005, we already determined that admitting State's Exhibit 1 did not violate appellant's right to confront witnesses against him and that Detective Shinaver's affidavit was admissible to authenticate the documents as business records. To the extent that appellant raises these issues again, we find the argument not well taken under the doctrine of res judicata and note that in granting appellant's motion to reopen his appeal, we only authorized him to raise certain issues not previously addressed.

[\*P26] Nevertheless, it is noteworthy that we recently addressed this same issue in the case of *State v. Stoner, 6th Dist. No. OT-05-042, 2006 Ohio 2122*, in which the appellant [\*\*17] argued that the calibration solution certificate for the batch and bottle was not certified and not authenticated by anyone from the Department of Health as a true copy and therefore was inadmissible. In rejecting the appellant's argument we held, *P 31*:

[\*P27] [HN6] "Pursuant to the decision of the Supreme Court of Ohio in *State v. Edwards, 107 Ohio St.3d 169, 2005 Ohio 6180, 837 N.E.2d 752*, judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Director of Health, even though that evidence would not be admissible at trial. See also *Maumee v. Weisner (1999), 87 Ohio St.3d 295, 298, 1999 Ohio 68, 720 N.E.2d 507; United States v. Raddatz (1980), 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424; United States v. Matlock (1974), 415 U.S. 164, 173-174, 94 S. Ct. 988, 39 L. Ed. 2d 242*. Therefore, the trial court in this case did not err by admitting into evidence the test-solution certificate to determine whether the state's chemical results complied with the director's regulations even if the Rules of Evidence governing authentication and hearsay would preclude admission of the certificate [\*\*18] at trial."

[\*P28] Appellant further argues that the results of the BAC DataMaster test administered to him should not have been admitted into evidence at the hearing below and relied upon by the lower court because the state failed to prove that it substantially complied with the regulations governing the administration of such tests.

[\*P29] [HN7] It is well-established that before the results of a breathalyzer test can be admitted into evidence to establish alcohol concentration under a *R.C. 4511.19* prosecution, the state must show that it substantially complied with the methods approved by the Ohio Director of Health ("ODH") in the administration of the test. *Defiance v. Kretz (1991), 60 Ohio St.3d 1, 3, 573 N.E.2d 32; Plummer, supra*. Those methods approved by the ODH are set forth in the Ohio Administrative Code. Once the state introduces evidence of substantial compliance with the applicable regulations, the burden shifts to the defendant to show that he was prejudiced by anything less than complete technical compliance with the challenged regulation. *Plummer, supra*.

[\*P30] Officer Baker testified at the [\*\*19] hearing below that after he arrested appellant he took him to the police station and administered a breath alcohol test using a BAC DataMaster. Officer Baker is a certified senior operator of the instrument and stated that he has used it at least 100 times. During Officer Baker's testimony, the state introduced State's Exhibit 1, the packet of documents discussed above which we determined in our earlier decision was admissible. Officer Baker testified that Officer Franklin Shinaver is the officer in charge of the BAC DataMaster and the records; that the logs are kept in the regular course of business by the Rossford Police Department; that pursuant to the logs, the machine was calibrated on November 28, 2003; that on December 4, 2003, a breath test was administered to appellant using that machine which produced a reading of .105; the test was given within two hours of appellant's

arrest; that prior to administering the test, Officer Baker observed appellant for 20 minutes; that on December 5, 2003, the machine was again calibrated using the same batch solution as was used on November 28, 2003; that the calibrations on both November 28 and December 5 were within the range of plus or [\*\*20] minus .005 grams per 210 liters of the target value for that instrument check solution; that the calibration solutions are stored in a refrigerator; and that when he administered the test to appellant there was no indication that the machine was functioning incorrectly. On cross-examination, Officer Baker stated that he was not present when the calibrations were conducted.

[\*P31] Appellant first asserts that the state failed to prove that the results of all tests, maintenance records and calibration checks documents were kept by the Rossford Police Department for a period of three years as required by *Ohio Adm. Code 3701-53-02(C)* and *3701-53-01(A)*. The record contains the affidavit of Detective Franklin Shinaver, a sergeant with the Rossford Police Department, which was attached to and authenticated State's Exhibit 1. The affidavit reads in relevant part:

[\*P32] "I, Franklin D. Shinaver, hereby certify that \* \* \* I am the custodian of all the records relating to the BAC DataMaster and the operation thereof, and that I am authorized to certify and do hereby certify that the attached are true copies of the log book [\*\*21] kept for the BAC DataMaster operated at the Rossford Police Department pursuant to the rules and regulations of the Ohio Department of Health. Other attached records and documents are routinely made and kept pursuant to and required by the rules and regulations of the Ohio Department of Health and/or requirements of the Rossford Prosecutor's Office and/or the Rossford Police Department and are maintained at the Rossford Police Department in Rossford, Wood County, Ohio."

[\*P33] By attesting that the Rossford Police Department routinely keeps and maintains the log books for the BAC DataMaster as required by the rules and regulations of the Ohio Department of Health, Shinaver essentially asserted that the records were maintained for three years as required by the Ohio Administrative Code. As such, the state introduced evidence that it had substantially complied with the applicable regulations and the burden shifted to appellant to show that he was prejudiced by anything less than strict compliance. He did not do so.

[\*P34] Appellant next asserts that the state failed to introduce evidence at the hearing below that a copy of the operator's manual for the BAC DataMaster was [\*\*22] kept at the testing location as required by *Ohio Adm. Code 3701-53-01(B)*. Although appellant's motion to suppress sufficiently raised a number of issues regarding compliance with alcohol testing to warrant a hearing, see *Purdy, supra*, including that the "machine was not properly installed pursuant to the owners and operators manual for the machine and with proper documentation maintained as required by *OAC 3701-53-06(A)* and *(B)*," it did not allege that the state failed to keep an operator's manual at the testing location. [HN8] *Ohio Adm. Code 3701-53-06(A)* and *(B)* address chain of custody issues and the requirement that laboratories successfully complete a national proficiency testing program. It is well-settled that "[t]he prosecution is not required \* \* \* to affirmatively demonstrate substantial compliance with every ODH regulation as a precondition to admitting alcohol concentration results. \* \* \* The prosecution's burden arises when the defendant has placed the operator's compliance with a particular regulation at issue." *State v. Luhrs (1990), 69 Ohio App.3d 731, 736, 591 N.E.2d 1251, 7 Anderson's Ohio App. Cas. 363* (citations omitted). Accordingly, appellant has waived [\*\*23] his right to challenge the admission of the BAC test results on this ground.

[\*P35] Appellant further asserts that there was no evidence introduced to establish that the air tested by the police was "deep lung (alveolar) air" as required by *Ohio Adm. Code 3701-53-02(C)*. That regulation reads:

[\*P36] [HN9] "Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule *3701-53-01 of the Administrative Code*. The results shall be recorded on forms prescribed by the director of health."

[\*P37] The record reveals that appellant's breath sample was analyzed according to the operational checklist for

the BAC DataMaster and that the form used contains the seal of the Ohio Department of Health. Moreover, Officer Baker testified that when administering the test to appellant, there [\*\*24] was no indication that the machine was functioning incorrectly. In *State v. Douglas*, 4th Dist. No. C-030897, 2004 Ohio 5726, at P 9, the court discussed the requirement of "deep lung" air as follows:

[\*P38] [HN10] "As the Ohio Supreme Court noted in *State v. Steele* [(1977), 52 Ohio St.2d 187, 190, 370 N.E.2d 740], the reason for waiting twenty minutes before testing a suspect is to eliminate the possibility that the test result is a product of anything other than the suspect's deep lung breath. Because the accuracy of the test results can be adversely affected if the suspect either ingests material orally, like food or drink, or regurgitates material internally, by belching or vomiting, the suspect must be observed for twenty minutes to verify that no external or internal material may cause a false reading."

[\*P39] Where, as in the present case, the testing officer waits the mandatory time period before administering the breath test, observes the suspect during that time period, and receives no indication that the breath testing device was malfunctioning, the trial court does not err in concluding that the state substantially complied with the ODH regulation [\*\*25] requiring testing of deep lung breath. See *State v. Moss* (Mar. 15, 1996), 4th Dist. No. 95CA2089, 1996 Ohio App. LEXIS 1096.

[\*P40] Finally, appellant asserts that the state produced no evidence that the particular bottle of calibration solution used to run calibration checks on the BAC DataMaster at issue was kept refrigerated when not in use as required by *Ohio Adm.Code 3701-53-04(C)*. To the contrary, Officer Baker specifically testified that the calibration solutions are stored in the refrigerator. The state therefore demonstrated substantial compliance with *Ohio Adm.Code 3701-53-04(C)*.

[\*P41] Accordingly, the state substantially complied with the methods approved by the ODH in the administration of the breathalyzer test and the trial court did not err in denying appellant's motion to suppress the results of that test. The first assignment of error is not well-taken.

[\*P42] On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Perrysburg Municipal Court is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to *App.R. 24* [\*\*26] . Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Dennis M. Parish, J.  
CONCUR.

81 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**State of Ohio, Appellee v. Kenneth R. Cook, Jr., Appellant****Court of Appeals No. WD-04-029****COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY***2006 Ohio 6062; 2006 Ohio App. LEXIS 6006***November 17, 2006, Decided**

**PRIOR HISTORY:** [\*\*1] Trial Court No. TRC-0311259A. *State v. Cook, 2005 Ohio 1550, 2005 Ohio App. LEXIS 1514 (Ohio Ct. App., Wood County, Mar. 31, 2005)*

**DISPOSITION:** JUDGMENT AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant's motion to reopen his appeal was granted by the court after it affirmed his conviction for driving with a prohibited alcohol level (DUI) and his sentence thereon. The court rendered its decision upon reopening.

**OVERVIEW:** Defendant was charged with DUI, speeding, and weaving. His motion to suppress the results of his field sobriety tests (FSTs) and BAC DataMaster test (BACD) results was denied. The trial court had determined that the police officer had correctly administered the FSTs, that the BACD machine was in proper working order, and that the officer had probable cause to arrest defendant based either on the results of the FSTs or upon the officer's own observations of defendant. Defendant thereafter entered a no contest plea and he was convicted of DUI. The first appeal resulted in an affirmance, in part, based on the presumption of regularity of the suppression proceedings, as no transcript was submitted. The court granted defendant's reopening request and the suppression transcript was filed. The court held that the trial court did not err in finding substantial compliance by the police officers involved with the applicable regulations for purposes of conducting the FSTs and the BACD. The State met its burden on a number of issues of showing proper administration and maintenance of the tests, the machinery, and the records. There was probable cause to arrest in the circumstances.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** administered, sobriety, motion to suppress, manual, probable cause to arrest, regulation, testing, calibration, machine, breath, influence of alcohol, driving, assignments of error, assignment of error, breath test, substantially complied, judicial notice, administering, standardized, alcohol, substantial compliance, strict compliance, admissible, admitting, lung, deep, packet, arrest, minute, air

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Trials > Burdens of Proof > Defense******Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN1] The law applicable to a motion to suppress is as follows. A motion to suppress must provide a prosecutor with notice of the basis for the challenge. However, the basis need not be set forth with minute detail, only with sufficient particularity to put the prosecution on notice of the nature of the challenge. Once a defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the State to demonstrate proper compliance with the regulations involved.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause******Evidence > Scientific Evidence > Sobriety Tests***

[HN3] The Supreme Court of Ohio has held that in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures. Subsequently, by amending *R.C. § 4511.19(D)(4)*, the Ohio General Assembly mandated a "substantial compliance" standard for the admission of field sobriety test results and their use as evidence of probable cause. The Supreme Court of Ohio has acknowledged that "substantial compliance" is now the standard.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview******Evidence > Judicial Notice > Scientific & Technical Facts******Evidence > Scientific Evidence > Sobriety Tests***

[HN4] The Ohio Second District Court of Appeals has recognized that trial courts may take judicial notice of the National Highway Traffic and Safety Administration (NHTSA) manual. A trial court may take judicial notice of the NHTSA standards governing the administration of field sobriety tests, including the horizontal gaze nystagmus (HGN) test. The applicable testing procedures in Ohio are set forth in the DWI Detection Standardized Field Sobriety Testing Student Manual published by NHTSA. These standards are not subject to reasonable dispute because they are capable of accurate and ready determination by reference to the NHTSA manual itself, a source whose accuracy cannot be questioned given its status as the seminal authority in this area. As a result, NHTSA standards governing the administration of the HGN test are subject to judicial notice under *Evid. R. 201(B)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause******Criminal Law & Procedure > Arrests > Warrantless Arrest***

[HN5] The United States Supreme Court has held that probable cause for a warrantless arrest is based on whether, at a particular moment, the facts and circumstances within a police officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant a prudent man in believing that a petitioner had committed an offense. In making this determination, the Ohio Supreme Court in Homan noted that while field sobriety tests must be administered in strict (now substantial) compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where the test results must be excluded for lack of strict (now substantial) compliance.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN6] Pursuant to the decision of the Supreme Court of Ohio in Edwards, judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Ohio Director of Health, even though that evidence would not be admissible at trial.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN7] It is well-established that before the results of a breathalyzer test can be admitted into evidence to establish alcohol concentration under a R.C. § 4511.19 prosecution, the State must show that it substantially complied with the methods approved by the Ohio Director of Health (ODH) in the administration of the test. Those methods approved by the ODH are set forth in the Ohio Administrative Code. Once the State introduces evidence of substantial compliance with the applicable regulations, the burden shifts to the defendant to show that he was prejudiced by anything less than complete technical compliance with the challenged regulation.

***Criminal Law & Procedure > Trials > Burdens of Proof > General Overview***  
***Evidence > Authentication > Chain of Custody***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN8] Ohio Admin. Code 3702:53-06(A) and (B) address chain of custody issues and the requirement that laboratories successfully complete a national proficiency testing program. It is well-settled that the prosecution is not required to affirmatively demonstrate substantial compliance with every Ohio Department of Health regulation as a precondition to admitting alcohol concentration results. The prosecution's burden arises when a defendant has placed the operator's compliance with a particular regulation at issue.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN9] See Ohio Admin. Code 3701:53-02(C).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***  
***Evidence > Scientific Evidence > Sobriety Tests***

[HN10] As the Ohio Supreme Court has noted, the reason for waiting 20 minutes before testing a suspect with an

alcohol breath test is to eliminate the possibility that the test result is a product of anything other than the suspect's deep lung breath. Because the accuracy of the test results can be adversely affected if the suspect either ingests material orally, like food or drink, or regurgitates material internally, by belching or vomiting, the suspect must be observed for 20 minutes to verify that no external or internal material may cause a false reading. Where the testing officer waits the mandatory time period before administering the breath test, observes the suspect during that time period, and receives no indication that the breath testing device was malfunctioning, a trial court does not err in concluding that the State substantially complied with the Ohio Department of Health regulation requiring testing of deep lung breath.

**COUNSEL:** Kevin A. Heban and Gerald E. Galernik, for appellee.

Mark Gardner, for appellant.

**JUDGES:** PIETRYKOWSKI, J. Peter M. Handwork, J., Mark L. Pietrykowski, J., Dennis M. Parish, J., CONCUR.

**OPINION BY:** Mark L. Pietrykowski

**OPINION:**

#### **DECISION AND JUDGMENT ENTRY**

PIETRYKOWSKI, J.

[\*P1] This case is before the court following our decision and judgment entry of August 10, 2005, granting the motion of defendant-appellant, Kenneth R. Cook, Jr., to reopen his appeal from a judgment of the Perrysburg Municipal Court. That judgment of conviction and sentence was entered after appellant entered a plea of no contest to a charge of driving with a prohibited alcohol level.

[\*P2] The facts of this case were set forth in our decision and judgment entry of March 31, 2005, in which we affirmed appellant's conviction and sentence. See *State v. Cook, 6th Dist. No. WD-04-029, 2005 Ohio 1550*. For purposes of this reopening, however, we will restate them as follows.

[\*P3] In December 2003, appellant was charged with driving with a prohibited alcohol level ("DUI"), speeding and weaving. Appellant filed a combined motion [\*\*2] in limine, to dismiss, and to suppress on the following grounds: (1) the officer had no lawful basis to stop him and no probable cause to arrest him; (2) he was coerced into submitting to alcohol testing; (3) the alcohol testing was not conducted in accordance with applicable statutes and regulations; (4) the officer obtained statements from him in violation of his *Fifth* and *Sixth Amendment* rights; and (5) the field sobriety tests were not conducted in strict compliance with applicable standards. Appellee, the state of Ohio, opposed the motions.

[\*P4] Following a hearing, the trial court issued a decision and judgment entry denying the motion to suppress. Regarding the field sobriety tests, the court held that the arresting officer, Officer Randall Baker, administered the horizontal gaze nystagmus test and the walk and turn test in strict compliance with the standards approved by the National Highway Traffic and Safety Administration ("NHTSA") and that probable cause to arrest appellant for DUI could have been based on the results of these tests alone. Nevertheless, the court further concluded that probable cause to arrest appellant was warranted under the totality of the circumstances [\*\*3] given appellant's erratic driving, the odor of alcohol about his person, and Officer Baker's own observations of appellant's behavior, including appellant's performance on non-standardized tests. Regarding appellant's challenge to the BAC DataMaster test results, the court held that evidence admitted at the hearing demonstrated that the machine was in proper working order when the test was administered to appellant. After the lower court denied the motion to suppress, appellant pled no contest to and was convicted of the DUI charge.

[\*P5] Appellant subsequently appealed his conviction and sentence to this court in which he raised four assignments of error challenging various aspects of the trial court's denial of his motion to suppress. Under his first assignment of error, appellant challenged the trial court's admission of State's Exhibit 1 into evidence. That exhibit is a packet of documents certifying that the breath test machine (the BAC DataMaster) was functioning properly and that the officer performing the test was certified to do so. The packet also contained appellant's breath test results. The entire packet was accompanied by the affidavit of Detective Franklin Shinaver, [\*\*4] who averred that the records were true copies of documents made and kept in the ordinary course of business and were public records. Appellant argued that the lower court erred in admitting State's Exhibit 1 into evidence because admitting such evidence without live testimony violated his rights under the *confrontation clause of the Sixth and Fourteenth Amendments to the United States Constitution* and because the affidavit was not admissible under the Ohio Rules of Evidence. In our review of this assignment of error, we rejected appellant's arguments and held that the exhibit was admissible. Appellant also raised three additional assignments of error: that the state failed to introduce evidence that the breath test was properly conducted or that the machine had its calibration properly checked as required by Department of Health requirements; and that the state failed to establish probable cause to arrest appellant for driving under the influence of alcohol; and that the court erred in finding probable cause to believe that appellant was operating a vehicle under the influence of alcohol. Because the remaining assignments of error were dependent upon the transcript from the hearing [\*\*5] on the motion to suppress for resolution, and because appellant failed to file a transcript from that hearing, we presumed the regularity of the proceedings below, rejected the three assignments of error and affirmed the trial court's denial of appellant's motion to suppress.

[\*P6] In a decision and judgment entry of August 10, 2005, we granted appellant's motion to reopen his appeal for the purpose of considering the original second, third and fourth assignments of error. Appellant filed the transcript from the suppression hearing and now articulates his assignments of error as follows:

[\*P7] "Error I. The court committed substantial prejudicial error by finding that the breath testing machine was properly checked for calibration.

[\*P8] "Error II. The state failed to establish probable cause to arrest the defendant for driving under the influence of alcohol."

[\*P9] We will first address the second assignment of error in which appellant asserts that the state failed to establish that Officer Randall Baker had probable cause to arrest him for driving under the influence of alcohol and, as such, the lower court erred in denying his motion to suppress.

[\*P10] [\*\*6] [HN1] The law applicable to a motion to suppress is as follows. A motion to suppress must provide a prosecutor with notice of the basis for the challenge. *Xenia v. Wallace (1988)*, 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph one of the syllabus. However, the basis need not be set forth with minute detail, only with sufficient particularity to put the prosecution on notice of the nature of the challenge. *State v. Shindler (1994)*, 70 Ohio St.3d 54, 57-58, 1994 Ohio 452, 636 N.E.2d 319. Once a defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *State v. Johnson (2000)*, 137 Ohio App.3d 847, 851, 739 N.E.2d 1249, citing *State v. Plummer (1986)*, 22 Ohio St.3d 292, 294, 22 Ohio B. 461, 490 N.E.2d 902.

[\*P11] [HN2] When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger (1993)*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable [\*\*7] standard. *State v. Klein (1991)*, 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

[\*P12] In support of his assertion that Officer Baker lacked probable cause to arrest him for DUI, appellant contends that Officer Baker relied on two non-standardized field sobriety tests in determining appellant's level of

intoxication and that the state failed to establish that the standardized field sobriety tests that Officer Baker administered to him were conducted in compliance with the NHTSA standards. As such, appellant asserts that the tests could not be relied upon as a basis for establishing probable cause to arrest him for DUI.

[\*P13] In *State v. Homan (2000)*, 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952, at paragraph one of the syllabus, [HN3] the Supreme Court of Ohio held "[i]n order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures." Subsequently, by amending *R.C. 4511.19(D)(4)*, the General Assembly mandated a "substantial compliance" standard for the admission of field sobriety test results and their use as evidence of probable cause. The Supreme Court of Ohio has acknowledged that "substantial compliance" is now the standard. *State v. Schmitt, 101 Ohio St.3d 79, 2004 Ohio 37, at P 9, 801 N.E.2d 446*.

[\*P14] At the hearing on the motion to suppress, Officer Baker of the Rossford Police Department testified as follows. On December 4, 2003, at approximately 3:30 a.m., he was on standard patrol on I-75 in Wood County, Ohio when he observed a car traveling southbound at a high rate of speed. He then activated his radar unit and followed the car for approximately one-half to three-quarters of a mile. The radar unit indicated that the car Officer Baker was following was traveling at 77 m.p.h. in a 65 m.p.h. zone. Also over that distance, Officer Baker saw the car weave within its lane three times. Officer Baker then activated his overhead lights and pulled over the vehicle. Officer Baker approached the driver's side of the car and asked the driver, appellant, for his driver's license. As he spoke to appellant, Officer Baker noticed an odor of alcohol about appellant's person and appellant admitted that he had been drinking. While appellant remained seated in the car, Officer Baker conducted an initial horizontal gaze nystagmus ("HGN") test on him, which indicated that appellant was under the influence of alcohol. Officer Baker then removed appellant from the vehicle and readministered the HGN test while appellant was standing straight up with his head looking straight forward. Officer Baker testified that he administered the test twice on each eye, that he instructed appellant to watch his pen as he moved it in front of his eyes and that he watched appellant's eyes as appellant tried to track the pen. Officer Baker stated that in administering the test, he observed appellant's eyes drifting, that there was a lack of smooth pursuit, and that they demonstrated a nystagmus before reaching the 45 degree mark. Officer Baker also administered the portion of the test dealing with the nystagmus at maximum deviation. He testified that appellant registered all six clues on the HGN test and that based on his training and experience, he believed that appellant was under the influence of alcohol at the time he was detained.

[\*P15] Officer Baker also asked appellant to perform the walk and turn test. Officer Baker told appellant to imagine a line on the road, explained how to do the test and demonstrated the test. In performing this test, appellant went off balance when pivoting and raised his arms from his sides six inches. The impaired driver report that Officer Baker completed to document appellant's performance of the standardized tests also indicates that appellant did not touch his heel to his toe and that he stepped off of the line while walking. He did not ask appellant to perform the one legged stand test after learning that appellant had a knee problem. Finally, Officer Baker administered two non-standardized field sobriety tests, the alphabet test and the finger test. He asked appellant to recite the alphabet from A to Z. Three times, appellant stopped at the letter W and could not continue. Officer Baker demonstrated the finger test for appellant but appellant could not pass the test. Officer Baker then placed appellant under arrest for operating a motor vehicle while under the influence of alcohol.

[\*P16] Officer Baker testified that he was trained in alcohol detection at the Toledo Police Academy as well as through other courses and that in administering the field sobriety tests to appellant, he complied with those training requirements. Officer Baker further testified that the Alcohol Detention Apprehension and Prosecution ("ADAP") manual under which he was trained was consistent with the NHTSA manual. Officer Baker, however, never testified as to the NHTSA requirements, or for that matter the ADAP requirements, for the field sobriety tests that he administered, and neither manual was admitted into evidence at the hearing below. Nevertheless, during Officer Baker's testimony, appellant's counsel asked the court to take judicial notice of the NHTSA manual. After discussing the issue with the parties, the court stated that it needed to research the issue.

[\*P17] In his decision and judgment entry ruling on appellant's motion to suppress, the lower court determined that Officer Baker administered the HGN and walk and turn tests in strict compliance with the NHTSA testing methods. It therefore appears that the trial court took judicial notice of the requirements of the NHTSA manual. [HN4] The Ohio Second District Court of Appeals has recognized that trial court's may take judicial notice of the NHTSA manual. In *State v. Stritch*, 2d Dist. No. 20759, 2005 Ohio 1376, at P 16, the court held:

[\*P18] "Upon review, we now agree that [\*\*12] a trial court may take judicial notice of the NHTSA standards governing the administration of field sobriety tests, including the HGN test. In [*State v.*] *Shepard* [2d Dist. No. 2001-CA-34, 2002 Ohio 1817], we recognized that the applicable testing procedures in Ohio are set forth in the DWI Detection Standardized Field Sobriety Testing Student Manual published by NHTSA. These standards are not subject to reasonable dispute because they are capable of accurate and ready determination by reference to the NHTSA manual itself, a source whose accuracy cannot be questioned given its status as the seminal authority in this area. As a result, NHTSA standards governing the administration of the HGN test are subject to judicial notice under *Evid.R. 201(B)*."

[\*P19] See, also, *State v. Knox*, 2d Dist. No. 2005-CA-74, 2006 Ohio 3039; *State v. Radford*, 2d Dist. No. 2005-CA-58, 2006 Ohio 1610.

[\*P20] This case differs from our earlier decision in *State v. Nickelson* (July 20, 2001), 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261, in which we found that field sobriety tests should have been suppressed. In that case, the state introduced [\*\*13] testimony of officers as to which tests were conducted and how they were conducted but it did not introduce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, no witness testified as to those guidelines, and the manual itself was not admitted. Similarly, in *State v. Purdy*, 6th Dist. No. H-04-008, 2004 Ohio 7069, we held that where an officer only testified that the field sobriety tests were conducted in accordance with his training, and the manual was not admitted into evidence to document the NHTSA guidelines, the results of the field sobriety tests should have been suppressed. The courts, however, in those cases neither expressly nor impliedly took judicial notice of the NHTSA guidelines.

[\*P21] In the present case, Officer Baker testified that he administered the standardized field sobriety tests in conformance with his training, that the manual under which he was trained was consistent with the NHTSA manual and the trial court appears to have taken judicial notice of the manual. Under these circumstances, we find that the court did not err in finding that Officer Baker substantially complied with the NHTSA [\*\*14] requirements in administering the field sobriety tests and did not err in relying on the results of those tests to find that Officer Baker had probable cause to arrest appellant for DUI.

[\*P22] Assuming arguendo that the court should have suppressed the results of the field sobriety tests, we further find that Officer Baker had probable cause to arrest appellant for DUI. In [HN5] *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142, the United States Supreme Court held that probable cause for a warrantless arrest is based on " \* \* \* whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed the offense." In making this determination, the court in *Homan*, *supra* at 427, noted: "[w]hile field sobriety tests must be administered in strict [now substantial] compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding [\*\*15] of probable cause to arrest even where no field sobriety tests were administered or where \* \* \* the test results must be excluded for lack of strict [now substantial] compliance."

[\*P23] Officer Baker testified that his decision to arrest appellant was based on all of the facts and circumstances present at that time. Those facts included that appellant was driving erratically (speeding and weaving within his lane), that appellant had an odor of alcohol about his person and admitted to drinking, and Officer Baker's general observations of appellant as appellant attempted to perform the field sobriety tests administered. Based the facts and circumstances surrounding appellant's arrest, we conclude that Officer Baker had probable cause to arrest him for DUI

and the second assignment of error is not well-taken.

[\*P24] In his first assignment of error, appellant challenges the validity of the breath test administered to him after he was arrested, and the trial court's denial of his motion to suppress the results of that test. Appellant first asserts that the documents admitted into evidence at the hearing below failed to establish that the BAC DataMaster was properly checked [\*\*16] for calibration as required by the Ohio Department of Health Regulations. More specifically, appellant asserts that State's Exhibit 1 was not certified by proper affidavit or attested to by a representative of the Ohio Department of Health and therefore should not have been given any weight by the trial court in its determination as to whether the state's chemical tests complied with the methods approved by the Director of Health.

[\*P25] Initially, we note that in our prior decision of March 31, 2005, we already determined that admitting State's Exhibit 1 did not violate appellant's right to confront witnesses against him and that Detective Shinaver's affidavit was admissible to authenticate the documents as business records. To the extent that appellant raises these issues again, we find the argument not well taken under the doctrine of res judicata and note that in granting appellant's motion to reopen his appeal, we only authorized him to raise certain issues not previously addressed.

[\*P26] Nevertheless, it is noteworthy that we recently addressed this same issue in the case of *State v. Stoner, 6th Dist. No. OT-05-042, 2006 Ohio 2122*, in which the appellant [\*\*17] argued that the calibration solution certificate for the batch and bottle was not certified and not authenticated by anyone from the Department of Health as a true copy and therefore was inadmissible. In rejecting the appellant's argument we held, *P 31*:

[\*P27] [HN6] "Pursuant to the decision of the Supreme Court of Ohio in *State v. Edwards, 107 Ohio St.3d 169, 2005 Ohio 6180, 837 N.E.2d 752*, judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Director of Health, even though that evidence would not be admissible at trial. See also *Maumee v. Weisner (1999), 87 Ohio St.3d 295, 298, 1999 Ohio 68, 720 N.E.2d 507; United States v. Raddatz (1980), 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424; United States v. Matlock (1974), 415 U.S. 164, 173-174, 94 S. Ct. 988, 39 L. Ed. 2d 242*. Therefore, the trial court in this case did not err by admitting into evidence the test-solution certificate to determine whether the state's chemical results complied with the director's regulations even if the Rules of Evidence governing authentication and hearsay would preclude admission of the certificate [\*\*18] at trial."

[\*P28] Appellant further argues that the results of the BAC DataMaster test administered to him should not have been admitted into evidence at the hearing below and relied upon by the lower court because the state failed to prove that it substantially complied with the regulations governing the administration of such tests.

[\*P29] [HN7] It is well-established that before the results of a breathalyzer test can be admitted into evidence to establish alcohol concentration under a *R.C. 4511.19* prosecution, the state must show that it substantially complied with the methods approved by the Ohio Director of Health ("ODH") in the administration of the test. *Defiance v. Kretz (1991), 60 Ohio St.3d 1, 3, 573 N.E.2d 32; Plummer, supra*. Those methods approved by the ODH are set forth in the Ohio Administrative Code. Once the state introduces evidence of substantial compliance with the applicable regulations, the burden shifts to the defendant to show that he was prejudiced by anything less than complete technical compliance with the challenged regulation. *Plummer, supra*.

[\*P30] Officer Baker testified at the [\*\*19] hearing below that after he arrested appellant he took him to the police station and administered a breath alcohol test using a BAC DataMaster. Officer Baker is a certified senior operator of the instrument and stated that he has used it at least 100 times. During Officer Baker's testimony, the state introduced State's Exhibit 1, the packet of documents discussed above which we determined in our earlier decision was admissible. Officer Baker testified that Officer Franklin Shinaver is the officer in charge of the BAC DataMaster and the records; that the logs are kept in the regular course of business by the Rossford Police Department; that pursuant to the logs, the machine was calibrated on November 28, 2003; that on December 4, 2003, a breath test was administered to appellant using that machine which produced a reading of .105; the test was given within two hours of appellant's

arrest; that prior to administering the test, Officer Baker observed appellant for 20 minutes; that on December 5, 2003, the machine was again calibrated using the same batch solution as was used on November 28, 2003; that the calibrations on both November 28 and December 5 were within the range of plus or minus .005 grams per 210 liters of the target value for that instrument check solution; that the calibration solutions are stored in a refrigerator; and that when he administered the test to appellant there was no indication that the machine was functioning incorrectly. On cross-examination, Officer Baker stated that he was not present when the calibrations were conducted.

[\*P31] Appellant first asserts that the state failed to prove that the results of all tests, maintenance records and calibration checks documents were kept by the Rossford Police Department for a period of three years as required by *Ohio Adm. Code 3701-53-02(C)* and *3701-53-01(A)*. The record contains the affidavit of Detective Franklin Shinaver, a sergeant with the Rossford Police Department, which was attached to and authenticated State's Exhibit 1. The affidavit reads in relevant part:

[\*P32] "I, Franklin D. Shinaver, hereby certify that \* \* \* I am the custodian of all the records relating to the BAC DataMaster and the operation thereof, and that I am authorized to certify and do hereby certify that the attached are true copies of the log book [\*\*21] kept for the BAC DataMaster operated at the Rossford Police Department pursuant to the rules and regulations of the Ohio Department of Health. Other attached records and documents are routinely made and kept pursuant to and required by the rules and regulations of the Ohio Department of Health and/or requirements of the Rossford Prosecutor's Office and/or the Rossford Police Department and are maintained at the Rossford Police Department in Rossford, Wood County, Ohio."

[\*P33] By attesting that the Rossford Police Department routinely keeps and maintains the log books for the BAC DataMaster as required by the rules and regulations of the Ohio Department of Health, Shinaver essentially asserted that the records were maintained for three years as required by the Ohio Administrative Code. As such, the state introduced evidence that it had substantially complied with the applicable regulations and the burden shifted to appellant to show that he was prejudiced by anything less than strict compliance. He did not do so.

[\*P34] Appellant next asserts that the state failed to introduce evidence at the hearing below that a copy of the operator's manual for the BAC DataMaster was [\*\*22] kept at the testing location as required by *Ohio Adm. Code 3701-53-01(B)*. Although appellant's motion to suppress sufficiently raised a number of issues regarding compliance with alcohol testing to warrant a hearing, see *Purdy, supra*, including that the "machine was not properly installed pursuant to the owners and operators manual for the machine and with proper documentation maintained as required by *OAC 3701-53-06(A)* and *(B)*," it did not allege that the state failed to keep an operator's manual at the testing location. [HN8] *Ohio Adm. Code 3701-53-06(A)* and *(B)* address chain of custody issues and the requirement that laboratories successfully complete a national proficiency testing program. It is well-settled that "[t]he prosecution is not required \* \* \* to affirmatively demonstrate substantial compliance with every ODH regulation as a precondition to admitting alcohol concentration results. \* \* \* The prosecution's burden arises when the defendant has placed the operator's compliance with a particular regulation at issue." *State v. Luhrs (1990), 69 Ohio App.3d 731, 736, 591 N.E.2d 1251, 7 Anderson's Ohio App. Cas. 363* (citations omitted). Accordingly, appellant has waived [\*\*23] his right to challenge the admission of the BAC test results on this ground.

[\*P35] Appellant further asserts that there was no evidence introduced to establish that the air tested by the police was "deep lung (alveolar) air" as required by *Ohio Adm. Code 3701-53-02(C)*. That regulation reads:

[\*P36] [HN9] "Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule *3701-53-01 of the Administrative Code*. The results shall be recorded on forms prescribed by the director of health."

[\*P37] The record reveals that appellant's breath sample was analyzed according to the operational checklist for

the BAC DataMaster and that the form used contains the seal of the Ohio Department of Health. Moreover, Officer Baker testified that when administering the test to appellant, there [\*\*24] was no indication that the machine was functioning incorrectly. In *State v. Douglas, 4th Dist. No. C-030897, 2004 Ohio 5726, at P 9*, the court discussed the requirement of "deep lung" air as follows:

[\*P38] [HN10] "As the Ohio Supreme Court noted in *State v. Steele [(1977), 52 Ohio St.2d 187, 190, 370 N.E.2d 740]*, the reason for waiting twenty minutes before testing a suspect is to eliminate the possibility that the test result is a product of anything other than the suspect's deep lung breath. Because the accuracy of the test results can be adversely affected if the suspect either ingests material orally, like food or drink, or regurgitates material internally, by belching or vomiting, the suspect must be observed for twenty minutes to verify that no external or internal material may cause a false reading."

[\*P39] Where, as in the present case, the testing officer waits the mandatory time period before administering the breath test, observes the suspect during that time period, and receives no indication that the breath testing device was malfunctioning, the trial court does not err in concluding that the state substantially complied with the ODH regulation [\*\*25] requiring testing of deep lung breath. See *State v. Moss (Mar. 15, 1996), 4th Dist. No. 95CA2089, 1996 Ohio App. LEXIS 1096*.

[\*P40] Finally, appellant asserts that the state produced no evidence that the particular bottle of calibration solution used to run calibration checks on the BAC DataMaster at issue was kept refrigerated when not in use as required by *Ohio Adm.Code 3701-53-04(C)*. To the contrary, Officer Baker specifically testified that the calibration solutions are stored in the refrigerator. The state therefore demonstrated substantial compliance with *Ohio Adm.Code 3701-53-04(C)*.

[\*P41] Accordingly, the state substantially complied with the methods approved by the ODH in the administration of the breathalyzer test and the trial court did not err in denying appellant's motion to suppress the results of that test. The first assignment of error is not well-taken.

[\*P42] On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Perrysburg Municipal Court is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to *App.R. 24 [\*\*26]* . Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Dennis M. Parish, J.  
CONCUR.

82 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee, - vs - SARAH M. PERL,**

**CASE NO. 2006-L-082**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE  
COUNTY**

*2006 Ohio 6100; 2006 Ohio App. LEXIS 6026*

**November 17, 2006, Decided**

**PRIOR HISTORY:** [\*\*1] Criminal Appeal from the Painesville Municipal Court, Case No. 06 TRC 01134.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Painesville Municipal Court (Ohio), which convicted her of operating a vehicle in excess of the posted speed limit and operating a motor vehicle while under the influence of alcohol. Defendant contended that the trial court erred in overruling her motion to suppress.

**OVERVIEW:** At the hearing on defendant's motion to suppress, a state trooper testified that he observed a vehicle traveling 13 miles per hour over the posted speed limit. The trooper stopped the vehicle, and upon defendant's admission that she had consumed alcohol, the trooper conducted various field sobriety tests. The trooper testified that defendant failed the tests. At the conclusion of the hearing, the trial court overruled the majority of defendant's motion to suppress. On appeal, defendant challenged the trooper's five-step demonstration of the walk-and-turn test as opposed to the nine-step requirement for the actual test. However, the trooper testified that, although he only demonstrated five steps, he advised defendant that, in order to complete the test, she would need to perform nine steps. *R.C. § 4511.19* required that the administration, not the demonstration, of field sobriety tests be conducted in substantial compliance with the national standards. While the trooper did not bring his radar certification with him to the suppression hearing, he was not required to do so because there was no evidence that defendant subpoenaed the certificate from the trooper.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** trooper, motion to suppress, radar, suppression hearing, demonstration, certification, substantially complied, assignment of error, field-sobriety, sobriety, manual, motion to dismiss, investigatory, cross-examination, walk-and-turn, calibration, calibrated, complied, evening, substantial compliance, strict compliance, underlying case, police officer, initial stop, articulable, hunch, speed, odor of alcohol, probable cause, traffic stop

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations*

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress***

[HN1] An appellate court reviews a ruling on a motion to suppress giving due deference to the trial court's assignment of weight and inferences drawn from the evidence. The appellate court must accept the trial court's factual determinations when they are supported by competent and credible evidence. However, the appellate court reviews the application of the law to those facts pursuant to a de novo standard.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause******Criminal Law & Procedure > Search & Seizure > Seizures of Persons******Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN2] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal behavior has occurred or is imminent. Investigatory stops based on "hunches" are invalid stops as they are not based on articulable facts. However, observation of traffic violations extend beyond an investigatory stop; they constitute probable cause. When a police officer witnesses a motorist in transit commit a traffic violation, the officer has probable cause to stop the vehicle for the purpose of issuing a citation.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures***

[HN3] *R.C. § 4511.19* requires that the administration, not the demonstration, of field-sobriety tests be conducted in substantial compliance with the National Highway Transportation Safety Administration standards. § 4511.19(D)(4)(b).

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN4] A motion to suppress must state its legal and factual bases with sufficient particularity to notify the prosecutor and the court of the issues to be decided.

**COUNSEL:** Joseph M. Gurley, Painesville City Law Director, Painesville, OH (For Plaintiff-Appellee).

Sandra A. Dray, Painesville, OH (For Defendant-Appellant).

**JUDGES:** CYNTHIA WESTCOTT RICE, J. DONALD R. FORD, P.J., concurs, COLLEEN MARY O'TOOLE, J., concurs in judgment only.

**OPINION BY:** CYNTHIA WESTCOTT RICE

**OPINION:** CYNTHIA WESTCOTT RICE, J.

[\*P1] Appellant, Sarah M. Perl, pleaded no contest to operating a vehicle in excess of the posted speed limit in violation of *R.C. 4511.21(C)* and operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(1)(a)*. Appellant was found guilty of both violations by the Painesville Municipal Court. Prior to the plea, appellant had filed a motion to suppress/motion to dismiss on March 31, 2006. The trial court denied the motion in part and granted the motion in part. Appellant appeals the denial of the remaining portion of appellant's motion to suppress. For the reasons that follow, we affirm.

[\*P2] Appellant's motion to suppress/motion to dismiss was based on the argument that [\*\*2] the stop, detention and arrest of appellant was without probable cause and in violation of appellant's Fourth and Fourteenth Amendment rights. A hearing on appellant's motion to suppress was held at the trial court on April 3, 2006. At the hearing, Trooper Kevin Harris, Ohio State Highway Patrol, testified that on February 17, 2006 at approximately 1:00 in the morning, he was driving west on Route 84 when he observed a vehicle traveling east at what he perceived to be a high rate of speed. Trooper Harris used his radar equipment and clocked the vehicle driving at 48 miles per hour in a 35 mile per hour

zone. n1 Based on these observations, Trooper Harris initiated a traffic stop of the vehicle.

n1 Trooper Harris also testified that he had calibrated the radar instrument at the beginning of his shift that evening. According to the trooper, the calibration revealed the equipment was functioning properly.

[\*P3] The trooper further testified that during his initial contact with the driver, appellant herein, [\*\*3] the trooper detected a "strong odor of alcohol." Appellant exited the vehicle upon the trooper's request. Trooper Harris informed appellant that he detected an odor of alcohol. At that point, appellant admitted to Trooper Harris that she had consumed "three beers and a shot" that evening.

[\*P4] The trooper then conducted a series of field sobriety tests; namely the Horizontal Gaze Nystagmus (HGN), the one-leg-stand and the walk-and-turn tests. As to the HGN, the trooper testified that he was familiar with the National Highway Traffic Safety Administration (NHTSA) standards and identified exhibit three as the written compliance standards and methods for the HGN. However, on cross-examination, the trooper could not identify the standards for the HGN test, although he maintained that he had substantially complied with those standards.

[\*P5] The trooper also identified exhibits one and two, the NHTSA standards for the other tests. However, these exhibits were never admitted into evidence. Trooper Harris described the requirements of the NHTSA and testified that he complied with those standards when directing appellant to perform the three field sobriety tests. According to [\*\*4] the trooper, appellant failed each of the three tests. Trooper Harris testified on cross-examination that he substantially complied with the NHTSA standards for the one-leg-stand test by demonstrating to appellant how to perform the test. He also testified that he complied with NHTSA standards for the walk-and-turn test by demonstrating the test through five step seven though the test requires nine steps. n2 Trooper Harris testified he advised appellant she would be required to take nine steps as opposed to his five steps of demonstration.

n2 During the suppression hearing, a videotape was played which depicted a portion of the field sobriety tests conducted on appellant as well as the trooper's demonstration.

[\*P6] At the close of the suppression hearing, the court found that there was sufficient evidence to stop appellant for speeding. The court also found that the trooper had substantially complied with the field sobriety test standards, with the exception of the HGN test. Therefore, the court granted [\*\*5] the motion to suppress in regard to the HGN test and overruled the motion as to the additional evidence.

[\*P7] Appellant's single assignment of error is:

[\*P8] "[1.] BASED ON THE TESTIMONY OF THE TROOPER AT THE HEARING, THE TRIAL COURT ERRED IN ITS FAILURE TO GRANT THE APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE AND DISMISS THE CASE."

[\*P9] We [HN1] review a ruling on a motion to suppress giving due deference to the trial court's assignment of weight and inferences drawn from the evidence. *State v. Hummel*, 154 Ohio App.3d 123, 2003 Ohio 4602, at P11, 796 N.E.2d 558. "We must accept the trial court's factual determinations when they are supported by competent and credible evidence." *Id.* However, we review the application of the law to those facts pursuant to a de novo standard. *Id.*

[\*P10] Appellant claims that the initial stop of her vehicle was a "fishing expedition" and was not based on legally sufficient facts to justify an investigatory stop. [HN2] "The investigatory stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal [\*\*6] behavior has occurred or is imminent." *State v. Gedeon* (1992), 81

*Ohio App.3d 617, 618, 611 N.E.2d 972*, see, also, *Terry v. Ohio (1968)*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. Appellant is correct that investigatory stops based on "hunches" are invalid stops as they are not based on articulable facts. *State v. Rucker (1990)*, 63 Ohio App.3d 762, 580 N.E.2d 59. However, there is nothing in the record to support appellant's contention that the initial traffic stop of appellant's vehicle was based on the hunch of Trooper Harris that something foul was afoot. On the contrary, the testimony at the suppression hearing showed that Trooper Harris observed appellant's vehicle traveling at a perceived high rate of speed which was then confirmed by a properly calibrated radar instrument. n3 Observation of traffic violations extend beyond an investigatory stop; they constitute probable cause. "[W]hen a police officer witnesses a motorist in transit commit a traffic violation, the officer has probable cause to stop the vehicle for the purpose of issuing a citation." *State v. Teter (Oct. 6, 2000)*, 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, \*10; see, also, [\*\*7] *State v. Graham, 11th Dist. No. 2005-P-0096, 2006 Ohio 4184, at P15*. Therefore, we conclude that the initial stop of appellant's vehicle was lawful.

n3 The trooper testified at the hearing that he was certified to conduct calibration checks on the radar equipment used in this instance. He further testified that he had calibrated this specific instrument at the beginning of his shift. According to the trooper, the calibration revealed the instrument "\*\*\* passed internal function and tuning fork\*\*\*.

[\*P11] During his initial contact with appellant, Trooper Harris noted that she had red and bloodshot eyes. There was no notation of slurred speech. Trooper Harris requested appellant exit the vehicle. She complied and indicated to the trooper that she had consumed "three beers and a shot" that evening.

[\*P12] Trooper Harris then proceeded to administer the field-sobriety tests. Appellant challenged the administration of these tests. Specifically, appellant asserts on appeal that the prosecution's [\*\*8] failure to admit the NHTSA manuals as exhibits was a fatal flaw. During the prosecution's case-in-chief, Trooper Harris identified the NHTSA manual for each field-sobriety test. These manuals were provided to the trooper in the form of exhibits one, two and three. There was no objection to these exhibits, however, they were not admitted into evidence.

[\*P13] Appellant compares these facts to those present in *State v. Brown, 166 Ohio App.3d 638, 166 Ohio App. 3d 638, 2006 Ohio 1172, 852 N.E.2d 1228*, wherein this court reversed the trial court's denial of " a motion to suppress. We conclude the facts sub judice are not on the same page with the facts present in *Brown*. n4 First, unlike in *Brown*, Trooper Harris did identify the NHTSA manual. Second, Trooper Harris explained the requirements of the NHTSA as it relates to the administered tests. Third, Trooper Harris did testify that he substantially complied with the standards of the NHTSA in administering the tests. n5

n4 Likewise, the facts in the underlying case are also distinguishable from *State v. Nickelson (July 20, 2001)*, 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261. The facts in *Nickelson* are akin to those present in *Brown* where there was no testimony whatsoever regarding the NHTSA standards or compliance with those standards.

[\*\*9]

n5 We confine our review of appellant's assignment of error to the trial court's denial of the motion to suppress and therefore do not address the trial court's decision to grant appellant's motion to suppress as to the HGN test.

[\*P14] More importantly, appellant does not challenge the administration of the field-sobriety tests on appeal as noncompliant with the NHTSA standards. Rather, appellant challenges the demonstration procedures utilized by

Trooper Harris in preparation for the administration of these tests. Specifically, appellant challenges the trooper's five-step demonstration of the walk-and-turn test as opposed to the nine-step requirement for the actual test. Trooper Harris testified that although he only demonstrated five steps for appellant, he advised her that in order to complete the test, she would need to perform nine steps. [HN3] *R.C. 4511.19* requires that the administration, not the demonstration, of field-sobriety tests be conducted in substantial compliance with the NHTSA standards. n6 See, *R.C. 4511.19(D)(4)(b)*.

n6 Actually, appellant argues throughout her brief that strict compliance is the required standard for administration of field sobriety tests. As we stated in *Brown*, supra, *R.C. 4511.19* was amended effective April 9, 2003 and no longer requires strict compliance. Rather, the proper standard is substantial compliance.

[\*\*10]

[\*P15] Appellant takes issue with the fact that Trooper Harris failed to bring his radar certification with him to the suppression hearing. Appellant cites no proper authority for this argument. Trooper Harris did testify that he was certified to use the Python radar, the same radar in the patrol car. Furthermore, we note that appellant did not raise a radar certification issue in her motion to suppress/motion to dismiss. [HN4] "A motion to suppress must state its legal and factual bases with sufficient particularity to notify the prosecutor and the court of the issues to be decided." *State v. Duncan*, 11th Dist. No. 2004-L-065, 2005 Ohio 7061, at P17. Furthermore, a review of the record shows that appellant's counsel did not raise an objection to the trooper's radar qualifications at trial. Certainly, counsel questioned the trooper regarding the certification on cross-examination, yet failed to lodge a complaint that he was not qualified. During this line of questioning, the trooper stated that he was certified on the same type of equipment that was used in the underlying case. In addition, there is no evidence that appellant subpoenaed the certification from the trooper. [\*\*11] Therefore, the trooper was not required to bring any documentation with him to the suppression hearing.

[\*P16] Appellant's single assignment of error is without merit.

[\*P17] For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Painesville Municipal Court is affirmed.

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.

83 of 195 DOCUMENTS

STATE OF OHIO, Plaintiff-Appellee, - vs - SARAH M. PERL,

CASE NO. 2006-L-082

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE  
COUNTY*2006 Ohio 6100; 2006 Ohio App. LEXIS 6026*

November 17, 2006, Decided

**PRIOR HISTORY:** [\*\*1] Criminal Appeal from the Painesville Municipal Court, Case No. 06 TRC 01134.**DISPOSITION:** Affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Painesville Municipal Court (Ohio), which convicted her of operating a vehicle in excess of the posted speed limit and operating a motor vehicle while under the influence of alcohol. Defendant contended that the trial court erred in overruling her motion to suppress.**OVERVIEW:** At the hearing on defendant's motion to suppress, a state trooper testified that he observed a vehicle traveling 13 miles per hour over the posted speed limit. The trooper stopped the vehicle, and upon defendant's admission that she had consumed alcohol, the trooper conducted various field sobriety tests. The trooper testified that defendant failed the tests. At the conclusion of the hearing, the trial court overruled the majority of defendant's motion to suppress. On appeal, defendant challenged the trooper's five-step demonstration of the walk-and-turn test as opposed to the nine-step requirement for the actual test. However, the trooper testified that, although he only demonstrated five steps, he advised defendant that, in order to complete the test, she would need to perform nine steps. *R.C. § 4511.19* required that the administration, not the demonstration, of field sobriety tests be conducted in substantial compliance with the national standards. While the trooper did not bring his radar certification with him to the suppression hearing, he was not required to do so because there was no evidence that defendant subpoenaed the certificate from the trooper.**OUTCOME:** The court affirmed the judgment of the trial court.**CORE TERMS:** trooper, motion to suppress, radar, suppression hearing, demonstration, certification, substantially complied, assignment of error, field-sobriety, sobriety, manual, motion to dismiss, investigatory, cross-examination, walk-and-turn, calibration, calibrated, complied, evening, substantial compliance, strict compliance, underlying case, police officer, initial stop, articulable, hunch, speed, odor of alcohol, probable cause, traffic stop**LexisNexis(R) Headnotes***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence**Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations*

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress***

[HN1] An appellate court reviews a ruling on a motion to suppress giving due deference to the trial court's assignment of weight and inferences drawn from the evidence. The appellate court must accept the trial court's factual determinations when they are supported by competent and credible evidence. However, the appellate court reviews the application of the law to those facts pursuant to a de novo standard.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause******Criminal Law & Procedure > Search & Seizure > Seizures of Persons******Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN2] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal behavior has occurred or is imminent. Investigatory stops based on "hunches" are invalid stops as they are not based on articulable facts. However, observation of traffic violations extend beyond an investigatory stop; they constitute probable cause. When a police officer witnesses a motorist in transit commit a traffic violation, the officer has probable cause to stop the vehicle for the purpose of issuing a citation.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures***

[HN3] *R.C. § 4511.19* requires that the administration, not the demonstration, of field-sobriety tests be conducted in substantial compliance with the National Highway Transportation Safety Administration standards. § 4511.19(D)(4)(b).

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN4] A motion to suppress must state its legal and factual bases with sufficient particularity to notify the prosecutor and the court of the issues to be decided.

**COUNSEL:** Joseph M. Gurley, Painesville City Law Director, Painesville, OH (For Plaintiff-Appellee).

Sandra A. Dray, Painesville, OH (For Defendant-Appellant).

**JUDGES:** CYNTHIA WESTCOTT RICE, J. DONALD R. FORD, P.J., concurs, COLLEEN MARY O'TOOLE, J., concurs in judgment only.

**OPINION BY:** CYNTHIA WESTCOTT RICE

**OPINION:** CYNTHIA WESTCOTT RICE, J.

[\*P1] Appellant, Sarah M. Perl, pleaded no contest to operating a vehicle in excess of the posted speed limit in violation of *R.C. 4511.21(C)* and operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(1)(a)*. Appellant was found guilty of both violations by the Painesville Municipal Court. Prior to the plea, appellant had filed a motion to suppress/motion to dismiss on March 31, 2006. The trial court denied the motion in part and granted the motion in part. Appellant appeals the denial of the remaining portion of appellant's motion to suppress. For the reasons that follow, we affirm.

[\*P2] Appellant's motion to suppress/motion to dismiss was based on the argument that [\*\*2] the stop, detention and arrest of appellant was without probable cause and in violation of appellant's Fourth and Fourteenth Amendment rights. A hearing on appellant's motion to suppress was held at the trial court on April 3, 2006. At the hearing, Trooper Kevin Harris, Ohio State Highway Patrol, testified that on February 17, 2006 at approximately 1:00 in the morning, he was driving west on Route 84 when he observed a vehicle traveling east at what he perceived to be a high rate of speed. Trooper Harris used his radar equipment and clocked the vehicle driving at 48 miles per hour in a 35 mile per hour

zone. n1 Based on these observations, Trooper Harris initiated a traffic stop of the vehicle.

n1 Trooper Harris also testified that he had calibrated the radar instrument at the beginning of his shift that evening. According to the trooper, the calibration revealed the equipment was functioning properly.

[\*P3] The trooper further testified that during his initial contact with the driver, appellant herein, [\*\*3] the trooper detected a "strong odor of alcohol." Appellant exited the vehicle upon the trooper's request. Trooper Harris informed appellant that he detected an odor of alcohol. At that point, appellant admitted to Trooper Harris that she had consumed "three beers and a shot" that evening.

[\*P4] The trooper then conducted a series of field sobriety tests; namely the Horizontal Gaze Nystagmus (HGN), the one-leg-stand and the walk-and-turn tests. As to the HGN, the trooper testified that he was familiar with the National Highway Traffic Safety Administration (NHTSA) standards and identified exhibit three as the written compliance standards and methods for the HGN. However, on cross-examination, the trooper could not identify the standards for the HGN test, although he maintained that he had substantially complied with those standards.

[\*P5] The trooper also identified exhibits one and two, the NHTSA standards for the other tests. However, these exhibits were never admitted into evidence. Trooper Harris described the requirements of the NHTSA and testified that he complied with those standards when directing appellant to perform the three field sobriety tests. According to [\*\*4] the trooper, appellant failed each of the three tests. Trooper Harris testified on cross-examination that he substantially complied with the NHTSA standards for the one-leg-stand test by demonstrating to appellant how to perform the test. He also testified that he complied with NHTSA standards for the walk-and-turn test by demonstrating the test through five step seven though the test requires nine steps. n2 Trooper Harris testified he advised appellant she would be required to take nine steps as opposed to his five steps of demonstration.

n2 During the suppression hearing, a videotape was played which depicted a portion of the field sobriety tests conducted on appellant as well as the trooper's demonstration.

[\*P6] At the close of the suppression hearing, the court found that there was sufficient evidence to stop appellant for speeding. The court also found that the trooper had substantially complied with the field sobriety test standards, with the exception of the HGN test. Therefore, the court granted [\*\*5] the motion to suppress in regard to the HGN test and overruled the motion as to the additional evidence.

[\*P7] Appellant's single assignment of error is:

[\*P8] "[1.] BASED ON THE TESTIMONY OF THE TROOPER AT THE HEARING, THE TRIAL COURT ERRED IN ITS FAILURE TO GRANT THE APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE AND DISMISS THE CASE."

[\*P9] We [HN1] review a ruling on a motion to suppress giving due deference to the trial court's assignment of weight and inferences drawn from the evidence. *State v. Hummel*, 154 Ohio App.3d 123, 2003 Ohio 4602, at P11, 796 N.E.2d 558. "We must accept the trial court's factual determinations when they are supported by competent and credible evidence." *Id.* However, we review the application of the law to those facts pursuant to a de novo standard. *Id.*

[\*P10] Appellant claims that the initial stop of her vehicle was a "fishing expedition" and was not based on legally sufficient facts to justify an investigatory stop. [HN2] "The investigatory stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal [\*\*6] behavior has occurred or is imminent." *State v. Gedeon* (1992), 81

*Ohio App.3d 617, 618, 611 N.E.2d 972*, see, also, *Terry v. Ohio (1968)*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. Appellant is correct that investigatory stops based on "hunches" are invalid stops as they are not based on articulable facts. *State v. Rucker (1990)*, 63 Ohio App.3d 762, 580 N.E.2d 59. However, there is nothing in the record to support appellant's contention that the initial traffic stop of appellant's vehicle was based on the hunch of Trooper Harris that something foul was afoot. On the contrary, the testimony at the suppression hearing showed that Trooper Harris observed appellant's vehicle traveling at a perceived high rate of speed which was then confirmed by a properly calibrated radar instrument. n3 Observation of traffic violations extend beyond an investigatory stop; they constitute probable cause. "[W]hen a police officer witnesses a motorist in transit commit a traffic violation, the officer has probable cause to stop the vehicle for the purpose of issuing a citation." *State v. Teter (Oct. 6, 2000)*, 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, \*10; see, also, [\*\*7] *State v. Graham, 11th Dist. No. 2005-P-0096, 2006 Ohio 4184, at P15*. Therefore, we conclude that the initial stop of appellant's vehicle was lawful.

n3 The trooper testified at the hearing that he was certified to conduct calibration checks on the radar equipment used in this instance. He further testified that he had calibrated this specific instrument at the beginning of his shift. According to the trooper, the calibration revealed the instrument "\*\*\* passed internal function and tuning fork\*\*\*.

[\*P11] During his initial contact with appellant, Trooper Harris noted that she had red and bloodshot eyes. There was no notation of slurred speech. Trooper Harris requested appellant exit the vehicle. She complied and indicated to the trooper that she had consumed "three beers and a shot" that evening.

[\*P12] Trooper Harris then proceeded to administer the field-sobriety tests. Appellant challenged the administration of these tests. Specifically, appellant asserts on appeal that the prosecution's [\*\*8] failure to admit the NHTSA manuals as exhibits was a fatal flaw. During the prosecution's case-in-chief, Trooper Harris identified the NHTSA manual for each field-sobriety test. These manuals were provided to the trooper in the form of exhibits one, two and three. There was no objection to these exhibits, however, they were not admitted into evidence.

[\*P13] Appellant compares these facts to those present in *State v. Brown, 166 Ohio App.3d 638, 166 Ohio App. 3d 638, 2006 Ohio 1172, 852 N.E.2d 1228*, wherein this court reversed the trial court's denial of " a motion to suppress. We conclude the facts sub judice are not on the same page with the facts present in *Brown*. n4 First, unlike in *Brown*, Trooper Harris did identify the NHTSA manual. Second, Trooper Harris explained the requirements of the NHTSA as it relates to the administered tests. Third, Trooper Harris did testify that he substantially complied with the standards of the NHTSA in administering the tests. n5

n4 Likewise, the facts in the underlying case are also distinguishable from *State v. Nickelson (July 20, 2001)*, 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261. The facts in *Nickelson* are akin to those present in *Brown* where there was no testimony whatsoever regarding the NHTSA standards or compliance with those standards.

[\*\*9]

n5 We confine our review of appellant's assignment of error to the trial court's denial of the motion to suppress and therefore do not address the trial court's decision to grant appellant's motion to suppress as to the HGN test.

[\*P14] More importantly, appellant does not challenge the administration of the field-sobriety tests on appeal as noncompliant with the NHTSA standards. Rather, appellant challenges the demonstration procedures utilized by

Trooper Harris in preparation for the administration of these tests. Specifically, appellant challenges the trooper's five-step demonstration of the walk-and-turn test as opposed to the nine-step requirement for the actual test. Trooper Harris testified that although he only demonstrated five steps for appellant, he advised her that in order to complete the test, she would need to perform nine steps. [HN3] *R.C. 4511.19* requires that the administration, not the demonstration, of field-sobriety tests be conducted in substantial compliance with the NHTSA standards. n6 See, *R.C. 4511.19(D)(4)(b)*.

n6 Actually, appellant argues throughout her brief that strict compliance is the required standard for administration of field sobriety tests. As we stated in *Brown*, supra, *R.C. 4511.19* was amended effective April 9, 2003 and no longer requires strict compliance. Rather, the proper standard is substantial compliance.

[\*\*10]

[\*P15] Appellant takes issue with the fact that Trooper Harris failed to bring his radar certification with him to the suppression hearing. Appellant cites no proper authority for this argument. Trooper Harris did testify that he was certified to use the Python radar, the same radar in the patrol car. Furthermore, we note that appellant did not raise a radar certification issue in her motion to suppress/motion to dismiss. [HN4] "A motion to suppress must state its legal and factual bases with sufficient particularity to notify the prosecutor and the court of the issues to be decided." *State v. Duncan*, 11th Dist. No. 2004-L-065, 2005 Ohio 7061, at P17. Furthermore, a review of the record shows that appellant's counsel did not raise an objection to the trooper's radar qualifications at trial. Certainly, counsel questioned the trooper regarding the certification on cross-examination, yet failed to lodge a complaint that he was not qualified. During this line of questioning, the trooper stated that he was certified on the same type of equipment that was used in the underlying case. In addition, there is no evidence that appellant subpoenaed the certification from the trooper. [\*\*11] Therefore, the trooper was not required to bring any documentation with him to the suppression hearing.

[\*P16] Appellant's single assignment of error is without merit.

[\*P17] For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Painesville Municipal Court is affirmed.

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.

84 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs- MARVIN J. BROWN,  
Defendant-Appellant.**

**CASE NO. 2004-T-0123**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
TRUMBULL COUNTY**

*166 Ohio App. 3d 638; 2006 Ohio 1172; 852 N.E.2d 1228; 2006 Ohio App. LEXIS  
1053*

**March 10, 2006, Decided**

**PRIOR HISTORY:** Criminal Appeal from the Warren Municipal Court, Case No. 2004 TRC 04100. *State v. Brown, 2005 Ohio 562, 2005 Ohio App. LEXIS 575 (Ohio Ct. App., Trumbull County, Feb. 11, 2005)*

**DISPOSITION:** Reversed and judgment entered for appellant.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** After his motion to suppress was denied, defendant pled no contest to speeding, a minor misdemeanor, in violation of *Ohio Rev. Code Ann. § 4511.21(C)*, and driving under the influence of alcohol (DUI), a misdemeanor of the first degree, in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*. The Warren Municipal Court (Ohio) found him guilty and sentenced him accordingly. Defendant appealed.

**OVERVIEW:** Defendant argued that the trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards. The appellate court held that the results of the field sobriety tests should have been suppressed because the State failed to prove that the tests were conducted in substantial compliance with the NHTSA manual. Defendant's motion and memorandum were specific enough to give the State notice of the basis for his challenge and were sufficient to shift the burden to the State to demonstrate that the field sobriety tests were properly conducted. The State did not carry its burden at the hearing as it failed to produce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, and did not admit the manual. Further, the totality of the circumstances, when the results of the field sobriety tests were excluded, did not establish that probable cause existed for the DUI arrest. The trooper's observations amounted at most to a reasonable suspicion to believe that defendant may have been under the influence of alcohol.

**OUTCOME:** The judgment of the trial court was reversed and judgment was entered in favor of defendant.

**CORE TERMS:** sobriety, trooper, arrest, motion to suppress, standardized, manual, driving, probable cause,

166 Ohio App. 3d 638, \*; 2006 Ohio 1172, \*\*;  
852 N.E.2d 1228, \*\*\*; 2006 Ohio App. LEXIS 1053

assignment of error, suppressed, speeding, license, substantial compliance, memorandum, dropped, influence of alcohol, strict compliance, conducting, probable cause to arrest, police officer, totality, sentencing, route, administered, suppress, misdemeanor, guidelines, appealable order, odor of alcohol, certification

### LexisNexis(R) Headnotes

#### *Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

#### *Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress*

#### *Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress*

[HN1] At a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard.

#### *Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

[HN2] Amended *Ohio Rev. Code Ann. § 4511.19*, effective April 9, 2003, no longer requires an arresting officer to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible. Rather, substantial compliance is required.

**COUNSEL:** Gregory V. Hicks, Warren Law Director, Warren, OH, and Traci Timko Rose, Assistant Law Director, Warren, OH (For Plaintiff-Appellee).

Samuel F. Bluedorn, Bluedorn & Ohlin, L.L.C., Warren, OH (For Defendant-Appellant).

**JUDGES:** DONALD R. FORD, P.J. CYNTHIA WESTCOTT RICE, J., concurs, DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

**OPINION BY:** DONALD R. FORD

**OPINION:** [\*\*\*1228] [\*639] DONALD R. FORD, P.J.

[\*\*P1] Appellant, Marvin J. Brown, appeals from the February 7, 2005 judgment entry of the Warren Municipal Court, in which he was sentenced for speeding and driving under the influence of alcohol ("DUI").

[\*\*P2] [\*\*\*1229] On June 8, 2004, a complaint was filed against appellant charging him with three counts: one count of speeding, a minor misdemeanor, in violation of *R.C. 4511.21(C)*; one count of DUI, a misdemeanor of the first degree, in violation of *R.C. 4511.19(A)(1)*; and one count of failure to wear a safety belt, a minor misdemeanor, in violation of *R.C. 4513.263*. On June 11, 2004, appellant entered a plea of not guilty at his initial appearance.

[\*640] [\*\*P3] On June 21, 2004, appellant filed a motion to suppress. n1 A suppression hearing was held on August 20, 2004. n2

n1 In his motion to suppress, appellant alleged a lack of probable cause and/or illegal basis to make an arrest in violation of his *Fourth* and *Fourteenth Amendment* rights under the United States Constitution and under *Article I, Section Fourteen*, of the Ohio Constitution. Further, appellant moved the court to suppress any

evidence including testimony and statements made concerning drunk driving, and field sobriety tests.

n2 The parties stipulated that the suppression hearing would be limited to the probable cause for the arrest and the procedures used for the standardized field sobriety tests which led to the arrest of appellant.

[\*\*P4] At that hearing, Trooper Erik Golias ("Trooper Golias") with the Ohio State Highway Patrol, Warren post, testified for appellee, the state of Ohio, that he was on duty on June 8, 2004, and came in contact with appellant. Trooper Golias was traveling in his marked cruiser southbound on State Route 46 ("Route 46") and appellant was driving northbound on Route 46. The speed limit on Route 46 in the area in question is forty miles per hour. Trooper Golias indicated that he is trained and certified in operating a radar. n3 He clocked appellant at 2:16 a.m. traveling at a speed of fifty miles per hour. n4 At that time, he initiated a traffic stop of appellant's vehicle.

n3 Trooper Golias stated that he has an Electronics Speed Measuring Devices ("ESMD") certification.

n4 Trooper Golias testified that prior to operating the radar, he checked the calibration at the beginning of his shift as well as after appellant was arrested. He maintained that the calibration check revealed that it was in proper working order both prior to his shift and immediately after appellant's arrest.

[\*\*P5] Upon approaching appellant's car, Trooper Golias noticed a strong odor of alcohol, and indicated that appellant's eyes were glassy and bloodshot but made no mention regarding appellant's speech. He stated that appellant fumbled through cards and papers and dropped his wallet on his lap. Trooper Golias asked appellant for his license and registration. He said that after appellant located his license, he dropped it on the seat. At that point, Trooper Golias ordered appellant out of his vehicle. He administered three field sobriety tests, including the Horizontal Gaze Nystagmus ("HGN"), the one-legged stand, and the walk and turn. n5 Trooper Golias testified that appellant failed all three tests. He then read appellant his Miranda rights, arrested him for DUI, and transported him to the station. En route to the station, Trooper Golias indicated that appellant said that he had consumed seven beers. At the station, appellant refused to take a breathalyzer test.

n5 Trooper Golias testified that he was trained in conducting those tests prior to graduating in September 2000, from the Highway Patrol Academy. In addition, he indicated that he had opportunities to perform those tests on prior occasions.

[\*641] [\*\*P6] On cross-examination, Trooper Golias testified that appellant made the comment about drinking seven beers after the arrest, and that he did not use that statement for his probable cause determination. Trooper Golias indicated that most of his testimony was not made from [\*\*\*1230] independent recollection but rather from reviewing his notes on the witness stand. After asked whether he had his ESMD certification with him, Trooper Golias responded that he did not.

[\*\*P7] On September 7, 2004, appellant filed a supplemental memorandum in support of his motion to suppress. n6 Appellee filed a response on September 20, 2004.

n6 In his supplemental memorandum, appellant alleged that appellee failed to establish the standardized manner of conducting field sobriety tests as required by the NHTSA. Also, appellant argued that the case should be dismissed for lack of probable cause.

[\*\*P8] Pursuant to its September 27, 2004 judgment entry, the trial court denied appellant's motion to suppress. The trial court determined that probable cause existed for the DUI arrest and that the field sobriety tests were conducted in strict compliance with the National Highway Traffic Safety Administration ("NHTSA") standards.

[\*\*P9] On October 13, 2004, appellant entered a plea of no contest regarding the DUI charge and asked that his sentence be stayed pending appeal. The trial court found appellant guilty of DUI and speeding, and dismissed the failure to wear a safety belt charge. Sentencing was deferred pending appeal. On October 20, 2004, appellant filed a notice of appeal from the October 13, 2004 judgment.

[\*\*P10] On February 7, 2005, the trial court sentenced appellant to one hundred eighty days in jail, one hundred seventy days suspended; ordered him to pay a fine in the amount of \$ 350; suspended his driver's license for two years; and placed him on three years non-reporting probation.

[\*\*P11] On February 14, 2005, this court issued a memorandum opinion in which we sua sponte dismissed appellant's appeal due to lack of a final appealable order. This court indicated that because no sentence had been rendered, there was no final appealable order.

[\*\*P12] On February 17, 2005, appellant filed a motion to reinstate the appeal. Pursuant to this court's March 30, 2005 judgment entry, we granted appellant's motion to reinstate the appeal, and instructed the clerk of courts to substitute the October 13, 2004 judgment entry with the new appealed judgment of February 7, 2005. It is from the February 7, 2005 judgment that appellant makes the following assignments of error: n7

[\*642] [\*\*P13] "[1.] The trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with NHTSA standards.

[\*\*P14] "[2.] The trial court erred in finding probable cause for [appellant's] DUI arrest."

n7 We note that appellee did not file an appellate brief. Also, appellant's notice of appeal is limited to DUI and does not reference the speeding charge. Thus, since appellant has not brought forth any argument regarding speeding, we conclude that it has not been advanced for purposes of this appeal. In addition, pursuant to this court's December 9, 2005 judgment entry, we indicated that the February 7, 2005 sentencing order may not have been a final appealable order since it was issued by the trial court while the appeal was still pending. Accordingly, we ordered that this case be remanded to the trial court for a period of ten days for the sole purpose of the trial court issuing a new sentencing order. The trial court filed a new sentencing order on December 15, 2005, in which appellant's sentence was identical to the foregoing February 7, 2005 order.

[\*\*P15] In his first assignment of error, appellant argues that the trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with the NHTSA standards. Appellant contends that appellee failed to establish the standardized manner of conducting such field sobriety tests as [\*\*\*1231] required by NHTSA, therefore, the field sobriety tests should have been suppressed.

[\*\*P16] This court stated in *State v. Jones, 11th Dist. No. 2001-A-0041, 2002 Ohio 6569, at P16*, that:

[\*\*P17] [HN1] "at a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills (1992)*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 \*\*\*. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger (1993)*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 \*\*\*. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Curry (1994)*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 \*\*\*." (Parallel citations

omitted.)

[\*\*P18] Appellant relies on *State v. Ryan, 5th Dist. No. 02-CA-00095, 2003 Ohio 2803*, for the proposition that if the state does not prove that field sobriety tests were conducted in strict compliance with the NHTSA manual, the results should be suppressed. n8 In *Ryan*, the appellant was stopped [\*643] for speeding, given field sobriety tests, and arrested for DUI. *Id. at P2*. The trooper acknowledged that he failed to perform the HGN test in strict compliance with the NHTSA manual, and did not remember some of the specifics of the testing procedure. *Id. at P3*. The state did not introduce the NHTSA manual at the hearing on appellant's motion to suppress. *Id. at P4*. While not accepting the HGN test, the trial court relied on the trooper's testimony without the actual NHTSA manual in denying the motion. *Id. at P5*.

n8 We note that [HN2] amended *R.C. 4511.19*, effective April 9, 2003, no longer requires an arresting officer to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible. Rather, substantial compliance is required, which we will apply here. *State v. Delarosa, 11th Dist. No. 2003-P-0129, 2005 Ohio 3399, at P45, fn. 4; State v. Boczar, 11th Dist. No. 2004-A-0063, 2005 Ohio 6910, at P31-36*. On January 21, 2004, although the Supreme Court of Ohio in *State v. Schmitt, 101 Ohio St.3d 79, 2004 Ohio 37, 801 N.E.2d 446*, applied the strict compliance standard, we stress that it dealt with an arrest which took place prior to the passage of S.B. 163, and the court acknowledged its application was limited in light of S.B. 163. *Id. at P9, fn. 1*.

[\*\*P19] In *Ryan*, the Fifth District indicated that while the trooper testified regarding his certification to administer the tests, he failed to testify as to the standardized requirements of the NHTSA guidelines. *Id. at P20*. The court held "that the state therefore failed in its burden as to the evidence required to oppose the motion to suppress and that the burden had not shifted to appellant to establish the standardized manner of conducting such tests as required by the NHTSA by impeaching the trooper. By placing this burden on appellant, he was required by impeachment or introduction of the NHTSA manual to carry the burden required of the state." *Id. at P21*.

[\*\*P20] A similar instance occurred in *State v. Nickelson (July 20, 2001), 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261*. In *Nickelson*, the appellant's vehicle was parked with its motor running, blocking the entrance of a bar. *2001 Ohio App. LEXIS 3261 at \*1*. A police officer proceeded to the appellant's car on foot and noticed indicia of intoxication. *2001 Ohio App. LEXIS 3261 at \*2*. After given field sobriety tests, the appellant was placed under arrest for DUI. *Id.* The appellant pleaded not guilty and later moved to suppress the evidence against [\*\*\*1232] him on the grounds that his stop and arrest were unconstitutional. *2001 Ohio App. LEXIS 3261 at \*2-3*. After a hearing, the trial court granted the appellant's motion to suppress regarding the walk-and-turn test because the police officer did not demonstrate that test for him. *2001 Ohio App. LEXIS 3261 at \*3*. However, the appellant's motion to suppress was denied in all other respects. *Id.* The appellant changed his plea to no contest and was found guilty of DUI by the trial court. *Id.*

[\*\*P21] On appeal, the appellant in *Nickelson*, argued, inter alia, that the trial court erred by failing to suppress all field sobriety tests due to the fact that they were not properly administered. *2001 Ohio App. LEXIS 3261 at \*4*. The appellant stressed that the results of those tests should have been suppressed because the police officer did not perform them in a standardized manner and in conformity with the NHTSA manual. *2001 Ohio App. LEXIS 3261 at \*8*.

[\*\*P22] The Sixth District agreed and stated *2001 Ohio App. LEXIS 3261 at \*10*:

[\*\*P23] "in this case, appellant's motion to suppress was specific enough to give appellee notice of the basis for challenging the seizure: appellant cited in his memorandum the constitutional provisions he believed were violated, and he cited [\*644] the [NHTSA manual], which he also believed was violated. Appellant provided case citations as well. In short, appellant's motion and memorandum were enough to shift the burden to appellee to demonstrate that, in this instance, the field sobriety tests were conducted properly. \*\*\* Appellee did not carry this burden at the hearing. While

appellee introduced testimony of officers as to which tests were conducted and how they were conducted, it did not introduce any evidence to prove that the tests were conducted in a standardized manner as provided by the [NHTSA]. No witness testified as to these guidelines, and the manual itself was not admitted. Because appellee did not prove that the field sobriety tests were conducted in accordance with the manual, the results of the field sobriety tests should have been suppressed. See *State v. Homan (2000)*, 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952 \*\*\*, paragraph one of the syllabus[.] \*\*\* Accordingly, appellant's third assignment of error is well-taken." (Parallel citation omitted.)

[\*\*P24] With regard to the case at bar, again, in appellant's motion to suppress, he alleged a lack of probable cause and/or illegal basis to make an arrest in violation of his constitutional rights as well as moved the court to suppress any evidence including testimony and statements made concerning drunk driving, and field sobriety tests. After the hearing, in his supplemental memorandum in support of his motion to suppress, appellant contended that appellee failed to establish the standardized manner of conducting field sobriety tests as required by the NHTSA. Thus, appellant's motion and memorandum were specific enough to give appellee notice of the basis for his challenge and were sufficient to shift the burden to appellee to demonstrate that the field sobriety tests were properly conducted. Appellee did not carry its burden at the hearing. Also, in appellee's response to appellant's motion to suppress, appellee conceded that Trooper Golias failed to make a conclusory affirmation that the tests were administered in compliance with the NHTSA manual, but that the technical requirement in *Ryan* should not be adopted by the trial court.

[\*\*P25] We believe that the rationale of the Fifth and Sixth Districts should apply here. Although appellee introduced testimony of Trooper Golias as to which tests were conducted and how they were administered, it failed to produce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, and did not admit the manual. Trooper Golias's testimony that he conducted the field sobriety tests in conformity [\*\*\*1233] with the manner and procedures with which he was taught is not the same as testifying that he administered the tests in substantial compliance with the guidelines set forth in the NHTSA manual. Trooper Golias failed to testify regarding the standardized requirements. Thus, pursuant to *Ryan* and *Nickelson, supra*, because appellee failed to prove that the field sobriety tests were conducted in substantial compliance with the NHTSA manual, the results of the tests should have been suppressed. Appellant's first assignment of error is with merit.

[\*645] [\*\*P26] In his second assignment of error, appellant alleges that the trial court erred in finding probable cause for his DUI arrest. Appellant maintains that since the standardized field sobriety tests were not performed in substantial compliance with the NHTSA standards, the trial court should have made a determination regarding whether probable cause for arrest existed exclusive of the field sobriety tests at issue.

[\*\*P27] Based on our analysis in appellant's first assignment of error, because we believe that the results of the field sobriety tests should have been suppressed, we must decide whether Trooper Golias had probable cause to arrest appellant absent the tests. See *Homan, supra*, at 427.

[\*\*P28] Appellant relies on *State v. Beagle, 2d Dist. No. 2002-CA-59, 2003 Ohio 4331*. In *Beagle*, the appellant crossed the right lane line by a tire's width two times and almost hit another vehicle; came very close to hitting a light post; had an odor of alcohol on his person; and admitted to consuming "three shots of Jack." *Id.* at P38. However, the Second District determined that the police officer had, at most, a reasonable suspicion that the appellant may have been under the influence of alcohol. *Id.* at P40. The court agreed with the appellant that the totality of the circumstances, excluding the field sobriety tests, did not rise to the level of probable cause to believe that the appellant was under the influence of alcohol. *Id.*

[\*\*P29] In the instant matter, appellant was stopped for traveling ten miles over the speed limit. There was no evidence submitted as to any erratic driving such as weaving, swerving, and/or driving left-of-center. Again, upon approaching appellant's vehicle, Trooper Golias noticed a strong odor of alcohol, indicated that appellant's eyes were glassy and bloodshot, and that appellant fumbled through cards and papers, dropped his wallet on his lap, and after locating his license, dropped it on the seat. Appellant did not admit that he consumed seven beers until *after* his arrest. Considering the foregoing facts in their totality, Trooper Golias's observations, without considering the field sobriety

tests, amounted at most to a reasonable suspicion to believe that appellant may have been under the influence of alcohol. We agree with appellant that the totality of the circumstances, when the results of the field sobriety tests are excluded, does not establish that probable cause existed for the DUI arrest. Appellant's second assignment of error is with merit.

[\*\*P30] For the foregoing reasons, appellant's assignments of error are well-taken. The judgment of the Warren Municipal Court is reversed and judgment is entered for appellant.

CYNTHIA WESTCOTT [\*646] RICE, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

**DISSENT BY:** DIANE V. GRENDALL,

**DISSENT:** DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

[\*\*P31] I concur with the majority's conclusion, under the first assignment of error, [\*\*\*1234] that the State failed to establish that Trooper Golias conducted the field sobriety tests in accordance with the National Highway Traffic Safety Administration standards.

[\*\*P32] I disagree, however, with the majority's conclusion, under the second assignment error, that Trooper Golias did not have probable cause to arrest appellant for driving under the influence of alcohol.

[\*\*P33] "In determining whether the police had probable cause to arrest an individual for DUI," the reviewing court must consider "whether, at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. \*\*\* In making this determination, [the court] will examine the 'totality' of facts and circumstances surrounding the arrest." *State v. Homan*, 89 Ohio St.3d 421, 427, 2000 Ohio 212, 732 N.E.2d 952 (citations omitted).

[\*\*P34] In the present case, there is abundant information sufficient to cause a prudent person to believe that appellant was driving under the influence. Appellant was stopped for speeding in the early morning hours. There was a "strong odor" of alcohol coming from appellant's person. Appellant's eyes were "glassy" and "blood-shot." Appellant "fumbled through cards and papers" while looking for his license and registration. Appellant dropped his wallet in his lap and, after locating his license, dropped his license as well. Appellant was unable to stand on one foot for longer than thirteen seconds. Appellant was unable to maintain his balance walking in a straight line. n9

n9 Although the results of the field sobriety tests Trooper Golias performed must be suppressed, it is well-established "[a] law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests." *State v. Schmitt*, 101 Ohio St.3d 79, 2004 Ohio 37, 801 N.E.2d 446, at syllabus. Accordingly, Trooper Golias' observations as to how appellant performed these tests may be considered when determining probable cause. *Id.* at P14.

[\*\*P35] The majority notes that Trooper Golias did not observe appellant driving erratically. The observation of erratic driving, however, is not essential to arrest for driving under the influence. What is essential is evidence that appellant's ability to operate a motor vehicle has been impaired by the consumption of alcohol. In the present case, there are numerous indications that [\*647] appellant's coordination was impaired to a degree that would affect his ability to drive.

[\*\*P36] This court has held, in numerous instances, that probable cause to arrest exists where the results of the

166 Ohio App. 3d 638, \*647; 2006 Ohio 1172, \*\*P36;  
852 N.E.2d 1228, \*\*\*1234; 2006 Ohio App. LEXIS 1053

field sobriety tests are not considered and where the officer has not observed erratic driving. See *State v. Duncan*, 11th Dist. No. 2004-L-065, 2005 Ohio 7061; *Kirtland Hills v. Deir*, 11th Dist. No. 2004-L-005, 2005 Ohio 1563; *State v. Lynch*, 11th Dist. No. 2002-L-177, 2004 Ohio 5014; *State v. Dohner*, 11th Dist. No. 2003-P-0059, 2004 Ohio 7242.

[\*\*P37] There is no reason for departing from these precedents in the present case. Accordingly, I respectfully dissent.

85 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs- MARVIN J. BROWN,  
Defendant-Appellant.**

**CASE NO. 2004-T-0123**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
TRUMBULL COUNTY**

*166 Ohio App. 3d 638; 2006 Ohio 1172; 852 N.E.2d 1228; 2006 Ohio App. LEXIS  
1053*

**March 10, 2006, Decided**

**PRIOR HISTORY:** Criminal Appeal from the Warren Municipal Court, Case No. 2004 TRC 04100. *State v. Brown, 2005 Ohio 562, 2005 Ohio App. LEXIS 575 (Ohio Ct. App., Trumbull County, Feb. 11, 2005)*

**DISPOSITION:** Reversed and judgment entered for appellant.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** After his motion to suppress was denied, defendant pled no contest to speeding, a minor misdemeanor, in violation of *Ohio Rev. Code Ann. § 4511.21(C)*, and driving under the influence of alcohol (DUI), a misdemeanor of the first degree, in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*. The Warren Municipal Court (Ohio) found him guilty and sentenced him accordingly. Defendant appealed.

**OVERVIEW:** Defendant argued that the trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards. The appellate court held that the results of the field sobriety tests should have been suppressed because the State failed to prove that the tests were conducted in substantial compliance with the NHTSA manual. Defendant's motion and memorandum were specific enough to give the State notice of the basis for his challenge and were sufficient to shift the burden to the State to demonstrate that the field sobriety tests were properly conducted. The State did not carry its burden at the hearing as it failed to produce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, and did not admit the manual. Further, the totality of the circumstances, when the results of the field sobriety tests were excluded, did not establish that probable cause existed for the DUI arrest. The trooper's observations amounted at most to a reasonable suspicion to believe that defendant may have been under the influence of alcohol.

**OUTCOME:** The judgment of the trial court was reversed and judgment was entered in favor of defendant.

**CORE TERMS:** sobriety, trooper, arrest, motion to suppress, standardized, manual, driving, probable cause,

166 Ohio App. 3d 638, \*; 2006 Ohio 1172, \*\*;  
852 N.E.2d 1228, \*\*\*; 2006 Ohio App. LEXIS 1053

assignment of error, suppressed, speeding, license, substantial compliance, memorandum, dropped, influence of alcohol, strict compliance, conducting, probable cause to arrest, police officer, totality, sentencing, route, administered, suppress, misdemeanor, guidelines, appealable order, odor of alcohol, certification

### LexisNexis(R) Headnotes

#### *Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

#### *Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress*

#### *Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress*

[HN1] At a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard.

#### *Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures*

[HN2] Amended *Ohio Rev. Code Ann. § 4511.19*, effective April 9, 2003, no longer requires an arresting officer to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible. Rather, substantial compliance is required.

**COUNSEL:** Gregory V. Hicks, Warren Law Director, Warren, OH, and Traci Timko Rose, Assistant Law Director, Warren, OH (For Plaintiff-Appellee).

Samuel F. Bluedorn, Bluedorn & Ohlin, L.L.C., Warren, OH (For Defendant-Appellant).

**JUDGES:** DONALD R. FORD, P.J. CYNTHIA WESTCOTT RICE, J., concurs, DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

**OPINION BY:** DONALD R. FORD

**OPINION:** [\*\*\*1228] [\*639] DONALD R. FORD, P.J.

[\*\*P1] Appellant, Marvin J. Brown, appeals from the February 7, 2005 judgment entry of the Warren Municipal Court, in which he was sentenced for speeding and driving under the influence of alcohol ("DUI").

[\*\*P2] [\*\*\*1229] On June 8, 2004, a complaint was filed against appellant charging him with three counts: one count of speeding, a minor misdemeanor, in violation of *R.C. 4511.21(C)*; one count of DUI, a misdemeanor of the first degree, in violation of *R.C. 4511.19(A)(1)*; and one count of failure to wear a safety belt, a minor misdemeanor, in violation of *R.C. 4513.263*. On June 11, 2004, appellant entered a plea of not guilty at his initial appearance.

[\*640] [\*\*P3] On June 21, 2004, appellant filed a motion to suppress. n1 A suppression hearing was held on August 20, 2004. n2

n1 In his motion to suppress, appellant alleged a lack of probable cause and/or illegal basis to make an arrest in violation of his *Fourth* and *Fourteenth Amendment* rights under the United States Constitution and under *Article I, Section Fourteen*, of the Ohio Constitution. Further, appellant moved the court to suppress any

evidence including testimony and statements made concerning drunk driving, and field sobriety tests.

n2 The parties stipulated that the suppression hearing would be limited to the probable cause for the arrest and the procedures used for the standardized field sobriety tests which led to the arrest of appellant.

[\*\*P4] At that hearing, Trooper Erik Golias ("Trooper Golias") with the Ohio State Highway Patrol, Warren post, testified for appellee, the state of Ohio, that he was on duty on June 8, 2004, and came in contact with appellant. Trooper Golias was traveling in his marked cruiser southbound on State Route 46 ("Route 46") and appellant was driving northbound on Route 46. The speed limit on Route 46 in the area in question is forty miles per hour. Trooper Golias indicated that he is trained and certified in operating a radar. n3 He clocked appellant at 2:16 a.m. traveling at a speed of fifty miles per hour. n4 At that time, he initiated a traffic stop of appellant's vehicle.

n3 Trooper Golias stated that he has an Electronics Speed Measuring Devices ("ESMD") certification.

n4 Trooper Golias testified that prior to operating the radar, he checked the calibration at the beginning of his shift as well as after appellant was arrested. He maintained that the calibration check revealed that it was in proper working order both prior to his shift and immediately after appellant's arrest.

[\*\*P5] Upon approaching appellant's car, Trooper Golias noticed a strong odor of alcohol, and indicated that appellant's eyes were glassy and bloodshot but made no mention regarding appellant's speech. He stated that appellant fumbled through cards and papers and dropped his wallet on his lap. Trooper Golias asked appellant for his license and registration. He said that after appellant located his license, he dropped it on the seat. At that point, Trooper Golias ordered appellant out of his vehicle. He administered three field sobriety tests, including the Horizontal Gaze Nystagmus ("HGN"), the one-legged stand, and the walk and turn. n5 Trooper Golias testified that appellant failed all three tests. He then read appellant his Miranda rights, arrested him for DUI, and transported him to the station. En route to the station, Trooper Golias indicated that appellant said that he had consumed seven beers. At the station, appellant refused to take a breathalyzer test.

n5 Trooper Golias testified that he was trained in conducting those tests prior to graduating in September 2000, from the Highway Patrol Academy. In addition, he indicated that he had opportunities to perform those tests on prior occasions.

[\*641] [\*\*P6] On cross-examination, Trooper Golias testified that appellant made the comment about drinking seven beers after the arrest, and that he did not use that statement for his probable cause determination. Trooper Golias indicated that most of his testimony was not made from [\*\*\*1230] independent recollection but rather from reviewing his notes on the witness stand. After asked whether he had his ESMD certification with him, Trooper Golias responded that he did not.

[\*\*P7] On September 7, 2004, appellant filed a supplemental memorandum in support of his motion to suppress. n6 Appellee filed a response on September 20, 2004.

n6 In his supplemental memorandum, appellant alleged that appellee failed to establish the standardized manner of conducting field sobriety tests as required by the NHTSA. Also, appellant argued that the case should be dismissed for lack of probable cause.

166 Ohio App. 3d 638, \*641; 2006 Ohio 1172, \*\*P7;  
852 N.E.2d 1228, \*\*\*1230; 2006 Ohio App. LEXIS 1053

[\*\*P8] Pursuant to its September 27, 2004 judgment entry, the trial court denied appellant's motion to suppress. The trial court determined that probable cause existed for the DUI arrest and that the field sobriety tests were conducted in strict compliance with the National Highway Traffic Safety Administration ("NHTSA") standards.

[\*\*P9] On October 13, 2004, appellant entered a plea of no contest regarding the DUI charge and asked that his sentence be stayed pending appeal. The trial court found appellant guilty of DUI and speeding, and dismissed the failure to wear a safety belt charge. Sentencing was deferred pending appeal. On October 20, 2004, appellant filed a notice of appeal from the October 13, 2004 judgment.

[\*\*P10] On February 7, 2005, the trial court sentenced appellant to one hundred eighty days in jail, one hundred seventy days suspended; ordered him to pay a fine in the amount of \$ 350; suspended his driver's license for two years; and placed him on three years non-reporting probation.

[\*\*P11] On February 14, 2005, this court issued a memorandum opinion in which we sua sponte dismissed appellant's appeal due to lack of a final appealable order. This court indicated that because no sentence had been rendered, there was no final appealable order.

[\*\*P12] On February 17, 2005, appellant filed a motion to reinstate the appeal. Pursuant to this court's March 30, 2005 judgment entry, we granted appellant's motion to reinstate the appeal, and instructed the clerk of courts to substitute the October 13, 2004 judgment entry with the new appealed judgment of February 7, 2005. It is from the February 7, 2005 judgment that appellant makes the following assignments of error: n7

[\*642] [\*\*P13] "[1.] The trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with NHTSA standards.

[\*\*P14] "[2.] The trial court erred in finding probable cause for [appellant's] DUI arrest."

n7 We note that appellee did not file an appellate brief. Also, appellant's notice of appeal is limited to DUI and does not reference the speeding charge. Thus, since appellant has not brought forth any argument regarding speeding, we conclude that it has not been advanced for purposes of this appeal. In addition, pursuant to this court's December 9, 2005 judgment entry, we indicated that the February 7, 2005 sentencing order may not have been a final appealable order since it was issued by the trial court while the appeal was still pending. Accordingly, we ordered that this case be remanded to the trial court for a period of ten days for the sole purpose of the trial court issuing a new sentencing order. The trial court filed a new sentencing order on December 15, 2005, in which appellant's sentence was identical to the foregoing February 7, 2005 order.

[\*\*P15] In his first assignment of error, appellant argues that the trial court erred in finding that standardized field sobriety tests were conducted in substantial compliance with the NHTSA standards. Appellant contends that appellee failed to establish the standardized manner of conducting such field sobriety tests as [\*\*\*1231] required by NHTSA, therefore, the field sobriety tests should have been suppressed.

[\*\*P16] This court stated in *State v. Jones, 11th Dist. No. 2001-A-0041, 2002 Ohio 6569, at P16*, that:

[\*\*P17] [HN1] "at a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills (1992)*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 \*\*\*. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger (1993)*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 \*\*\*. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Curry (1994)*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 \*\*\*." (Parallel citations

omitted.)

[\*\*P18] Appellant relies on *State v. Ryan, 5th Dist. No. 02-CA-00095, 2003 Ohio 2803*, for the proposition that if the state does not prove that field sobriety tests were conducted in strict compliance with the NHTSA manual, the results should be suppressed. n8 In *Ryan*, the appellant was stopped [\*643] for speeding, given field sobriety tests, and arrested for DUI. *Id. at P2*. The trooper acknowledged that he failed to perform the HGN test in strict compliance with the NHTSA manual, and did not remember some of the specifics of the testing procedure. *Id. at P3*. The state did not introduce the NHTSA manual at the hearing on appellant's motion to suppress. *Id. at P4*. While not accepting the HGN test, the trial court relied on the trooper's testimony without the actual NHTSA manual in denying the motion. *Id. at P5*.

n8 We note that [HN2] amended *R.C. 4511.19*, effective April 9, 2003, no longer requires an arresting officer to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible. Rather, substantial compliance is required, which we will apply here. *State v. Delarosa, 11th Dist. No. 2003-P-0129, 2005 Ohio 3399, at P45, fn. 4; State v. Boczar, 11th Dist. No. 2004-A-0063, 2005 Ohio 6910, at P31-36*. On January 21, 2004, although the Supreme Court of Ohio in *State v. Schmitt, 101 Ohio St.3d 79, 2004 Ohio 37, 801 N.E.2d 446*, applied the strict compliance standard, we stress that it dealt with an arrest which took place prior to the passage of S.B. 163, and the court acknowledged its application was limited in light of S.B. 163. *Id. at P9, fn. 1*.

[\*\*P19] In *Ryan*, the Fifth District indicated that while the trooper testified regarding his certification to administer the tests, he failed to testify as to the standardized requirements of the NHTSA guidelines. *Id. at P20*. The court held "that the state therefore failed in its burden as to the evidence required to oppose the motion to suppress and that the burden had not shifted to appellant to establish the standardized manner of conducting such tests as required by the NHTSA by impeaching the trooper. By placing this burden on appellant, he was required by impeachment or introduction of the NHTSA manual to carry the burden required of the state." *Id. at P21*.

[\*\*P20] A similar instance occurred in *State v. Nickelson (July 20, 2001), 6th Dist. No. H-00-036, 2001 Ohio App. LEXIS 3261*. In *Nickelson*, the appellant's vehicle was parked with its motor running, blocking the entrance of a bar. *2001 Ohio App. LEXIS 3261 at \*1*. A police officer proceeded to the appellant's car on foot and noticed indicia of intoxication. *2001 Ohio App. LEXIS 3261 at \*2*. After given field sobriety tests, the appellant was placed under arrest for DUI. *Id.* The appellant pleaded not guilty and later moved to suppress the evidence against [\*\*\*1232] him on the grounds that his stop and arrest were unconstitutional. *2001 Ohio App. LEXIS 3261 at \*2-3*. After a hearing, the trial court granted the appellant's motion to suppress regarding the walk-and-turn test because the police officer did not demonstrate that test for him. *2001 Ohio App. LEXIS 3261 at \*3*. However, the appellant's motion to suppress was denied in all other respects. *Id.* The appellant changed his plea to no contest and was found guilty of DUI by the trial court. *Id.*

[\*\*P21] On appeal, the appellant in *Nickelson*, argued, inter alia, that the trial court erred by failing to suppress all field sobriety tests due to the fact that they were not properly administered. *2001 Ohio App. LEXIS 3261 at \*4*. The appellant stressed that the results of those tests should have been suppressed because the police officer did not perform them in a standardized manner and in conformity with the NHTSA manual. *2001 Ohio App. LEXIS 3261 at \*8*.

[\*\*P22] The Sixth District agreed and stated *2001 Ohio App. LEXIS 3261 at \*10*:

[\*\*P23] "in this case, appellant's motion to suppress was specific enough to give appellee notice of the basis for challenging the seizure: appellant cited in his memorandum the constitutional provisions he believed were violated, and he cited [\*644] the [NHTSA manual], which he also believed was violated. Appellant provided case citations as well. In short, appellant's motion and memorandum were enough to shift the burden to appellee to demonstrate that, in this instance, the field sobriety tests were conducted properly. \*\*\* Appellee did not carry this burden at the hearing. While

appellee introduced testimony of officers as to which tests were conducted and how they were conducted, it did not introduce any evidence to prove that the tests were conducted in a standardized manner as provided by the [NHTSA]. No witness testified as to these guidelines, and the manual itself was not admitted. Because appellee did not prove that the field sobriety tests were conducted in accordance with the manual, the results of the field sobriety tests should have been suppressed. See *State v. Homan (2000)*, 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952 \*\*\*, paragraph one of the syllabus[.] \*\*\* Accordingly, appellant's third assignment of error is well-taken." (Parallel citation omitted.)

[\*\*P24] With regard to the case at bar, again, in appellant's motion to suppress, he alleged a lack of probable cause and/or illegal basis to make an arrest in violation of his constitutional rights as well as moved the court to suppress any evidence including testimony and statements made concerning drunk driving, and field sobriety tests. After the hearing, in his supplemental memorandum in support of his motion to suppress, appellant contended that appellee failed to establish the standardized manner of conducting field sobriety tests as required by the NHTSA. Thus, appellant's motion and memorandum were specific enough to give appellee notice of the basis for his challenge and were sufficient to shift the burden to appellee to demonstrate that the field sobriety tests were properly conducted. Appellee did not carry its burden at the hearing. Also, in appellee's response to appellant's motion to suppress, appellee conceded that Trooper Golias failed to make a conclusory affirmation that the tests were administered in compliance with the NHTSA manual, but that the technical requirement in *Ryan* should not be adopted by the trial court.

[\*\*P25] We believe that the rationale of the Fifth and Sixth Districts should apply here. Although appellee introduced testimony of Trooper Golias as to which tests were conducted and how they were administered, it failed to produce any evidence to prove that the tests were conducted in a standardized manner as provided by the NHTSA, and did not admit the manual. Trooper Golias's testimony that he conducted the field sobriety tests in conformity [\*\*\*1233] with the manner and procedures with which he was taught is not the same as testifying that he administered the tests in substantial compliance with the guidelines set forth in the NHTSA manual. Trooper Golias failed to testify regarding the standardized requirements. Thus, pursuant to *Ryan* and *Nickelson, supra*, because appellee failed to prove that the field sobriety tests were conducted in substantial compliance with the NHTSA manual, the results of the tests should have been suppressed. Appellant's first assignment of error is with merit.

[\*645] [\*\*P26] In his second assignment of error, appellant alleges that the trial court erred in finding probable cause for his DUI arrest. Appellant maintains that since the standardized field sobriety tests were not performed in substantial compliance with the NHTSA standards, the trial court should have made a determination regarding whether probable cause for arrest existed exclusive of the field sobriety tests at issue.

[\*\*P27] Based on our analysis in appellant's first assignment of error, because we believe that the results of the field sobriety tests should have been suppressed, we must decide whether Trooper Golias had probable cause to arrest appellant absent the tests. See *Homan, supra*, at 427.

[\*\*P28] Appellant relies on *State v. Beagle, 2d Dist. No. 2002-CA-59, 2003 Ohio 4331*. In *Beagle*, the appellant crossed the right lane line by a tire's width two times and almost hit another vehicle; came very close to hitting a light post; had an odor of alcohol on his person; and admitted to consuming "three shots of Jack." *Id.* at P38. However, the Second District determined that the police officer had, at most, a reasonable suspicion that the appellant may have been under the influence of alcohol. *Id.* at P40. The court agreed with the appellant that the totality of the circumstances, excluding the field sobriety tests, did not rise to the level of probable cause to believe that the appellant was under the influence of alcohol. *Id.*

[\*\*P29] In the instant matter, appellant was stopped for traveling ten miles over the speed limit. There was no evidence submitted as to any erratic driving such as weaving, swerving, and/or driving left-of-center. Again, upon approaching appellant's vehicle, Trooper Golias noticed a strong odor of alcohol, indicated that appellant's eyes were glassy and bloodshot, and that appellant fumbled through cards and papers, dropped his wallet on his lap, and after locating his license, dropped it on the seat. Appellant did not admit that he consumed seven beers until *after* his arrest. Considering the foregoing facts in their totality, Trooper Golias's observations, without considering the field sobriety

166 Ohio App. 3d 638, \*645; 2006 Ohio 1172, \*\*P29;  
852 N.E.2d 1228, \*\*\*1233; 2006 Ohio App. LEXIS 1053

tests, amounted at most to a reasonable suspicion to believe that appellant may have been under the influence of alcohol. We agree with appellant that the totality of the circumstances, when the results of the field sobriety tests are excluded, does not establish that probable cause existed for the DUI arrest. Appellant's second assignment of error is with merit.

[\*\*P30] For the foregoing reasons, appellant's assignments of error are well-taken. The judgment of the Warren Municipal Court is reversed and judgment is entered for appellant.

CYNTHIA WESTCOTT [\*646] RICE, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

**DISSENT BY:** DIANE V. GRENDALL,

**DISSENT:** DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

[\*\*P31] I concur with the majority's conclusion, under the first assignment of error, [\*\*\*1234] that the State failed to establish that Trooper Golias conducted the field sobriety tests in accordance with the National Highway Traffic Safety Administration standards.

[\*\*P32] I disagree, however, with the majority's conclusion, under the second assignment error, that Trooper Golias did not have probable cause to arrest appellant for driving under the influence of alcohol.

[\*\*P33] "In determining whether the police had probable cause to arrest an individual for DUI," the reviewing court must consider "whether, at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. \*\*\* In making this determination, [the court] will examine the 'totality' of facts and circumstances surrounding the arrest." *State v. Homan*, 89 Ohio St.3d 421, 427, 2000 Ohio 212, 732 N.E.2d 952 (citations omitted).

[\*\*P34] In the present case, there is abundant information sufficient to cause a prudent person to believe that appellant was driving under the influence. Appellant was stopped for speeding in the early morning hours. There was a "strong odor" of alcohol coming from appellant's person. Appellant's eyes were "glassy" and "blood-shot." Appellant "fumbled through cards and papers" while looking for his license and registration. Appellant dropped his wallet in his lap and, after locating his license, dropped his license as well. Appellant was unable to stand on one foot for longer than thirteen seconds. Appellant was unable to maintain his balance walking in a straight line. n9

n9 Although the results of the field sobriety tests Trooper Golias performed must be suppressed, it is well-established "[a] law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests." *State v. Schmitt*, 101 Ohio St.3d 79, 2004 Ohio 37, 801 N.E.2d 446, at syllabus. Accordingly, Trooper Golias' observations as to how appellant performed these tests may be considered when determining probable cause. *Id.* at P14.

[\*\*P35] The majority notes that Trooper Golias did not observe appellant driving erratically. The observation of erratic driving, however, is not essential to arrest for driving under the influence. What is essential is evidence that appellant's ability to operate a motor vehicle has been impaired by the consumption of alcohol. In the present case, there are numerous indications that [\*647] appellant's coordination was impaired to a degree that would affect his ability to drive.

[\*\*P36] This court has held, in numerous instances, that probable cause to arrest exists where the results of the

166 Ohio App. 3d 638, \*647; 2006 Ohio 1172, \*\*P36;  
852 N.E.2d 1228, \*\*\*1234; 2006 Ohio App. LEXIS 1053

field sobriety tests are not considered and where the officer has not observed erratic driving. See *State v. Duncan*, 11th Dist. No. 2004-L-065, 2005 Ohio 7061; *Kirtland Hills v. Deir*, 11th Dist. No. 2004-L-005, 2005 Ohio 1563; *State v. Lynch*, 11th Dist. No. 2002-L-177, 2004 Ohio 5014; *State v. Dohner*, 11th Dist. No. 2003-P-0059, 2004 Ohio 7242.

[\*\*P37] There is no reason for departing from these precedents in the present case. Accordingly, I respectfully dissent.

86 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**CITY OF CLEVELAND, Plaintiff-appellee vs. MARK SANDERS,  
Defendant-appellant**

**NO. 83073**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2004 Ohio 4473; 2004 Ohio App. LEXIS 4057*

**August 26, 2004, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDING: Criminal appeal from Cleveland Municipal Court, Case No. TRC-103929

**DISPOSITION:** Judgment of the Municipal Court reversed; cause remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from an order of the Cleveland Municipal Court (Ohio), which denied his motion to suppress evidence. Defendant was charged with driving under the influence, driving with a blood alcohol content reading over 0.17 (DBAC), and speeding. He entered a no contest plea to the DBAC charge, the other two counts were nolle prossed, and defendant was found guilty of the DBAC offense.

**OVERVIEW:** Defendant was stopped for exceeding the speed limit, and he was thereafter arrested and charged with multiple offenses arising from being intoxicated while driving. Defendant's suppression motion was denied. Thereafter, defendant pleaded no contest to one charge and the others were nol prossed. On appeal, defendant contended that the denial of suppression was error. The court found that the officer had reasonable suspicion that defendant was operating his vehicle in violation of the law, based on the excessive speed clocked by the officer's radar device, together with the officer's 30 years of experience. Accordingly, the vehicle stop was lawful. However, the court found that defendant's arrest for drunk driving was improper because the trial court's findings on the probable cause issue were against the manifest weight of the evidence. Although the officer testified to defendant's condition, which "appeared to be intoxicated," he also testified that defendant did not weave in his vehicle, his other actions were not indicative of one who was intoxicated, the field sobriety tests were not administered until after defendant was arrested, and the breath analyzer test was inadmissible.

**OUTCOME:** The court reversed the order of the trial court and remanded the matter for further proceedings.

**CORE TERMS:** arrest, driving, probable cause, intoxicated, sobriety, breath, analyzer, alcohol, influence of alcohol, arresting officer, bloodshot, probable cause to arrest, assignment of error, speeding, smell, odor of alcohol, videotape,

totality, indicia, glassy, drink, motor vehicle, intrusion, detainee, erratic, driver, beer, articulable suspicion, reasonable suspicion, drunk driving

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] When addressing a suppression ruling, a reviewing court defers to the finder of fact as long as those facts are supported by competent, credible evidence. If the court's findings of fact are supported by credible competent evidence, the reviewing court then reviews the court's application of the law to those facts under a de novo standard.

#### ***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN2] In order for a vehicle stop to be proper, an officer must have a reasonable and articulable suspicion that a driver is either engaged in criminal activity or operating his motor vehicle in violation of the law. The reasonableness of the stop is viewed in light of the totality of the surrounding circumstances. The officer stopping the defendant must be able to articulate specific facts which, along with the reasonable inferences arising from those facts, reasonably warrant the intrusion which the stop comprises.

#### ***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

#### ***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard***

[HN3] Because an arrest is the ultimate intrusion upon a citizen's liberty, an arresting officer must have more than a reasonable, articulable suspicion of criminal activity. He must have probable cause to believe an individual has committed a crime. Further, an arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN4] For an arrest for driving under the influence of alcohol or with an illegal alcohol level, in determining whether an arresting officer had probable cause to arrest a defendant for driving with an alcohol blood level above the legal limit, a court must address the facts available to the officer at the time of the arrest. If, at the moment of the arrest, the facts and circumstances were trustworthy enough to induce a prudent person to believe that the defendant indeed had a blood alcohol above the legal limit while driving, then the officer had probable cause for the arrest. If, however, the officer lacked probable cause to arrest, then any evidence obtained as a result of that arrest is inadmissible.

#### ***Civil Procedure > Appeals > Standards of Review > De Novo Review***

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN5] Following an adverse ruling on a suppression motion, there are three methods to challenge a trial court's ruling.

First, the appealing party may challenge the findings of fact. This challenge requires a reviewing court to decide whether the court's findings are against the manifest weight of the evidence. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court may reverse the trial court for committing an error of law. If the trial court has not erred in its findings of fact and "has properly identified the law to be applied," the appealing party can still challenge the court's final determination in its ruling on the law. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. As the United States Supreme Court has held, as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN6] In reviewing adverse rulings on a suppression motion in drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors, including: (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN7] In reviewing adverse rulings on a suppression motion in drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors, including: (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol  
& Field Sobriety > Admissibility  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable  
Cause  
Evidence > Scientific Evidence > Sobriety Tests***

[HN8] Several courts have barred the portable breath analyzer (PBT) tests for probable cause purposes. As the Ohio Court of Appeals, Third Appellate District, explained, the results of the PBT are inadmissible because the Ohio Department of Health no longer recognizes the test. Therefore, the results of the PBT cannot serve as probable cause to arrest an appellant for driving under the influence of alcohol.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

***Evidence > Scientific Evidence > Blood Alcohol***

[HN9] For an arrest for driving while intoxicated or with an excessive blood alcohol to be valid, a suspect need not display every possible indication that he is intoxicated. Nonetheless, the courts require a police officer to administer field sobriety tests or to have sufficient indication of intoxication before an arrest is made. Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated. Nonetheless, an analysis of an investigatory stop leading to an arrest requires careful attention to each stage of the detention in order to make sure that the extent of the intrusion represented by each stage is warranted by the officer's reasonable and articulable suspicion at that point.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

[HN10] Investigating a detainee for possible inebriation includes administering field sobriety tests like the "finger to nose" test, the Horizontal Gaze Nystagmus test, the "walk and turn" test, and the "one leg stand" test. The portable breath analyzer test has, in the past, also been considered a test providing probable cause. The law prohibits driving under the influence of alcohol; it does not prohibit driving after the mere consumption of an alcoholic beverage. Just the smell of alcohol is not enough to establish driving under the influence. Nor is a defendant's admission of having had a drink. Glassy or bloodshot eyes, along with the smell of alcohol and an admission of having had a drink, may not be sufficient to arrest but are sufficient to merit further investigation in the form of field sobriety tests.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN11] An arrest for driving while intoxicated can be made without sobriety tests first being performed, if there are sufficient indicia of intoxication apart from any sobriety tests. Thus the totality of the circumstances may support the finding that probable cause existed for an arrest even without a field sobriety test. These cases are inherently fact-sensitive.

**COUNSEL:** For plaintiff-appellee: SUBODH CHANDRA, ESQ., DIRECTOR OF LAW AND PROSECUTING ATTORNEY, SANFORD E. WATSON, II, ESQ., Chief Assistant Prosecutor, Bryan Fritz, Esq., Assistant Prosecutor, Cleveland, Ohio.

For defendant-appellant: HECTOR G. MARTINEZ, JR., ESQ., Zukerman, Daiker & Lear Co., L.P.A., Cleveland, Ohio.

**JUDGES:** DIANE KARPINSKI JUDGE. JAMES J. SWEENEY, J., CONCURS; ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY.

**OPINION BY:** DIANE KARPINSKI

**OPINION:** AND

## JOURNAL ENTRY AND OPINION

KARPINSKI, J.

[\*P1] Defendant, Mark Sanders, appeals the trial court's denial of his motion to suppress following a suppression hearing. Defendant was charged with driving under the influence, driving with a blood alcohol content reading over 0.17, and speeding, in violation of Cleveland City Ordinances. Following the court's denial of his motion to suppress, he pleaded no contest to and was found guilty of operating a vehicle with a high alcohol concentration in violation of Cleveland Ordinance 433.01(a)(6). The other two counts were nolle.

[\*P2] Defendant appealed, stating one assignment [\*P2] of error with seven issues listed under that assignment. The assignment of error states:

[\*P3] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

[\*P4] The first issue listed under this assignment of error states:

[\*P5] WHETHER THE ARRESTING OFFICER CONDUCTED AN IMPROPER WARRANTLESS STOP OF THE APPELLANT'S VEHICLE; THUS RENDERING ALL SUBSEQUENTLY OBTAINED EVIDENCE THE FRUIT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE IN VIOLATION OF THE RIGHTS GUARANTEED APPELLANT BY THE *FOURTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION*.

[\*P6] Defendant claims that his stop was not justified because the officer lacked an articulable suspicion that criminal activity took place at the time of the stop. Because he believes that the officer lacked probable cause to stop him, he argues that any evidence obtained as a result of that stop is not admissible.

[\*P7] [HN1] When addressing a suppression ruling, a reviewing court defers to the finder of fact as long as those facts are supported by competent, credible evidence. *State v. Gibson (Mar. 17, 2000), Ross App. [\*\*3] No 99 CA 2516, 2000 Ohio App. LEXIS 1197*, citing *State v. Medcalf*. If the court's findings of fact are supported by credible competent evidence, the reviewing court then reviews the court's application of the law to those facts under a de novo standard.

[\*P8] [HN2] In order for a stop to be proper, the officer must have a reasonable and articulable suspicion that the driver is either engaged in criminal activity or operating his motor vehicle in violation of the law. *State v. Howell (Nov. 13, 1995), Warren App. No. CA95-06-057, 1995 Ohio App. LEXIS 5014*, citing *Delaware v. Prouse (1979), 440 U.S. 648, 663, 59 L. Ed. 2d 660, 99 S. Ct. 1391*; *State v. Brandenburg (1987), 41 Ohio App.3d 109, 110, 534 N.E.2d 906*. The reasonableness of the stop is viewed in light of the totality of the surrounding circumstances. *Id.*, citing *State v. Bobo (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489*. The officer stopping the defendant must be able to articulate specific facts which, along with the reasonable inferences arising from those facts, reasonably warrant the intrusion which the stop comprises. *Terry v. Ohio (1968), 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868*.

[\*P9] Defendant argues that the officer did not have a reasonable [\*P4] suspicion of illegal activity to justify the stop. The officer testified, however, that he had measured defendant's speed at 48 MPH in a 25 MPH zone with a radar device. The officer also testified that he had been a police officer for thirty years. The officer's experience, coupled with the readout from the radar device, provide a reasonable suspicion that defendant was operating his motor vehicle in violation of the law. This portion of the assignment of error is without merit.

[\*P10] Defendant also argues that his arrest for drunk driving was improper. He states the issue as follows:

[\*P11] WHETHER THE ARRESTING OFFICER CONDUCTED AN IMPROPER ARREST OF THE APPELLANT FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL; [SIC] THUS RENDERING ALL

SUBSEQUENTLY OBTAINED EVIDENCE THE FRUIT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE IN VIOLATION OF THE RIGHTS GUARANTEED APPELLANT BY THE *FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION*.

[\*P12] Defendant argues that the arresting officer lacked probable cause to arrest him for driving under the influence of alcohol. [HN3] "Because an arrest is the ultimate intrusion upon [\*\*5] a citizen's liberty, the arresting officer must have more than a reasonable, articulable suspicion of criminal activity. He must have probable cause to believe the individual has committed a crime." *State v. Evans (1998)*, 127 Ohio App. 3d 56, 64, 711 N.E.2d 761.

[\*P13] Further, "an arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused." *State v. Timson (1974)*, 38 Ohio St.2d 122, 311 N.E.2d 16, paragraph one of the syllabus.

[\*P14] Similarly, [HN4] for an arrest for driving under the influence or with an illegal alcohol level, in determining whether an arresting officer had probable cause to arrest a defendant for driving with an alcohol blood level above the legal limit, the court must address the facts available to the officer at the time of the arrest. If, at the moment of the arrest, the facts and circumstances were trustworthy enough to induce a prudent person to [\*\*6] believe that the defendant indeed had a blood alcohol above the legal limit while driving, then the officer had probable cause for the arrest. *Beck v. Ohio (1964)*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223. If, however, the officer lacked probable cause to arrest, then any evidence obtained as a result of that arrest is inadmissible. *State v. Timson (1974)*, 38 Ohio St.2d 122, 311 N.E.2d 16, paragraph two of the syllabus.

[\*P15] [HN5] Following an adverse ruling on a suppression motion, there are three methods to challenge the trial court's ruling. First, the appealing party may challenge the findings of fact. This challenge requires the reviewing court to decide whether the court's findings are against the manifest weight of the evidence. *State v. Barrett (Feb. 26, 2001)*, Licking App. No. 00CA-47, 2001 Ohio App. LEXIS 692, at \*4. "Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court may reverse the trial court for committing an error of law." *Id.* If the trial court has not erred in its findings of fact and "has properly identified the law to be applied, [\*\*7] " the appealing party can still challenge the court's final determination in its ruling on the law. *Id.*

[\*P16] When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. \*\*\* As the United States Supreme Court held in *Ornelas v. U.S. (1996)*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911, "as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

[\*P17] *Id.* at \*4-5.

[\*P18] [HN6] In reviewing drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. *State v. Medcalf (1996)*, 111 Ohio App.3d 142, 147, 675 N.E.2d 1268. "An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol." *Id.*, citations omitted. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors:

[\*P19] \*\*\* These factors include, but [\*\*8] are not limited to: (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of

the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); [HN7] (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong, "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together [\*\*9] with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative. *State v. Evans (1998), 127 Ohio App.3d 56, 63, fn. 2, 711 N.E.2d 761.*

[\*P20] The first question, then, is whether the court's findings were against the manifest weight of the evidence. The officer testified that defendant "appeared to be intoxicated." The only facts the officer cited to support his statement that defendant appeared intoxicated was, "His eyes were dilated. He had an odor of alcoholic beverage on his breath. \*\*\* I asked him if he had been drinking. He said yes. He had one drink." Id.

[\*P21] The officer, who had been a policeman for thirty years, also testified that he has made thousands of DUI arrests. He stated that he "tested [defendant] on the probable cause device, the portable breath analyzer. And in my estimate and the totality of the circumstances, lead me to arrest him for the DUI." Tr. 9. He agreed with the prosecutor's statement that because of the results of the breath analyzer, which he has used for seven or eight years, along with defendant's [\*\*10] driving, demeanor, smell of alcohol and his dilated eyes, he believed that defendant was "substantially impaired" such that he could not safely operate a motor vehicle.

[\*P22] The officer admitted on cross-examination that defendant did not weave, that he properly executed a lane change including using his signal, that he was cooperative, that he did not fumble when retrieving his driver's license, and that he was steady and did not sway or weave when standing outside the vehicle. The officer admitted, moreover, that he did not administer the field sobriety tests until after he arrested defendant. He decided to arrest "because he was intoxicated." Tr. 20. The officer repeatedly referenced his years of experience in arresting drunk drivers.

[\*P23] The officer also admitted that he was aware that the breath analyzer he used was not approved by the Ohio Department of Health, that he did not have any calibration records for that analyzer with him in court, and that he could not remember the manufacturer of the device. He also testified that the field sobriety tests, administered after the arrest when the defendant was back at the station, are subjective tests which do not [\*\*11] have numbered clues, so that the results are "based on experience and common sense." Tr. at 28. He stated that all the test results are subjective and denied any objective criteria for interpreting the sobriety tests. The officer also admitted that he arrested defendant after observing him for less than two minutes.

[\*P24] The issue, therefore, is whether the officer's observations were adequate to provide probable cause for the arrest. The videotape of the arrest shows that the officer arrested defendant immediately after taking the breath analyzer reading. The trial court ruled that this reading was not admissible. The only reason the court gave for barring this evidence was "on some point that defense counsel raised." Tr. at 70. We note, however, that [HN8] several courts have barred the portable breath analyzer tests for probable cause purposes. As the Third Appellate District explained, "the results of the PBT are inadmissible because the Ohio Department of Health no longer recognizes the test. Therefore, the results of the \*\*\* PBT could not serve as probable cause to arrest the appellant for driving under the influence of alcohol." *State v. Ferguson, Defiance App. No. 4-01-34, 2002 Ohio 1763.* [\*\*12] See also *State v. Anez (2000), 108 Ohio Misc. 2d 18, 738 N.E.2d 491*; *State v. Keith, Guernsey App. No. 02CA01, 2003 Ohio 2354* (where officer did not identify type of portable analyzer he used.)

[\*P25] Without that test, we are left with limited evidence of intoxication. The videotape shows that defendant walked steadily, spoke clearly, and followed the officer's orders promptly. Defendant was not driving erratically when he was stopped. And when he was told to exit his vehicle, he did not stumble or weave. Police had not received a report that defendant was intoxicated, nor was there any testimony that his eyes were bloodshot or glassy, though they were

dilated. The officer did not report any slurred speech. He did state there was the smell of alcohol on defendant's breath. Defendant readily admitted to drinking one cocktail, but the record does not indicate at what time he had it. Few, if any, of the factors listed in *Evans, supra*, therefore, justified the arrest for drunk driving.

[\*P26] [HN9] For an arrest for driving while intoxicated or with an excessive blood alcohol to be valid, a suspect need not display every possible indication that he [\*\*13] is intoxicated. *State v. Barrett (Feb. 26, 2001), Licking App. No. 00CA-47, 2001 Ohio App. LEXIS 692*. Nonetheless, the courts require the officer to administer field sobriety tests or to have sufficient indication of intoxication before an arrest is made.

[\*P27] "Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated." *1996 Ohio App. LEXIS 3361 at \*8.*" *State v. Evans*, quoting *State v. Yemma, (Aug. 9, 1996), Portage App. No. 95-P-0156, 1996 Ohio App. LEXIS 3361*.

[\*P28] Nonetheless, "an analysis of an investigatory stop leading to an arrest requires careful attention to each stage of the detention in order to make sure that the extent of the intrusion represented by each stage is warranted by the officer's reasonable and articulable suspicion at that point." *State v. Spillers (Mar. 24, 2000), Darke App. No. 1504, 2000 Ohio App. LEXIS 1151, [\*\*14] at \*7*.

[\*P29] [HN10] Investigating a detainee for possible inebriation includes administering field sobriety tests like the "finger to nose" test, the Horizontal Gaze Nystagmus test (HGN), the "walk and turn" test, and the "one leg stand" test. The portable breath analyzer test has, in the past, also been considered a test providing probable cause. Except for the breath analyzer test, which has been barred for consideration for probable cause, the officer used none of these tests prior to arresting defendant.

[\*P30] As Judge Fain has noted, "The law prohibits driving under the influence of alcohol; it does not prohibit driving after the mere consumption of an alcoholic beverage." *U.S. v. Frantz (2001), 177 F. Supp. 2d 760, 762*, quoting *State v. Spillers 2000 Ohio App. LEXIS 1151, at \*3*; see also *State v. Dixon 2000 Ohio App. LEXIS 5661, at \*2*; *State v. Taylor (1981), 3 Ohio App.3d 197, 198, 3 Ohio B. 224, 444 N.E.2d 481*. As the court in *Dixon* noted, just the smell of alcohol is not enough to establish driving under the influence. Nor is the defendant's admission of having had a drink. In *Frantz*, the court noted that glassy or bloodshot [\*\*15] eyes, along with the smell of alcohol and an admission of having had a drink, may not be sufficient to arrest but are sufficient to merit further investigation in the form of field sobriety tests. *Frantz at 763*.

[\*P31] In a case similar to the case at bar, the Second Appellate District found that when a defendant had admitted to having a couple of beers, had glassy, bloodshot eyes, gave off a strong odor of alcohol, and was speeding well in excess of the speed limit, "although these facts, by themselves, may not rise to the level of probable cause for an arrest, they are sufficient to justify the lesser intrusion of requiring [the defendant] to perform field sobriety tests." *State v. Cooper, Clark App. No. 2001-CA-86, P25, 2002 Ohio 2778*; *State v. Cowell, Montgomery App. No. 19119, 2002 Ohio 5126*, holding that the officer's hearing defendant's truck hit the curb, coupled with an odor of alcohol, an admission to having two or three beers, and the presence of a can of beer in the passenger door was sufficient to justify asking defendant to perform field sobriety tests. See also *State v. Downey (1987), 37 Ohio App.3d 45, 523 N.E.2d 521*; *State v. Evans, (1988) 127 Ohio App.3d 56, 711 N.E.2d 761*. [\*\*16] In the case at bar, the officer did not perform the sobriety tests until after the arrest.

[\*P32] [HN11] An arrest for driving while intoxicated can never be made without sobriety tests first being performed, if there are sufficient indicia of intoxication apart from any sobriety tests. *State v. Homan (2000), 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952*. Thus the totality of the circumstances may support the finding that probable cause existed for an arrest even without a field sobriety test. *Id.* "These cases are inherently fact-sensitive." *Cooper*,

*supra*.

[\*P33] On the other hand, the First Appellate District found that speeding and the odor of alcohol, without more, did not provide probable cause to arrest. *State v. Taylor (1981)*, 3 Ohio App.3d 197, 3 Ohio B. 224, 444 N.E.2d 481. The Fourth Appellate District court also found that bloodshot eyes, a little difficulty exiting a vehicle, less than fluid speech, admission to having a couple of drinks, without an observation of erratic driving, was insufficient to provide probable cause for an arrest. *State v. Theiss (Dec. 17, 2001)*, Athens App. No. 01CA37, 2001 Ohio 2630.

[\*P34] In a case in which no traffic violation occurred, [\*\*17] but rather the defendant's car lacked a license plate light, the court found that because the officer "did not observe erratic or impaired driving on the part of" the defendant, who did not "appear to have any problem pulling the vehicle to the side of the road," the mere presence of bloodshot and watery eyes and moderate odor of alcohol did not justify an arrest for driving under the influence of alcohol. Despite the defendant's poor performance on the HGN test, from the totality of the circumstances, the court could not "rationally conclude that there was probable cause to arrest \*\*\*." *State v. Sanders, Marion App. No. 9-2000-56, 2000 Ohio 1813, 2000 Ohio App. LEXIS 6232, \*7-8*. But see *State v. Ousley (Sept. 20, 1999)*, Ross App. No. 99CA-2476, 1999 Ohio App. LEXIS 4459, at \*7-8.

[\*P35] In the case at bar, although defendant was speeding, the videotape shows no erratic driving. Rather, defendant safely maneuvered his car from the left lane to the right, using his turn signal, turned onto a side street, again using his turn signal, and pulled into a parking lot with no difficulty. The officer stated merely that he knew defendant was intoxicated [\*\*18] without any other indicia than the speeding and the dilated pupils. These circumstances do not justify an arrest for driving under the influence of alcohol.

[\*P36] In *State v. Dixon (Dec. 1, 2000)*, Greene App. No. 2000-CA30, 2000 Ohio App. LEXIS 5661, the court held that the smell of alcohol, along with glassy, bloodshot eyes and the admission that the defendant had one or two beers was insufficient to justify even administering the field sobriety tests. Although the defendant in *Dixon* had not committed a traffic violation but rather was stopped for tinted windows, the facts in *Dixon* are otherwise similar to the case at bar.

[\*P37] The determination of whether probable cause existed to arrest for driving while intoxicated, as we previously noted, is very fact specific. In the case at bar, after reviewing the videotape of defendant's arrest, and, even taking into consideration the fact that the videotape could not convey the strong smell of alcohol the officer noted on defendant, we find that at the time of the arrest, the officer lacked sufficient evidence of intoxication to provide probable cause to justify an arrest for drunk driving. This assignment of error has merit.

[\*P38] [\*\*19] Because the arrest was improper, the evidence resulting from the arrest was not admissible. We conclude that the trial court erred in overruling defendant's motion to suppress the evidence. This case is reversed and remanded for further proceedings consistent with this opinion. n1

n1 This court's decision in Assignment of Error I renders the remaining issues moot.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE AT TRIAL THE RESULTS [sic] OF APPELLANT'S PERFORMANCE ON THE ONE LEG STAND TEST, THE WALK AND TURN TEST, THE FINGERS TO NOSE TEST, AND THE ALPHABET TEST BASED UPON THE ARRESTING OFFICER'S FAILURE TO ADMINISTER AND EVALUATE SAID TESTS IN STRICT COMPLIANCE WITH THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION OR N.H.T.S.A. STANDARDS GOVERNING STANDARDIZED FIELD SOBRIETY TESTING.

4. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH OHIO ADMINISTRATIVE CODE SECTION

3701-53-04(A)(2).

5. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH *OHIO ADMINISTRATIVE CODE SECTION 3701-53-04*.

5. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH *OHIO ADMINISTRATIVE CODE SECTION 3701-53-04(E)*.

7. THE STATE OF OHIO HAS FAILED TO SUBSTANTIALLY COMPLY WITH THE TIME LIMITS AND REGULATIONS IN *R.C. 4511.19(B)* AND *OAC 3701-53-02*, INCLUDING THE OPERATOR'S CHECKLIST INSTRUCTIONS ISSUED BY THE OHIO DEPARTMENT OF HEALTH INCLUDED IN THE APPENDICES TO *OAC 3701-53-02*.

[\*\*20]

[\*P39] This cause is reversed and remanded.

It is, therefore, ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

JAMES J. SWEENEY, J., CONCURS; ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY;

DIANE KARPINSKI

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)* [\*\*21] . See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.

87 of 195 DOCUMENTS



Warning

As of: Jan 31, 2007

**CITY OF CLEVELAND, Plaintiff-appellee vs. MARK SANDERS,  
Defendant-appellant**

**NO. 83073**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2004 Ohio 4473; 2004 Ohio App. LEXIS 4057*

**August 26, 2004, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDING: Criminal appeal from Cleveland Municipal Court, Case No. TRC-103929

**DISPOSITION:** Judgment of the Municipal Court reversed; cause remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from an order of the Cleveland Municipal Court (Ohio), which denied his motion to suppress evidence. Defendant was charged with driving under the influence, driving with a blood alcohol content reading over 0.17 (DBAC), and speeding. He entered a no contest plea to the DBAC charge, the other two counts were nolle prossed, and defendant was found guilty of the DBAC offense.

**OVERVIEW:** Defendant was stopped for exceeding the speed limit, and he was thereafter arrested and charged with multiple offenses arising from being intoxicated while driving. Defendant's suppression motion was denied. Thereafter, defendant pleaded no contest to one charge and the others were nol prossed. On appeal, defendant contended that the denial of suppression was error. The court found that the officer had reasonable suspicion that defendant was operating his vehicle in violation of the law, based on the excessive speed clocked by the officer's radar device, together with the officer's 30 years of experience. Accordingly, the vehicle stop was lawful. However, the court found that defendant's arrest for drunk driving was improper because the trial court's findings on the probable cause issue were against the manifest weight of the evidence. Although the officer testified to defendant's condition, which "appeared to be intoxicated," he also testified that defendant did not weave in his vehicle, his other actions were not indicative of one who was intoxicated, the field sobriety tests were not administered until after defendant was arrested, and the breath analyzer test was inadmissible.

**OUTCOME:** The court reversed the order of the trial court and remanded the matter for further proceedings.

**CORE TERMS:** arrest, driving, probable cause, intoxicated, sobriety, breath, analyzer, alcohol, influence of alcohol, arresting officer, bloodshot, probable cause to arrest, assignment of error, speeding, smell, odor of alcohol, videotape,

totality, indicia, glassy, drink, motor vehicle, intrusion, detainee, erratic, driver, beer, articulable suspicion, reasonable suspicion, drunk driving

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] When addressing a suppression ruling, a reviewing court defers to the finder of fact as long as those facts are supported by competent, credible evidence. If the court's findings of fact are supported by credible competent evidence, the reviewing court then reviews the court's application of the law to those facts under a de novo standard.

#### ***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN2] In order for a vehicle stop to be proper, an officer must have a reasonable and articulable suspicion that a driver is either engaged in criminal activity or operating his motor vehicle in violation of the law. The reasonableness of the stop is viewed in light of the totality of the surrounding circumstances. The officer stopping the defendant must be able to articulate specific facts which, along with the reasonable inferences arising from those facts, reasonably warrant the intrusion which the stop comprises.

#### ***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***

#### ***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

#### ***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard***

[HN3] Because an arrest is the ultimate intrusion upon a citizen's liberty, an arresting officer must have more than a reasonable, articulable suspicion of criminal activity. He must have probable cause to believe an individual has committed a crime. Further, an arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN4] For an arrest for driving under the influence of alcohol or with an illegal alcohol level, in determining whether an arresting officer had probable cause to arrest a defendant for driving with an alcohol blood level above the legal limit, a court must address the facts available to the officer at the time of the arrest. If, at the moment of the arrest, the facts and circumstances were trustworthy enough to induce a prudent person to believe that the defendant indeed had a blood alcohol above the legal limit while driving, then the officer had probable cause for the arrest. If, however, the officer lacked probable cause to arrest, then any evidence obtained as a result of that arrest is inadmissible.

#### ***Civil Procedure > Appeals > Standards of Review > De Novo Review***

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN5] Following an adverse ruling on a suppression motion, there are three methods to challenge a trial court's ruling.

First, the appealing party may challenge the findings of fact. This challenge requires a reviewing court to decide whether the court's findings are against the manifest weight of the evidence. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court may reverse the trial court for committing an error of law. If the trial court has not erred in its findings of fact and "has properly identified the law to be applied," the appealing party can still challenge the court's final determination in its ruling on the law. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. As the United States Supreme Court has held, as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN6] In reviewing adverse rulings on a suppression motion in drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors, including: (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN7] In reviewing adverse rulings on a suppression motion in drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors, including: (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol  
& Field Sobriety > Admissibility  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable  
Cause  
Evidence > Scientific Evidence > Sobriety Tests***

[HN8] Several courts have barred the portable breath analyzer (PBT) tests for probable cause purposes. As the Ohio Court of Appeals, Third Appellate District, explained, the results of the PBT are inadmissible because the Ohio Department of Health no longer recognizes the test. Therefore, the results of the PBT cannot serve as probable cause to arrest an appellant for driving under the influence of alcohol.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

***Evidence > Scientific Evidence > Blood Alcohol***

[HN9] For an arrest for driving while intoxicated or with an excessive blood alcohol to be valid, a suspect need not display every possible indication that he is intoxicated. Nonetheless, the courts require a police officer to administer field sobriety tests or to have sufficient indication of intoxication before an arrest is made. Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated. Nonetheless, an analysis of an investigatory stop leading to an arrest requires careful attention to each stage of the detention in order to make sure that the extent of the intrusion represented by each stage is warranted by the officer's reasonable and articulable suspicion at that point.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

[HN10] Investigating a detainee for possible inebriation includes administering field sobriety tests like the "finger to nose" test, the Horizontal Gaze Nystagmus test, the "walk and turn" test, and the "one leg stand" test. The portable breath analyzer test has, in the past, also been considered a test providing probable cause. The law prohibits driving under the influence of alcohol; it does not prohibit driving after the mere consumption of an alcoholic beverage. Just the smell of alcohol is not enough to establish driving under the influence. Nor is a defendant's admission of having had a drink. Glassy or bloodshot eyes, along with the smell of alcohol and an admission of having had a drink, may not be sufficient to arrest but are sufficient to merit further investigation in the form of field sobriety tests.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN11] An arrest for driving while intoxicated can be made without sobriety tests first being performed, if there are sufficient indicia of intoxication apart from any sobriety tests. Thus the totality of the circumstances may support the finding that probable cause existed for an arrest even without a field sobriety test. These cases are inherently fact-sensitive.

**COUNSEL:** For plaintiff-appellee: SUBODH CHANDRA, ESQ., DIRECTOR OF LAW AND PROSECUTING ATTORNEY, SANFORD E. WATSON, II, ESQ., Chief Assistant Prosecutor, Bryan Fritz, Esq., Assistant Prosecutor, Cleveland, Ohio.

For defendant-appellant: HECTOR G. MARTINEZ, JR., ESQ., Zukerman, Daiker & Lear Co., L.P.A., Cleveland, Ohio.

**JUDGES:** DIANE KARPINSKI JUDGE. JAMES J. SWEENEY, J., CONCURS; ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY.

**OPINION BY:** DIANE KARPINSKI

**OPINION:** AND

## JOURNAL ENTRY AND OPINION

KARPINSKI, J.

[\*P1] Defendant, Mark Sanders, appeals the trial court's denial of his motion to suppress following a suppression hearing. Defendant was charged with driving under the influence, driving with a blood alcohol content reading over 0.17, and speeding, in violation of Cleveland City Ordinances. Following the court's denial of his motion to suppress, he pleaded no contest to and was found guilty of operating a vehicle with a high alcohol concentration in violation of Cleveland Ordinance 433.01(a)(6). The other two counts were nolle.

[\*P2] Defendant appealed, stating one assignment [\*P2] of error with seven issues listed under that assignment. The assignment of error states:

[\*P3] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

[\*P4] The first issue listed under this assignment of error states:

[\*P5] WHETHER THE ARRESTING OFFICER CONDUCTED AN IMPROPER WARRANTLESS STOP OF THE APPELLANT'S VEHICLE; THUS RENDERING ALL SUBSEQUENTLY OBTAINED EVIDENCE THE FRUIT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE IN VIOLATION OF THE RIGHTS GUARANTEED APPELLANT BY THE *FOURTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION*.

[\*P6] Defendant claims that his stop was not justified because the officer lacked an articulable suspicion that criminal activity took place at the time of the stop. Because he believes that the officer lacked probable cause to stop him, he argues that any evidence obtained as a result of that stop is not admissible.

[\*P7] [HN1] When addressing a suppression ruling, a reviewing court defers to the finder of fact as long as those facts are supported by competent, credible evidence. *State v. Gibson (Mar. 17, 2000), Ross App. [\*\*3] No 99 CA 2516, 2000 Ohio App. LEXIS 1197*, citing *State v. Medcalf*. If the court's findings of fact are supported by credible competent evidence, the reviewing court then reviews the court's application of the law to those facts under a de novo standard.

[\*P8] [HN2] In order for a stop to be proper, the officer must have a reasonable and articulable suspicion that the driver is either engaged in criminal activity or operating his motor vehicle in violation of the law. *State v. Howell (Nov. 13, 1995), Warren App. No. CA95-06-057, 1995 Ohio App. LEXIS 5014*, citing *Delaware v. Prouse (1979), 440 U.S. 648, 663, 59 L. Ed. 2d 660, 99 S. Ct. 1391*; *State v. Brandenburg (1987), 41 Ohio App.3d 109, 110, 534 N.E.2d 906*. The reasonableness of the stop is viewed in light of the totality of the surrounding circumstances. *Id.*, citing *State v. Bobo (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489*. The officer stopping the defendant must be able to articulate specific facts which, along with the reasonable inferences arising from those facts, reasonably warrant the intrusion which the stop comprises. *Terry v. Ohio (1968), 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868*.

[\*P9] Defendant argues that the officer did not have a reasonable [\*P4] suspicion of illegal activity to justify the stop. The officer testified, however, that he had measured defendant's speed at 48 MPH in a 25 MPH zone with a radar device. The officer also testified that he had been a police officer for thirty years. The officer's experience, coupled with the readout from the radar device, provide a reasonable suspicion that defendant was operating his motor vehicle in violation of the law. This portion of the assignment of error is without merit.

[\*P10] Defendant also argues that his arrest for drunk driving was improper. He states the issue as follows:

[\*P11] WHETHER THE ARRESTING OFFICER CONDUCTED AN IMPROPER ARREST OF THE APPELLANT FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL; [SIC] THUS RENDERING ALL

SUBSEQUENTLY OBTAINED EVIDENCE THE FRUIT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE IN VIOLATION OF THE RIGHTS GUARANTEED APPELLANT BY THE *FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION*.

[\*P12] Defendant argues that the arresting officer lacked probable cause to arrest him for driving under the influence of alcohol. [HN3] "Because an arrest is the ultimate intrusion upon [\*\*5] a citizen's liberty, the arresting officer must have more than a reasonable, articulable suspicion of criminal activity. He must have probable cause to believe the individual has committed a crime." *State v. Evans (1998)*, 127 Ohio App. 3d 56, 64, 711 N.E.2d 761.

[\*P13] Further, "an arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused." *State v. Timson (1974)*, 38 Ohio St.2d 122, 311 N.E.2d 16, paragraph one of the syllabus.

[\*P14] Similarly, [HN4] for an arrest for driving under the influence or with an illegal alcohol level, in determining whether an arresting officer had probable cause to arrest a defendant for driving with an alcohol blood level above the legal limit, the court must address the facts available to the officer at the time of the arrest. If, at the moment of the arrest, the facts and circumstances were trustworthy enough to induce a prudent person to [\*\*6] believe that the defendant indeed had a blood alcohol above the legal limit while driving, then the officer had probable cause for the arrest. *Beck v. Ohio (1964)*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223. If, however, the officer lacked probable cause to arrest, then any evidence obtained as a result of that arrest is inadmissible. *State v. Timson (1974)*, 38 Ohio St.2d 122, 311 N.E.2d 16, paragraph two of the syllabus.

[\*P15] [HN5] Following an adverse ruling on a suppression motion, there are three methods to challenge the trial court's ruling. First, the appealing party may challenge the findings of fact. This challenge requires the reviewing court to decide whether the court's findings are against the manifest weight of the evidence. *State v. Barrett (Feb. 26, 2001)*, Licking App. No. 00CA-47, 2001 Ohio App. LEXIS 692, at \*4. "Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court may reverse the trial court for committing an error of law." *Id.* If the trial court has not erred in its findings of fact and "has properly identified the law to be applied, [\*\*7] " the appealing party can still challenge the court's final determination in its ruling on the law. *Id.*

[\*P16] When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. \*\*\* As the United States Supreme Court held in *Ornelas v. U.S. (1996)*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911, "as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

[\*P17] *Id.* at \*4-5.

[\*P18] [HN6] In reviewing drunk driving cases, the courts have traditionally evaluated the totality of the facts and circumstances. *State v. Medcalf (1996)*, 111 Ohio App.3d 142, 147, 675 N.E.2d 1268. "An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol." *Id.*, citations omitted. In determining whether adequate indicia existed at the time of the arrest, the courts examine a number of factors:

[\*P19] \*\*\* These factors include, but [\*\*8] are not limited to: (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of

the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); [HN7] (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong, "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together [\*\*9] with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative. *State v. Evans (1998), 127 Ohio App.3d 56, 63, fn. 2, 711 N.E.2d 761.*

[\*P20] The first question, then, is whether the court's findings were against the manifest weight of the evidence. The officer testified that defendant "appeared to be intoxicated." The only facts the officer cited to support his statement that defendant appeared intoxicated was, "His eyes were dilated. He had an odor of alcoholic beverage on his breath. \*\*\* I asked him if he had been drinking. He said yes. He had one drink." Id.

[\*P21] The officer, who had been a policeman for thirty years, also testified that he has made thousands of DUI arrests. He stated that he "tested [defendant] on the probable cause device, the portable breath analyzer. And in my estimate and the totality of the circumstances, lead me to arrest him for the DUI." Tr. 9. He agreed with the prosecutor's statement that because of the results of the breath analyzer, which he has used for seven or eight years, along with defendant's [\*\*10] driving, demeanor, smell of alcohol and his dilated eyes, he believed that defendant was "substantially impaired" such that he could not safely operate a motor vehicle.

[\*P22] The officer admitted on cross-examination that defendant did not weave, that he properly executed a lane change including using his signal, that he was cooperative, that he did not fumble when retrieving his driver's license, and that he was steady and did not sway or weave when standing outside the vehicle. The officer admitted, moreover, that he did not administer the field sobriety tests until after he arrested defendant. He decided to arrest "because he was intoxicated." Tr. 20. The officer repeatedly referenced his years of experience in arresting drunk drivers.

[\*P23] The officer also admitted that he was aware that the breath analyzer he used was not approved by the Ohio Department of Health, that he did not have any calibration records for that analyzer with him in court, and that he could not remember the manufacturer of the device. He also testified that the field sobriety tests, administered after the arrest when the defendant was back at the station, are subjective tests which do not [\*\*11] have numbered clues, so that the results are "based on experience and common sense." Tr. at 28. He stated that all the test results are subjective and denied any objective criteria for interpreting the sobriety tests. The officer also admitted that he arrested defendant after observing him for less than two minutes.

[\*P24] The issue, therefore, is whether the officer's observations were adequate to provide probable cause for the arrest. The videotape of the arrest shows that the officer arrested defendant immediately after taking the breath analyzer reading. The trial court ruled that this reading was not admissible. The only reason the court gave for barring this evidence was "on some point that defense counsel raised." Tr. at 70. We note, however, that [HN8] several courts have barred the portable breath analyzer tests for probable cause purposes. As the Third Appellate District explained, "the results of the PBT are inadmissible because the Ohio Department of Health no longer recognizes the test. Therefore, the results of the \*\*\* PBT could not serve as probable cause to arrest the appellant for driving under the influence of alcohol." *State v. Ferguson, Defiance App. No. 4-01-34, 2002 Ohio 1763.* [\*\*12] See also *State v. Anez (2000), 108 Ohio Misc. 2d 18, 738 N.E.2d 491*; *State v. Keith, Guernsey App. No. 02CA01, 2003 Ohio 2354* (where officer did not identify type of portable analyzer he used.)

[\*P25] Without that test, we are left with limited evidence of intoxication. The videotape shows that defendant walked steadily, spoke clearly, and followed the officer's orders promptly. Defendant was not driving erratically when he was stopped. And when he was told to exit his vehicle, he did not stumble or weave. Police had not received a report that defendant was intoxicated, nor was there any testimony that his eyes were bloodshot or glassy, though they were

dilated. The officer did not report any slurred speech. He did state there was the smell of alcohol on defendant's breath. Defendant readily admitted to drinking one cocktail, but the record does not indicate at what time he had it. Few, if any, of the factors listed in *Evans, supra*, therefore, justified the arrest for drunk driving.

[\*P26] [HN9] For an arrest for driving while intoxicated or with an excessive blood alcohol to be valid, a suspect need not display every possible indication that he [\*\*13] is intoxicated. *State v. Barrett (Feb. 26, 2001), Licking App. No. 00CA-47, 2001 Ohio App. LEXIS 692*. Nonetheless, the courts require the officer to administer field sobriety tests or to have sufficient indication of intoxication before an arrest is made.

[\*P27] "Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated." *1996 Ohio App. LEXIS 3361 at \*8.*" *State v. Evans*, quoting *State v. Yemma, (Aug. 9, 1996), Portage App. No. 95-P-0156, 1996 Ohio App. LEXIS 3361*.

[\*P28] Nonetheless, "an analysis of an investigatory stop leading to an arrest requires careful attention to each stage of the detention in order to make sure that the extent of the intrusion represented by each stage is warranted by the officer's reasonable and articulable suspicion at that point." *State v. Spillers (Mar. 24, 2000), Darke App. No. 1504, 2000 Ohio App. LEXIS 1151, [\*\*14] at \*7*.

[\*P29] [HN10] Investigating a detainee for possible inebriation includes administering field sobriety tests like the "finger to nose" test, the Horizontal Gaze Nystagmus test (HGN), the "walk and turn" test, and the "one leg stand" test. The portable breath analyzer test has, in the past, also been considered a test providing probable cause. Except for the breath analyzer test, which has been barred for consideration for probable cause, the officer used none of these tests prior to arresting defendant.

[\*P30] As Judge Fain has noted, "The law prohibits driving under the influence of alcohol; it does not prohibit driving after the mere consumption of an alcoholic beverage." *U.S. v. Frantz (2001), 177 F. Supp. 2d 760, 762*, quoting *State v. Spillers 2000 Ohio App. LEXIS 1151, at \*3*; see also *State v. Dixon 2000 Ohio App. LEXIS 5661, at \*2*; *State v. Taylor (1981), 3 Ohio App.3d 197, 198, 3 Ohio B. 224, 444 N.E.2d 481*. As the court in *Dixon* noted, just the smell of alcohol is not enough to establish driving under the influence. Nor is the defendant's admission of having had a drink. In *Frantz*, the court noted that glassy or bloodshot [\*\*15] eyes, along with the smell of alcohol and an admission of having had a drink, may not be sufficient to arrest but are sufficient to merit further investigation in the form of field sobriety tests. *Frantz at 763*.

[\*P31] In a case similar to the case at bar, the Second Appellate District found that when a defendant had admitted to having a couple of beers, had glassy, bloodshot eyes, gave off a strong odor of alcohol, and was speeding well in excess of the speed limit, "although these facts, by themselves, may not rise to the level of probable cause for an arrest, they are sufficient to justify the lesser intrusion of requiring [the defendant] to perform field sobriety tests." *State v. Cooper, Clark App. No. 2001-CA-86, P25, 2002 Ohio 2778*; *State v. Cowell, Montgomery App. No. 19119, 2002 Ohio 5126*, holding that the officer's hearing defendant's truck hit the curb, coupled with an odor of alcohol, an admission to having two or three beers, and the presence of a can of beer in the passenger door was sufficient to justify asking defendant to perform field sobriety tests. See also *State v. Downey (1987), 37 Ohio App.3d 45, 523 N.E.2d 521*; *State v. Evans, (1988) 127 Ohio App.3d 56, 711 N.E.2d 761*. [\*\*16] In the case at bar, the officer did not perform the sobriety tests until after the arrest.

[\*P32] [HN11] An arrest for driving while intoxicated can never be made without sobriety tests first being performed, if there are sufficient indicia of intoxication apart from any sobriety tests. *State v. Homan (2000), 89 Ohio St.3d 421, 2000 Ohio 212, 732 N.E.2d 952*. Thus the totality of the circumstances may support the finding that probable cause existed for an arrest even without a field sobriety test. *Id.* "These cases are inherently fact-sensitive." *Cooper*,

*supra*.

[\*P33] On the other hand, the First Appellate District found that speeding and the odor of alcohol, without more, did not provide probable cause to arrest. *State v. Taylor (1981)*, 3 Ohio App.3d 197, 3 Ohio B. 224, 444 N.E.2d 481. The Fourth Appellate District court also found that bloodshot eyes, a little difficulty exiting a vehicle, less than fluid speech, admission to having a couple of drinks, without an observation of erratic driving, was insufficient to provide probable cause for an arrest. *State v. Theiss (Dec. 17, 2001)*, Athens App. No. 01CA37, 2001 Ohio 2630.

[\*P34] In a case in which no traffic violation occurred, [\*\*17] but rather the defendant's car lacked a license plate light, the court found that because the officer "did not observe erratic or impaired driving on the part of" the defendant, who did not "appear to have any problem pulling the vehicle to the side of the road," the mere presence of bloodshot and watery eyes and moderate odor of alcohol did not justify an arrest for driving under the influence of alcohol. Despite the defendant's poor performance on the HGN test, from the totality of the circumstances, the court could not "rationally conclude that there was probable cause to arrest \*\*\*." *State v. Sanders, Marion App. No. 9-2000-56, 2000 Ohio 1813, 2000 Ohio App. LEXIS 6232, \*7-8*. But see *State v. Ousley (Sept. 20, 1999)*, Ross App. No. 99CA-2476, 1999 Ohio App. LEXIS 4459, at \*7-8.

[\*P35] In the case at bar, although defendant was speeding, the videotape shows no erratic driving. Rather, defendant safely maneuvered his car from the left lane to the right, using his turn signal, turned onto a side street, again using his turn signal, and pulled into a parking lot with no difficulty. The officer stated merely that he knew defendant was intoxicated [\*\*18] without any other indicia than the speeding and the dilated pupils. These circumstances do not justify an arrest for driving under the influence of alcohol.

[\*P36] In *State v. Dixon (Dec. 1, 2000)*, Greene App. No. 2000-CA30, 2000 Ohio App. LEXIS 5661, the court held that the smell of alcohol, along with glassy, bloodshot eyes and the admission that the defendant had one or two beers was insufficient to justify even administering the field sobriety tests. Although the defendant in *Dixon* had not committed a traffic violation but rather was stopped for tinted windows, the facts in *Dixon* are otherwise similar to the case at bar.

[\*P37] The determination of whether probable cause existed to arrest for driving while intoxicated, as we previously noted, is very fact specific. In the case at bar, after reviewing the videotape of defendant's arrest, and, even taking into consideration the fact that the videotape could not convey the strong smell of alcohol the officer noted on defendant, we find that at the time of the arrest, the officer lacked sufficient evidence of intoxication to provide probable cause to justify an arrest for drunk driving. This assignment of error has merit.

[\*P38] [\*\*19] Because the arrest was improper, the evidence resulting from the arrest was not admissible. We conclude that the trial court erred in overruling defendant's motion to suppress the evidence. This case is reversed and remanded for further proceedings consistent with this opinion. n1

n1 This court's decision in Assignment of Error I renders the remaining issues moot.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE AT TRIAL THE RESULTS [sic] OF APPELLANT'S PERFORMANCE ON THE ONE LEG STAND TEST, THE WALK AND TURN TEST, THE FINGERS TO NOSE TEST, AND THE ALPHABET TEST BASED UPON THE ARRESTING OFFICER'S FAILURE TO ADMINISTER AND EVALUATE SAID TESTS IN STRICT COMPLIANCE WITH THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION OR N.H.T.S.A. STANDARDS GOVERNING STANDARDIZED FIELD SOBRIETY TESTING.

4. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH OHIO ADMINISTRATIVE CODE SECTION

3701-53-04(A)(2).

5. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH *OHIO ADMINISTRATIVE CODE SECTION 3701-53-04*.

5. WHETHER THE ARRESTING AGENCY ADMINISTERING THE TEST OF APPELLANT'S BREATH ALCOHOL LEVEL SUBSTANTIALLY COMPLIED WITH *OHIO ADMINISTRATIVE CODE SECTION 3701-53-04(E)*.

7. THE STATE OF OHIO HAS FAILED TO SUBSTANTIALLY COMPLY WITH THE TIME LIMITS AND REGULATIONS IN *R.C. 4511.19(B)* AND *OAC 3701-53-02*, INCLUDING THE OPERATOR'S CHECKLIST INSTRUCTIONS ISSUED BY THE OHIO DEPARTMENT OF HEALTH INCLUDED IN THE APPENDICES TO *OAC 3701-53-02*.

[\*\*20]

[\*P39] This cause is reversed and remanded.

It is, therefore, ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

JAMES J. SWEENEY, J., CONCURS; ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY;

DIANE KARPINSKI

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)* [\*\*21] . See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.

88 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**CITY OF WESTLAKE, Plaintiff-Appellee vs. JOHN A. KREBS,  
Defendant-Appellant**

**No. 81382**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2002 Ohio 7073; 2002 Ohio App. LEXIS 6908*

**December 19, 2002, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDING: Criminal appeal from Rocky River Municipal Court. Case No. 02-TRD-05382.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** This was an appeal from a verdict by Rocky River Municipal Court (Ohio), that found the defendant guilty of speeding.

**OVERVIEW:** The defendant bore the burden of proving the circumstance resulting in an officer's incompetency, i.e., that the officer was wearing a non-distinct uniform. The defendant presented no evidence that, although not wearing a hat, an officer was not in a distinctive uniform. The officer could testify under *Ohio R. Evid. 601(C)* and *Ohio Rev. Code Ann. § 4549.16*. Police officers calibrated the laser device before use each day by adjusting the distance measured by the device until it equaled the known distance between two fixed objects in the police parking lot. The officer's testimony, if believed, established beyond a reasonable doubt that the defendant was in fact speeding. The defendant contended that the judge erred in proceeding with his trial, over his objection, when documents he had sought by subpoena from were not presented. The defendant suffered no prejudice when the judge decided to move on and conclude the proceedings.

**OUTCOME:** The lower court decision was affirmed.

**CORE TERMS:** laser, wearing, hat, distinctive, speeding, manual, calibration, calibrate, certification, traffic, arrest, speed, wear, card, announcement, assignment of error, miles-per-hour, fifty-five, subpoena, issuing, miles, incompetent to testify, incompetency, competent to testify, police officers, traffic ticket, misdemeanor, directing, traveling, mandatory

**LexisNexis(R) Headnotes**

***Evidence > Competency > General Overview***

[HN1] See *Ohio R. Evid. 601*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview******Governments > Local Governments > Police Power******Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] The Staff Note to *Ohio R. Evid. 601(C)* indicates that the court views the rule simply as a restatement of *Ohio Rev. Code Ann. § 4549.16*, and that the rule preserves the provisions of the statute. *Ohio Rev. Code Ann. § 4549.15* and *Ohio Rev. Code Ann. § 4549.16* are related. The provisions of *Ohio Rev. Code Ann. § 4549.15* and *4549.16* require that an officer whose primary duty is to arrest or assist with the arrest of individuals who violate traffic laws must wear a distinctive uniform. An officer who fails to comply with *Ohio Rev. Code Ann. § 4549.15* will be deemed incompetent to testify as a witness in any prosecution against an arrested person pursuant to *Ohio Rev. Code Ann. § 4549.16*. Through the enactment of these statutes, the legislature demonstrated an intent to provide uniformity in traffic control and regulation in an effort to make driving safer within Ohio's political subdivisions. It requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he or she was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty to be identified clearly.

***Evidence > Competency > General Overview******Governments > Local Governments > Police Power******Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] When a municipal police officer testifies that he is not wearing his hat when issuing a traffic ticket, and wearing a hat is not mandatory, the failure of the officer to wear the hat alone does not render the officer incompetent to testify. This is in keeping with the Ohio Supreme Court's pronouncement that the reason for *Ohio R. Evid. 601(C)* and *Ohio Rev. Code Ann. § 4549.16* is to prevent confusion and promote clear identification of officers on traffic duty, and recognizes that a small variance in an officer's otherwise obviously distinctive uniform should not result in the officer's incompetency.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN4] Whether the evidence is legally sufficient to sustain a verdict is a question of law.

***Criminal Law & Procedure > Accusatory Instruments > Indictments******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] See *Ohio R. Crim. P. 29*.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN6] Whether phrased in terms of a *Ohio R. Crim. P. 29* motion, or in terms of a sufficiency of the evidence argument, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt.

**COUNSEL:** For Plaintiff-Appellee: JOHN D. WHEELER, Prosecutor City of Westlake, Westlake, Ohio.

For Defendant-Appellant: JOHN A. KREBS, Fairview Park, Ohio.

**JUDGES:** PATRICIA A. BLACKMON, P.J., AND TERRENCE O'DONNELL, J., CONCUR. ANNE L. KILBANE JUDGE.

**OPINION BY:** ANNE L. KILBANE

**OPINION:** ACCELERATED DOCKET

JOURNAL ENTRY AND OPINION

ANNE L. KILBANE, J.:

[\*P1] This is an appeal from a verdict by Rocky River Municipal Judge Donna C. Fitzsimmons that found appellant John A. Krebs guilty of speeding. n1 Krebs claims that the officer issuing the citation was not properly dressed and, therefore, not competent to testify and that Westlake failed to prove that its laser equipment was operating properly. We affirm.

n1 In violation of Westlake Codified Ordinance ("W.C.O.") 333.03

[\*P2] On March 12, 2002, at approximately 10:00 p.m., Krebs was operating a red Mercury eastbound on Center Ridge Road approaching [\*\*2] Crocker Road in Westlake. Westlake Police Officer Marcel Sorgi, assigned to patrol duty, was parked in a fully marked zone car near Brentwood Estates, just west of Crocker Road, and was using a laser device to monitor the speed of vehicles on Center Ridge Road. As the Krebs car approached, the officer obtained two readings on his device indicating that it was traveling at either fifty or fifty-five miles-per-hour in that thirty-five miles-per-hour zone. n2

n2 While, according to the traffic ticket, Officer Sorgi indicated Krebs' speed as fifty five miles per hour, his testimony at trial indicated, at different times, that he clocked Krebs at either fifty or fifty five miles per hour.

[\*P3] The officer issued Krebs a citation for speeding in violation of W.C.O. 333.03, a fourth degree misdemeanor; as he was explaining the citation and verifying Krebs' driver's license and insurance information, Krebs asked why he was not wearing his uniform hat, to which the officer responded that he was not required to [\*\*3] wear his hat at all times.

[\*P4] Krebs pleaded not guilty to the charge and, prior to trial, issued a subpoena duces tecum to Officer Sorgi directing him to bring to trial the laser device, as well as its instructions and operating manuals, all testing, calibration, repair and maintenance records, and all of Officer Sorgi's training records and certifications for the device.

[\*P5] At trial, Officer Sorgi appeared and brought with him various items, including the laser device, its manufacturer's certification that it had been factory-calibrated, a warranty card and an operating manual, apparently with a few pages missing.

[\*P6] The officer testified that, as a part of his training as a patrolman, he has received instruction on how to calibrate and use the laser device, and that on March 12, 2002, he followed mandatory procedures to calibrate it before he began his shift. He explained how he used the device to gauge the speed of Krebs' car, how it registered a speed of either fifty or fifty-five miles per hour, that he stopped Krebs and issued him a citation for speeding, and that he was not required to wear his uniform hat while issuing speeding citations.

[\*P7] [\*\*4] Krebs moved to suppress Officer Sorgi's testimony on the ground that, because he was not wearing

his hat when he issued Krebs the citation, he was not wearing a legally distinctive uniform as required by *R.C. 4549.16*. The judge denied the motion, noting that the officer testified that on March 12, 2002, at the time he issued Krebs' citation, he was wearing the official police uniform in which he was dressed that day in court, each time without his hat.

[\*P8] Krebs objected to the materials Officer Sorgi had brought to court, noting missing pages in the operating manual, and the lack of certification renewals and repair and maintenance records he had requested by subpoena. Westlake asserted that, apart from a few pages of the operations manual, any information Krebs sought that was not provided did not exist. Krebs protested to the judge, that the laser radar device was "highly sophisticated, technical equipment which requires periodic calibration. They won't show me what the calibration requirements are." He made this argument without providing any basis to establish his personal knowledge of the workings of a laser device. The parties then quibbled over [\*\*5] whether a certain card the officer brought to court was a simple manufacturer's warranty card or a calibration certification requirement card.

[\*P9] The judge ruled that, based on the assistant prosecutor's assurances that all available discovery responses had been provided, Westlake had complied with Krebs' subpoena request. Krebs then finished his cross-examination of Officer Sorgi, Westlake rested, Krebs rested his case, and the parties proceeded to final argument. Neither party offered the disputed documents or the laser device into evidence and they are not part of the record on appeal. The judge found Krebs guilty of speeding, and fined him \$ 25 plus court costs. He posted an appeal bond and the judge granted his motion to stay execution of his sentence.

[\*P10] Krebs asserts in the first of his three assignments of error that Officer Sorgi was not wearing a legally distinctive uniform, in violation of both statutory requirements and prohibition by evidentiary rule, and so was not competent to testify at his trial.

[\*P11] [HN1] *Evid.R. 601* provides that every person is competent to be a witness except, in pertinent part:

[\*P12] "(C) An officer, while on duty [\*\*6] for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute."

[\*P13] The Ohio Supreme Court discussed *Evid.R. 601(C)*, *R.C. 4549.15* and *4549.16*:

[\*P14] [HN2] "The Staff Note to *Evid.R. 601(C)* indicates that this court adopted the rule simply as a restatement of \*\*\* 4549.16, and that the rule preserves the provisions of [the] statute.

[\*P15] "\*\*\*\*

[\*P16] " *R.C. 4549.15* and *4549.16* are \*\*\* related. The provisions of *R.C. 4549.15* and *4549.16* require that an officer whose primary duty is to arrest or assist with the arrest of individuals who violate traffic laws must wear a distinctive uniform \*\*\*. An officer who fails to comply with *R.C. 4549.15* will be deemed incompetent to testify as a witness in any [\*\*7] prosecution against an arrested person pursuant to *R.C. 4549.16*.

[\*P17] "Through the enactment of these statutes, the legislature demonstrated an intent to provide uniformity in traffic control and regulation in an effort to make driving safer within Ohio's political subdivisions. It requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he [or she] was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty to be identified clearly." n3

n3 *State v. Heins* (1995), 72 Ohio St.3d 504, 506, 1995 Ohio 208, 651 N.E.2d 933. (Internal citations omitted.)

[\*P18] This court recently ruled that, [HN3] when a municipal police officer testifies that he was not wearing his hat when issuing a traffic ticket, and wearing a hat is not mandatory, the failure of the officer to wear the hat alone does not render the officer incompetent to testify. n4 This [\*\*8] is in keeping with the Ohio Supreme Court's above pronouncement that the reason for *Evid.R. 601(C)* and *R.C. 4549.16* is to prevent confusion and promote clear identification of officers on traffic duty, and recognizes that a small variance in an officer's otherwise obviously distinctive uniform should not result in the officer's incompetency.

n4 *Brooklyn v. Blake* (Feb. 7, 2002), *Cuyahoga App. No. 79032*, 2002 Ohio 499.

[\*P19] The defendant bears the burden of proving the circumstance resulting in the officer's incompetency, i.e., that the officer was wearing a non-distinct uniform. n5 Krebs presented no evidence that, although not wearing a hat, Officer Sorgi was not in a distinctive uniform. This assignment of error is overruled.

n5 *State v. Rau* (1989), 65 Ohio App.3d 478, 480, 584 N.E.2d 788.

[\*\*9]

[\*P20] Krebs next challenges the judge's finding that the laser device was operating properly and we treat this assignment as an attack on the sufficiency of the evidence presented to sustain his conviction. [HN4] Whether the evidence is legally sufficient to sustain a verdict is a question of law. n6

n6 *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148.

[\*P21] [HN5] Under *Crim.R. 29*,

[\*P22] "The court on motion of the defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction on such offense or offenses. \*\*\*"

[\*P23] [HN6] Whether phrased in terms of a *Crim.R. 29* motion, or in terms of a sufficiency of the evidence argument, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have [\*\*10] found the essential elements of the crime proven beyond a reasonable doubt. n7

n7 See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541, *State v. Jenks* (1991) 61 Ohio St.3d 259, 574 N.E.2d 492.

[\*P24] Officer Sorgi testified that, as a matter of routine procedure, Westlake police officers calibrate the laser device before use each day by adjusting the distance measured by the device until it equals the known distance between two fixed objects in the police parking lot. He stated that he was trained to calibrate the device in this way, that it is an accurate way to calibrate it, and that he performed this calibration on March 12, 2002, at the beginning of his shift. When he saw Krebs' car driving in his direction on Center Ridge Road he aimed the laser beam at the car license plate and, he claimed, the device indicated the car was traveling at either fifty or fifty-five miles-per-hour, obviously faster than the posted speed limit. His testimony, if [\*\*11] believed, established beyond a reasonable doubt that Krebs was in fact speeding. This assignment of error is overruled.

[\*P25] Finally, Krebs contends that the judge erred in proceeding with his trial, over his objection, when documents he had sought by subpoena from Westlake were not presented. Specifically, he argues that no "equipment manuals, maintenance records or certification requirements" were contained in the documents he was shown, and that the operating manual provided was incomplete.

[\*P26] Krebs, however, fails to demonstrate that these documents existed in the face of the assistant prosecutor's explanation that Westlake did not have them. Additionally, he made no assertion at trial, or on appeal, that, if he had been given the requested documents, he could demonstrate the inaccuracy of the laser device, but only that he could, perhaps, operate it to determine if it functioned. Therefore, he suffered no prejudice when the judge decided to move on and conclude the proceedings. This assignment of error has no merit.

Judgment affirmed.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds [\*\*12] for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PATRICIA A. BLACKMON, P.J., AND

TERRENCE O'DONNELL, J., CONCUR

ANNE L. KILBANE

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc. App.R.22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)*, unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.

89 of 195 DOCUMENTS



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As of: Jan 31, 2007

**CITY OF WESTLAKE, Plaintiff-Appellee vs. JOHN A. KREBS,  
Defendant-Appellant**

**No. 81382**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2002 Ohio 7073; 2002 Ohio App. LEXIS 6908*

**December 19, 2002, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDING: Criminal appeal from Rocky River Municipal Court. Case No. 02-TRD-05382.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** This was an appeal from a verdict by Rocky River Municipal Court (Ohio), that found the defendant guilty of speeding.

**OVERVIEW:** The defendant bore the burden of proving the circumstance resulting in an officer's incompetency, i.e., that the officer was wearing a non-distinct uniform. The defendant presented no evidence that, although not wearing a hat, an officer was not in a distinctive uniform. The officer could testify under *Ohio R. Evid. 601(C)* and *Ohio Rev. Code Ann. § 4549.16*. Police officers calibrated the laser device before use each day by adjusting the distance measured by the device until it equaled the known distance between two fixed objects in the police parking lot. The officer's testimony, if believed, established beyond a reasonable doubt that the defendant was in fact speeding. The defendant contended that the judge erred in proceeding with his trial, over his objection, when documents he had sought by subpoena from were not presented. The defendant suffered no prejudice when the judge decided to move on and conclude the proceedings.

**OUTCOME:** The lower court decision was affirmed.

**CORE TERMS:** laser, wearing, hat, distinctive, speeding, manual, calibration, calibrate, certification, traffic, arrest, speed, wear, card, announcement, assignment of error, miles-per-hour, fifty-five, subpoena, issuing, miles, incompetent to testify, incompetency, competent to testify, police officers, traffic ticket, misdemeanor, directing, traveling, mandatory

**LexisNexis(R) Headnotes**

***Evidence > Competency > General Overview***

[HN1] See *Ohio R. Evid. 601*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview******Governments > Local Governments > Police Power******Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] The Staff Note to *Ohio R. Evid. 601(C)* indicates that the court views the rule simply as a restatement of *Ohio Rev. Code Ann. § 4549.16*, and that the rule preserves the provisions of the statute. *Ohio Rev. Code Ann. § 4549.15* and *Ohio Rev. Code Ann. § 4549.16* are related. The provisions of *Ohio Rev. Code Ann. § 4549.15* and *4549.16* require that an officer whose primary duty is to arrest or assist with the arrest of individuals who violate traffic laws must wear a distinctive uniform. An officer who fails to comply with *Ohio Rev. Code Ann. § 4549.15* will be deemed incompetent to testify as a witness in any prosecution against an arrested person pursuant to *Ohio Rev. Code Ann. § 4549.16*. Through the enactment of these statutes, the legislature demonstrated an intent to provide uniformity in traffic control and regulation in an effort to make driving safer within Ohio's political subdivisions. It requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he or she was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty to be identified clearly.

***Evidence > Competency > General Overview******Governments > Local Governments > Police Power******Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] When a municipal police officer testifies that he is not wearing his hat when issuing a traffic ticket, and wearing a hat is not mandatory, the failure of the officer to wear the hat alone does not render the officer incompetent to testify. This is in keeping with the Ohio Supreme Court's pronouncement that the reason for *Ohio R. Evid. 601(C)* and *Ohio Rev. Code Ann. § 4549.16* is to prevent confusion and promote clear identification of officers on traffic duty, and recognizes that a small variance in an officer's otherwise obviously distinctive uniform should not result in the officer's incompetency.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN4] Whether the evidence is legally sufficient to sustain a verdict is a question of law.

***Criminal Law & Procedure > Accusatory Instruments > Indictments******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] See *Ohio R. Crim. P. 29*.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN6] Whether phrased in terms of a *Ohio R. Crim. P. 29* motion, or in terms of a sufficiency of the evidence argument, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt.

**COUNSEL:** For Plaintiff-Appellee: JOHN D. WHEELER, Prosecutor City of Westlake, Westlake, Ohio.

For Defendant-Appellant: JOHN A. KREBS, Fairview Park, Ohio.

**JUDGES:** PATRICIA A. BLACKMON, P.J., AND TERRENCE O'DONNELL, J., CONCUR. ANNE L. KILBANE JUDGE.

**OPINION BY:** ANNE L. KILBANE

**OPINION:** ACCELERATED DOCKET

JOURNAL ENTRY AND OPINION

ANNE L. KILBANE, J.:

[\*P1] This is an appeal from a verdict by Rocky River Municipal Judge Donna C. Fitzsimmons that found appellant John A. Krebs guilty of speeding. n1 Krebs claims that the officer issuing the citation was not properly dressed and, therefore, not competent to testify and that Westlake failed to prove that its laser equipment was operating properly. We affirm.

n1 In violation of Westlake Codified Ordinance ("W.C.O.") 333.03

[\*P2] On March 12, 2002, at approximately 10:00 p.m., Krebs was operating a red Mercury eastbound on Center Ridge Road approaching [\*\*2] Crocker Road in Westlake. Westlake Police Officer Marcel Sorgi, assigned to patrol duty, was parked in a fully marked zone car near Brentwood Estates, just west of Crocker Road, and was using a laser device to monitor the speed of vehicles on Center Ridge Road. As the Krebs car approached, the officer obtained two readings on his device indicating that it was traveling at either fifty or fifty-five miles-per-hour in that thirty-five miles-per-hour zone. n2

n2 While, according to the traffic ticket, Officer Sorgi indicated Krebs' speed as fifty five miles per hour, his testimony at trial indicated, at different times, that he clocked Krebs at either fifty or fifty five miles per hour.

[\*P3] The officer issued Krebs a citation for speeding in violation of W.C.O. 333.03, a fourth degree misdemeanor; as he was explaining the citation and verifying Krebs' driver's license and insurance information, Krebs asked why he was not wearing his uniform hat, to which the officer responded that he was not required to [\*\*3] wear his hat at all times.

[\*P4] Krebs pleaded not guilty to the charge and, prior to trial, issued a subpoena duces tecum to Officer Sorgi directing him to bring to trial the laser device, as well as its instructions and operating manuals, all testing, calibration, repair and maintenance records, and all of Officer Sorgi's training records and certifications for the device.

[\*P5] At trial, Officer Sorgi appeared and brought with him various items, including the laser device, its manufacturer's certification that it had been factory-calibrated, a warranty card and an operating manual, apparently with a few pages missing.

[\*P6] The officer testified that, as a part of his training as a patrolman, he has received instruction on how to calibrate and use the laser device, and that on March 12, 2002, he followed mandatory procedures to calibrate it before he began his shift. He explained how he used the device to gauge the speed of Krebs' car, how it registered a speed of either fifty or fifty-five miles per hour, that he stopped Krebs and issued him a citation for speeding, and that he was not required to wear his uniform hat while issuing speeding citations.

[\*P7] [\*\*4] Krebs moved to suppress Officer Sorgi's testimony on the ground that, because he was not wearing

his hat when he issued Krebs the citation, he was not wearing a legally distinctive uniform as required by *R.C. 4549.16*. The judge denied the motion, noting that the officer testified that on March 12, 2002, at the time he issued Krebs' citation, he was wearing the official police uniform in which he was dressed that day in court, each time without his hat.

[\*P8] Krebs objected to the materials Officer Sorgi had brought to court, noting missing pages in the operating manual, and the lack of certification renewals and repair and maintenance records he had requested by subpoena. Westlake asserted that, apart from a few pages of the operations manual, any information Krebs sought that was not provided did not exist. Krebs protested to the judge, that the laser radar device was "highly sophisticated, technical equipment which requires periodic calibration. They won't show me what the calibration requirements are." He made this argument without providing any basis to establish his personal knowledge of the workings of a laser device. The parties then quibbled over [\*\*5] whether a certain card the officer brought to court was a simple manufacturer's warranty card or a calibration certification requirement card.

[\*P9] The judge ruled that, based on the assistant prosecutor's assurances that all available discovery responses had been provided, Westlake had complied with Krebs' subpoena request. Krebs then finished his cross-examination of Officer Sorgi, Westlake rested, Krebs rested his case, and the parties proceeded to final argument. Neither party offered the disputed documents or the laser device into evidence and they are not part of the record on appeal. The judge found Krebs guilty of speeding, and fined him \$ 25 plus court costs. He posted an appeal bond and the judge granted his motion to stay execution of his sentence.

[\*P10] Krebs asserts in the first of his three assignments of error that Officer Sorgi was not wearing a legally distinctive uniform, in violation of both statutory requirements and prohibition by evidentiary rule, and so was not competent to testify at his trial.

[\*P11] [HN1] *Evid.R. 601* provides that every person is competent to be a witness except, in pertinent part:

[\*P12] "(C) An officer, while on duty [\*\*6] for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute."

[\*P13] The Ohio Supreme Court discussed *Evid.R. 601(C)*, *R.C. 4549.15* and *4549.16*:

[\*P14] [HN2] "The Staff Note to *Evid.R. 601(C)* indicates that this court adopted the rule simply as a restatement of \*\*\* 4549.16, and that the rule preserves the provisions of [the] statute.

[\*P15] "\*\*\*\*

[\*P16] " *R.C. 4549.15* and *4549.16* are \*\*\* related. The provisions of *R.C. 4549.15* and *4549.16* require that an officer whose primary duty is to arrest or assist with the arrest of individuals who violate traffic laws must wear a distinctive uniform \*\*\*. An officer who fails to comply with *R.C. 4549.15* will be deemed incompetent to testify as a witness in any [\*\*7] prosecution against an arrested person pursuant to *R.C. 4549.16*.

[\*P17] "Through the enactment of these statutes, the legislature demonstrated an intent to provide uniformity in traffic control and regulation in an effort to make driving safer within Ohio's political subdivisions. It requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he [or she] was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty to be identified clearly." n3

n3 *State v. Heins* (1995), 72 Ohio St.3d 504, 506, 1995 Ohio 208, 651 N.E.2d 933. (Internal citations omitted.)

[\*P18] This court recently ruled that, [HN3] when a municipal police officer testifies that he was not wearing his hat when issuing a traffic ticket, and wearing a hat is not mandatory, the failure of the officer to wear the hat alone does not render the officer incompetent to testify. n4 This [\*\*8] is in keeping with the Ohio Supreme Court's above pronouncement that the reason for *Evid.R. 601(C)* and *R.C. 4549.16* is to prevent confusion and promote clear identification of officers on traffic duty, and recognizes that a small variance in an officer's otherwise obviously distinctive uniform should not result in the officer's incompetency.

n4 *Brooklyn v. Blake* (Feb. 7, 2002), *Cuyahoga App. No. 79032*, 2002 Ohio 499.

[\*P19] The defendant bears the burden of proving the circumstance resulting in the officer's incompetency, i.e., that the officer was wearing a non-distinct uniform. n5 Krebs presented no evidence that, although not wearing a hat, Officer Sorgi was not in a distinctive uniform. This assignment of error is overruled.

n5 *State v. Rau* (1989), 65 Ohio App.3d 478, 480, 584 N.E.2d 788.

[\*\*9]

[\*P20] Krebs next challenges the judge's finding that the laser device was operating properly and we treat this assignment as an attack on the sufficiency of the evidence presented to sustain his conviction. [HN4] Whether the evidence is legally sufficient to sustain a verdict is a question of law. n6

n6 *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148.

[\*P21] [HN5] Under *Crim.R. 29*,

[\*P22] "The court on motion of the defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction on such offense or offenses. \*\*\*"

[\*P23] [HN6] Whether phrased in terms of a *Crim.R. 29* motion, or in terms of a sufficiency of the evidence argument, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have [\*\*10] found the essential elements of the crime proven beyond a reasonable doubt. n7

n7 See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541, *State v. Jenks* (1991) 61 Ohio St.3d 259, 574 N.E.2d 492.

[\*P24] Officer Sorgi testified that, as a matter of routine procedure, Westlake police officers calibrate the laser device before use each day by adjusting the distance measured by the device until it equals the known distance between two fixed objects in the police parking lot. He stated that he was trained to calibrate the device in this way, that it is an accurate way to calibrate it, and that he performed this calibration on March 12, 2002, at the beginning of his shift. When he saw Krebs' car driving in his direction on Center Ridge Road he aimed the laser beam at the car license plate and, he claimed, the device indicated the car was traveling at either fifty or fifty-five miles-per-hour, obviously faster than the posted speed limit. His testimony, if [\*\*11] believed, established beyond a reasonable doubt that Krebs was in fact speeding. This assignment of error is overruled.

[\*P25] Finally, Krebs contends that the judge erred in proceeding with his trial, over his objection, when documents he had sought by subpoena from Westlake were not presented. Specifically, he argues that no "equipment manuals, maintenance records or certification requirements" were contained in the documents he was shown, and that the operating manual provided was incomplete.

[\*P26] Krebs, however, fails to demonstrate that these documents existed in the face of the assistant prosecutor's explanation that Westlake did not have them. Additionally, he made no assertion at trial, or on appeal, that, if he had been given the requested documents, he could demonstrate the inaccuracy of the laser device, but only that he could, perhaps, operate it to determine if it functioned. Therefore, he suffered no prejudice when the judge decided to move on and conclude the proceedings. This assignment of error has no merit.

Judgment affirmed.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds [\*\*12] for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PATRICIA A. BLACKMON, P.J., AND

TERRENCE O'DONNELL, J., CONCUR

ANNE L. KILBANE

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc. App.R.22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)*, unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.

90 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - SCOTT M. MOLK,  
Defendant-Appellant.**

**CASE NO. 2001-L-146**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE  
COUNTY**

*2002 Ohio 6926; 2002 Ohio App. LEXIS 6661*

**December 13, 2002, Decided**

**PRIOR HISTORY:** [\*\*1] Criminal Appeal from the Mentor Municipal Court, Case No. 01 TRC 1677.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was charged with driving under the influence of alcohol (DUI), in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and he filed a motion to suppress evidence. The Mentor Municipal Court (Ohio) denied the motion and convicted defendant of the charge after a jury found defendant guilty. Defendant appealed.

**OVERVIEW:** Defendant was a passenger in a vehicle when the driver was arrested for DUI. The police officer who made the arrest was offered to drive defendant home, but drove him to a bar when defendant insisted he be taken there. Less than a hour later, that officer and another officer encountered defendant after the other officer stopped defendant for speeding and because the car he was driving was emitting excessive exhaust. Defendant refused the officers' request that he take field sobriety tests and also refused to take a Breathalyzer test. At his trial on a charge of DUI, defendant moved to suppress the officers' testimony, arguing that the officers did not have a legal basis for stopping him or arresting him. The appellate court held that (1) speeding and driving a car that was emitting excessive smoke from the exhaust were violations of the Mentor, Ohio, City Ordinance, and defendant's violation of either provision gave police a legal basis for stopping him; and (2) considering the totality of the facts known to police, including defendant's behavior, physical appearance, and refusal to take field sobriety tests, the officers who arrested defendant for DUI had probable cause to do so.

**OUTCOME:** The trial court's judgment was affirmed.

**CORE TERMS:** driving, influence of alcohol, exhaust, arrest, probable cause, suppression hearing, speeding, morning, smoke, credibility, sobriety, glassy, coming, radar, assignments of error, motion to suppress, mathematical, totality, probable cause to arrest, articulable suspicion, ordinance, passenger, traffic, license, driver, speed, circumstances

surrounding, reasonable suspicion, evidence presented, refusal to submit

### **LexisNexis(R) Headnotes**

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

[HN1] At a hearing on a motion to suppress, a trial court, functioning as the trier of fact, is in the best position to evaluate the evidence, judge the credibility of the witnesses, and resolve the factual issues. When reviewing a trial court's ruling on a motion to suppress, an appellate court is bound to accept the trial court's factual determinations if they are supported by competent and credible evidence. Once an appellate court accepts a trial court's factual determinations as true, the appellate court must conduct a de novo review of the trial court's application of the law to those facts.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

*Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview*

[HN2] Issues not raised in a trial court may not be raised for the first time on appeal because such issues are deemed waived.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

*Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses*

[HN3] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual, provided the officer has the requisite reasonable suspicion, based upon specific and articulable facts, that a crime has occurred or is imminent. Additionally, any traffic violation, even a minor traffic violation, witnessed by a police officer is, standing alone, sufficient grounds to stop the vehicle observed violating the ordinance. Once an officer has stopped a vehicle for a minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may proceed to investigate the detainee for driving under the influence if there exists reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

[HN4] Excessive smoke coming from an exhaust is a violation of Mentor, Ohio, City Ordinance § 72.17. Speeding is a violation of Mentor, Ohio, City Ordinance § 73.01. A defendant's traffic violations surpass the fundamental requirement of a reasonable, articulable suspicion, giving a police officer probable cause with which to stop the defendant's vehicle. Furthermore, even a defendant is able to contradict a police officer's testimony with regards to a speeding violation, the officer would still have probable cause to initiate a stop due to the defendant's smoking exhaust violation.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause*

*Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge*

[HN5] In determining whether the police had probable cause to arrest a person for driving under the influence, the Court of Appeals of Ohio considers whether, at the moment of arrest, the police had sufficient information, derived from a

reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. In making this determination, the court of appeals will examine the totality of facts and circumstances surrounding the arrest. The mere odor of alcohol, glassy eyes, slurred speech, and/or other indicia of the use of alcohol by a driver are, in and of themselves, insufficient to constitute probable cause to arrest; however, based on the totality of the circumstances surrounding an arrest, probable cause may exist beyond the mere appearance of drunkenness.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause*

*Criminal Law & Procedure > Arrests > Probable Cause*

[HN6] A defendant's refusal to submit to field sobriety tests is a factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol.

**COUNSEL:** Ron M. Graham, Mentor City Prosecutor, Mentor, OH (For Plaintiff-Appellee).

Brent L. English, Law Offices of Brent L. English, Cleveland, OH (For Defendant-Appellant).

**JUDGES:** DIANE V. GRENDALL, J. DONALD R. FORD, J., JUDITH A. CHRISTLEY, J., concur.

**OPINION BY:** DIANE V. GRENDALL

**OPINION:** DIANE V. GRENDALL, J.

[\*P1] Scott Molk ("appellant") appeals the judgment of conviction by the Mentor Municipal Court. The trial court's judgment was entered upon a jury's verdict finding appellant guilty of driving while under the influence of alcohol, a violation of *R.C. 4511.19(A)(1)*. For the following reasons, we affirm the decision of the trial court.

[\*P2] On March 22, 2001, at approximately 12:45 a.m., appellant was a passenger in a vehicle whose driver was arrested for driving under the influence of alcohol. As the vehicle appellant was riding in was towed, Mentor Police Officer Covell offered to take appellant home, but appellant stated that he wanted to return to a local bar called Safe Crackers. Prior to returning appellant to Safe Crackers, Officer Covell noticed appellant "had a strong [\*\*2] odor of alcoholic beverage coming off his breath, he was slow and mumbled in speech, his eyes were glassy, he was unbalanced and uncoordinated." Subsequently, appellant was returned to Safe Crackers by Officer Covell, who advised appellant several times not to drive that morning because it appeared appellant was under the influence of alcohol. Appellant failed to take the officer's advice. At approximately 1:30 a.m. that same morning, appellant was stopped, arrested, and charged with driving under the influence of alcohol by Mentor Police Officer Sutton.

[\*P3] The record indicates that appellant was initially pulled over for a speeding violation, as well as a smoking exhaust, both violations of Mentor City Ordinances. However, when Officer Sutton approached appellant to ask him for his driver's license, he noticed the strong odor of an alcoholic beverage emanating from appellant. Officer Sutton also observed appellant's glassy eyes and slurred speech as he surrendered his license. Subsequently, in accordance with Mentor Police Department policy, Officer Covell arrived on the scene to provide backup to Officer Sutton during the stop. Upon arriving at the scene, Officer Covell advised Officer [\*\*3] Sutton that he had taken appellant back to Safe Crackers earlier that morning and that he also felt appellant was exhibiting signs of intoxication. Based on his personal observations and those of Officer Covell, Officer Sutton asked appellant if he would submit to some field sobriety tests. At the insistence of appellant's brother, who was a passenger in appellant's vehicle, appellant refused to do so. Appellant was then placed under arrest and charged with driving under the influence of alcohol. The record also indicates that appellant refused to take a Breathalyzer test once he arrived at the police station.

[\*P4] Appellant subsequently filed a Motion to Suppress and a hearing was held on May 21, 2001. At the hearing, appellant argued that he was not speeding and that Officer Sutton had no probable cause to place him under arrest. Based on the evidence presented at the hearing, the trial court denied appellant's motion to suppress. On July 5, 2001, a jury trial was held in which appellant was convicted of driving under the influence, in violation of *R.C. 4511.19(A)(1)*. The trial court's imposition of sentence was stayed pending an appeal. This appeal followed, [\*4] and appellant asserts two assignments of error for our review:

[\*P5] "[1.] The Trial Court committed reversible error by concluding the arresting officer had "probable cause" to stop the Appellant's vehicle on March 22, 2001.

[\*P6] "[2.] The Trial Court committed reversible error by concluding the arresting officer had probable cause to believe Appellant was driving a motor vehicle while under the influence of alcohol."

[\*P7] As appellant's assignments of error are closely related, we proceed to address them collectively.

[\*P8] Appellant first argues that the "trial court erred in not suppressing all evidence obtained as a result of the unlawful traffic stop." Appellant further claims that Officer Sutton did not have a "reasonable, articulable suspicion that appellant had violated any traffic laws."

[\*P9] [HN1] At a hearing on a motion to suppress, a trial court, functioning as the trier of fact, is in the best position to evaluate the evidence, judge the credibility of the witnesses, and resolve the factual issues. *State v. Mills (1992)*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972. When reviewing a trial court's ruling on a motion to suppress, an appellate court is bound to accept the trial court's [\*5] factual determinations if they are supported by competent and credible evidence. *State v. Searls (1997)*, 118 Ohio App.3d 739, 741, 693 N.E.2d 1184. Once an appellate court accepts the trial court's factual determinations as true, the appellate court must conduct a de novo review of the trial court's application of the law to those facts. *Id.*

[\*P10] The record indicates that appellant's brother, Officer Sutton, and Officer Covell testified at the suppression hearing. After considering the evidence presented at the suppression hearing, the trial court made the following findings of fact: "(1) Mentor Police Officer Patrolman Sutton and Patrolman Covell saw defendant driving on Mentor Avenue near Acacia in Mentor about 1:20 A.M. on March 22, 2001. One observed the defendant's speed to be faster than the posted speed limit. (2) The other officer followed the Defendant \*\*\*. He observed smoke from defendant's vehicle's exhaust system. Speeds at various time [sic] faster than speed limit and direction signals were used. (3) After defendant was pulled over, officer observed some signs of alcohol in defendant's behavior as well as condition. At defendant's brothers [sic] insistence, [\*6] defendant refused to take alcohol influence performance tests as well as refusing [sic] to take the breath test at police station later on. (4) The defendant was charged with driving under the influence."

[\*P11] In response to the trial court's findings of fact, appellant questions the credibility of the testimony supplied by Officers Covell and Sutton. In his brief, appellant attempts to prove, through intricate mathematical calculations, that Officer Sutton's testimony does not support the trial court's finding that appellant was speeding. While we admire appellant's efforts in this regard, the record indicates that appellant failed to raise the mathematical issue before the trial court. It is well settled law that [HN2] issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived. *State v. Burge (1993)*, 88 Ohio App. 3d 91, 93, 623 N.E.2d 146, citing *State v. Comen (1990)*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640. As appellant failed to argue the issue of mathematical calculations before the trial court, it is deemed waived for purposes of this appeal.

[\*P12] Our review of the record reveals both Officer [\*7] Covell and Officer Sutton testified at the suppression hearing that appellant exhibited signs of intoxication on March 22, 2001. Officer Covell also testified that prior to the stop, he observed erratic driving on behalf of appellant. Officer Sutton testified that he observed an excessive amount of smoke coming from appellant's exhaust and that he subsequently clocked appellant's speed at 38 miles per hour in a 25 miles per hour zone. In response, appellant recycles the argument that Officer Sutton's testimony lacks credibility. We

disagree with appellant.

[\*P13] The record indicates Officer Sutton testified that at the beginning and end of his shift, Officer Sutton performed both "internal and external calibration tests" on his radar unit. Officer Sutton further testified that the radar unit "tested true" both at the beginning and end of his shift. We also note that appellant offered no objections to Officer Sutton's testimony regarding the calibration of his radar unit at the suppression hearing. Furthermore, once appellant had been stopped, Officer Sutton noted appellant's glassy eyes, slouched posture, and lack of coordination. Additionally, both officers testified that appellant's brother [\*\*8] instructed appellant to refuse to submit to any field sobriety tests. To this point, appellant has failed to provide any evidence that would refute the credibility of Officer Sutton's testimony.

[\*P14] The only witness to testify on appellant's behalf at the suppression hearing was appellant's brother. As a passenger in the vehicle that morning, appellant's brother alleged that appellant did not violate any traffic laws. However, appellant's brother also admitted on the record that he had consumed "five or six beers" that morning and when asked if he was under the influence of alcohol that morning, appellant's brother responded: "Me, yeah." Taking into account the testimony presented at the suppression hearing, along with appellant's failure to refute such evidence, it is clear to this court that the trial court's findings of fact were supported by competent, credible evidence, and thus will be accepted as true by this court for purposes of review.

[\*P15] [HN3] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual, provided the officer has the requisite reasonable suspicion, based upon specific and articulable facts, that a crime [\*\*9] has occurred or is imminent. *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972, citing *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868; see, also, *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 296, 1999 Ohio 68, 720 N.E.2d 507. Additionally, this court has held that any traffic violation, even a minor traffic violation, witnessed by a police officer is, standing alone, sufficient grounds to stop the vehicle observed violating the ordinance. *State v. Cosari* (Mar. 30, 2001), 11th Dist. No. 99- P-0120, 2001 Ohio App. LEXIS 1562, at \*6; *State v. Burdick* (May 26, 2000), 11th Dist. No. 98- G-2209, 2000 Ohio App. LEXIS 2264, at \*13; *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95- P-0156, 1996 Ohio App. LEXIS 3361, at \*7. Once an officer has stopped a vehicle for a minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may proceed to investigate the detainee for driving under the influence if there exists reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts. *Burdick, supra*, 2000 Ohio App. LEXIS 2264, at \*13-14, [\*\*10] citing *Yemma, supra*, at \*7.

[\*P16] As mentioned above, Officer Sutton testified that he observed an excessive amount of smoke coming from appellant's exhaust. In fact, Officer Sutton testified that he observed smoke "pouring out" of appellant's exhaust. [HN4] Excessive smoke coming from an exhaust is a violation of Mentor City Ordinance 72.17. Officer Sutton also testified that he clocked appellant's vehicle on his stationary radar speeding at 38 miles per hour in a 25 miles per hour zone. Speeding is a violation of Mentor City Ordinance 73.01. As those are both violations of Mentor City Traffic Ordinances, we hold, that under *Cosari* and *Gedeon*, appellant's traffic violations surpassed the fundamental requirement of a reasonable, articulable suspicion, giving Officer Sutton probable cause with which to stop appellant's vehicle. See *Beck v. Ohio* (1964), 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223. Furthermore, we find it important to note, that, even if appellant had been able to contradict Officer Sutton's testimony with regards to the speeding violation, Officer Sutton would still have had probable cause to initiate a stop due to appellant's smoking [\*\*11] exhaust violation.

[\*P17] Our previous analysis also indicates that Officer Sutton had a reasonable and articulable suspicion to investigate appellant for driving under the influence of alcohol after the initial traffic stop. Thus, the only remaining argument raised by appellant is whether Officer Sutton had probable cause to arrest appellant for driving under the influence. To this we answer in the affirmative.

[\*P18] [HN5] In determining whether the police had probable cause to arrest appellant for DUI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of

facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Beck v. Ohio* (1964), 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 311 N.E.2d 16. In making this determination, we will examine the "totality" of facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906. [\*\*12] Also, the mere odor of alcohol, glassy eyes, slurred speech, and/or other indicia of the use of alcohol, by a driver are, in and of themselves, insufficient to constitute probable cause to arrest; however, based on the totality of the circumstances surrounding an arrest, probable cause may exist beyond the mere appearance of drunkenness. *City of Eastlake v. Pavlisin*, 11th Dist. No. 2001- L-207, 2002 Ohio 4702, at 2.

[\*P19] The record before us indicates that prior to being stopped by Officer Sutton, Officer Covell observed that appellant "braked rather hard and went over the broken white line halfway into the center lane and then came back up into the curb lane." Also, both officers testified that appellant was slouched over in his seat, used vulgar, abusive language, and that once he exited the vehicle; appellant had trouble maintaining his balance. In fact, Officer Covell testified that: "as appellant exited the vehicle he was still staggered, unbalanced, he fell into the side of the vehicle a couple times, he kind of staggered into the side of the car a couple times as he walked back to the rear." Officer Covell also testified that: "he was very slurred in speech, was [\*\*13] swearing at me. \*\*\*. He called me a fucking mutt." The record indicates that appellant also stated that: "he was not going to take any tests." [HN6] Appellant's refusal to submit to field sobriety tests is another factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol. *State v. Arnold* (Sept. 7, 1999), 12th Dist. No. CA99-02-026, 1999 Ohio App. LEXIS 4159; *State v. Buehl* (Jan. 26, 2000), 9th Dist. No. 19469, 2000 Ohio App. LEXIS 155, (Defendant's refusal to submit to field sobriety tests was properly considered as evidence that he had been driving under the influence.)

[\*P20] When the officers' testimony of appellant's erratic driving, physical instability, and abusive behavior is coupled with the observations noted in our previous analysis, it becomes apparent that the totality of the circumstances indicate Officer Sutton had probable cause to arrest appellant for driving under the influence of alcohol. Appellant's second assignment of error is also without merit.

[\*P21] We hold that appellant's first and second assignments of error are not well taken and without merit. For the foregoing reasons, [\*\*14] the decision of the trial court in this matter is affirmed.

DONALD R. FORD, J.,

JUDITH A. CHRISTLEY, J.,

concur.

91 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - SCOTT M. MOLK,  
Defendant-Appellant.**

**CASE NO. 2001-L-146**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE  
COUNTY**

*2002 Ohio 6926; 2002 Ohio App. LEXIS 6661*

**December 13, 2002, Decided**

**PRIOR HISTORY:** [\*\*1] Criminal Appeal from the Mentor Municipal Court, Case No. 01 TRC 1677.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was charged with driving under the influence of alcohol (DUI), in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and he filed a motion to suppress evidence. The Mentor Municipal Court (Ohio) denied the motion and convicted defendant of the charge after a jury found defendant guilty. Defendant appealed.

**OVERVIEW:** Defendant was a passenger in a vehicle when the driver was arrested for DUI. The police officer who made the arrest was offered to drive defendant home, but drove him to a bar when defendant insisted he be taken there. Less than a hour later, that officer and another officer encountered defendant after the other officer stopped defendant for speeding and because the car he was driving was emitting excessive exhaust. Defendant refused the officers' request that he take field sobriety tests and also refused to take a Breathalyzer test. At his trial on a charge of DUI, defendant moved to suppress the officers' testimony, arguing that the officers did not have a legal basis for stopping him or arresting him. The appellate court held that (1) speeding and driving a car that was emitting excessive smoke from the exhaust were violations of the Mentor, Ohio, City Ordinance, and defendant's violation of either provision gave police a legal basis for stopping him; and (2) considering the totality of the facts known to police, including defendant's behavior, physical appearance, and refusal to take field sobriety tests, the officers who arrested defendant for DUI had probable cause to do so.

**OUTCOME:** The trial court's judgment was affirmed.

**CORE TERMS:** driving, influence of alcohol, exhaust, arrest, probable cause, suppression hearing, speeding, morning, smoke, credibility, sobriety, glassy, coming, radar, assignments of error, motion to suppress, mathematical, totality, probable cause to arrest, articulable suspicion, ordinance, passenger, traffic, license, driver, speed, circumstances

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### **LexisNexis(R) Headnotes**

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*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

[HN1] At a hearing on a motion to suppress, a trial court, functioning as the trier of fact, is in the best position to evaluate the evidence, judge the credibility of the witnesses, and resolve the factual issues. When reviewing a trial court's ruling on a motion to suppress, an appellate court is bound to accept the trial court's factual determinations if they are supported by competent and credible evidence. Once an appellate court accepts a trial court's factual determinations as true, the appellate court must conduct a de novo review of the trial court's application of the law to those facts.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

*Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview*

[HN2] Issues not raised in a trial court may not be raised for the first time on appeal because such issues are deemed waived.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

*Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses*

[HN3] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual, provided the officer has the requisite reasonable suspicion, based upon specific and articulable facts, that a crime has occurred or is imminent. Additionally, any traffic violation, even a minor traffic violation, witnessed by a police officer is, standing alone, sufficient grounds to stop the vehicle observed violating the ordinance. Once an officer has stopped a vehicle for a minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may proceed to investigate the detainee for driving under the influence if there exists reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

[HN4] Excessive smoke coming from an exhaust is a violation of Mentor, Ohio, City Ordinance § 72.17. Speeding is a violation of Mentor, Ohio, City Ordinance § 73.01. A defendant's traffic violations surpass the fundamental requirement of a reasonable, articulable suspicion, giving a police officer probable cause with which to stop the defendant's vehicle. Furthermore, even a defendant is able to contradict a police officer's testimony with regards to a speeding violation, the officer would still have probable cause to initiate a stop due to the defendant's smoking exhaust violation.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause*

*Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge*

[HN5] In determining whether the police had probable cause to arrest a person for driving under the influence, the Court of Appeals of Ohio considers whether, at the moment of arrest, the police had sufficient information, derived from a

reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. In making this determination, the court of appeals will examine the totality of facts and circumstances surrounding the arrest. The mere odor of alcohol, glassy eyes, slurred speech, and/or other indicia of the use of alcohol by a driver are, in and of themselves, insufficient to constitute probable cause to arrest; however, based on the totality of the circumstances surrounding an arrest, probable cause may exist beyond the mere appearance of drunkenness.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause*

*Criminal Law & Procedure > Arrests > Probable Cause*

[HN6] A defendant's refusal to submit to field sobriety tests is a factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol.

**COUNSEL:** Ron M. Graham, Mentor City Prosecutor, Mentor, OH (For Plaintiff-Appellee).

Brent L. English, Law Offices of Brent L. English, Cleveland, OH (For Defendant-Appellant).

**JUDGES:** DIANE V. GRENDALL, J. DONALD R. FORD, J., JUDITH A. CHRISTLEY, J., concur.

**OPINION BY:** DIANE V. GRENDALL

**OPINION:** DIANE V. GRENDALL, J.

[\*P1] Scott Molk ("appellant") appeals the judgment of conviction by the Mentor Municipal Court. The trial court's judgment was entered upon a jury's verdict finding appellant guilty of driving while under the influence of alcohol, a violation of *R.C. 4511.19(A)(1)*. For the following reasons, we affirm the decision of the trial court.

[\*P2] On March 22, 2001, at approximately 12:45 a.m., appellant was a passenger in a vehicle whose driver was arrested for driving under the influence of alcohol. As the vehicle appellant was riding in was towed, Mentor Police Officer Covell offered to take appellant home, but appellant stated that he wanted to return to a local bar called Safe Crackers. Prior to returning appellant to Safe Crackers, Officer Covell noticed appellant "had a strong [\*\*2] odor of alcoholic beverage coming off his breath, he was slow and mumbled in speech, his eyes were glassy, he was unbalanced and uncoordinated." Subsequently, appellant was returned to Safe Crackers by Officer Covell, who advised appellant several times not to drive that morning because it appeared appellant was under the influence of alcohol. Appellant failed to take the officer's advice. At approximately 1:30 a.m. that same morning, appellant was stopped, arrested, and charged with driving under the influence of alcohol by Mentor Police Officer Sutton.

[\*P3] The record indicates that appellant was initially pulled over for a speeding violation, as well as a smoking exhaust, both violations of Mentor City Ordinances. However, when Officer Sutton approached appellant to ask him for his driver's license, he noticed the strong odor of an alcoholic beverage emanating from appellant. Officer Sutton also observed appellant's glassy eyes and slurred speech as he surrendered his license. Subsequently, in accordance with Mentor Police Department policy, Officer Covell arrived on the scene to provide backup to Officer Sutton during the stop. Upon arriving at the scene, Officer Covell advised Officer [\*\*3] Sutton that he had taken appellant back to Safe Crackers earlier that morning and that he also felt appellant was exhibiting signs of intoxication. Based on his personal observations and those of Officer Covell, Officer Sutton asked appellant if he would submit to some field sobriety tests. At the insistence of appellant's brother, who was a passenger in appellant's vehicle, appellant refused to do so. Appellant was then placed under arrest and charged with driving under the influence of alcohol. The record also indicates that appellant refused to take a Breathalyzer test once he arrived at the police station.

[\*P4] Appellant subsequently filed a Motion to Suppress and a hearing was held on May 21, 2001. At the hearing, appellant argued that he was not speeding and that Officer Sutton had no probable cause to place him under arrest. Based on the evidence presented at the hearing, the trial court denied appellant's motion to suppress. On July 5, 2001, a jury trial was held in which appellant was convicted of driving under the influence, in violation of *R.C. 4511.19(A)(1)*. The trial court's imposition of sentence was stayed pending an appeal. This appeal followed, [\*\*4] and appellant asserts two assignments of error for our review:

[\*P5] "[1.] The Trial Court committed reversible error by concluding the arresting officer had "probable cause" to stop the Appellant's vehicle on March 22, 2001.

[\*P6] "[2.] The Trial Court committed reversible error by concluding the arresting officer had probable cause to believe Appellant was driving a motor vehicle while under the influence of alcohol."

[\*P7] As appellant's assignments of error are closely related, we proceed to address them collectively.

[\*P8] Appellant first argues that the "trial court erred in not suppressing all evidence obtained as a result of the unlawful traffic stop." Appellant further claims that Officer Sutton did not have a "reasonable, articulable suspicion that appellant had violated any traffic laws."

[\*P9] [HN1] At a hearing on a motion to suppress, a trial court, functioning as the trier of fact, is in the best position to evaluate the evidence, judge the credibility of the witnesses, and resolve the factual issues. *State v. Mills (1992)*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972. When reviewing a trial court's ruling on a motion to suppress, an appellate court is bound to accept the trial court's [\*\*5] factual determinations if they are supported by competent and credible evidence. *State v. Searls (1997)*, 118 Ohio App.3d 739, 741, 693 N.E.2d 1184. Once an appellate court accepts the trial court's factual determinations as true, the appellate court must conduct a de novo review of the trial court's application of the law to those facts. *Id.*

[\*P10] The record indicates that appellant's brother, Officer Sutton, and Officer Covell testified at the suppression hearing. After considering the evidence presented at the suppression hearing, the trial court made the following findings of fact: "(1) Mentor Police Officer Patrolman Sutton and Patrolman Covell saw defendant driving on Mentor Avenue near Acacia in Mentor about 1:20 A.M. on March 22, 2001. One observed the defendant's speed to be faster than the posted speed limit. (2) The other officer followed the Defendant \*\*\*. He observed smoke from defendant's vehicle's exhaust system. Speeds at various time [sic] faster than speed limit and direction signals were used. (3) After defendant was pulled over, officer observed some signs of alcohol in defendant's behavior as well as condition. At defendant's brothers [sic] insistence, [\*\*6] defendant refused to take alcohol influence performance tests as well as refusing [sic] to take the breath test at police station later on. (4) The defendant was charged with driving under the influence."

[\*P11] In response to the trial court's findings of fact, appellant questions the credibility of the testimony supplied by Officers Covell and Sutton. In his brief, appellant attempts to prove, through intricate mathematical calculations, that Officer Sutton's testimony does not support the trial court's finding that appellant was speeding. While we admire appellant's efforts in this regard, the record indicates that appellant failed to raise the mathematical issue before the trial court. It is well settled law that [HN2] issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived. *State v. Burge (1993)*, 88 Ohio App. 3d 91, 93, 623 N.E.2d 146, citing *State v. Comen (1990)*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640. As appellant failed to argue the issue of mathematical calculations before the trial court, it is deemed waived for purposes of this appeal.

[\*P12] Our review of the record reveals both Officer [\*\*7] Covell and Officer Sutton testified at the suppression hearing that appellant exhibited signs of intoxication on March 22, 2001. Officer Covell also testified that prior to the stop, he observed erratic driving on behalf of appellant. Officer Sutton testified that he observed an excessive amount of smoke coming from appellant's exhaust and that he subsequently clocked appellant's speed at 38 miles per hour in a 25 miles per hour zone. In response, appellant recycles the argument that Officer Sutton's testimony lacks credibility. We

disagree with appellant.

[\*P13] The record indicates Officer Sutton testified that at the beginning and end of his shift, Officer Sutton performed both "internal and external calibration tests" on his radar unit. Officer Sutton further testified that the radar unit "tested true" both at the beginning and end of his shift. We also note that appellant offered no objections to Officer Sutton's testimony regarding the calibration of his radar unit at the suppression hearing. Furthermore, once appellant had been stopped, Officer Sutton noted appellant's glassy eyes, slouched posture, and lack of coordination. Additionally, both officers testified that appellant's brother [\*\*8] instructed appellant to refuse to submit to any field sobriety tests. To this point, appellant has failed to provide any evidence that would refute the credibility of Officer Sutton's testimony.

[\*P14] The only witness to testify on appellant's behalf at the suppression hearing was appellant's brother. As a passenger in the vehicle that morning, appellant's brother alleged that appellant did not violate any traffic laws. However, appellant's brother also admitted on the record that he had consumed "five or six beers" that morning and when asked if he was under the influence of alcohol that morning, appellant's brother responded: "Me, yeah." Taking into account the testimony presented at the suppression hearing, along with appellant's failure to refute such evidence, it is clear to this court that the trial court's findings of fact were supported by competent, credible evidence, and thus will be accepted as true by this court for purposes of review.

[\*P15] [HN3] The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual, provided the officer has the requisite reasonable suspicion, based upon specific and articulable facts, that a crime [\*\*9] has occurred or is imminent. *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972, citing *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868; see, also, *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 296, 1999 Ohio 68, 720 N.E.2d 507. Additionally, this court has held that any traffic violation, even a minor traffic violation, witnessed by a police officer is, standing alone, sufficient grounds to stop the vehicle observed violating the ordinance. *State v. Cosari* (Mar. 30, 2001), 11th Dist. No. 99- P-0120, 2001 Ohio App. LEXIS 1562, at \*6; *State v. Burdick* (May 26, 2000), 11th Dist. No. 98- G-2209, 2000 Ohio App. LEXIS 2264, at \*13; *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95- P-0156, 1996 Ohio App. LEXIS 3361, at \*7. Once an officer has stopped a vehicle for a minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may proceed to investigate the detainee for driving under the influence if there exists reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts. *Burdick, supra*, 2000 Ohio App. LEXIS 2264, at \*13-14, [\*\*10] citing *Yemma, supra*, at \*7.

[\*P16] As mentioned above, Officer Sutton testified that he observed an excessive amount of smoke coming from appellant's exhaust. In fact, Officer Sutton testified that he observed smoke "pouring out" of appellant's exhaust. [HN4] Excessive smoke coming from an exhaust is a violation of Mentor City Ordinance 72.17. Officer Sutton also testified that he clocked appellant's vehicle on his stationary radar speeding at 38 miles per hour in a 25 miles per hour zone. Speeding is a violation of Mentor City Ordinance 73.01. As those are both violations of Mentor City Traffic Ordinances, we hold, that under *Cosari* and *Gedeon*, appellant's traffic violations surpassed the fundamental requirement of a reasonable, articulable suspicion, giving Officer Sutton probable cause with which to stop appellant's vehicle. See *Beck v. Ohio* (1964), 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223. Furthermore, we find it important to note, that, even if appellant had been able to contradict Officer Sutton's testimony with regards to the speeding violation, Officer Sutton would still have had probable cause to initiate a stop due to appellant's smoking [\*\*11] exhaust violation.

[\*P17] Our previous analysis also indicates that Officer Sutton had a reasonable and articulable suspicion to investigate appellant for driving under the influence of alcohol after the initial traffic stop. Thus, the only remaining argument raised by appellant is whether Officer Sutton had probable cause to arrest appellant for driving under the influence. To this we answer in the affirmative.

[\*P18] [HN5] In determining whether the police had probable cause to arrest appellant for DUI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of

facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Beck v. Ohio* (1964), 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct. 223; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 311 N.E.2d 16. In making this determination, we will examine the "totality" of facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906. [\*\*12] Also, the mere odor of alcohol, glassy eyes, slurred speech, and/or other indicia of the use of alcohol, by a driver are, in and of themselves, insufficient to constitute probable cause to arrest; however, based on the totality of the circumstances surrounding an arrest, probable cause may exist beyond the mere appearance of drunkenness. *City of Eastlake v. Pavlisin*, 11th Dist. No. 2001- L-207, 2002 Ohio 4702, at 2.

[\*P19] The record before us indicates that prior to being stopped by Officer Sutton, Officer Covell observed that appellant "braked rather hard and went over the broken white line halfway into the center lane and then came back up into the curb lane." Also, both officers testified that appellant was slouched over in his seat, used vulgar, abusive language, and that once he exited the vehicle; appellant had trouble maintaining his balance. In fact, Officer Covell testified that: "as appellant exited the vehicle he was still staggered, unbalanced, he fell into the side of the vehicle a couple times, he kind of staggered into the side of the car a couple times as he walked back to the rear." Officer Covell also testified that: "he was very slurred in speech, was [\*\*13] swearing at me. \*\*\*. He called me a fucking mutt." The record indicates that appellant also stated that: "he was not going to take any tests." [HN6] Appellant's refusal to submit to field sobriety tests is another factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol. *State v. Arnold* (Sept. 7, 1999), 12th Dist. No. CA99-02-026, 1999 Ohio App. LEXIS 4159; *State v. Buehl* (Jan. 26, 2000), 9th Dist. No. 19469, 2000 Ohio App. LEXIS 155, (Defendant's refusal to submit to field sobriety tests was properly considered as evidence that he had been driving under the influence.)

[\*P20] When the officers' testimony of appellant's erratic driving, physical instability, and abusive behavior is coupled with the observations noted in our previous analysis, it becomes apparent that the totality of the circumstances indicate Officer Sutton had probable cause to arrest appellant for driving under the influence of alcohol. Appellant's second assignment of error is also without merit.

[\*P21] We hold that appellant's first and second assignments of error are not well taken and without merit. For the foregoing reasons, [\*\*14] the decision of the trial court in this matter is affirmed.

DONALD R. FORD, J.,

JUDITH A. CHRISTLEY, J.,

concur.

92 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, PLAINTIFF-APPELLEE, VS. JEFFREY S. LLOYD,  
DEFENDANT-APPELLANT.**

**CASE NO. 2001-CO-36**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,  
COLUMBIANA COUNTY**

*2002 Ohio 3017; 2002 Ohio App. LEXIS 3027*

**June 13, 2002, Decided**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from Southwest Area County Court Case No. 2001-TR-D-1712-S.

**DISPOSITION:** Trial court's judgment was reversed and case was remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from his speeding conviction in the Southwest Area County Court, Columbiana County (Ohio), arguing primarily that error had occurred in many discovery and evidentiary rulings.

**OVERVIEW:** Defendant was arrested for speeding after an officer using a laser speed-measuring device clocked him at an excessive speed. The laser evidence was the primary evidence at trial, although the trial court viewed a videotape not offered in evidence and heard the officer's account of the arrest. The appellate court upheld two of defendant's assignments of error. First, the trial court committed prejudicial error when it failed to comply with *Ohio R. Crim. P. 16(B)(1)(e)* and allowed the prosecution not to timely supply defendant with the name and other information on its expert witness regarding the laser device. The trial court also abused its discretion in severely limiting the extent to which it allowed defendant to cross-examine the officer regarding the device. Although the trial court further erred in permitting a prosecution expert to testify regarding a scientific study that was not properly in evidence and might have committed unpreserved error in watching the videotape, neither of these errors affected defendant's outcome. Nonetheless, the first two errors cited were sufficient to invalidate defendant's conviction.

**OUTCOME:** The appellate court reversed the judgment of conviction and remanded the matter for further consistent proceedings.

**CORE TERMS:** laser, speed, assignment of error, discovery, judicial notice, training, accuracy, rested, cross-examination, miles, credibility, taking judicial notice, calibrated, traveling, objected, voltage, radar, expert witness, experiment, pro se, certificate, videotape, sixty-six, speeding, resume, expert testimony, hearsay, continuance, reliability, calibration

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Jencks Act  
Criminal Law & Procedure > Counsel > General Overview***

[HN1] See *Ohio R. Crim. P. 16(B)(1)(e)*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview  
Evidence > Testimony > Examination > Cross-Examination > General Overview***

***Evidence > Testimony > Presentation of Evidence***

[HN2] A trial court shall exercise reasonable control over the mode and order of interrogating witnesses. *Ohio R. Evid. 611(A)*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination  
Evidence > Testimony > Examination > Cross-Examination > General Overview***

[HN3] A trial court shall allow cross-examination on all relevant matters and matters affecting credibility. *Ohio R. Evid. 611(B)*.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Evidence > Procedural Considerations > Rulings on Evidence***

***Evidence > Testimony > Examination > Cross-Examination > Scope***

[HN4] The scope of cross-examination lies within an Ohio trial court's discretion. An appellate court will not reverse a trial court's ruling on the scope of cross-examination absent an abuse of that discretion.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN5] One of the oldest and most fundamental rights in the Anglo-American system of evidence is the right of a party to cross-examine an adverse witness. The value of the right of cross-examination is well-settled in Ohio jurisprudence.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Timeliness***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN6] Although evidentiary rulings are typically reviewed only for abuse of the trial court's discretion, errors relating to the trial court's admission of hearsay must be viewed in the light of *Ohio R. Evid. 103(A)* and the standard established in *Ohio R. Crim. P. 52(A)*, providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right. *Ohio R. Evid. 103(A)* provides that a party must object to the contested evidence in a timely manner to preserve the issue for appeal.

***Evidence > Hearsay > Rule Components > Truth of Matter Asserted***

[HN7] Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Ohio R. Evid. 801(C)*.

***Evidence > Testimony > Experts > Criminal Trials***

[HN8] *Ohio R. Evid. 702(C)* provides that an expert witness may give his opinion if it, among other things, is based on

reliable scientific, technical, or other specialized information. If the expert's testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if it meets three requirements. The requirements are: (1) the theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) the design of the procedure, test, or experiment reliably implements the theory; (3) the particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

***Evidence > Judicial Notice***

***Evidence > Scientific Evidence > General Overview***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN9] Under Ohio case law, the scientific accuracy of a laser device is the type of fact that can be judicially noticed.

***Evidence > Judicial Notice > General Overview***

[HN10] It is mandatory for a court to take judicial notice if requested by a party and supplied with the necessary information. *Ohio R. Evid. 201(D)*.

***Evidence > Judicial Notice***

[HN11] Judicial notice may be taken at any time during the proceedings. *Ohio R. Evid. 201(F)*.

***Evidence > Judicial Notice > General Overview***

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN12] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. *Ohio R. Evid. 201(E)*.

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

[HN13] The failure to object to an alleged error at trial waives all but plain error.

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview***

[HN14] An Ohio appellate court reverses for plain error only if the outcome of the trial clearly would have been different absent the error.

***Criminal Law & Procedure > Counsel > Right to Self-Representation***

[HN15] An Ohio trial court is not obligated to provide a pro se defendant legal advice as to how to present his defense.

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview***

[HN16] Judging the credibility of witnesses is primarily the responsibility of the trier of fact.

**COUNSEL:** For Plaintiff-Appellee: Robert L. Herron, Prosecuting Attorney, Shelli Ellen Petrella, Assistant Prosecuting Attorney, Lisbon, Ohio.

For Defendant-Appellant: Attorney Milton A. Hayman, Steubenville, Ohio.

**JUDGES:** Hon. Gene Donofrio, Hon. Joseph J. Vukovich, Hon. Mary DeGenaro. Vukovich, J., concurs. DeGenaro, J.,

concur.

**OPINION BY:** Gene Donofrio

**OPINION:** DONOFRIO, J.

[\*P1] Defendant-appellant, Jeffrey S. Lloyd, appeals from the decision of the Southwest Area County Court of Columbiana County finding him guilty of exceeding the speed limit and fining him \$ 100.

[\*P2] On May 28, 2001, Trooper Craig Monte (Trooper Monte) stopped appellant's vehicle on Ohio State Route 7 for speeding. Trooper Monte issued appellant a traffic ticket that stated he clocked appellant with his laser traveling at sixty-six miles per hour in a fifty-five miles per hour zone. Appellant pled not guilty. The court scheduled a trial for June 27, 2001.

[\*P3] Appellant, acting pro se, filed a request for discovery seeking, among other things, a witness list, a log of the [\*\*2] laser speed detection device used to determine his speed, the arresting officer's training certificates, an overview and description of the State of Ohio's curriculum for the training and certification for officers for the use of laser speed detection devices, and how and where the laser speed detection device was calibrated. Plaintiff-appellee, the State of Ohio, provided some of the requested information to appellant on June 22, 2001. On June 25, 2001, appellant filed a motion to compel discovery of the remaining information. Appellant also filed a motion for a continuance of the trial scheduled for June 27, 2001 because he had not yet received all of his requested discovery. On June 26, 2001, appellant filed a motion to dismiss the case alleging appellee's actions interfered with his right to a speedy trial. The trial court held a hearing on appellant's motions on June 27, 2001. It overruled appellant's motion to dismiss, granted appellant's motion for a continuance, and ordered appellee to complete any discovery within seven days.

[\*P4] A trial was held on July 27, 2001. Appellant appeared pro se. The trial court found appellant guilty of exceeding the speed limit in violation [\*\*3] of *R.C. 4511.21(D)* and fined him \$ 100 plus costs, which it journalized in its July 30, 2001 judgment entry. Appellant filed a timely notice of appeal on August 2, 2001. The trial court stayed appellant's fine pending this appeal.

[\*P5] Appellant is now represented by counsel. He raises eight assignments of error, the first of which states:

[\*P6] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT-APPELLANT'S *OHIO CRIMINAL RULE 16* MOTION TO COMPEL DISCOVERY ON SEVERAL KEY ISSUES, THEREBY ABUSING ITS DISCRETION MATERIALLY COMPROMISING DEFENDANT'S ABILITY TO PROPERLY DEFEND HIMSELF."

[\*P7] Appellant complained in his motion to compel that appellee failed to supply him with nineteen of his discovery requests. Of the nineteen items requested, the trial court ordered appellee to supply appellant with one of them, that being any damage history to the laser device. It ruled the other items appellant requested were either irrelevant or undiscoverable. Appellant now argues that the trial court erred in disallowing discovery on several of his requests.

[\*P8] The granting or overruling of discovery motions in a criminal case rests [\*\*4] within the sound discretion of the trial court and will only be disturbed on appeal in cases of clear abuse of discretion. *State v. Shoop (1993)*, 87 *Ohio App.3d 462, 469, 622 N.E.2d 665*. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was arbitrary, unreasonable or unconscionable. *State v. Adams (1980)*, 62 *Ohio St.2d 151, 157, 16 Ohio Op. 3d 169, 404 N.E.2d 144*.

[\*P9] "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party." *State v. Smith (Aug. 10, 2001)*, 2001 *Ohio App. LEXIS 3531*, 11th Dist. No. 2000- A-52, 2001 *WL 901016* at \* 4, quoting *Lakewood v. Papadelis (1987)*, 32 *Ohio St.3d 1, 3, 511 N.E.2d 1138*. "The overall purpose of the discovery

rules is to produce a fair trial." *Id.*, citing *State v. Mitchell (1975)*, 47 Ohio App.2d 61, 80, 1 Ohio Op. 3d 181, 352 N.E.2d 636.

[\*P10] First, appellant alleges the court erred in not requiring appellee to submit to him the name and address of its expert witness. In its initial response to discovery appellee stated it intended to call a laser expert witness from LPI Manufacturers, the company that made the laser, but that the exact name and address of the expert [\*\*5] was unknown at that time. The trial court stated appellee would only be required to provide appellant with the expert's name. *Crim.R. 16(B)(1)(e)* provides that "[HN1] upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial."

[\*P11] At the time appellee filed its discovery response it did not yet know who its expert witness would be. However, on July 20, 2001, appellee filed the resume of its expert witness with the court, which included the expert witness's name and address. Appellant states, and there is nothing on the record to the contrary, that appellee never served him with a copy of the expert's name, address, or resume. No certificate of service accompanies the expert's resume that appellee filed with the court. Therefore, we can presume appellee did not serve a copy of its expert's resume with appellant. Without the name and address of appellee's expert, appellant was denied the opportunity to review the expert's credentials before trial and had no one to whom to address interrogatories. Thus, the trial court erred [\*\*6] in not ordering appellee to provide appellant with its expert's address. Furthermore, appellee failed to provide appellant with even its expert's name.

[\*P12] Second, appellant argues the court erred by denying his request for an overview and description of the State of Ohio's curriculum regarding the education and certification of officers for the use of laser speed devices; hourly, classroom, and field training requirements; and continuing education thereof. Appellee stated at the motion hearing this information was irrelevant because it had already provided appellant with a copy of Trooper Monte's certification in the use of the laser, therefore indicating that he had completed all training necessary to become certified. The court agreed with appellee.

[\*P13] At trial, Trooper Monte testified regarding the training he underwent to become certified in the use of electronic speed measuring devices and in visually estimating the speed of vehicles. Trooper Monte testified that while in the police academy he had one week designated as radar and laser week. He stated that this week consisted of five normal workdays. He testified that this week also included training on the [\*\*7] visual estimation of the speed of oncoming traffic. Appellee also introduced into evidence Trooper Monte's "Officer's Certificate of Training," which stated he satisfactorily completed all course requirements in theory, technical aspects, and practical use of electronic speed measuring devices.

[\*P14] Although appellant did not have the information about Trooper Monte's training in the use of laser devices before trial, this did not prejudice him. Appellee gave Trooper Monte's certificate of training to appellant in discovery; thus, appellant knew Trooper Monte was certified. The other information Trooper Monte testified to regarding the training week was not essential to appellee's case nor did it help or hurt appellant's case.

[\*P15] Third, appellant argues the court erred in denying his discovery request for the time the laser device was calibrated and tested for the day of his citation and for the date it was submitted for factory testing and calibration. At the motion hearing, the court held appellee did not have to provide appellant with this requested information because appellant could question Trooper Monte about these issues at trial. However, appellee did provide [\*\*8] appellant with the certificate of calibration from Laser Technology, Inc. in its response to discovery, which verified that the laser device in question was calibrated on June 30, 1994.

[\*P16] At trial, Trooper Monte testified the laser device in question was last calibrated at the factory on June 30, 1994 and introduced the certificate of calibration confirming the calibration date. (State's Exhibit 2). Trooper Monte also testified he calibrated the laser device at the beginning of his shift the day he issued appellant the speeding citation.

Nothing in the record indicates appellant was prejudiced by lack of discovery concerning when Trooper Monte calibrated the laser.

[\*P17] Finally, appellant argues appellee failed to comply with the court's order that it provide additional discovery to him within seven days of the June 27, 2001 hearing. He claims that he was prejudiced by appellee's delay of fifteen days.

[\*P18] Appellant failed to object to appellee's delay in filing the court ordered discovery until appellee rested its case. At that time, appellant requested a continuance based on appellee's delay in providing him with the requested discovery. The trial court [\*\*9] overruled appellant's request stating he should have raised it at the beginning of trial. Since appellant did not bring to the court's attention appellee's delay in completing discovery until appellee rested its case, the court did not err in denying appellant's request for a continuance.

[\*P19] Since the trial court failed to order appellee to provide appellant with its expert's address or resume and because appellee failed to provide appellant with any information whatsoever about the expert it intended to call, the trial court abused its discretion and impeded the purpose of the discovery rules. Accordingly, appellant's first assignment of error has merit.

[\*P20] Appellant's second assignment of error states:

[\*P21] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DENYING DEFENDANT THE RIGHT TO CROSS EXAMINE THE STATE'S WITNESSES WITH QUESTIONS DESIGNED TO IMPEACH THEIR TESTIMONY AND TO REBUT EVIDENCE AS TO THE OPERATING INTEGRITY OF THE LASER SPEED DETECTION DEVICE USED BY THE ARRESTING OFFICER TO DETERMINE DEFENDANT'S SPEED."

[\*P22] Appellant alleges that had the trial court permitted him to cross-examine the witnesses as he wished, [\*\*10] he could have established the laser device must be operated in strict accordance with the operating manual, that it contains design flaws that render it incapable of providing accurate readings on all occasions, and that Trooper Monte was not qualified to measure speed. Appellant claims that the trial court improperly sustained appellee's objections to many of his questions on cross-examination of Trooper Monte. Appellant cites to *Xenia v. Boehman* (1996), 114 Ohio App.3d 78, 682 N.E.2d 1029, to support his argument in which the Second District Court of Appeals reversed the defendant's speeding conviction. The court found the trial court erred in not permitting the defendant to question the arresting officer regarding the circumstances of the defendant's traffic stop, the circumstances surrounding other tickets the officer had issued, and about what could cause false readings on a radar speed detection device. The court held the defendant, who was acting pro se, was attempting to impeach the officer's credibility and to determine his competency to use the radar device. Therefore, the court held the trial court abused its discretion in prohibiting these lines of questioning.

[\*P23] [\*\*11] [HN2] A trial court shall exercise reasonable control over the mode and order of interrogating witnesses. *Evid.R. 611(A)*. [HN3] The trial court shall allow cross-examination "on all relevant matters and matters affecting credibility." *Evid.R. 611(B)*. [HN4] The scope of cross-examination lies within the trial court's discretion. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916; *State v. Acre* (1983), 6 Ohio St.3d 140, 145, 6 Ohio B. 197, 451 N.E.2d 802. This court will not reverse a trial court's ruling on the scope of cross-examination absent an abuse of that discretion. *Id.*

[\*P24] Appellant alleges the court erred in disallowing him to ask certain questions of Trooper Monte. Specifically, appellant calls our attention to the following excerpts from the trial transcript. Appellant asked Trooper Monte, "Do you find radar to be superior to laser? Or do you find laser to radar?" (Tr. 32). The trial court sustained appellee's objection on the basis of relevancy. Appellant also asked Trooper Monte, "at what range do you have to qualify for your service weapon?" (Tr. 34). Appellee again objected on the basis of relevancy. Appellant argued the

relevancy was Trooper Monte's aiming. The court sustained [\*\*12] the objection. Next, appellant asked Trooper Monte a line of questions regarding whether the laser device would work if it was damaged and whether excessive voltage could have damaged the laser device. Trooper Monte testified he did not know about the voltage of the laser. The court then sustained an objection to appellant's question regarding whether Trooper Monte had had enough faith in the laser device to subject it to an extreme voltage test. Finally, appellant asked Trooper Monte if he was able to visually measure the speed of an aircraft at approximately thirteen hundred feet. Again, appellee objected and the court sustained the objection.

[\*P25] It is worth noting "[HN5] one of the oldest and most fundamental rights in the Anglo-American system of evidence is the right of a party to cross-examine an adverse witness. The value of the *right* of cross-examination is well-settled in Ohio jurisprudence. ' \* \* \* The importance of the right of full cross-examination, of an adverse witness, can scarcely be overestimated. As a test of the accuracy, truthfulness, and credibility of testimony, it is invaluable.' (Emphasis added.) *Martin v. Elden* (1877), 32 Ohio St. 282, 287. [\*\*13] " *Smith v. Mitchell* (1988), 35 Ohio St.3d 237, 239, 520 N.E.2d 213.

[\*P26] The trial court abused its discretion in not permitting appellant to pursue the above lines of questioning. As in *Boehman*, most of appellant's lines of questioning, although not artfully presented, sought responses that could potentially impeach Trooper Monte's credibility. When appellant asked Trooper Monte whether he thought laser to be superior to radar, he was attempting to determine whether there may have been a more accurate way for Trooper Monte to determine his speed. When appellant asked Trooper Monte about his range for firing weapons, he was trying to establish that it would be difficult to aim and fire a laser at a car license plate that was a far distance away. When he asked Trooper Monte if he could visually measure the speed of an aircraft at thirteen hundred feet, he was attempting to establish that when Trooper Monte visually estimated his speed (while he was approximately thirteen hundred feet from appellant) it would be difficult for him to do so accurately.

[\*P27] The only line of questioning the court properly sustained appellee's objection to was regarding design flaws dealing [\*\*14] with voltage. Trooper Monte testified he did not know about the voltage issues concerning the laser device. Thus, the court did not allow further questions on the issue. Also, appellant was able to question appellee's laser expert about potential design flaws dealing with voltage.

[\*P28] Thus, appellant's second assignment of error has merit.

[\*P29] Appellant's third assignment of error states:

[\*P30] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY RELYING SOLELY ON THE TESTIMONY OF THE STATE'S WITNESSES, ABSENT ADMISSION INTO EVIDENCE OF THE LTI MARKSMAN 20-20 LASER SPEED DETECTION DEVICE."

[\*P31] Appellant contends the trial court should not have relied on the testimony of appellee's witnesses regarding the laser device since appellee did not introduce the laser device into evidence. Appellee called Professor Wyatt Kilgallin (Prof. Kilgallin) as a laser expert. Appellant claims the court drew conclusions from Prof. Kilgallin's testimony that resulted in the court taking judicial notice of the laser device as an acceptable device to be used in this jurisdiction. Additionally, he argues appellee should have asked that the record reflect [\*\*15] the specific reading derived from the laser device on the date in question.

[\*P32] Appellant fails to cite to any authority to support his contention that absent the admission of the laser into evidence, appellee's witnesses cannot be relied upon. Appellant also fails to point to any conclusion the trial court reached regarding the laser device that was improper. Finally, as to the record reflecting the reading from the laser on the day in question, Trooper Monte testified that when he used the laser to determine appellant's speed, the laser indicated sixty-six miles per hour.

[\*P33] Accordingly, appellant's third assignment of error is without merit.

[\*P34] Appellant's fourth assignment of error states:

[\*P35] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY ADMITTING THE STATE'S WRITTEN HEARSAY EVIDENCE, DESPITE RENEWED DEFENSE OBJECTIONS."

[\*P36] The trial court admitted a written study entitled, "Analysis of Laser Speed Measurement Data" (New Jersey study) into evidence. The study was conducted by the New Jersey Department of Transportation and was dated January 28, 1997. The New Jersey study was designed to evaluate the accuracy [\*\*16] and precision of the LTI Marksman 20-20 Laser Speed Detection System. The study compared the laser device in question with other speed measurement devices. Prof. Kilgallin used the New Jersey study to supplement his testimony. Appellant objected to the introduction of the New Jersey study and Prof. Kilgallin's testimony regarding it as hearsay because appellee did not produce the facts/data that the study was based on. The trial court overruled the objection but noted it would "take it for the weight that should be given to it." (Tr. 72).

[\*P37] Appellant argues the court improperly admitted this study into evidence because it draws conclusions from data gathered by someone who did not testify at trial.

[\*P38] "[HN6] Although evidentiary rulings are typically reviewed only for abuse of the trial court's discretion, 'errors relating to the trial court's admission of hearsay must be viewed in the light of *Evid.R. 103(A)* and the standard established in *Crim.R. 52(A)*, providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right.'" *Safkow v. Scheiben*, 7th Dist. No. 99- CO-79, 2001 Ohio 3255, 2001 Ohio App. LEXIS 2113, 2001 WL 503200 at \* 3, [\*\*17] quoting *State v. Sorrels* (1991), 71 Ohio App.3d 162, 165, 593 N.E.2d 313. *Evid.R. 103(A)* provides that a party must object to the contested evidence in a timely manner to preserve the issue for appeal.

[\*P39] [HN7] Hearsay is an out of court statement offered in court to prove the truth of the matter asserted. *Evid.R. 801(C)*. The New Jersey study meets this definition. [HN8] *Evid.R. 702(C)* provides that an expert witness may give his opinion if it, among other things, "is based on reliable scientific, technical, or other specialized information." If the expert's testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if it meets three requirements. *Id.* The requirements are:

[\*P40] "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

[\*P41] "(2) The design of the procedure, test, or experiment reliably implements the theory;

[\*P42] "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result." *Id.*

[\*P43] Prof. Kilgallin's testimony concerning the New [\*\*18] Jersey study does not meet these requirements. Prof. Kilgallin did not testify as to the reliability of the design of the study nor did he testify that the experiments were performed in such a way as to yield an accurate result. Since the study was hearsay and Prof. Kilgallin failed to testify regarding its reliability, the trial court should not have admitted it into evidence.

[\*P44] However, it does not appear that by admitting the study into evidence the court prejudiced appellant. The court noted it would only consider the study for the weight that should be given to it. Furthermore, appellant cross-examined Prof. Kilgallin about the study. Prof. Kilgallin admitted he was not there when the study was conducted. Additionally, the majority of Prof. Kilgallin's expert testimony did not concern the New Jersey study, but instead concentrated on his own personal knowledge of the laser device. Finally, there is no indication that the court specifically relied on the study in rendering its decision.

[\*P45] Therefore, although the trial court should not have admitted the New Jersey study, its error was harmless.

Thus, appellant's fourth assignment of error is without merit. [\*\*19]

[\*P46] Appellant's fifth assignment of error states:

[\*P47] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY TAKING JUDICIAL NOTICE OF THE LASER SPEED DETECTION DEVICE BEFORE DEFENDANT COULD FULLY DEVELOP HIS CASE, AND ABSENT THE LASER'S ADMISSION INTO EVIDENCE."

[\*P48] Appellant argues the trial court erred in taking judicial notice of the laser device at the time when appellee objected to appellant's cross-examination of Prof. Kilgallin.

[\*P49] At trial, appellant objected to the court taking judicial notice of the fact that the LTI Marksman 20-20 laser device was reliable and accurate for determining speed; however, he did so after the court had already taken judicial notice of this fact. Even if appellant had objected to the judicial notice sooner, it was still proper for the court to take judicial notice.

[\*P50] "[HN9] The scientific accuracy of a laser device is the type of fact that can be judicially noticed." *City of Columbus v. Dawson* (Mar. 14, 2000), 2000 Ohio App. LEXIS 951, 10th Dist. No. 99 AP-589, 2000 WL 271766 at \* 2. [HN10] It is mandatory for a court to take judicial notice if requested by a party and supplied with the necessary information. *Evid.R. 201(D)*. [HN11] Judicial [\*\*20] notice may be taken at any time during the proceedings. *Evid.R. 201(F)*. "[HN12] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." *Evid.R. 201(E)*.

[\*P51] According to the above rules of evidence, appellant was entitled to an opportunity to be heard as to the propriety of the court taking judicial notice of the accuracy and reliability of the LTI Marksman 20-20 laser device. The trial court did afford appellant this opportunity. After appellee concluded its direct examination of Prof. Kilgallin, it asked the court to take judicial notice of the fact that the LTI Marksman 20-20 laser device is an accurate device to determine the speed of a vehicle. The court stated it would first permit appellant to question Prof. Kilgallin and then appellee could renew its motion. Additionally, appellee supplied the court via Prof. Kilgallin's testimony with the information necessary and requested that the court take judicial notice of the laser device's accuracy. Hence, the court was obligated to take [\*\*21] judicial notice as requested. *Evid.R. 201(D)*.

[\*P52] Thus, appellant's fifth assignment of error is without merit.

[\*P53] Appellant's sixth assignment of error states:

[\*P54] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY RELYING ON TESTIMONY AND CITING THE VIDEO TAPE THE TROOPER ALLEGEDLY MADE, EVEN THOUGH SAID VIDEO TAPE WAS NEVER ADMITTED INTO EVIDENCE."

[\*P55] A police cruiser videotape was made of Trooper Monte's traffic stop of appellant. Appellee never entered this tape into evidence; however, appellee did play the tape for the court. Appellant argues that the court erred in hearing testimony about what was on the videotape.

[\*P56] Appellant did not object to the playing of the videotape. [HN13] The failure to object to an alleged error at trial waives all but plain error. *State v. Lindsey* (2000), 87 Ohio St.3d 479, 482, 721 N.E.2d 995. Thus, [HN14] we will reverse only if the outcome of the trial clearly would have been different absent the error. *Id.*

[\*P57] There is no indication that the outcome of the trial clearly would have been different had the court not listened to testimony about the videotape. In the tape, appellant makes a comment to Trooper [\*\*22] Monte after Trooper Monte tells appellant that he clocked him traveling at sixty-six miles per hour. Trooper Monte testified that

appellant replied, "I don't doubt that." (Tr. 9). Trooper Monte later testified it was possible appellant made this remark sarcastically. When the court announced its decision, it commented appellant's remark to Trooper Monte did not seem sarcastic. However, the court had before it other evidence of appellant's guilt in addition to this one comment. The court stated the following in its judgment entry. It found the LTI Marksman 20-20 laser device to be an accepted device for the measurement of speed in this jurisdiction. It found Trooper Monte properly operated the laser device and determined appellant was traveling at sixty-six miles per hour. The court also found the laser device was in proper working order. Therefore, the court did not need to rely on appellant's comment as evidence of his guilt.

[\*P58] Accordingly, the trial court did not commit plain error in watching the videotape or in listening to testimony of what occurred at the traffic stop. Thus, appellant's sixth assignment of error is without merit.

[\*P59] Appellant's seventh assignment [\*\*23] of error states:

[\*P60] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ISSUING A VERDICT BEFORE EITHER PLAINTIFF OR DEFENDANT RESTED THEIR CASE."

[\*P61] Appellant alleges that since he was a pro se defendant and because neither party formally announced that it had rested its case, the court should have inquired if each party rested before rendering its judgment. Appellant claims, absent that type of supervision by the court, he could have missed opportunities to move for a directed verdict, which compromised his ability to defend himself.

[\*P62] Although neither party explicitly stated, "I rest my case," it is obvious when reading the transcript that each party rested before the court entered its decision. The following excerpts from the transcript are applicable.

[\*P63] "THE COURT: \* \* \*. Does the State have any further evidence to present?"

[\*P64] "MS. PETRELLA: The State does not, Your Honor.

[\*P65] "THEREUPON, THE PLAINTIFF, THE STATE OF OHIO, RESTED ITS CASE IN CHIEF." (Tr. 134-35).

[\*P66] "THE COURT: \* \* \*. You have no other witnesses to present, Mr. Lloyd?"

[\*P67] "MR LLOYD: No, Your Honor.

[\*P68] "THE COURT: All right. [\*\*24]

[\*P69] "THEREUPON, THE DEFENDANT, JEFFREY S. LLOYD, RESTED HIS CASE." (Tr. 152).

[\*P70] Based on the above excerpts, the trial court did not prematurely render its decision. Furthermore, [HN15] the trial court is not obligated to provide a pro se defendant legal advice as to how to present his defense. *Cleveland v. Lane* (Dec. 9, 1999), 1999 Ohio App. LEXIS 5893, 8th Dist. No. 75151, 1999 WL 1129582 at \* 3.

[\*P71] Thus, appellant's seventh assignment of error is without merit.

[\*P72] Appellant's eighth assignment of error states:

[\*P73] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY FINDING DEFENDANT GUILTY ABSENT PROOF BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS OPERATING A VEHICLE IN EXCESS OF THE POSTED SPEED LIMIT."

[\*P74] Appellant argues that he raised reasonable doubt as to whether he was actually speeding when Trooper Monte stopped him. Appellant relies on the case of *State v. Sapphire* (Dec. 8, 2000), 2000 Ohio App. LEXIS 5767, 2nd

Dist. No. 2000 CA 39, 2000 WL 1803852, in which the Second District Court of Appeals reversed the defendant's conviction for speeding. At trial, the court took judicial notice of the accuracy and dependability of [\*\*25] the laser device based solely on the court's training. The appellate court held that since no expert testimony was presented regarding the scientific reliability of the laser device, the trial court could not properly take judicial notice of its accuracy. 2000 Ohio App. LEXIS 5767 at \* 11. Since the trial court should not have admitted the reading from the laser device without expert testimony, the court held there was no admissible evidence that the defendant was traveling at the rate of speed alleged. Therefore, the court reversed the defendant's conviction. In the present case, appellant argues that he impeached Prof. Kilgallin's testimony; therefore, appellee could not use the reading from the laser device as evidence of his speed.

[\*P75] The case sub judice is distinguishable from *Saphire*. The trial court took judicial notice of the accuracy and dependability of the laser device based on Prof. Kilgallin's expert testimony. The court did not rely on its own training on laser devices as the trial court in *Saphire* did. Even with appellant's attempted impeachment of Prof. Kilgallin, the trial court was in the best position to judge the credibility of Prof. Kilgallin's testimony. [HN16] Judging the [\*\*26] credibility of witnesses is primarily the responsibility of the trier of fact. *State v. DeHass (1967)*, 10 Ohio St.2d 230, 231, 39 Ohio Op. 2d 366, 227 N.E.2d 212.

[\*P76] Additionally, Trooper Monte testified that he observed appellant's vehicle traveling on State Route 7 at what he perceived as approximately sixty-five miles per hour. He then used his Marksman 20-20 laser to determine that appellant was actually traveling at sixty-six miles per hour. Trooper Monte testified that the posted speed limit on State Route 7 is fifty-five miles per hour.

[\*P77] As can be seen, the conviction in the trial court is based primarily on the testimony of Trooper Monte and Prof. Kilgallin. Given our findings in the first and second assignments of error that involve both Prof. Kilgallin and Trooper Monte, this eighth assignment of error is rendered moot.

[\*P78] Based on the merit of appellant's first and second assignments of error, the decision of the trial court is hereby reversed and remanded for further proceedings according to law and consistent with this opinion.

Vukovich, J., concurs

DeGenaro, J., concurs

93 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, PLAINTIFF-APPELLEE, VS. JEFFREY S. LLOYD,  
DEFENDANT-APPELLANT.**

**CASE NO. 2001-CO-36**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,  
COLUMBIANA COUNTY**

*2002 Ohio 3017; 2002 Ohio App. LEXIS 3027*

**June 13, 2002, Decided**

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from Southwest Area County Court Case No. 2001-TR-D-1712-S.

**DISPOSITION:** Trial court's judgment was reversed and case was remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from his speeding conviction in the Southwest Area County Court, Columbiana County (Ohio), arguing primarily that error had occurred in many discovery and evidentiary rulings.

**OVERVIEW:** Defendant was arrested for speeding after an officer using a laser speed-measuring device clocked him at an excessive speed. The laser evidence was the primary evidence at trial, although the trial court viewed a videotape not offered in evidence and heard the officer's account of the arrest. The appellate court upheld two of defendant's assignments of error. First, the trial court committed prejudicial error when it failed to comply with *Ohio R. Crim. P. 16(B)(1)(e)* and allowed the prosecution not to timely supply defendant with the name and other information on its expert witness regarding the laser device. The trial court also abused its discretion in severely limiting the extent to which it allowed defendant to cross-examine the officer regarding the device. Although the trial court further erred in permitting a prosecution expert to testify regarding a scientific study that was not properly in evidence and might have committed unpreserved error in watching the videotape, neither of these errors affected defendant's outcome. Nonetheless, the first two errors cited were sufficient to invalidate defendant's conviction.

**OUTCOME:** The appellate court reversed the judgment of conviction and remanded the matter for further consistent proceedings.

**CORE TERMS:** laser, speed, assignment of error, discovery, judicial notice, training, accuracy, rested, cross-examination, miles, credibility, taking judicial notice, calibrated, traveling, objected, voltage, radar, expert witness, experiment, pro se, certificate, videotape, sixty-six, speeding, resume, expert testimony, hearsay, continuance, reliability, calibration

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Jencks Act  
Criminal Law & Procedure > Counsel > General Overview***

[HN1] See *Ohio R. Crim. P. 16(B)(1)(e)*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview  
Evidence > Testimony > Examination > Cross-Examination > General Overview***

***Evidence > Testimony > Presentation of Evidence***

[HN2] A trial court shall exercise reasonable control over the mode and order of interrogating witnesses. *Ohio R. Evid. 611(A)*.

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination  
Evidence > Testimony > Examination > Cross-Examination > General Overview***

[HN3] A trial court shall allow cross-examination on all relevant matters and matters affecting credibility. *Ohio R. Evid. 611(B)*.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Evidence > Procedural Considerations > Rulings on Evidence***

***Evidence > Testimony > Examination > Cross-Examination > Scope***

[HN4] The scope of cross-examination lies within an Ohio trial court's discretion. An appellate court will not reverse a trial court's ruling on the scope of cross-examination absent an abuse of that discretion.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN5] One of the oldest and most fundamental rights in the Anglo-American system of evidence is the right of a party to cross-examine an adverse witness. The value of the right of cross-examination is well-settled in Ohio jurisprudence.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview  
Evidence > Procedural Considerations > Objections & Offers of Proof > Timeliness***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN6] Although evidentiary rulings are typically reviewed only for abuse of the trial court's discretion, errors relating to the trial court's admission of hearsay must be viewed in the light of *Ohio R. Evid. 103(A)* and the standard established in *Ohio R. Crim. P. 52(A)*, providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right. *Ohio R. Evid. 103(A)* provides that a party must object to the contested evidence in a timely manner to preserve the issue for appeal.

***Evidence > Hearsay > Rule Components > Truth of Matter Asserted***

[HN7] Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Ohio R. Evid. 801(C)*.

***Evidence > Testimony > Experts > Criminal Trials***

[HN8] *Ohio R. Evid. 702(C)* provides that an expert witness may give his opinion if it, among other things, is based on

reliable scientific, technical, or other specialized information. If the expert's testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if it meets three requirements. The requirements are: (1) the theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) the design of the procedure, test, or experiment reliably implements the theory; (3) the particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

***Evidence > Judicial Notice***

***Evidence > Scientific Evidence > General Overview***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN9] Under Ohio case law, the scientific accuracy of a laser device is the type of fact that can be judicially noticed.

***Evidence > Judicial Notice > General Overview***

[HN10] It is mandatory for a court to take judicial notice if requested by a party and supplied with the necessary information. *Ohio R. Evid. 201(D)*.

***Evidence > Judicial Notice***

[HN11] Judicial notice may be taken at any time during the proceedings. *Ohio R. Evid. 201(F)*.

***Evidence > Judicial Notice > General Overview***

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview***

***Evidence > Procedural Considerations > Rulings on Evidence***

[HN12] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. *Ohio R. Evid. 201(E)*.

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

[HN13] The failure to object to an alleged error at trial waives all but plain error.

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview***

[HN14] An Ohio appellate court reverses for plain error only if the outcome of the trial clearly would have been different absent the error.

***Criminal Law & Procedure > Counsel > Right to Self-Representation***

[HN15] An Ohio trial court is not obligated to provide a pro se defendant legal advice as to how to present his defense.

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview***

[HN16] Judging the credibility of witnesses is primarily the responsibility of the trier of fact.

**COUNSEL:** For Plaintiff-Appellee: Robert L. Herron, Prosecuting Attorney, Shelli Ellen Petrella, Assistant Prosecuting Attorney, Lisbon, Ohio.

For Defendant-Appellant: Attorney Milton A. Hayman, Steubenville, Ohio.

**JUDGES:** Hon. Gene Donofrio, Hon. Joseph J. Vukovich, Hon. Mary DeGenaro. Vukovich, J., concurs. DeGenaro, J.,

concur.

**OPINION BY:** Gene Donofrio

**OPINION:** DONOFRIO, J.

[\*P1] Defendant-appellant, Jeffrey S. Lloyd, appeals from the decision of the Southwest Area County Court of Columbiana County finding him guilty of exceeding the speed limit and fining him \$ 100.

[\*P2] On May 28, 2001, Trooper Craig Monte (Trooper Monte) stopped appellant's vehicle on Ohio State Route 7 for speeding. Trooper Monte issued appellant a traffic ticket that stated he clocked appellant with his laser traveling at sixty-six miles per hour in a fifty-five miles per hour zone. Appellant pled not guilty. The court scheduled a trial for June 27, 2001.

[\*P3] Appellant, acting pro se, filed a request for discovery seeking, among other things, a witness list, a log of the [\*\*2] laser speed detection device used to determine his speed, the arresting officer's training certificates, an overview and description of the State of Ohio's curriculum for the training and certification for officers for the use of laser speed detection devices, and how and where the laser speed detection device was calibrated. Plaintiff-appellee, the State of Ohio, provided some of the requested information to appellant on June 22, 2001. On June 25, 2001, appellant filed a motion to compel discovery of the remaining information. Appellant also filed a motion for a continuance of the trial scheduled for June 27, 2001 because he had not yet received all of his requested discovery. On June 26, 2001, appellant filed a motion to dismiss the case alleging appellee's actions interfered with his right to a speedy trial. The trial court held a hearing on appellant's motions on June 27, 2001. It overruled appellant's motion to dismiss, granted appellant's motion for a continuance, and ordered appellee to complete any discovery within seven days.

[\*P4] A trial was held on July 27, 2001. Appellant appeared pro se. The trial court found appellant guilty of exceeding the speed limit in violation [\*\*3] of *R.C. 4511.21(D)* and fined him \$ 100 plus costs, which it journalized in its July 30, 2001 judgment entry. Appellant filed a timely notice of appeal on August 2, 2001. The trial court stayed appellant's fine pending this appeal.

[\*P5] Appellant is now represented by counsel. He raises eight assignments of error, the first of which states:

[\*P6] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT-APPELLANT'S *OHIO CRIMINAL RULE 16* MOTION TO COMPEL DISCOVERY ON SEVERAL KEY ISSUES, THEREBY ABUSING ITS DISCRETION MATERIALLY COMPROMISING DEFENDANT'S ABILITY TO PROPERLY DEFEND HIMSELF."

[\*P7] Appellant complained in his motion to compel that appellee failed to supply him with nineteen of his discovery requests. Of the nineteen items requested, the trial court ordered appellee to supply appellant with one of them, that being any damage history to the laser device. It ruled the other items appellant requested were either irrelevant or undiscoverable. Appellant now argues that the trial court erred in disallowing discovery on several of his requests.

[\*P8] The granting or overruling of discovery motions in a criminal case rests [\*\*4] within the sound discretion of the trial court and will only be disturbed on appeal in cases of clear abuse of discretion. *State v. Shoop (1993)*, 87 *Ohio App.3d 462, 469, 622 N.E.2d 665*. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was arbitrary, unreasonable or unconscionable. *State v. Adams (1980)*, 62 *Ohio St.2d 151, 157, 16 Ohio Op. 3d 169, 404 N.E.2d 144*.

[\*P9] "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party." *State v. Smith (Aug. 10, 2001)*, 2001 *Ohio App. LEXIS 3531*, 11th Dist. No. 2000- A-52, 2001 *WL 901016* at \* 4, quoting *Lakewood v. Papadelis (1987)*, 32 *Ohio St.3d 1, 3, 511 N.E.2d 1138*. "The overall purpose of the discovery

rules is to produce a fair trial." *Id.*, citing *State v. Mitchell (1975)*, 47 Ohio App.2d 61, 80, 1 Ohio Op. 3d 181, 352 N.E.2d 636.

[\*P10] First, appellant alleges the court erred in not requiring appellee to submit to him the name and address of its expert witness. In its initial response to discovery appellee stated it intended to call a laser expert witness from LPI Manufacturers, the company that made the laser, but that the exact name and address of the expert [\*\*5] was unknown at that time. The trial court stated appellee would only be required to provide appellant with the expert's name. *Crim.R. 16(B)(1)(e)* provides that "[HN1] upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial."

[\*P11] At the time appellee filed its discovery response it did not yet know who its expert witness would be. However, on July 20, 2001, appellee filed the resume of its expert witness with the court, which included the expert witness's name and address. Appellant states, and there is nothing on the record to the contrary, that appellee never served him with a copy of the expert's name, address, or resume. No certificate of service accompanies the expert's resume that appellee filed with the court. Therefore, we can presume appellee did not serve a copy of its expert's resume with appellant. Without the name and address of appellee's expert, appellant was denied the opportunity to review the expert's credentials before trial and had no one to whom to address interrogatories. Thus, the trial court erred [\*\*6] in not ordering appellee to provide appellant with its expert's address. Furthermore, appellee failed to provide appellant with even its expert's name.

[\*P12] Second, appellant argues the court erred by denying his request for an overview and description of the State of Ohio's curriculum regarding the education and certification of officers for the use of laser speed devices; hourly, classroom, and field training requirements; and continuing education thereof. Appellee stated at the motion hearing this information was irrelevant because it had already provided appellant with a copy of Trooper Monte's certification in the use of the laser, therefore indicating that he had completed all training necessary to become certified. The court agreed with appellee.

[\*P13] At trial, Trooper Monte testified regarding the training he underwent to become certified in the use of electronic speed measuring devices and in visually estimating the speed of vehicles. Trooper Monte testified that while in the police academy he had one week designated as radar and laser week. He stated that this week consisted of five normal workdays. He testified that this week also included training on the [\*\*7] visual estimation of the speed of oncoming traffic. Appellee also introduced into evidence Trooper Monte's "Officer's Certificate of Training," which stated he satisfactorily completed all course requirements in theory, technical aspects, and practical use of electronic speed measuring devices.

[\*P14] Although appellant did not have the information about Trooper Monte's training in the use of laser devices before trial, this did not prejudice him. Appellee gave Trooper Monte's certificate of training to appellant in discovery; thus, appellant knew Trooper Monte was certified. The other information Trooper Monte testified to regarding the training week was not essential to appellee's case nor did it help or hurt appellant's case.

[\*P15] Third, appellant argues the court erred in denying his discovery request for the time the laser device was calibrated and tested for the day of his citation and for the date it was submitted for factory testing and calibration. At the motion hearing, the court held appellee did not have to provide appellant with this requested information because appellant could question Trooper Monte about these issues at trial. However, appellee did provide [\*\*8] appellant with the certificate of calibration from Laser Technology, Inc. in its response to discovery, which verified that the laser device in question was calibrated on June 30, 1994.

[\*P16] At trial, Trooper Monte testified the laser device in question was last calibrated at the factory on June 30, 1994 and introduced the certificate of calibration confirming the calibration date. (State's Exhibit 2). Trooper Monte also testified he calibrated the laser device at the beginning of his shift the day he issued appellant the speeding citation.

Nothing in the record indicates appellant was prejudiced by lack of discovery concerning when Trooper Monte calibrated the laser.

[\*P17] Finally, appellant argues appellee failed to comply with the court's order that it provide additional discovery to him within seven days of the June 27, 2001 hearing. He claims that he was prejudiced by appellee's delay of fifteen days.

[\*P18] Appellant failed to object to appellee's delay in filing the court ordered discovery until appellee rested its case. At that time, appellant requested a continuance based on appellee's delay in providing him with the requested discovery. The trial court [\*\*9] overruled appellant's request stating he should have raised it at the beginning of trial. Since appellant did not bring to the court's attention appellee's delay in completing discovery until appellee rested its case, the court did not err in denying appellant's request for a continuance.

[\*P19] Since the trial court failed to order appellee to provide appellant with its expert's address or resume and because appellee failed to provide appellant with any information whatsoever about the expert it intended to call, the trial court abused its discretion and impeded the purpose of the discovery rules. Accordingly, appellant's first assignment of error has merit.

[\*P20] Appellant's second assignment of error states:

[\*P21] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DENYING DEFENDANT THE RIGHT TO CROSS EXAMINE THE STATE'S WITNESSES WITH QUESTIONS DESIGNED TO IMPEACH THEIR TESTIMONY AND TO REBUT EVIDENCE AS TO THE OPERATING INTEGRITY OF THE LASER SPEED DETECTION DEVICE USED BY THE ARRESTING OFFICER TO DETERMINE DEFENDANT'S SPEED."

[\*P22] Appellant alleges that had the trial court permitted him to cross-examine the witnesses as he wished, [\*\*10] he could have established the laser device must be operated in strict accordance with the operating manual, that it contains design flaws that render it incapable of providing accurate readings on all occasions, and that Trooper Monte was not qualified to measure speed. Appellant claims that the trial court improperly sustained appellee's objections to many of his questions on cross-examination of Trooper Monte. Appellant cites to *Xenia v. Boehman* (1996), 114 Ohio App.3d 78, 682 N.E.2d 1029, to support his argument in which the Second District Court of Appeals reversed the defendant's speeding conviction. The court found the trial court erred in not permitting the defendant to question the arresting officer regarding the circumstances of the defendant's traffic stop, the circumstances surrounding other tickets the officer had issued, and about what could cause false readings on a radar speed detection device. The court held the defendant, who was acting pro se, was attempting to impeach the officer's credibility and to determine his competency to use the radar device. Therefore, the court held the trial court abused its discretion in prohibiting these lines of questioning.

[\*P23] [\*\*11] [HN2] A trial court shall exercise reasonable control over the mode and order of interrogating witnesses. *Evid.R. 611(A)*. [HN3] The trial court shall allow cross-examination "on all relevant matters and matters affecting credibility." *Evid.R. 611(B)*. [HN4] The scope of cross-examination lies within the trial court's discretion. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916; *State v. Acre* (1983), 6 Ohio St.3d 140, 145, 6 Ohio B. 197, 451 N.E.2d 802. This court will not reverse a trial court's ruling on the scope of cross-examination absent an abuse of that discretion. Id.

[\*P24] Appellant alleges the court erred in disallowing him to ask certain questions of Trooper Monte. Specifically, appellant calls our attention to the following excerpts from the trial transcript. Appellant asked Trooper Monte, "Do you find radar to be superior to laser? Or do you find laser to radar?" (Tr. 32). The trial court sustained appellee's objection on the basis of relevancy. Appellant also asked Trooper Monte, "at what range do you have to qualify for your service weapon?" (Tr. 34). Appellee again objected on the basis of relevancy. Appellant argued the

relevancy was Trooper Monte's aiming. The court sustained [\*\*12] the objection. Next, appellant asked Trooper Monte a line of questions regarding whether the laser device would work if it was damaged and whether excessive voltage could have damaged the laser device. Trooper Monte testified he did not know about the voltage of the laser. The court then sustained an objection to appellant's question regarding whether Trooper Monte had had enough faith in the laser device to subject it to an extreme voltage test. Finally, appellant asked Trooper Monte if he was able to visually measure the speed of an aircraft at approximately thirteen hundred feet. Again, appellee objected and the court sustained the objection.

[\*P25] It is worth noting "[HN5] one of the oldest and most fundamental rights in the Anglo-American system of evidence is the right of a party to cross-examine an adverse witness. The value of the *right* of cross-examination is well-settled in Ohio jurisprudence. ' \* \* \* The importance of the right of full cross-examination, of an adverse witness, can scarcely be overestimated. As a test of the accuracy, truthfulness, and credibility of testimony, it is invaluable.' (Emphasis added.) *Martin v. Elden* (1877), 32 Ohio St. 282, 287. [\*\*13] " *Smith v. Mitchell* (1988), 35 Ohio St.3d 237, 239, 520 N.E.2d 213.

[\*P26] The trial court abused its discretion in not permitting appellant to pursue the above lines of questioning. As in *Boehman*, most of appellant's lines of questioning, although not artfully presented, sought responses that could potentially impeach Trooper Monte's credibility. When appellant asked Trooper Monte whether he thought laser to be superior to radar, he was attempting to determine whether there may have been a more accurate way for Trooper Monte to determine his speed. When appellant asked Trooper Monte about his range for firing weapons, he was trying to establish that it would be difficult to aim and fire a laser at a car license plate that was a far distance away. When he asked Trooper Monte if he could visually measure the speed of an aircraft at thirteen hundred feet, he was attempting to establish that when Trooper Monte visually estimated his speed (while he was approximately thirteen hundred feet from appellant) it would be difficult for him to do so accurately.

[\*P27] The only line of questioning the court properly sustained appellee's objection to was regarding design flaws dealing [\*\*14] with voltage. Trooper Monte testified he did not know about the voltage issues concerning the laser device. Thus, the court did not allow further questions on the issue. Also, appellant was able to question appellee's laser expert about potential design flaws dealing with voltage.

[\*P28] Thus, appellant's second assignment of error has merit.

[\*P29] Appellant's third assignment of error states:

[\*P30] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY RELYING SOLELY ON THE TESTIMONY OF THE STATE'S WITNESSES, ABSENT ADMISSION INTO EVIDENCE OF THE LTI MARKSMAN 20-20 LASER SPEED DETECTION DEVICE."

[\*P31] Appellant contends the trial court should not have relied on the testimony of appellee's witnesses regarding the laser device since appellee did not introduce the laser device into evidence. Appellee called Professor Wyatt Kilgallin (Prof. Kilgallin) as a laser expert. Appellant claims the court drew conclusions from Prof. Kilgallin's testimony that resulted in the court taking judicial notice of the laser device as an acceptable device to be used in this jurisdiction. Additionally, he argues appellee should have asked that the record reflect [\*\*15] the specific reading derived from the laser device on the date in question.

[\*P32] Appellant fails to cite to any authority to support his contention that absent the admission of the laser into evidence, appellee's witnesses cannot be relied upon. Appellant also fails to point to any conclusion the trial court reached regarding the laser device that was improper. Finally, as to the record reflecting the reading from the laser on the day in question, Trooper Monte testified that when he used the laser to determine appellant's speed, the laser indicated sixty-six miles per hour.

[\*P33] Accordingly, appellant's third assignment of error is without merit.

[\*P34] Appellant's fourth assignment of error states:

[\*P35] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY ADMITTING THE STATE'S WRITTEN HEARSAY EVIDENCE, DESPITE RENEWED DEFENSE OBJECTIONS."

[\*P36] The trial court admitted a written study entitled, "Analysis of Laser Speed Measurement Data" (New Jersey study) into evidence. The study was conducted by the New Jersey Department of Transportation and was dated January 28, 1997. The New Jersey study was designed to evaluate the accuracy [\*\*16] and precision of the LTI Marksman 20-20 Laser Speed Detection System. The study compared the laser device in question with other speed measurement devices. Prof. Kilgallin used the New Jersey study to supplement his testimony. Appellant objected to the introduction of the New Jersey study and Prof. Kilgallin's testimony regarding it as hearsay because appellee did not produce the facts/data that the study was based on. The trial court overruled the objection but noted it would "take it for the weight that should be given to it." (Tr. 72).

[\*P37] Appellant argues the court improperly admitted this study into evidence because it draws conclusions from data gathered by someone who did not testify at trial.

[\*P38] "[HN6] Although evidentiary rulings are typically reviewed only for abuse of the trial court's discretion, 'errors relating to the trial court's admission of hearsay must be viewed in the light of *Evid.R. 103(A)* and the standard established in *Crim.R. 52(A)*, providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right.'" *Safkow v. Scheiben*, 7th Dist. No. 99- CO-79, 2001 Ohio 3255, 2001 Ohio App. LEXIS 2113, 2001 WL 503200 at \* 3, [\*\*17] quoting *State v. Sorrels* (1991), 71 Ohio App.3d 162, 165, 593 N.E.2d 313. *Evid.R. 103(A)* provides that a party must object to the contested evidence in a timely manner to preserve the issue for appeal.

[\*P39] [HN7] Hearsay is an out of court statement offered in court to prove the truth of the matter asserted. *Evid.R. 801(C)*. The New Jersey study meets this definition. [HN8] *Evid.R. 702(C)* provides that an expert witness may give his opinion if it, among other things, "is based on reliable scientific, technical, or other specialized information." If the expert's testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if it meets three requirements. *Id.* The requirements are:

[\*P40] "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

[\*P41] "(2) The design of the procedure, test, or experiment reliably implements the theory;

[\*P42] "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result." *Id.*

[\*P43] Prof. Kilgallin's testimony concerning the New [\*\*18] Jersey study does not meet these requirements. Prof. Kilgallin did not testify as to the reliability of the design of the study nor did he testify that the experiments were performed in such a way as to yield an accurate result. Since the study was hearsay and Prof. Kilgallin failed to testify regarding its reliability, the trial court should not have admitted it into evidence.

[\*P44] However, it does not appear that by admitting the study into evidence the court prejudiced appellant. The court noted it would only consider the study for the weight that should be given to it. Furthermore, appellant cross-examined Prof. Kilgallin about the study. Prof. Kilgallin admitted he was not there when the study was conducted. Additionally, the majority of Prof. Kilgallin's expert testimony did not concern the New Jersey study, but instead concentrated on his own personal knowledge of the laser device. Finally, there is no indication that the court specifically relied on the study in rendering its decision.

[\*P45] Therefore, although the trial court should not have admitted the New Jersey study, its error was harmless.

Thus, appellant's fourth assignment of error is without merit. [\*\*19]

[\*P46] Appellant's fifth assignment of error states:

[\*P47] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY TAKING JUDICIAL NOTICE OF THE LASER SPEED DETECTION DEVICE BEFORE DEFENDANT COULD FULLY DEVELOP HIS CASE, AND ABSENT THE LASER'S ADMISSION INTO EVIDENCE."

[\*P48] Appellant argues the trial court erred in taking judicial notice of the laser device at the time when appellee objected to appellant's cross-examination of Prof. Kilgallin.

[\*P49] At trial, appellant objected to the court taking judicial notice of the fact that the LTI Marksman 20-20 laser device was reliable and accurate for determining speed; however, he did so after the court had already taken judicial notice of this fact. Even if appellant had objected to the judicial notice sooner, it was still proper for the court to take judicial notice.

[\*P50] "[HN9] The scientific accuracy of a laser device is the type of fact that can be judicially noticed." *City of Columbus v. Dawson* (Mar. 14, 2000), 2000 Ohio App. LEXIS 951, 10th Dist. No. 99 AP-589, 2000 WL 271766 at \* 2. [HN10] It is mandatory for a court to take judicial notice if requested by a party and supplied with the necessary information. *Evid.R. 201(D)*. [HN11] Judicial [\*\*20] notice may be taken at any time during the proceedings. *Evid.R. 201(F)*. "[HN12] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." *Evid.R. 201(E)*.

[\*P51] According to the above rules of evidence, appellant was entitled to an opportunity to be heard as to the propriety of the court taking judicial notice of the accuracy and reliability of the LTI Marksman 20-20 laser device. The trial court did afford appellant this opportunity. After appellee concluded its direct examination of Prof. Kilgallin, it asked the court to take judicial notice of the fact that the LTI Marksman 20-20 laser device is an accurate device to determine the speed of a vehicle. The court stated it would first permit appellant to question Prof. Kilgallin and then appellee could renew its motion. Additionally, appellee supplied the court via Prof. Kilgallin's testimony with the information necessary and requested that the court take judicial notice of the laser device's accuracy. Hence, the court was obligated to take [\*\*21] judicial notice as requested. *Evid.R. 201(D)*.

[\*P52] Thus, appellant's fifth assignment of error is without merit.

[\*P53] Appellant's sixth assignment of error states:

[\*P54] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY RELYING ON TESTIMONY AND CITING THE VIDEO TAPE THE TROOPER ALLEGEDLY MADE, EVEN THOUGH SAID VIDEO TAPE WAS NEVER ADMITTED INTO EVIDENCE."

[\*P55] A police cruiser videotape was made of Trooper Monte's traffic stop of appellant. Appellee never entered this tape into evidence; however, appellee did play the tape for the court. Appellant argues that the court erred in hearing testimony about what was on the videotape.

[\*P56] Appellant did not object to the playing of the videotape. [HN13] The failure to object to an alleged error at trial waives all but plain error. *State v. Lindsey* (2000), 87 Ohio St.3d 479, 482, 721 N.E.2d 995. Thus, [HN14] we will reverse only if the outcome of the trial clearly would have been different absent the error. *Id.*

[\*P57] There is no indication that the outcome of the trial clearly would have been different had the court not listened to testimony about the videotape. In the tape, appellant makes a comment to Trooper [\*\*22] Monte after Trooper Monte tells appellant that he clocked him traveling at sixty-six miles per hour. Trooper Monte testified that

appellant replied, "I don't doubt that." (Tr. 9). Trooper Monte later testified it was possible appellant made this remark sarcastically. When the court announced its decision, it commented appellant's remark to Trooper Monte did not seem sarcastic. However, the court had before it other evidence of appellant's guilt in addition to this one comment. The court stated the following in its judgment entry. It found the LTI Marksman 20-20 laser device to be an accepted device for the measurement of speed in this jurisdiction. It found Trooper Monte properly operated the laser device and determined appellant was traveling at sixty-six miles per hour. The court also found the laser device was in proper working order. Therefore, the court did not need to rely on appellant's comment as evidence of his guilt.

[\*P58] Accordingly, the trial court did not commit plain error in watching the videotape or in listening to testimony of what occurred at the traffic stop. Thus, appellant's sixth assignment of error is without merit.

[\*P59] Appellant's seventh assignment [\*\*23] of error states:

[\*P60] "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ISSUING A VERDICT BEFORE EITHER PLAINTIFF OR DEFENDANT RESTED THEIR CASE."

[\*P61] Appellant alleges that since he was a pro se defendant and because neither party formally announced that it had rested its case, the court should have inquired if each party rested before rendering its judgment. Appellant claims, absent that type of supervision by the court, he could have missed opportunities to move for a directed verdict, which compromised his ability to defend himself.

[\*P62] Although neither party explicitly stated, "I rest my case," it is obvious when reading the transcript that each party rested before the court entered its decision. The following excerpts from the transcript are applicable.

[\*P63] "THE COURT: \* \* \*. Does the State have any further evidence to present?"

[\*P64] "MS. PETRELLA: The State does not, Your Honor.

[\*P65] "THEREUPON, THE PLAINTIFF, THE STATE OF OHIO, RESTED ITS CASE IN CHIEF." (Tr. 134-35).

[\*P66] "THE COURT: \* \* \*. You have no other witnesses to present, Mr. Lloyd?"

[\*P67] "MR LLOYD: No, Your Honor.

[\*P68] "THE COURT: All right. [\*\*24]

[\*P69] "THEREUPON, THE DEFENDANT, JEFFREY S. LLOYD, RESTED HIS CASE." (Tr. 152).

[\*P70] Based on the above excerpts, the trial court did not prematurely render its decision. Furthermore, [HN15] the trial court is not obligated to provide a pro se defendant legal advice as to how to present his defense. *Cleveland v. Lane* (Dec. 9, 1999), 1999 Ohio App. LEXIS 5893, 8th Dist. No. 75151, 1999 WL 1129582 at \* 3.

[\*P71] Thus, appellant's seventh assignment of error is without merit.

[\*P72] Appellant's eighth assignment of error states:

[\*P73] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY FINDING DEFENDANT GUILTY ABSENT PROOF BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS OPERATING A VEHICLE IN EXCESS OF THE POSTED SPEED LIMIT."

[\*P74] Appellant argues that he raised reasonable doubt as to whether he was actually speeding when Trooper Monte stopped him. Appellant relies on the case of *State v. Sapphire* (Dec. 8, 2000), 2000 Ohio App. LEXIS 5767, 2nd

Dist. No. 2000 CA 39, 2000 WL 1803852, in which the Second District Court of Appeals reversed the defendant's conviction for speeding. At trial, the court took judicial notice of the accuracy and dependability of [\*\*25] the laser device based solely on the court's training. The appellate court held that since no expert testimony was presented regarding the scientific reliability of the laser device, the trial court could not properly take judicial notice of its accuracy. 2000 Ohio App. LEXIS 5767 at \* 11. Since the trial court should not have admitted the reading from the laser device without expert testimony, the court held there was no admissible evidence that the defendant was traveling at the rate of speed alleged. Therefore, the court reversed the defendant's conviction. In the present case, appellant argues that he impeached Prof. Kilgallin's testimony; therefore, appellee could not use the reading from the laser device as evidence of his speed.

[\*P75] The case sub judice is distinguishable from *Saphire*. The trial court took judicial notice of the accuracy and dependability of the laser device based on Prof. Kilgallin's expert testimony. The court did not rely on its own training on laser devices as the trial court in *Saphire* did. Even with appellant's attempted impeachment of Prof. Kilgallin, the trial court was in the best position to judge the credibility of Prof. Kilgallin's testimony. [HN16] Judging the [\*\*26] credibility of witnesses is primarily the responsibility of the trier of fact. *State v. DeHass (1967)*, 10 Ohio St.2d 230, 231, 39 Ohio Op. 2d 366, 227 N.E.2d 212.

[\*P76] Additionally, Trooper Monte testified that he observed appellant's vehicle traveling on State Route 7 at what he perceived as approximately sixty-five miles per hour. He then used his Marksman 20-20 laser to determine that appellant was actually traveling at sixty-six miles per hour. Trooper Monte testified that the posted speed limit on State Route 7 is fifty-five miles per hour.

[\*P77] As can be seen, the conviction in the trial court is based primarily on the testimony of Trooper Monte and Prof. Kilgallin. Given our findings in the first and second assignments of error that involve both Prof. Kilgallin and Trooper Monte, this eighth assignment of error is rendered moot.

[\*P78] Based on the merit of appellant's first and second assignments of error, the decision of the trial court is hereby reversed and remanded for further proceedings according to law and consistent with this opinion.

Vukovich, J., concurs

DeGenaro, J., concurs

94 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- SERGEY YEVTUKH,  
Defendant-Appellant**

**Case No. 01COA01426**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, ASHLAND  
COUNTY**

*2002 Ohio 762; 2002 Ohio App. LEXIS 850*

**February 19, 2002, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Appeal from the Municipal Court, Case No. 01TRD00873.

**DISPOSITION:** Trial court's judgment was affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment by the Municipal Court of Ashland County (Ohio), claiming that the trial court erred in permitting the State to reopen its case after a motion for acquittal had been made.

**OVERVIEW:** A police officer stopped defendant, a commercial truck driver, for speeding and a seat belt violation. At the conclusion of the State's case, defendant moved for acquittal based upon the State's failure to identify the type of speed measuring device used and offer expert testimony regarding its dependability and construction. The trial court permitted the State to reopen its case and present additional testimony. The appellate court held that defendant had not objected to the speed clocked by the laser device. The admission of the laser device reading did not affect a substantive right. Defendant's motion for acquittal in lieu of timely objecting to the evidence was not sufficient to perfect the error for appeal. If a timely objection had been made, there would have been no need to reopen the case and recall the witness.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** laser, reopen, speed, sixty-eight, timely objection, specific ground

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Trials > Motions for Acquittal******Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN1] The question of opening up a case for the presentation of further testimony after a motion for acquittal is within the sound discretion of a trial court.

***Criminal Law & Procedure > Trials > Direct Examinations******Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN2] In order to find an abuse of discretion, appellate courts must determine that a trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment.

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview******Evidence > Procedural Considerations > Rulings on Evidence***

[HN3] *Ohio R. Evid. 103* governs rulings on evidence.

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview******Evidence > Procedural Considerations > Rulings on Evidence***

[HN4] See *Ohio R. Evid. 103(A)(1)*.

***Criminal Law & Procedure > Trials > Motions for Acquittal***

[HN5] The making of an *Ohio R. Crim. P. 29* motion for acquittal in lieu of timely objecting is not sufficient to perfect an error for appeal.

**COUNSEL:** For Plaintiff-Appellee: W. DAVID MONTAGUE, Ashland, OH.

For Defendant-Appellant: BRENT L. ENGLISH, Cleveland, OH.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. John F. Boggins, J. Farmer, J., Hoffman, P.J., and Boggins, J., concur.

**OPINION BY:** Sheila G. Farmer

**OPINION:**

Farmer, J.

On January 24, 2001, Ohio State Highway Patrol Trooper Brian Darby stopped appellant, Sergey Yevtukh, a commercial truck driver, for speeding in violation of *R.C. 4511.21*. Trooper Darby cited appellant for driving sixty-eight m.p.h. in a fifty-five m.p.h. zone. Appellant was also cited for a seat belt violation. A bench trial was held on June 21, 2001. At the conclusion of the state's case, appellant moved for acquittal pursuant to *Crim.R. 29* based upon the state's failure to identify the type of speed measuring device used and offer expert testimony regarding its dependability and construction. The trial court permitted the state to reopen its case and present additional testimony. The trial court found appellant guilty and ordered him to pay a total fine of \$ 130.00 and [\*2] court costs. Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTION TO REOPEN ITS CASE AND RECALL A WITNESS TO ADDUCE CRITICALLY IMPORTANT NEW EVIDENCE.

II THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY TAKING JUDICIAL NOTICE OF THE LTI 20/20 SPEED-MEASURING DEVICE.

III ASSUMING THE EVIDENCE BASED ON THE SPEED-MEASURING DEVICE WAS NOT ADMISSIBLE, THE EVIDENCE WAS OTHERWISE INSUFFICIENT TO PROVE ALL ELEMENTS OF THE STATE'S CASE.

I

Appellant claims the trial court erred in permitting the state to reopen its case after a motion for acquittal had been made. Specifically, appellant claims the trial court abused its discretion in permitting the state to recall Trooper Darby and identify the laser device. We disagree. [HN1] The question of opening up a case for the presentation of further testimony is within the sound discretion of the trial court. *City of Columbus v. Grant (1981), 1 Ohio App.3d 96, 439 N.E.2d 907*. [HN2] In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable [\*3] and not merely an error of law or judgment. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140*. A review of the record establishes the state asked Trooper Darby on direct examination how he was trained in the "laser" device, and offered State's Exhibit 1, a photostatic copy of his certification. T. at 3-6. Trooper Darby testified to the calibration of the device and what speed the device read when aimed at appellant's vehicle. T. at 9-11, 14. No objection was made to the speed clocked by the laser device (sixty-eight m.p.h.). T. at 14. [HN3] *Evid.R. 103* governs rulings on evidence. [HN4] Subsection (A)(1) states the following: (A) Effect of erroneous ruling

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context;\*\*\*

No objection was made on the record and the admission of the laser device reading did not affect a substantive right. [HN5] The making of a *Crim.R. 29* motion for acquittal [\*4] in lieu of timely objecting is not sufficient to perfect the error for appeal. The technique employed sub judice was a bushwhack on the state's case. If a timely objection had been made, there would have been no need to reopen the case and recall the witness. Further, State's Exhibit 1, Trooper Darby's certificate, identified the laser device used. No objection was made to its admission. Appellant in his motion to the trial court conceded the laser is identified in said exhibit. T. at 31. Upon review, we find the trial court did not abuse its discretion in permitting the state to reopen its case. Assignment of Error I is denied.

II, III

Based upon our ruling supra, we do not need to address these assignments of error. *App.R. 12(A)(1)(c)*.

The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed.

By Farmer, J. Hoffman, P.J. and Boggins, J. concur.

95 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- SERGEY YEVTUKH,  
Defendant-Appellant**

**Case No. 01COA01426**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, ASHLAND  
COUNTY**

*2002 Ohio 762; 2002 Ohio App. LEXIS 850*

**February 19, 2002, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Appeal from the Municipal Court, Case No. 01TRD00873.

**DISPOSITION:** Trial court's judgment was affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment by the Municipal Court of Ashland County (Ohio), claiming that the trial court erred in permitting the State to reopen its case after a motion for acquittal had been made.

**OVERVIEW:** A police officer stopped defendant, a commercial truck driver, for speeding and a seat belt violation. At the conclusion of the State's case, defendant moved for acquittal based upon the State's failure to identify the type of speed measuring device used and offer expert testimony regarding its dependability and construction. The trial court permitted the State to reopen its case and present additional testimony. The appellate court held that defendant had not objected to the speed clocked by the laser device. The admission of the laser device reading did not affect a substantive right. Defendant's motion for acquittal in lieu of timely objecting to the evidence was not sufficient to perfect the error for appeal. If a timely objection had been made, there would have been no need to reopen the case and recall the witness.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** laser, reopen, speed, sixty-eight, timely objection, specific ground

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Trials > Motions for Acquittal******Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN1] The question of opening up a case for the presentation of further testimony after a motion for acquittal is within the sound discretion of a trial court.

***Criminal Law & Procedure > Trials > Direct Examinations******Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN2] In order to find an abuse of discretion, appellate courts must determine that a trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment.

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview******Evidence > Procedural Considerations > Rulings on Evidence***

[HN3] *Ohio R. Evid. 103* governs rulings on evidence.

***Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview******Evidence > Procedural Considerations > Rulings on Evidence***

[HN4] See *Ohio R. Evid. 103(A)(1)*.

***Criminal Law & Procedure > Trials > Motions for Acquittal***

[HN5] The making of an *Ohio R. Crim. P. 29* motion for acquittal in lieu of timely objecting is not sufficient to perfect an error for appeal.

**COUNSEL:** For Plaintiff-Appellee: W. DAVID MONTAGUE, Ashland, OH.

For Defendant-Appellant: BRENT L. ENGLISH, Cleveland, OH.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. John F. Boggins, J. Farmer, J., Hoffman, P.J., and Boggins, J., concur.

**OPINION BY:** Sheila G. Farmer

**OPINION:**

Farmer, J.

On January 24, 2001, Ohio State Highway Patrol Trooper Brian Darby stopped appellant, Sergey Yevtukh, a commercial truck driver, for speeding in violation of *R.C. 4511.21*. Trooper Darby cited appellant for driving sixty-eight m.p.h. in a fifty-five m.p.h. zone. Appellant was also cited for a seat belt violation. A bench trial was held on June 21, 2001. At the conclusion of the state's case, appellant moved for acquittal pursuant to *Crim.R. 29* based upon the state's failure to identify the type of speed measuring device used and offer expert testimony regarding its dependability and construction. The trial court permitted the state to reopen its case and present additional testimony. The trial court found appellant guilty and ordered him to pay a total fine of \$ 130.00 and [\*2] court costs. Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTION TO REOPEN ITS CASE AND RECALL A WITNESS TO ADDUCE CRITICALLY IMPORTANT NEW EVIDENCE.

II THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY TAKING JUDICIAL NOTICE OF THE LTI 20/20 SPEED-MEASURING DEVICE.

III ASSUMING THE EVIDENCE BASED ON THE SPEED-MEASURING DEVICE WAS NOT ADMISSIBLE, THE EVIDENCE WAS OTHERWISE INSUFFICIENT TO PROVE ALL ELEMENTS OF THE STATE'S CASE.

I

Appellant claims the trial court erred in permitting the state to reopen its case after a motion for acquittal had been made. Specifically, appellant claims the trial court abused its discretion in permitting the state to recall Trooper Darby and identify the laser device. We disagree. [HN1] The question of opening up a case for the presentation of further testimony is within the sound discretion of the trial court. *City of Columbus v. Grant (1981), 1 Ohio App.3d 96, 439 N.E.2d 907*. [HN2] In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable [\*3] and not merely an error of law or judgment. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140*. A review of the record establishes the state asked Trooper Darby on direct examination how he was trained in the "laser" device, and offered State's Exhibit 1, a photostatic copy of his certification. T. at 3-6. Trooper Darby testified to the calibration of the device and what speed the device read when aimed at appellant's vehicle. T. at 9-11, 14. No objection was made to the speed clocked by the laser device (sixty-eight m.p.h.). T. at 14. [HN3] *Evid.R. 103* governs rulings on evidence. [HN4] Subsection (A)(1) states the following: (A) Effect of erroneous ruling

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context;\*\*\*

No objection was made on the record and the admission of the laser device reading did not affect a substantive right. [HN5] The making of a *Crim.R. 29* motion for acquittal [\*4] in lieu of timely objecting is not sufficient to perfect the error for appeal. The technique employed sub judice was a bushwhack on the state's case. If a timely objection had been made, there would have been no need to reopen the case and recall the witness. Further, State's Exhibit 1, Trooper Darby's certificate, identified the laser device used. No objection was made to its admission. Appellant in his motion to the trial court conceded the laser is identified in said exhibit. T. at 31. Upon review, we find the trial court did not abuse its discretion in permitting the state to reopen its case. Assignment of Error I is denied.

II, III

Based upon our ruling supra, we do not need to address these assignments of error. *App.R. 12(A)(1)(c)*.

The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed.

By Farmer, J. Hoffman, P.J. and Boggins, J. concur.

96 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**CITY OF CLEVELAND HEIGHTS, PLAINTIFF-APPELLEE v. DANIEL KATZ,  
DEFENDANT-APPELLANT**

**NO. 79568**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2002 Ohio 4241; 2001 Ohio App. LEXIS 5394*

**December 6, 2001, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal appeal from Cleveland Heights Municipal Court, No. TRD 0101569.

**DISPOSITION:** Defendant-appellant's conviction for speeding was affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant driver appealed the judgment of the Cleveland Heights Municipal Court (Ohio), entered after a bench trial, finding him guilty of speeding and fining him.

**OVERVIEW:** The trial court did not err in taking judicial notice of the scientific reliability of a radar unit. There was no evidence in the record to indicate the unit was not reliable. Defendant offered no evidence whatsoever that any of the three tests on the equipment were flawed or produced inaccurate results. Accordingly, there was no reason for the trial court to require evidence of more tests before concluding that the radar unit was accurate. It was not necessary for the city to prove that the test equipment used to calibrate the radar unit was itself properly calibrated. Defendant presented no evidence whatsoever that the testing equipment was not in proper working order. There was, in fact, evidence that the testing equipment was in proper working order. The trial court did not err finding defendant guilty of speeding.

**OUTCOME:** The lower court was affirmed.

**CORE TERMS:** radar, calibrated, calibration, accuracy, speed, fork, tuning, miles, reliability, testing equipment, equipment used, calibrate, working order, certificate, speeding, miles per hour, admissible, judicial notice, assignment of error, manufacturer, functioning, reflecting, testing, scientific, tuning fork, external, training, announcement, trained, tested

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Inferences & Presumptions > Inferences  
Evidence > Judicial Notice > Scientific & Technical Facts***

[HN1] A court may take judicial notice of the technical theory of operation and the scientific reliability of stationary radar devices.

***Civil Procedure > Appeals > Reviewability > Preservation for Review  
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN2] Where an appellant does not raise an issue in the trial court, it is waived on appeal.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN3] Once judicial notice of the operation and reliability of a radar device is taken, the court must further determine (1) that the radar device is in good operating condition and properly calibrated at the time of use; (2) that the operator of the radar device is properly qualified to use the device; and (3) that the police officer properly operates and reads the radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] As few as two tests, an internal calibration test and an external calibration test, are sufficient to demonstrate that a radar unit is properly calibrated.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN5] Once it is determined that a device is generally reliable when properly operated by a properly trained operator to prove a certain thing, such as speed, dependent upon the individual circumstances of the case, it may not be necessary for the State, in the absence of evidence to the contrary, to offer any evidence of the similar proper working order of another device used to test the first device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN6] The State must demonstrate that a radar unit is properly set up, tested and functioning properly.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN7] While generally the accuracy of a radar unit and the accuracy of a testing apparatus are essential to a speeding conviction based solely on the radar evidence, the weight of authority holds that when two tuning forks are used to ascertain the accuracy of the radar unit, additional proof of the accuracy of the tuning forks is not necessary. This is because each tuning fork corroborates the accuracy of the other, and it is highly unlikely that the radar unit and each tuning fork would be inaccurate to the same degree.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN8] Testimony regarding a driver's speed as determined by a radar unit is admissible if the city demonstrates that the radar device is in good operating condition and properly calibrated at the time of use, the operator of the device is properly trained and qualified to use it and does, in fact, properly operate the radar device.

**COUNSEL:** For Plaintiff-Appellee: Kim T. Segebarth, Esq., City Prosecutor, City of Cleveland Heights, Cleveland Heights, OH.

For Defendant-Appellant: Nate N. Malek, Esq., Malek, Dean & Associates, LLC, Solon, OH.

**JUDGES:** TIMOTHY E. McMONAGLE, PRESIDING JUDGE. ANN DYKE, J. and TERRENCE O'DONNELL, J., CONCUR.

**OPINION BY:** TIMOTHY E. McMONAGLE

**OPINION:** JOURNAL ENTRY AND OPINION

TIMOTHY E. McMONAGLE, P.J.:

Defendant-appellant, Daniel Katz, appeals the judgment of the Cleveland Heights Municipal Court, entered after a bench trial, finding him guilty of speeding, in violation of Section 333.03 of the Codified Ordinances of Cleveland Heights, and fining him \$ 55.

Cleveland Heights Police Officer Don Roach testified at appellant's trial that at approximately 8:37 p.m. on February 7, 2001, he was parked in a police cruiser in the median at the intersection of Fairmount and Arlington Boulevards in Cleveland Heights. Roach was facing west, monitoring the speed of eastbound vehicles on Fairmount with a radar device.

Roach testified that he observed appellant's SUV pulling away from a huge group [\*2] of cars and approaching him at a pretty good rate.

According to Roach, he locked in the radar device on appellant's SUV and then heard a high-pitched tone, which confirmed his visual sighting of appellant's high speed. The reading on the radar unit indicated that appellant was traveling 47 miles per hour in a zone marked 35 miles per hour. Roach testified that appellant's speed was unreasonable for the conditions.

Roach testified that he had received specialized training, including 8 hours of training at the police academy and 40 hours of on-the-road training, regarding operation of the model 96-11 KR-10 radar unit he was using on September 7, 2001. Roach also testified that his main function as a police officer since his graduation from the police academy twelve years prior had been operating radar equipment.

Roach testified that he performed a light test, an internal calibration test and an external calibration test on the radar unit prior to using it on September 7, 2001. The light test involved pressing a special button on the unit to make sure that all the lights on the unit were working properly. According to Roach, the internal calibration test involved pressing another designated [\*3] button on the unit to elicit a preset reading of 32 miles per hour. Roach then used two tuning forks to test the external calibration of the unit. According to Roach, one fork is set at 35 miles per hour and the other is set at 65 miles per hour. When he tapped the forks against a non-metallic object and then placed them in front of the radar unit, they gave readings of 35 miles per hour and 65 miles per hour respectively. Roach testified that the three tests he performed indicated that the radar unit was working properly on September 7, 2001.

Scott Whitmer, a communications and radar technician for the City of Cleveland Heights Police Department, also testified at appellant's trial.

Whitmer testified that one of his job responsibilities was to test the calibration of the radar units used by City of Cleveland Heights police officers, including the unit used by Roach on February 7, 2001. Whitmer testified further that he had received extensive training regarding testing and calibrating radar devices from Simco Electronics, the manufacturer of the devices, and through his service in the United States Air Force.

Whitmer testified that he tests and calibrates all of the radar devices [\*4] once a year, using three pieces of equipment specifically designed for testing radar equipment.

Whitmer testified that on September 20 and 21, 2000, he calibrated the radar device used by Roach according to the manufacturer's instructions and when the machinery left our precinct, it was working true and accurate. Whitmer testified further that he had no records reflecting that any repairs had been completed on the unit after that time.

The trial court admitted four records created by Whitmer concerning his tests on the unit: 1) an inventory sheet reflecting the model and serial numbers of the unit and its associated tuning forks; 2) a certificate reflecting that Whitmer calibrated the unit on September 21, 2000 at 35 miles per hour, 50 miles per hour and 65 miles per hour; 3) a certificate of accuracy reflecting that one tuning fork associated with the unit was properly calibrated at 35 miles per hour; and 4) a certificate of accuracy reflecting that the other tuning fork associated with the unit was properly calibrated at 65 miles per hour.

Whitmer also testified that the equipment he used to test Roach's radar unit was shipped to Simco Electronics in August 2000 for testing and [\*5] calibrating.

According to Whitmer, Simco subsequently returned the equipment with certificates of calibration indicating that the test equipment was properly calibrated.

Defense counsel objected to the admission of the certificates of calibration, however, arguing that they were not authenticated. Defense counsel argued further that without the certificates or any testimony by a representative of Simco Electronics that the testing equipment had been properly calibrated, there was no way of knowing whether the equipment used by Whitmer to test the radar device used by Roach was properly calibrated and, therefore, no way of knowing whether the radar device used by Roach to determine that appellant was speeding was accurate. Accordingly, defense counsel asserted that Officer Roach's testimony regarding appellant's speed, as determined by the radar device, was not admissible for consideration by the trier of fact.

In a journal entry filed on April 4, 2001, the trial court ruled that Officer Roach's testimony regarding the radar reading was admissible, finding that the level of proof proposed by appellant, i.e., that evidence of a radar reading is not admissible absent evidence that [\*6] the equipment used to calibrate the radar device has itself been properly calibrated, was not necessary to the radar reading.

In light of Officer Roach's testimony, the trial court found that appellant was traveling at 47 miles per hour in a zone marked 35 miles per hour and that the speed was unreasonable for the conditions. On April 9, 2001, the trial court fined appellant \$ 55 plus costs but stayed the sentence pending appeal.

Appellant raises two assignments of error for our review:

I. THE CONVICTION AGAINST DANIEL KATZ SHOULD BE REVERSED SINCE THERE WAS INSUFFICIENT TESTIMONY AS TO THE PROPER CALIBRATION OF OFFICER DONALD ROACH'S RADAR EQUIPMENT.

II. THE CONVICTION AGAINST DANIEL KATZ SHOULD BE REVERSED WHERE THE TRIAL COURT DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In his first assignment of error, appellant asserts that the trial court erred in admitting Officer Roach's testimony regarding his speed because there was insufficient testimony regarding the calibration of Officer Roach's radar equipment.

[HN1] A court may take judicial notice of the technical theory of operation and the scientific reliability of stationary radar devices. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630; [\*7] *Cleveland Heights v.*

*Bartell*, 1987 Ohio App. LEXIS 7152, (Feb. 19, 1987), Cuyahoga App. No. 51719, unreported. Although not raised in his brief on appeal, at oral argument appellant asserted that the trial court improperly took judicial notice of the scientific reliability of the KR-10 stationary radar device used by Officer Roach. [HN2] Appellant did not raise this issue in the trial court, however, and therefore has waived it on appeal.

In *Cleveland Heights v. Bartell* (1987), Cuyahoga App. No. 51719, unreported, the trial court took judicial notice of the scientific reliability of the KR-10 radar unit and this court upheld that finding. Contrary to appellant's argument, our holding did not preclude appellant from further challenging the unit's reliability at trial. If appellant had wanted to challenge the reliability of the KR-10 unit at trial, he could have subpoenaed representatives from the manufacturer of the device and questioned them regarding its reliability. As counsel admitted in oral argument, however, appellant did not do so, and accordingly, there is no evidence in the record to indicate the unit is not reliable. Therefore, the trial court did not err in taking judicial notice of the scientific reliability [\*8] of the KR-10 radar unit, in reliance on *Bartell*.

[HN3] Once judicial notice of the operation and reliability of a radar device is taken, the court must further determine 1) that the radar device was in good operating condition and properly calibrated at the time of use; 2) that the operator of the radar device was properly qualified to use the device; and 3) that the police officer properly operated and read the radar device. *Id.*

Although appellant concedes that a court may take judicial notice of the reliability and operation of a radar device, as the trial court did here, appellant asks this Court to find that the City failed to prove that the radar device at issue was calibrated properly because 1) Officer Roach should have performed more than three tests on his unit to ascertain its accuracy; and 2) the City did not produce evidence that the equipment used by Whitmer to calibrate the unit and its associated tuning forks was itself properly calibrated.

Appellant argues that the trial court should have required evidence that more than three tests had been performed on Officer Roach's radar unit before concluding that it was properly calibrated because there are limitations to the three [\*9] tests performed by Officer Roach. Appellant asserts that the light test performed by Roach was insufficient because it merely determined that the light fixtures inside the radar unit were functioning properly. He also asserts that tuning forks may get dented or bent and, if used on a radar unit that is out of calibration, could possibly indicate accuracy when, in fact, the unit is out of calibration.

We refuse to speculate, however, about possible problems with the tests. This court has previously held that [HN4] as few as two tests (an internal calibration test and an external calibration test) are sufficient to demonstrate that a radar unit is properly calibrated. *Lyndhurst v. Danvers*, 1988 Ohio App. LEXIS 4621, (Nov. 23, 1988), Cuyahoga App. No. 55537, unreported; *Cleveland Heights v. Bartell*, *supra*. Moreover, appellant offered no evidence whatsoever that any of the three tests performed by Officer Roach on February 7, 2001 were flawed or produced inaccurate results. Accordingly, there was no reason for the trial court to require evidence of more tests before concluding that Roach's radar unit was accurate.

Appellant also contends that there was insufficient evidence that Roach's radar unit was properly calibrated [\*10] at the time of use because the City failed to show that Simco Electronics properly calibrated the equipment used by Whitmer to subsequently test and calibrate the unit. Appellant asserts that Whitmer's calibrations of Roach's radar unit were accurate only if the test equipment used to perform the calibrations was itself properly calibrated. Therefore, appellant contends, without testimony from a representative of the manufacturer that the test equipment was properly calibrated, there was no evidence that the radar device used by Roach was functioning properly and, accordingly, Roach's testimony regarding appellant's speed was inadmissible.

Appellant's argument was squarely rejected, however, in *State v. Ellison*, 1987 Ohio App. LEXIS 5688, (Jan. 30, 1987), Auglaize App. No. 2-85-35. In *Ellison*, the defendant was convicted of operating a motor vehicle at a speed of 70 miles per hour in a 55 miles per hour zone. The defendant challenged the trial court's finding that the radar device was in proper working order because the State had not presented evidence of certification from the manufacturer as to the

accuracy of the tuning forks used to test the calibration of the unit.

The Third Appellate District rejected [\*11] the defendant's argument, stating:

Like most matters of proof, however, there may be various ways to prove the same thing, or a point is reached in the matter of proof, beyond which no further proof is needed and presumptions of regularity pertain. Thus, in determining that a mechanism is in proper working order, it might become absurd to require that each component part be also proved to be in working order, or, for example, that a testing mechanism, which is not itself a component part, is itself in working order. The sufficiency of proof will, as to individual things which must be proved in a specific case, vary as to the circumstances involved and the availability of other proof, and generally will be left to the sound discretion of the trial court, particularly where there is no showing, as here, that the testing device is, in some respect, not in proper working order.

\*\*\* Thus, [HN5] once it is determined that a device is generally reliable when properly operated by a properly trained operator to prove a certain thing, such as speed, dependent upon the individual circumstances of the case, it may not be necessary for the State, in the absence of evidence to the contrary, to [\*12] offer any evidence of the similar proper working order of another device used to test the first device.

The circumstances of this case demonstrate that it was not necessary for the City to prove that the test equipment used by Whitmer to calibrate Roach's radar unit was itself properly calibrated. First, appellant presented no evidence whatsoever that the testing equipment was not in proper working order. Accordingly, as in *Ellison, supra*, there was no need for the City to produce evidence that the testing equipment was properly calibrated.

Moreover, although no one from Simco Electronics testified regarding the accuracy of the testing equipment, Scott Whitmer testified that the testing equipment was sent to Simco in August 2000 to be tested and calibrated and was subsequently returned with certificates of calibration indicating that the test equipment was properly calibrated. Therefore, contrary to appellant's assertion, there was, in fact, evidence that the testing equipment was in proper working order.

Appellant contends that his argument that the City must demonstrate that the testing equipment was itself properly calibrated has been suggested and followed by the Ohio Supreme [\*13] Court in *State v. Bonar (1973), 40 Ohio App. 2d 360, 319 N.E.2d 388*. Appellant's reliance on Bonar, however, is misplaced. First, Bonar was decided by the Seventh Appellate District Court of Appeals, not the Supreme Court of Ohio.

Moreover, Bonar clearly does not support appellant's argument. In Bonar, the defendant was convicted of operating a motor vehicle at a speed of 75 miles per hour in a 60 miles per hour zone. The defendant appealed his conviction, arguing that the State had put on no evidence to indicate that the radar unit that had clocked his speed was functioning properly. The Seventh Appellate District Court of Appeals reversed the defendant's conviction, finding that there was \*\*\* no testimony as to whether the radar measuring equipment was properly installed, set up or operating correctly. Accordingly, the Seventh District held that the trial court should have granted the defendant's motion for a directed verdict.

The Seventh Appellate District did not hold, as appellant contends, that in any case involving a radar detector, the State must prove that the equipment used to calibrate the radar detector has itself been properly calibrated. Rather, the Bonar [\*14] court held that [HN6] the State must demonstrate, as it did here, that the unit was properly set up, tested and functioning properly.

In *State v. Bechtel (1985), 24 Ohio App. 3d 72, 493 N.E.2d 318*, the defendant appealed his conviction for speeding, arguing that the trial court erred in admitting testimony regarding the tuning forks used to test the calibration of the

radar unit because there was no testimony regarding the accuracy of the tuning forks. The Ninth Appellate District disagreed, however, stating:

[HN7]

While generally the accuracy of the radar unit and the accuracy of the testing apparatus are essential to a speeding conviction based solely on the radar evidence, the weight of the authority holds that when two tuning forks are used to ascertain the accuracy of the radar unit, additional proof of the accuracy of the tuning forks is not necessary. This is because each tuning fork corroborates the accuracy of the other, and it is highly unlikely that the radar unit and each tuning fork would be inaccurate to the same degree. *Id.* at 73. (Citations omitted).

Here, in addition to the light test and internal calibration tests, Officer Roach used two [\*15] individually-calibrated tuning forks to test the external calibration of his radar unit. If in *Bechtel* the use of two tuning forks was sufficient to demonstrate the accuracy of a radar device, we see no reason in this case to require further proof that the equipment used to calibrate the radar device and tuning forks was itself properly calibrated, especially where there was no evidence that the testing equipment was not functioning properly.

Appellant's first assignment of error is therefore overruled.

In his second assignment of error, appellant contends that because the City failed to prove that the testing equipment used to calibrate Roach's radar unit was itself properly calibrated, it failed to demonstrate the accuracy of Roach's unit and, therefore, Roach's testimony regarding appellant's speed as determined by the radar device was not admissible at trial. Appellant further contends that without Roach's testimony there was no competent evidence produced at trial to establish that he was speeding and, therefore, his conviction was against the manifest weight of the evidence. We disagree.

As set forth in our discussion regarding appellant's first assignment of error, the City [\*16] was not required to prove that the equipment used to calibrate Officer Roach's radar unit was itself properly calibrated. Rather, Officer Roach's [HN8] testimony regarding appellant's speed as determined by the radar unit was admissible if the City demonstrated that the radar device was in good operating condition and properly calibrated at the time of use, the operator of the device was properly trained and qualified to use it and did, in fact, properly operate the radar device. See *State v. Bechtel, supra*.

Scott Whitmer testified for the City that Roach's unit had been tested and calibrated on September 20 and 21, 2000 and no repairs were made to the unit after that time. Officer Roach testified that he performed three tests on the unit on February 7, 2001 prior to apprehending appellant and all three tests indicated that the unit was operating properly. He testified further that he had been specially trained in operating the radar device used to determine appellant's speed on February 7, 2001 and that he was properly operating the device at the time of appellant's speeding violation.

This testimony laid a sufficient foundation to establish the accuracy of Roach's radar unit and, therefore, [\*17] Roach's testimony regarding appellant's speed as established through the radar unit was properly admissible.

In light of this testimony, the trial court did not err in finding appellant guilty of speeding.

Appellant's second assignment of error is therefore overruled.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Heights Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

TIMOTHY E. McMONAGLE

PRESIDING JUDGE

ANN DYKE, J. and

TERRENCE O'DONNELL, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, [\*18] per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section 2(A)(1).

97 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**CITY OF CLEVELAND HEIGHTS, PLAINTIFF-APPELLEE v. DANIEL KATZ,  
DEFENDANT-APPELLANT**

**NO. 79568**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2002 Ohio 4241; 2001 Ohio App. LEXIS 5394*

**December 6, 2001, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal appeal from Cleveland Heights Municipal Court, No. TRD 0101569.

**DISPOSITION:** Defendant-appellant's conviction for speeding was affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant driver appealed the judgment of the Cleveland Heights Municipal Court (Ohio), entered after a bench trial, finding him guilty of speeding and fining him.

**OVERVIEW:** The trial court did not err in taking judicial notice of the scientific reliability of a radar unit. There was no evidence in the record to indicate the unit was not reliable. Defendant offered no evidence whatsoever that any of the three tests on the equipment were flawed or produced inaccurate results. Accordingly, there was no reason for the trial court to require evidence of more tests before concluding that the radar unit was accurate. It was not necessary for the city to prove that the test equipment used to calibrate the radar unit was itself properly calibrated. Defendant presented no evidence whatsoever that the testing equipment was not in proper working order. There was, in fact, evidence that the testing equipment was in proper working order. The trial court did not err finding defendant guilty of speeding.

**OUTCOME:** The lower court was affirmed.

**CORE TERMS:** radar, calibrated, calibration, accuracy, speed, fork, tuning, miles, reliability, testing equipment, equipment used, calibrate, working order, certificate, speeding, miles per hour, admissible, judicial notice, assignment of error, manufacturer, functioning, reflecting, testing, scientific, tuning fork, external, training, announcement, trained, tested

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Inferences & Presumptions > Inferences  
Evidence > Judicial Notice > Scientific & Technical Facts***

[HN1] A court may take judicial notice of the technical theory of operation and the scientific reliability of stationary radar devices.

***Civil Procedure > Appeals > Reviewability > Preservation for Review  
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

[HN2] Where an appellant does not raise an issue in the trial court, it is waived on appeal.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice > General Overview  
Evidence > Scientific Evidence > General Overview***

[HN3] Once judicial notice of the operation and reliability of a radar device is taken, the court must further determine (1) that the radar device is in good operating condition and properly calibrated at the time of use; (2) that the operator of the radar device is properly qualified to use the device; and (3) that the police officer properly operates and reads the radar device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN4] As few as two tests, an internal calibration test and an external calibration test, are sufficient to demonstrate that a radar unit is properly calibrated.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN5] Once it is determined that a device is generally reliable when properly operated by a properly trained operator to prove a certain thing, such as speed, dependent upon the individual circumstances of the case, it may not be necessary for the State, in the absence of evidence to the contrary, to offer any evidence of the similar proper working order of another device used to test the first device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN6] The State must demonstrate that a radar unit is properly set up, tested and functioning properly.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN7] While generally the accuracy of a radar unit and the accuracy of a testing apparatus are essential to a speeding conviction based solely on the radar evidence, the weight of authority holds that when two tuning forks are used to ascertain the accuracy of the radar unit, additional proof of the accuracy of the tuning forks is not necessary. This is because each tuning fork corroborates the accuracy of the other, and it is highly unlikely that the radar unit and each tuning fork would be inaccurate to the same degree.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Scientific Evidence > Daubert Standard***

[HN8] Testimony regarding a driver's speed as determined by a radar unit is admissible if the city demonstrates that the radar device is in good operating condition and properly calibrated at the time of use, the operator of the device is properly trained and qualified to use it and does, in fact, properly operate the radar device.

**COUNSEL:** For Plaintiff-Appellee: Kim T. Segebarth, Esq., City Prosecutor, City of Cleveland Heights, Cleveland Heights, OH.

For Defendant-Appellant: Nate N. Malek, Esq., Malek, Dean & Associates, LLC, Solon, OH.

**JUDGES:** TIMOTHY E. McMONAGLE, PRESIDING JUDGE. ANN DYKE, J. and TERRENCE O'DONNELL, J., CONCUR.

**OPINION BY:** TIMOTHY E. McMONAGLE

**OPINION:** JOURNAL ENTRY AND OPINION

TIMOTHY E. McMONAGLE, P.J.:

Defendant-appellant, Daniel Katz, appeals the judgment of the Cleveland Heights Municipal Court, entered after a bench trial, finding him guilty of speeding, in violation of Section 333.03 of the Codified Ordinances of Cleveland Heights, and fining him \$ 55.

Cleveland Heights Police Officer Don Roach testified at appellant's trial that at approximately 8:37 p.m. on February 7, 2001, he was parked in a police cruiser in the median at the intersection of Fairmount and Arlington Boulevards in Cleveland Heights. Roach was facing west, monitoring the speed of eastbound vehicles on Fairmount with a radar device.

Roach testified that he observed appellant's SUV pulling away from a huge group [\*2] of cars and approaching him at a pretty good rate.

According to Roach, he locked in the radar device on appellant's SUV and then heard a high-pitched tone, which confirmed his visual sighting of appellant's high speed. The reading on the radar unit indicated that appellant was traveling 47 miles per hour in a zone marked 35 miles per hour. Roach testified that appellant's speed was unreasonable for the conditions.

Roach testified that he had received specialized training, including 8 hours of training at the police academy and 40 hours of on-the-road training, regarding operation of the model 96-11 KR-10 radar unit he was using on September 7, 2001. Roach also testified that his main function as a police officer since his graduation from the police academy twelve years prior had been operating radar equipment.

Roach testified that he performed a light test, an internal calibration test and an external calibration test on the radar unit prior to using it on September 7, 2001. The light test involved pressing a special button on the unit to make sure that all the lights on the unit were working properly. According to Roach, the internal calibration test involved pressing another designated [\*3] button on the unit to elicit a preset reading of 32 miles per hour. Roach then used two tuning forks to test the external calibration of the unit. According to Roach, one fork is set at 35 miles per hour and the other is set at 65 miles per hour. When he tapped the forks against a non-metallic object and then placed them in front of the radar unit, they gave readings of 35 miles per hour and 65 miles per hour respectively. Roach testified that the three tests he performed indicated that the radar unit was working properly on September 7, 2001.

Scott Whitmer, a communications and radar technician for the City of Cleveland Heights Police Department, also testified at appellant's trial.

Whitmer testified that one of his job responsibilities was to test the calibration of the radar units used by City of Cleveland Heights police officers, including the unit used by Roach on February 7, 2001. Whitmer testified further that he had received extensive training regarding testing and calibrating radar devices from Simco Electronics, the manufacturer of the devices, and through his service in the United States Air Force.

Whitmer testified that he tests and calibrates all of the radar devices [\*4] once a year, using three pieces of equipment specifically designed for testing radar equipment.

Whitmer testified that on September 20 and 21, 2000, he calibrated the radar device used by Roach according to the manufacturer's instructions and when the machinery left our precinct, it was working true and accurate. Whitmer testified further that he had no records reflecting that any repairs had been completed on the unit after that time.

The trial court admitted four records created by Whitmer concerning his tests on the unit: 1) an inventory sheet reflecting the model and serial numbers of the unit and its associated tuning forks; 2) a certificate reflecting that Whitmer calibrated the unit on September 21, 2000 at 35 miles per hour, 50 miles per hour and 65 miles per hour; 3) a certificate of accuracy reflecting that one tuning fork associated with the unit was properly calibrated at 35 miles per hour; and 4) a certificate of accuracy reflecting that the other tuning fork associated with the unit was properly calibrated at 65 miles per hour.

Whitmer also testified that the equipment he used to test Roach's radar unit was shipped to Simco Electronics in August 2000 for testing and [\*5] calibrating.

According to Whitmer, Simco subsequently returned the equipment with certificates of calibration indicating that the test equipment was properly calibrated.

Defense counsel objected to the admission of the certificates of calibration, however, arguing that they were not authenticated. Defense counsel argued further that without the certificates or any testimony by a representative of Simco Electronics that the testing equipment had been properly calibrated, there was no way of knowing whether the equipment used by Whitmer to test the radar device used by Roach was properly calibrated and, therefore, no way of knowing whether the radar device used by Roach to determine that appellant was speeding was accurate. Accordingly, defense counsel asserted that Officer Roach's testimony regarding appellant's speed, as determined by the radar device, was not admissible for consideration by the trier of fact.

In a journal entry filed on April 4, 2001, the trial court ruled that Officer Roach's testimony regarding the radar reading was admissible, finding that the level of proof proposed by appellant, i.e., that evidence of a radar reading is not admissible absent evidence that [\*6] the equipment used to calibrate the radar device has itself been properly calibrated, was not necessary to the radar reading.

In light of Officer Roach's testimony, the trial court found that appellant was traveling at 47 miles per hour in a zone marked 35 miles per hour and that the speed was unreasonable for the conditions. On April 9, 2001, the trial court fined appellant \$ 55 plus costs but stayed the sentence pending appeal.

Appellant raises two assignments of error for our review:

I. THE CONVICTION AGAINST DANIEL KATZ SHOULD BE REVERSED SINCE THERE WAS INSUFFICIENT TESTIMONY AS TO THE PROPER CALIBRATION OF OFFICER DONALD ROACH'S RADAR EQUIPMENT.

II. THE CONVICTION AGAINST DANIEL KATZ SHOULD BE REVERSED WHERE THE TRIAL COURT DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In his first assignment of error, appellant asserts that the trial court erred in admitting Officer Roach's testimony regarding his speed because there was insufficient testimony regarding the calibration of Officer Roach's radar equipment.

[HN1] A court may take judicial notice of the technical theory of operation and the scientific reliability of stationary radar devices. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630; [\*7] *Cleveland Heights v.*

*Bartell*, 1987 Ohio App. LEXIS 7152, (Feb. 19, 1987), Cuyahoga App. No. 51719, unreported. Although not raised in his brief on appeal, at oral argument appellant asserted that the trial court improperly took judicial notice of the scientific reliability of the KR-10 stationary radar device used by Officer Roach. [HN2] Appellant did not raise this issue in the trial court, however, and therefore has waived it on appeal.

In *Cleveland Heights v. Bartell* (1987), Cuyahoga App. No. 51719, unreported, the trial court took judicial notice of the scientific reliability of the KR-10 radar unit and this court upheld that finding. Contrary to appellant's argument, our holding did not preclude appellant from further challenging the unit's reliability at trial. If appellant had wanted to challenge the reliability of the KR-10 unit at trial, he could have subpoenaed representatives from the manufacturer of the device and questioned them regarding its reliability. As counsel admitted in oral argument, however, appellant did not do so, and accordingly, there is no evidence in the record to indicate the unit is not reliable. Therefore, the trial court did not err in taking judicial notice of the scientific reliability [\*8] of the KR-10 radar unit, in reliance on *Bartell*.

[HN3] Once judicial notice of the operation and reliability of a radar device is taken, the court must further determine 1) that the radar device was in good operating condition and properly calibrated at the time of use; 2) that the operator of the radar device was properly qualified to use the device; and 3) that the police officer properly operated and read the radar device. *Id.*

Although appellant concedes that a court may take judicial notice of the reliability and operation of a radar device, as the trial court did here, appellant asks this Court to find that the City failed to prove that the radar device at issue was calibrated properly because 1) Officer Roach should have performed more than three tests on his unit to ascertain its accuracy; and 2) the City did not produce evidence that the equipment used by Whitmer to calibrate the unit and its associated tuning forks was itself properly calibrated.

Appellant argues that the trial court should have required evidence that more than three tests had been performed on Officer Roach's radar unit before concluding that it was properly calibrated because there are limitations to the three [\*9] tests performed by Officer Roach. Appellant asserts that the light test performed by Roach was insufficient because it merely determined that the light fixtures inside the radar unit were functioning properly. He also asserts that tuning forks may get dented or bent and, if used on a radar unit that is out of calibration, could possibly indicate accuracy when, in fact, the unit is out of calibration.

We refuse to speculate, however, about possible problems with the tests. This court has previously held that [HN4] as few as two tests (an internal calibration test and an external calibration test) are sufficient to demonstrate that a radar unit is properly calibrated. *Lyndhurst v. Danvers*, 1988 Ohio App. LEXIS 4621, (Nov. 23, 1988), Cuyahoga App. No. 55537, unreported; *Cleveland Heights v. Bartell*, *supra*. Moreover, appellant offered no evidence whatsoever that any of the three tests performed by Officer Roach on February 7, 2001 were flawed or produced inaccurate results. Accordingly, there was no reason for the trial court to require evidence of more tests before concluding that Roach's radar unit was accurate.

Appellant also contends that there was insufficient evidence that Roach's radar unit was properly calibrated [\*10] at the time of use because the City failed to show that Simco Electronics properly calibrated the equipment used by Whitmer to subsequently test and calibrate the unit. Appellant asserts that Whitmer's calibrations of Roach's radar unit were accurate only if the test equipment used to perform the calibrations was itself properly calibrated. Therefore, appellant contends, without testimony from a representative of the manufacturer that the test equipment was properly calibrated, there was no evidence that the radar device used by Roach was functioning properly and, accordingly, Roach's testimony regarding appellant's speed was inadmissible.

Appellant's argument was squarely rejected, however, in *State v. Ellison*, 1987 Ohio App. LEXIS 5688, (Jan. 30, 1987), Auglaize App. No. 2-85-35. In *Ellison*, the defendant was convicted of operating a motor vehicle at a speed of 70 miles per hour in a 55 miles per hour zone. The defendant challenged the trial court's finding that the radar device was in proper working order because the State had not presented evidence of certification from the manufacturer as to the

accuracy of the tuning forks used to test the calibration of the unit.

The Third Appellate District rejected [\*11] the defendant's argument, stating:

Like most matters of proof, however, there may be various ways to prove the same thing, or a point is reached in the matter of proof, beyond which no further proof is needed and presumptions of regularity pertain. Thus, in determining that a mechanism is in proper working order, it might become absurd to require that each component part be also proved to be in working order, or, for example, that a testing mechanism, which is not itself a component part, is itself in working order. The sufficiency of proof will, as to individual things which must be proved in a specific case, vary as to the circumstances involved and the availability of other proof, and generally will be left to the sound discretion of the trial court, particularly where there is no showing, as here, that the testing device is, in some respect, not in proper working order.

\*\*\* Thus, [HN5] once it is determined that a device is generally reliable when properly operated by a properly trained operator to prove a certain thing, such as speed, dependent upon the individual circumstances of the case, it may not be necessary for the State, in the absence of evidence to the contrary, to [\*12] offer any evidence of the similar proper working order of another device used to test the first device.

The circumstances of this case demonstrate that it was not necessary for the City to prove that the test equipment used by Whitmer to calibrate Roach's radar unit was itself properly calibrated. First, appellant presented no evidence whatsoever that the testing equipment was not in proper working order. Accordingly, as in *Ellison, supra*, there was no need for the City to produce evidence that the testing equipment was properly calibrated.

Moreover, although no one from Simco Electronics testified regarding the accuracy of the testing equipment, Scott Whitmer testified that the testing equipment was sent to Simco in August 2000 to be tested and calibrated and was subsequently returned with certificates of calibration indicating that the test equipment was properly calibrated. Therefore, contrary to appellant's assertion, there was, in fact, evidence that the testing equipment was in proper working order.

Appellant contends that his argument that the City must demonstrate that the testing equipment was itself properly calibrated has been suggested and followed by the Ohio Supreme [\*13] Court in *State v. Bonar (1973), 40 Ohio App. 2d 360, 319 N.E.2d 388*. Appellant's reliance on Bonar, however, is misplaced. First, Bonar was decided by the Seventh Appellate District Court of Appeals, not the Supreme Court of Ohio.

Moreover, Bonar clearly does not support appellant's argument. In Bonar, the defendant was convicted of operating a motor vehicle at a speed of 75 miles per hour in a 60 miles per hour zone. The defendant appealed his conviction, arguing that the State had put on no evidence to indicate that the radar unit that had clocked his speed was functioning properly. The Seventh Appellate District Court of Appeals reversed the defendant's conviction, finding that there was \*\*\* no testimony as to whether the radar measuring equipment was properly installed, set up or operating correctly. Accordingly, the Seventh District held that the trial court should have granted the defendant's motion for a directed verdict.

The Seventh Appellate District did not hold, as appellant contends, that in any case involving a radar detector, the State must prove that the equipment used to calibrate the radar detector has itself been properly calibrated. Rather, the Bonar [\*14] court held that [HN6] the State must demonstrate, as it did here, that the unit was properly set up, tested and functioning properly.

In *State v. Bechtel (1985), 24 Ohio App. 3d 72, 493 N.E.2d 318*, the defendant appealed his conviction for speeding, arguing that the trial court erred in admitting testimony regarding the tuning forks used to test the calibration of the

radar unit because there was no testimony regarding the accuracy of the tuning forks. The Ninth Appellate District disagreed, however, stating:

[HN7]

While generally the accuracy of the radar unit and the accuracy of the testing apparatus are essential to a speeding conviction based solely on the radar evidence, the weight of the authority holds that when two tuning forks are used to ascertain the accuracy of the radar unit, additional proof of the accuracy of the tuning forks is not necessary. This is because each tuning fork corroborates the accuracy of the other, and it is highly unlikely that the radar unit and each tuning fork would be inaccurate to the same degree. *Id.* at 73. (Citations omitted).

Here, in addition to the light test and internal calibration tests, Officer Roach used two [\*15] individually-calibrated tuning forks to test the external calibration of his radar unit. If in *Bechtel* the use of two tuning forks was sufficient to demonstrate the accuracy of a radar device, we see no reason in this case to require further proof that the equipment used to calibrate the radar device and tuning forks was itself properly calibrated, especially where there was no evidence that the testing equipment was not functioning properly.

Appellant's first assignment of error is therefore overruled.

In his second assignment of error, appellant contends that because the City failed to prove that the testing equipment used to calibrate Roach's radar unit was itself properly calibrated, it failed to demonstrate the accuracy of Roach's unit and, therefore, Roach's testimony regarding appellant's speed as determined by the radar device was not admissible at trial. Appellant further contends that without Roach's testimony there was no competent evidence produced at trial to establish that he was speeding and, therefore, his conviction was against the manifest weight of the evidence. We disagree.

As set forth in our discussion regarding appellant's first assignment of error, the City [\*16] was not required to prove that the equipment used to calibrate Officer Roach's radar unit was itself properly calibrated. Rather, Officer Roach's [HN8] testimony regarding appellant's speed as determined by the radar unit was admissible if the City demonstrated that the radar device was in good operating condition and properly calibrated at the time of use, the operator of the device was properly trained and qualified to use it and did, in fact, properly operate the radar device. See *State v. Bechtel, supra*.

Scott Whitmer testified for the City that Roach's unit had been tested and calibrated on September 20 and 21, 2000 and no repairs were made to the unit after that time. Officer Roach testified that he performed three tests on the unit on February 7, 2001 prior to apprehending appellant and all three tests indicated that the unit was operating properly. He testified further that he had been specially trained in operating the radar device used to determine appellant's speed on February 7, 2001 and that he was properly operating the device at the time of appellant's speeding violation.

This testimony laid a sufficient foundation to establish the accuracy of Roach's radar unit and, therefore, [\*17] Roach's testimony regarding appellant's speed as established through the radar unit was properly admissible.

In light of this testimony, the trial court did not err in finding appellant guilty of speeding.

Appellant's second assignment of error is therefore overruled.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Heights Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

TIMOTHY E. McMONAGLE

PRESIDING JUDGE

ANN DYKE, J. and

TERRENCE O'DONNELL, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, [\*18] per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section 2(A)(1).

98 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- RODNEY L. NAPIER,  
Defendant-Appellant**

**Case No. 2001CA00035**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK  
COUNTY**

*2001 Ohio App. LEXIS 3507*

**July 30, 2001, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal Appeal from Canton Municipal Court Case 2000 TRD 8789.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his speeding conviction in the Canton Municipal Court (Ohio), claiming that his conviction was against the sufficiency of the evidence since no scientific foundation for and the reliability of the radar unit used had been admitted and due to discovery misconduct by the State.

**OVERVIEW:** Defendant was cited for speeding based on an officer's observation and use of a radar unit. He requested discovery of the radar unit's calibration record. The State did not comply with the request or a subsequent court order. Defendant moved to dismiss the action. The trial court overruled the motion and proceeded to a magistrate's trial. At trial, defendant objected to testimony about the radar unit; but the magistrate allowed it. The trial court adopted the magistrate's decision, and defendant appealed. The appellate court was troubled by the clear failure to comply with the discovery request and order and the blatant misrepresentation that the information had been provided. However, because a conviction for speeding could be based on an officer's visual observation and training, the evidence was not material. Receipt of the information would not have changed the trial's outcome.

**OUTCOME:** The conviction was affirmed.

**CORE TERMS:** speeding, radar, discovery, training, speed, mile, assignment of error, visual, prosecuting attorney, memorialized, disclosure, zone, withheld, sufficient evidence, Conclusions of Law, reasonable probability, assignments of error, requested discovery, failed to provide, reasonable doubt, personnel file, serial number, discoverable, certificate, reliability, calibration, requesting, photograph, overruling, advisement

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN1] An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN2] A conviction for speeding will not be reversed on sufficiency grounds even if a radar reading was improperly admitted into evidence when the officer testified that, based upon his visual observation, the vehicle was speeding.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests***

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects***

***Criminal Law & Procedure > Counsel > General Overview***

[HN3] See *Ohio R. Crim. P. 16(B)(1)*.

***Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct***

[HN4] See *Ohio R. Crim. P. 16(E)(3)*.

***Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] Ohio law is clear that an officer's testimony that, based upon his visual observation, a vehicle was speeding is in and of itself sufficient to support a conviction for speeding.

**COUNSEL:** For Plaintiff-Appellee: EUGENE D. O'BYRNE, Canton, OH.

For Defendant-Appellant: JOHN A. ARMSTRONG, Canton, OH.

**JUDGES:** Hon. Julie Edwards, P.J. Hon. Sheila Farmer, J. Hon. John Wise, J. Edwards, P.J. Farmer, J. and Wise, J. concur.

**OPINION BY:** Julie Edwards

**OPINION:** Edwards, P. J.

Defendant-appellant Rodney L. Napier appeals his conviction in Canton Municipal Court for speeding in violation of *R.C. 4511.21*. Plaintiff-appellee is the State of Ohio.

## STATEMENT OF THE FACTS AND CASE

On September 2, 2000, appellant Rodney Napier was cited for speeding in violation of *R.C. 4511.21*, a misdemeanor. The speeding citation indicated that appellant was driving 64 miles per hour in a 40 mile per hour zone and that appellant's speed was "unsafe for condition". At his arraignment on September 12, 2000, appellant entered a plea of not guilty. Appellant, on September 14, 2000, filed a "Request for Discovery" requesting disclosure of, among other items, the make, model and serial number of the radar unit referred to on the citation issued to appellant, [\*2] the training record of the Deputy who issued the citation with respect to such radar unit, and the calibration record and repair history of the radar unit. Appellant also requested the Deputy's personnel file. Thereafter, after the above information was not provided to appellant by appellee, appellant, on October 4, 2000, filed a Motion to Compel Discovery or, in the Alternative, Motion to Dismiss. As memorialized in a Judgment Entry filed two days later, the trial court overruled appellant's motion. A Motion for Reconsideration was filed by appellant on October 11, 2000. The trial court, pursuant to a Judgment Entry filed on October 31, 2000, sustained appellant's Motion for Reconsideration in part. The trial court, in its October 31, 2000, entry, ordered appellee to provide all of the discovery requested by appellant, with the exception of the Deputy's personnel file, by November 3, 2000. After appellee failed to provide the requested discovery to appellant by such date, appellant, on November 6, 2000, filed a Motion to Dismiss seeking dismissal of the speeding charge. Appellee, in its response to such motion, indicated that appellee had "answered and complied as completely as possible [\*3] to defense counsel's Request for Discovery." As memorialized in a November 7, 2000, Judgment Entry, the trial court overruled appellant's Motion to Dismiss, stating that "the State [appellee] in its answer to defendant's motion to dismiss indicates that it has provided all available discovery to defendant." A bench trial before a Magistrate was held on November 8, 2000. At the bench trial, Deputy Richard Ballas, who has approximately sixteen years experience as a Deputy Sheriff and who has training in issuing speeding tickets, testified for appellee. Deputy Ballas testified that, on September 2, 2000, at approximately 10:10 P.M., he was sitting in a stationary marked cruiser monitoring traffic while in uniform when he observed appellant coming around a corner at "a high rate of speed." Trial Transcript at 26. The Deputy testified that he visually estimated appellant's speed at 56 or 57 miles per hour in a 40 mile per hour zone. After activating his radar unit, Deputy Ballas initially clocked appellant's vehicle at 57 miles per hour. The Deputy testified that as he monitored appellant's vehicle, the "highest speed that I monitored it [appellant's vehicle] at was 64 and then I locked [\*4] that speed in." Trial Transcript at 26. Deputy Ballas then pulled over appellant's vehicle and cited appellant for speeding. At the conclusion of the evidence, the Magistrate, in his November 8, 2000, Report, found appellant guilty of speeding in violation of *R.C. 4511.21* and ordered appellant to pay a \$ 20.00 fine and court costs. In addition, appellant's driver's license was assessed two points. After the Magistrate filed Findings of Fact and Conclusions of Law, appellant, with leave of court, filed objections to the Magistrate's Decision. As memorialized in a Judgment Entry filed on January 2, 2001, the trial court overruled appellant's objections. It is from the trial court's January 2, 2001, Judgment Entry that appellant now prosecutes his appeal, raising the following assignments of error:

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THE FIFTH DISTRICT COURT OF APPEALS SHOULD CONCLUDE THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADOPTING THE MAGISTRATE'S DECISION SUBSEQUENT TO THE ADMISSION AND CONSIDERATION OF CERTAIN EVIDENCE/INFORMATION IN THIS CASE: (1) THAT THE STATE WILFULLY WITHHELD FROM THE DEFENSE, DESPITE REPEATED DISCOVERY REQUESTS AND A TRIAL COURT [\*5] ORDER COMPELLING DISCLOSURES OF THE INFORMATION; (2) SINCE FOREKNOWLEDGE OF THE REQUESTED INFORMATION WOULD HAVE BENEFITTED THE ACCUSED IN PREPARATION OF HIS DEFENSE; AND (3) BECAUSE THE ACCUSED WAS UNFAIRLY PREJUDICED AS A RESULT OF THE REQUESTED INFORMATION NOT BEING PROVIDED.

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DEFENDANT'S CONVICTION FOR VIOLATION OF *R.C. 4511.21(D)* WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

For purposes of clarity, we shall address appellant's assignments of error out of sequence.

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Appellant, in his second assignment of error, contends that his conviction for speeding in violation of *R.C. 4511.21* is against the sufficiency of the evidence since no expert testimony was offered by the State as to the scientific foundation for and the reliability of the radar unit used by Deputy Ballas on September 2, 2000. Appellant further notes that the trial court did not take judicial notice of the reliability of such unit. In short, appellant maintains that there was insufficient testimony to support his speeding conviction because the radar reading taken by Deputy Ballas should not have been admitted into evidence. In *State v. Jenks (1981)*, 61 Ohio St. 3d 259, 574 N.E.2d 492, [\*6] the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: [HN1] An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks, supra*, at paragraph two of the syllabus.

[HN2] A "conviction for speeding will not be [reversed on sufficiency grounds even if a radar reading was improperly admitted into evidence when the officer testified that, based upon his visual observation, the vehicle was speeding." *State v. Wilson (1995)*, 102 Ohio App. 3d 1, 4, 656 N.E.2d 954 (Emphasis added.), citing *Kirtland Hills v. Logan (1984)*, 21 Ohio App. 3d 67, 69, 486 N.E.2d 231. During the bench trial in this matter, Deputy Ballas, who has both training [\*7] and extensive experience in issuing speeding tickets, testified that he visually estimated appellant's speed at 56 or 57 miles per hour in a 40 mile per hour zone. Thus, even without the radar reading, there was sufficient evidence supporting appellant's conviction for speeding in violation of 4511.21. Appellant's second assignment of error is, therefore, overruled.

## I

Appellant, in his first assignment of error, argues that the trial court abused its discretion in adopting the Magistrate's Decision finding appellant guilty of speeding in violation of *R.C. 4511.21* since appellee wilfully withheld discoverable evidence from appellant and since appellant was unfairly prejudiced by appellee's failure to provide such evidence. As is stated above, appellant, on September 14, 2000, filed a "Request for Discovery" requesting disclosure of, among other items, the make, model and serial number of the radar unit referred to on the citation issued by Deputy Ballas to appellant, Deputy Ballas' training record with respect to such radar unit, and the calibration record and repair history of such unit. After his numerous attempts to obtain the above discovery were unsuccessful, [\*8] appellant, on November 6, 2000, filed a Motion to Dismiss. While such motion was overruled by the trial court based on appellee's representation that the requested discovery was provided to appellant, there is no doubt that, as of the date of the trial, the discovery sought by appellant was never provided by appellee. During the trial in this matter, appellee attempted to adduce testimony from Deputy Ballas as to his training and qualifications for radar use and regarding the radar unit used by Deputy Ballas. Appellee, for example, specifically asked Deputy Ballas to produce a certificate evidencing his training in radar use. However, appellant objected to appellee's questioning of Deputy Ballas and appellee's request for production of the certificate since appellee had failed to provide the above discovery to appellant although ordered to do so by the trial court. After appellee moved the Magistrate for a judgment of acquittal, the Magistrate denied appellant's motion, stating on the record as follows: BY THE COURT: All right, I'm going to take your objection under advisement and we're going to proceed in this fashion. I'm going to hear that remainder of the evidence and at the conclusion [\*9] of the case I'm going to evaluate the case in its entirety and I'll reconsider your motion at that time and I will also

consider as an alternative, if I feel that there is some violence done to the Rules and that the proper remedy is not to dismiss it, I will consider it in the alternative to simply adjourning the trial to sometime convenient to continue it where now that you're in possession of the information, presumably you will be, we can continue the trial when you won't be impeded by lack of the evidence, so I'm going to take your motion for dismissal and to exclude the evidence under advisement, I'm going to take the evidence into the record and rule later on it.

Trial Transcript at 21 -22. Appellant now maintains that, because appellee blatantly withheld discoverable information, the trial court erred in adopting the Magistrate's report finding appellant guilty of speeding. [HN3] *Crim. R. 16(B)(1)*, which concerns disclosure of evidence by the prosecuting attorney, states, in relevant part, as follows: (c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, [\*10] documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

In turn, [HN4] *Crim. R. 16(E)(3)* provides that, if a party fails to comply with discovery, "... the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." This Court is deeply troubled by appellee's clear failure to comply with *Crim. R. 16* and, even more so, by appellee's blatant misrepresentation to the trial court in its response to appellant's Motion to Dismiss that the discovery sought by appellant had been provided by appellee. We are further disconcerted by appellee's statement in its appellate brief that the information sought by appellant was not available to appellee until the day of trial. However, while we find that the evidence sought by appellant [\*11] relative to the radar unit was wilfully withheld by appellee, we find that such evidence was not material. In *United States v. Bagley (1985)*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375, the court ruled that [HN5] in determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. See also *State v. Johnston (1988)*, 39 Ohio St. 3d 48, 529 N.E.2d 898. Upon our review of the record, we cannot say that the outcome of appellant's trial would have been different had the evidence sought by appellant regarding the radar unit been disclosed by appellee. The evidence appellant requested through discovery was, therefore, not material to his guilt. As was noted previously, [HN6] Ohio law is clear that an officer's testimony that, based upon his visual observation, a vehicle was speeding is in and of itself sufficient to support a conviction for [\*12] speeding. See *Wilson, supra*. The Magistrate, in his December 5, 2000, Findings of Fact and Conclusions of Law, stated unequivocally that Deputy Ballas "had a clear and unobstructed view of said [appellant's] vehicle; and by virtue of his training and experience was able to estimate by visual observation its speed to a reasonable degree of certainty." As noted by the trial court in its January 2, 2001, Judgment Entry overruling appellant's objections, "the record reveals there was sufficient evidence to support a conviction of a violation of 4511.21 speeding based upon the officer's visual observation and training without even considering the stationary radar reading obtained by the officer." (Emphasis added.) In short, we conclude that the possibility that the undisclosed evidence would have changed the outcome of appellant's trial is not sufficient to undermine our confidence in the outcome of the same. As a final note, while appellant argues in his brief that the trial court erred in overruling appellant's November 6, 2000, Motion to Dismiss, we do not concur. While appellee may have misrepresented the status of discovery to the trial court, the trial court, at such [\*13] time, had no reason to doubt appellee's statement in its response to such motion that appellee had provided all available discovery to appellant. Only during trial did it become apparent that appellee had completely failed to comply with the trial court's discovery order. However, as is stated above, we find no prejudice based on Deputy Ballas' testimony.

Appellant's first assignment of error is, therefore, overruled. Accordingly, the judgment of the Canton Municipal Court is affirmed.

By Edwards, P.J. Farmer, J. and Wise, J. concur

99 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- RODNEY L. NAPIER,  
Defendant-Appellant**

**Case No. 2001CA00035**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK  
COUNTY**

*2001 Ohio App. LEXIS 3507*

**July 30, 2001, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal Appeal from Canton Municipal Court Case 2000 TRD 8789.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his speeding conviction in the Canton Municipal Court (Ohio), claiming that his conviction was against the sufficiency of the evidence since no scientific foundation for and the reliability of the radar unit used had been admitted and due to discovery misconduct by the State.

**OVERVIEW:** Defendant was cited for speeding based on an officer's observation and use of a radar unit. He requested discovery of the radar unit's calibration record. The State did not comply with the request or a subsequent court order. Defendant moved to dismiss the action. The trial court overruled the motion and proceeded to a magistrate's trial. At trial, defendant objected to testimony about the radar unit; but the magistrate allowed it. The trial court adopted the magistrate's decision, and defendant appealed. The appellate court was troubled by the clear failure to comply with the discovery request and order and the blatant misrepresentation that the information had been provided. However, because a conviction for speeding could be based on an officer's visual observation and training, the evidence was not material. Receipt of the information would not have changed the trial's outcome.

**OUTCOME:** The conviction was affirmed.

**CORE TERMS:** speeding, radar, discovery, training, speed, mile, assignment of error, visual, prosecuting attorney, memorialized, disclosure, zone, withheld, sufficient evidence, Conclusions of Law, reasonable probability, assignments of error, requested discovery, failed to provide, reasonable doubt, personnel file, serial number, discoverable, certificate, reliability, calibration, requesting, photograph, overruling, advisement

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN1] An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview  
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN2] A conviction for speeding will not be reversed on sufficiency grounds even if a radar reading was improperly admitted into evidence when the officer testified that, based upon his visual observation, the vehicle was speeding.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests  
Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects  
Criminal Law & Procedure > Counsel > General Overview***

[HN3] See *Ohio R. Crim. P. 16(B)(1)*.

***Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct***

[HN4] See *Ohio R. Crim. P. 16(E)(3)*.

***Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct  
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN5] In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] Ohio law is clear that an officer's testimony that, based upon his visual observation, a vehicle was speeding is in and of itself sufficient to support a conviction for speeding.

**COUNSEL:** For Plaintiff-Appellee: EUGENE D. O'BYRNE, Canton, OH.

For Defendant-Appellant: JOHN A. ARMSTRONG, Canton, OH.

**JUDGES:** Hon. Julie Edwards, P.J. Hon. Sheila Farmer, J. Hon. John Wise, J. Edwards, P.J. Farmer, J. and Wise, J. concur.

**OPINION BY:** Julie Edwards

**OPINION:** Edwards, P. J.

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## I

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Appellant's first assignment of error is, therefore, overruled. Accordingly, the judgment of the Canton Municipal Court is affirmed.

By Edwards, P.J. Farmer, J. and Wise, J. concur

100 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**VILLAGE OF MAYFIELD, Plaintiff-appellee vs. DAVID MINELLO,  
Defendant-appellant**

**Nos. 76464 and 78086**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2000 Ohio App. LEXIS 5875*

**December 14, 2000, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeals from LYNDHURST MUNICIPAL COURT. Case Nos. 98TRC09857 AB&C.

**DISPOSITION:**

AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, convicted of speeding and driving while intoxicated, claimed the Lyndhurst Municipal Court (Ohio) denied him due process of law by refusing to enforce his discovery requests and by overruling his motion to suppress evidence.

**OVERVIEW:** Defendant was found guilty of speeding and driving while intoxicated. Error in refusing to grant a hearing on the administrative license suspension was harmless because credit for time served on the administrative license suspension was granted. Discovery of calibration log books was properly limited to time of most recent recalibration. Trial court did not err in refusing to accept defendant's no contest plea or in refusing to suppress the results of the breath test. *Ohio Admin. Code § 3701-53-04(1)* applied only to solutions approved after its effective date, and the solution batch used on defendant was approved prior to the effective date of this section. The arresting officer had probable cause to conduct field sobriety tests and the video of the stop was properly admitted. Defendant did not file a formal, written objection to his waiver of his speedy trial right.

**OUTCOME:** Judgment affirmed. Trial court did not abuse its discretion in rejecting proposed no contest plea or in limiting discovery of calibration logs. Officer had probable cause to conduct sobriety tests. Oral objection to waiver of speedy trial rights was futile, and videotape of arrest was admissible.

**CORE TERMS:** batch, calibration, log, department of health, village, expiration date, arresting officer, breath test, sobriety, regulation, license suspension, speedy trial, driving, assignment of error, traffic stop, breathalyzer, unreliable, invalid, contest plea, mile, complains, probable cause, videotape, discovery, speeding, radar, self-incrimination, announcement, manufacturer, questioning

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

[HN1] Even if a court errs by failing to grant a defendant the administrative license suspension appeal within the statutorily allotted time, there is no substantial prejudice if the court grants the defendant credit for time served on the administrative license suspension.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence Evidence > Scientific Evidence > Blood Alcohol*

[HN2] *Ohio Admin. Code § 3701-53-01(A)* requires that the results of calibration tests be retained for not less than three years. The failure to record calibration logs for the mandatory three year period is grounds for suppressing evidence of a breathalyzer test.

*Civil Procedure > Discovery > Privileged Matters > General Overview*

*Civil Procedure > Discovery > Relevance*

*Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects*

[HN3] *Ohio R. Civ. P. 26(B)(1)* provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

*Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects*

[HN4] The courts permit discovery of calibration logs.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere*

*Criminal Law & Procedure > Guilty Pleas > No Contest Pleas*

[HN5] The court has no obligation to accept a no contest plea to a serious misdemeanor offense. *Ohio R. Crim. P. 11(D)*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Scientific Evidence > Blood Alcohol*

[HN6] A defendant may claim that the results of a breath test should be excluded: (1) because the State failed to comply with regulatory protocols issued by the Department of Health that govern breath-test procedures; or (2) because some fact existed that rendered the results of the breath test inaccurate, unreliable, or otherwise invalid under the Ohio Rules of Evidence.

***Evidence > Scientific Evidence > Blood Alcohol***

[HN7] See *Ohio Admin. Code* § 3701-53-04.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Motions to Suppress***

[HN8] In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. A defendant's failure to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN9] Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under U.S. Const. amend. IV, even if the officer has some ulterior motive for making the stop. Such as a suspicion that the violator was engaging in more nefarious criminal activity.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN10] As to having probable cause to conduct field sobriety tests, all that is required is a reasonable suspicion of criminal activity.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN11] Assuming strict compliance with sobriety tests, a driver's failure of sobriety tests, coupled with other indicia of driving under the influence, establishes sufficient cause for arrest.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

[HN12] The courts have consistently rejected the idea that police must first read a suspect Miranda rights before conducting field sobriety tests since roadside questioning of a motorist pursuant to a routine traffic stop does not ordinarily constitute custodial interrogation requiring Miranda warnings.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege***

***Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege***

***Evidence > Privileges > Self-Incrimination Privilege > General Overview***

[HN13] Any statements made before a defendant has been arrested are not be subject to a U.S. Const. amend. V right against self-incrimination.

***Criminal Law & Procedure > Pretrial Motions > Speedy Trial > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial***

[HN14] Following an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.

**COUNSEL:** For plaintiff-appellee: VINCENT A. FEUDO, Prosecuting Attorney, Village of Mayfield, MICHAEL E. CICERO, ESQ., Cleveland, OH.

For defendant-appellant: BRIAN D. KERNS, Middleburg Heights, OH.

**JUDGES:** JOHN T. PATTON, JUDGE, PATRICIA A. BLACKMON, J., CONCURS. DIANE KARPINSKI, P.J., WITH SEPARATE CONCURRING OPINION.

**OPINION BY:** JOHN T. PATTON

**OPINION:**

JOURNAL ENTRY AND OPINION

JOHN T. PATTON, J.:

A jury found defendant David Minello guilty of speeding and driving while intoxicated. In this appeal, he claims the court denied him due process of law by refusing to enforce his discovery requests and by overruling his motion to suppress evidence.

A village of Mayfield police officer on traffic duty on I-271 clocked defendant's car traveling ninety miles per hour in a sixty mile per hour zone. The officer pulled defendant's vehicle over and immediately noticed a strong odor of alcohol. The officer described defendant as having a "deranged appearance, red, glassy eyes, just seemed a bit confused in the car."

I

The first assignment of error raises several issues relating to a [\*2] claimed denial of due process.

A

Defendant first claims the court denied him due process of law by (1) refusing to grant him a hearing on his administrative license suspension and (2) refusing to grant him occupational driving privileges pending trial on the drunk driving charge. He maintains the court refused to grant the driving privileges as a means of pressuring him to plead to the charges. The village concedes the court failed to conduct the administrative license suspension hearing, but claims that any error would be harmless because the court credited the time served on the administrative license suspension to the license suspension ordered as part of the sentence for the drunk driving charge.

In *Mayfield Heights v. Buckner*, 1996 Ohio App. LEXIS 4390 (Oct. 3, 1996), Cuyahoga App. No. 69221, unreported, we addressed an identical argument. [HN1] While agreeing that the court erred by failing to grant Buckner the administrative license suspension appeal within the statutorily allotted time, we nonetheless found no substantial prejudice because the court credited the administrative license suspension against a suspension ordered for the drunk driving charge.

As in *Buckner*, the court here granted defendant [\*3] credit for time served on the administrative license suspension. While we cannot condone any practice that deprives drivers of their rights to speedy administrative license appeals, absent substantial prejudice, we see no grounds for reversal.

Defendant also makes the argument that the court refused to grant him occupational driving privileges as a means of coercing a guilty plea. An argument that calls into question the scruples of the trial court requires substantiation - and none is provided. Without more, we can find no error or irregularity.

## B

Defendant next complains the court violated his right to due process by failing to grant his motion to compel the village to produce calibration log books. Defendant requested the calibration logs for the previous three years. The village possessed the logs, but only permitted defense counsel to examine calibration logs for the previous year. Defendant claims he needed to examine all the logs in order to determine whether the breathalyzer had been improperly calibrated with an outdated calibration solution.

[HN2] *Ohio Admin.Code 3701-53-01(A)* requires that the results of calibration tests be retained for not less than three years. The failure [\*4] to record calibration logs for the mandatory three year period is grounds for suppressing evidence of a breathalyzer test. See, e.g., *State v. Hominsky (1995)*, 107 Ohio App. 3d 787, 669 N.E.2d 523; *State v. Griffith*, 1988 Ohio App. LEXIS 3833 (Sept. 21, 1988), Summit App. No. 13551, unreported.

[HN3] *Civ.R. 26(B)(1)* provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. [HN4] The courts permit discovery of calibration logs. See, e.g., *State v. McCann*, 1993 Ohio App. LEXIS 3762 (July 23, 1993), Licking App. No. CA-92-103, unreported; *State v. Brocco*, 1999 Ohio App. LEXIS 2341 (May 21, 1999), Lake App. No. 98-L-056, unreported. By law, the village is required to maintain those logs, so it should not have been onerous for the village to permit inspection of those logs.

Ultimately, however, we cannot say that the court abused its discretion by failing to permit discovery of the logs because the logs would have been irrelevant under the circumstances. In an amended response to discovery, the village submitted documentation showing that the breathalyzer used to test defendant's breath had been recalibrated by the manufacturer in July 1997 - thirteen months [\*5] before defendant's arrest. Because there is no argument that the July 1997 recalibration had been done inaccurately, the only relevant calibration logs would be those compiled subsequent to July 1997. Cf. *State v. Brandenstein*, 1999 Ohio App. LEXIS 6428 (Dec. 30, 1999), *Cuyahoga App. No. 98 BA 30*, unreported (calibration performed prior to calibrations performed by State Highway Patrol were of "little relevance" when the first calibration did not reveal inaccuracies).

## C

Finally, defendant complains the court violated his right to due process of law by refusing to accept his no contest plea and forcing the matter to go to trial. Defendant maintains he offered to plead no contest to the charges, but the court refused the plea and forced him to go to trial as a means of exerting "economic pressure" on him to plead guilty and avoid a trial. He claims the error is particularly egregious since the court had previously indicated that it would entertain a no contest plea.

[HN5] The court has no obligation to accept a no contest plea to a serious misdemeanor offense. See *Crim.R. 11(D)*. Defendant's proffer of no contest plea stated that he would plead no contest to the charge of driving while intoxicated, [\*6] but that proffer did not include any agreement to plead to the speeding violation or the driving while under the influence charge. Moreover, the proffer came at the eleventh hour, just one day before trial. Given these facts, we cannot say the court abused its discretion by rejecting the proposed no contest plea. The first assignment of error is overruled.

## II

The second assignment of error raises issues relating to the court's refusal to suppress the results of the breath test. Defendant claims the village used an outdated calibration sample and that the arresting officer's reasons for stopping him were pretext.

## A

[HN6] A defendant may claim that the results of a breath test should be excluded: (1) because the State failed to

comply with regulatory protocols issued by the Department of Health that govern breath-test procedures; or (2) because some fact existed that rendered the results of the breath test inaccurate, unreliable, or otherwise invalid under the Ohio Rules of Evidence. *State v. French* (1995), 72 Ohio St. 3d 446, 451-452, 650 N.E.2d 887.

Defendant based part of his motion to suppress the evidence of the breath test on a June 12, 1997 letter written by the [\*7] Ohio Department of Health and sent to law enforcement agencies using Guth Simulator Solution Batches 95400 and 96130. As relevant here, the letter recommended that breath test machines using batch or lot number 96130 instrument solution cease using that batch. The letter noted that questions had arisen concerning the stability of batch 96130, so the Department of Health was recommending that the batch not be used after its expiration date of June 20, 1997. The court found that "for some reason," the village continued to use batch 96130 after receiving this letter, using it to calibrate the Data Master machine used to test defendant nearly fourteen months later on August 6, 1998.

[HN7] *Ohio Adm.Code 3701-53-04* states in relevant part:

(1) \* \* \* An instrument check solution approved by the director *after the effective date of this rule* shall not be used after the manufacturer's expiration date but in no event shall the solution be used more than three years after its date of manufacture, notwithstanding the manufacturer's expiration date. (emphasis added).

Although *Ohio Adm.Code 3701-53-04(1)* would ordinarily invalidate batch 96130, that provision did not take effect until [\*8] July 7, 1997, and specifically stated that it applied only to solutions approved by the director of the department of health *after* its effective date. Because batch 96130 had been approved prior to the effective date of the administrative code section, that section did not apply.

We recently addressed a similar argument concerning the applicability of Department of Health administrative regulations promulgated after-the-fact in *Rocky River v. Papandreas*, 2000 Ohio App. LEXIS 1170 (Mar. 23, 2000), Cuyahoga App. No. 76132, unreported. Papandreas took a breath test that came back with an invalid sample error. After waiting five minutes, the police retested Papandreas. On appeal, Papandreas argued that subsequently implemented administrative regulations called for an additional twenty-minute wait between an invalid sample error and retest. We rejected an argument that the guidelines should be applied retroactively, noting that the Department of Health's regulation did not undermine the validity of prior testing procedures, but merely set forth new rules in an abundance of caution. The same reasoning in *Papandreas* applies here.

Moreover, nothing in the June 12, 1997 letter suggests that the use of batch [\*9] 96130 would yield improper results. Indeed, the letter pointed out that then-current regulations did not require any expiration date on batch 96130, but the limited data available to the Department of Health suggested batch 96130 had a "significantly longer stability" than the proposed expiration date. The Department of Health noted it suggested discarding the solution "in order to be consistent" with the proposed regulation.

The import of this letter was that the Department of Health was only recommending replacing the batch solution after the expiration date in order to be consistent with the newly proposed regulations - not because the data showed that the solution would be compromised by age. This is not a case where the Department of Health had significant concerns about the integrity of batch 96130, and we refuse to read the regulation as suggesting that there had been any question about the integrity of batch 96130. Since *Ohio Adm.Code 3701-53-04* was not in effect at the time, and there has been no showing that age would compromise the integrity of the batch solution, we find the court did not err by refusing to suppress the evidence of the breath test taken on a machine calibrated [\*10] with batch 96130.

Defendant also cites to *State v. Miller*, 1998 Ohio App. LEXIS 6198 (Dec. 15, 1998), Marion App. No. 9-98-42, unreported, for the proposition that breath tests used on machines calibrated with batch 96130 are invalid because the concentration of the batch was not established through the use of proper scientific methods. He maintains *Miller* dictates that any breath test used with batch 96130 is invalid.

Without passing judgment on *Miller*, we find defendant failed to present this argument in a proper fashion. [HN8] "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler* (1994), 70 Ohio St. 3d 54, 636 N.E.2d 319, syllabus; *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, 524 N.E.2d 889, paragraph one of the syllabus. A defendant's failure to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. *Xenia v. Wallace, supra*, at 218; *Bryan v. Fox* (1991), 76 Ohio App. 3d 607, 610, 602 N.E.2d 753.

At no point, [\*11] either by motion or during the suppression hearing itself, did defendant raise the holding in *Miller* as grounds for suppression. The only argument relating to batch 96130 centered on the Department of Health's June 12, 1997 letter concerning the expiration date of batch 96130. Absent notice of an intent to argue the issues raised in *Miller*, defendant is deemed to have waived the right to argue this point on appeal.

## B

Defendant next argues that the arresting officer lacked probable cause to conduct field sobriety tests. He maintains the arresting officer made a "snap decision" to find defendant intoxicated even before field sobriety tests had been performed.

The Supreme Court of Ohio has held that stops based on minor traffic violations do not violate the Fourth Amendment. In *Dayton v. Erickson* (1996), 76 Ohio St. 3d 3, 665 N.E.2d 1091, the syllabus states:

[HN9]

Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer has some ulterior motive for making the stop, such as a suspicion that [\*12] the violator was engaging in more nefarious criminal activity.

The arresting officer clocked defendant traveling ninety miles per hour in a sixty mile per hour speed zone. Under any rational view of the law, the officer validly pulled defendant over.

[HN10] As to having probable cause to conduct field sobriety tests, all that is required is a reasonable suspicion of criminal activity. *Columbus v. Anderson* (1991), 74 Ohio App. 3d 768, 770, 600 N.E.2d 712; *State v. Sanders* (1998), 130 Ohio App. 3d 789, 794, 721 N.E.2d 433. The arresting officer testified that he smelled a strong odor of alcohol, noticed defendant had a "deranged appearance, red, glassy eyes, just seemed a bit confused in the car." These indicia are sufficiently valid criteria for conducting field sobriety tests.

Once the officer had probable cause to conduct field sobriety tests, defendant's poor performance on those tests could constitute cause to arrest. The arresting officer testified that defendant failed the alphabet test and the Horizontal Gaze Nystagmus test, and that he became argumentative during the testing. [HN11] Assuming strict compliance with these sobriety tests (a claim not made [\*13] in this appeal), a driver's failure of sobriety tests, coupled with other indicia of driving under the influence, establishes sufficient cause for arrest. See *State v. Homan* (2000), 89 Ohio St. 3d 421, 732 N.E.2d 952, paragraph one of the syllabus.

## C

Defendant next complains the court erred by refusing to suppress a videotape of the stop and arrest in this case. Defendant argues the playing of the videotape at trial violated his right to remain silent.

[HN12] The courts have consistently rejected the idea that police must first read a suspect Miranda rights before conducting field sobriety tests since roadside questioning of a motorist pursuant to a routine traffic stop does not ordinarily constitute custodial interrogation requiring Miranda warnings. See, e.g., *Berkemer v. McCarty* (1984), 468

*U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138; State v. Feasel (1988), 41 Ohio App. 3d 155, 157, 534 N.E.2d 940; North Royalton v. Smyth, 1999 Ohio App. LEXIS 2168 (May 13, 1999), Cuyahoga App. No. 74029, unreported; Cleveland v. Criss, 1998 Ohio App. LEXIS 5900 (Dec. 10, 1998), Cuyahoga App. No. 72862, unreported; State v. Pelz, 1998 Ohio App. LEXIS 5313 (Nov. 5, 1998), Cuyahoga App. No. 73654, unreported.*

In *City [\*14] of Fairview Park v. Hejnal, 1995 Ohio App. LEXIS 116 (Jan. 19, 1995), Cuyahoga App. No. 67506, unreported*, we followed *Berkemer*, recognizing that Miranda warnings are not required prior to mere roadside questioning after a routine traffic stop:

In *Berkemer v. McCarty (1984), 468 U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138*, the United States Supreme Court ruled that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation for the purposes of the Miranda rule. See *Ohio v. Senedak, 1989 Ohio App. LEXIS 2553 (June 21, 1989), Mahoning App. No. 88 C.A. 160, unreported*. The *Berkemer* court noted that although an ordinary traffic stop curtails the freedom of action of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. *Berkemer* at 421. The Court stated that " \* \* \* In short, the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than surrounding kinds of interrogation at issue in Miranda itself, [\*15] \* \* \*" *468 U.S. at 438-439*. " \* \* \* the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* Paragraph two of the syllabus.

[HN13] Any statements defendant made before he had been arrested would not be subject to a Fifth Amendment right against self-incrimination. That being the case, a videotape of those statements would be admissible, just as if the officer had testified to those statements.

We reject any idea that the officer had to inform defendant that the stop was being videotaped. Because no Fifth Amendment rights had attached at the time of the stop, the officer would need no more permission to videotape the stop than he would to photograph the scene. Because no right against self-incrimination had attached at that point, the officer had no duty to inform defendant that the stop would be videotaped.

## D

Lastly, defendant claims the court erred by not suppressing evidence relating to the speeding charge because the arresting officer gave no testimony concerning the posted rate of speed and further testified that he shot the radar through the rear window of the cruiser.

The arresting officer testified that [\*16] sixty miles per hour was the speed limit on the stretch of interstate highway where defendant committed his speeding offense. See Suppression Hearing Tr. 49.

In addition, the arresting officer gave a full account of his training in using the radar gun. Defendant points to no authority for the proposition that a valid radar gun reading cannot be obtained by shooting the radar through a window. The second assignment of error is overruled.

## III

In his third assignment of error, defendant complains the court violated his right to a speedy trial. Defendant admits he signed a form waiving his right to a speedy trial, but claims he did not intend to waive the right to a speedy trial on all charges, and subsequently revoked that waiver.

The record shows that defendant executed a waiver of his right to a speedy trial on August 10, 1998. The court

convened the suppression hearing on November 12, 1998. At the close of that day's testimony, defense counsel told the court:

I don't believe my client ever waived his speedy trial rights. If he has, he certainly withdraws any waiver of the speedy trial rights he's been granted because the delay in getting this matter to a resolution is obviously [\*17] impinging upon his constitutional right to due process.

In *State v. O'Brien* (1987), 34 Ohio St. 3d 7, 516 N.E.2d 218, paragraph two of the syllabus states:

[HN14]

Following an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time."

Defendant did not file a "formal, written objection" and demand for trial, so his attempt to do so orally during the suppression hearing was futile. See *State v. Cook*, 2000 Ohio App. LEXIS 1944 (May 8, 2000), Warren App. No. CA99-10-126, unreported. The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Lyndhurst Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded [\*18] to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PATRICIA A. BLACKMON, J., CONCURS.

DIANE KARPINSKI, P.J., WITH  
SEPARATE CONCURRING OPINION

JOHN T. PATTON

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac. R. II*, Section 2(A)(1).

**CONCUR BY:** DIANE KARPINSKI

**CONCUR:**

CONCURRING OPINION

## KARPINSKI, J., CONCURRING:

I concur with the majority but wish to clarify my position regarding the admissibility of the results of the appellant's Breathalyzer test. The majority relies on *Rocky River v. Papandreas*, 2000 Ohio App. LEXIS 1170 (Mar. 23, 2000), Cuyahoga App. No. 76132, unreported, [\*19] 2000 Ohio App. LEXIS 1170, to support the admissibility of that test. As I stated in my dissent in *Papandreas*, "I have no disagreement with admitting a test result when the procedure by which the result was obtained was in at least substantial compliance with the applicable regulations and any deviation from the regulations did not compromise the integrity of the test results." 2000 Ohio App. LEXIS 1170 at \*16-17

This case differs from *Papandreas* because the test results relied on in that case were obtained by a method which clearly had been shown to be unreliable. I stated in that case that it was unfair to admit "results from a procedure that is now recognized as deficient by scientific standards \* \* \*." 2000 Ohio App. LEXIS 1170 at \*16. In the instant case, there is no evidence to show that the results of the breathalyzer test administered to Minello were not reliable. In fact, as the majority points out, "the limited data available to the Department of Health suggested that batch 96130 had a 'significantly longer stability' than the proposed expiration date. The Department of Health noted it suggested discarding the solution 'in order to be consistent' with the proposed regulation." Majority [\*20] Opinion at 8. The appellant provided no evidence that the test results were unreliable because of the batch of testing solution used. Unlike *Papandreas*, which presented expert testimony regarding why the test results were unreliable, Minello only argued that because the regulation had ordered the solution to be discarded, the test results should be suppressed. Absent evidence of the type presented in *Papandreas*, which showed the test results to be unreliable, it is not necessary to eliminate these test results, because the order issued by the Department of Health was issued for consistency, not accuracy.

101 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**VILLAGE OF MAYFIELD, Plaintiff-appellee vs. DAVID MINELLO,  
Defendant-appellant**

**Nos. 76464 and 78086**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2000 Ohio App. LEXIS 5875*

**December 14, 2000, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeals from LYNDHURST MUNICIPAL COURT. Case Nos. 98TRC09857 AB&C.

**DISPOSITION:**

AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, convicted of speeding and driving while intoxicated, claimed the Lyndhurst Municipal Court (Ohio) denied him due process of law by refusing to enforce his discovery requests and by overruling his motion to suppress evidence.

**OVERVIEW:** Defendant was found guilty of speeding and driving while intoxicated. Error in refusing to grant a hearing on the administrative license suspension was harmless because credit for time served on the administrative license suspension was granted. Discovery of calibration log books was properly limited to time of most recent recalibration. Trial court did not err in refusing to accept defendant's no contest plea or in refusing to suppress the results of the breath test. *Ohio Admin. Code § 3701-53-04(1)* applied only to solutions approved after its effective date, and the solution batch used on defendant was approved prior to the effective date of this section. The arresting officer had probable cause to conduct field sobriety tests and the video of the stop was properly admitted. Defendant did not file a formal, written objection to his waiver of his speedy trial right.

**OUTCOME:** Judgment affirmed. Trial court did not abuse its discretion in rejecting proposed no contest plea or in limiting discovery of calibration logs. Officer had probable cause to conduct sobriety tests. Oral objection to waiver of speedy trial rights was futile, and videotape of arrest was admissible.

**CORE TERMS:** batch, calibration, log, department of health, village, expiration date, arresting officer, breath test, sobriety, regulation, license suspension, speedy trial, driving, assignment of error, traffic stop, breathalyzer, unreliable, invalid, contest plea, mile, complains, probable cause, videotape, discovery, speeding, radar, self-incrimination, announcement, manufacturer, questioning

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN1] Even if a court errs by failing to grant a defendant the administrative license suspension appeal within the statutorily allotted time, there is no substantial prejudice if the court grants the defendant credit for time served on the administrative license suspension.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence Evidence > Scientific Evidence > Blood Alcohol***

[HN2] *Ohio Admin. Code § 3701-53-01(A)* requires that the results of calibration tests be retained for not less than three years. The failure to record calibration logs for the mandatory three year period is grounds for suppressing evidence of a breathalyzer test.

***Civil Procedure > Discovery > Privileged Matters > General Overview***

***Civil Procedure > Discovery > Relevance***

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects***

[HN3] *Ohio R. Civ. P. 26(B)(1)* provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects***

[HN4] The courts permit discovery of calibration logs.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere***

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

[HN5] The court has no obligation to accept a no contest plea to a serious misdemeanor offense. *Ohio R. Crim. P. 11(D)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Evidence > Scientific Evidence > Blood Alcohol***

[HN6] A defendant may claim that the results of a breath test should be excluded: (1) because the State failed to comply with regulatory protocols issued by the Department of Health that govern breath-test procedures; or (2) because some fact existed that rendered the results of the breath test inaccurate, unreliable, or otherwise invalid under the Ohio Rules of Evidence.

***Evidence > Scientific Evidence > Blood Alcohol***

[HN7] See *Ohio Admin. Code* § 3701-53-04.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Motions to Suppress***

[HN8] In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. A defendant's failure to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal.

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN9] Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under U.S. Const. amend. IV, even if the officer has some ulterior motive for making the stop. Such as a suspicion that the violator was engaging in more nefarious criminal activity.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN10] As to having probable cause to conduct field sobriety tests, all that is required is a reasonable suspicion of criminal activity.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause***

[HN11] Assuming strict compliance with sobriety tests, a driver's failure of sobriety tests, coupled with other indicia of driving under the influence, establishes sufficient cause for arrest.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

[HN12] The courts have consistently rejected the idea that police must first read a suspect Miranda rights before conducting field sobriety tests since roadside questioning of a motorist pursuant to a routine traffic stop does not ordinarily constitute custodial interrogation requiring Miranda warnings.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege***

***Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege***

***Evidence > Privileges > Self-Incrimination Privilege > General Overview***

[HN13] Any statements made before a defendant has been arrested are not be subject to a U.S. Const. amend. V right against self-incrimination.

***Criminal Law & Procedure > Pretrial Motions > Speedy Trial > General Overview***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial***

[HN14] Following an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.

**COUNSEL:** For plaintiff-appellee: VINCENT A. FEUDO, Prosecuting Attorney, Village of Mayfield, MICHAEL E. CICERO, ESQ., Cleveland, OH.

For defendant-appellant: BRIAN D. KERNS, Middleburg Heights, OH.

**JUDGES:** JOHN T. PATTON, JUDGE, PATRICIA A. BLACKMON, J., CONCURS. DIANE KARPINSKI, P.J., WITH SEPARATE CONCURRING OPINION.

**OPINION BY:** JOHN T. PATTON

**OPINION:**

JOURNAL ENTRY AND OPINION

JOHN T. PATTON, J.:

A jury found defendant David Minello guilty of speeding and driving while intoxicated. In this appeal, he claims the court denied him due process of law by refusing to enforce his discovery requests and by overruling his motion to suppress evidence.

A village of Mayfield police officer on traffic duty on I-271 clocked defendant's car traveling ninety miles per hour in a sixty mile per hour zone. The officer pulled defendant's vehicle over and immediately noticed a strong odor of alcohol. The officer described defendant as having a "deranged appearance, red, glassy eyes, just seemed a bit confused in the car."

I

The first assignment of error raises several issues relating to a [\*2] claimed denial of due process.

A

Defendant first claims the court denied him due process of law by (1) refusing to grant him a hearing on his administrative license suspension and (2) refusing to grant him occupational driving privileges pending trial on the drunk driving charge. He maintains the court refused to grant the driving privileges as a means of pressuring him to plead to the charges. The village concedes the court failed to conduct the administrative license suspension hearing, but claims that any error would be harmless because the court credited the time served on the administrative license suspension to the license suspension ordered as part of the sentence for the drunk driving charge.

In *Mayfield Heights v. Buckner*, 1996 Ohio App. LEXIS 4390 (Oct. 3, 1996), Cuyahoga App. No. 69221, unreported, we addressed an identical argument. [HN1] While agreeing that the court erred by failing to grant Buckner the administrative license suspension appeal within the statutorily allotted time, we nonetheless found no substantial prejudice because the court credited the administrative license suspension against a suspension ordered for the drunk driving charge.

As in *Buckner*, the court here granted defendant [\*3] credit for time served on the administrative license suspension. While we cannot condone any practice that deprives drivers of their rights to speedy administrative license appeals, absent substantial prejudice, we see no grounds for reversal.

Defendant also makes the argument that the court refused to grant him occupational driving privileges as a means of coercing a guilty plea. An argument that calls into question the scruples of the trial court requires substantiation - and none is provided. Without more, we can find no error or irregularity.

## B

Defendant next complains the court violated his right to due process by failing to grant his motion to compel the village to produce calibration log books. Defendant requested the calibration logs for the previous three years. The village possessed the logs, but only permitted defense counsel to examine calibration logs for the previous year. Defendant claims he needed to examine all the logs in order to determine whether the breathalyzer had been improperly calibrated with an outdated calibration solution.

[HN2] *Ohio Admin.Code 3701-53-01(A)* requires that the results of calibration tests be retained for not less than three years. The failure [\*4] to record calibration logs for the mandatory three year period is grounds for suppressing evidence of a breathalyzer test. See, e.g., *State v. Hominsky (1995)*, 107 Ohio App. 3d 787, 669 N.E.2d 523; *State v. Griffith*, 1988 Ohio App. LEXIS 3833 (Sept. 21, 1988), Summit App. No. 13551, unreported.

[HN3] *Civ.R. 26(B)(1)* provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. [HN4] The courts permit discovery of calibration logs. See, e.g., *State v. McCann*, 1993 Ohio App. LEXIS 3762 (July 23, 1993), Licking App. No. CA-92-103, unreported; *State v. Brocco*, 1999 Ohio App. LEXIS 2341 (May 21, 1999), Lake App. No. 98-L-056, unreported. By law, the village is required to maintain those logs, so it should not have been onerous for the village to permit inspection of those logs.

Ultimately, however, we cannot say that the court abused its discretion by failing to permit discovery of the logs because the logs would have been irrelevant under the circumstances. In an amended response to discovery, the village submitted documentation showing that the breathalyzer used to test defendant's breath had been recalibrated by the manufacturer in July 1997 - thirteen months [\*5] before defendant's arrest. Because there is no argument that the July 1997 recalibration had been done inaccurately, the only relevant calibration logs would be those compiled subsequent to July 1997. Cf. *State v. Brandenstein*, 1999 Ohio App. LEXIS 6428 (Dec. 30, 1999), *Cuyahoga App. No. 98 BA 30*, unreported (calibration performed prior to calibrations performed by State Highway Patrol were of "little relevance" when the first calibration did not reveal inaccuracies).

## C

Finally, defendant complains the court violated his right to due process of law by refusing to accept his no contest plea and forcing the matter to go to trial. Defendant maintains he offered to plead no contest to the charges, but the court refused the plea and forced him to go to trial as a means of exerting "economic pressure" on him to plead guilty and avoid a trial. He claims the error is particularly egregious since the court had previously indicated that it would entertain a no contest plea.

[HN5] The court has no obligation to accept a no contest plea to a serious misdemeanor offense. See *Crim.R. 11(D)*. Defendant's proffer of no contest plea stated that he would plead no contest to the charge of driving while intoxicated, [\*6] but that proffer did not include any agreement to plead to the speeding violation or the driving while under the influence charge. Moreover, the proffer came at the eleventh hour, just one day before trial. Given these facts, we cannot say the court abused its discretion by rejecting the proposed no contest plea. The first assignment of error is overruled.

## II

The second assignment of error raises issues relating to the court's refusal to suppress the results of the breath test. Defendant claims the village used an outdated calibration sample and that the arresting officer's reasons for stopping him were pretext.

## A

[HN6] A defendant may claim that the results of a breath test should be excluded: (1) because the State failed to

comply with regulatory protocols issued by the Department of Health that govern breath-test procedures; or (2) because some fact existed that rendered the results of the breath test inaccurate, unreliable, or otherwise invalid under the Ohio Rules of Evidence. *State v. French* (1995), 72 Ohio St. 3d 446, 451-452, 650 N.E.2d 887.

Defendant based part of his motion to suppress the evidence of the breath test on a June 12, 1997 letter written by the [\*7] Ohio Department of Health and sent to law enforcement agencies using Guth Simulator Solution Batches 95400 and 96130. As relevant here, the letter recommended that breath test machines using batch or lot number 96130 instrument solution cease using that batch. The letter noted that questions had arisen concerning the stability of batch 96130, so the Department of Health was recommending that the batch not be used after its expiration date of June 20, 1997. The court found that "for some reason," the village continued to use batch 96130 after receiving this letter, using it to calibrate the Data Master machine used to test defendant nearly fourteen months later on August 6, 1998.

[HN7] *Ohio Adm.Code 3701-53-04* states in relevant part:

(1) \* \* \* An instrument check solution approved by the director *after the effective date of this rule* shall not be used after the manufacturer's expiration date but in no event shall the solution be used more than three years after its date of manufacture, notwithstanding the manufacturer's expiration date. (emphasis added).

Although *Ohio Adm.Code 3701-53-04(1)* would ordinarily invalidate batch 96130, that provision did not take effect until [\*8] July 7, 1997, and specifically stated that it applied only to solutions approved by the director of the department of health *after* its effective date. Because batch 96130 had been approved prior to the effective date of the administrative code section, that section did not apply.

We recently addressed a similar argument concerning the applicability of Department of Health administrative regulations promulgated after-the-fact in *Rocky River v. Papandreas*, 2000 Ohio App. LEXIS 1170 (Mar. 23, 2000), Cuyahoga App. No. 76132, unreported. Papandreas took a breath test that came back with an invalid sample error. After waiting five minutes, the police retested Papandreas. On appeal, Papandreas argued that subsequently implemented administrative regulations called for an additional twenty-minute wait between an invalid sample error and retest. We rejected an argument that the guidelines should be applied retroactively, noting that the Department of Health's regulation did not undermine the validity of prior testing procedures, but merely set forth new rules in an abundance of caution. The same reasoning in *Papandreas* applies here.

Moreover, nothing in the June 12, 1997 letter suggests that the use of batch [\*9] 96130 would yield improper results. Indeed, the letter pointed out that then-current regulations did not require any expiration date on batch 96130, but the limited data available to the Department of Health suggested batch 96130 had a "significantly longer stability" than the proposed expiration date. The Department of Health noted it suggested discarding the solution "in order to be consistent" with the proposed regulation.

The import of this letter was that the Department of Health was only recommending replacing the batch solution after the expiration date in order to be consistent with the newly proposed regulations - not because the data showed that the solution would be compromised by age. This is not a case where the Department of Health had significant concerns about the integrity of batch 96130, and we refuse to read the regulation as suggesting that there had been any question about the integrity of batch 96130. Since *Ohio Adm.Code 3701-53-04* was not in effect at the time, and there has been no showing that age would compromise the integrity of the batch solution, we find the court did not err by refusing to suppress the evidence of the breath test taken on a machine calibrated [\*10] with batch 96130.

Defendant also cites to *State v. Miller*, 1998 Ohio App. LEXIS 6198 (Dec. 15, 1998), Marion App. No. 9-98-42, unreported, for the proposition that breath tests used on machines calibrated with batch 96130 are invalid because the concentration of the batch was not established through the use of proper scientific methods. He maintains *Miller* dictates that any breath test used with batch 96130 is invalid.

Without passing judgment on *Miller*, we find defendant failed to present this argument in a proper fashion. [HN8] "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler* (1994), 70 Ohio St. 3d 54, 636 N.E.2d 319, syllabus; *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, 524 N.E.2d 889, paragraph one of the syllabus. A defendant's failure to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. *Xenia v. Wallace, supra*, at 218; *Bryan v. Fox* (1991), 76 Ohio App. 3d 607, 610, 602 N.E.2d 753.

At no point, [\*11] either by motion or during the suppression hearing itself, did defendant raise the holding in *Miller* as grounds for suppression. The only argument relating to batch 96130 centered on the Department of Health's June 12, 1997 letter concerning the expiration date of batch 96130. Absent notice of an intent to argue the issues raised in *Miller*, defendant is deemed to have waived the right to argue this point on appeal.

## B

Defendant next argues that the arresting officer lacked probable cause to conduct field sobriety tests. He maintains the arresting officer made a "snap decision" to find defendant intoxicated even before field sobriety tests had been performed.

The Supreme Court of Ohio has held that stops based on minor traffic violations do not violate the Fourth Amendment. In *Dayton v. Erickson* (1996), 76 Ohio St. 3d 3, 665 N.E.2d 1091, the syllabus states:

[HN9]

Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer has some ulterior motive for making the stop, such as a suspicion that [\*12] the violator was engaging in more nefarious criminal activity.

The arresting officer clocked defendant traveling ninety miles per hour in a sixty mile per hour speed zone. Under any rational view of the law, the officer validly pulled defendant over.

[HN10] As to having probable cause to conduct field sobriety tests, all that is required is a reasonable suspicion of criminal activity. *Columbus v. Anderson* (1991), 74 Ohio App. 3d 768, 770, 600 N.E.2d 712; *State v. Sanders* (1998), 130 Ohio App. 3d 789, 794, 721 N.E.2d 433. The arresting officer testified that he smelled a strong odor of alcohol, noticed defendant had a "deranged appearance, red, glassy eyes, just seemed a bit confused in the car." These indicia are sufficiently valid criteria for conducting field sobriety tests.

Once the officer had probable cause to conduct field sobriety tests, defendant's poor performance on those tests could constitute cause to arrest. The arresting officer testified that defendant failed the alphabet test and the Horizontal Gaze Nystagmus test, and that he became argumentative during the testing. [HN11] Assuming strict compliance with these sobriety tests (a claim not made [\*13] in this appeal), a driver's failure of sobriety tests, coupled with other indicia of driving under the influence, establishes sufficient cause for arrest. See *State v. Homan* (2000), 89 Ohio St. 3d 421, 732 N.E.2d 952, paragraph one of the syllabus.

## C

Defendant next complains the court erred by refusing to suppress a videotape of the stop and arrest in this case. Defendant argues the playing of the videotape at trial violated his right to remain silent.

[HN12] The courts have consistently rejected the idea that police must first read a suspect Miranda rights before conducting field sobriety tests since roadside questioning of a motorist pursuant to a routine traffic stop does not ordinarily constitute custodial interrogation requiring Miranda warnings. See, e.g., *Berkemer v. McCarty* (1984), 468

*U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138; State v. Feasel (1988), 41 Ohio App. 3d 155, 157, 534 N.E.2d 940; North Royalton v. Smyth, 1999 Ohio App. LEXIS 2168 (May 13, 1999), Cuyahoga App. No. 74029, unreported; Cleveland v. Criss, 1998 Ohio App. LEXIS 5900 (Dec. 10, 1998), Cuyahoga App. No. 72862, unreported; State v. Pelz, 1998 Ohio App. LEXIS 5313 (Nov. 5, 1998), Cuyahoga App. No. 73654, unreported.*

In *City [\*14] of Fairview Park v. Hejnal, 1995 Ohio App. LEXIS 116 (Jan. 19, 1995), Cuyahoga App. No. 67506, unreported*, we followed *Berkemer*, recognizing that Miranda warnings are not required prior to mere roadside questioning after a routine traffic stop:

In *Berkemer v. McCarty (1984), 468 U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138*, the United States Supreme Court ruled that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation for the purposes of the Miranda rule. See *Ohio v. Senedak, 1989 Ohio App. LEXIS 2553 (June 21, 1989), Mahoning App. No. 88 C.A. 160, unreported*. The *Berkemer* court noted that although an ordinary traffic stop curtails the freedom of action of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. *Berkemer* at 421. The Court stated that " \* \* \* In short, the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than surrounding kinds of interrogation at issue in Miranda itself, [\*15] \* \* \*" *468 U.S. at 438-439*. " \* \* \* the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* Paragraph two of the syllabus.

[HN13] Any statements defendant made before he had been arrested would not be subject to a Fifth Amendment right against self-incrimination. That being the case, a videotape of those statements would be admissible, just as if the officer had testified to those statements.

We reject any idea that the officer had to inform defendant that the stop was being videotaped. Because no Fifth Amendment rights had attached at the time of the stop, the officer would need no more permission to videotape the stop than he would to photograph the scene. Because no right against self-incrimination had attached at that point, the officer had no duty to inform defendant that the stop would be videotaped.

## D

Lastly, defendant claims the court erred by not suppressing evidence relating to the speeding charge because the arresting officer gave no testimony concerning the posted rate of speed and further testified that he shot the radar through the rear window of the cruiser.

The arresting officer testified that [\*16] sixty miles per hour was the speed limit on the stretch of interstate highway where defendant committed his speeding offense. See Suppression Hearing Tr. 49.

In addition, the arresting officer gave a full account of his training in using the radar gun. Defendant points to no authority for the proposition that a valid radar gun reading cannot be obtained by shooting the radar through a window. The second assignment of error is overruled.

## III

In his third assignment of error, defendant complains the court violated his right to a speedy trial. Defendant admits he signed a form waiving his right to a speedy trial, but claims he did not intend to waive the right to a speedy trial on all charges, and subsequently revoked that waiver.

The record shows that defendant executed a waiver of his right to a speedy trial on August 10, 1998. The court

convened the suppression hearing on November 12, 1998. At the close of that day's testimony, defense counsel told the court:

I don't believe my client ever waived his speedy trial rights. If he has, he certainly withdraws any waiver of the speedy trial rights he's been granted because the delay in getting this matter to a resolution is obviously [\*17] impinging upon his constitutional right to due process.

In *State v. O'Brien* (1987), 34 Ohio St. 3d 7, 516 N.E.2d 218, paragraph two of the syllabus states:

[HN14]

Following an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time."

Defendant did not file a "formal, written objection" and demand for trial, so his attempt to do so orally during the suppression hearing was futile. See *State v. Cook*, 2000 Ohio App. LEXIS 1944 (May 8, 2000), Warren App. No. CA99-10-126, unreported. The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Lyndhurst Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded [\*18] to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PATRICIA A. BLACKMON, J., CONCURS.

DIANE KARPINSKI, P.J., WITH  
SEPARATE CONCURRING OPINION

JOHN T. PATTON

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac. R. II, Section 2(A)(1)*.

**CONCUR BY:** DIANE KARPINSKI

**CONCUR:**

CONCURRING OPINION

## KARPINSKI, J., CONCURRING:

I concur with the majority but wish to clarify my position regarding the admissibility of the results of the appellant's Breathalyzer test. The majority relies on *Rocky River v. Papandreas*, 2000 Ohio App. LEXIS 1170 (Mar. 23, 2000), Cuyahoga App. No. 76132, unreported, [\*19] 2000 Ohio App. LEXIS 1170, to support the admissibility of that test. As I stated in my dissent in *Papandreas*, "I have no disagreement with admitting a test result when the procedure by which the result was obtained was in at least substantial compliance with the applicable regulations and any deviation from the regulations did not compromise the integrity of the test results." 2000 Ohio App. LEXIS 1170 at \*16-17

This case differs from *Papandreas* because the test results relied on in that case were obtained by a method which clearly had been shown to be unreliable. I stated in that case that it was unfair to admit "results from a procedure that is now recognized as deficient by scientific standards \* \* \*." 2000 Ohio App. LEXIS 1170 at \*16. In the instant case, there is no evidence to show that the results of the breathalyzer test administered to Minello were not reliable. In fact, as the majority points out, "the limited data available to the Department of Health suggested that batch 96130 had a 'significantly longer stability' than the proposed expiration date. The Department of Health noted it suggested discarding the solution 'in order to be consistent' with the proposed regulation." Majority [\*20] Opinion at 8. The appellant provided no evidence that the test results were unreliable because of the batch of testing solution used. Unlike *Papandreas*, which presented expert testimony regarding why the test results were unreliable, Minello only argued that because the regulation had ordered the solution to be discarded, the test results should be suppressed. Absent evidence of the type presented in *Papandreas*, which showed the test results to be unreliable, it is not necessary to eliminate these test results, because the order issued by the Department of Health was issued for consistency, not accuracy.

102 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - TIM ROBINSON, Defendant-Appellant.**

**ACCELERATED CASE NO. 99-P-0019**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
PORTAGE COUNTY**

*2000 Ohio App. LEXIS 2994*

**June 30, 2000, Decided**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Portage County Municipal Court/Ravenna Division. Case No. R 98 TRC 19526S.

**DISPOSITION:**

Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant challenged a judgment of the Portage Municipal Court, Ravenna Division (Ohio) which convicted and sentenced him, following a no contest plea, for driving with a prohibited breath alcohol concentration in violation of *Ohio Rev. Code Ann. § 4511.19(A)(3)*.

**OVERVIEW:** A police trooper observed appellant speeding and stopped him. Upon questioning appellant, the trooper noticed the odor of alcohol and asked if appellant had been drinking. He was given a breathalyzer test at the station. The first test gave a response of invalid sample. The second test showed an alcohol level in excess of the amount allowed by law for a person driving. Appellant pleaded no contest. On appeal, appellant argued that the trial court erred in denying his motion to suppress the results of the breath verifier test as the procedure was not conducted in compliance with the Ohio Administrative Code Regulations. The court affirmed, because an officer conducting a breath test was not required to retain a printout of an invalid sample reading. Furthermore, appellant failed to show how he was prejudiced by the printout being thrown away. Additionally, there was no evidence that the second test was administered improperly. Appellant stipulated to the validity of the test which meant he stipulated to the trooper's compliance with regulations. There was no error in denying the motion.

**OUTCOME:** Judgment affirmed because appellant failed to show any non-compliance with the department of health regulations regarding the breath test, or any prejudice as a result of non-compliance. Also, there was no evidence that the test was administered improperly; thus, the trial court properly denied the motion to suppress.

**CORE TERMS:** motion to suppress, breath, gram, invalid, printout, alcohol, regulation, machine, driving, alcohol concentration, particularity, liters, substantially complied, influence of alcohol, suppression hearing, assignment of error, testing procedure, odor of alcohol, breath test, patrol car, milliliters, conducting, testing, sitting

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN1] When considering a motion to suppress, the trial court must weigh the evidence and judge the credibility of witnesses. Upon review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. After accepting such factual findings as true, the appellate court must then independently determine whether the applicable legal standard has been met as a matter of law.

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

[HN2] *Ohio R. Crim. P. 47* requires that a motion to suppress state its underlying legal and factual basis with sufficient particularity to place the prosecution and the trial court on notice of the issues to be decided.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

[HN3] *Ohio Admin. Code § 3701-53-01(A)* requires that all Breathalyzer test results be recorded and retained for a minimum of three years.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

[HN4] The *Ohio Admin. Code § 3701-53-02(B)*, -53-04(E) does require certain documents be kept for Breathalyzer testing for a period of three years. Those documents include checklist forms recording the results of subject tests, instrument checks, maintenance records, and the actual test results themselves.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Evidence > Scientific Evidence > Blood Alcohol*

[HN5] With respect to Breathalyzer test results, *Ohio Admin. Code § 3701-53-01(A)* states that "results" shall be expressed as equivalent to: (1) grams by weight of alcohol per 100 milliliters of blood (grams per cent by weight); (2) grams by weight of alcohol per 210 liters of deep lung breath; (3) grams by weight of alcohol per 100 milliliters of urine (grams per cent by weight). As can be clearly seen, a "result," as that term is defined above, does not encompass a result expressed as "invalid sample."

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN6] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures must comply with the department of health regulations. It is incumbent upon the person contesting the reliability of the test to raise the issue before the court. Only then is the prosecution required to prove that the test was conducted in substantial compliance with the applicable regulation.

**COUNSEL:** VICTOR V. VIGLUICCI, PORTAGE COUNTY PROSECUTOR, KELLI K. NORMAN, ASSISTANT PROSECUTOR, Ravenna, OH, (For Plaintiff-Appellee).

ATTY. NORMAN W. SANDVOSS, SANDVOSS & LENTZ, Ravenna, OH, (For Defendant-Appellant).

**JUDGES:** HON. DONALD R. FORD, P.J., HON. JUDITH A. CHRISTLEY, J., HON. ROBERT A. NADER, J. FORD, J., NADER, J., concur.

**OPINION BY:** JUDITH A. CHRISTLEY

**OPINION:** CHRISTLEY, J.

This is an accelerated calendar appeal submitted to the court on the briefs of the parties. Appellant, Tim Robinson, appeals from his conviction and sentence entered on a no contest plea in the Portage County Municipal Court, Ravenna Division. For the reasons that follow, we affirm the judgment of the trial court.

On October 22, 1998, at approximately 1:00 a.m., Trooper Todd Reider ("Trooper Reider") of the Ohio State Highway Patrol was monitoring traffic on a portion of State Route 59 in Portage County, Ohio. While sitting in a restaurant parking lot, Trooper Reider observed an approaching vehicle that appeared to be travelling in excess of the posted speed limit. [\*2] Trooper Reider activated his radar and clocked the vehicle at fifty-two m.p.h. in a thirty-five m.p.h. zone. Based on the vehicle's speed, Trooper Reider pulled onto State Route 59 and effected a traffic stop.

The officer approached the stopped vehicle and saw appellant sitting behind the steering wheel. When Trooper Reider asked appellant for his driver's license, the officer noticed an odor of alcohol emanating from within the vehicle. As a result, he asked appellant to walk back to his patrol car.

Once in the patrol car, Trooper Reider asked appellant if he had been drinking. Appellant told the officer that he had three drinks that night. During the conversation, Trooper Reider detected an odor of alcohol on appellant's breath. Accordingly, Trooper Reider performed several field sobriety tests on appellant. Due to appellant's poor performance on the tests, Trooper Reider determined that appellant was under the influence of alcohol and placed him under arrest.

Appellant was transported to the Ravenna Highway Patrol post. At the post, Trooper Reider asked appellant to submit to a breath test, to which appellant agreed. After observing appellant for the required twenty minutes, [\*3] Trooper Reider instructed appellant on how to properly breath into the machine. On his first attempt, appellant failed to blow into the machine long enough, and as a result, a reading of "invalid sample" was printed out. This printout was discarded by the officer.

On appellant's second attempt, the results of the test indicated that appellant had a concentration of alcohol of .118% of a gram per 210 liters of breath. Appellant was subsequently charged with speeding in violation of *R.C. 4511.21*, driving under the influence of alcohol in violation *R.C. 4511.19(A)(1)*, and driving with a prohibited breath alcohol concentration in violation of *R.C. 4511.19(A)(3)*.

On December 10, 1998, appellant filed a motion to suppress the results of the breath test. A hearing was held on January 27, 1999, at which time appellant stipulated to the results of the second test. At the conclusion of the evidence, the trial court overruled appellant's motion to suppress.

On March 4, 1999, appellant entered a plea of no contest to driving with a prohibited breath alcohol concentration. The remaining two charges were dismissed by [\*4] the trial court at the request of appellee. Appellant was sentenced accordingly. From this decision, appellant filed a timely notice of appeal with this court. He now asserts the following assignment of error for our review:

"The trial court erred to the prejudice of defendant-appellant in overruling his motion to suppress the

results of the B. A. C. verifier test because said testing procedure was not conducted in compliance with the Ohio Administrative Code Regulations."

[HN1] When considering a motion to suppress, the trial court must weigh the evidence and judge the credibility of witnesses. *State v. Koziol*, 1997 Ohio App. LEXIS 3877, \*13 (Aug. 29, 1997), Lake App. No. 96-L-193, unreported, 1997 WL 585913, citing *State v. DePew* (1988), 38 Ohio St. 3d 275, 277, 528 N.E.2d 542. Upon review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Koziol* at 4, citing *State v. Retherford* (1994), 93 Ohio App. 3d 586, 592, 639 N.E.2d 498. After accepting such factual findings as true, the appellate court must then independently determine whether the applicable legal standard has been met as a [\*5] matter of law. *Koziol* at 4; *Retherford* at 592.

First, we would like to note that appellant's motion to suppress did not raise with particularity the issue of Trooper Reider's disposing of the "invalid sample" printout. [HN2] *Crim.R. 47* requires that a motion to suppress state its underlying legal and factual basis with sufficient particularity to place the prosecution and the trial court on notice of the issues to be decided. *State v. Hominsky* (1995), 107 Ohio App. 3d 787, 791, 669 N.E.2d 523, citing *State v. Shindler* (1994), 70 Ohio St. 3d 54, 636 N.E.2d 319. Despite appellant's failure to strictly comply with *Crim.R. 47*, the prosecution did not object to appellant arguing this issue at the hearing on the motion to suppress. As a result, we will address the merits of appellant's appeal.

[HN3] *O.A.C. 3701-53-01(A)* requires that all Breathalyzer test results be recorded and retained for a minimum of three years. Based on this requirement, appellant argues that law enforcement officers should also keep printouts which reflect an "invalid sample." Appellant maintains that such a rule would prevent "unscrupulous law officers" from throwing away results below [\*6] the legal limit. In addition, appellant believes that the history of a machine cannot be properly tracked if there is no record of "failed tests." We disagree.

First, [HN4] the Ohio Administrative Code does require certain documents be kept for a period of three years. Those documents include checklist forms recording the results of subject tests, instrument checks, maintenance records, and the actual test results themselves. See, generally, *O.A.C. 3701-53-02(B)*; *O.A.C. 3701-53-04(E)*. [HN5] With respect to test results, *O.A.C. 3701-53-01(A)* states that "results" shall be expressed as equivalent to:

"(1) Grams by weight of alcohol per one hundred milliliters of blood (grams per cent by weight);

"(2) Grams by weight of alcohol per two hundred ten liters of deep lung breath;

"(3) Grams by weight of alcohol per one hundred milliliters of urine (grams per cent by weight)."

As can be clearly seen, a "result," as that term is defined above, does not encompass a result expressed as "invalid sample." Accordingly, we conclude that an officer conducting such a test is not required to retain a printout to that effect.

In addition, appellant has also failed to show that he suffered prejudice as [\*7] a result of any alleged noncompliance with Ohio Department of Health ("ODH") regulations. [HN6] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures must comply with ODH regulations. *Hominsky* at 795. It is incumbent upon the person contesting the reliability of the test to raise the issue before the court. Only then is the prosecution required to prove that the test was conducted in substantial compliance with the applicable regulation. *Defiance v. Kretz* (1991), 60 Ohio St. 3d 1, 3, 573 N.E.2d 32; *State v. Monsour*, 1997 Ohio App. LEXIS 5466, \*71 (Dec. 5, 1997), Portage App. No. 96-P-0274, unreported, 1997 WL 772941.

Here, appellant's attorney stipulated to the validity of the results of the second test at the beginning of the suppression hearing. Because appellant did not question those results, the prosecution did not introduce its calibration packet to show that the machine in question was working properly on the day appellant was tested. Accordingly, even assuming that the "invalid sample" printout should have been retained, we fail to see how the failure to do so affects the

validity of the second test, especially in light of [\*8] appellant's stipulation. In effect, by stipulating to the validity of the results of the second test, appellant conceded the fact that Trooper Reider had substantially complied with the relevant regulations when conducting the tests.

Furthermore, there is no evidence in the record, nor has appellant suggested, that the test was administered improperly or that the testing procedure was flawed in any way with respect to *either* test. During the suppression hearing, Trooper Reider testified that he retested appellant immediately after the "invalid sample" result came back. Before doing so, however, the officer once again explained to appellant what he needed to do to complete the test. In addition, Trooper Reider initiated a new testing sequence, which included removing the first mouthpiece and replacing it with a new one. Therefore, we conclude that, based on the evidence in the record, Trooper Reider substantially complied with the ODH regulations. Thus, the trial court properly denied appellant's motion to suppress.

Based on the foregoing analysis, appellant's assignment of error is meritless. The judgment of the trial court is affirmed.

JUDGE JUDITH A. CHRISTLEY

FORD, P. [\*9] J.,

NADER, J.,

concur.

103 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - TIM ROBINSON, Defendant-Appellant.****ACCELERATED CASE NO. 99-P-0019****COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
PORTAGE COUNTY***2000 Ohio App. LEXIS 2994***June 30, 2000, Decided****PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Portage County Municipal Court/Ravenna Division. Case No. R 98 TRC 19526S.

**DISPOSITION:**

Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant challenged a judgment of the Portage Municipal Court, Ravenna Division (Ohio) which convicted and sentenced him, following a no contest plea, for driving with a prohibited breath alcohol concentration in violation of *Ohio Rev. Code Ann. § 4511.19(A)(3)*.

**OVERVIEW:** A police trooper observed appellant speeding and stopped him. Upon questioning appellant, the trooper noticed the odor of alcohol and asked if appellant had been drinking. He was given a breathalyzer test at the station. The first test gave a response of invalid sample. The second test showed an alcohol level in excess of the amount allowed by law for a person driving. Appellant pleaded no contest. On appeal, appellant argued that the trial court erred in denying his motion to suppress the results of the breath verifier test as the procedure was not conducted in compliance with the Ohio Administrative Code Regulations. The court affirmed, because an officer conducting a breath test was not required to retain a printout of an invalid sample reading. Furthermore, appellant failed to show how he was prejudiced by the printout being thrown away. Additionally, there was no evidence that the second test was administered improperly. Appellant stipulated to the validity of the test which meant he stipulated to the trooper's compliance with regulations. There was no error in denying the motion.

**OUTCOME:** Judgment affirmed because appellant failed to show any non-compliance with the department of health regulations regarding the breath test, or any prejudice as a result of non-compliance. Also, there was no evidence that the test was administered improperly; thus, the trial court properly denied the motion to suppress.

**CORE TERMS:** motion to suppress, breath, gram, invalid, printout, alcohol, regulation, machine, driving, alcohol concentration, particularity, liters, substantially complied, influence of alcohol, suppression hearing, assignment of error, testing procedure, odor of alcohol, breath test, patrol car, milliliters, conducting, testing, sitting

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN1] When considering a motion to suppress, the trial court must weigh the evidence and judge the credibility of witnesses. Upon review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. After accepting such factual findings as true, the appellate court must then independently determine whether the applicable legal standard has been met as a matter of law.

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

[HN2] *Ohio R. Crim. P. 47* requires that a motion to suppress state its underlying legal and factual basis with sufficient particularity to place the prosecution and the trial court on notice of the issues to be decided.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

[HN3] *Ohio Admin. Code § 3701-53-01(A)* requires that all Breathalyzer test results be recorded and retained for a minimum of three years.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

[HN4] The *Ohio Admin. Code § 3701-53-02(B)*, -53-04(E) does require certain documents be kept for Breathalyzer testing for a period of three years. Those documents include checklist forms recording the results of subject tests, instrument checks, maintenance records, and the actual test results themselves.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Evidence > Scientific Evidence > Blood Alcohol*

[HN5] With respect to Breathalyzer test results, *Ohio Admin. Code § 3701-53-01(A)* states that "results" shall be expressed as equivalent to: (1) grams by weight of alcohol per 100 milliliters of blood (grams per cent by weight); (2) grams by weight of alcohol per 210 liters of deep lung breath; (3) grams by weight of alcohol per 100 milliliters of urine (grams per cent by weight). As can be clearly seen, a "result," as that term is defined above, does not encompass a result expressed as "invalid sample."

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN6] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures must comply with the department of health regulations. It is incumbent upon the person contesting the reliability of the test to raise the issue before the court. Only then is the prosecution required to prove that the test was conducted in substantial compliance with the applicable regulation.

**COUNSEL:** VICTOR V. VIGLUICCI, PORTAGE COUNTY PROSECUTOR, KELLI K. NORMAN, ASSISTANT PROSECUTOR, Ravenna, OH, (For Plaintiff-Appellee).

ATTY. NORMAN W. SANDVOSS, SANDVOSS & LENTZ, Ravenna, OH, (For Defendant-Appellant).

**JUDGES:** HON. DONALD R. FORD, P.J., HON. JUDITH A. CHRISTLEY, J., HON. ROBERT A. NADER, J. FORD, J., NADER, J., concur.

**OPINION BY:** JUDITH A. CHRISTLEY

**OPINION:** CHRISTLEY, J.

This is an accelerated calendar appeal submitted to the court on the briefs of the parties. Appellant, Tim Robinson, appeals from his conviction and sentence entered on a no contest plea in the Portage County Municipal Court, Ravenna Division. For the reasons that follow, we affirm the judgment of the trial court.

On October 22, 1998, at approximately 1:00 a.m., Trooper Todd Reider ("Trooper Reider") of the Ohio State Highway Patrol was monitoring traffic on a portion of State Route 59 in Portage County, Ohio. While sitting in a restaurant parking lot, Trooper Reider observed an approaching vehicle that appeared to be travelling in excess of the posted speed limit. [\*2] Trooper Reider activated his radar and clocked the vehicle at fifty-two m.p.h. in a thirty-five m.p.h. zone. Based on the vehicle's speed, Trooper Reider pulled onto State Route 59 and effected a traffic stop.

The officer approached the stopped vehicle and saw appellant sitting behind the steering wheel. When Trooper Reider asked appellant for his driver's license, the officer noticed an odor of alcohol emanating from within the vehicle. As a result, he asked appellant to walk back to his patrol car.

Once in the patrol car, Trooper Reider asked appellant if he had been drinking. Appellant told the officer that he had three drinks that night. During the conversation, Trooper Reider detected an odor of alcohol on appellant's breath. Accordingly, Trooper Reider performed several field sobriety tests on appellant. Due to appellant's poor performance on the tests, Trooper Reider determined that appellant was under the influence of alcohol and placed him under arrest.

Appellant was transported to the Ravenna Highway Patrol post. At the post, Trooper Reider asked appellant to submit to a breath test, to which appellant agreed. After observing appellant for the required twenty minutes, [\*3] Trooper Reider instructed appellant on how to properly breath into the machine. On his first attempt, appellant failed to blow into the machine long enough, and as a result, a reading of "invalid sample" was printed out. This printout was discarded by the officer.

On appellant's second attempt, the results of the test indicated that appellant had a concentration of alcohol of .118% of a gram per 210 liters of breath. Appellant was subsequently charged with speeding in violation of *R.C. 4511.21*, driving under the influence of alcohol in violation *R.C. 4511.19(A)(1)*, and driving with a prohibited breath alcohol concentration in violation of *R.C. 4511.19(A)(3)*.

On December 10, 1998, appellant filed a motion to suppress the results of the breath test. A hearing was held on January 27, 1999, at which time appellant stipulated to the results of the second test. At the conclusion of the evidence, the trial court overruled appellant's motion to suppress.

On March 4, 1999, appellant entered a plea of no contest to driving with a prohibited breath alcohol concentration. The remaining two charges were dismissed by [\*4] the trial court at the request of appellee. Appellant was sentenced accordingly. From this decision, appellant filed a timely notice of appeal with this court. He now asserts the following assignment of error for our review:

"The trial court erred to the prejudice of defendant-appellant in overruling his motion to suppress the

results of the B. A. C. verifier test because said testing procedure was not conducted in compliance with the Ohio Administrative Code Regulations."

[HN1] When considering a motion to suppress, the trial court must weigh the evidence and judge the credibility of witnesses. *State v. Koziol*, 1997 Ohio App. LEXIS 3877, \*13 (Aug. 29, 1997), Lake App. No. 96-L-193, unreported, 1997 WL 585913, citing *State v. DePew* (1988), 38 Ohio St. 3d 275, 277, 528 N.E.2d 542. Upon review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Koziol* at 4, citing *State v. Retherford* (1994), 93 Ohio App. 3d 586, 592, 639 N.E.2d 498. After accepting such factual findings as true, the appellate court must then independently determine whether the applicable legal standard has been met as a [\*5] matter of law. *Koziol* at 4; *Retherford* at 592.

First, we would like to note that appellant's motion to suppress did not raise with particularity the issue of Trooper Reider's disposing of the "invalid sample" printout. [HN2] *Crim.R. 47* requires that a motion to suppress state its underlying legal and factual basis with sufficient particularity to place the prosecution and the trial court on notice of the issues to be decided. *State v. Hominsky* (1995), 107 Ohio App. 3d 787, 791, 669 N.E.2d 523, citing *State v. Shindler* (1994), 70 Ohio St. 3d 54, 636 N.E.2d 319. Despite appellant's failure to strictly comply with *Crim.R. 47*, the prosecution did not object to appellant arguing this issue at the hearing on the motion to suppress. As a result, we will address the merits of appellant's appeal.

[HN3] *O.A.C. 3701-53-01(A)* requires that all Breathalyzer test results be recorded and retained for a minimum of three years. Based on this requirement, appellant argues that law enforcement officers should also keep printouts which reflect an "invalid sample." Appellant maintains that such a rule would prevent "unscrupulous law officers" from throwing away results below [\*6] the legal limit. In addition, appellant believes that the history of a machine cannot be properly tracked if there is no record of "failed tests." We disagree.

First, [HN4] the Ohio Administrative Code does require certain documents be kept for a period of three years. Those documents include checklist forms recording the results of subject tests, instrument checks, maintenance records, and the actual test results themselves. See, generally, *O.A.C. 3701-53-02(B)*; *O.A.C. 3701-53-04(E)*. [HN5] With respect to test results, *O.A.C. 3701-53-01(A)* states that "results" shall be expressed as equivalent to:

"(1) Grams by weight of alcohol per one hundred milliliters of blood (grams per cent by weight);

"(2) Grams by weight of alcohol per two hundred ten liters of deep lung breath;

"(3) Grams by weight of alcohol per one hundred milliliters of urine (grams per cent by weight)."

As can be clearly seen, a "result," as that term is defined above, does not encompass a result expressed as "invalid sample." Accordingly, we conclude that an officer conducting such a test is not required to retain a printout to that effect.

In addition, appellant has also failed to show that he suffered prejudice as [\*7] a result of any alleged noncompliance with Ohio Department of Health ("ODH") regulations. [HN6] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures must comply with ODH regulations. *Hominsky* at 795. It is incumbent upon the person contesting the reliability of the test to raise the issue before the court. Only then is the prosecution required to prove that the test was conducted in substantial compliance with the applicable regulation. *Defiance v. Kretz* (1991), 60 Ohio St. 3d 1, 3, 573 N.E.2d 32; *State v. Monsour*, 1997 Ohio App. LEXIS 5466, \*71 (Dec. 5, 1997), Portage App. No. 96-P-0274, unreported, 1997 WL 772941.

Here, appellant's attorney stipulated to the validity of the results of the second test at the beginning of the suppression hearing. Because appellant did not question those results, the prosecution did not introduce its calibration packet to show that the machine in question was working properly on the day appellant was tested. Accordingly, even assuming that the "invalid sample" printout should have been retained, we fail to see how the failure to do so affects the

validity of the second test, especially in light of [\*8] appellant's stipulation. In effect, by stipulating to the validity of the results of the second test, appellant conceded the fact that Trooper Reider had substantially complied with the relevant regulations when conducting the tests.

Furthermore, there is no evidence in the record, nor has appellant suggested, that the test was administered improperly or that the testing procedure was flawed in any way with respect to *either* test. During the suppression hearing, Trooper Reider testified that he retested appellant immediately after the "invalid sample" result came back. Before doing so, however, the officer once again explained to appellant what he needed to do to complete the test. In addition, Trooper Reider initiated a new testing sequence, which included removing the first mouthpiece and replacing it with a new one. Therefore, we conclude that, based on the evidence in the record, Trooper Reider substantially complied with the ODH regulations. Thus, the trial court properly denied appellant's motion to suppress.

Based on the foregoing analysis, appellant's assignment of error is meritless. The judgment of the trial court is affirmed.

JUDGE JUDITH A. CHRISTLEY

FORD, P. [\*9] J.,

NADER, J.,

concur.

104 of 195 DOCUMENTS

**VILLAGE OF GRANVILLE, Plaintiff-Appellee -vs- EMILY T. NORRIS,  
Defendant-Appellant****Case No. 99CA00042****COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, LICKING  
COUNTY***1999 Ohio App. LEXIS 5503***November 17, 1999, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Appeal from the Licking County Municipal Court. Case No. 98TRC13721.

**DISPOSITION:** JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant sought review of her conviction in Licking County Municipal Court (Ohio), on one count of operating a motor vehicle after underage consumption, in violation of *Ohio Rev. Code Ann. § 4511.19(B)(2)*, claiming error in trial court's failure to suppress breath blood alcohol test evidence.

**OVERVIEW:** Appellant sought review of her conviction for operating a motor vehicle after underage consumption, in violation of *Ohio Rev. Code Ann. § 4511.19(B)(2)*, claiming error in trial court's failure to suppress breath blood alcohol test evidence. Appellant maintained that appellee city failed to prove compliance with the Ohio Department of Health Regulations relative to the calibration of the blood alcohol content machine used during appellant's test. The court found that testimony established that appellee proved substantial compliance with the regulations. Accordingly, trial court did not err in overruling appellant's motion to suppress on this issue. Appellant also argued that appellee failed to establish the scientific reliability of the breath testing process. The court found that a statement made by appellee was tantamount to appellee asking the trial court to take judicial notice of the court's prior Daubert determination of the scientific reliability of the instrument check and the calibration solution.

**OUTCOME:** Affirmed because testimony established that appellee proved substantial compliance with the regulations relative to the calibration of the blood alcohol content machine and because appellee properly asked trial court to take judicial notice of court's prior Daubert determination of the scientific reliability of the instrument check and the calibration solution.

**CORE TERMS:** calibration, bottle, reliability, scientific, breath, retrieved, machine, judicial notice, refrigerator, testing, motion to suppress, findings of fact, refrigerated, sentence, assignment of error, scientific evidence, testing procedure, motor vehicle, machine used, commencement, consumption, regulations, dispatcher, permission, proceeded, depleted, manifest, underage, kitchen, senior

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN1] There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case.

***Civil Procedure > Appeals > Standards of Review > De Novo Review******Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.

***Evidence > Judicial Notice > General Overview***

[HN3] A court which has received evidence in a case previously before it may take judicial notice of its previous finding in a later case.

**COUNSEL:** For Plaintiff-Appellee: ELENA V. TUHY, GRANVILLE PROSECUTOR, Newark, Ohio.

For Defendant-Appellant: JONATHAN T. TYACK, Columbus, Ohio.

**JUDGES:** Hon. W. Scott Gwin, P.J., Hon. William B. Hoffman, J., Hon. Sheila G. Farmer, J. Gwin, P.J. and Farmer, J. concur.

**OPINION BY:** William B. Hoffman

**OPINION:**

OPINION

Hoffman, J.

Defendant-appellant Emily T. Norris appeals her conviction and sentence entered by the Licking County Municipal Court on one count of operating a motor vehicle after underage consumption, in violation of *R.C. 4511.19(B)(2)*. Plaintiff-appellee is the Village of Granville.

**STATEMENT OF THE CASE AND FACTS**

At approximately 12:30 a.m. on October 17, 1998, Officer Sean Eitel of the Granville Police Department observed a vehicle traveling at an excessive rate of speed. Officer Eitel activated his radar unit, which clocked the vehicle at forty-seven miles per hour, twelve miles per hour over the posted speed limit. Thereafter, the officer initiated a routine traffic stop of the vehicle. Appellant was identified as the driver. Officer [\*2] Eitel subsequently arrested appellant, who was eighteen years old at the time, for operating a motor vehicle after underage consumption, in violation of *R.C.*

4511.19(B)(2). At her arraignment on November 18, 1998, appellant entered a plea of not guilty to the charge. On November 20, 1998, appellant filed a Motion to Suppress/in Limine, which was predicated on two grounds. First, appellant asserted the Village failed to comply with the procedures and regulations set forth by the Ohio Department of Health in calibrating the BAC Datamaster machine used to test her. Additionally, appellant challenged the scientific reliability of the breath test, in general, arguing the breath testing process does not comply with the criteria set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, and adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St. 3d 607, 687 N.E.2d 735. The trial court conducted a hearing on the motion on February 3, 1999. At the hearing, Granville Police Officer Susanna C. Dawson testified she is a senior [\*3] operator of the BAC Datamaster machine and calibrated the Granville Police Department machine on October 18, 1998, subsequent to appellant's test. Officer Dawson's testimony revealed the calibration check was done in accordance with the Ohio Department of Health Regulations. Granville Police Officer David S. Baer testified he is a senior operator of the BAC Datamaster machine and was on duty on October 11, 1998. As part of his duties that day, he conducted an instrument check on the Granville Police Department's machine. Officer Baer explained he performed the instrument check in accordance with the check list prescribed on the BAC instrument check form. With regard to the calibration solution used during the instrument check, the officer stated he obtained a bottle of solution from the department refrigerator. Officer Baer further testified he had used this particular bottle of calibration solution when he performed the October 4, 1998 instrument check. Prior to his testimony in the instant action, Officer Baer testified in the case of *State v. Henry Baker*, Licking County Municipal Court Case No. 98-TRC-13721. During his testimony in the Baker case, Baer stated he obtained the bottle [\*4] of calibration solution used in conducting the October 11, 1998 instrument check from the Ohio State Highway Patrol on October 11, 1998. During his direct examination in the instant action, the officer stated his testimony in the Baker case was inaccurate and he had actually obtained the bottle of calibration solution used to perform the instrument checks on October 4, 1998, and October 11, 1998, from the Heath Police Department on October 4, 1998. Officer Baer explained, in September, 1998, the Granville Police Department had depleted its supply of calibration solution, and, as of October 4, 1998, the supply had not been replenished. As such, on October 4, 1998, Officer Baer contacted the Ohio State Highway Patrol and asked to borrow a bottle of calibration solution. After receiving permission from OSHP, Officer Baer proceeded to the Heath Police Department, where a BAC Datamaster machine belonging to the OSHP is located. Upon his arrival, the dispatcher buzzed the officer in, he walked into the kitchen area and retrieved a bottle of calibration solution out of the refrigerator. During his cross-examination, Officer Baer acknowledged he had no personal knowledge of how the particular [\*5] bottle of calibration solution he retrieved had been opened or stored at any time prior to October 4, 1998. During his redirect examination, the officer stated with confidence, the bottle of calibration solution had not been opened more than three months prior to October 4, 1998. Officer Baer recalled this information from a notation on the actual bottle. At the commencement of the hearing, Prosecutor Elena Tuhy for the Village stated: In regards to the challenge to the scientific reliability of the calibration or the instrument check solution, I would renew the arguments I've made the last few times in regards to relying on the previous testimony of Dr. Sutteimer from the Ohio Department of Health and I believe the Court still has a copy of that testimony. Thank you.

Transcript of February 3, 1999 Hearing on Motion to Suppress at 5. After hearing all the evidence and taking the matter under consideration, the trial court denied appellant's Motion to Suppress/in Limine via Judgment Entry dated March 12, 1999. Thereafter, on April 22, 1999, appellant entered a plea of no contest to the charge. The trial court sentenced appellant to thirty days in jail. The trial court suspended twenty-seven [\*6] of those days and placed appellant on probation for a period of one year. It is from this conviction and sentence appellant appeals, raising the following assignment of error:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S BREATH TEST RESULTS. (JUDGMENT ENTRY FILED MARCH 12, 1999, ATTACHED HERETO AS EXHIBIT B).

A. THE VILLAGE OF GRANVILLE FAILED TO PROVE COMPLIANCE WITH THE OHIO DEPARTMENT OF HEALTH REGULATIONS REGARDING THE CALIBRATION OF THE B.A.C. DATAMASTER MACHINE.

B. THE VILLAGE OF GRANVILLE FAILED TO ESTABLISH THE SCIENTIFIC RELIABILITY OF THE BREATH TESTING PROCESS.

STANDARD OF REVIEW

[HN1] There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. See: *State v. Fanning* (1982), 1 Ohio St. 3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App. 3d 486, 597 N.E.2d 1141, *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E.2d 726. Second, [\*7] an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See: *State v. Williams* (1993), 86 Ohio App. 3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App. 3d 93, 96, 641 N.E.2d 1172, *State v. Claytor* (1993), 85 Ohio App. 3d 623, 627, 620 N.E.2d 906, 908, and *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E.2d 726. As the United States Supreme Court held in [HN2] *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911, ". . . as a general matter determinations of reasonable [\*8] suspicion and probable cause should be reviewed de novo on appeal."

I.A.

In the first prong of her argument, appellant maintains the Village failed to prove compliance with the Ohio Department of Health Regulations relative to the calibration of the BAC Datamaster machine used during appellant's test. Specifically, appellant argues the Village failed to establish the calibration solution was refrigerated "when not being used" at all times "after first use" as required by *Ohio Administrative Code section 3701-53-04(C)*. At the hearing, Officers Dawson and Baer testified regarding the instrument checks they conducted on October 4, 1998, October 11, 1998, and October 18, 1998. Relative to the October 11, 1998, and the October 18, 1998 instrument checks, Officers Baer and Dawson testified, respectively, he/she retrieved the calibration solution from the refrigerator at the Granville Police Department. Regarding the October 4, 1998 instrument check, Officer Baer testified the Granville Police Department had depleted its supply of calibration solution in September, 1998, and, on October 4, 1998, he received permission from OSHP to obtain a bottle of calibration solution located at the Heath [\*9] Police Department. Officer Baer further testified when he arrived at the Heath Police Department on October 4, 1998, the dispatcher buzzed him in, and he proceeded to the kitchen area where he retrieved a bottle of calibration solution from the refrigerator. We find Officer Baer's testimony, when he retrieved the solution from the Heath Police Department on October 4, 1998, it was refrigerated provides sufficient circumstantial evidence from which the trial court could conclude the Heath Police Department properly refrigerated the solution in compliance with the Ohio Department Health Regulations. We further find this evidence coupled with the testimony of Officers Dawson and Baer relative to the refrigeration of the solution at the Granville Police Department from October 4, 1998, after Officer Baer obtained it from the Heath Police Department, through October 18, 1998, establishes the Village proved substantial compliance with the regulations. Accordingly, we find the trial court did not err in overruling appellant's motion to suppress on this issue. Appellant's assignment of error is overruled on this ground.

I.B.

In her second prong of her argument, appellant argues the Village [\*10] failed to establish the scientific reliability of the breath testing process. Specifically, appellant argues, "although the scientific reliability of the breath testing procedure was called into question \* \* \* no expert testimony or other scientific evidence was ever presented to support the reliability of the breath testing procedure." Brief of Appellant at 7. Appellant maintains the trial court had an obligation to independently review the reliability of the scientific evidence prior to its admission pursuant to *Daubert v.*

*Merrell Dow, supra*, and *Miller v. Bike Athletic Co., supra*. At the commencement of the hearing, the Village informed the trial court it wished to renew the arguments it had made in prior cases with respect to appellant's challenge of the scientific reliability of the instrument check and the calibration solution. We find this statement is tantamount to the Village asking the trial court to take judicial notice of the court's prior determination of the scientific reliability of the instrument check and the calibration solution. The trial court denied appellant's motion to suppress on this issue, finding "the scientific testing of the breath [\*11] of Defendants (sic) as set out under the Ohio Administrative Code and the Ohio Revised Code and as put in place by the Ohio Department of Health meets the standards promulgated by the Ohio Supreme Court and United States Supreme Court." March 12, 1999 Judgment Entry at 4-5. Implicit in this finding is the trial court's acknowledgment it took judicial notice of its previous determination of the scientific reliability of the breath testing process pursuant to *Daubert v. Merrell Dow, supra*; and [HN3] *Miller v. Bike Athletic, supra*. We hold a court which has received evidence in a case previously before it may take judicial notice of its previous finding in a later case. See, *State v. Gazdak, 1991 Ohio App. LEXIS 4598* (September 30, 1991), Geauga App. No. 90-G-1611, unreported. Because the trial court properly took judicial notice of its previous determination of the scientific reliability of the instrument check and the calibration solution, we find the court did not err in overruling appellant's motion on this issue. Appellant's assignment of error is overruled on this ground.

The conviction and sentence of the Licking County Municipal Court is affirmed.

By: Hoffman, J. Gwin, P.J. and Farmer, [\*12] J. concur

105 of 195 DOCUMENTS

**VILLAGE OF GRANVILLE, Plaintiff-Appellee -vs- EMILY T. NORRIS,  
Defendant-Appellant****Case No. 99CA00042****COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, LICKING  
COUNTY***1999 Ohio App. LEXIS 5503***November 17, 1999, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Appeal from the Licking County Municipal Court. Case No. 98TRC13721.

**DISPOSITION:** JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant sought review of her conviction in Licking County Municipal Court (Ohio), on one count of operating a motor vehicle after underage consumption, in violation of *Ohio Rev. Code Ann. § 4511.19(B)(2)*, claiming error in trial court's failure to suppress breath blood alcohol test evidence.

**OVERVIEW:** Appellant sought review of her conviction for operating a motor vehicle after underage consumption, in violation of *Ohio Rev. Code Ann. § 4511.19(B)(2)*, claiming error in trial court's failure to suppress breath blood alcohol test evidence. Appellant maintained that appellee city failed to prove compliance with the Ohio Department of Health Regulations relative to the calibration of the blood alcohol content machine used during appellant's test. The court found that testimony established that appellee proved substantial compliance with the regulations. Accordingly, trial court did not err in overruling appellant's motion to suppress on this issue. Appellant also argued that appellee failed to establish the scientific reliability of the breath testing process. The court found that a statement made by appellee was tantamount to appellee asking the trial court to take judicial notice of the court's prior Daubert determination of the scientific reliability of the instrument check and the calibration solution.

**OUTCOME:** Affirmed because testimony established that appellee proved substantial compliance with the regulations relative to the calibration of the blood alcohol content machine and because appellee properly asked trial court to take judicial notice of court's prior Daubert determination of the scientific reliability of the instrument check and the calibration solution.

**CORE TERMS:** calibration, bottle, reliability, scientific, breath, retrieved, machine, judicial notice, refrigerator, testing, motion to suppress, findings of fact, refrigerated, sentence, assignment of error, scientific evidence, testing procedure, motor vehicle, machine used, commencement, consumption, regulations, dispatcher, permission, proceeded, depleted, manifest, underage, kitchen, senior

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence******Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN1] There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case.

***Civil Procedure > Appeals > Standards of Review > De Novo Review******Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN2] As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.

***Evidence > Judicial Notice > General Overview***

[HN3] A court which has received evidence in a case previously before it may take judicial notice of its previous finding in a later case.

**COUNSEL:** For Plaintiff-Appellee: ELENA V. TUHY, GRANVILLE PROSECUTOR, Newark, Ohio.

For Defendant-Appellant: JONATHAN T. TYACK, Columbus, Ohio.

**JUDGES:** Hon. W. Scott Gwin, P.J., Hon. William B. Hoffman, J., Hon. Sheila G. Farmer, J. Gwin, P.J. and Farmer, J. concur.

**OPINION BY:** William B. Hoffman

**OPINION:**

OPINION

Hoffman, J.

Defendant-appellant Emily T. Norris appeals her conviction and sentence entered by the Licking County Municipal Court on one count of operating a motor vehicle after underage consumption, in violation of *R.C. 4511.19(B)(2)*. Plaintiff-appellee is the Village of Granville.

**STATEMENT OF THE CASE AND FACTS**

At approximately 12:30 a.m. on October 17, 1998, Officer Sean Eitel of the Granville Police Department observed a vehicle traveling at an excessive rate of speed. Officer Eitel activated his radar unit, which clocked the vehicle at forty-seven miles per hour, twelve miles per hour over the posted speed limit. Thereafter, the officer initiated a routine traffic stop of the vehicle. Appellant was identified as the driver. Officer [\*2] Eitel subsequently arrested appellant, who was eighteen years old at the time, for operating a motor vehicle after underage consumption, in violation of *R.C.*

4511.19(B)(2). At her arraignment on November 18, 1998, appellant entered a plea of not guilty to the charge. On November 20, 1998, appellant filed a Motion to Suppress/in Limine, which was predicated on two grounds. First, appellant asserted the Village failed to comply with the procedures and regulations set forth by the Ohio Department of Health in calibrating the BAC Datamaster machine used to test her. Additionally, appellant challenged the scientific reliability of the breath test, in general, arguing the breath testing process does not comply with the criteria set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, and adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St. 3d 607, 687 N.E.2d 735. The trial court conducted a hearing on the motion on February 3, 1999. At the hearing, Granville Police Officer Susanna C. Dawson testified she is a senior [\*3] operator of the BAC Datamaster machine and calibrated the Granville Police Department machine on October 18, 1998, subsequent to appellant's test. Officer Dawson's testimony revealed the calibration check was done in accordance with the Ohio Department of Health Regulations. Granville Police Officer David S. Baer testified he is a senior operator of the BAC Datamaster machine and was on duty on October 11, 1998. As part of his duties that day, he conducted an instrument check on the Granville Police Department's machine. Officer Baer explained he performed the instrument check in accordance with the check list prescribed on the BAC instrument check form. With regard to the calibration solution used during the instrument check, the officer stated he obtained a bottle of solution from the department refrigerator. Officer Baer further testified he had used this particular bottle of calibration solution when he performed the October 4, 1998 instrument check. Prior to his testimony in the instant action, Officer Baer testified in the case of *State v. Henry Baker*, Licking County Municipal Court Case No. 98-TRC-13721. During his testimony in the Baker case, Baer stated he obtained the bottle [\*4] of calibration solution used in conducting the October 11, 1998 instrument check from the Ohio State Highway Patrol on October 11, 1998. During his direct examination in the instant action, the officer stated his testimony in the Baker case was inaccurate and he had actually obtained the bottle of calibration solution used to perform the instrument checks on October 4, 1998, and October 11, 1998, from the Heath Police Department on October 4, 1998. Officer Baer explained, in September, 1998, the Granville Police Department had depleted its supply of calibration solution, and, as of October 4, 1998, the supply had not been replenished. As such, on October 4, 1998, Officer Baer contacted the Ohio State Highway Patrol and asked to borrow a bottle of calibration solution. After receiving permission from OSHP, Officer Baer proceeded to the Heath Police Department, where a BAC Datamaster machine belonging to the OSHP is located. Upon his arrival, the dispatcher buzzed the officer in, he walked into the kitchen area and retrieved a bottle of calibration solution out of the refrigerator. During his cross-examination, Officer Baer acknowledged he had no personal knowledge of how the particular [\*5] bottle of calibration solution he retrieved had been opened or stored at any time prior to October 4, 1998. During his redirect examination, the officer stated with confidence, the bottle of calibration solution had not been opened more than three months prior to October 4, 1998. Officer Baer recalled this information from a notation on the actual bottle. At the commencement of the hearing, Prosecutor Elena Tuhy for the Village stated: In regards to the challenge to the scientific reliability of the calibration or the instrument check solution, I would renew the arguments I've made the last few times in regards to relying on the previous testimony of Dr. Sutteimer from the Ohio Department of Health and I believe the Court still has a copy of that testimony. Thank you.

Transcript of February 3, 1999 Hearing on Motion to Suppress at 5. After hearing all the evidence and taking the matter under consideration, the trial court denied appellant's Motion to Suppress/in Limine via Judgment Entry dated March 12, 1999. Thereafter, on April 22, 1999, appellant entered a plea of no contest to the charge. The trial court sentenced appellant to thirty days in jail. The trial court suspended twenty-seven [\*6] of those days and placed appellant on probation for a period of one year. It is from this conviction and sentence appellant appeals, raising the following assignment of error:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S BREATH TEST RESULTS. (JUDGMENT ENTRY FILED MARCH 12, 1999, ATTACHED HERETO AS EXHIBIT B).

A. THE VILLAGE OF GRANVILLE FAILED TO PROVE COMPLIANCE WITH THE OHIO DEPARTMENT OF HEALTH REGULATIONS REGARDING THE CALIBRATION OF THE B.A.C. DATAMASTER MACHINE.

B. THE VILLAGE OF GRANVILLE FAILED TO ESTABLISH THE SCIENTIFIC RELIABILITY OF THE BREATH TESTING PROCESS.

STANDARD OF REVIEW

[HN1] There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. See: *State v. Fanning* (1982), 1 Ohio St. 3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App. 3d 486, 597 N.E.2d 1141, *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E.2d 726. Second, [\*7] an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See: *State v. Williams* (1993), 86 Ohio App. 3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App. 3d 93, 96, 641 N.E.2d 1172, *State v. Claytor* (1993), 85 Ohio App. 3d 623, 627, 620 N.E.2d 906, 908, and *State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E.2d 726. As the United States Supreme Court held in [HN2] *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911, ". . . as a general matter determinations of reasonable [\*8] suspicion and probable cause should be reviewed de novo on appeal."

I.A.

In the first prong of her argument, appellant maintains the Village failed to prove compliance with the Ohio Department of Health Regulations relative to the calibration of the BAC Datamaster machine used during appellant's test. Specifically, appellant argues the Village failed to establish the calibration solution was refrigerated "when not being used" at all times "after first use" as required by *Ohio Administrative Code section 3701-53-04(C)*. At the hearing, Officers Dawson and Baer testified regarding the instrument checks they conducted on October 4, 1998, October 11, 1998, and October 18, 1998. Relative to the October 11, 1998, and the October 18, 1998 instrument checks, Officers Baer and Dawson testified, respectively, he/she retrieved the calibration solution from the refrigerator at the Granville Police Department. Regarding the October 4, 1998 instrument check, Officer Baer testified the Granville Police Department had depleted its supply of calibration solution in September, 1998, and, on October 4, 1998, he received permission from OSHP to obtain a bottle of calibration solution located at the Heath [\*9] Police Department. Officer Baer further testified when he arrived at the Heath Police Department on October 4, 1998, the dispatcher buzzed him in, and he proceeded to the kitchen area where he retrieved a bottle of calibration solution from the refrigerator. We find Officer Baer's testimony, when he retrieved the solution from the Heath Police Department on October 4, 1998, it was refrigerated provides sufficient circumstantial evidence from which the trial court could conclude the Heath Police Department properly refrigerated the solution in compliance with the Ohio Department Health Regulations. We further find this evidence coupled with the testimony of Officers Dawson and Baer relative to the refrigeration of the solution at the Granville Police Department from October 4, 1998, after Officer Baer obtained it from the Heath Police Department, through October 18, 1998, establishes the Village proved substantial compliance with the regulations. Accordingly, we find the trial court did not err in overruling appellant's motion to suppress on this issue. Appellant's assignment of error is overruled on this ground.

I.B.

In her second prong of her argument, appellant argues the Village [\*10] failed to establish the scientific reliability of the breath testing process. Specifically, appellant argues, "although the scientific reliability of the breath testing procedure was called into question \* \* \* no expert testimony or other scientific evidence was ever presented to support the reliability of the breath testing procedure." Brief of Appellant at 7. Appellant maintains the trial court had an obligation to independently review the reliability of the scientific evidence prior to its admission pursuant to *Daubert v.*

*Merrell Dow, supra*, and *Miller v. Bike Athletic Co., supra*. At the commencement of the hearing, the Village informed the trial court it wished to renew the arguments it had made in prior cases with respect to appellant's challenge of the scientific reliability of the instrument check and the calibration solution. We find this statement is tantamount to the Village asking the trial court to take judicial notice of the court's prior determination of the scientific reliability of the instrument check and the calibration solution. The trial court denied appellant's motion to suppress on this issue, finding "the scientific testing of the breath [\*11] of Defendants (sic) as set out under the Ohio Administrative Code and the Ohio Revised Code and as put in place by the Ohio Department of Health meets the standards promulgated by the Ohio Supreme Court and United States Supreme Court." March 12, 1999 Judgment Entry at 4-5. Implicit in this finding is the trial court's acknowledgment it took judicial notice of its previous determination of the scientific reliability of the breath testing process pursuant to *Daubert v. Merrell Dow, supra*; and [HN3] *Miller v. Bike Athletic, supra*. We hold a court which has received evidence in a case previously before it may take judicial notice of its previous finding in a later case. See, *State v. Gazdak, 1991 Ohio App. LEXIS 4598* (September 30, 1991), Geauga App. No. 90-G-1611, unreported. Because the trial court properly took judicial notice of its previous determination of the scientific reliability of the instrument check and the calibration solution, we find the court did not err in overruling appellant's motion on this issue. Appellant's assignment of error is overruled on this ground.

The conviction and sentence of the Licking County Municipal Court is affirmed.

By: Hoffman, J. Gwin, P.J. and Farmer, [\*12] J. concur

106 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- PATRICIA WALTON,  
Defendant-Appellant**

**Case No. 98 CA 00046**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD  
COUNTY**

*1999 Ohio App. LEXIS 3277*

**June 30, 1999, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal Appeal from the Lancaster Municipal Court. Case No. 97-TRC-12410.

**DISPOSITION:** JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant challenged a decision and journal entry from the Lancaster Municipal Court (Ohio) overruling her motion to suppress evidence after appellant was convicted of driving while under the influence and speeding.

**OVERVIEW:** Appellant's vehicle was stopped for speeding. Appellant was arrested and charged with speeding and driving under the influence of alcohol. Appellant was found guilty and the appeal followed. Appellant challenged the trial court's finding that appellant was guilty of exceeding the speed limit, contending that such finding was not supported by sufficient evidence. Appellant specifically asserted that there was insufficient evidence to support her conviction since no expert testimony was offered by the State nor did the court take judicial notice of the scientific foundation and reliability of the radar. The court noted that the prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly. Defendant's conviction and sentence was affirmed because the arresting officer testified in detail as to how the radar unit was calibrated prior to and after appellant's arrest and that the machine was working properly.

**OUTCOME:** Appellant's conviction for speeding was affirmed because there was sufficient evidence and testimony to support the reliability of the radar device used to determine that appellant was speeding.

**CORE TERMS:** breath, testing, batch, target, bottle, motor vehicle, machine, assignment of error, alcohol, radar, violating, concentration, scientific, overruling, influence of alcohol, expert testimony, withdrawn, driving, blood, urine, breath sample, alcohol level, blood alcohol, manifest, manufacturer, calibration, blood alcohol level, trier of fact,

regulations, sentenced

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN1] A fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

[HN2] Pursuant to *Ohio Rev. Code Ann. § 3701.143*, the director of health shall determine, or cause to be determined, the techniques or methods for chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol in the person's blood, urine, breath, or other bodily substance. *Ohio Rev. Code Ann. § 3701.143* further provides that the director of health shall approve satisfactory techniques or methods. To accomplish this task, the Department of Health has established a protocol under Ohio Administrative Code Chapter 3701.

#### ***Contracts Law > Negotiable Instruments > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN3] Ohio Admin. Code § 3701:53-04(A) states that an instrument check on approved evidential breath testing instruments shall be performed no less than once every seven days using an instrument check solution containing ethyl alcohol approved by the director of health. Such section further provides that an instrument check solution is valid when the result is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. While the Department of Health has authority to determine the techniques and methods for testing blood, urine, breath or other bodily substances, the Ohio Department of Health may not abuse its discretion in doing so. An abuse of discretion has been defined as an unreasonable, arbitrary or unconscionable act.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Juvenile Offenders > Alcohol Offenses***

#### ***Evidence > Scientific Evidence > Blood Alcohol***

[HN4] See *Ohio Rev. Code Ann. § 4511.19(D)(1)*.

#### ***Civil Procedure > Judgments > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Witnesses > General Overview***

[HN5] On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Judicial Notice > General Overview  
Evidence > Testimony > Experts > General Overview***

[HN6] Courts have taken judicial notice of the reliability of radar units. The Ohio Supreme Court specifically stated as follows: the court is in accord with the trend of the most recent decisions that readings of a radar speed meter may be accepted in evidence, just as the court accepts photographs, x-rays, electroencephalographs, speedometer readings, and the like, without the necessity of offering expert testimony as to the scientific principles underlying them.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN7] The Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN8] The prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly.

**COUNSEL:** For Plaintiff-Appellee: PATRICK N. HARRIS City Prosecutor's Office, Lancaster, OH.

For Defendant-Appellant: SCOTT P. WOOD, Lancaster, OH.

**JUDGES:** Hon. John Wise, P.J. Hon. Sheila Farmer, J. Hon. Julie Edwards, J. By Edwards, J. Wise, P. J. and Farmer, J. concur. WISE, P. J., CONCURRING. FARMER, J. CONCURRING.

**OPINION BY:** Julie Edwards

**OPINION:**

OPINION

Edwards, J.

Defendant-appellant Patricia Walton appeals from the May 18, 1998, Decision and Journal Entry of the Lancaster Municipal Court overruling her Motion to Suppress and the final Entry entered by such court on June 17, 1998.

STATEMENT OF THE FACTS AND CASE

On November 28, 1997, at approximately 1:21 A.M. Trooper Tito Duran, who is with the State Highway Patrol, made a traffic stop of appellant's vehicle for speeding. Duran, who was in uniform, was driving a cruiser at the time. Using a K-55 radar, Trooper Duran had clocked appellant's vehicle as traveling at the rate of 68 miles per hour in a 55 miles per hour zone. After stopping appellant, Trooper Duran noticed a moderate odor of alcohol emanating from [\*2]

appellant and her vehicle. For such reason, after having appellant exit her vehicle, he performed a horizontal gaze nystagmus check on appellant's eyes and asked appellant to perform field sobriety tests to determine if she was driving while impaired. Based upon the results of the horizontal gaze nystagmus and the field sobriety tests, which he believed were consistent with those of someone under the influence of alcohol, and the fact that appellant, once in the police cruiser, smelled of alcohol, Trooper Duran arrested appellant for driving under the influence of alcohol. Following her arrest, appellant was taken to the State Highway Patrol post where she submitted to a chemical breath test that was performed using a BAC Datamaster. Appellant's test yielded a result of .105 grams of alcohol per 210 liters of breath. Thereafter, appellant was charged with operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(1)*, operating a motor vehicle while having a prohibited alcohol level in violation of *4511.19(A)(3)* and operating a motor vehicle over the posted speed limit, in violation of *R.C. 4511.21(D)*, [\*3] On December 30, 1997, appellant filed a Motion to Suppress the results of her breath test alleging, in the third branch of her motion, that "the instrument check solution used to check the breath machine is inherently untrustworthy and incapable of being verified by the Ohio Department of Health and, therefore, the Director of the Ohio Department of Health has abused his discretion in approving the instrument check solution..." Appellant, in branches 1, 2 and 4 of her Motion to Suppress, also argued: (1) that Trooper Duran's stop of her was illegal, (2) that certain Ohio Department of Health regulations regarding breath testing were not substantially complied with, and (4) that she was not advised of her Miranda rights before oral and written statements were obtained from her by the police. An oral hearing on branches 1, 2 and 4 of appellant's Motion to Suppress was held on March 23, 1998. At the conclusion of the hearing, the trial court took the matter under consideration. On April 27, 1998, an oral hearing on the third branch of appellant's Motion to Suppress was held. For the purposes of the April 27, 1998, hearing only, appellant's case was consolidated with 98-TRC-186, State [\*4] of Ohio v. Marcus Riders. Pursuant to a Decision and Journal Entry filed on May 18, 1998, the trial court overruled appellant's Motion to Suppress with regard to branch 3 of such motion, holding that "since the breath machines used to test [both appellant and Rider] were checked by an instrument check solution which was reliable and supported by sound scientific principles, the Director of the Ohio Department of Health has not abused his discretion in affirming the previously approved instrument check solution." No decision was filed either granting or denying the other three branches of appellant's motion. A bench trial before Judge Don S. McAuliffe was held on June 17, 1998. Prior to the start of the testimony, appellant's counsel moved, pursuant to *R.C. 2941.32*, for an order requiring the prosecution to elect whether to proceed under *4511.19(A)(1)* or *4511.19(A)(3)*. The trial court denied appellant's oral motion. At the conclusion of the trial, the trial court found appellant not guilty of violating *R.C. 4511.19(A)(1)*, operating a motor vehicle while under the influence of alcohol, but guilty of violating both *4511.21(D)*, exceeding [\*5] the speed limits, and *4511.19(A)(3)*, operating a motor vehicle with a prohibited alcohol level. With respect to the speeding offense, appellant was fined \$ 25.00 while, with respect to the driving under the influence offense, appellant was fined \$ 350.00, ordered to pay court costs and sentenced to ten days in jail. The trial court, however, suspended seven days of appellant's sentence and stated that it would credit her with three days attendance at a residential alcohol program. In addition, appellant's driver's license was suspended for 180 days. A sentencing entry was filed on June 17, 1998. It is from the May 18, 1998, and June 17, 1998, Entries that appellant prosecutes her appeal, raising the following assignments of error:

1. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO RULE ON BRANCHES 1, 2, AND 4 OF DEFENDANT'S MOTION TO SUPPRESS.

2. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING BRANCH 3 OF DEFENDANT'S MOTION TO SUPPRESS.

3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING DEFENDANT'S MOTION TO ORDER THE STATE TO ELECT BETWEEN THE *R.C. SECTION 4511.19(A)(1)* CHARGE AND *R.C. 4511.19(A)(3)* [\*6] CHARGE.

4. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL ON THE *R.C. SECTION 4511.19(A)(3)* CHARGE.

5. THE TRIAL COURT FINDING THAT DEFENDANT WAS GUILTY OF VIOLATING *R.C. SECTION 4511.19(A)(3)* WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

6. THE TRIAL COURT FINDING THAT DEFENDANT WAS GUILTY OF VIOLATING *R.C. 4511.21(D)* WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

## I

Appellant, in her first assignment of error, contends that the trial court's failure to rule on branches 1, 2 and 4 of appellant's Motion to Suppress after the March 23, 1998, oral hearing constituted prejudicial error since "a ruling in [appellant's] favor could have resulted in the dismissal of all charges and/or suppression of material evidence." At the conclusion of the March 23, 1998, hearing, the trial court took the matter under consideration. Appellant is correct in her assertion that the trial court failed to journalize its decision on branches 1, 2, and 4 of her Motion to Suppress. However, "[HN1] the fundamental rule is that an appellate court will not consider any error which could have been [\*7] brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co. (1982), 70 Ohio St. 2d 207, 210, 436 N.E.2d 1001*. Had the trial court's failure to rule on branches 1, 2, and 4 of the appellant's Motion to Suppress been brought to the trial court's attention, the trial court could have issued a ruling as to such branches. Moreover, when a trial court fails to rule upon a motion, an appellate court generally will presume the trial court overruled the motion. *Akbar-el v. Muhammed (1995), 105 Ohio App. 3d 81, 663 N.E.2d 703*. In view of this presumption, we find the trial court did not err in failing to rule on branches 1, 2 and 4 of appellant's Motion to Suppress. Furthermore, presuming the trial court overruled branches 1, 2, and 4 of appellant's Motion to Suppress, we find that the trial court's ruling was proper. Appellant, in the first branch of her motion, alleged that Trooper Duran's stop of her was illegal. The trial court correctly overruled branch 1 of appellant's motion since, based on the K-55 reading, Trooper Duran had probable cause to arrest appellant for speeding. The second branch of appellant's motion challenged the compliance [\*8] with Ohio Department of Health regulations regarding breath testing machines. The State, at the March 23, 1998, suppression hearing, demonstrated that there was substantial compliance with Ohio Department of Health regulations regarding testing of BAC machines. Trooper Duran testified at the hearing that, in compliance with such regulations, the patrol post customarily checks the calibration of a breath machine every seven days and that the subject breath machine was checked on November 16, 1997 and then again on November 23, 1997, five days before appellant's arrest. See Transcript of March 23, 1998, hearing at 52 - 53. Duran further testified that the subject breath machine was again checked seven days later on November 30, 1997, which is after appellant's arrest. The State, in support of Trooper Duran's testimony, submitted records documenting the calibration of the machine. Defense counsel objected to the records only on grounds of hearsay since neither were the individuals who had prepared such records present at the hearing nor were the records authenticated by the records custodian or certified. See Transcript of March 23, 1998, hearing at 60. The trial court, however, admitted [\*9] the records over appellant's objection, finding that they were kept in the regular course of business. Thus, the trial court properly overruled branch two of appellant's Motion to Suppress. Appellant, in branch 4 of her Motion to Suppress, argued that she was not advised of her Miranda rights before oral and written statements were obtained from her by the police. However, since no oral or written statements were obtained from appellant nor admitted at trial, the trial court did not err in overruling branch 4 of appellant's motion. Appellant's first assignment of error is denied.

## II

In her second assignment of error, appellant argues that the trial court committed prejudicial error in overruling branch 3 of her Motion to Suppress. Appellant was charged with violating *R.C. 4511.19(A)(1)* and (A)(3) after submitting to a BAC Datamaster and testing .105. Appellant specifically challenges the trial court's finding that the instrument check solution, batch number 97220, used to check the calibration of the breath testing machine in appellant's case, is reliable and has been subjected to scientific verification by the Ohio Department of Health. [HN2] Pursuant to *R.C. 3701.143*, [\*10] the director of health shall determine, or cause to be determined, the techniques or methods for "chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol...in the person's blood, urine, breath, or other bodily substance." *R.C. 3701.143* further provides that

the director of health "shall approve satisfactory techniques or methods." To accomplish this task, the Department of Health has established a protocol under Ohio Administrative Code Chapter 3701. [HN3] Ohio Adm. Code 3701:53-04(A) states that an instrument check on approved evidential breath testing instruments shall be performed no less than once every seven days using an instrument check solution containing ethyl alcohol approved by the director of health. Such section further provides that an instrument check solution is valid when the result is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. While the Department of Health has authority to determine the techniques and methods for testing blood, urine, breath or other bodily substances, the Ohio Department [\*11] of Health may not abuse its discretion in doing so. See *State v. Sebach*, 1998 Ohio App. LEXIS 5122 (1998), Knox App. No. 97 CA 24, unreported. An abuse of discretion has been defined as an unreasonable, arbitrary or unconscionable act. *Blakemore v Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140. At the April 27, 1998, hearing, Dr. Craig Sutheimer, a Deputy Director at the Ohio Department of Health and Chief of the Alcohol Testing Program, testified that instrument check solution batch number 97220 is manufactured by Steifel Research and sold under a Guth Laboratories label. When the Ohio Department of Health purchases a solution such as batch number 97220 for use in a breathalyzer machine, it receives an affidavit from the manufacturer indicating the amount of alcohol in the solution (the "target value"). Thereafter, the Ohio Department of Health independently tests four sample bottles out of the batch four times each, for a total of sixteen tests, to confirm the accuracy of the target value that the manufacturer assigns to the solution. The testing performed by the Department of Health is not itself used to establish a target value. If the target value is found to be accurate, the Ohio Department [\*12] of Health certifies the solution. Batch number 97220, which contained 1,800 bottles, was certified at Dr. Sutheimer's recommendation by the Ohio Department of Health on September 30, 1997, despite the fact that Dr. Sutheimer's repeated inquiries to Steifel Research for documentation as to the quality control used in establishing the target value and as to the number of tests run went unanswered. At such point in time, Dr. Sutheimer also had been unable to get into visit Steifel Research. After visiting Steifel Research on November 21, 1997, Dr. Sutheimer discovered that Steifel Research had only analyzed three bottles out of batch number 97220 and had sent two additional bottles out to Adirondack Lab for testing prior to providing the Ohio Department of Health with an affidavit assigning the target value. At the April 27, 1998, hearing, Dr. Sutheimer testified to a reasonable degree of scientific certainty that at the time the solution certificate was issued by the Ohio Department of Health on September 30, 1997, "neither the manufacturer nor the Department of Health had analyzed enough bottles to set a true target for batch number 97220." Transcript of Proceedings at 55. For batch [\*13] number 97220, a minimum of six to eight bottles should have been tested by one entity, namely Steifel, to set a true target value. See Transcript of April 27, 1998, hearing at 82-84. For such reason, during the first week of December of 1997, Steifel tested ten additional unopened bottles of batch 97220 which had been sent to it by the Ohio Department of Health for analysis. Dr. Sutheimer, however, admitted that the ten bottles did not represent a perfect random selection since he gave Steifel every bottle that he had on hand. A perfect random selection would have been done prior to the entire batch of 1,800 bottles being released. However, Dr. Sutheimer did state that the ten bottles sent were "random in nature." They were the last ten bottles left in the batch and were bottle numbers 217, 233, 344, 498, 740, 749, 1,034, 1,073, 1,801, and 1,815. (Transcript at Pages 73 and 74). Dr. Sutheimer, who personally went to Steifel Labs to review the raw data of the further testing that was performed in December of 1997, testified that "it is the testing done in December that makes me feel comfortable as to what the true target value is". Transcript at 70. He was, however, not present for [\*14] such testing. Based on the testing performed in December of 1997, we find that the instrument check solution batch number 97220 is reliable. The Ohio Department of Health did abuse its discretion in approving batch number 97220 on September 30, 1997, when it certified the solution and blindly accepted Steifel's target value for the batch. However, the subsequent testing done on batch number 97220 in December, 1997, was based on sound scientific procedure and the target value set through that December, 1997, testing was the same target value originally set through the earlier insufficient testing, and was the same target value certified by the Director of the Ohio Department of Health on September 30, 1997. We agree with our colleagues from the Third District Court of Appeals when they found that the solution of ethyl alcohol from batch number 97220 was reliable since it was confirmed through subsequent scientific testing that that batch contained the amount of ethyl alcohol previously certified by the *Director of Health*. *State v. Miller*, 1998 Ohio App. LEXIS 6198 unreported, Court of Appeals of Ohio, Third District, Marion County, Dec. 15, 1998, No. 9-98-42. Appellant's second assignment of error is overruled. [\*15]

## III

In her third assignment of error, appellant asserts that the trial court committed prejudicial error in overruling her motion to order the State to elect between the *R.C. 4511.19(A)(1)* charge, driving under the influence of alcohol, and the *R.C. 4511.19(A)(3)* charge, driving with a prohibited alcohol level. While the trial court overruled appellant's motion, it held that appellant could only be convicted and sentenced for one offense. Appellant specifically points to *R.C. 2941.32* which provides as follows: "if two or more indictments or informations are pending against the same defendant for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and upon trial being had upon one of them, the remaining indictments or information shall be quashed." However, *R.C. 4511.19(A)(1)* and (3) have been held to create separate offenses. *State v. Mendieta (1984)*, 20 Ohio App. 3d 18, 484 N.E.2d 180. See also *State v. Wilcox (1983)*, 10 Ohio App. 3d 11, 460 N.E.2d 323. A defendant, therefore, may be charged with both and found guilty [\*16] of both, but may only be sentenced as to one. *Id.* Since appellant was not sentenced on both charges, the trial court did not err in overruling appellant's motion and allowing the State to pursue both charges. Appellant's third assignment of error is denied.

## IV, V

In her fourth assignment of error, appellant argues that the trial court committed prejudicial error in overruling her motion for acquittal on the *R.C. 4511.19(A)(3)* charge, operating a motor vehicle with a prohibited alcohol level. Appellant had moved for acquittal at the conclusion of the State's case pursuant to *Criminal Rule 29* since the State did not correlate the results of appellant's blood alcohol test, which was taken within two hours of the alleged offense as mandated by *R.C. 4511.19(D)(1)*, to her blood alcohol level at the time of appellant's operation of the motor vehicle. Appellant's blood alcohol test, which was taken approximately 53 minutes after the operation of a motor vehicle, indicated a blood alcohol level of .105 grams of alcohol per 210 liters of breath. [HN4] *R.C. 4511.19(D)(1)* states as follows: "In any criminal prosecution or [\*17] juvenile court proceeding for a violation of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, the court may admit evidence on the concentration of alcohol, drugs of abuse, or alcohol and drugs of abuse in the defendant's blood, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance withdrawn within two hours of the time of the alleged violation." (Emphasis added)

As the Sixth District Court of Appeals stated in *State v. Ulrich (1984)*, 17 Ohio App. 3d 182, 191, 478 N.E.2d 812:

"Clearly, it is the intent of the Ohio Legislature in prosecutions under *R.C. 4511.19(A)(3)* to have admitted, as evidence of the alleged offender's concentration of alcohol in the alleged offender's breath at the time of the alleged offense, a chemical analysis of the alleged offender's breath provided that the breath [\*18] sample was withdrawn according to established guidelines. It is a legislative determination that a breath sample withdrawn within two hours of the alleged offense will accurately reflect the alleged offender's alcohol content, by weight, in the withdrawn breath sample at the time of the alleged offense. Thus, the amount of alcohol concentration in the alleged offender's breath at the time of the alleged offense is shown by a chemical analysis of a sample of the alleged offender's breath which is withdrawn within two hours of the time of the alleged violation."

Since appellant's breath sample was taken within two hours of the alleged violation, the trial court correctly determined that it accurately reflected appellant's blood alcohol content at the time of the offense. The trial court, therefore, did not err in overruling appellant's Motion for Acquittal on the *R.C. 4511.19(A)(3)* charge. Similarly, in her fifth assignment of error, appellant contends that the trial court's finding that appellant was guilty of violating *R.C. 4511.19(A)(3)*, operation of a motor vehicle with a prohibited level of alcohol, was against the manifest weight [\*19] of the evidence. [HN5] On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the

judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E.2d 212, syllabus 1. Appellant specifically asserts that the trial court's finding that appellant was guilty of violating 4511.19(A)(3) was against the manifest weight of the evidence since the State did not correlate appellant's [\*20] "chemical test reflecting blood alcohol level to the time of the alleged operation of the motor vehicle in rebuttal to expert testimony...that, at the time of [the] alleged operation of a motor vehicle, a defendant's blood alcohol level was under the legal limit." At appellant's trial, Dr. Alfred Staubus, appellant's expert witness, testified that at the time appellant last operated the motor vehicle, it is possible to a reasonable degree of medical certainty that her blood alcohol concentration was less than .100. Dr. Staubus further testified that, assuming the State's chemical test was accurate, appellant's alcohol level could have been as low as .087 or as high as .123, and that any stomach acid in her mouth due to regurgitation could have affected the outcome of her blood alcohol concentration test. However, "expert testimony is not necessary to correlate intoxilyzer test results to the time of the alleged offense." *Ulrich, supra at 191*. Rather, a defendant "may challenge the accuracy of his specific test result through the use of expert testimony, to show that he could not have produced the test result claimed by the prosecution under those circumstances." *City of Columbus v. Day* (1985), 24 Ohio App. 3d 173, 493 N.E.2d 1002, [\*21] syllabus. The testimony of Dr. Staubus was presented by appellant for such purpose. The State, however, was not required to rebut Dr. Staubus' testimony by presenting expert testimony correlating appellant's test results to the time of the alleged offense since, as is stated above, a breath sample withdrawn within two hours of the alleged offense has been legislatively determined to accurately reflect the alleged offender's alcohol content at the time of the alleged offense. Upon consideration of the record, this court cannot say that the trial judge, as trier of fact, clearly lost his way and created a manifest miscarriage of justice. Appellant's fourth and fifth assignments of error are overruled.

## VI

In her final assignment of error, appellant challenges the trial court's finding that appellant was guilty of violating *R.C. 4511.21(D)*, exceeding the speed limit, contending that such finding was not supported by sufficient evidence. Appellant specifically asserts that there was insufficient evidence to support her conviction since no expert testimony was offered by the State nor did the court take judicial notice of the scientific foundation and reliability [\*22] of the K55 radar. [HN6] Courts have taken judicial notice of the reliability of radar units. See *City of East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630 and *City of Xenia v. Boehman* (1996), 114 Ohio App. 3d 78, 682 N.E.2d 1029. The Ohio Supreme Court, in *Ferrell*, specifically stated as follows: "We are in accord with the trend of the most recent decisions that readings of a radar speed meter may be accepted in evidence, just as we accept photographs, x-rays, electroencephalographs, speedometer readings, and the like, without the necessity of offering expert testimony as to the scientific principles underlying them." 168 Ohio St. at 303. In *State v. Jenks* (1981), 61 Ohio St. 3d 259, 574 N.E.2d 492, [HN7] the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is [\*23] whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks, supra*, at paragraph two of the syllabus.

When applying the aforementioned standard of review to the case sub judice, based upon the facts noted supra, we do not find, as a matter of law, appellant's conviction for violating *R.C. 4511.21(D)* was based upon insufficient evidence. [HN8] The prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device "was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly ...". *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630, syllabus. At the March 23,

1998, hearing on appellant's Motion to Suppress and at appellant's trial, Trooper Duran, who has a certificate from the Department of Health authorizing him to perform breath tests using a BAC Datamaster, also testified as to his training and certification to operate the K55 radar unit. Trooper Duran laid the foundation [\*24] for the admission of the results of the K55 radar by testifying in detail as to how the radar unit was calibrated both prior to and after appellant's arrest and by testifying as to his certification and experience in the use of the same. Trooper Duran testified that he checked to verify that his machine was working properly both before and after his shift on November 28, 1997, and that based on his training and experience, his machine was working properly when he clocked appellant's vehicle. The record clearly indicates that Duran laid a foundation for the trial court considering him as an expert. See *State v. Woods*, 1993 Ohio App. LEXIS 2218 (April 15, 1993), Stark App. No. CA-9115, unreported. The court finds, therefore, that the trial court's finding that appellant was guilty of violating R.C. 4511.21(D) was supported by sufficient evidence. Appellant's sixth assignment of error is denied.

The judgment of the Lancaster Municipal Court is affirmed.

By Edwards, J. Wise, P. J. and Farmer, J. concur

**CONCUR BY:** John Wise; Sheila Farmer

**CONCUR:**

WISE, P. J., CONCURRING

I concur with the result of the majority's opinion but on different legal rationale.

FARMER, J. CONCURRING

I concur with [\*25] the opinion but for different reasons. In Assignment of Error II, appellant claimed the trial court erred in denying her challenge to the datamaster's check solution, batch number 97220. Specifically, appellant had argued said solution was unreliable and had not been subject to scientific verification. In *State v. Sebach*, 1998 Ohio App. LEXIS 5122 (September 25, 1998), Knox App. No. 97CA24, unreported, and *State v. Miracle*, 1998 Ohio App. LEXIS 5118 (September 25, 1998), Knox App. No. 97CA25, unreported, this court reviewed the Ohio Department of Health's protocol in certifying calibration solutions and found it to be in compliance with Ohio Adm.Code 3701:53-04(A). Specifically, this court held at 6 "the Department of Health qualifies a batch of calibration solutions by using its own procedures and affirms that the testing samples fall within the manufacturer's target concentration value. Once the Department of Health makes that quality assurance determination, it is not necessary to know the manufacturer's procedures." Based upon this holding, there is no need to rely on the subsequent testing of the ten bottles after the fact.

107 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee -vs- PATRICIA WALTON,  
Defendant-Appellant**

**Case No. 98 CA 00046**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD  
COUNTY**

*1999 Ohio App. LEXIS 3277*

**June 30, 1999, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal Appeal from the Lancaster Municipal Court. Case No. 97-TRC-12410.

**DISPOSITION:** JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant challenged a decision and journal entry from the Lancaster Municipal Court (Ohio) overruling her motion to suppress evidence after appellant was convicted of driving while under the influence and speeding.

**OVERVIEW:** Appellant's vehicle was stopped for speeding. Appellant was arrested and charged with speeding and driving under the influence of alcohol. Appellant was found guilty and the appeal followed. Appellant challenged the trial court's finding that appellant was guilty of exceeding the speed limit, contending that such finding was not supported by sufficient evidence. Appellant specifically asserted that there was insufficient evidence to support her conviction since no expert testimony was offered by the State nor did the court take judicial notice of the scientific foundation and reliability of the radar. The court noted that the prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly. Defendant's conviction and sentence was affirmed because the arresting officer testified in detail as to how the radar unit was calibrated prior to and after appellant's arrest and that the machine was working properly.

**OUTCOME:** Appellant's conviction for speeding was affirmed because there was sufficient evidence and testimony to support the reliability of the radar device used to determine that appellant was speeding.

**CORE TERMS:** breath, testing, batch, target, bottle, motor vehicle, machine, assignment of error, alcohol, radar, violating, concentration, scientific, overruling, influence of alcohol, expert testimony, withdrawn, driving, blood, urine, breath sample, alcohol level, blood alcohol, manifest, manufacturer, calibration, blood alcohol level, trier of fact,

regulations, sentenced

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

#### ***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN1] A fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

[HN2] Pursuant to *Ohio Rev. Code Ann. § 3701.143*, the director of health shall determine, or cause to be determined, the techniques or methods for chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol in the person's blood, urine, breath, or other bodily substance. *Ohio Rev. Code Ann. § 3701.143* further provides that the director of health shall approve satisfactory techniques or methods. To accomplish this task, the Department of Health has established a protocol under Ohio Administrative Code Chapter 3701.

#### ***Contracts Law > Negotiable Instruments > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN3] Ohio Admin. Code § 3701:53-04(A) states that an instrument check on approved evidential breath testing instruments shall be performed no less than once every seven days using an instrument check solution containing ethyl alcohol approved by the director of health. Such section further provides that an instrument check solution is valid when the result is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. While the Department of Health has authority to determine the techniques and methods for testing blood, urine, breath or other bodily substances, the Ohio Department of Health may not abuse its discretion in doing so. An abuse of discretion has been defined as an unreasonable, arbitrary or unconscionable act.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Juvenile Offenders > Alcohol Offenses***

#### ***Evidence > Scientific Evidence > Blood Alcohol***

[HN4] See *Ohio Rev. Code Ann. § 4511.19(D)(1)*.

#### ***Civil Procedure > Judgments > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements***

#### ***Criminal Law & Procedure > Witnesses > General Overview***

[HN5] On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Judicial Notice > General Overview  
Evidence > Testimony > Experts > General Overview*

[HN6] Courts have taken judicial notice of the reliability of radar units. The Ohio Supreme Court specifically stated as follows: the court is in accord with the trend of the most recent decisions that readings of a radar speed meter may be accepted in evidence, just as the court accepts photographs, x-rays, electroencephalographs, speedometer readings, and the like, without the necessity of offering expert testimony as to the scientific principles underlying them.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor  
Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*

[HN7] The Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN8] The prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly.

**COUNSEL:** For Plaintiff-Appellee: PATRICK N. HARRIS City Prosecutor's Office, Lancaster, OH.

For Defendant-Appellant: SCOTT P. WOOD, Lancaster, OH.

**JUDGES:** Hon. John Wise, P.J. Hon. Sheila Farmer, J. Hon. Julie Edwards, J. By Edwards, J. Wise, P. J. and Farmer, J. concur. WISE, P. J., CONCURRING. FARMER, J. CONCURRING.

**OPINION BY:** Julie Edwards

**OPINION:**

OPINION

Edwards, J.

Defendant-appellant Patricia Walton appeals from the May 18, 1998, Decision and Journal Entry of the Lancaster Municipal Court overruling her Motion to Suppress and the final Entry entered by such court on June 17, 1998.

STATEMENT OF THE FACTS AND CASE

On November 28, 1997, at approximately 1:21 A.M. Trooper Tito Duran, who is with the State Highway Patrol, made a traffic stop of appellant's vehicle for speeding. Duran, who was in uniform, was driving a cruiser at the time. Using a K-55 radar, Trooper Duran had clocked appellant's vehicle as traveling at the rate of 68 miles per hour in a 55 miles per hour zone. After stopping appellant, Trooper Duran noticed a moderate odor of alcohol emanating from [\*2]

appellant and her vehicle. For such reason, after having appellant exit her vehicle, he performed a horizontal gaze nystagmus check on appellant's eyes and asked appellant to perform field sobriety tests to determine if she was driving while impaired. Based upon the results of the horizontal gaze nystagmus and the field sobriety tests, which he believed were consistent with those of someone under the influence of alcohol, and the fact that appellant, once in the police cruiser, smelled of alcohol, Trooper Duran arrested appellant for driving under the influence of alcohol. Following her arrest, appellant was taken to the State Highway Patrol post where she submitted to a chemical breath test that was performed using a BAC Datamaster. Appellant's test yielded a result of .105 grams of alcohol per 210 liters of breath. Thereafter, appellant was charged with operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(1)*, operating a motor vehicle while having a prohibited alcohol level in violation of *4511.19(A)(3)* and operating a motor vehicle over the posted speed limit, in violation of *R.C. 4511.21(D)*, [\*3] On December 30, 1997, appellant filed a Motion to Suppress the results of her breath test alleging, in the third branch of her motion, that "the instrument check solution used to check the breath machine is inherently untrustworthy and incapable of being verified by the Ohio Department of Health and, therefore, the Director of the Ohio Department of Health has abused his discretion in approving the instrument check solution..." Appellant, in branches 1, 2 and 4 of her Motion to Suppress, also argued: (1) that Trooper Duran's stop of her was illegal, (2) that certain Ohio Department of Health regulations regarding breath testing were not substantially complied with, and (4) that she was not advised of her Miranda rights before oral and written statements were obtained from her by the police. An oral hearing on branches 1, 2 and 4 of appellant's Motion to Suppress was held on March 23, 1998. At the conclusion of the hearing, the trial court took the matter under consideration. On April 27, 1998, an oral hearing on the third branch of appellant's Motion to Suppress was held. For the purposes of the April 27, 1998, hearing only, appellant's case was consolidated with 98-TRC-186, State [\*4] of Ohio v. Marcus Riders. Pursuant to a Decision and Journal Entry filed on May 18, 1998, the trial court overruled appellant's Motion to Suppress with regard to branch 3 of such motion, holding that "since the breath machines used to test [both appellant and Rider] were checked by an instrument check solution which was reliable and supported by sound scientific principles, the Director of the Ohio Department of Health has not abused his discretion in affirming the previously approved instrument check solution." No decision was filed either granting or denying the other three branches of appellant's motion. A bench trial before Judge Don S. McAuliffe was held on June 17, 1998. Prior to the start of the testimony, appellant's counsel moved, pursuant to *R.C. 2941.32*, for an order requiring the prosecution to elect whether to proceed under *4511.19(A)(1)* or *4511.19(A)(3)*. The trial court denied appellant's oral motion. At the conclusion of the trial, the trial court found appellant not guilty of violating *R.C. 4511.19(A)(1)*, operating a motor vehicle while under the influence of alcohol, but guilty of violating both *4511.21(D)*, exceeding [\*5] the speed limits, and *4511.19(A)(3)*, operating a motor vehicle with a prohibited alcohol level. With respect to the speeding offense, appellant was fined \$ 25.00 while, with respect to the driving under the influence offense, appellant was fined \$ 350.00, ordered to pay court costs and sentenced to ten days in jail. The trial court, however, suspended seven days of appellant's sentence and stated that it would credit her with three days attendance at a residential alcohol program. In addition, appellant's driver's license was suspended for 180 days. A sentencing entry was filed on June 17, 1998. It is from the May 18, 1998, and June 17, 1998, Entries that appellant prosecutes her appeal, raising the following assignments of error:

1. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO RULE ON BRANCHES 1, 2, AND 4 OF DEFENDANT'S MOTION TO SUPPRESS.

2. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING BRANCH 3 OF DEFENDANT'S MOTION TO SUPPRESS.

3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING DEFENDANT'S MOTION TO ORDER THE STATE TO ELECT BETWEEN THE *R.C. SECTION 4511.19(A)(1)* CHARGE AND *R.C. 4511.19(A)(3)* [\*6] CHARGE.

4. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL ON THE *R.C. SECTION 4511.19(A)(3)* CHARGE.

5. THE TRIAL COURT FINDING THAT DEFENDANT WAS GUILTY OF VIOLATING *R.C. SECTION 4511.19(A)(3)* WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

6. THE TRIAL COURT FINDING THAT DEFENDANT WAS GUILTY OF VIOLATING *R.C. 4511.21(D)* WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

## I

Appellant, in her first assignment of error, contends that the trial court's failure to rule on branches 1, 2 and 4 of appellant's Motion to Suppress after the March 23, 1998, oral hearing constituted prejudicial error since "a ruling in [appellant's] favor could have resulted in the dismissal of all charges and/or suppression of material evidence." At the conclusion of the March 23, 1998, hearing, the trial court took the matter under consideration. Appellant is correct in her assertion that the trial court failed to journalize its decision on branches 1, 2, and 4 of her Motion to Suppress. However, "[HN1] the fundamental rule is that an appellate court will not consider any error which could have been [\*7] brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co. (1982), 70 Ohio St. 2d 207, 210, 436 N.E.2d 1001*. Had the trial court's failure to rule on branches 1, 2, and 4 of the appellant's Motion to Suppress been brought to the trial court's attention, the trial court could have issued a ruling as to such branches. Moreover, when a trial court fails to rule upon a motion, an appellate court generally will presume the trial court overruled the motion. *Akbar-el v. Muhammed (1995), 105 Ohio App. 3d 81, 663 N.E.2d 703*. In view of this presumption, we find the trial court did not err in failing to rule on branches 1, 2 and 4 of appellant's Motion to Suppress. Furthermore, presuming the trial court overruled branches 1, 2, and 4 of appellant's Motion to Suppress, we find that the trial court's ruling was proper. Appellant, in the first branch of her motion, alleged that Trooper Duran's stop of her was illegal. The trial court correctly overruled branch 1 of appellant's motion since, based on the K-55 reading, Trooper Duran had probable cause to arrest appellant for speeding. The second branch of appellant's motion challenged the compliance [\*8] with Ohio Department of Health regulations regarding breath testing machines. The State, at the March 23, 1998, suppression hearing, demonstrated that there was substantial compliance with Ohio Department of Health regulations regarding testing of BAC machines. Trooper Duran testified at the hearing that, in compliance with such regulations, the patrol post customarily checks the calibration of a breath machine every seven days and that the subject breath machine was checked on November 16, 1997 and then again on November 23, 1997, five days before appellant's arrest. See Transcript of March 23, 1998, hearing at 52 - 53. Duran further testified that the subject breath machine was again checked seven days later on November 30, 1997, which is after appellant's arrest. The State, in support of Trooper Duran's testimony, submitted records documenting the calibration of the machine. Defense counsel objected to the records only on grounds of hearsay since neither were the individuals who had prepared such records present at the hearing nor were the records authenticated by the records custodian or certified. See Transcript of March 23, 1998, hearing at 60. The trial court, however, admitted [\*9] the records over appellant's objection, finding that they were kept in the regular course of business. Thus, the trial court properly overruled branch two of appellant's Motion to Suppress. Appellant, in branch 4 of her Motion to Suppress, argued that she was not advised of her Miranda rights before oral and written statements were obtained from her by the police. However, since no oral or written statements were obtained from appellant nor admitted at trial, the trial court did not err in overruling branch 4 of appellant's motion. Appellant's first assignment of error is denied.

## II

In her second assignment of error, appellant argues that the trial court committed prejudicial error in overruling branch 3 of her Motion to Suppress. Appellant was charged with violating *R.C. 4511.19(A)(1)* and (A)(3) after submitting to a BAC Datamaster and testing .105. Appellant specifically challenges the trial court's finding that the instrument check solution, batch number 97220, used to check the calibration of the breath testing machine in appellant's case, is reliable and has been subjected to scientific verification by the Ohio Department of Health. [HN2] Pursuant to *R.C. 3701.143*, [\*10] the director of health shall determine, or cause to be determined, the techniques or methods for "chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol...in the person's blood, urine, breath, or other bodily substance." *R.C. 3701.143* further provides that

the director of health "shall approve satisfactory techniques or methods." To accomplish this task, the Department of Health has established a protocol under Ohio Administrative Code Chapter 3701. [HN3] Ohio Adm. Code 3701:53-04(A) states that an instrument check on approved evidential breath testing instruments shall be performed no less than once every seven days using an instrument check solution containing ethyl alcohol approved by the director of health. Such section further provides that an instrument check solution is valid when the result is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. While the Department of Health has authority to determine the techniques and methods for testing blood, urine, breath or other bodily substances, the Ohio Department [\*11] of Health may not abuse its discretion in doing so. See *State v. Sebach*, 1998 Ohio App. LEXIS 5122 (1998), Knox App. No. 97 CA 24, unreported. An abuse of discretion has been defined as an unreasonable, arbitrary or unconscionable act. *Blakemore v Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140. At the April 27, 1998, hearing, Dr. Craig Sutheimer, a Deputy Director at the Ohio Department of Health and Chief of the Alcohol Testing Program, testified that instrument check solution batch number 97220 is manufactured by Steifel Research and sold under a Guth Laboratories label. When the Ohio Department of Health purchases a solution such as batch number 97220 for use in a breathalyzer machine, it receives an affidavit from the manufacturer indicating the amount of alcohol in the solution (the "target value"). Thereafter, the Ohio Department of Health independently tests four sample bottles out of the batch four times each, for a total of sixteen tests, to confirm the accuracy of the target value that the manufacturer assigns to the solution. The testing performed by the Department of Health is not itself used to establish a target value. If the target value is found to be accurate, the Ohio Department [\*12] of Health certifies the solution. Batch number 97220, which contained 1,800 bottles, was certified at Dr. Sutheimer's recommendation by the Ohio Department of Health on September 30, 1997, despite the fact that Dr. Sutheimer's repeated inquiries to Steifel Research for documentation as to the quality control used in establishing the target value and as to the number of tests run went unanswered. At such point in time, Dr. Sutheimer also had been unable to get into visit Steifel Research. After visiting Steifel Research on November 21, 1997, Dr. Sutheimer discovered that Steifel Research had only analyzed three bottles out of batch number 97220 and had sent two additional bottles out to Adirondack Lab for testing prior to providing the Ohio Department of Health with an affidavit assigning the target value. At the April 27, 1998, hearing, Dr. Sutheimer testified to a reasonable degree of scientific certainty that at the time the solution certificate was issued by the Ohio Department of Health on September 30, 1997, "neither the manufacturer nor the Department of Health had analyzed enough bottles to set a true target for batch number 97220." Transcript of Proceedings at 55. For batch [\*13] number 97220, a minimum of six to eight bottles should have been tested by one entity, namely Steifel, to set a true target value. See Transcript of April 27, 1998, hearing at 82-84. For such reason, during the first week of December of 1997, Steifel tested ten additional unopened bottles of batch 97220 which had been sent to it by the Ohio Department of Health for analysis. Dr. Sutheimer, however, admitted that the ten bottles did not represent a perfect random selection since he gave Steifel every bottle that he had on hand. A perfect random selection would have been done prior to the entire batch of 1,800 bottles being released. However, Dr. Sutheimer did state that the ten bottles sent were "random in nature." They were the last ten bottles left in the batch and were bottle numbers 217, 233, 344, 498, 740, 749, 1,034, 1,073, 1,801, and 1,815. (Transcript at Pages 73 and 74). Dr. Sutheimer, who personally went to Steifel Labs to review the raw data of the further testing that was performed in December of 1997, testified that "it is the testing done in December that makes me feel comfortable as to what the true target value is". Transcript at 70. He was, however, not present for [\*14] such testing. Based on the testing performed in December of 1997, we find that the instrument check solution batch number 97220 is reliable. The Ohio Department of Health did abuse its discretion in approving batch number 97220 on September 30, 1997, when it certified the solution and blindly accepted Steifel's target value for the batch. However, the subsequent testing done on batch number 97220 in December, 1997, was based on sound scientific procedure and the target value set through that December, 1997, testing was the same target value originally set through the earlier insufficient testing, and was the same target value certified by the Director of the Ohio Department of Health on September 30, 1997. We agree with our colleagues from the Third District Court of Appeals when they found that the solution of ethyl alcohol from batch number 97220 was reliable since it was confirmed through subsequent scientific testing that that batch contained the amount of ethyl alcohol previously certified by the *Director of Health*. *State v. Miller*, 1998 Ohio App. LEXIS 6198 unreported, Court of Appeals of Ohio, Third District, Marion County, Dec. 15, 1998, No. 9-98-42. Appellant's second assignment of error is overruled. [\*15]

## III

In her third assignment of error, appellant asserts that the trial court committed prejudicial error in overruling her motion to order the State to elect between the *R.C. 4511.19(A)(1)* charge, driving under the influence of alcohol, and the *R.C. 4511.19(A)(3)* charge, driving with a prohibited alcohol level. While the trial court overruled appellant's motion, it held that appellant could only be convicted and sentenced for one offense. Appellant specifically points to *R.C. 2941.32* which provides as follows: "if two or more indictments or informations are pending against the same defendant for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and upon trial being had upon one of them, the remaining indictments or information shall be quashed." However, *R.C. 4511.19(A)(1)* and (3) have been held to create separate offenses. *State v. Mendieta (1984)*, 20 Ohio App. 3d 18, 484 N.E.2d 180. See also *State v. Wilcox (1983)*, 10 Ohio App. 3d 11, 460 N.E.2d 323. A defendant, therefore, may be charged with both and found guilty [\*16] of both, but may only be sentenced as to one. *Id.* Since appellant was not sentenced on both charges, the trial court did not err in overruling appellant's motion and allowing the State to pursue both charges. Appellant's third assignment of error is denied.

## IV, V

In her fourth assignment of error, appellant argues that the trial court committed prejudicial error in overruling her motion for acquittal on the *R.C. 4511.19(A)(3)* charge, operating a motor vehicle with a prohibited alcohol level. Appellant had moved for acquittal at the conclusion of the State's case pursuant to *Criminal Rule 29* since the State did not correlate the results of appellant's blood alcohol test, which was taken within two hours of the alleged offense as mandated by *R.C. 4511.19(D)(1)*, to her blood alcohol level at the time of appellant's operation of the motor vehicle. Appellant's blood alcohol test, which was taken approximately 53 minutes after the operation of a motor vehicle, indicated a blood alcohol level of .105 grams of alcohol per 210 liters of breath. [HN4] *R.C. 4511.19(D)(1)* states as follows: "In any criminal prosecution or [\*17] juvenile court proceeding for a violation of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, the court may admit evidence on the concentration of alcohol, drugs of abuse, or alcohol and drugs of abuse in the defendant's blood, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance withdrawn within two hours of the time of the alleged violation." (Emphasis added)

As the Sixth District Court of Appeals stated in *State v. Ulrich (1984)*, 17 Ohio App. 3d 182, 191, 478 N.E.2d 812:

"Clearly, it is the intent of the Ohio Legislature in prosecutions under *R.C. 4511.19(A)(3)* to have admitted, as evidence of the alleged offender's concentration of alcohol in the alleged offender's breath at the time of the alleged offense, a chemical analysis of the alleged offender's breath provided that the breath [\*18] sample was withdrawn according to established guidelines. It is a legislative determination that a breath sample withdrawn within two hours of the alleged offense will accurately reflect the alleged offender's alcohol content, by weight, in the withdrawn breath sample at the time of the alleged offense. Thus, the amount of alcohol concentration in the alleged offender's breath at the time of the alleged offense is shown by a chemical analysis of a sample of the alleged offender's breath which is withdrawn within two hours of the time of the alleged violation."

Since appellant's breath sample was taken within two hours of the alleged violation, the trial court correctly determined that it accurately reflected appellant's blood alcohol content at the time of the offense. The trial court, therefore, did not err in overruling appellant's Motion for Acquittal on the *R.C. 4511.19(A)(3)* charge. Similarly, in her fifth assignment of error, appellant contends that the trial court's finding that appellant was guilty of violating *R.C. 4511.19(A)(3)*, operation of a motor vehicle with a prohibited level of alcohol, was against the manifest weight [\*19] of the evidence. [HN5] On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the

judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E.2d 212, syllabus 1. Appellant specifically asserts that the trial court's finding that appellant was guilty of violating 4511.19(A)(3) was against the manifest weight of the evidence since the State did not correlate appellant's [\*20] "chemical test reflecting blood alcohol level to the time of the alleged operation of the motor vehicle in rebuttal to expert testimony...that, at the time of [the] alleged operation of a motor vehicle, a defendant's blood alcohol level was under the legal limit." At appellant's trial, Dr. Alfred Staubus, appellant's expert witness, testified that at the time appellant last operated the motor vehicle, it is possible to a reasonable degree of medical certainty that her blood alcohol concentration was less than .100. Dr. Staubus further testified that, assuming the State's chemical test was accurate, appellant's alcohol level could have been as low as .087 or as high as .123, and that any stomach acid in her mouth due to regurgitation could have affected the outcome of her blood alcohol concentration test. However, "expert testimony is not necessary to correlate intoxilyzer test results to the time of the alleged offense." *Ulrich, supra at 191*. Rather, a defendant "may challenge the accuracy of his specific test result through the use of expert testimony, to show that he could not have produced the test result claimed by the prosecution under those circumstances." *City of Columbus v. Day* (1985), 24 Ohio App. 3d 173, 493 N.E.2d 1002, [\*21] syllabus. The testimony of Dr. Staubus was presented by appellant for such purpose. The State, however, was not required to rebut Dr. Staubus' testimony by presenting expert testimony correlating appellant's test results to the time of the alleged offense since, as is stated above, a breath sample withdrawn within two hours of the alleged offense has been legislatively determined to accurately reflect the alleged offender's alcohol content at the time of the alleged offense. Upon consideration of the record, this court cannot say that the trial judge, as trier of fact, clearly lost his way and created a manifest miscarriage of justice. Appellant's fourth and fifth assignments of error are overruled.

## VI

In her final assignment of error, appellant challenges the trial court's finding that appellant was guilty of violating *R.C. 4511.21(D)*, exceeding the speed limit, contending that such finding was not supported by sufficient evidence. Appellant specifically asserts that there was insufficient evidence to support her conviction since no expert testimony was offered by the State nor did the court take judicial notice of the scientific foundation and reliability [\*22] of the K55 radar. [HN6] Courts have taken judicial notice of the reliability of radar units. See *City of East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630 and *City of Xenia v. Boehman* (1996), 114 Ohio App. 3d 78, 682 N.E.2d 1029. The Ohio Supreme Court, in *Ferrell*, specifically stated as follows: "We are in accord with the trend of the most recent decisions that readings of a radar speed meter may be accepted in evidence, just as we accept photographs, x-rays, electroencephalographs, speedometer readings, and the like, without the necessity of offering expert testimony as to the scientific principles underlying them." 168 Ohio St. at 303. In *State v. Jenks* (1981), 61 Ohio St. 3d 259, 574 N.E.2d 492, [HN7] the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is [\*23] whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks, supra*, at paragraph two of the syllabus.

When applying the aforementioned standard of review to the case sub judice, based upon the facts noted supra, we do not find, as a matter of law, appellant's conviction for violating *R.C. 4511.21(D)* was based upon insufficient evidence. [HN8] The prosecution, to sustain a conviction based on evidence obtained from radar, must prove that the radar device "was properly set up and tested by a technician trained by experience to do so, and that at the time it was functioning properly ...". *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630, syllabus. At the March 23,

1998, hearing on appellant's Motion to Suppress and at appellant's trial, Trooper Duran, who has a certificate from the Department of Health authorizing him to perform breath tests using a BAC Datamaster, also testified as to his training and certification to operate the K55 radar unit. Trooper Duran laid the foundation [\*24] for the admission of the results of the K55 radar by testifying in detail as to how the radar unit was calibrated both prior to and after appellant's arrest and by testifying as to his certification and experience in the use of the same. Trooper Duran testified that he checked to verify that his machine was working properly both before and after his shift on November 28, 1997, and that based on his training and experience, his machine was working properly when he clocked appellant's vehicle. The record clearly indicates that Duran laid a foundation for the trial court considering him as an expert. See *State v. Woods*, 1993 Ohio App. LEXIS 2218 (April 15, 1993), Stark App. No. CA-9115, unreported. The court finds, therefore, that the trial court's finding that appellant was guilty of violating R.C. 4511.21(D) was supported by sufficient evidence. Appellant's sixth assignment of error is denied.

The judgment of the Lancaster Municipal Court is affirmed.

By Edwards, J. Wise, P. J. and Farmer, J. concur

**CONCUR BY:** John Wise; Sheila Farmer

**CONCUR:**

WISE, P. J., CONCURRING

I concur with the result of the majority's opinion but on different legal rationale.

FARMER, J. CONCURRING

I concur with [\*25] the opinion but for different reasons. In Assignment of Error II, appellant claimed the trial court erred in denying her challenge to the datamaster's check solution, batch number 97220. Specifically, appellant had argued said solution was unreliable and had not been subject to scientific verification. In *State v. Sebach*, 1998 Ohio App. LEXIS 5122 (September 25, 1998), Knox App. No. 97CA24, unreported, and *State v. Miracle*, 1998 Ohio App. LEXIS 5118 (September 25, 1998), Knox App. No. 97CA25, unreported, this court reviewed the Ohio Department of Health's protocol in certifying calibration solutions and found it to be in compliance with Ohio Adm.Code 3701:53-04(A). Specifically, this court held at 6 "the Department of Health qualifies a batch of calibration solutions by using its own procedures and affirms that the testing samples fall within the manufacturer's target concentration value. Once the Department of Health makes that quality assurance determination, it is not necessary to know the manufacturer's procedures." Based upon this holding, there is no need to rely on the subsequent testing of the ten bottles after the fact.

108 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF MAYFIELD HEIGHTS, Plaintiff-appellee vs. TIMOTHY J. KINCAID,  
Defendant-appellant**

**NO. 74182**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*1999 Ohio App. LEXIS 2144*

**May 13, 1999, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from Lyndhurst Municipal Court. Case. No. 97TRD11715.

**DISPOSITION:**

JUDGMENT: AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver challenged a judgment of the Lyndhurst (Ohio) Municipal Court convicting him of speeding, contending that the court erred by taking judicial notice of the accuracy and reliability of the radar device used by the arresting officer by accepting the officer's testimony about the speed of appellant's vehicle and by accepting his testimony that the device was in good condition for accurate work.

**OVERVIEW:** Appellant driver challenged a municipal court conviction for speeding, claiming that there were insufficient grounds for taking judicial notice of the accuracy of the particular radar unit used by the arresting officer. The arresting officer testified that he clocked appellant exceeding the speed limit. The officer also testified that he had been trained on a K-55 radar, but was using a Genesis radar unit on the day in question. Appellant's objections were overruled by the court and the testimony was introduced into evidence on grounds that there were sufficient grounds for taking judicial notice of the accuracy of the radar unit. Since it was unclear on the record whether the officer's training applied to the Genesis device, the appellate court affirmed the conviction because while appellant challenged the adequacy of the officer's training, he failed on appeal to include relevant portions of the cross-examination and the court therefore presumed the validity of the trial court's ruling.

**OUTCOME:** The court affirmed the judgment because even if the lower court erred in taking judicial notice of the construction and operation of the radar device, appellant failed to provide a record on appeal that demonstrated that the accuracy of the particular unit or the qualifications of its operator were in question.

**CORE TERMS:** radar, speed, arresting officer, speed limit, accuracy, morning, assignment of error, posted, judicial notice, interstate highway, miles, speeding, training, announcement, stationary, taking judicial notice, assignments of error, calibration, trained, overrule, presume, expert testimony, good condition, police officer, reliability, municipal, mile-per-hour, traveling, accepting, resort

**LexisNexis(R) Headnotes**

***Evidence > Judicial Notice***

[HN1] Under *Ohio R. Evid. 201(B)*, a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Judicial Notice > General Overview***

***Evidence > Testimony > Experts > General Overview***

[HN2] The Ohio Supreme Court has held that courts may accept the readings of all stationary radar speed meters, and may take judicial notice of the scientific principles underlying them, without resort to expert testimony to establish their construction, operation, reliability, and accuracy. Judicial notice can be extended to a particular model of moving radar device if the court has received expert testimony as to the construction, operation, and accuracy of that model. However, judicial notice cannot automatically be extended to other models of moving radar devices.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Judicial Notice > General Overview***

[HN3] Even if a court takes judicial notice of the construction and operation of a radar device, it may not accept a radar reading unless there is evidence demonstrating the accuracy of the particular unit in question and the qualifications of the operator.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

***Governments > Local Governments > Duties & Powers***

[HN4] Mayfield Heights, Ohio, Codified Ordinances § 333.03(k) provides: Whenever, in accordance with this section or *Ohio Rev. Code Ann. § 4511.21*, the maximum prima-facie speed limitations as established herein have been altered, either higher or lower, and the appropriate signs giving notice have been erected as required, operators of motor vehicles shall be governed by the speed limitations set forth on such signs. It is prima facie unlawful for any person to exceed the speed limits posted upon such signs.

**COUNSEL:** For plaintiff-appellee: GEORGE J. ARGIE, DOMINIC J. VITANTONIO, Mayfield Heights Prosecutor, Mayfield Village, Ohio.

For defendant-appellant: TIMOTHY J. KINCAID, pro se, Dublin, Ohio.

**JUDGES:** JUDGE KENNETH A. ROCCO. DIANE KARPINSKI, P.J., and MICHAEL J. CORRIGAN, J. CONCUR.

**OPINION BY:** KENNETH A. ROCCO

**OPINION:**

## JOURNAL ENTRY and OPINION

KENNETH A. ROCCO, J.:

This case is before the court on appeal from a decision of the Lyndhurst Municipal Court finding appellant, Thomas J. Kincaid, guilty of speeding and imposing a fine of \$ 32 plus court costs of \$ 45.00. Appellant asserts the following five assignments of error:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN TAKING JUDICIAL NOTICE OF THE ACCURACY AND RELIABILITY OF A [*sic*] "GENESIS" RADAR WHEN NO EXPERT TESTIMONY WAS OFFERED BY THE PROSECUTION CONCERNING THE CONSTRUCTION OF THE "GENESIS" RADAR DEVICE OR ITS METHOD OF OPERATION AND WHERE JUDICIAL NOTICE HAD NEVER PREVIOUSLY BEEN TAKEN OF THE "GENESIS" RADAR DEVICE.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN [\*2] ADMITTING TESTIMONY FROM A POLICE OFFICER REGARDING THE SPEED OF DEFENDANT'S VEHICLE BASED ON THE RADAR OBSERVATIONS MADE BY THE OFFICER WHEN THERE WAS NO TESTIMONY AS TO THE OFFICER'S QUALIFICATION TO OPERATE SUCH DEVICE.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FINDING THAT THE "GENESIS" RADAR DEVICE USED BY THE ARRESTING OFFICER WAS IN GOOD CONDITION FOR ACCURATE WORK WHEN THE EVIDENCE FAILED TO ESTABLISH THAT THE ARRESTING OFFICER WAS QUALIFIED TO OPERATE SUCH DEVICE.

IV. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT THERE WAS NO TESTIMONY AS TO WHETHER THE SPEED INDICATED ON THE RADAR DEVICE RELATED TO THE DEFENDANT'S VEHICLE.

V. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN DETERMINING THAT THE SPEED LIMIT IN THE AREA IN WHICH THE ALLEGED SPEEDING VIOLATION TOOK PLACE WAS 60 MILES PER HOUR WHEN THAT SPEED LIMIT IS NOT AN AUTHORIZED SPEED LIMIT UNDER SECTION 330.03 OF THE CODIFIED ORDINANCES OF MAYFIELD HEIGHTS.

For the following reasons, the court finds that none of these contentions has merit and affirms the decision of the municipal court.

## STATEMENT OF FACTS AND PROCEEDINGS [\*3] BELOW

On August 25, 1997, appellant was cited for speeding in the southbound express lane of Interstate 271. The ticket indicates appellant was traveling at 79 miles per hour in a 60-mile-per-hour zone, as determined by a "Genesis" radar device, in violation of Section 333.03 of the Codified Ordinances of Mayfield Heights, Ohio.

Appellant pled not guilty, and the case proceeded to trial on February 11, 1998. No request having been made by either party, the proceedings were not recorded. See *Crim.R.* 22. However, the trial court did settle and approve a statement of proceedings pursuant to *App.R.* 9(C), which we quote here in its entirety:

This case was heard by the Lyndhurst Municipal Court on the 11th day of February 1998. The only witness to testify for the prosecution was the arresting officer.

The arresting officer testified that he had been employed as a City of Mayfield Heights patrolman since the summer of 1994. He had received training on K-55 radar at the Cleveland Police Academy. He was using a Genesis radar unit on the day in question. That morning, he tested the patrolcar-mounted radar unit several times during the morning of August 25, 1997, and performed [\*4] calibration tests on it as trained. The tests included using tuning forks and performing an internal calibration check. Based on those tests, he testified that he concluded that the devise [*sic*] was in good condition for accurate work on August 25, 1997.

The arresting officer testified that he was stationed on Interstate Highway 271 in Mayfield Heights, Cuyahoga County, Ohio on the morning of August 25, 1997 running a radar unit. The posted speed limit in the area in question was 60 m.p.h. which is the speed limit established by the Cuyahoga County Commissioners on certain sections of the interstate highway system in Cuyahoga County pursuant to *Ohio Rev. Code Sec. 4511.21*.

The arresting officer testified that he observed defendant's vehicle shortly after 7:00 a.m. that morning and determined that defendant's vehicle appeared to be traveling faster than the rest of the traffic in the immediate vicinity. He aimed the radar unit at the defendant's vehicle. The radar unit emitted a high-pitched sound which was consistent with his visual observation of a speeding vehicle.

He locked the speed in at 79 m.p.h. on the unit which was consistent with the sound, and proceeded [\*5] to pursue the defendant and issued him a speeding citation.

The defendant objected to the introduction of the testimony regarding the radar speed reading on the basis that there were not sufficient grounds for taking judicial notice of the accuracy of the radar device being used by the arresting officer. Defendant's objections were overruled by the court and the testimony was introduced into evidence on the grounds that there were sufficient grounds for taking judicial notice of the accuracy of the radar unit. No other evidence was produced regarding the speed of the vehicle driven by the defendant.

The witness for the prosecution also testified that in the area of the Interstate Highway 271 where he had stopped the defendant on the morning of August 25, 1997 there was a posted sign which indicated that the speed limit was 60 m.p.h. There was no other testimony as to the speed limit at the location at which the defendant was observed on the morning of August 25, 1997.

Following the testimony of the arresting officer, the prosecution rested and defendant moved for an acquittal on the basis that (i) the evidence regarding the radar speed reading should be excluded and, [\*6] without the evidence, there was insufficient evidence to convict the defendant, and (ii) the speed limit on Interstate Highway 271 was not established as 60 m.p.h. Defendant's motion was denied.

Following further oral argument on [these same issues], the defendant was found guilty and fined \$ 32.00 plus court costs.

The court entered judgment against appellant on March 13, 1998, the day after appellant filed his notice of appeal. Hence, this appeal was timely filed under *App.R. 4(C)*.

#### LAW AND ANALYSIS

Appellant first complains that the trial court erred by taking judicial notice of the accuracy and reliability of the "Genesis" radar device. [HN1] Under *Evid.R. 201(B)*,

[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable [*sic*] be questioned.

The record in this case shows that the "Genesis" radar device was mounted to the arresting officer's patrol car but does not show whether it was a stationary device or a moving device. [HN2] The Ohio [\*7] Supreme Court has held that courts may accept the readings of all stationary radar speed meters, and may take judicial notice of the scientific principles underlying them, without resort to expert testimony to establish their construction, operation, reliability and accuracy. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 303, 154 N.E.2d 630. Judicial notice can be extended to a particular model of moving radar device if the court has received expert testimony as to the construction, operation and accuracy of that model. However, judicial notice cannot automatically be extended to other models of moving radar devices. *Moreland Hills v. Gazdak* (1988), 49 Ohio App. 3d 22, 23, 550 N.E.2d 203; also see *State v. Kirkland* (Mar. 2, 1998), 1998 Ohio App. LEXIS 1100, Logan App. No. 8-97-22, unreported.

Absent evidence about whether the "Genesis" radar was a moving device or a stationary device, this court cannot say whether the trial court properly could have taken judicial notice of the construction and operation of the device. Appellant has failed to provide us with a record that demonstrates the claimed error; therefore, we must presume the validity of the trial court's ruling. *Rose Chevrolet, Inc.* [\*8] v. *Adams* (1988), 36 Ohio St. 3d 17, 19, 520 N.E.2d 564; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 199, 400 N.E.2d 384; *Baker v. Cuyahoga County Court of Common Pleas* (1989), 61 Ohio App. 3d 59, 62, 572 N.E.2d 155. Accordingly, we overrule the first assignment of error.

The second and third assignments of error contend there was no evidence that the police officer was qualified to operate the radar device. Therefore, appellant argues, the court erred by accepting the officer's testimony about the speed of appellant's vehicle and by accepting his testimony that the device was in good condition for accurate work.

[HN3] Even if a court takes judicial notice of the construction and operation of a radar device, it may not accept a radar reading unless there is evidence demonstrating the accuracy of the particular unit in question and the qualifications of the operator. *East Cleveland v. Ferrell*, *supra*, at 303. The evidence in the record here indicates this officer was trained, on a K-55 radar device. It is not clear on the record whether this training would apply to the Genesis device; however, the officer's performance of calibration tests on the Genesis device "as [\*9] trained" implies that the same training is applicable. Appellant had the opportunity to cross-examine the officer if he wished to challenge the adequacy of his training. He failed to include the relevant portions of any such cross-examination in the record; therefore, we must again presume the validity of the trial court's ruling and overrule the second and third assignments of error.

The fourth assignment of error contends the trial court erred by admitting the officer's testimony regarding the speed of appellant's vehicle when there was no testimony that the speed indicated on the radar device was the speed of appellant's vehicle. The trial court's statement of the evidence indicates that the police officer testified he aimed the radar unit at appellant's vehicle and locked the speed in at 79 m.p.h. The fourth assignment of error is therefore overruled.

Appellant's fifth assignment of error asserts that the court erred by determining that the speed limit was 60 miles per hour when a 60-mile-per-hour speed limit is not authorized under the Codified Ordinances of Mayfield Heights. The court determined that the posted speed limit of 60 miles per hour was established by the Cuyahoga [\*10] County Commissioners pursuant to *R.C. 4511.21*. [HN4] Section 333.03(k) of the Codified Ordinances of Mayfield Heights provides:

Whenever, in accordance with this section or Ohio *R.C. 4511.21*, the maximum prima-facie speed limitations as established herein have been altered, either higher or lower, and the appropriate signs giving notice have been erected as required, operators of motor vehicles shall be governed by the speed limitations set forth on such signs. It is prima facie unlawful for any person to exceed the speed limits posted upon such signs.

Thus, the municipal ordinances plainly prohibited operation of a motor vehicle at a speed exceeding the posted limits. Appellant's fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lyndhurst Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified [\*11] copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

DIANE KARPINSKI, P.J. and

MICHAEL J. CORRIGAN, J. CONCUR

JUDGE

KENNETH A. ROCCO

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc. App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section 2(A) (1).

109 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF MAYFIELD HEIGHTS, Plaintiff-appellee vs. TIMOTHY J. KINCAID,  
Defendant-appellant**

**NO. 74182**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*1999 Ohio App. LEXIS 2144*

**May 13, 1999, Date of Announcement of Decision**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from Lyndhurst Municipal Court. Case. No. 97TRD11715.

**DISPOSITION:**

JUDGMENT: AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver challenged a judgment of the Lyndhurst (Ohio) Municipal Court convicting him of speeding, contending that the court erred by taking judicial notice of the accuracy and reliability of the radar device used by the arresting officer by accepting the officer's testimony about the speed of appellant's vehicle and by accepting his testimony that the device was in good condition for accurate work.

**OVERVIEW:** Appellant driver challenged a municipal court conviction for speeding, claiming that there were insufficient grounds for taking judicial notice of the accuracy of the particular radar unit used by the arresting officer. The arresting officer testified that he clocked appellant exceeding the speed limit. The officer also testified that he had been trained on a K-55 radar, but was using a Genesis radar unit on the day in question. Appellant's objections were overruled by the court and the testimony was introduced into evidence on grounds that there were sufficient grounds for taking judicial notice of the accuracy of the radar unit. Since it was unclear on the record whether the officer's training applied to the Genesis device, the appellate court affirmed the conviction because while appellant challenged the adequacy of the officer's training, he failed on appeal to include relevant portions of the cross-examination and the court therefore presumed the validity of the trial court's ruling.

**OUTCOME:** The court affirmed the judgment because even if the lower court erred in taking judicial notice of the construction and operation of the radar device, appellant failed to provide a record on appeal that demonstrated that the accuracy of the particular unit or the qualifications of its operator were in question.

**CORE TERMS:** radar, speed, arresting officer, speed limit, accuracy, morning, assignment of error, posted, judicial notice, interstate highway, miles, speeding, training, announcement, stationary, taking judicial notice, assignments of error, calibration, trained, overrule, presume, expert testimony, good condition, police officer, reliability, municipal, mile-per-hour, traveling, accepting, resort

**LexisNexis(R) Headnotes**

***Evidence > Judicial Notice***

[HN1] Under *Ohio R. Evid. 201(B)*, a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Judicial Notice > General Overview***

***Evidence > Testimony > Experts > General Overview***

[HN2] The Ohio Supreme Court has held that courts may accept the readings of all stationary radar speed meters, and may take judicial notice of the scientific principles underlying them, without resort to expert testimony to establish their construction, operation, reliability, and accuracy. Judicial notice can be extended to a particular model of moving radar device if the court has received expert testimony as to the construction, operation, and accuracy of that model. However, judicial notice cannot automatically be extended to other models of moving radar devices.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

***Evidence > Judicial Notice > General Overview***

[HN3] Even if a court takes judicial notice of the construction and operation of a radar device, it may not accept a radar reading unless there is evidence demonstrating the accuracy of the particular unit in question and the qualifications of the operator.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

***Governments > Local Governments > Duties & Powers***

[HN4] Mayfield Heights, Ohio, Codified Ordinances § 333.03(k) provides: Whenever, in accordance with this section or *Ohio Rev. Code Ann. § 4511.21*, the maximum prima-facie speed limitations as established herein have been altered, either higher or lower, and the appropriate signs giving notice have been erected as required, operators of motor vehicles shall be governed by the speed limitations set forth on such signs. It is prima facie unlawful for any person to exceed the speed limits posted upon such signs.

**COUNSEL:** For plaintiff-appellee: GEORGE J. ARGIE, DOMINIC J. VITANTONIO, Mayfield Heights Prosecutor, Mayfield Village, Ohio.

For defendant-appellant: TIMOTHY J. KINCAID, pro se, Dublin, Ohio.

**JUDGES:** JUDGE KENNETH A. ROCCO. DIANE KARPINSKI, P.J., and MICHAEL J. CORRIGAN, J. CONCUR.

**OPINION BY:** KENNETH A. ROCCO

**OPINION:**

## JOURNAL ENTRY and OPINION

KENNETH A. ROCCO, J.:

This case is before the court on appeal from a decision of the Lyndhurst Municipal Court finding appellant, Thomas J. Kincaid, guilty of speeding and imposing a fine of \$ 32 plus court costs of \$ 45.00. Appellant asserts the following five assignments of error:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN TAKING JUDICIAL NOTICE OF THE ACCURACY AND RELIABILITY OF A [*sic*] "GENESIS" RADAR WHEN NO EXPERT TESTIMONY WAS OFFERED BY THE PROSECUTION CONCERNING THE CONSTRUCTION OF THE "GENESIS" RADAR DEVICE OR ITS METHOD OF OPERATION AND WHERE JUDICIAL NOTICE HAD NEVER PREVIOUSLY BEEN TAKEN OF THE "GENESIS" RADAR DEVICE.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN [\*2] ADMITTING TESTIMONY FROM A POLICE OFFICER REGARDING THE SPEED OF DEFENDANT'S VEHICLE BASED ON THE RADAR OBSERVATIONS MADE BY THE OFFICER WHEN THERE WAS NO TESTIMONY AS TO THE OFFICER'S QUALIFICATION TO OPERATE SUCH DEVICE.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FINDING THAT THE "GENESIS" RADAR DEVICE USED BY THE ARRESTING OFFICER WAS IN GOOD CONDITION FOR ACCURATE WORK WHEN THE EVIDENCE FAILED TO ESTABLISH THAT THE ARRESTING OFFICER WAS QUALIFIED TO OPERATE SUCH DEVICE.

IV. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT THERE WAS NO TESTIMONY AS TO WHETHER THE SPEED INDICATED ON THE RADAR DEVICE RELATED TO THE DEFENDANT'S VEHICLE.

V. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN DETERMINING THAT THE SPEED LIMIT IN THE AREA IN WHICH THE ALLEGED SPEEDING VIOLATION TOOK PLACE WAS 60 MILES PER HOUR WHEN THAT SPEED LIMIT IS NOT AN AUTHORIZED SPEED LIMIT UNDER SECTION 330.03 OF THE CODIFIED ORDINANCES OF MAYFIELD HEIGHTS.

For the following reasons, the court finds that none of these contentions has merit and affirms the decision of the municipal court.

## STATEMENT OF FACTS AND PROCEEDINGS [\*3] BELOW

On August 25, 1997, appellant was cited for speeding in the southbound express lane of Interstate 271. The ticket indicates appellant was traveling at 79 miles per hour in a 60-mile-per-hour zone, as determined by a "Genesis" radar device, in violation of Section 333.03 of the Codified Ordinances of Mayfield Heights, Ohio.

Appellant pled not guilty, and the case proceeded to trial on February 11, 1998. No request having been made by either party, the proceedings were not recorded. See *Crim.R.* 22. However, the trial court did settle and approve a statement of proceedings pursuant to *App.R.* 9(C), which we quote here in its entirety:

This case was heard by the Lyndhurst Municipal Court on the 11th day of February 1998. The only witness to testify for the prosecution was the arresting officer.

The arresting officer testified that he had been employed as a City of Mayfield Heights patrolman since the summer of 1994. He had received training on K-55 radar at the Cleveland Police Academy. He was using a Genesis radar unit on the day in question. That morning, he tested the patrolcar-mounted radar unit several times during the morning of August 25, 1997, and performed [\*4] calibration tests on it as trained. The tests included using tuning forks and performing an internal calibration check. Based on those tests, he testified that he concluded that the devise [*sic*] was in good condition for accurate work on August 25, 1997.

The arresting officer testified that he was stationed on Interstate Highway 271 in Mayfield Heights, Cuyahoga County, Ohio on the morning of August 25, 1997 running a radar unit. The posted speed limit in the area in question was 60 m.p.h. which is the speed limit established by the Cuyahoga County Commissioners on certain sections of the interstate highway system in Cuyahoga County pursuant to *Ohio Rev. Code Sec. 4511.21*.

The arresting officer testified that he observed defendant's vehicle shortly after 7:00 a.m. that morning and determined that defendant's vehicle appeared to be traveling faster than the rest of the traffic in the immediate vicinity. He aimed the radar unit at the defendant's vehicle. The radar unit emitted a high-pitched sound which was consistent with his visual observation of a speeding vehicle.

He locked the speed in at 79 m.p.h. on the unit which was consistent with the sound, and proceeded [\*5] to pursue the defendant and issued him a speeding citation.

The defendant objected to the introduction of the testimony regarding the radar speed reading on the basis that there were not sufficient grounds for taking judicial notice of the accuracy of the radar device being used by the arresting officer. Defendant's objections were overruled by the court and the testimony was introduced into evidence on the grounds that there were sufficient grounds for taking judicial notice of the accuracy of the radar unit. No other evidence was produced regarding the speed of the vehicle driven by the defendant.

The witness for the prosecution also testified that in the area of the Interstate Highway 271 where he had stopped the defendant on the morning of August 25, 1997 there was a posted sign which indicated that the speed limit was 60 m.p.h. There was no other testimony as to the speed limit at the location at which the defendant was observed on the morning of August 25, 1997.

Following the testimony of the arresting officer, the prosecution rested and defendant moved for an acquittal on the basis that (i) the evidence regarding the radar speed reading should be excluded and, [\*6] without the evidence, there was insufficient evidence to convict the defendant, and (ii) the speed limit on Interstate Highway 271 was not established as 60 m.p.h. Defendant's motion was denied.

Following further oral argument on [these same issues], the defendant was found guilty and fined \$ 32.00 plus court costs.

The court entered judgment against appellant on March 13, 1998, the day after appellant filed his notice of appeal. Hence, this appeal was timely filed under *App.R. 4(C)*.

#### LAW AND ANALYSIS

Appellant first complains that the trial court erred by taking judicial notice of the accuracy and reliability of the "Genesis" radar device. [HN1] Under *Evid.R. 201(B)*,

[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable [*sic*] be questioned.

The record in this case shows that the "Genesis" radar device was mounted to the arresting officer's patrol car but does not show whether it was a stationary device or a moving device. [HN2] The Ohio [\*7] Supreme Court has held that courts may accept the readings of all stationary radar speed meters, and may take judicial notice of the scientific principles underlying them, without resort to expert testimony to establish their construction, operation, reliability and accuracy. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 303, 154 N.E.2d 630. Judicial notice can be extended to a particular model of moving radar device if the court has received expert testimony as to the construction, operation and accuracy of that model. However, judicial notice cannot automatically be extended to other models of moving radar devices. *Moreland Hills v. Gazdak* (1988), 49 Ohio App. 3d 22, 23, 550 N.E.2d 203; also see *State v. Kirkland* (Mar. 2, 1998), 1998 Ohio App. LEXIS 1100, Logan App. No. 8-97-22, unreported.

Absent evidence about whether the "Genesis" radar was a moving device or a stationary device, this court cannot say whether the trial court properly could have taken judicial notice of the construction and operation of the device. Appellant has failed to provide us with a record that demonstrates the claimed error; therefore, we must presume the validity of the trial court's ruling. *Rose Chevrolet, Inc.* [\*8] v. *Adams* (1988), 36 Ohio St. 3d 17, 19, 520 N.E.2d 564; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 199, 400 N.E.2d 384; *Baker v. Cuyahoga County Court of Common Pleas* (1989), 61 Ohio App. 3d 59, 62, 572 N.E.2d 155. Accordingly, we overrule the first assignment of error.

The second and third assignments of error contend there was no evidence that the police officer was qualified to operate the radar device. Therefore, appellant argues, the court erred by accepting the officer's testimony about the speed of appellant's vehicle and by accepting his testimony that the device was in good condition for accurate work.

[HN3] Even if a court takes judicial notice of the construction and operation of a radar device, it may not accept a radar reading unless there is evidence demonstrating the accuracy of the particular unit in question and the qualifications of the operator. *East Cleveland v. Ferrell*, *supra*, at 303. The evidence in the record here indicates this officer was trained, on a K-55 radar device. It is not clear on the record whether this training would apply to the Genesis device; however, the officer's performance of calibration tests on the Genesis device "as [\*9] trained" implies that the same training is applicable. Appellant had the opportunity to cross-examine the officer if he wished to challenge the adequacy of his training. He failed to include the relevant portions of any such cross-examination in the record; therefore, we must again presume the validity of the trial court's ruling and overrule the second and third assignments of error.

The fourth assignment of error contends the trial court erred by admitting the officer's testimony regarding the speed of appellant's vehicle when there was no testimony that the speed indicated on the radar device was the speed of appellant's vehicle. The trial court's statement of the evidence indicates that the police officer testified he aimed the radar unit at appellant's vehicle and locked the speed in at 79 m.p.h. The fourth assignment of error is therefore overruled.

Appellant's fifth assignment of error asserts that the court erred by determining that the speed limit was 60 miles per hour when a 60-mile-per-hour speed limit is not authorized under the Codified Ordinances of Mayfield Heights. The court determined that the posted speed limit of 60 miles per hour was established by the Cuyahoga [\*10] County Commissioners pursuant to *R.C. 4511.21*. [HN4] Section 333.03(k) of the Codified Ordinances of Mayfield Heights provides:

Whenever, in accordance with this section or Ohio *R.C. 4511.21*, the maximum prima-facie speed limitations as established herein have been altered, either higher or lower, and the appropriate signs giving notice have been erected as required, operators of motor vehicles shall be governed by the speed limitations set forth on such signs. It is prima facie unlawful for any person to exceed the speed limits posted upon such signs.

Thus, the municipal ordinances plainly prohibited operation of a motor vehicle at a speed exceeding the posted limits. Appellant's fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lyndhurst Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified [\*11] copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

DIANE KARPINSKI, P.J. and

MICHAEL J. CORRIGAN, J. CONCUR

JUDGE

KENNETH A. ROCCO

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc. App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section 2(A) (1).

110 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - CYNTHIA A. SANDERS,  
Defendant-Appellant.**

**CASE NO. 97-A-0049**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
ASHTABULA COUNTY**

*130 Ohio App. 3d 789; 721 N.E.2d 433; 1998 Ohio App. LEXIS 6149*

**December 18, 1998, Decided**

**PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Ashtabula County Court, Eastern Area. Case No. 96 TRC 02537.

**DISPOSITION:**

JUDGMENT: Affirmed in part; reversed in part and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from her conviction and sentence in the Ashtabula County Court, Eastern Area (Ohio), on one count of driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and one count of failure to signal in violation of *Ohio Rev. Code Ann. § 4511.39*.

**OVERVIEW:** Defendant was convicted and sentenced for driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and one count of failure to signal in violation of *Ohio Rev. Code Ann. § 4511.39*. On appeal, the court reversed the conviction for driving under the influence because it found that the trial court had erred in denying the admission of defendant's signature, given shortly after her arrest, to refute the officer's testimony that defendant's motor skills were impaired due to her alcohol intake. The court concluded that the signature was relevant, if not dispositive of whether she was under the influence. The court also held that the trial court had abused its discretion in permitting the state to admit the arresting officer's report into evidence in violation of *Ohio R. Evid. 612* and *803(8)*, which prohibited the introduction of a police officer's report unless offered by defendant. The court concluded that defendant's conviction for violating § 4511.39 was supported by sufficient evidence, and affirmed the conviction.

**OUTCOME:** The court reversed defendant's conviction for driving under the influence and remanded for a new trial because the trial court had erred in refusing to admit relevant evidence and erroneously permitted the state to admit evidence of the police report, in violation of the rules of evidence. The court affirmed the conviction for failure to signal

because it was supported by sufficient evidence.

**CORE TERMS:** trooper, signature, signal, assignment of error, influence of alcohol, adverse party, refresh, noticed, driving, memory, cross-examination, sobriety, arrest, testifying, introduce, driver, inadmissible, criminal activities, impaired, motion to strike, defense counsel, breath test, destruction, exculpatory, admissible, arresting, cigarette, traffic, admit, destroyed

#### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

[HN1] A police officer does not need probable cause before conducting field sobriety tests. All that is required is reasonable suspicion of criminal activity.

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview  
Evidence > Relevance > Relevant Evidence***

***Evidence > Scientific Evidence > Handwriting***

[HN2] Pursuant to *Ohio R. Evid. 402*, relevant evidence is generally admissible. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Ohio R. Evid. 401*.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview***

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN3] Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

***Evidence > Testimony > Refreshing Recollection > Memory Aids > Writings***

***Evidence > Testimony > Refreshing Recollection > Refreshing Before Testimony***

***Evidence > Testimony > Refreshing Recollection > Refreshing During Testimony***

[HN4] Except as otherwise provided in criminal proceedings by *Ohio R. Crim. P. 16(B)(1)(g)* and *16(C)(1)(d)*, if a witness uses a writing to refresh his memory for the purpose of testifying, either while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. *Ohio R. Evid. 612* only allows an adverse party to introduce the writing into evidence.

***Administrative Law > Agency Adjudication > Hearings > Evidence > Admissibility > Hearsay***

***Evidence > Hearsay > Exceptions > Public Records > General Overview***

[HN5] *Ohio R. Evid. 802* excludes the admission of hearsay unless otherwise provided for in the rules. *Ohio R. Evid. 803* consists of a list of twenty-two exceptions to the general rule that hearsay is inadmissible. *Ohio R. Evid. 803(8)* includes, as one of the exceptions: records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other

circumstances indicate lack of trustworthiness. R. 803(8) prohibits the introduction of reports which recite an officer's observations or criminal activities or observations made as part of an investigation of criminal activities, unless, of course, offered by the defendant.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

[HN6] A properly qualified officer may testify at trial regarding a driver's performance on the horizontal gaze nystagmus test as it pertains to the issues of probable cause to arrest, and whether the driver was operating a vehicle while under the influence of alcohol. See *Ohio Rev. Code Ann. § 4511.19(A)(1)*. However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of *Ohio Rev. Code Ann. § 4511.19(A)(2), (3), or (4)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Evidence > Scientific Evidence > Blood Alcohol***

[HN7] Horizontal gaze nystagmus (HGN) testing can be used to establish probable cause as to whether a person is driving under the influence of alcohol because there is a correlation between blood-alcohol concentration and nystagmus. An HGN test is one of several valid tools that can be used to indicate whether a person has been driving while alcohol impaired, in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview***

[HN8] See *Ohio Rev. Code Ann. § 4511.39*.

**COUNSEL:** THOMAS L. SARTINI, ASHTABULA COUNTY PROSECUTOR, LINDA G. SILAKOSKI, ASSISTANT PROSECUTOR, Jefferson, OH (For Plaintiff-Appellee).

ATTY. MARK GARDNER, Cleveland, OH (For Defendant-Appellant).

**JUDGES:** HON. JUDITH A. CHRISTLEY, P.J., HON. ROBERT A. NADER, J., HON. WILLIAM M. O'NEILL, J. CHRISTLEY, P.J., dissents with Dissenting Opinion, NADER, J., concurs.

**OPINION BY:** WILLIAM M. O'NEILL

**OPINION:** [\*\*434] [\*791]

OPINION

O'NEILL, J.

Appellant, Cynthia A. Sanders, appeals from her conviction and sentence in the Ashtabula County Court, Eastern Area, on one count of driving under the influence of alcohol in violation of *R.C. 4511.19(A)(1)* [\*\*435] and one count of failure to signal in violation of *R.C. 4511.39*.

[\*792] The following facts are relevant to a determination of this appeal. On June 30, 1996, at approximately 12:47 a.m., Ohio State Highway Patrol Trooper Paul March was on routine traffic enforcement just outside the Village

of Jefferson, Ohio. Using laser radar, he clocked a vehicle traveling in the opposite direction on State Route 167 [\*\*\*2] at forty-four m.p.h. in a thirty-five m.p.h. zone. The vehicle was being driven by appellant. Trooper March turned his cruiser around and began following appellant. He noticed that appellant was "drifting" within her own lane and, when she stopped at the intersection with Market Street, her passenger side tires were actually on top of the white line on the edge of the road. Appellant then made a right hand turn onto Market Street without using her turn signal. At that point, Trooper March believed that he had witnessed three traffic violations so he stopped appellant.

Upon approaching appellant's vehicle, Trooper March activated an audio tape recorder he had concealed in his pocket. He noticed that the interior of the vehicle was filled with smoke and that appellant was smoking a cigarette. He also noticed that appellant was chewing gum and that her eyes were bloodshot. Trooper March did not detect the odor of alcohol about appellant at that time. He did observe, however, what he described as an unusually slow and deliberate speech pattern on the part of appellant as though she had to consciously think about the questions asked and how she would respond.

Appellant explained to the [\*\*\*3] trooper that she had attended a graduation party earlier in the evening and that she was attempting to find her boyfriend's house in Dorset, Ohio. She had become lost as she was not familiar with that portion of Ashtabula County. Trooper March informed appellant that she was proceeding in the opposite direction from Dorset.

Based upon his observations up to that point, Trooper March asked appellant to step out of the car, put out her cigarette, and spit out her gum. Appellant complied and, at that time, the trooper noticed an odor of alcohol about appellant. Upon further questioning, appellant informed Trooper March that earlier she had consumed "a couple" of drinks.

Trooper March then administered a series of field sobriety tests, beginning with the Horizontal Gaze Nystagmus test ("HGN"). This was followed by the "one leg stand" test and the "walk and turn" test. In the opinion of Trooper March, appellant was under the influence of alcohol. Appellant was placed under arrest and transported to the Ashtabula County Sheriff's Department. There, at 1:14 a.m., appellant signed her name on a 2255 form which informs a defendant of the consequences of failing to take a breath test. Appellant [\*\*\*4] then volunteered to take a breath test which established that her blood alcohol level was at .083 grams of alcohol per 210 liters of breath, which is below the legal limit in Ohio of .10.

[\*793] Appellant was then issued a citation for driving under the influence of alcohol in violation of *R.C. 4511.19(A)(1)*, and failing to signal before making a turn in violation of *R.C. 4511.39*. Appellant was given written warnings for her alleged marked lane violation and excess speed violation.

Prior to trial, appellant filed a motion to suppress all evidence seized in the course of her detention. This motion was overruled by the trial court on June 4, 1997. Appellant also filed a motion *in limine* to prohibit the state from introducing into evidence the results of appellant's breath test as well as the results of the HGN test. On the morning of the trial, the trial court granted appellant's motion as to the results of appellant's breath test but ruled that evidence of the HGN test would be admissible.

A jury trial commenced on July 29, 1997. On July 31, 1997, the jury found appellant [\*\*436] guilty on both charges. Appellant was sentenced accordingly on August 1, 1997. She timely filed a notice of appeal [\*\*\*5] and has set forth the following assignments of error:

"1. The trial court erred when it denied Defendant's motion to suppress all information obtained by the police after the scope of the traffic stop was expanded without cause.

"2. The trial court violated Defendant's right to due process when it ruled that evidence of Defendant's handwriting from the morning of her arrest was inadmissible.

130 Ohio App. 3d 789, \*793; 721 N.E.2d 433, \*\*436;  
1998 Ohio App. LEXIS 6149, \*\*\*5

"3. The Defendant's right to due process was violated by the State's destruction of exculpatory material evidence.

"4. The trial court abused its discretion when it admitted the arresting officer's report into evidence.

"5. The trial court erred when it denied Defendant's motion to strike the arresting officer's testimony regarding the results of the horizontal gaze nystagmus test on the basis that no foundation had been laid.

"6. The trial court abused its discretion when it denied Defendant's motion to strike the arresting officer's testimony regarding the results of the horizontal gaze nystagmus test on the basis that the results were irrelevant to the issue of whether Defendant was driving while under the influence of alcohol.

"7. There is insufficient evidence to support the conviction [\*\*\*6] of Defendant on the charge of failure to signal before executing a turn."

In the first assignment of error, appellant contends that the trial court erred when it denied her motion to suppress all information obtained by the police after the scope of the traffic stop was expanded without cause.

[\*794] It is undisputed that Trooper March was justified in making the initial stop of appellant based upon the speeding violation alone. n1 However, the question raised by appellant is whether Trooper March had some specific and articulable facts to make further detention of appellant reasonable. See *State v. Hart (1988)*, 61 Ohio App. 3d 37, 41, 572 N.E.2d 141; *State v. Foster (1993)*, 87 Ohio App. 3d 32, 40, 621 N.E.2d 843.

n1 The issue of the turn signal violation is disputed by appellant and will be addressed under appellant's seventh assignment of error.

In the case *sub judice*, after stopping appellant based upon three possible traffic violations, Trooper March approached appellant's vehicle. There, he noticed [\*\*\*7] a cloud of smoke inside the vehicle which was being caused by the smoking of a cigarette by appellant. He also noticed that appellant was chewing gum. Cigarette smoking and gum chewing are two means by which a person can attempt to conceal the odor of alcohol on his or her breath. Trooper March also noticed that appellant's eyes were bloodshot, which is a factor often observed in people who are under the influence of alcohol. *State v. Bycznski (1994)*, 98 Ohio App. 3d 625, 630, 649 N.E.2d 285; *Wickliffe v. Gutauckas (1992)*, 79 Ohio App. 3d 224, 226, 607 N.E.2d 54. Finally, the trooper noticed that appellant's speech pattern was slow and deliberate, as though she had to consciously think about how she would answer the trooper's questions, and that her reaction time was unusually slow.

Based upon the totality of these circumstances including appellant's driving problems in conjunction with the observations of Trooper March after he stopped appellant, we conclude that Trooper March had some specific and articulable facts to further detain appellant and to ask her to step out of her vehicle.

Once that request was made, further facts came to the trooper's attention which warranted [\*\*\*8] even further inquiry in the form of field sobriety tests. Specifically, it [\*\*437] appeared to Trooper March that appellant had to use the car door for balance in getting out of the vehicle. Once appellant was out and she had extinguished her cigarette and spit out her gum, Trooper March noticed an odor of alcohol on appellant's breath. Appellant then admitted to having consumed "a couple of drinks" earlier in the evening.

It is well-established that [HN1] a police officer does not need probable cause before conducting field sobriety tests. All that is required is reasonable suspicion of criminal activity. *Columbus v. Anderson (1991)*, 74 Ohio App. 3d 768, 770, 600 N.E.2d 712. In the present case, it is clear that reasonable suspicion existed for Trooper March to conduct a series of field sobriety tests based upon the totality of the circumstances. Accordingly, the trial court properly denied

appellant's motion to [\*795] suppress all information obtained by the police. Thus, appellant's first assignment of error is without merit.

In the second assignment of error, appellant asserts that the trial court erred in ruling that a sample of her signature obtained shortly after her arrest was inadmissible. [\*\*\*9] It is apparent that after appellant was taken to the sheriff's department, she signed her name on a "refusal form" which is used to inform a defendant of the consequences of failing to take a breath test. This occurred at 1:14 a.m., approximately twenty-seven minutes after having been stopped by the Highway Patrol. At trial, defense counsel attempted to admit into evidence an enlarged copy of that form, but the trial court ruled that it was irrelevant.

Upon review of the trial transcript, it is clear that this case came down to appellant's word versus Trooper March's word. There is no objective evidence in the record to corroborate either parties' version of the facts. Appellant maintained that she was not intoxicated while Trooper March claimed that she was.

Trooper March testified that alcohol impairs a person's fine and gross motor skills. Thus, appellant sought to introduce evidence of her signature shortly after her arrest to refute the trooper's testimony that her motor skills were impaired due to the influence of alcohol. [HN2] Pursuant to *Evid.R. 402*, relevant evidence is generally admissible. "Relevant evidence" is defined as:

"\*\*\* evidence having any tendency to make the [\*\*\*10] existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Evid.R. 401*.

The trial court found the signature to be inadmissible, stating:

"I don't think it's relevant at all, the clarity of her signature. I really don't. I don't see that the signature as interpreted by Officer March is relevant to this inquiry."

The court added:

"\*\*\* I reject the notion that one's signature can be used to support the contingent that one is or is not under the influence of alcohol \*\*\*."

We disagree with the trial court's conclusion. While we cannot conclude that the clarity with which appellant was able to sign her name is dispositive of whether she was under the influence at that time, it clearly was relevant. When a signature appears neat and legible, the inference that can be made is that the signatory's motor skills were not impaired. Thus, since impairment was the critical issue in this trial, it was error to prevent the jury from viewing appellant's signature written shortly after her arrest.

The trial court also expressed concern that the content of the refusal form on which [\*\*\*11] appellant's signature appeared may have been confusing to the jury. Even if this were true, however, the trial court rejected appellant's offer to redact everything on the form except for her signature which would have [\*796] eliminated any potential confusion. Accordingly, this was also not a valid bar to the admission of the signature.

Based upon the foregoing analysis, the trial court erred when it ruled that appellant's [\*\*438] signature from the morning of her arrest was inadmissible. Appellant's second assignment of error is sustained.

In the third assignment of error, appellant submits that her right to due process was violated by the state's destruction of exculpatory material evidence. Specifically, appellant argues that the deliberate destruction or suppression of evidence favorable to the defendant by the state violates the defendant's constitutional rights whether the destruction occurred in good faith or bad faith. For this proposition, appellant relies on *Brady v. Maryland (1963)*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194. In the present case, appellant claims that Trooper March destroyed the audio

tape recording of the traffic stop that resulted in appellant's arrest for [\*\*\*12] driving under the influence of alcohol. The destruction of this tape prevented appellant from access to a key piece of exculpatory evidence that would have shown a calm, lucid, cooperative person throughout the stop and detention.

However, appellant's interpretation of *Brady* is unfounded. The United States Supreme Court later clarified *Brady* in *Arizona v. Youngblood* (1988), 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 109 S. Ct. 333, wherein the court stated:

"The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to *disclose* to the defendant material exculpatory evidence. But we think the Due Process Clause requires a *different* result when we deal with the failure of the State to *preserve* evidentiary material \* \* \*, the results of which might have exonerated the defendant. \* \* \* We therefore hold that [HN3] *unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.*" (Emphasis added.)

The *Youngblood* court also stated that "the presence or absence [\*\*\*13] of bad faith \* \* \* must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at footnote located at 56.

Thus, in the case at bar, appellant must establish not only that the recording was exculpatory, but that Trooper March had knowledge of the exculpatory value of the tape at the time he destroyed it. Appellant has failed on both counts. The only evidence to support appellant's claim that the tape recording was exculpatory was appellant's own testimony. This was directly contradicted by the testimony of Trooper March. Hence, appellant has failed to show that the recording was exculpatory. Moreover, appellant has failed to establish that Trooper March had knowledge of the [\*797] exculpatory value of the tape when he destroyed it. In fact, the only evidence on this point was that Trooper March routinely taped over his audio tapes from one stop to the next as the sole purpose for the recordings was to help Trooper March prepare any reports that needed to be prepared.

Accordingly, appellant's due process rights were not violated when Trooper March taped over the audio tape recording of her traffic stop. Appellant's [\*\*\*14] third assignment of error is without merit.

In the fourth assignment of error, appellant contends that the trial court abused its discretion when it admitted the arresting officer's report into evidence. In reviewing the trial transcript, it is evident that defense counsel used Trooper March's written report to refresh the memory of the trooper during cross-examination. The trial court permitted the state to admit the report on the basis of *Evid.R. 612* which provides, in relevant part:

"[HN4] Except as otherwise provided in criminal proceedings by *Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure*, if a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests [\*\*439] of justice, an *adverse* party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." (Emphasis added.)

It is clear, however, that *Evid.R. 612* only allows an *adverse* party to introduce the [\*\*\*15] writing into evidence. Here, Trooper March was the state's witness and, therefore, the state was not permitted to have the report admitted on the basis of *Evid.R. 612*.

[HN5] *Evid.R. 802* excludes the admission of hearsay unless otherwise provided for in the rules. *Evid.R. 803* consists of a list of twenty-two exceptions to the general rule that hearsay is inadmissible. *Evid.R. 803(8)* includes, as one of the exceptions:

"Records, reports, statements, or data compilations, in any form, of public offices or agencies,

130 Ohio App. 3d 789, \*797; 721 N.E.2d 433, \*\*439;  
1998 Ohio App. LEXIS 6149, \*\*\*15

setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, *unless offered by defendant*, unless the sources of information or other circumstances indicate lack of trustworthiness." (Emphasis added.)

As interpreted by the Supreme Court of Ohio in *State v. Ward* (1984), 15 Ohio St. 3d 355, at 358, 474 N.E.2d 300, Evid.R. 803(8) "prohibits the introduction of reports which recite an officer's observations or criminal [\*798] activities or observations made as part of [\*\*\*16] an investigation of criminal activities," unless, of course, offered by the defendant.

Based upon this analysis, it was an abuse of discretion for the trial court to admit the arresting officer's report into evidence. Appellant's fourth assignment of error is sustained.

In the fifth assignment of error, appellant asserts that the trial court erred when it denied her motion to strike Trooper March's testimony regarding the results of the HGN test on the basis that no foundation had been laid. Specifically, appellant maintains that Trooper March was not properly qualified to administer the HGN test and that, in fact, he did not follow the proper procedures when he administered the test to appellant.

The Supreme Court of Ohio has held:

"[HN6] A properly qualified officer may testify at trial regarding a driver's performance on the horizontal gaze nystagmus test as it pertains to the issues of probable cause to arrest and whether the driver was operating a vehicle while under the influence of alcohol. See *R.C. 4511.19(A)(1)*. However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of *R.C. [\*\*\*17] 4511.19(A)(2), (3), or (4)*." *State v. Bresson* (1990), 51 Ohio St. 3d 123, 554 N.E.2d 1330, syllabus.

A review of the testimony given by Trooper March demonstrates that it fit within the guidelines of *Bresson*. While the trooper admitted that he had not been trained in administering an HGN test in three and one-half years, and had not read the field sobriety testing policy written by the Ohio State Highway Patrol in over a year, he was able to demonstrate extensive knowledge of the testing procedures and he offered his opinion regarding appellant's level of intoxication. Moreover, the HGN test was just one test administered by Trooper March. Two other field sobriety tests were given to appellant, and, in the opinion of Trooper March, she failed them both. Under the facts of the present case, we see no prejudicial error in the admission of the testimony of the arresting officer regarding the HGN test based on a perceived lack of foundation. The procedural defects brought out on cross-examination affect the credibility of the witness, not the admissibility of the evidence. Appellant's [\*440] fifth assignment of error is without merit.

In the sixth assignment of error, appellant argues [\*\*\*18] that the trial court abused its discretion when it denied her motion to strike Trooper March's testimony regarding the results of the HGN test since the results were irrelevant in a prosecution under *R.C. 4511.19(A)(1)*. It is appellant's contention that while the results of the HGN test would be relevant in a prosecution under *R.C. 4511.19(A)(3)* since a police officer can use an HGN test to predict the blood-alcohol level of a suspect, the results are [\*799] irrelevant in the present case because no relationship was established between the results of an HGN test and impaired driving.

This is a unique argument but one that is clearly without merit. Pursuant to the Supreme Court's decision in *Bresson*, [HN7] HGN testing can be used to establish probable cause as to whether a person is driving under the influence of alcohol because there is a correlation between blood-alcohol concentration and nystagmus. *Bresson*, 51 Ohio St. 3d at 124-125. Additionally, the court stated that according to the United States Department of Transportation, "the HGN test is the single most accurate field test to use in determining whether a person is alcohol impaired." *Id.* at 125. Thus, the logical conclusion is that an HGN test [\*\*\*19] is one of several valid tools that can be used to indicate whether a person has been driving while alcohol impaired, in violation of *R.C. 4511.19(A)(1)*.

130 Ohio App. 3d 789, \*799; 721 N.E.2d 433, \*\*440;  
1998 Ohio App. LEXIS 6149, \*\*\*19

Based upon the foregoing, the trial court did not abuse its discretion when it denied appellant's motion to strike Trooper March's testimony regarding the results of the HGN test. Appellant's sixth assignment of error is without merit.

In the seventh assignment of error, appellant contends that there was insufficient evidence to support her conviction on the charge of failing to signal before executing a turn. "A challenge to the sufficiency of the evidence is quantitatively and qualitatively different from a challenge to the weight of the evidence." *State v. Longmire* (Dec. 19, 1997), 1997 Ohio App. LEXIS 5744, Portage App. No. 97-P-0024, unreported, at 3. This difference was addressed by the Supreme Court of Ohio in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541. There, the court explained the concept of sufficiency of the evidence as follows:

"In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. [\*\*\*20] 388, 124 N.E.2d 148." 78 Ohio St. 3d at 386.

In the instant cause, appellant was found guilty of violating [HN8] *R.C. 4511.39* which provides, in pertinent part:

"No person shall turn a vehicle or trackless trolley or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

"When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle or trackless trolley before turning."

[\*800] Appellant asserts that the statute in question only requires the use of a turn signal before turning when another car will be affected by the maneuver. While appellant admits she did not use her turn signal, she concludes that since no other car was affected by her maneuver, she did not violate *R.C. 4511.39*. This argument was previously made and rejected in *State v. Lowman* (1992), 82 Ohio App. 3d 831, 613 N.E.2d 692. The Twelfth District Court of Appeals reasoned as follows:

"The first paragraph of *R.C. 4511.39* sets forth two [\*\*\*21] distinct duties. It embodies a requirement of reasonable care in changing directions in traffic *and* a requirement to use a signal. The statute says that a driver may not change direction until he [\*\*441] has ascertained 'that the movement can be made with reasonable safety *nor* without giving an appropriate signal \*\*\*.' (Emphasis added.) The signal requirement is set forth in absolute terms and is not modified by the language mandating reasonableness in changing directions.

"Further, because it is followed by the phrase 'in the manner hereinafter provided' the term 'appropriate signal' must be seen as describing the mechanics of giving the signal itself, and not as referring to the situation in which the signal is required. The fact that the legislature required the use of an 'appropriate signal' cannot be construed as making the use of such signal contingent upon traffic conditions. Similarly, the phrase 'when required' simply refers to a situation in which the driver intends to change direction on the roadway. The phrase refers to the signal requirement as set forth in the first paragraph of the statute, and again there is no indication that this language was intended to make the [\*\*\*22] requirement conditional. The legislature could have chosen a term such as 'when reasonable,' but it did not do so. We decline to read such language into the section." (Emphasis added.) *Id.* at 835.

We agree with the foregoing opinion. Accordingly, appellant's conviction for violating *R.C. 4511.39* was supported by sufficient evidence. Appellant's seventh assignment of error is without merit.

Based on the foregoing analysis, appellant's conviction on the charge of driving under the influence of alcohol is reversed and the matter remanded for a new trial on that charge. However, appellant's conviction on the charge of failing to signal before making a turn is affirmed.

JUDGE WILLIAM M. O'NEILL

CHRISTLEY, P.J., dissents with Dissenting Opinion,

[\*801] NADER, J., concurs.

**DISSENT BY: JUDITH A. CHRISTLEY**

**DISSENT:**

DISSENTING OPINION

CHRISTLEY, P.J.

I respectfully dissent from the majority's analysis and conclusion in reference to the second and fourth assignments of error.

As to the second assignment of error, the issue of the admission of appellant's signature on her driver's license, I would agree that the trial court's blanket rejection of the offer of the signature is incorrect. [\*\*\*23] Certainly, when a proper foundation had been laid, a signature analysis could indeed have been relevant to show the degree of physical impairment of the signature's author. However, the record in the instant case did not show that any such foundation was laid. There was no proffer of the opinion of an expert; there was no comparative signature offered; in other words, there was no evidence put forth or proffered which would support the claims of appellant as to relevancy.

I disagree strongly with the majority that the jury would be qualified to draw a conclusion that, because a single signature appeared to be neat and legible, *ergo*, the writer was sober. It would require an inference on an inference; *i.e.*, the signature was the writer's normal signature, and a neat and legible signature could only be produced if the writer was sober. Without a foundation or a proffer of such a foundation, I believe the trial court was correct in disallowing the signature from evidence. The end result was therefore the right conclusion, albeit for the wrong reason. I would therefore affirm as to the second assignment.

As to the fourth assignment, I concur with the majority's conclusion that [\*\*\*24] the admission of the report was error. However, I would find it to be harmless error because all of the relevant material in the report was, in fact, testified to by Trooper March. Thus, there were no prejudicial revelations beyond those to which he had already testified.

[\*\*442] The pertinent provisions of Ohio Rules of Evidence discussed herein. *Evid.R. 612* reads in part:

"Writing Used to Refresh Memory. Except as otherwise provided in criminal proceedings by *Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure*, if a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that [\*802] the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, [\*\*\*25] and order delivery of the remainder to the party entitled thereto. \* \* \*"

*Evid.R. 803(8)* reads:

"Hearsay Exceptions; Availability of the Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"\*\*\*

"(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness."

In the case at bar, during the state's direct examination of Trooper March, the state first utilized the report to refresh his memory. The report was entitled "Ohio State Highway Patrol Impaired Driver Report" and was marked "State's Exhibit C." Pursuant to *Evid.R. 612*, appellant's counsel was then given the opportunity to inspect the report and to utilize it in the defense's cross-examination [\*\*\*26] of Trooper March. No party has disputed the propriety of these actions.

During cross-examination, the defense attempted to attack the accuracy of Trooper March's observations of appellant, thereby calling into question the trooper's credibility. During this process, the defense made several references to Trooper March's report. When defense counsel was referring to the contents of the report, Trooper March again admitted that he could not presently recollect all of his prior observations without the assistance of the report. Defense counsel thereafter showed Trooper March portions of the report and repeated the questions. The state did not object when defense counsel used the report in this fashion.

At the close of the state's case, the state offered State's Exhibit C, the report, into evidence. Defense counsel objected on the grounds that *Evid.R. 803(8)* permitted the introduction of the report only when *the defense* was the party offering it into evidence. The trial court rejected this argument and overruled defense counsel's objections on two grounds. First, the trial court stated that because defense counsel also used the report to refresh Trooper March's memory, the opportunity [\*\*\*27] to introduce the report shifted back to the state. Under this interpretation of the rule, the state then became the adverse party referenced in *Evid.R. 612*. Second, the trial court characterized the report as a test outcome or [\*803] a test score rather than an investigative report, thereby holding that it was admissible pursuant to *Evid.R. 803(8)*.

At the outset, I believe that the trial court misapplied *Evid.R. 612* in this case. Here, the adverse party referenced in the rule is the defense. The state was the original party whose witness needed to have his memory refreshed on direct examination [\*\*\*443] with the report. In accordance with *Evid.R. 612*, the adverse party was then the defense. As indicated above, the defense was then entitled to inspect the report and to utilize the report in cross-examination. n1 The defense did so. If the defense had thereafter desired to move the court to introduce the report into evidence, it could have done so. However, the defense did not.

n1 Here, I note that the state made no objection to the defense inspecting the report.

[\*\*\*28]

Nevertheless, the trial court determined that the provision of *Evid.R. 612* regarding the opportunity to introduce evidence somehow shifted when the defense allowed Trooper March to review the report to refresh his memory during cross-examination.

Irrespective of the fact that I find no authority for such an interpretation, I do not perceive that the defense's use of the report resulted in a shift of who was considered the adverse party. Instead, the defense simply used the report to cross-examine the witness as it was permitted to do under *Evid.R. 612*. n2 Indeed, the defense's primary objective was to call into question the witness' credibility; the fact that Trooper March could not recall presently his prior observations in the report did not change that objective.

n2 It would appear from *State v. Goff* (1998), 82 Ohio St. 3d 123, 136-137, 694 N.E.2d 916, that the defense could be the first party to use a document to refresh a witness' memory on cross-examination.

The purpose of the rule would not be [\*\*\*29] well-served if the state could prevent the original adverse party from thoroughly cross-examining a witness out of concern that such an inquiry might result in the state being able to admit the report.

Thus, as the report was first used to refresh the state's witness on the state's direct examination of that witness, the defense remained the adverse party, the only one who was entitled to move the court to introduce the report into evidence. Because the defense did not do so, the report should not have come in under *Evid.R. 612*.

Moreover, when a document which has been used to refresh a witness' recollection is submitted to the jury pursuant to *Evid.R. 612*, the document is not being offered as substantive evidence. Weissenberger, *Ohio Evidence* (1998) 285-286, Section 612.4. *Dayton v. Combs* (1993), 94 Ohio App. 3d 291, 298, 640 N.E.2d 863. Instead, it is being offered as a basis to evaluate the testimony of the [\*804] witness. Thus, unless the document had some other basis for admissibility as substantive evidence, the trial court should have instructed the jury to consider the document only for the limited purpose of assessing credibility. Weissenberger. No such charge was given to the [\*\*\*30] jury in the case at bar.

I also believe that the trial court erred when it held, in the alternative, that the report was admissible as a test score under *Evid.R. 803(8)*. In this regard, the Supreme Court of Ohio has held that *Evid.R. 803(8)* "prohibits the introduction of reports which recite an officer's observations of criminal activities or observations made as part of an investigation of criminal activities. \*\*\* [It] does not prohibit introduction of records of a routine, intra-police, or machine maintenance nature, such as intoxilyzer calibration logs." *State v. Ward* (1984), 15 Ohio St. 3d 355, 358, 474 N.E.2d 300.

By characterizing the report as a test score, the trial court was attempting to classify the report in the second admissible category of records, such as intoxilyzer calibration logs. However, it is obvious that the report contains Trooper March's observations of criminal activities made during his investigation in the case. For example, Trooper March indicated on the report that appellant had a moderate odor of alcoholic beverage about her person, [\*\*\*444] that her speech was slow, and that she failed various field sobriety tests. This report is not a record of a routine, [\*\*\*31] intra-police, or machine maintenance nature. It is, rather, a document containing the individual observations Trooper March made during his criminal investigation of appellant.

Other Ohio appellate courts have also found the "Ohio State Highway Patrol Impaired Driver Report" to be inadmissible under *Evid.R. 803(8)*. *State v. Joyce* (June 12, 1998), Hamilton App. No. C-970642, unreported, 1998 Ohio App. LEXIS 2566; *State v. McDaniel* (Feb. 21, 1995), Meigs App. No. 94CA08, unreported, 1995 Ohio App. LEXIS 716.

If the trial court erred by admitting State's Exhibit C into evidence, the query turns to whether the error was harmless beyond a reasonable doubt. I believe it was harmless error because it was merely cumulative of the officer's testimony. As previously indicated, there were no additional prejudicial revelations for which there had not already been testimony. Thus, there is no merit to this assignment.

Based upon my analysis concerning the second and fourth assignments of error, I would affirm the trial court's judgment in this matter.

PRESIDING JUDGE JUDITH A. CHRISTLEY

111 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - CYNTHIA A. SANDERS,  
Defendant-Appellant.**

**CASE NO. 97-A-0049**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
ASHTABULA COUNTY**

*130 Ohio App. 3d 789; 721 N.E.2d 433; 1998 Ohio App. LEXIS 6149*

**December 18, 1998, Decided**

**PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Ashtabula County Court, Eastern Area. Case No. 96 TRC 02537.

**DISPOSITION:**

JUDGMENT: Affirmed in part; reversed in part and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from her conviction and sentence in the Ashtabula County Court, Eastern Area (Ohio), on one count of driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and one count of failure to signal in violation of *Ohio Rev. Code Ann. § 4511.39*.

**OVERVIEW:** Defendant was convicted and sentenced for driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*, and one count of failure to signal in violation of *Ohio Rev. Code Ann. § 4511.39*. On appeal, the court reversed the conviction for driving under the influence because it found that the trial court had erred in denying the admission of defendant's signature, given shortly after her arrest, to refute the officer's testimony that defendant's motor skills were impaired due to her alcohol intake. The court concluded that the signature was relevant, if not dispositive of whether she was under the influence. The court also held that the trial court had abused its discretion in permitting the state to admit the arresting officer's report into evidence in violation of *Ohio R. Evid. 612* and *803(8)*, which prohibited the introduction of a police officer's report unless offered by defendant. The court concluded that defendant's conviction for violating § 4511.39 was supported by sufficient evidence, and affirmed the conviction.

**OUTCOME:** The court reversed defendant's conviction for driving under the influence and remanded for a new trial because the trial court had erred in refusing to admit relevant evidence and erroneously permitted the state to admit evidence of the police report, in violation of the rules of evidence. The court affirmed the conviction for failure to signal

because it was supported by sufficient evidence.

**CORE TERMS:** trooper, signature, signal, assignment of error, influence of alcohol, adverse party, refresh, noticed, driving, memory, cross-examination, sobriety, arrest, testifying, introduce, driver, inadmissible, criminal activities, impaired, motion to strike, defense counsel, breath test, destruction, exculpatory, admissible, arresting, cigarette, traffic, admit, destroyed

#### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

[HN1] A police officer does not need probable cause before conducting field sobriety tests. All that is required is reasonable suspicion of criminal activity.

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview  
Evidence > Relevance > Relevant Evidence***

***Evidence > Scientific Evidence > Handwriting***

[HN2] Pursuant to *Ohio R. Evid. 402*, relevant evidence is generally admissible. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Ohio R. Evid. 401*.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview***

***Criminal Law & Procedure > Discovery & Inspection > Brady Materials***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN3] Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

***Evidence > Testimony > Refreshing Recollection > Memory Aids > Writings***

***Evidence > Testimony > Refreshing Recollection > Refreshing Before Testimony***

***Evidence > Testimony > Refreshing Recollection > Refreshing During Testimony***

[HN4] Except as otherwise provided in criminal proceedings by *Ohio R. Crim. P. 16(B)(1)(g)* and *16(C)(1)(d)*, if a witness uses a writing to refresh his memory for the purpose of testifying, either while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. *Ohio R. Evid. 612* only allows an adverse party to introduce the writing into evidence.

***Administrative Law > Agency Adjudication > Hearings > Evidence > Admissibility > Hearsay***

***Evidence > Hearsay > Exceptions > Public Records > General Overview***

[HN5] *Ohio R. Evid. 802* excludes the admission of hearsay unless otherwise provided for in the rules. *Ohio R. Evid. 803* consists of a list of twenty-two exceptions to the general rule that hearsay is inadmissible. *Ohio R. Evid. 803(8)* includes, as one of the exceptions: records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other

circumstances indicate lack of trustworthiness. R. 803(8) prohibits the introduction of reports which recite an officer's observations or criminal activities or observations made as part of an investigation of criminal activities, unless, of course, offered by the defendant.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Probable Cause***

[HN6] A properly qualified officer may testify at trial regarding a driver's performance on the horizontal gaze nystagmus test as it pertains to the issues of probable cause to arrest, and whether the driver was operating a vehicle while under the influence of alcohol. See *Ohio Rev. Code Ann. § 4511.19(A)(1)*. However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of *Ohio Rev. Code Ann. § 4511.19(A)(2), (3), or (4)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements  
Evidence > Scientific Evidence > Blood Alcohol***

[HN7] Horizontal gaze nystagmus (HGN) testing can be used to establish probable cause as to whether a person is driving under the influence of alcohol because there is a correlation between blood-alcohol concentration and nystagmus. An HGN test is one of several valid tools that can be used to indicate whether a person has been driving while alcohol impaired, in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview***

[HN8] See *Ohio Rev. Code Ann. § 4511.39*.

**COUNSEL:** THOMAS L. SARTINI, ASHTABULA COUNTY PROSECUTOR, LINDA G. SILAKOSKI, ASSISTANT PROSECUTOR, Jefferson, OH (For Plaintiff-Appellee).

ATTY. MARK GARDNER, Cleveland, OH (For Defendant-Appellant).

**JUDGES:** HON. JUDITH A. CHRISTLEY, P.J., HON. ROBERT A. NADER, J., HON. WILLIAM M. O'NEILL, J. CHRISTLEY, P.J., dissents with Dissenting Opinion, NADER, J., concurs.

**OPINION BY:** WILLIAM M. O'NEILL

**OPINION:** [\*\*434] [\*791]

OPINION

O'NEILL, J.

Appellant, Cynthia A. Sanders, appeals from her conviction and sentence in the Ashtabula County Court, Eastern Area, on one count of driving under the influence of alcohol in violation of *R.C. 4511.19(A)(1)* [\*\*435] and one count of failure to signal in violation of *R.C. 4511.39*.

[\*792] The following facts are relevant to a determination of this appeal. On June 30, 1996, at approximately 12:47 a.m., Ohio State Highway Patrol Trooper Paul March was on routine traffic enforcement just outside the Village

of Jefferson, Ohio. Using laser radar, he clocked a vehicle traveling in the opposite direction on State Route 167 [\*\*\*2] at forty-four m.p.h. in a thirty-five m.p.h. zone. The vehicle was being driven by appellant. Trooper March turned his cruiser around and began following appellant. He noticed that appellant was "drifting" within her own lane and, when she stopped at the intersection with Market Street, her passenger side tires were actually on top of the white line on the edge of the road. Appellant then made a right hand turn onto Market Street without using her turn signal. At that point, Trooper March believed that he had witnessed three traffic violations so he stopped appellant.

Upon approaching appellant's vehicle, Trooper March activated an audio tape recorder he had concealed in his pocket. He noticed that the interior of the vehicle was filled with smoke and that appellant was smoking a cigarette. He also noticed that appellant was chewing gum and that her eyes were bloodshot. Trooper March did not detect the odor of alcohol about appellant at that time. He did observe, however, what he described as an unusually slow and deliberate speech pattern on the part of appellant as though she had to consciously think about the questions asked and how she would respond.

Appellant explained to the [\*\*\*3] trooper that she had attended a graduation party earlier in the evening and that she was attempting to find her boyfriend's house in Dorset, Ohio. She had become lost as she was not familiar with that portion of Ashtabula County. Trooper March informed appellant that she was proceeding in the opposite direction from Dorset.

Based upon his observations up to that point, Trooper March asked appellant to step out of the car, put out her cigarette, and spit out her gum. Appellant complied and, at that time, the trooper noticed an odor of alcohol about appellant. Upon further questioning, appellant informed Trooper March that earlier she had consumed "a couple" of drinks.

Trooper March then administered a series of field sobriety tests, beginning with the Horizontal Gaze Nystagmus test ("HGN"). This was followed by the "one leg stand" test and the "walk and turn" test. In the opinion of Trooper March, appellant was under the influence of alcohol. Appellant was placed under arrest and transported to the Ashtabula County Sheriff's Department. There, at 1:14 a.m., appellant signed her name on a 2255 form which informs a defendant of the consequences of failing to take a breath test. Appellant [\*\*\*4] then volunteered to take a breath test which established that her blood alcohol level was at .083 grams of alcohol per 210 liters of breath, which is below the legal limit in Ohio of .10.

[\*793] Appellant was then issued a citation for driving under the influence of alcohol in violation of *R.C. 4511.19(A)(1)*, and failing to signal before making a turn in violation of *R.C. 4511.39*. Appellant was given written warnings for her alleged marked lane violation and excess speed violation.

Prior to trial, appellant filed a motion to suppress all evidence seized in the course of her detention. This motion was overruled by the trial court on June 4, 1997. Appellant also filed a motion *in limine* to prohibit the state from introducing into evidence the results of appellant's breath test as well as the results of the HGN test. On the morning of the trial, the trial court granted appellant's motion as to the results of appellant's breath test but ruled that evidence of the HGN test would be admissible.

A jury trial commenced on July 29, 1997. On July 31, 1997, the jury found appellant [\*\*436] guilty on both charges. Appellant was sentenced accordingly on August 1, 1997. She timely filed a notice of appeal [\*\*\*5] and has set forth the following assignments of error:

"1. The trial court erred when it denied Defendant's motion to suppress all information obtained by the police after the scope of the traffic stop was expanded without cause.

"2. The trial court violated Defendant's right to due process when it ruled that evidence of Defendant's handwriting from the morning of her arrest was inadmissible.

130 Ohio App. 3d 789, \*793; 721 N.E.2d 433, \*\*436;  
1998 Ohio App. LEXIS 6149, \*\*\*5

"3. The Defendant's right to due process was violated by the State's destruction of exculpatory material evidence.

"4. The trial court abused its discretion when it admitted the arresting officer's report into evidence.

"5. The trial court erred when it denied Defendant's motion to strike the arresting officer's testimony regarding the results of the horizontal gaze nystagmus test on the basis that no foundation had been laid.

"6. The trial court abused its discretion when it denied Defendant's motion to strike the arresting officer's testimony regarding the results of the horizontal gaze nystagmus test on the basis that the results were irrelevant to the issue of whether Defendant was driving while under the influence of alcohol.

"7. There is insufficient evidence to support the conviction [\*\*\*6] of Defendant on the charge of failure to signal before executing a turn."

In the first assignment of error, appellant contends that the trial court erred when it denied her motion to suppress all information obtained by the police after the scope of the traffic stop was expanded without cause.

[\*794] It is undisputed that Trooper March was justified in making the initial stop of appellant based upon the speeding violation alone. n1 However, the question raised by appellant is whether Trooper March had some specific and articulable facts to make further detention of appellant reasonable. See *State v. Hart* (1988), 61 Ohio App. 3d 37, 41, 572 N.E.2d 141; *State v. Foster* (1993), 87 Ohio App. 3d 32, 40, 621 N.E.2d 843.

n1 The issue of the turn signal violation is disputed by appellant and will be addressed under appellant's seventh assignment of error.

In the case *sub judice*, after stopping appellant based upon three possible traffic violations, Trooper March approached appellant's vehicle. There, he noticed [\*\*\*7] a cloud of smoke inside the vehicle which was being caused by the smoking of a cigarette by appellant. He also noticed that appellant was chewing gum. Cigarette smoking and gum chewing are two means by which a person can attempt to conceal the odor of alcohol on his or her breath. Trooper March also noticed that appellant's eyes were bloodshot, which is a factor often observed in people who are under the influence of alcohol. *State v. Bycznski* (1994), 98 Ohio App. 3d 625, 630, 649 N.E.2d 285; *Wickliffe v. Gutauckas* (1992), 79 Ohio App. 3d 224, 226, 607 N.E.2d 54. Finally, the trooper noticed that appellant's speech pattern was slow and deliberate, as though she had to consciously think about how she would answer the trooper's questions, and that her reaction time was unusually slow.

Based upon the totality of these circumstances including appellant's driving problems in conjunction with the observations of Trooper March after he stopped appellant, we conclude that Trooper March had some specific and articulable facts to further detain appellant and to ask her to step out of her vehicle.

Once that request was made, further facts came to the trooper's attention which warranted [\*\*\*8] even further inquiry in the form of field sobriety tests. Specifically, it [\*\*437] appeared to Trooper March that appellant had to use the car door for balance in getting out of the vehicle. Once appellant was out and she had extinguished her cigarette and spit out her gum, Trooper March noticed an odor of alcohol on appellant's breath. Appellant then admitted to having consumed "a couple of drinks" earlier in the evening.

It is well-established that [HN1] a police officer does not need probable cause before conducting field sobriety tests. All that is required is reasonable suspicion of criminal activity. *Columbus v. Anderson* (1991), 74 Ohio App. 3d 768, 770, 600 N.E.2d 712. In the present case, it is clear that reasonable suspicion existed for Trooper March to conduct a series of field sobriety tests based upon the totality of the circumstances. Accordingly, the trial court properly denied

appellant's motion to [\*795] suppress all information obtained by the police. Thus, appellant's first assignment of error is without merit.

In the second assignment of error, appellant asserts that the trial court erred in ruling that a sample of her signature obtained shortly after her arrest was inadmissible. [\*\*\*9] It is apparent that after appellant was taken to the sheriff's department, she signed her name on a "refusal form" which is used to inform a defendant of the consequences of failing to take a breath test. This occurred at 1:14 a.m., approximately twenty-seven minutes after having been stopped by the Highway Patrol. At trial, defense counsel attempted to admit into evidence an enlarged copy of that form, but the trial court ruled that it was irrelevant.

Upon review of the trial transcript, it is clear that this case came down to appellant's word versus Trooper March's word. There is no objective evidence in the record to corroborate either parties' version of the facts. Appellant maintained that she was not intoxicated while Trooper March claimed that she was.

Trooper March testified that alcohol impairs a person's fine and gross motor skills. Thus, appellant sought to introduce evidence of her signature shortly after her arrest to refute the trooper's testimony that her motor skills were impaired due to the influence of alcohol. [HN2] Pursuant to *Evid.R. 402*, relevant evidence is generally admissible. "Relevant evidence" is defined as:

"\*\*\* evidence having any tendency to make the [\*\*\*10] existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Evid.R. 401*.

The trial court found the signature to be inadmissible, stating:

"I don't think it's relevant at all, the clarity of her signature. I really don't. I don't see that the signature as interpreted by Officer March is relevant to this inquiry."

The court added:

"\*\*\* I reject the notion that one's signature can be used to support the contingent that one is or is not under the influence of alcohol \*\*\*."

We disagree with the trial court's conclusion. While we cannot conclude that the clarity with which appellant was able to sign her name is dispositive of whether she was under the influence at that time, it clearly was relevant. When a signature appears neat and legible, the inference that can be made is that the signatory's motor skills were not impaired. Thus, since impairment was the critical issue in this trial, it was error to prevent the jury from viewing appellant's signature written shortly after her arrest.

The trial court also expressed concern that the content of the refusal form on which [\*\*\*11] appellant's signature appeared may have been confusing to the jury. Even if this were true, however, the trial court rejected appellant's offer to redact everything on the form except for her signature which would have [\*796] eliminated any potential confusion. Accordingly, this was also not a valid bar to the admission of the signature.

Based upon the foregoing analysis, the trial court erred when it ruled that appellant's [\*\*438] signature from the morning of her arrest was inadmissible. Appellant's second assignment of error is sustained.

In the third assignment of error, appellant submits that her right to due process was violated by the state's destruction of exculpatory material evidence. Specifically, appellant argues that the deliberate destruction or suppression of evidence favorable to the defendant by the state violates the defendant's constitutional rights whether the destruction occurred in good faith or bad faith. For this proposition, appellant relies on *Brady v. Maryland (1963)*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194. In the present case, appellant claims that Trooper March destroyed the audio

tape recording of the traffic stop that resulted in appellant's arrest for [\*\*\*12] driving under the influence of alcohol. The destruction of this tape prevented appellant from access to a key piece of exculpatory evidence that would have shown a calm, lucid, cooperative person throughout the stop and detention.

However, appellant's interpretation of *Brady* is unfounded. The United States Supreme Court later clarified *Brady* in *Arizona v. Youngblood* (1988), 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 109 S. Ct. 333, wherein the court stated:

"The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to *disclose* to the defendant material exculpatory evidence. But we think the Due Process Clause requires a *different* result when we deal with the failure of the State to *preserve* evidentiary material \* \* \*, the results of which might have exonerated the defendant. \* \* \* We therefore hold that [HN3] *unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.*" (Emphasis added.)

The *Youngblood* court also stated that "the presence or absence [\*\*\*13] of bad faith \* \* \* must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at footnote located at 56.

Thus, in the case at bar, appellant must establish not only that the recording was exculpatory, but that Trooper March had knowledge of the exculpatory value of the tape at the time he destroyed it. Appellant has failed on both counts. The only evidence to support appellant's claim that the tape recording was exculpatory was appellant's own testimony. This was directly contradicted by the testimony of Trooper March. Hence, appellant has failed to show that the recording was exculpatory. Moreover, appellant has failed to establish that Trooper March had knowledge of the [\*797] exculpatory value of the tape when he destroyed it. In fact, the only evidence on this point was that Trooper March routinely taped over his audio tapes from one stop to the next as the sole purpose for the recordings was to help Trooper March prepare any reports that needed to be prepared.

Accordingly, appellant's due process rights were not violated when Trooper March taped over the audio tape recording of her traffic stop. Appellant's [\*\*\*14] third assignment of error is without merit.

In the fourth assignment of error, appellant contends that the trial court abused its discretion when it admitted the arresting officer's report into evidence. In reviewing the trial transcript, it is evident that defense counsel used Trooper March's written report to refresh the memory of the trooper during cross-examination. The trial court permitted the state to admit the report on the basis of *Evid.R. 612* which provides, in relevant part:

"[HN4] Except as otherwise provided in criminal proceedings by *Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure*, if a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests [\*\*439] of justice, an *adverse* party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." (Emphasis added.)

It is clear, however, that *Evid.R. 612* only allows an *adverse* party to introduce the [\*\*\*15] writing into evidence. Here, Trooper March was the state's witness and, therefore, the state was not permitted to have the report admitted on the basis of *Evid.R. 612*.

[HN5] *Evid.R. 802* excludes the admission of hearsay unless otherwise provided for in the rules. *Evid.R. 803* consists of a list of twenty-two exceptions to the general rule that hearsay is inadmissible. *Evid.R. 803(8)* includes, as one of the exceptions:

"Records, reports, statements, or data compilations, in any form, of public offices or agencies,

130 Ohio App. 3d 789, \*797; 721 N.E.2d 433, \*\*439;  
1998 Ohio App. LEXIS 6149, \*\*\*15

setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, *unless offered by defendant*, unless the sources of information or other circumstances indicate lack of trustworthiness." (Emphasis added.)

As interpreted by the Supreme Court of Ohio in *State v. Ward* (1984), 15 Ohio St. 3d 355, at 358, 474 N.E.2d 300, Evid.R. 803(8) "prohibits the introduction of reports which recite an officer's observations or criminal [\*798] activities or observations made as part of [\*\*\*16] an investigation of criminal activities," unless, of course, offered by the defendant.

Based upon this analysis, it was an abuse of discretion for the trial court to admit the arresting officer's report into evidence. Appellant's fourth assignment of error is sustained.

In the fifth assignment of error, appellant asserts that the trial court erred when it denied her motion to strike Trooper March's testimony regarding the results of the HGN test on the basis that no foundation had been laid. Specifically, appellant maintains that Trooper March was not properly qualified to administer the HGN test and that, in fact, he did not follow the proper procedures when he administered the test to appellant.

The Supreme Court of Ohio has held:

"[HN6] A properly qualified officer may testify at trial regarding a driver's performance on the horizontal gaze nystagmus test as it pertains to the issues of probable cause to arrest and whether the driver was operating a vehicle while under the influence of alcohol. See *R.C. 4511.19(A)(1)*. However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of *R.C. [\*\*\*17] 4511.19(A)(2), (3), or (4)*." *State v. Bresson* (1990), 51 Ohio St. 3d 123, 554 N.E.2d 1330, syllabus.

A review of the testimony given by Trooper March demonstrates that it fit within the guidelines of *Bresson*. While the trooper admitted that he had not been trained in administering an HGN test in three and one-half years, and had not read the field sobriety testing policy written by the Ohio State Highway Patrol in over a year, he was able to demonstrate extensive knowledge of the testing procedures and he offered his opinion regarding appellant's level of intoxication. Moreover, the HGN test was just one test administered by Trooper March. Two other field sobriety tests were given to appellant, and, in the opinion of Trooper March, she failed them both. Under the facts of the present case, we see no prejudicial error in the admission of the testimony of the arresting officer regarding the HGN test based on a perceived lack of foundation. The procedural defects brought out on cross-examination affect the credibility of the witness, not the admissibility of the evidence. Appellant's [\*440] fifth assignment of error is without merit.

In the sixth assignment of error, appellant argues [\*\*\*18] that the trial court abused its discretion when it denied her motion to strike Trooper March's testimony regarding the results of the HGN test since the results were irrelevant in a prosecution under *R.C. 4511.19(A)(1)*. It is appellant's contention that while the results of the HGN test would be relevant in a prosecution under *R.C. 4511.19(A)(3)* since a police officer can use an HGN test to predict the blood-alcohol level of a suspect, the results are [\*799] irrelevant in the present case because no relationship was established between the results of an HGN test and impaired driving.

This is a unique argument but one that is clearly without merit. Pursuant to the Supreme Court's decision in *Bresson*, [HN7] HGN testing can be used to establish probable cause as to whether a person is driving under the influence of alcohol because there is a correlation between blood-alcohol concentration and nystagmus. *Bresson*, 51 Ohio St. 3d at 124-125. Additionally, the court stated that according to the United States Department of Transportation, "the HGN test is the single most accurate field test to use in determining whether a person is alcohol impaired." *Id.* at 125. Thus, the logical conclusion is that an HGN test [\*\*\*19] is one of several valid tools that can be used to indicate whether a person has been driving while alcohol impaired, in violation of *R.C. 4511.19(A)(1)*.

130 Ohio App. 3d 789, \*799; 721 N.E.2d 433, \*\*440;  
1998 Ohio App. LEXIS 6149, \*\*\*19

Based upon the foregoing, the trial court did not abuse its discretion when it denied appellant's motion to strike Trooper March's testimony regarding the results of the HGN test. Appellant's sixth assignment of error is without merit.

In the seventh assignment of error, appellant contends that there was insufficient evidence to support her conviction on the charge of failing to signal before executing a turn. "A challenge to the sufficiency of the evidence is quantitatively and qualitatively different from a challenge to the weight of the evidence." *State v. Longmire* (Dec. 19, 1997), 1997 Ohio App. LEXIS 5744, Portage App. No. 97-P-0024, unreported, at 3. This difference was addressed by the Supreme Court of Ohio in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541. There, the court explained the concept of sufficiency of the evidence as follows:

"In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. [\*\*\*20] 388, 124 N.E.2d 148." 78 Ohio St. 3d at 386.

In the instant cause, appellant was found guilty of violating [HN8] *R.C. 4511.39* which provides, in pertinent part:

"No person shall turn a vehicle or trackless trolley or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

"When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle or trackless trolley before turning."

[\*800] Appellant asserts that the statute in question only requires the use of a turn signal before turning when another car will be affected by the maneuver. While appellant admits she did not use her turn signal, she concludes that since no other car was affected by her maneuver, she did not violate *R.C. 4511.39*. This argument was previously made and rejected in *State v. Lowman* (1992), 82 Ohio App. 3d 831, 613 N.E.2d 692. The Twelfth District Court of Appeals reasoned as follows:

"The first paragraph of *R.C. 4511.39* sets forth two [\*\*\*21] distinct duties. It embodies a requirement of reasonable care in changing directions in traffic *and* a requirement to use a signal. The statute says that a driver may not change direction until he [\*\*441] has ascertained 'that the movement can be made with reasonable safety *nor* without giving an appropriate signal \*\*\*.' (Emphasis added.) The signal requirement is set forth in absolute terms and is not modified by the language mandating reasonableness in changing directions.

"Further, because it is followed by the phrase 'in the manner hereinafter provided' the term 'appropriate signal' must be seen as describing the mechanics of giving the signal itself, and not as referring to the situation in which the signal is required. The fact that the legislature required the use of an 'appropriate signal' cannot be construed as making the use of such signal contingent upon traffic conditions. Similarly, the phrase 'when required' simply refers to a situation in which the driver intends to change direction on the roadway. The phrase refers to the signal requirement as set forth in the first paragraph of the statute, and again there is no indication that this language was intended to make the [\*\*\*22] requirement conditional. The legislature could have chosen a term such as 'when reasonable,' but it did not do so. We decline to read such language into the section." (Emphasis added.) *Id.* at 835.

We agree with the foregoing opinion. Accordingly, appellant's conviction for violating *R.C. 4511.39* was supported by sufficient evidence. Appellant's seventh assignment of error is without merit.

Based on the foregoing analysis, appellant's conviction on the charge of driving under the influence of alcohol is reversed and the matter remanded for a new trial on that charge. However, appellant's conviction on the charge of failing to signal before making a turn is affirmed.

JUDGE WILLIAM M. O'NEILL

CHRISTLEY, P.J., dissents with Dissenting Opinion,

[\*801] NADER, J., concurs.

**DISSENT BY: JUDITH A. CHRISTLEY**

**DISSENT:**

DISSENTING OPINION

CHRISTLEY, P.J.

I respectfully dissent from the majority's analysis and conclusion in reference to the second and fourth assignments of error.

As to the second assignment of error, the issue of the admission of appellant's signature on her driver's license, I would agree that the trial court's blanket rejection of the offer of the signature is incorrect. [\*\*\*23] Certainly, when a proper foundation had been laid, a signature analysis could indeed have been relevant to show the degree of physical impairment of the signature's author. However, the record in the instant case did not show that any such foundation was laid. There was no proffer of the opinion of an expert; there was no comparative signature offered; in other words, there was no evidence put forth or proffered which would support the claims of appellant as to relevancy.

I disagree strongly with the majority that the jury would be qualified to draw a conclusion that, because a single signature appeared to be neat and legible, *ergo*, the writer was sober. It would require an inference on an inference; *i.e.*, the signature was the writer's normal signature, and a neat and legible signature could only be produced if the writer was sober. Without a foundation or a proffer of such a foundation, I believe the trial court was correct in disallowing the signature from evidence. The end result was therefore the right conclusion, albeit for the wrong reason. I would therefore affirm as to the second assignment.

As to the fourth assignment, I concur with the majority's conclusion that [\*\*\*24] the admission of the report was error. However, I would find it to be harmless error because all of the relevant material in the report was, in fact, testified to by Trooper March. Thus, there were no prejudicial revelations beyond those to which he had already testified.

[\*\*442] The pertinent provisions of Ohio Rules of Evidence discussed herein. *Evid.R. 612* reads in part:

"Writing Used to Refresh Memory. Except as otherwise provided in criminal proceedings by *Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure*, if a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that [\*802] the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, [\*\*\*25] and order delivery of the remainder to the party entitled thereto. \* \* \*"

*Evid.R. 803(8)* reads:

"Hearsay Exceptions; Availability of the Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\*\*\*

"(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness."

In the case at bar, during the state's direct examination of Trooper March, the state first utilized the report to refresh his memory. The report was entitled "Ohio State Highway Patrol Impaired Driver Report" and was marked "State's Exhibit C." Pursuant to *Evid.R. 612*, appellant's counsel was then given the opportunity to inspect the report and to utilize it in the defense's cross-examination [\*\*\*26] of Trooper March. No party has disputed the propriety of these actions.

During cross-examination, the defense attempted to attack the accuracy of Trooper March's observations of appellant, thereby calling into question the trooper's credibility. During this process, the defense made several references to Trooper March's report. When defense counsel was referring to the contents of the report, Trooper March again admitted that he could not presently recollect all of his prior observations without the assistance of the report. Defense counsel thereafter showed Trooper March portions of the report and repeated the questions. The state did not object when defense counsel used the report in this fashion.

At the close of the state's case, the state offered State's Exhibit C, the report, into evidence. Defense counsel objected on the grounds that *Evid.R. 803(8)* permitted the introduction of the report only when *the defense* was the party offering it into evidence. The trial court rejected this argument and overruled defense counsel's objections on two grounds. First, the trial court stated that because defense counsel also used the report to refresh Trooper March's memory, the opportunity [\*\*\*27] to introduce the report shifted back to the state. Under this interpretation of the rule, the state then became the adverse party referenced in *Evid.R. 612*. Second, the trial court characterized the report as a test outcome or [\*803] a test score rather than an investigative report, thereby holding that it was admissible pursuant to *Evid.R. 803(8)*.

At the outset, I believe that the trial court misapplied *Evid.R. 612* in this case. Here, the adverse party referenced in the rule is the defense. The state was the original party whose witness needed to have his memory refreshed on direct examination [\*\*443] with the report. In accordance with *Evid.R. 612*, the adverse party was then the defense. As indicated above, the defense was then entitled to inspect the report and to utilize the report in cross-examination. n1 The defense did so. If the defense had thereafter desired to move the court to introduce the report into evidence, it could have done so. However, the defense did not.

n1 Here, I note that the state made no objection to the defense inspecting the report.

[\*\*\*28]

Nevertheless, the trial court determined that the provision of *Evid.R. 612* regarding the opportunity to introduce evidence somehow shifted when the defense allowed Trooper March to review the report to refresh his memory during cross-examination.

Irrespective of the fact that I find no authority for such an interpretation, I do not perceive that the defense's use of the report resulted in a shift of who was considered the adverse party. Instead, the defense simply used the report to cross-examine the witness as it was permitted to do under *Evid.R. 612*. n2 Indeed, the defense's primary objective was to call into question the witness' credibility; the fact that Trooper March could not recall presently his prior observations in the report did not change that objective.

130 Ohio App. 3d 789, \*803; 721 N.E.2d 433, \*\*443;  
1998 Ohio App. LEXIS 6149, \*\*\*28

n2 It would appear from *State v. Goff* (1998), 82 Ohio St. 3d 123, 136-137, 694 N.E.2d 916, that the defense could be the first party to use a document to refresh a witness' memory on cross-examination.

The purpose of the rule would not be [\*\*\*29] well-served if the state could prevent the original adverse party from thoroughly cross-examining a witness out of concern that such an inquiry might result in the state being able to admit the report.

Thus, as the report was first used to refresh the state's witness on the state's direct examination of that witness, the defense remained the adverse party, the only one who was entitled to move the court to introduce the report into evidence. Because the defense did not do so, the report should not have come in under *Evid.R. 612*.

Moreover, when a document which has been used to refresh a witness' recollection is submitted to the jury pursuant to *Evid.R. 612*, the document is not being offered as substantive evidence. Weissenberger, *Ohio Evidence* (1998) 285-286, Section 612.4. *Dayton v. Combs* (1993), 94 Ohio App. 3d 291, 298, 640 N.E.2d 863. Instead, it is being offered as a basis to evaluate the testimony of the [\*804] witness. Thus, unless the document had some other basis for admissibility as substantive evidence, the trial court should have instructed the jury to consider the document only for the limited purpose of assessing credibility. Weissenberger. No such charge was given to the [\*\*\*30] jury in the case at bar.

I also believe that the trial court erred when it held, in the alternative, that the report was admissible as a test score under *Evid.R. 803(8)*. In this regard, the Supreme Court of Ohio has held that *Evid.R. 803(8)* "prohibits the introduction of reports which recite an officer's observations of criminal activities or observations made as part of an investigation of criminal activities. \*\*\* [It] does not prohibit introduction of records of a routine, intra-police, or machine maintenance nature, such as intoxilyzer calibration logs." *State v. Ward* (1984), 15 Ohio St. 3d 355, 358, 474 N.E.2d 300.

By characterizing the report as a test score, the trial court was attempting to classify the report in the second admissible category of records, such as intoxilyzer calibration logs. However, it is obvious that the report contains Trooper March's observations of criminal activities made during his investigation in the case. For example, Trooper March indicated on the report that appellant had a moderate odor of alcoholic beverage about her person, [\*\*\*444] that her speech was slow, and that she failed various field sobriety tests. This report is not a record of a routine, [\*\*\*31] intra-police, or machine maintenance nature. It is, rather, a document containing the individual observations Trooper March made during his criminal investigation of appellant.

Other Ohio appellate courts have also found the "Ohio State Highway Patrol Impaired Driver Report" to be inadmissible under *Evid.R. 803(8)*. *State v. Joyce* (June 12, 1998), Hamilton App. No. C-970642, unreported, 1998 Ohio App. LEXIS 2566; *State v. McDaniel* (Feb. 21, 1995), Meigs App. No. 94CA08, unreported, 1995 Ohio App. LEXIS 716.

If the trial court erred by admitting State's Exhibit C into evidence, the query turns to whether the error was harmless beyond a reasonable doubt. I believe it was harmless error because it was merely cumulative of the officer's testimony. As previously indicated, there were no additional prejudicial revelations for which there had not already been testimony. Thus, there is no merit to this assignment.

Based upon my analysis concerning the second and fourth assignments of error, I would affirm the trial court's judgment in this matter.

PRESIDING JUDGE JUDITH A. CHRISTLEY

112 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - THOMAS M. GRABNER,  
Defendant-Appellant.**

**ACCELERATED CASE NO. 96-G-2038**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
GEAUGA COUNTY**

*1997 Ohio App. LEXIS 4418*

**September 30, 1997, Decided**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Chardon Municipal Court. Case No. 96 TRC 4146.

**DISPOSITION:**

JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** By an accelerated appeal from the Chardon Municipal Court (Ohio), defendant challenged the judgment convicting him of operating a motor vehicle under the influence of alcohol.

**OVERVIEW:** Defendant's vehicle crossed the white, solid line and travelled off the road numerous times. An officer stopped defendant's car. At the police station a blood alcohol test was administered, which showed that defendant was over the legal limit. At trial, defendant sought to suppress all evidence flowing from the vehicle stop and to suppress the test results. The trial court declined to suppress the evidence. Defendant then pleaded no contest to operating a motor vehicle while under the influence of alcohol. On appeal, defendant asserted error in the failure to suppress all evidence obtained as a result of a warrantless and unreasonable vehicle stop and in the denial of defendant's motion to suppress the test result generated by a machine that had not been calibrated with a properly certified calibration test solution. The court rejected both arguments, and affirmed defendant's conviction. The officer had probable cause to stop defendant's car when defendant had committed a minor traffic violation, failure to drive within marked lanes. Second, by pleading no contest, defendant admitted to the truth of the underlying facts. He suffered no prejudice as a result of any flaw in the test.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** certificate, calibration, motor vehicle, lane, influence of alcohol, regulations, breath, assignment of

error, probable cause, violating, contest, alcohol, drive, ethyl alcohol, traveling, eastbound, noticed, testing, exited, articulable suspicion, substantially comply, traffic violation, suspension, corrected, suppress, pleaded, marked, flaw, edge, tires

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN1] The Supreme Court of Ohio has held that where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

#### ***Evidence > Scientific Evidence > Blood Alcohol***

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN2] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures and equipment must substantially comply with Ohio Department of Health regulations.

### **COUNSEL:**

JAMES M. GILLETTE, POLICE PROSECUTOR, Chardon, OH, (For Plaintiff-Appellee).

ATTY. JOHN F. NORTON, Cleveland, OH, (For Defendant-Appellant).

**JUDGES:** HON. DONALD R. FORD, P.J., HON. WILLIAM M. O'NEILL, J., HON. MARY CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment. O'NEILL, J., CACIOPPO, J., Ret. Ninth Appellate District, sitting by assignment, concur.

**OPINION BY:** DONALD R. FORD

### **OPINION:**

#### **OPINION**

FORD, P.J.

This is an accelerated appeal from the Chardon Municipal Court. Appellant, Thomas M. Grabner, appeals from a judgment entry convicting him of operating a motor vehicle under the influence of alcohol, *R.C. 4511.19(A)(1)*.

At approximately 12:43 a.m. on May 26, 1996, Patrolman Frank Chickos ("Chickos") of the Bainbridge Police Department was traveling westbound on U.S. Route 422 when he noticed appellant's automobile traveling eastbound at a low rate of speed. Chickos then activated the radar unit in his cruiser, which indicated that appellant's vehicle was traveling forty-five m.p.h. in a zone where the speed limit was sixty-five m.p.h. [\*2] Chickos then turned around in the grass median between the eastbound and westbound lanes. Before Chickos proceeded eastbound, he noticed appellant's vehicle, which was in the right lane, cross the white solid line on the right side of the highway. Chickos then observed appellant's automobile travel off the right side of the road two more times.

At this point, Chickos engaged his overhead emergency lights to stop appellant's vehicle, but appellant failed to

stop. Chickos then activated his emergency siren and appellant did not stop then either. Eventually, appellant exited from the highway and stopped at the end of the exit ramp at State Route 306. After stopping, Chickos exited his vehicle and began to walk toward appellant's automobile. Appellant then drove away and proceeded southbound on State Route 306. Chickos pursued and, by using the public address speaker in his cruiser, ordered appellant to pull over. After turning onto another road, appellant finally stopped.

As Chickos approached, appellant exited his vehicle, with his pants positioned around his knees. Appellant informed Chickos that he had just taken his girlfriend home. Chickos observed that appellant's speech was slurred, [\*3] that his eyes were bloodshot, and that his balance was poor. Upon Chickos' instruction, appellant pulled up his pants and sat in his automobile. Shortly thereafter, Sergeant Alan Lynn and Patrolman Robert Rank of the Bainbridge Police Department arrived at the scene.

Chickos asked appellant for his driver's license, which appellant was unable to locate after a lengthy search of his wallet. Chickos then requested appellant to perform several field sobriety tests. First, appellant could not recite the alphabet. Second, appellant was unable to stand on one foot for thirty seconds. Third, appellant performed poorly on the walk-and-turn test. Finally, appellant failed the horizontal gaze nystagmus test. At that point, appellant was placed under arrest. Appellant resisted being handcuffed and receiving a pat-down search. During his arrest, appellant was hostile toward the officers and repeatedly insulted them.

Upon arrival at the Bainbridge Police Department, Chickos observed appellant for twenty minutes and then administered a BAC DataMaster test. After two failed attempts, appellant submitted a valid sample and the test showed that he had a breath-alcohol concentration of .304 grams [\*4] by weight of alcohol per two hundred ten liters of breath.

At that time, appellant was issued citations for the following violations: failure to drive within marked lanes, *R.C. 4511.33(A)*; operating a motor vehicle under Financial Responsibility Act suspension, *R.C. 4507.02(B)*; operating a motor vehicle while under a twelve-point court suspension, *R.C. 4507.02(D)*; operating a motor vehicle with a prohibited concentration of alcohol in his breath, *R.C. 4511.19(A)(3)*; and operating a motor vehicle while under the influence of alcohol, *R.C. 4511.19(A)(1)*.

In a judgment entry filed on May 29, 1996, the trial court ordered that appellant's driver's license be suspended pending the outcome of this matter. On July 2, 1996, appellant moved to suppress all evidence flowing from the stop of his vehicle and to suppress the results of appellant's BAC DataMaster test, because the test was not administered according to Ohio Department of Health regulations. The trial court overruled appellant's motion on September 10, 1996. Appellant then pleaded no contest to violating *R.C. 4511.19(A)(1)*, and the court found him guilty on that charge. The court dismissed the other charges, and stayed appellant's [\*5] sentence pending this appeal.

On appeal, appellant now raises the following as error:

"[1.] The trial court erred to the prejudice of [appellant] in overruling his motion to suppress all evidence obtained as a result of a warrantless and unreasonable stop of [appellant's] car.

"[2.] The trial court erred to the prejudice of [appellant] when it denied his motion to suppress a chemical test result generated by a machine that had not been calibrated with a properly certified calibration test solution."

In the first assignment, appellant basically asserts that Chickos did not have the requisite articulable suspicion to conduct an investigative stop of appellant's automobile. This contention is without merit because Chickos had probable cause to stop appellant's vehicle. In *Dayton v. Erickson (1996)*, 76 Ohio St. 3d 3, 665 N.E.2d 1091, [HN1] the Supreme Court of Ohio held:

"We conclude that where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid

regardless of the officer's underlying subjective intent or motivation for stopping the [\*6] vehicle in question." *Id.* at 11-12.

In the case *sub judice*, Chickos testified that appellant's tires crossed the edge line on three separate occasions. Therefore, he had probable cause to believe that appellant had committed a minor traffic violation, *i.e.*, failure to drive within marked lanes, *R.C. 4511.33(A)*, which obviously would rise above the crest of an articulable suspicion to stop. Thus, pursuant to the holding of *Erickson*, Chickos' stop of appellant's vehicle was justified by appellant's lane violation. n1 Appellant's first assignment of error is without merit.

n1 Although appellant asserts that Chickos elected to stop appellant's vehicle when he first observed him drive forty-five m.p.h. in a sixty-five m.p.h. zone at 12:43 a.m., Chickos' testimony reveals that he decided to stop appellant's automobile only after he noticed appellant's tires cross the right edge line three times.

In the second assignment of error, appellant asserts that since the certificate relied on by the officer [\*7] in calibrating the BAC DataMaster was not in compliance with Ohio Department of Health regulations, the results of appellant's breath-alcohol test are unreliable and therefore must be suppressed. The certificate sent from the Ohio Department of Health to the Bainbridge Police Department states: "This calibration solution contains 1.21 +/- 2%mg/mL ethyl alcohol in distilled water." Thus, appellant asserts that the plus or minus two percent language of the certificate rendered it useless as the basis for testing to a target value.

Appellant's contention is not well-founded, because he suffered no prejudice as a result of any alleged noncompliance with Ohio Department of Health Regulations. Although appellant was given a citation for violating both *R.C. 4511.19(A)(1)* and (A)(3), he pleaded no contest to *R.C. 4511.19(A)(1)*, operating a vehicle under the influence of alcohol, and was found guilty of violating that statute. By pleading no contest, appellant admitted to the truth of the underlying facts upon which the citation for the *R.C. 4511.19(A)(1)* violation was predicated. *Crim.R. 11(B)(2)*. Since a prohibited amount of alcohol on an individual's breath is not a necessary element of [\*8] operating a motor vehicle under the influence of alcohol, *R.C. 4511.19(A)(1)*, appellant suffered no prejudice as a result of any flaw in the BAC DataMaster test. Additionally, there is no prejudice to appellant with respect to the *R.C. 4511.19(A)(3)* charge since that citation was dismissed by the trial court.

Although appellant has suffered no harm as a result of any alleged flaw in the calibration certificate from the Department of Health, we will briefly address the merits of the second assignment. [HN2] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures and equipment must substantially comply with Ohio Department of Health regulations. *State v. Hominsky (1995), 107 Ohio App. 3d 787, 795, 669 N.E.2d 523.*

Sergeant Ian Michael Bachovich ("Bachovich") of the Bainbridge Police Department testified at the suppression hearing. He stated that he was responsible for conducting calibration checks on the department's BAC DataMaster. He further testified that he performed the calibration checks on May 22, 1996, and on May 29, 1996. He testified that both tests resulted in a reading within the acceptable range of within plus or minus .005 of .100 [\*9] g/210L stated on the certificate.

Appellant's asserts that the "+/- 2%" listed on the certificate renders his BAC DataMaster test result inadmissible. We disagree. As the trial court noted, appellant has failed to demonstrate any prejudice suffered as a result of the extraneous percentage added to the amount of ethyl alcohol in the solution. Furthermore, the error makes no reference to the target values and there is no evidence indicating that the testing solution was anything other than 1.21 mg/mL ethyl alcohol in distilled water. Therefore, we conclude that the "+/- 2%" on the calibration certificate fails to raise any serious doubt regarding the reliability of the BAC DataMaster test. Accordingly, we hold that the calibration tests of the BAC DataMaster substantially comply with the Department of Health regulations. Appellant's second assignment of error is not well-taken. n2

n2 Parenthetically, we note that the trial court stated in its judgment entry that "the Department of Health sent a corrected certificate issued February 29, 1996[,] deleting the '+/-2%' from the certificate dated February 16, 1996." There is no evidence in the record of the correction. Bachovich, who testified concerning the calibration tests, stated that he never received a corrected certificate. Thus, this finding of the trial court was not supported by competent, credible evidence. See *C. E. Morris Co. v. Foley Constr. Co.* (1978), *54 Ohio St. 2d 279, 376 N.E.2d 578*.

[\*10]

For the foregoing reasons, appellant's assignments of error are without merit. The judgment of the Chardon Municipal Court is affirmed.

PRESIDING JUDGE DONALD R. FORD

O'NEILL, J.,

CACIOPPO, J., Ret.,  
Ninth Appellate District,  
sitting by assignment,

concur.

113 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, - vs - THOMAS M. GRABNER,  
Defendant-Appellant.**

**ACCELERATED CASE NO. 96-G-2038**

**COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT,  
GEAUGA COUNTY**

*1997 Ohio App. LEXIS 4418*

**September 30, 1997, Decided**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Chardon Municipal Court. Case No. 96 TRC 4146.

**DISPOSITION:**

JUDGMENT: Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** By an accelerated appeal from the Chardon Municipal Court (Ohio), defendant challenged the judgment convicting him of operating a motor vehicle under the influence of alcohol.

**OVERVIEW:** Defendant's vehicle crossed the white, solid line and travelled off the road numerous times. An officer stopped defendant's car. At the police station a blood alcohol test was administered, which showed that defendant was over the legal limit. At trial, defendant sought to suppress all evidence flowing from the vehicle stop and to suppress the test results. The trial court declined to suppress the evidence. Defendant then pleaded no contest to operating a motor vehicle while under the influence of alcohol. On appeal, defendant asserted error in the failure to suppress all evidence obtained as a result of a warrantless and unreasonable vehicle stop and in the denial of defendant's motion to suppress the test result generated by a machine that had not been calibrated with a properly certified calibration test solution. The court rejected both arguments, and affirmed defendant's conviction. The officer had probable cause to stop defendant's car when defendant had committed a minor traffic violation, failure to drive within marked lanes. Second, by pleading no contest, defendant admitted to the truth of the underlying facts. He suffered no prejudice as a result of any flaw in the test.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** certificate, calibration, motor vehicle, lane, influence of alcohol, regulations, breath, assignment of

error, probable cause, violating, contest, alcohol, drive, ethyl alcohol, traveling, eastbound, noticed, testing, exited, articulable suspicion, substantially comply, traffic violation, suspension, corrected, suppress, pleaded, marked, flaw, edge, tires

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops***

[HN1] The Supreme Court of Ohio has held that where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Evidence > Scientific Evidence > Blood Alcohol***

***Evidence > Scientific Evidence > Sobriety Tests***

[HN2] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures and equipment must substantially comply with Ohio Department of Health regulations.

**COUNSEL:**

JAMES M. GILLETTE, POLICE PROSECUTOR, Chardon, OH, (For Plaintiff-Appellee).

ATTY. JOHN F. NORTON, Cleveland, OH, (For Defendant-Appellant).

**JUDGES:** HON. DONALD R. FORD, P.J., HON. WILLIAM M. O'NEILL, J., HON. MARY CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment. O'NEILL, J., CACIOPPO, J., Ret. Ninth Appellate District, sitting by assignment, concur.

**OPINION BY:** DONALD R. FORD

**OPINION:**

**OPINION**

FORD, P.J.

This is an accelerated appeal from the Chardon Municipal Court. Appellant, Thomas M. Grabner, appeals from a judgment entry convicting him of operating a motor vehicle under the influence of alcohol, *R.C. 4511.19(A)(1)*.

At approximately 12:43 a.m. on May 26, 1996, Patrolman Frank Chickos ("Chickos") of the Bainbridge Police Department was traveling westbound on U.S. Route 422 when he noticed appellant's automobile traveling eastbound at a low rate of speed. Chickos then activated the radar unit in his cruiser, which indicated that appellant's vehicle was traveling forty-five m.p.h. in a zone where the speed limit was sixty-five m.p.h. [\*2] Chickos then turned around in the grass median between the eastbound and westbound lanes. Before Chickos proceeded eastbound, he noticed appellant's vehicle, which was in the right lane, cross the white solid line on the right side of the highway. Chickos then observed appellant's automobile travel off the right side of the road two more times.

At this point, Chickos engaged his overhead emergency lights to stop appellant's vehicle, but appellant failed to

stop. Chickos then activated his emergency siren and appellant did not stop then either. Eventually, appellant exited from the highway and stopped at the end of the exit ramp at State Route 306. After stopping, Chickos exited his vehicle and began to walk toward appellant's automobile. Appellant then drove away and proceeded southbound on State Route 306. Chickos pursued and, by using the public address speaker in his cruiser, ordered appellant to pull over. After turning onto another road, appellant finally stopped.

As Chickos approached, appellant exited his vehicle, with his pants positioned around his knees. Appellant informed Chickos that he had just taken his girlfriend home. Chickos observed that appellant's speech was slurred, [\*3] that his eyes were bloodshot, and that his balance was poor. Upon Chickos' instruction, appellant pulled up his pants and sat in his automobile. Shortly thereafter, Sergeant Alan Lynn and Patrolman Robert Rank of the Bainbridge Police Department arrived at the scene.

Chickos asked appellant for his driver's license, which appellant was unable to locate after a lengthy search of his wallet. Chickos then requested appellant to perform several field sobriety tests. First, appellant could not recite the alphabet. Second, appellant was unable to stand on one foot for thirty seconds. Third, appellant performed poorly on the walk-and-turn test. Finally, appellant failed the horizontal gaze nystagmus test. At that point, appellant was placed under arrest. Appellant resisted being handcuffed and receiving a pat-down search. During his arrest, appellant was hostile toward the officers and repeatedly insulted them.

Upon arrival at the Bainbridge Police Department, Chickos observed appellant for twenty minutes and then administered a BAC DataMaster test. After two failed attempts, appellant submitted a valid sample and the test showed that he had a breath-alcohol concentration of .304 grams [\*4] by weight of alcohol per two hundred ten liters of breath.

At that time, appellant was issued citations for the following violations: failure to drive within marked lanes, *R.C. 4511.33(A)*; operating a motor vehicle under Financial Responsibility Act suspension, *R.C. 4507.02(B)*; operating a motor vehicle while under a twelve-point court suspension, *R.C. 4507.02(D)*; operating a motor vehicle with a prohibited concentration of alcohol in his breath, *R.C. 4511.19(A)(3)*; and operating a motor vehicle while under the influence of alcohol, *R.C. 4511.19(A)(1)*.

In a judgment entry filed on May 29, 1996, the trial court ordered that appellant's driver's license be suspended pending the outcome of this matter. On July 2, 1996, appellant moved to suppress all evidence flowing from the stop of his vehicle and to suppress the results of appellant's BAC DataMaster test, because the test was not administered according to Ohio Department of Health regulations. The trial court overruled appellant's motion on September 10, 1996. Appellant then pleaded no contest to violating *R.C. 4511.19(A)(1)*, and the court found him guilty on that charge. The court dismissed the other charges, and stayed appellant's [\*5] sentence pending this appeal.

On appeal, appellant now raises the following as error:

"[1.] The trial court erred to the prejudice of [appellant] in overruling his motion to suppress all evidence obtained as a result of a warrantless and unreasonable stop of [appellant's] car.

"[2.] The trial court erred to the prejudice of [appellant] when it denied his motion to suppress a chemical test result generated by a machine that had not been calibrated with a properly certified calibration test solution."

In the first assignment, appellant basically asserts that Chickos did not have the requisite articulable suspicion to conduct an investigative stop of appellant's automobile. This contention is without merit because Chickos had probable cause to stop appellant's vehicle. In *Dayton v. Erickson (1996)*, 76 Ohio St. 3d 3, 665 N.E.2d 1091, [HN1] the Supreme Court of Ohio held:

"We conclude that where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid

regardless of the officer's underlying subjective intent or motivation for stopping the [\*6] vehicle in question." *Id.* at 11-12.

In the case *sub judice*, Chickos testified that appellant's tires crossed the edge line on three separate occasions. Therefore, he had probable cause to believe that appellant had committed a minor traffic violation, *i.e.*, failure to drive within marked lanes, *R.C. 4511.33(A)*, which obviously would rise above the crest of an articulable suspicion to stop. Thus, pursuant to the holding of *Erickson*, Chickos' stop of appellant's vehicle was justified by appellant's lane violation. n1 Appellant's first assignment of error is without merit.

n1 Although appellant asserts that Chickos elected to stop appellant's vehicle when he first observed him drive forty-five m.p.h. in a sixty-five m.p.h. zone at 12:43 a.m., Chickos' testimony reveals that he decided to stop appellant's automobile only after he noticed appellant's tires cross the right edge line three times.

In the second assignment of error, appellant asserts that since the certificate relied on by the officer [\*7] in calibrating the BAC DataMaster was not in compliance with Ohio Department of Health regulations, the results of appellant's breath-alcohol test are unreliable and therefore must be suppressed. The certificate sent from the Ohio Department of Health to the Bainbridge Police Department states: "This calibration solution contains 1.21 +/- 2%mg/mL ethyl alcohol in distilled water." Thus, appellant asserts that the plus or minus two percent language of the certificate rendered it useless as the basis for testing to a target value.

Appellant's contention is not well-founded, because he suffered no prejudice as a result of any alleged noncompliance with Ohio Department of Health Regulations. Although appellant was given a citation for violating both *R.C. 4511.19(A)(1)* and (A)(3), he pleaded no contest to *R.C. 4511.19(A)(1)*, operating a vehicle under the influence of alcohol, and was found guilty of violating that statute. By pleading no contest, appellant admitted to the truth of the underlying facts upon which the citation for the *R.C. 4511.19(A)(1)* violation was predicated. *Crim.R. 11(B)(2)*. Since a prohibited amount of alcohol on an individual's breath is not a necessary element of [\*8] operating a motor vehicle under the influence of alcohol, *R.C. 4511.19(A)(1)*, appellant suffered no prejudice as a result of any flaw in the BAC DataMaster test. Additionally, there is no prejudice to appellant with respect to the *R.C. 4511.19(A)(3)* charge since that citation was dismissed by the trial court.

Although appellant has suffered no harm as a result of any alleged flaw in the calibration certificate from the Department of Health, we will briefly address the merits of the second assignment. [HN2] In order for the results of a breath alcohol test to be admissible evidence, the testing procedures and equipment must substantially comply with Ohio Department of Health regulations. *State v. Hominsky (1995), 107 Ohio App. 3d 787, 795, 669 N.E.2d 523.*

Sergeant Ian Michael Bachovich ("Bachovich") of the Bainbridge Police Department testified at the suppression hearing. He stated that he was responsible for conducting calibration checks on the department's BAC DataMaster. He further testified that he performed the calibration checks on May 22, 1996, and on May 29, 1996. He testified that both tests resulted in a reading within the acceptable range of within plus or minus .005 of .100 [\*9] g/210L stated on the certificate.

Appellant's asserts that the "+/- 2%" listed on the certificate renders his BAC DataMaster test result inadmissible. We disagree. As the trial court noted, appellant has failed to demonstrate any prejudice suffered as a result of the extraneous percentage added to the amount of ethyl alcohol in the solution. Furthermore, the error makes no reference to the target values and there is no evidence indicating that the testing solution was anything other than 1.21 mg/mL ethyl alcohol in distilled water. Therefore, we conclude that the "+/- 2%" on the calibration certificate fails to raise any serious doubt regarding the reliability of the BAC DataMaster test. Accordingly, we hold that the calibration tests of the BAC DataMaster substantially comply with the Department of Health regulations. Appellant's second assignment of error is not well-taken. n2

n2 Parenthetically, we note that the trial court stated in its judgment entry that "the Department of Health sent a corrected certificate issued February 29, 1996[,] deleting the '+/-2%' from the certificate dated February 16, 1996." There is no evidence in the record of the correction. Bachovich, who testified concerning the calibration tests, stated that he never received a corrected certificate. Thus, this finding of the trial court was not supported by competent, credible evidence. See *C. E. Morris Co. v. Foley Constr. Co. (1978)*, 54 Ohio St. 2d 279, 376 N.E.2d 578.

[\*10]

For the foregoing reasons, appellant's assignments of error are without merit. The judgment of the Chardon Municipal Court is affirmed.

PRESIDING JUDGE DONALD R. FORD

O'NEILL, J.,

CACIOPPO, J., Ret.,  
Ninth Appellate District,  
sitting by assignment,

concur.

114 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, PLAINTIFF-APPELLEE v. DARYL G. DAUGHERTY,  
DEFENDANT-APPELLANT**

**CASE NO. 5-97-20**

**COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, HANCOCK  
COUNTY**

*1997 Ohio App. LEXIS 4278*

**September 17, 1997, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeal from Municipal Court.

**DISPOSITION:**

JUDGMENT: Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a decision of the Findlay Municipal Court (Ohio), that convicted him of speeding. Defendant asserted that the court erred when it admitted evidence of a radar test into trial pursuant to *Ohio Rev. Code Ann. § 4511.091*, that it erred by admitting testimony of the arresting officer regarding the results of those radar observations, and that the court's decision ran against the manifest weight of the evidence.

**OVERVIEW:** Defendant was convicted of speeding. That decision was affirmed by the court, which found that the trial court had not erred when it admitted evidence of a radar test into trial under *Ohio Rev. Code Ann. § 4511.091*. Defendant asserted that the admission of those test results violated his due process and equal protection rights, but the court determined that defendant had not overcome the presumption of constitutionality which all statutes enjoyed. Judicial notice regarding the accuracy of a radar device could be taken by a court that had received prior expert testimony as to that device's accuracy. The court noted that testimony as to the accuracy of the device had been taken and that the state's goal of keeping its road safe was rationally met by § 4511.091. Further, the court determined that the trial court's verdict had not run against the manifest weight of the evidence as that decision had not resulted in a manifest miscarriage of justice. Weight and credibility were matters for the trier of fact to decide.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** radar, assignment of error, judicial notice, speeding, speed, scientific, accuracy, calibration, due

process, traveling, admitting, manifest, expert testimony, arresting officer, equal protection, working order, motor vehicle, credibility, rationally, dependable, training, speeders, speed limit, confirmed, arresting, appealing, overrule, mph

### **LexisNexis(R) Headnotes**

#### ***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

[HN1] All legislative enactments enjoy a presumption of validity and constitutionality. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, the statute will be presumed to be constitutional.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN2] *Ohio Rev. Code Ann. § 4511.091* provides, in pertinent part: the driver of any motor vehicle which has been checked by radar to determine the speed of the motor vehicle over a measured distance of the highway and found to be in violation of any of the provisions of *Ohio Rev. Code Ann. § 4511.21* or *4511.211*, may be arrested until a warrant may be obtained, provided such officer has observed the recording of the speed of such motor vehicle by the radio microwaves, electrical or mechanical timing device.

#### ***Evidence > Judicial Notice > General Overview***

#### ***Evidence > Scientific Evidence > General Overview***

#### ***Evidence > Testimony > Experts > Criminal Trials***

[HN3] The accuracy of a radar device is a proper subject for judicial notice. However, judicial notice of the accuracy or dependability of a K-55 radar device may not be taken unless the trial court has received prior expert testimony on the accuracy of that device.

#### ***Evidence > Judicial Notice***

[HN4] A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN5] In determining whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and decide whether, in resolving conflicts of evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

#### ***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN6] The weight and credibility of witnesses are matters to be determined by the trier of facts.

### **COUNSEL:**

MR. WILLIAM E. CLARK, Attorney at Law, Reg. No. 0006702, Findlay, Ohio, For Appellant.

MR. ROBERT A. BEUTLER, JR., Director of Law, Reg. No. 0023179, Findlay, Ohio, For Appellee.

**JUDGES:** HADLEY, J. BRYANT and SHAW, JJ., concur.

**OPINION BY:** HADLEY

**OPINION:**

OPINION

**HADLEY, J.** Daryl G. Daugherty ("appellant") is appealing his speeding conviction in the Findlay Municipal Court. For the following reasons, we affirm appellant's conviction.

The facts of the case arose when on April 21, 1997, appellant was driving south on County Road 140 while en route to work. Appellant passed an Ohio State Patrolman traveling north on County Road 140. The officer turned around and followed appellant. Using a K-55 radar device, the officer determined that appellant was traveling 66 mph in a 55 mph zone. Consequently, the officer stopped appellant and cited him for speeding.

Appellant entered a not guilty plea and filed a Motion in Limine requesting that the evidence obtained by radar be excluded from his trial. Appellant argued that it was a denial of due process and equal protection of law for the court [\*2] to allow the introduction of radar tests when no independent agency certified either that type of test or the operator of such devices.

On May 7, 1997, the trial court overruled appellant's motion. That same day, appellant's case proceeded to trial on the citation. The State offered evidence of appellant's speed as calculated by radar. At the conclusion of the trial, the court found appellant guilty of speeding. The court fined appellant \$ 30.00 plus court costs.

A judgment entry was filed on May 20, 1997. It is from this sentence and conviction that appellant is appealing the following three assignments of error.

**ASSIGNMENT OF ERROR NO.1**

**The trial court erred in overruling the appellant's motion in limine and allowing the introduction of result of K-55 radar.**

In his first assignment of error, appellant argues that the admission of the K-55 radar results was a violation of his due process and equal protection rights. Therefore, the trial court erred in admitting those results. We conclude that the K-55 radar results were properly admitted and consequently, affirm the trial court for the following reasons.

We begin our analysis by noting that [HN1] all legislative enactments [\*3] enjoy a presumption of validity and constitutionality. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St. 3d 360, 361, 653 N.E.2d 212; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St. 3d 193, 199, 551 N.E.2d 938, overruled on other grounds, *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460, 639 N.E.2d 425; *Hardy v. VerMeulen* (1987), 32 Ohio St. 3d 45, 48, 512 N.E.2d 626, cert. denied (1988), 484 U.S. 1066, 98 L. Ed. 2d 993, 108 S. Ct. 1029. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, the statute will be presumed to be constitutional. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St. 3d 351, 352, 639 N.E.2d 31.

*R.C. 4511.091* provides, in pertinent part:

[HN2] **The driver of any motor vehicle which has been checked by radar \* \* \* to determine the speed of the motor vehicle over a measured distance of the highway \* \* \* and found to be in violation of any of the provisions of section 4511.21 or 4511.211 or the Revised Code, may be arrested until a warrant may be obtained, provided such officer has observed the recording [\*4] of the speed of such motor vehicle by the radio microwaves, electrical or mechanical timing device \* \* \* \***

Appellant contends that *R.C. 4511.091* violates his due process rights by not providing for a neutral party overseer to administer the methods and techniques used by law enforcement agencies in their training, calibration, and testing of the K-55 radar unit. Moreover, he claims that "the manufacturers of K-55 radar devices have a pecuniary interest" in the operation of the device. Therefore, appellant concludes that his right to have his case decided by an impartial tribunal is destroyed when a trial court takes judicial notice of a radar device.

The Ohio Supreme Court has previously held that [HN3] the accuracy of a radar device is a proper subject for judicial notice. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630. However, judicial notice of the accuracy or dependability of a K-55 radar device may not be taken unless the trial court has received prior expert testimony on the accuracy of that device. *State v. Colby* (1984), 14 Ohio App. 3d 291, 470 N.E.2d 924. See also *State v. Wilson* (May 6, 1982), Auglaize App. No. 2-81-24, unreported; *State v. [\*5] Doles* (1980), 70 Ohio App. 2d 35, 433 N.E.2d 1290. Moreover, the Rules of Evidence dictate that:

[HN4] **A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**

*Evid.R. 201(B)*.

In the present case, we note that the Findlay Municipal Court has previously received expert testimony concerning the scientific principles relating to the use of K-55 radar devices and found them to be dependable. *State v. Calladine* (October 24, 1989), Case No. 89-TRD-9034, unreported. Therefore, we hold that judicial notice as to the scientific principles relating to the use of a K-55 radar device in appellant's case was appropriate. See *State v. Bechtel* (1985), 24 Ohio App. 3d 72, 73, 493 N.E.2d 318; *State v. Ayesch* (1985), 24 Ohio App. 3d 73, 74, 493 N.E.2d 325; *Kettering v. Smith* (Apr. 12, 1984), Montgomery App. No. 8383, unreported; *State v. Kinker* (Mar. 4, 1983), Huron App. No. H-82-24, unreported; and *State v. Shew* (Dec. 30, 1983), Warren App. No. CA83-04-022, unreported. [\*6]

Moreover, appellant has not been deprived of any due process rights. The record reflects that the officer testified as to the working order and operation of the radar device. He said that he had checked the calibration of the device at 8:00 a.m. and then again at 2:00 p.m. on the day that he stopped appellant. n1 He further testified that he had received three months of training in the use of K-55 radar devices. Under these circumstances we find that the trial court did not violate appellant's due process rights when it admitted the K-55 radar results.

n1 We note that appellant was stopped around 1:35 pm that afternoon.

Nor do we find that appellant's equal protection rights were violated. Contrary to appellant's assertions, we believe that the State's goal in keeping its roads safe from speeders is rationally met by *R.C. 4511.091*. That statute allows police officers to use radar devices to check the speed of potential speeders. If the radar device establishes that an individual is speeding, the police officer [\*7] can stop that vehicle and issue him or her a ticket. Every car on the road is subject to having its speed checked. Therefore, we believe that the State's goal is rationally related to the use of radar devices.

Accordingly, the trial court did not err in taking judicial notice of the scientific principles relating to the use of the K-55 radar device. Appellant's first assignment of error is therefore, overruled.

## **ASSIGNMENT OF ERROR NO.2**

**The trial court erred in admitting testimony of the arresting officer regarding the results of radar observations.**

In his second assignment of error, appellant argues that the trial court erred in admitting the arresting officer's testimony when the State offered no expert evidence that the K-55 radar device was dependable and accurate. In support of his argument, appellant cites our prior decision of *Colby, supra, at 291*.

However, in appellant's first assignment of error, we noted that the trial court had previously heard expert testimony as to the scientific principles relating to the use of K-55 radar devices in 1989. See *Calladine, supra*. Therefore, under our reasoning in *Colby, supra*, the trial court could [\*8] properly take judicial notice of the scientific principles relating to the use of a K-55 radar device in appellant's case.

Furthermore, in addition to the judicial notice, the officer testified that he was trained in operating the K-55 radar device, he had checked the device's calibration, appellant's vehicle had been visually confirmed, an audio signal verified the validity of the reading, the officer compared his own speedometer reading with the device, and he had properly operated the device. We have previously held that such "judicial notice, coupled with the evidence of the qualifications of the trooper to operate the unit, the evidence that it was in proper working order, and the evidence that it was properly operated, satisfied the requirements for the admission of the reading to show a violation of the speed statute." *State v. Ellison* (Jan. 30, 1987), Auglaize App. No. 2-85-35, unreported. Therefore, the trial court did not err in admitting the arresting officer's testimony regarding the results of the radar device.

Accordingly, we overrule appellant's second assignment of error.

#### ASSIGNMENT OF ERROR NO.3

**The decision of the trial court is against the manifest [\*9] weight of the evidence and contrary to law.**

Appellant maintains in his final assignment of error that his speeding conviction is against the manifest weight of the evidence. [HN5] In determining whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and decide whether, in resolving conflicts of evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Otten* (1986), 33 Ohio App. 3d 339, 340, 515 N.E.2d 1009; *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717. See also *State v. Jenks* (1991), 61 Ohio St. 3d 259, 273, 574 N.E.2d 492 (holding that the relevant inquiry is whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt).

In the present case, the record reflects that the arresting officer testified that he observed appellant traveling at a speed greater than the posted speed limit. He estimated that appellant was traveling approximately ten miles over the [\*10] speed limit. Therefore, he activated his radar device and confirmed that appellant was speeding.

Although appellant testified that he could not have been speeding, [HN6] the weight and credibility of witnesses are matters to be determined by the trier of facts. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273. Therefore, we must defer to the judgment of the trial court.

Furthermore, the trial court found that the arresting officer had followed the appropriate procedures, he had checked the K-55 radar device's calibration prior to, and after, stopping appellant, and the device was in working order on the date appellant was stopped. The trial court additionally took judicial notice of the K-55 radar device's accuracy. Therefore, we hold that there was sufficient evidence to sustain appellant's conviction. Accordingly, we overrule appellant's final assignment of error.

For the aforementioned reasons, we affirm the judgment of the Findlay Municipal Court.

**Judgment affirmed.**

BRYANT and SHAW, JJ., concur.

115 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, PLAINTIFF-APPELLEE v. DARYL G. DAUGHERTY,  
DEFENDANT-APPELLANT**

**CASE NO. 5-97-20**

**COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, HANCOCK  
COUNTY**

*1997 Ohio App. LEXIS 4278*

**September 17, 1997, Date of Judgment Entry**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeal from Municipal Court.

**DISPOSITION:**

JUDGMENT: Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a decision of the Findlay Municipal Court (Ohio), that convicted him of speeding. Defendant asserted that the court erred when it admitted evidence of a radar test into trial pursuant to *Ohio Rev. Code Ann. § 4511.091*, that it erred by admitting testimony of the arresting officer regarding the results of those radar observations, and that the court's decision ran against the manifest weight of the evidence.

**OVERVIEW:** Defendant was convicted of speeding. That decision was affirmed by the court, which found that the trial court had not erred when it admitted evidence of a radar test into trial under *Ohio Rev. Code Ann. § 4511.091*. Defendant asserted that the admission of those test results violated his due process and equal protection rights, but the court determined that defendant had not overcome the presumption of constitutionality which all statutes enjoyed. Judicial notice regarding the accuracy of a radar device could be taken by a court that had received prior expert testimony as to that device's accuracy. The court noted that testimony as to the accuracy of the device had been taken and that the state's goal of keeping its road safe was rationally met by § 4511.091. Further, the court determined that the trial court's verdict had not run against the manifest weight of the evidence as that decision had not resulted in a manifest miscarriage of justice. Weight and credibility were matters for the trier of fact to decide.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** radar, assignment of error, judicial notice, speeding, speed, scientific, accuracy, calibration, due

process, traveling, admitting, manifest, expert testimony, arresting officer, equal protection, working order, motor vehicle, credibility, rationally, dependable, training, speeders, speed limit, confirmed, arresting, appealing, overrule, mph

### **LexisNexis(R) Headnotes**

#### ***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

[HN1] All legislative enactments enjoy a presumption of validity and constitutionality. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, the statute will be presumed to be constitutional.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN2] *Ohio Rev. Code Ann. § 4511.091* provides, in pertinent part: the driver of any motor vehicle which has been checked by radar to determine the speed of the motor vehicle over a measured distance of the highway and found to be in violation of any of the provisions of *Ohio Rev. Code Ann. § 4511.21* or *4511.211*, may be arrested until a warrant may be obtained, provided such officer has observed the recording of the speed of such motor vehicle by the radio microwaves, electrical or mechanical timing device.

#### ***Evidence > Judicial Notice > General Overview***

#### ***Evidence > Scientific Evidence > General Overview***

#### ***Evidence > Testimony > Experts > Criminal Trials***

[HN3] The accuracy of a radar device is a proper subject for judicial notice. However, judicial notice of the accuracy or dependability of a K-55 radar device may not be taken unless the trial court has received prior expert testimony on the accuracy of that device.

#### ***Evidence > Judicial Notice***

[HN4] A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN5] In determining whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and decide whether, in resolving conflicts of evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

#### ***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN6] The weight and credibility of witnesses are matters to be determined by the trier of facts.

### **COUNSEL:**

MR. WILLIAM E. CLARK, Attorney at Law, Reg. No. 0006702, Findlay, Ohio, For Appellant.

MR. ROBERT A. BEUTLER, JR., Director of Law, Reg. No. 0023179, Findlay, Ohio, For Appellee.

**JUDGES:** HADLEY, J. BRYANT and SHAW, JJ., concur.

**OPINION BY:** HADLEY

**OPINION:**

OPINION

**HADLEY, J.** Daryl G. Daugherty ("appellant") is appealing his speeding conviction in the Findlay Municipal Court. For the following reasons, we affirm appellant's conviction.

The facts of the case arose when on April 21, 1997, appellant was driving south on County Road 140 while en route to work. Appellant passed an Ohio State Patrolman traveling north on County Road 140. The officer turned around and followed appellant. Using a K-55 radar device, the officer determined that appellant was traveling 66 mph in a 55 mph zone. Consequently, the officer stopped appellant and cited him for speeding.

Appellant entered a not guilty plea and filed a Motion in Limine requesting that the evidence obtained by radar be excluded from his trial. Appellant argued that it was a denial of due process and equal protection of law for the court [\*2] to allow the introduction of radar tests when no independent agency certified either that type of test or the operator of such devices.

On May 7, 1997, the trial court overruled appellant's motion. That same day, appellant's case proceeded to trial on the citation. The State offered evidence of appellant's speed as calculated by radar. At the conclusion of the trial, the court found appellant guilty of speeding. The court fined appellant \$ 30.00 plus court costs.

A judgment entry was filed on May 20, 1997. It is from this sentence and conviction that appellant is appealing the following three assignments of error.

**ASSIGNMENT OF ERROR NO.1**

**The trial court erred in overruling the appellant's motion in limine and allowing the introduction of result of K-55 radar.**

In his first assignment of error, appellant argues that the admission of the K-55 radar results was a violation of his due process and equal protection rights. Therefore, the trial court erred in admitting those results. We conclude that the K-55 radar results were properly admitted and consequently, affirm the trial court for the following reasons.

We begin our analysis by noting that [HN1] all legislative enactments [\*3] enjoy a presumption of validity and constitutionality. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St. 3d 360, 361, 653 N.E.2d 212; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St. 3d 193, 199, 551 N.E.2d 938, overruled on other grounds, *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460, 639 N.E.2d 425; *Hardy v. VerMeulen* (1987), 32 Ohio St. 3d 45, 48, 512 N.E.2d 626, cert. denied (1988), 484 U.S. 1066, 98 L. Ed. 2d 993, 108 S. Ct. 1029. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, the statute will be presumed to be constitutional. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St. 3d 351, 352, 639 N.E.2d 31.

*R.C. 4511.091* provides, in pertinent part:

[HN2] **The driver of any motor vehicle which has been checked by radar \* \* \* to determine the speed of the motor vehicle over a measured distance of the highway \* \* \* and found to be in violation of any of the provisions of section 4511.21 or 4511.211 or the Revised Code, may be arrested until a warrant may be obtained, provided such officer has observed the recording [\*4] of the speed of such motor vehicle by the radio microwaves, electrical or mechanical timing device \* \* \* \***

Appellant contends that *R.C. 4511.091* violates his due process rights by not providing for a neutral party overseer to administer the methods and techniques used by law enforcement agencies in their training, calibration, and testing of the K-55 radar unit. Moreover, he claims that "the manufacturers of K-55 radar devices have a pecuniary interest" in the operation of the device. Therefore, appellant concludes that his right to have his case decided by an impartial tribunal is destroyed when a trial court takes judicial notice of a radar device.

The Ohio Supreme Court has previously held that [HN3] the accuracy of a radar device is a proper subject for judicial notice. *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 154 N.E.2d 630. However, judicial notice of the accuracy or dependability of a K-55 radar device may not be taken unless the trial court has received prior expert testimony on the accuracy of that device. *State v. Colby* (1984), 14 Ohio App. 3d 291, 470 N.E.2d 924. See also *State v. Wilson* (May 6, 1982), Auglaize App. No. 2-81-24, unreported; *State v. [\*5] Doles* (1980), 70 Ohio App. 2d 35, 433 N.E.2d 1290. Moreover, the Rules of Evidence dictate that:

[HN4] **A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**

*Evid.R. 201(B)*.

In the present case, we note that the Findlay Municipal Court has previously received expert testimony concerning the scientific principles relating to the use of K-55 radar devices and found them to be dependable. *State v. Calladine* (October 24, 1989), Case No. 89-TRD-9034, unreported. Therefore, we hold that judicial notice as to the scientific principles relating to the use of a K-55 radar device in appellant's case was appropriate. See *State v. Bechtel* (1985), 24 Ohio App. 3d 72, 73, 493 N.E.2d 318; *State v. Ayesch* (1985), 24 Ohio App. 3d 73, 74, 493 N.E.2d 325; *Kettering v. Smith* (Apr. 12, 1984), Montgomery App. No. 8383, unreported; *State v. Kinker* (Mar. 4, 1983), Huron App. No. H-82-24, unreported; and *State v. Shew* (Dec. 30, 1983), Warren App. No. CA83-04-022, unreported. [\*6]

Moreover, appellant has not been deprived of any due process rights. The record reflects that the officer testified as to the working order and operation of the radar device. He said that he had checked the calibration of the device at 8:00 a.m. and then again at 2:00 p.m. on the day that he stopped appellant. n1 He further testified that he had received three months of training in the use of K-55 radar devices. Under these circumstances we find that the trial court did not violate appellant's due process rights when it admitted the K-55 radar results.

n1 We note that appellant was stopped around 1:35 pm that afternoon.

Nor do we find that appellant's equal protection rights were violated. Contrary to appellant's assertions, we believe that the State's goal in keeping its roads safe from speeders is rationally met by *R.C. 4511.091*. That statute allows police officers to use radar devices to check the speed of potential speeders. If the radar device establishes that an individual is speeding, the police officer [\*7] can stop that vehicle and issue him or her a ticket. Every car on the road is subject to having its speed checked. Therefore, we believe that the State's goal is rationally related to the use of radar devices.

Accordingly, the trial court did not err in taking judicial notice of the scientific principles relating to the use of the K-55 radar device. Appellant's first assignment of error is therefore, overruled.

## **ASSIGNMENT OF ERROR NO.2**

**The trial court erred in admitting testimony of the arresting officer regarding the results of radar observations.**

In his second assignment of error, appellant argues that the trial court erred in admitting the arresting officer's testimony when the State offered no expert evidence that the K-55 radar device was dependable and accurate. In support of his argument, appellant cites our prior decision of *Colby, supra, at 291*.

However, in appellant's first assignment of error, we noted that the trial court had previously heard expert testimony as to the scientific principles relating to the use of K-55 radar devices in 1989. See *Calladine, supra*. Therefore, under our reasoning in *Colby, supra*, the trial court could [\*8] properly take judicial notice of the scientific principles relating to the use of a K-55 radar device in appellant's case.

Furthermore, in addition to the judicial notice, the officer testified that he was trained in operating the K-55 radar device, he had checked the device's calibration, appellant's vehicle had been visually confirmed, an audio signal verified the validity of the reading, the officer compared his own speedometer reading with the device, and he had properly operated the device. We have previously held that such "judicial notice, coupled with the evidence of the qualifications of the trooper to operate the unit, the evidence that it was in proper working order, and the evidence that it was properly operated, satisfied the requirements for the admission of the reading to show a violation of the speed statute." *State v. Ellison* (Jan. 30, 1987), Auglaize App. No. 2-85-35, unreported. Therefore, the trial court did not err in admitting the arresting officer's testimony regarding the results of the radar device.

Accordingly, we overrule appellant's second assignment of error.

#### ASSIGNMENT OF ERROR NO.3

**The decision of the trial court is against the manifest [\*9] weight of the evidence and contrary to law.**

Appellant maintains in his final assignment of error that his speeding conviction is against the manifest weight of the evidence. [HN5] In determining whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and decide whether, in resolving conflicts of evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Otten* (1986), 33 Ohio App. 3d 339, 340, 515 N.E.2d 1009; *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717. See also *State v. Jenks* (1991), 61 Ohio St. 3d 259, 273, 574 N.E.2d 492 (holding that the relevant inquiry is whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt).

In the present case, the record reflects that the arresting officer testified that he observed appellant traveling at a speed greater than the posted speed limit. He estimated that appellant was traveling approximately ten miles over the [\*10] speed limit. Therefore, he activated his radar device and confirmed that appellant was speeding.

Although appellant testified that he could not have been speeding, [HN6] the weight and credibility of witnesses are matters to be determined by the trier of facts. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273. Therefore, we must defer to the judgment of the trial court.

Furthermore, the trial court found that the arresting officer had followed the appropriate procedures, he had checked the K-55 radar device's calibration prior to, and after, stopping appellant, and the device was in working order on the date appellant was stopped. The trial court additionally took judicial notice of the K-55 radar device's accuracy. Therefore, we hold that there was sufficient evidence to sustain appellant's conviction. Accordingly, we overrule appellant's final assignment of error.

For the aforementioned reasons, we affirm the judgment of the Findlay Municipal Court.

**Judgment affirmed.**

BRYANT and SHAW, JJ., concur.

116 of 195 DOCUMENTS

**City of Sylvania, Appellee v. Tracy L. Secor, Appellant**

**Court of Appeals No. L-96-080**

**COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS  
COUNTY**

*1996 Ohio App. LEXIS 5491*

**December 6, 1996, Decided**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** Trial Court No. TRC-9509402.

**DISPOSITION:** The judgment of the Sylvania Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted of driving under the influence of alcohol in violation of Ohio Rev. Stat. Ann. § 4511.19(A)(1). Defendant's conviction was after a bench trial in the Sylvania Municipal Court (Ohio). Defendant was sentenced to three days in a driver's intervention program, which defendant appealed.

**OVERVIEW:** On appeal, the court held that defendant's contention the trial court erred in denying his motion to dismiss on the grounds of double jeopardy was not well taken. The court held that the trial court did not err in barring defendant from challenging the competency, admissibility, relevancy, authenticity, and credibility of his breath-alcohol test at trial. The court held that defendant did not file a pretrial motion to suppress his test results. As a result, under Ohio Rev. Stat. Ann. §§ 4511.19(A)(1)-(4), defendant waived the requirement on the State to lay a foundation for the admissibility of the test results at trial. In the case at bar, defendant first raised the issue of the test's accuracy and sought both a continuance and a motion in limine related to the test in question on the first day of trial. The court held that the trial court did not err in barring defendant from questioning witnesses about the reliability of the solution used in his breath-alcohol results. The court further found that defendant was not prejudiced nor prevented from having a fair trial, and affirmed the judgment of the trial court.

**OUTCOME:** The court affirmed defendant's conviction of driving under the influence of alcohol. The court also assessed defendant the costs of his appeal.

**CORE TERMS:** admissibility, assignment of error, chemical test, calibration, unreliable, breath, well-taken, motion to dismiss, influence of alcohol, newspaper article, motion in limine, pretrial motion, credibility, competency, breath-alcohol, breathalyzer, authenticity, continuance, challenging, relevancy, traveling, suppress, barring, driver, memo

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence Evidence > Demonstrative Evidence > Foundational Requirements*

[HN1] Because *Ohio Crim. R. 12(B)(3)* applies to all charges under *Ohio Rev. Code Ann. § 4511.19*, a defendant charged under §§ 4511.19(A)(1)-(4) who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the State to lay a foundation for the admissibility of the test results at trial. The chemical test result is admissible at trial without the State's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed in accordance with methods approved by the Director of Health, and that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to *Ohio Rev. Code Ann. § 3701.143*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Procedural Considerations > Objections & Offers of Proof > Objections Evidence > Scientific Evidence > Blood Alcohol*

[HN2] Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised at trial even though the admissibility of the chemical test results was not challenged through a pretrial motion.

**COUNSEL:** Robert Pyzik, for appellee.

William Garrett, for appellant.

**JUDGES:** Peter M. Handwork, J., George M. Glasser, J., Melvin L. Resnick, P.J. CONCUR.

#### **OPINION: DECISION AND JUDGMENT ENTRY**

This matter is before the court on appeal from the Sylvania Municipal Court wherein appellant, Tracy L. Secor, was convicted of driving while under the influence of alcohol, a violation of R.C. 4511.19(A)(1).

A trial commenced on February 20, 1996. Officer

Kevin Pooley of the Sylvania police department testified he was on duty August 2, 1995. At approximately 10:45 p.m., he was patrolling the streets of Sylvania when he saw a 1988 Eagle Talon twice travel left of the center yellow line. Officer Pooley additionally noticed that the vehicle appeared to be traveling over the speed limit. Officer Pooley's radar equipment indicated the vehicle was traveling forty-three m.p.h. in a twenty-five m.p.h. zone. Officer Pooley signaled [\*2] the vehicle to pull over and approached the drivers's side. He immediately detected an odor of alcohol from the opened window. Appellant, the driver, admitted to Officer Pooley he had consumed six beers. Appellant exited the vehicle. Officer Pooley noted that appellant appeared glassy eyed and was unsteady on his feet.

Following his unsatisfactory performance on a series of field sobriety tests, appellant was arrested for driving under the influence of alcohol. A subsequent breathalyzer test revealed appellant's breath contained .134 grams of alcohol per 210 liters of breath. A judge subsequently found him guilty of violating R.C. 4511.19(A)(1) and sentenced him to three days in a driver's intervention program. Appellant now appeals setting forth the following assignments of error:

**"I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANTS (SIC) MOTION TO DISMISS BASED ON DOUBLE JEOPARDY.**

**"II. THE TRIAL COURT ERRED ON RULING THAT THE DEFENDANT-APPELLANT COULD NOT QUESTION WITNESSES CONCERNING '...SIMULATOR SOLUTIONS OR ANYTHING ALONG THOSE LINES...' AND BY RULING THAT THE DEFENDANT-APPELLANT COULD ONLY ASK GENERAL QUESTIONS CONCERNING THE CREDIBILITY AND COMPETENCY THE RESULTS [\*3] OF THE BREATH TEST OF THE DEFENDANT-APPELLANT."**

In his first assignment of error, appellant contends the trial court erred in denying his motion to dismiss on the grounds of double jeopardy. Under the authority of the Supreme Court of Ohio in *State v. Gustafson* (1996), 76 Ohio St. 3d 425, 668 N.E.2d 435, this court finds appellant's first assignment of error not well-taken.

In his second assignment of error, appellant contends the court erred in barring appellant from challenging the competency, admissibility, relevancy, authenticity, and credibility of his breath-alcohol test at trial. Appellant did not file a pretrial motion to suppress his test results.

The Ohio Supreme Court held in *State v. French* (1995), 72 Ohio St. 3d 446, 650 N.E.2d 887, paragraph one of the syllabus:

[HN1] "Because *Crim.R. 12(B)(3)* applies to all charges under R.C. 4511.19, a defendant charged under R.C. 4511.19(A)(1) through (4) who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial. The chemical test result is admissible at trial without [\*4] the state's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed in accordance with methods approved by the Director of Health, and that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to R.C. 3701.143. (*Defiance v. Kretz* [1991], 60 Ohio St. 3d 1, 573 N.E.2d 32, approved; *Cincinnati v. Sand* [1975], 43 Ohio St. 2d 79, 330 N.E.2d 908, modified.)

The court went on to explain: "This does not mean, however, that the defendant may not challenge the chemical test results at trial under the Rules of Evidence. [HN2] Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised." 72 Ohio St. 3d at 452.

On the day of trial, appellant filed a motion for continuance and a motion in limine. Before the trial court, appellant's counsel alleged newly discovered evidence revealed that the solutions used to calibrate the breathalyzer in the instant case were unreliable. Said evidence had recently come to the parties attention from [\*5] a newspaper article published less than a week earlier. Appellant's counsel also cited to a memo on the subject issued by the Ohio Department of Health. In response, the state acknowledged familiarity with the memo but specifically noted that the solution used in appellant's test was not part of the batch of solutions deemed unreliable by the Department of Health. The court explained on the record that inasmuch as the newspaper article appeared six days before trial, the issue of the unreliable calibration solution could have been raised earlier. The court denied appellant's motion for continuance and his motion in limine.

Following the testimony of the arresting officer, appellant's counsel made the following proffer:

"COUNSEL: Just as a record, these questions that I would ask of this witness from here on in would deal with the breath testing device, solutions, calibration procedures. Am I being prevented from asking questions in that area?"

**COURT: Yes. That's improper, It's noted for the record.**

**COUNSEL :** All right. Then that's a pro-offer (sic) that I or a reviewing course that I would intend to ask this witness at great length about the intoxilizer, his knowledge [\*6] or lack or knowledge on it, his lack of knowledge on how it's maintained. I would offer, or ask questions about the inaccuracies in the calibration, solutions."

This proposed testimony, dealing with Ohio Department of Health regulations, clearly goes to the admissibility as opposed to the weight of the test results. Based on the circumstances in this case and on the authority of *State v. French, supra*, we conclude that the trial court did not err in barring appellant from questioning witnesses about his breath-alcohol test result. Appellant's second assignment of error is found not well-taken.

On consideration whereof, the court finds that appellant was not prejudiced nor prevented from having a fair trial, and the judgment of the Sylvania Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, 6th *Dist.Loc.App.R. 4*, amended 7/1/92.

Peter M. Handwork, J.

JUDGE

George M. Glasser, J.

Melvin L. Resnick, P.J.

CONCUR.

117 of 195 DOCUMENTS

**City of Sylvania, Appellee v. Tracy L. Secor, Appellant**

**Court of Appeals No. L-96-080**

**COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS  
COUNTY**

*1996 Ohio App. LEXIS 5491*

**December 6, 1996, Decided**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** Trial Court No. TRC-9509402.

**DISPOSITION:** The judgment of the Sylvania Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted of driving under the influence of alcohol in violation of Ohio Rev. Stat. Ann. § 4511.19(A)(1). Defendant's conviction was after a bench trial in the Sylvania Municipal Court (Ohio). Defendant was sentenced to three days in a driver's intervention program, which defendant appealed.

**OVERVIEW:** On appeal, the court held that defendant's contention the trial court erred in denying his motion to dismiss on the grounds of double jeopardy was not well taken. The court held that the trial court did not err in barring defendant from challenging the competency, admissibility, relevancy, authenticity, and credibility of his breath-alcohol test at trial. The court held that defendant did not file a pretrial motion to suppress his test results. As a result, under Ohio Rev. Stat. Ann. §§ 4511.19(A)(1)-(4), defendant waived the requirement on the State to lay a foundation for the admissibility of the test results at trial. In the case at bar, defendant first raised the issue of the test's accuracy and sought both a continuance and a motion in limine related to the test in question on the first day of trial. The court held that the trial court did not err in barring defendant from questioning witnesses about the reliability of the solution used in his breath-alcohol results. The court further found that defendant was not prejudiced nor prevented from having a fair trial, and affirmed the judgment of the trial court.

**OUTCOME:** The court affirmed defendant's conviction of driving under the influence of alcohol. The court also assessed defendant the costs of his appeal.

**CORE TERMS:** admissibility, assignment of error, chemical test, calibration, unreliable, breath, well-taken, motion to dismiss, influence of alcohol, newspaper article, motion in limine, pretrial motion, credibility, competency, breath-alcohol, breathalyzer, authenticity, continuance, challenging, relevancy, traveling, suppress, barring, driver, memo

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence Evidence > Demonstrative Evidence > Foundational Requirements*

[HN1] Because *Ohio Crim. R. 12(B)(3)* applies to all charges under *Ohio Rev. Code Ann. § 4511.19*, a defendant charged under §§ 4511.19(A)(1)-(4) who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the State to lay a foundation for the admissibility of the test results at trial. The chemical test result is admissible at trial without the State's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed in accordance with methods approved by the Director of Health, and that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to *Ohio Rev. Code Ann. § 3701.143*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Procedural Considerations > Objections & Offers of Proof > Objections Evidence > Scientific Evidence > Blood Alcohol*

[HN2] Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised at trial even though the admissibility of the chemical test results was not challenged through a pretrial motion.

**COUNSEL:** Robert Pyzik, for appellee.

William Garrett, for appellant.

**JUDGES:** Peter M. Handwork, J., George M. Glasser, J., Melvin L. Resnick, P.J. CONCUR.

**OPINION: DECISION AND JUDGMENT ENTRY**

This matter is before the court on appeal from the Sylvania Municipal Court wherein appellant, Tracy L. Secor, was convicted of driving while under the influence of alcohol, a violation of R.C. 4511.19(A)(1).

A trial commenced on February 20, 1996. Officer

Kevin Pooley of the Sylvania police department testified he was on duty August 2, 1995. At approximately 10:45 p.m., he was patrolling the streets of Sylvania when he saw a 1988 Eagle Talon twice travel left of the center yellow line. Officer Pooley additionally noticed that the vehicle appeared to be traveling over the speed limit. Officer Pooley's radar equipment indicated the vehicle was traveling forty-three m.p.h. in a twenty-five m.p.h. zone. Officer Pooley signaled [\*2] the vehicle to pull over and approached the drivers's side. He immediately detected an odor of alcohol from the opened window. Appellant, the driver, admitted to Officer Pooley he had consumed six beers. Appellant exited the vehicle. Officer Pooley noted that appellant appeared glassy eyed and was unsteady on his feet.

Following his unsatisfactory performance on a series of field sobriety tests, appellant was arrested for driving under the influence of alcohol. A subsequent breathalyzer test revealed appellant's breath contained .134 grams of alcohol per 210 liters of breath. A judge subsequently found him guilty of violating R.C. 4511.19(A)(1) and sentenced him to three days in a driver's intervention program. Appellant now appeals setting forth the following assignments of error:

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In his first assignment of error, appellant contends the trial court erred in denying his motion to dismiss on the grounds of double jeopardy. Under the authority of the Supreme Court of Ohio in *State v. Gustafson* (1996), 76 Ohio St. 3d 425, 668 N.E.2d 435, this court finds appellant's first assignment of error not well-taken.

In his second assignment of error, appellant contends the court erred in barring appellant from challenging the competency, admissibility, relevancy, authenticity, and credibility of his breath-alcohol test at trial. Appellant did not file a pretrial motion to suppress his test results.

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[HN1] "Because *Crim.R. 12(B)(3)* applies to all charges under R.C. 4511.19, a defendant charged under R.C. 4511.19(A)(1) through (4) who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial. The chemical test result is admissible at trial without [\*4] the state's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed in accordance with methods approved by the Director of Health, and that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to R.C. 3701.143. (*Defiance v. Kretz* [1991], 60 Ohio St. 3d 1, 573 N.E.2d 32, approved; *Cincinnati v. Sand* [1975], 43 Ohio St. 2d 79, 330 N.E.2d 908, modified.)

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On the day of trial, appellant filed a motion for continuance and a motion in limine. Before the trial court, appellant's counsel alleged newly discovered evidence revealed that the solutions used to calibrate the breathalyzer in the instant case were unreliable. Said evidence had recently come to the parties attention from [\*5] a newspaper article published less than a week earlier. Appellant's counsel also cited to a memo on the subject issued by the Ohio Department of Health. In response, the state acknowledged familiarity with the memo but specifically noted that the solution used in appellant's test was not part of the batch of solutions deemed unreliable by the Department of Health. The court explained on the record that inasmuch as the newspaper article appeared six days before trial, the issue of the unreliable calibration solution could have been raised earlier. The court denied appellant's motion for continuance and his motion in limine.

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**COURT: Yes. That's improper, It's noted for the record.**

**COUNSEL : All right. Then that's a pro-offer (sic) that I or a reviewing course that I would intend to ask this witness at great length about the intoxilizer, his knowledge [\*6] or lack or knowledge on it, his lack of knowledge on how it's maintained. I would offer, or ask questions about the inaccuracies in the calibration, solutions."**

**This proposed testimony, dealing with Ohio Department of Health regulations, clearly goes to the admissibility as opposed to the weight of the test results. Based on the circumstances in this case and on the authority of *State v. French, supra*, we conclude that the trial court did not err in barring appellant from questioning witnesses about his breath-alcohol test result. Appellant's second assignment of error is found not well-taken.**

**On consideration whereof, the court finds that appellant was not prejudiced nor prevented from having a fair trial, and the judgment of the Sylvania Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal.**

**A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, 6th *Dist.Loc.App.R. 4*, amended 7/1/92.**

**Peter M. Handwork, J.**

**JUDGE**

**George M. Glasser, J.**

**Melvin L. Resnick, P.J.**

**CONCUR.**

118 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee v. DANIEL L. PRENDERGAST,  
Defendant-Appellant**

**C.A. Case No. 14746-7**

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,  
MONTGOMERY COUNTY**

*1995 Ohio App. LEXIS 3225*

**August 2, 1995, Rendered**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** T.C. Case No. 94 TRC-6441.

**DISPOSITION:** The judgment of the trial court is Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment of the trial court (Ohio), which convicted him of operating a motor vehicle while under the influence of alcohol, in violation of *Ohio Rev. Code Ann. § 4511.19(A)*.

**OVERVIEW:** Defendant appealed his conviction for operating a motor vehicle while under the influence of alcohol. On review, the court affirmed. Defendant alleged that the trial court erred in failing to suppress certain evidence. The court found that observation of a traffic violation, such as speeding, was sufficient to establish reasonable suspicion to support a routine traffic stop. The police officer credibly testified that he visually observed defendant speeding, and that the radar device confirmed that defendant was traveling approximately seventeen miles over the speed limit. A seventeen-mile excess was not a "minor" speeding violation, but, rather, was a substantial violation. Further, the officer testified that he observed defendant pass two cars at a high rate of speed. Under these facts, the court found no persuasive reason to deviate or carve an exception to the general rule that observation of a traffic violation by an officer was sufficient to support a finding of reasonable suspicion to stop the vehicle.

**OUTCOME:** The court affirmed defendant's conviction for operating a motor vehicle while under the influence of alcohol.

**CORE TERMS:** speeding, motion to suppress, traffic stop, lane, influence of alcohol, reasonable suspicion, breathalyzer, driving, traffic violation, radar, mile, Fourth Amendment, seizure, marked, suppression hearing, assignment of error, satisfactorily, traveling, speed, credible evidence, persuasive, crossing, routine, criminal activity, insufficient to support, initial stop, speed limit, high rate, administered, arrested

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN1] In reviewing a motion to suppress, an appellate court is to determine whether the trial court's findings are supported by competent, credible evidence. If the findings are so supported, the appellate court must independently determine whether they meet the applicable legal standard.

*Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection*

*Criminal Law & Procedure > Search & Seizure > General Overview*

[HN2] The Fourth Amendment to the United States Constitution guarantees the right of people to be free from unreasonable searches and seizures. The purpose of the Fourth Amendment is to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. It is important to note that only unreasonable searches and seizures are unconstitutional.

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches > General Overview*

[HN3] It is undisputed that the warrantless stop of an automobile is a "seizure" within the meaning of the Fourth Amendment. In the context of a routine traffic stop, the officer must have a reasonable, articulable suspicion of criminal activity to perform the stop. It has generally been held that the observation of a traffic offense provides a sufficient basis for such a stop.

**COUNSEL:** JOHN F. BLAKE, City of Kettering, 3600 Shroyer Road, Kettering, Ohio 45429, Atty. Reg. #0006669, Attorney for Plaintiff-Appellee.

JOHN H. RION, 1630 First National Plaza, P.O. Box 1262, Dayton, Ohio 45402, Atty. Reg. #0002228, Attorney for Defendant-Appellant.

**JUDGES:** BROGAN, P.J., WOLFF, J., and YOUNG, J., concur.

**OPINION BY:** BROGAN

**OPINION:**

OPINION

BROGAN, P.J.

Appellant Daniel L. Prendergast appeals from his conviction and sentence for operating a motor vehicle while under the influence of alcohol, in violation of *R.C. 4511.19(A)*. On appeal, Prendergast alleges that the trial court erred in failing to suppress certain evidence.

On June 18, 1994, Prendergast was arrested and charged with speeding, driving while under the influence of alcohol, and driving with a blood-alcohol content in excess of that prescribed by law. He subsequently entered not guilty pleas to all charges.

On July 12, 1994, Prendergast filed a motion to suppress the breathalyzer results, the officer's observations, and certain [\*2] statements made by Prendergast to the police, based on the following: (1) there was no probable cause to arrest Prendergast; (2) a senior officer was not present when the breathalyzer test was administered; (3) the breathalyzer machine was not operated in accordance with regulations; and (4) Prendergast was not given the proper *Miranda*

warnings. A hearing was held on the motion to suppress on August 3, 1994.

At the outset of the suppression hearing, the trial court overruled the branches of the suppression motion concerning the actual operation of the breathalyzer test on the grounds that the motion was not supported by a proper factual basis. As to the remaining branches of the motion, Sgt. Michael Willcox, a Kettering police officer, testified that he arrested Prendergast for speeding and driving while under the influence of alcohol on June 18, 1994. He testified that on that date, at approximately 1:30 a.m., he observed a vehicle traveling eastbound on Dorothy Lane in Kettering. Sgt. Willcox stated that he noticed that the vehicle was traveling at a high rate of speed, and that he observed it pass two cars that were in the left lane. He further testified that, in response, [\*3] he activated his radar and received a reading on that particular vehicle of fifty-two miles per hour. The posted speed limit in the area is thirty-five miles per hour. Sgt. Willcox stated that he was trained and experienced in using the radar equipment, and that he had checked the calibration for accuracy prior to using the equipment. After checking the vehicle's speed on the radar, Sgt. Willcox then turned on his overhead lights and pulled the vehicle over. Prendergast was the driver of the vehicle and there were no passengers in the car.

Sgt. Willcox testified that he detected a moderate odor of alcohol, and that Prendergast's eyes appeared bloodshot. He asked Prendergast to recite the alphabet. Sgt. Willcox stated that Prendergast did not perform this test satisfactorily. He then administered the horizontal gaze nystagmus test, which Prendergast also did not perform satisfactorily. He then requested Prendergast to exit the vehicle. Various field sobriety tests were performed. Sgt. Willcox stated that none of the tests were performed satisfactorily. Prendergast was then placed under arrest for operating a vehicle while under the influence of alcohol. Prendergast later submitted [\*4] to a breathalyzer test, the results of which were not entered into evidence.

The trial court overruled the remaining branches of Prendergast's motion to suppress. Prendergast subsequently pled no contest to the charges. Prendergast was convicted of operating a vehicle while under the influence of alcohol. The other charges were dropped.

As his sole assignment of error, Prendergast raises the following:

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION TO SUPPRESS,  
BECAUSE THE OFFICER STOPPED THE VEHICLE WITHOUT FIRST HAVING A  
REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

In support of this assignment of error, Prendergast argues that the speeding violation was a "minor traffic violation" and, as such, was insufficient to support a reasonable suspicion to stop the vehicle. We note that Prendergast does not claim that he was not speeding, nor does he argue that the stop for speeding was a mere pretext to investigate a hunch on a D.U.I. Instead, he simply contends that reasonable suspicion to support a traffic stop must be based on "something more" than a minor traffic violation.

At the outset, we note that Prendergast did not specifically raise the constitutionality [\*5] of the initial stop of the automobile in his motion to suppress. However, evidence regarding the issue was presented at the suppression hearing, and the trial judge expressly ruled that the initial stop of the automobile was proper. Accordingly, we will proceed to address the merits of his argument.

[HN1] In reviewing a motion to suppress, an appellate court "is to determine whether the court's findings are supported by competent, credible evidence." *State v. Self* (1990), 56 Ohio St.3d 73, 564 N.E.2d 446. If the findings are so supported, we must independently determine whether they meet the applicable legal standard. *State v. Retherford* (1994), 93 Ohio App.3d 586, 639 N.E.2d 498. Having closely reviewed the transcript of the suppression hearing, we conclude that the trial court's finding that Prendergast was speeding is supported by competent, credible evidence. Indeed, Prendergast does not challenge this finding. Thus, accepting the trial court's findings as true, we proceed to determine whether the court's decision is contrary to law.

[HN2] The Fourth Amendment to the United States Constitution guarantees the right of people to be free from unreasonable searches and seizures. The [\*6] purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall* (1980), 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 100 S. Ct. 1870, quoting *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 554, 49 L. Ed. 2d 1116, 96 S. Ct. 3074. It is important to note that only unreasonable searches and seizures are unconstitutional.

[HN3] It is undisputed that the warrantless stop of an automobile is a "seizure" within the meaning of the Fourth Amendment. See *Delaware v. Prouse* (1979), 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391. In the context of a routine traffic stop, the officer must have a reasonable, articulable suspicion of criminal activity to perform the stop. See *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. It has generally been held that the observation of a traffic offense provides a sufficient basis for such a stop. See., e.g., *State v. Richardson* (1994), 94 Ohio App.3d 501, 641 N.E.2d 216.

Prendergast contends that observation of a minor traffic violation, such as speeding, is not sufficient to establish a reasonable [\*7] suspicion to support a routine traffic stop. Prendergast suggests that "evidence beyond that - evidence that would, for example, have shown that [his] slightly excessive speed was dangerous" must be present to support a proper basis for a traffic stop. Prendergast cites several cases in support of his argument.

First, Prendergast cites to *State v. Gullett* (1992), 78 Ohio App.3d 138, 604 N.E.2d 176, and *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. The respective courts in those cases held that minimal crossing of the marked traffic lanes, without further evidence of criminal activity such as repeated weaving or erratic driving, was insufficient to support a finding of reasonable suspicion necessary for a proper traffic stop under the totality of the circumstances. We find those cases to be distinguishable from the present case. *R.C. 4511.33(A)*, which contains rules for driving in marked lanes, provides in part: "A vehicle or trackless trolley shall be driven, *as nearly as practicable*, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with [\*8] safety." (Emphasis added.) In light of the language contained in the statute, it was reasonable for the courts in those cases to require some evidence beyond a minor crossing of the marked lines to justify a traffic stop. In the present case, Prendergast was not stopped for violation of *R.C. 4511.33(A)*; thus, the analyses in those cases is not persuasive to our resolution of this case.

In addition, we have closely reviewed other authorities cited by Prendergast in support of his position and find that none of them are relevant or persuasive. In this case, Sgt. Willcox credibly testified that he visually observed Prendergast speeding, and that the radar device confirmed that Prendergast was traveling approximately seventeen miles over the speed limit. In our opinion, a seventeen mile excess is not a "minor" speeding violation, but, rather, is a substantial violation. Further, Sgt. Willcox testified that he observed Prendergast pass two cars at a high rate of speed. Under the facts of this case, we find no persuasive reason to deviate or carve an exception to the general rule that observation of a traffic violation by an officer is sufficient to support a finding of reasonable suspicion [\*9] to stop the vehicle.

The assignment of error is overruled.

The judgment of the trial court is Affirmed.

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WOLFF, J., and YOUNG, J., concur.

119 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee v. DANIEL L. PRENDERGAST,  
Defendant-Appellant**

**C.A. Case No. 14746-7**

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,  
MONTGOMERY COUNTY**

*1995 Ohio App. LEXIS 3225*

**August 2, 1995, Rendered**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** T.C. Case No. 94 TRC-6441.

**DISPOSITION:** The judgment of the trial court is Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment of the trial court (Ohio), which convicted him of operating a motor vehicle while under the influence of alcohol, in violation of *Ohio Rev. Code Ann. § 4511.19(A)*.

**OVERVIEW:** Defendant appealed his conviction for operating a motor vehicle while under the influence of alcohol. On review, the court affirmed. Defendant alleged that the trial court erred in failing to suppress certain evidence. The court found that observation of a traffic violation, such as speeding, was sufficient to establish reasonable suspicion to support a routine traffic stop. The police officer credibly testified that he visually observed defendant speeding, and that the radar device confirmed that defendant was traveling approximately seventeen miles over the speed limit. A seventeen-mile excess was not a "minor" speeding violation, but, rather, was a substantial violation. Further, the officer testified that he observed defendant pass two cars at a high rate of speed. Under these facts, the court found no persuasive reason to deviate or carve an exception to the general rule that observation of a traffic violation by an officer was sufficient to support a finding of reasonable suspicion to stop the vehicle.

**OUTCOME:** The court affirmed defendant's conviction for operating a motor vehicle while under the influence of alcohol.

**CORE TERMS:** speeding, motion to suppress, traffic stop, lane, influence of alcohol, reasonable suspicion, breathalyzer, driving, traffic violation, radar, mile, Fourth Amendment, seizure, marked, suppression hearing, assignment of error, satisfactorily, traveling, speed, credible evidence, persuasive, crossing, routine, criminal activity, insufficient to support, initial stop, speed limit, high rate, administered, arrested

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN1] In reviewing a motion to suppress, an appellate court is to determine whether the trial court's findings are supported by competent, credible evidence. If the findings are so supported, the appellate court must independently determine whether they meet the applicable legal standard.

*Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection*

*Criminal Law & Procedure > Search & Seizure > General Overview*

[HN2] The Fourth Amendment to the United States Constitution guarantees the right of people to be free from unreasonable searches and seizures. The purpose of the Fourth Amendment is to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. It is important to note that only unreasonable searches and seizures are unconstitutional.

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches > General Overview*

[HN3] It is undisputed that the warrantless stop of an automobile is a "seizure" within the meaning of the Fourth Amendment. In the context of a routine traffic stop, the officer must have a reasonable, articulable suspicion of criminal activity to perform the stop. It has generally been held that the observation of a traffic offense provides a sufficient basis for such a stop.

**COUNSEL:** JOHN F. BLAKE, City of Kettering, 3600 Shroyer Road, Kettering, Ohio 45429, Atty. Reg. #0006669, Attorney for Plaintiff-Appellee.

JOHN H. RION, 1630 First National Plaza, P.O. Box 1262, Dayton, Ohio 45402, Atty. Reg. #0002228, Attorney for Defendant-Appellant.

**JUDGES:** BROGAN, P.J., WOLFF, J., and YOUNG, J., concur.

**OPINION BY:** BROGAN

**OPINION:**

OPINION

BROGAN, P.J.

Appellant Daniel L. Prendergast appeals from his conviction and sentence for operating a motor vehicle while under the influence of alcohol, in violation of *R.C. 4511.19(A)*. On appeal, Prendergast alleges that the trial court erred in failing to suppress certain evidence.

On June 18, 1994, Prendergast was arrested and charged with speeding, driving while under the influence of alcohol, and driving with a blood-alcohol content in excess of that prescribed by law. He subsequently entered not guilty pleas to all charges.

On July 12, 1994, Prendergast filed a motion to suppress the breathalyzer results, the officer's observations, and certain [\*2] statements made by Prendergast to the police, based on the following: (1) there was no probable cause to arrest Prendergast; (2) a senior officer was not present when the breathalyzer test was administered; (3) the breathalyzer machine was not operated in accordance with regulations; and (4) Prendergast was not given the proper *Miranda*

warnings. A hearing was held on the motion to suppress on August 3, 1994.

At the outset of the suppression hearing, the trial court overruled the branches of the suppression motion concerning the actual operation of the breathalyzer test on the grounds that the motion was not supported by a proper factual basis. As to the remaining branches of the motion, Sgt. Michael Willcox, a Kettering police officer, testified that he arrested Prendergast for speeding and driving while under the influence of alcohol on June 18, 1994. He testified that on that date, at approximately 1:30 a.m., he observed a vehicle traveling eastbound on Dorothy Lane in Kettering. Sgt. Willcox stated that he noticed that the vehicle was traveling at a high rate of speed, and that he observed it pass two cars that were in the left lane. He further testified that, in response, [\*3] he activated his radar and received a reading on that particular vehicle of fifty-two miles per hour. The posted speed limit in the area is thirty-five miles per hour. Sgt. Willcox stated that he was trained and experienced in using the radar equipment, and that he had checked the calibration for accuracy prior to using the equipment. After checking the vehicle's speed on the radar, Sgt. Willcox then turned on his overhead lights and pulled the vehicle over. Prendergast was the driver of the vehicle and there were no passengers in the car.

Sgt. Willcox testified that he detected a moderate odor of alcohol, and that Prendergast's eyes appeared bloodshot. He asked Prendergast to recite the alphabet. Sgt. Willcox stated that Prendergast did not perform this test satisfactorily. He then administered the horizontal gaze nystagmus test, which Prendergast also did not perform satisfactorily. He then requested Prendergast to exit the vehicle. Various field sobriety tests were performed. Sgt. Willcox stated that none of the tests were performed satisfactorily. Prendergast was then placed under arrest for operating a vehicle while under the influence of alcohol. Prendergast later submitted [\*4] to a breathalyzer test, the results of which were not entered into evidence.

The trial court overruled the remaining branches of Prendergast's motion to suppress. Prendergast subsequently pled no contest to the charges. Prendergast was convicted of operating a vehicle while under the influence of alcohol. The other charges were dropped.

As his sole assignment of error, Prendergast raises the following:

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION TO SUPPRESS,  
BECAUSE THE OFFICER STOPPED THE VEHICLE WITHOUT FIRST HAVING A  
REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

In support of this assignment of error, Prendergast argues that the speeding violation was a "minor traffic violation" and, as such, was insufficient to support a reasonable suspicion to stop the vehicle. We note that Prendergast does not claim that he was not speeding, nor does he argue that the stop for speeding was a mere pretext to investigate a hunch on a D.U.I. Instead, he simply contends that reasonable suspicion to support a traffic stop must be based on "something more" than a minor traffic violation.

At the outset, we note that Prendergast did not specifically raise the constitutionality [\*5] of the initial stop of the automobile in his motion to suppress. However, evidence regarding the issue was presented at the suppression hearing, and the trial judge expressly ruled that the initial stop of the automobile was proper. Accordingly, we will proceed to address the merits of his argument.

[HN1] In reviewing a motion to suppress, an appellate court "is to determine whether the court's findings are supported by competent, credible evidence." *State v. Self* (1990), 56 Ohio St.3d 73, 564 N.E.2d 446. If the findings are so supported, we must independently determine whether they meet the applicable legal standard. *State v. Retherford* (1994), 93 Ohio App.3d 586, 639 N.E.2d 498. Having closely reviewed the transcript of the suppression hearing, we conclude that the trial court's finding that Prendergast was speeding is supported by competent, credible evidence. Indeed, Prendergast does not challenge this finding. Thus, accepting the trial court's findings as true, we proceed to determine whether the court's decision is contrary to law.

[HN2] The Fourth Amendment to the United States Constitution guarantees the right of people to be free from unreasonable searches and seizures. The [\*6] purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall* (1980), 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 100 S. Ct. 1870, quoting *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 554, 49 L. Ed. 2d 1116, 96 S. Ct. 3074. It is important to note that only unreasonable searches and seizures are unconstitutional.

[HN3] It is undisputed that the warrantless stop of an automobile is a "seizure" within the meaning of the Fourth Amendment. See *Delaware v. Prouse* (1979), 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391. In the context of a routine traffic stop, the officer must have a reasonable, articulable suspicion of criminal activity to perform the stop. See *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. It has generally been held that the observation of a traffic offense provides a sufficient basis for such a stop. See., e.g., *State v. Richardson* (1994), 94 Ohio App.3d 501, 641 N.E.2d 216.

Prendergast contends that observation of a minor traffic violation, such as speeding, is not sufficient to establish a reasonable [\*7] suspicion to support a routine traffic stop. Prendergast suggests that "evidence beyond that - evidence that would, for example, have shown that [his] slightly excessive speed was dangerous" must be present to support a proper basis for a traffic stop. Prendergast cites several cases in support of his argument.

First, Prendergast cites to *State v. Gullett* (1992), 78 Ohio App.3d 138, 604 N.E.2d 176, and *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. The respective courts in those cases held that minimal crossing of the marked traffic lanes, without further evidence of criminal activity such as repeated weaving or erratic driving, was insufficient to support a finding of reasonable suspicion necessary for a proper traffic stop under the totality of the circumstances. We find those cases to be distinguishable from the present case. *R.C. 4511.33(A)*, which contains rules for driving in marked lanes, provides in part: "A vehicle or trackless trolley shall be driven, *as nearly as practicable*, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with [\*8] safety." (Emphasis added.) In light of the language contained in the statute, it was reasonable for the courts in those cases to require some evidence beyond a minor crossing of the marked lines to justify a traffic stop. In the present case, Prendergast was not stopped for violation of *R.C. 4511.33(A)*; thus, the analyses in those cases is not persuasive to our resolution of this case.

In addition, we have closely reviewed other authorities cited by Prendergast in support of his position and find that none of them are relevant or persuasive. In this case, Sgt. Willcox credibly testified that he visually observed Prendergast speeding, and that the radar device confirmed that Prendergast was traveling approximately seventeen miles over the speed limit. In our opinion, a seventeen mile excess is not a "minor" speeding violation, but, rather, is a substantial violation. Further, Sgt. Willcox testified that he observed Prendergast pass two cars at a high rate of speed. Under the facts of this case, we find no persuasive reason to deviate or carve an exception to the general rule that observation of a traffic violation by an officer is sufficient to support a finding of reasonable suspicion [\*9] to stop the vehicle.

The assignment of error is overruled.

The judgment of the trial court is Affirmed.

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WOLFF, J., and YOUNG, J., concur.

120 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**The STATE of Ohio, Appellee, v. WILSON, Appellant****No. 93-A-1810****Court of Appeals of Ohio, Eleventh Appellate District, Ashtabula County***102 Ohio App. 3d 1; 656 N.E.2d 954; 1995 Ohio App. LEXIS 972***March 20, 1995, Decided****PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Eastern Area County Court, Case No. 93 CRB 199; 93 CRB 200; and 93 TRD 1078.

**DISPOSITION:**

*Judgment accordingly.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his convictions in the Ashtabula County Court, Eastern Area (Ohio) for speeding, menacing, and disorderly conduct.

**OVERVIEW:** A police officer pulled over defendant for speeding. Defendant was abusive and threatened the officer. The officer called for backup and arrested defendant. Defendant was convicted in the trial court of speeding, menacing, and disorderly conduct. On appeal, the court affirmed defendant's convictions for speeding and menacing and reversed his conviction for disorderly conduct. The court held that defendant's conviction for speeding was supported by sufficient evidence because the officer testified that he thought defendant was speeding based upon his observation. The court determined that defendant was properly convicted of menacing pursuant to *Ohio Rev. Code Ann. § 2903.22(A)* because he repeatedly threatened the officer with violence. The court ruled that defendant was erroneously convicted of disorderly conduct pursuant to *Ohio Rev. Code Ann. § 2917.11(A)(3)* because his conduct would not have caused a reasonable police officer to want to respond with violence. The court held that the complaints charging defendant with menacing and disorderly conduct were properly sworn to as required by *Ohio R. Crim. P. 3*.

**OUTCOME:** The court affirmed defendant's convictions for speeding and menacing. The court reversed defendant's conviction for disorderly conduct.

**CORE TERMS:** disorderly conduct, radar, charging, menacing, speeding, driving, sworn, void, beyond a reasonable doubt, profanity, violent, license, visual, loud, police officer, convicted, violently, traffic ticket, physical harm, speed

limit, altercation, meritless, asshole, provoke, unsworn, backup, kick, ass

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Appeals > Briefs***

#### ***Criminal Law & Procedure > Appeals > Briefs***

[HN1] *Ohio R. App. P. 18(C)* states in part: If an appellee fails to file his brief, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN2] A conviction for speeding will not be reversed on sufficiency grounds even if a radar reading is improperly admitted into evidence when the officer has testified that, based upon his visual observation, the vehicle is speeding.

#### ***Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > General Overview***

[HN3] *Ohio Rev. Code Ann. § 2903.22(A)* states: No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > General Overview***

[HN4] *Ohio Rev. Code Ann. § 2917.11(A)(3)* states in part: No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following: Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview***

#### ***Torts > Negligence > Standards of Care > Appropriate Standard > Objectivity***

[HN5] The standard for disorderly conduct pursuant to *Ohio Rev. Code Ann. § 2917.11(A)(3)* is objective rather than subjective, and there is no requirement that an arresting officer, in fact, be provoked to a violent response.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN6] Regarding a traffic citation, a signature at the bottom of the ticket is required. However, it need not be sworn. *Ohio Traffic R. 3(C)*.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN7] *Ohio R. Crim. P. 3* states: The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths. *Ohio R. Crim. P. 3*.

***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN8] It is not necessary that an affidavit supporting a complaint be executed by one who has observed the commission of the offense. It is sufficient if such person has reasonable grounds to believe the accused has committed the crime. The important issue is not whether the affiant has personal knowledge, but rather whether or not a crime actually has been committed.

**COUNSEL:**

*Gregory J. Brown*, Ashtabula County Prosecuting Attorney, for Appellee.

*Gregory M. Gilson*, for Appellant.

**JUDGES:**

Ford, Presiding Judge. Christley and Joseph E. Mahoney, JJ., concur.

**OPINION BY:**

FORD

**OPINION:**

[\*2] [\*\*954] FORD, Presiding Judge.

This accelerated calendar case comes from the Ashtabula County Court, Eastern Area, and has been submitted on the briefs. n1

n1 Appellee, state of Ohio, did not file a brief. In this case, we read the transcript and are familiar with the testimony. However, we refer appellee to *App.R. 18(C)* which [HN1] states: "If an appellee fails to file his brief, \* \* \* the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

Appellant, Matthew K. Wilson, was charged with speeding, in violation of *R.C. 4511.21*; [\*\*\*2] menacing, in violation of *R.C. 2903.22(A)*; and disorderly conduct, in violation of *R.C. 2917.11(A)(3)*. After a bench trial, he was convicted of all three counts and sentenced.

On May 15, 1993, at approximately 1:00 p.m., Officer Robert D. Houser of the North Kingsville Police Department was monitoring traffic from a stationary position on State Route 20. Houser observed appellant driving a vehicle. From this observation, Houser thought appellant was driving in excess of [\*\*955] the thirty-five m.p.h. posted speed limit. Immediately after his visual observation, Houser activated a K-55 radar unit. It revealed that appellant was driving fifty-two m.p.h.

Houser stopped appellant and asked for his driver's license. Appellant produced a license, but portions of it were illegible due to destruction. Houser could not read appellant's social security number.

Although Houser did not recognize appellant immediately, shortly after the stop was initiated, Houser realized that he had encountered appellant when [\*3] Houser was working at the Cleveland Electric Illuminating Company. Apparently, appellant's wife also worked there, and appellant would drive his wife to work and pick [\*\*\*3] her up at the end of the day.

Houser testified that appellant became belligerent almost immediately after being stopped. When appellant

presented his license, he dropped his wallet and said, "This is really bullshit." Furthermore, appellant was loud and frequently used profanity. Specifically, appellant referred to Houser as "asshole," "Mr. asshole," and "motherfucker." Also, appellant informed Houser eight or nine times that he would "kick [Houser's] ass."

Initially, Houser did not feel threatened. However, after appellant persisted and edged toward him, he felt threatened and thought the altercation would escalate into a "scuffle."

Houser called dispatch and requested a Code Ten, meaning he needed backup as soon as possible. Officer Gentry arrived, and he said that appellant was loud, irritated and very upset. When Gentry was handcuffing appellant, appellant jerked and spun around. However, Gentry subdued appellant and handcuffed him.

Both Douglas and Kitty Williams observed the incident from their residence and corroborated the officers' testimony. Mr. Williams said that appellant was loud, used profanity, and flailed his hands. Furthermore, he testified that he "thought [\*\*\*4] maybe a fight would break out." Ms. Williams also said appellant used profanity.

Appellant appeals his convictions, assigning the following as error:

"1. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of a speeding violation when there was not sufficient testimony as to the calibration of the K-55 radar unit, and there was no expert testimony as to the reliability of the radar.

"2. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of the offense of menacing in violation of *O.R.C. 2903.22(A)*.

"3. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of aggravated disorderly conduct in violation of *O.R.C. 2917.11(A)(3)*.

"4. The trial court erred in exercising jurisdiction in the criminal cases against the defendant, as the complaints charging the crimes were not executed by the complaining officer, and the jurat was not properly signed under oath."

Regarding the first assignment, appellant argues that there was insufficient testimony to support his speeding conviction because the radar reading should not have been admitted. Specifically, he claims that appellee [\*\*\*5] failed to establish [\*4] that the radar device was properly calibrated, that appellee failed to show that Houser was properly trained to use the K-55 radar, and that appellee failed to present testimony regarding the construction of and method of using the K-55 radar unit.

This court has held that [HN2] a conviction for speeding will not be reversed on sufficiency grounds even if a radar reading was improperly admitted into evidence when the officer testified that, based upon his visual observation, the vehicle was speeding. *Kirtland Hills v. Logan (1984), 21 Ohio App. 3d 67, 69, 21 Ohio B. Rep. 71, 74, 486 N.E.2d 231, 232-233*. Houser said that, based on his visual observation, he thought appellant was driving in excess of the speed limit. Thus, this assignment is without merit.

In the second assignment, appellant contends that the trial court erred in finding appellant guilty of menacing.

[\*\*956] *R.C. 2903.22(A)* states:

[HN3] "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

Clearly, under the facts of this case, appellee proved the elements of [\*\*\*6] this crime. Appellant said eight or nine times that he would "kick [Houser's] ass." Furthermore, as the altercation progressed, Houser thought appellant would cause him physical harm and called for immediate backup. This assignment is meritless.

102 Ohio App. 3d 1, \*4; 656 N.E.2d 954, \*\*956;  
1995 Ohio App. LEXIS 972, \*\*\*6

In the third assignment, appellant claims his conviction for disorderly conduct should be reversed. We agree.

As previously stated, appellant was charged pursuant to *R.C. 2917.11(A)(3)*, which states:

[HN4] "No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

"\* \* \*

"Insulting, taunting, or challenging another, *under circumstances in which such conduct is likely to provoke a violent response* \* \* \*." (Emphasis added.)

Accordingly, appellant could only be convicted if his conduct was likely to provoke a violent response from Houser.

The issue is whether, under the circumstances, a reasonable police officer would find appellant's language such that the officer would want to respond violently. *Warren v. Patrone (1991)*, 75 Ohio App. 3d 595, 598, 600 N.E.2d 344, 345; *State v. Johnson (1982)*, 6 Ohio App. 3d 56, 57, 6 Ohio B. Rep. 268, 269, 453 N.E.2d [\*5] 1101, 1102. [\*\*\*7] [HN5] The standard is objective rather than subjective, and there is no requirement that the arresting officer, in fact, be provoked to a violent response. *Patrone at 598, 600 N.E.2d at 345*.

We find that even though appellant's behavior was obnoxious, under the factual table presented here, a reasonable police officer would not want to respond violently. Thus, this assignment is with merit. We note, however, that while we conclude that appellant's conviction cannot be sustained pursuant to the subsection under which he was charged, it appears that appellant could have been found guilty of disorderly conduct had he been charged under one of the other subsections.

In the fourth assignment, appellant argues that the trial court's judgment is void because the complaints charging the crimes were unsworn complaints.

There were three charging instruments in this case: a traffic ticket charging the speeding violation that was signed by Houser, and two sworn complaints, one charging appellant with menacing, the other charging him with disorderly conduct.

[HN6] Regarding the traffic citation, a signature at the bottom of the ticket is required. However, it need not be sworn. See *Traf.R. 3(C)*. [\*\*\*8] Thus, because the traffic ticket was signed, it was not void.

The complaints charging menacing and disorderly conduct were sworn to by Chief Hitzel. *Crim.R. 3* states:

[HN7] "The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

In this case, because the disorderly conduct and menacing complaints were sworn to, they complied in this respect with *Crim.R. 3*. *State v. Green (1988)*, 48 Ohio App. 3d 121, 548 N.E.2d 334, cited by appellant, is inapplicable since in that case the complaint was unsworn.

Appellant also argues that because the complaint was signed by Chief Hitzel rather than Houser or Gentry, it is void. However, [HN8] "'it is not necessary that the affidavit be executed by one who observed the commission of the offense. It is sufficient if such person has reasonable grounds to believe the accused has committed the crime.'" *State v. Cragon (Apr. 15, 1994)*, 1994 Ohio App. LEXIS 1593, Ashtabula App. No. 93-A-1789, unreported, at 4, 1994 WL 171654, quoting *Sopko v. [\*\*\*9] Maxwell (1965)*, 3 Ohio St. 2d 123, 124, 32 Ohio Op. 2d 99, 99, 209 [\*\*957] N.E.2d 201, 202. "The important issue is not whether the affiant had personal knowledge, but rather whether or [\*\*6]

102 Ohio App. 3d 1, \*6; 656 N.E.2d 954, \*\*957;  
1995 Ohio App. LEXIS 972, \*\*\*9

not a crime was actually committed." *Cragon* at 4-5. Thus, the complaint was not void, and this assignment is meritless.

Based on the foregoing, the judgment of trial court is affirmed in part and reversed in part, and judgment is entered for appellant on the charge of disorderly conduct.

*Judgment accordingly.*

Christley and Joseph E. Mahoney, JJ., concur.

121 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**The STATE of Ohio, Appellee, v. WILSON, Appellant****No. 93-A-1810****Court of Appeals of Ohio, Eleventh Appellate District, Ashtabula County***102 Ohio App. 3d 1; 656 N.E.2d 954; 1995 Ohio App. LEXIS 972***March 20, 1995, Decided****PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Eastern Area County Court, Case No. 93 CRB 199; 93 CRB 200; and 93 TRD 1078.

**DISPOSITION:**

*Judgment accordingly.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his convictions in the Ashtabula County Court, Eastern Area (Ohio) for speeding, menacing, and disorderly conduct.

**OVERVIEW:** A police officer pulled over defendant for speeding. Defendant was abusive and threatened the officer. The officer called for backup and arrested defendant. Defendant was convicted in the trial court of speeding, menacing, and disorderly conduct. On appeal, the court affirmed defendant's convictions for speeding and menacing and reversed his conviction for disorderly conduct. The court held that defendant's conviction for speeding was supported by sufficient evidence because the officer testified that he thought defendant was speeding based upon his observation. The court determined that defendant was properly convicted of menacing pursuant to *Ohio Rev. Code Ann. § 2903.22(A)* because he repeatedly threatened the officer with violence. The court ruled that defendant was erroneously convicted of disorderly conduct pursuant to *Ohio Rev. Code Ann. § 2917.11(A)(3)* because his conduct would not have caused a reasonable police officer to want to respond with violence. The court held that the complaints charging defendant with menacing and disorderly conduct were properly sworn to as required by *Ohio R. Crim. P. 3*.

**OUTCOME:** The court affirmed defendant's convictions for speeding and menacing. The court reversed defendant's conviction for disorderly conduct.

**CORE TERMS:** disorderly conduct, radar, charging, menacing, speeding, driving, sworn, void, beyond a reasonable doubt, profanity, violent, license, visual, loud, police officer, convicted, violently, traffic ticket, physical harm, speed

limit, altercation, meritless, asshole, provoke, unsworn, backup, kick, ass

### **LexisNexis(R) Headnotes**

#### ***Civil Procedure > Appeals > Briefs***

#### ***Criminal Law & Procedure > Appeals > Briefs***

[HN1] *Ohio R. App. P. 18(C)* states in part: If an appellee fails to file his brief, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

#### ***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN2] A conviction for speeding will not be reversed on sufficiency grounds even if a radar reading is improperly admitted into evidence when the officer has testified that, based upon his visual observation, the vehicle is speeding.

#### ***Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > General Overview***

#### ***Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > General Overview***

[HN3] *Ohio Rev. Code Ann. § 2903.22(A)* states: No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > General Overview***

[HN4] *Ohio Rev. Code Ann. § 2917.11(A)(3)* states in part: No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following: Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview***

#### ***Torts > Negligence > Standards of Care > Appropriate Standard > Objectivity***

[HN5] The standard for disorderly conduct pursuant to *Ohio Rev. Code Ann. § 2917.11(A)(3)* is objective rather than subjective, and there is no requirement that an arresting officer, in fact, be provoked to a violent response.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN6] Regarding a traffic citation, a signature at the bottom of the ticket is required. However, it need not be sworn. *Ohio Traffic R. 3(C)*.

#### ***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview***

#### ***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN7] *Ohio R. Crim. P. 3* states: The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths. *Ohio R. Crim. P. 3*.

***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN8] It is not necessary that an affidavit supporting a complaint be executed by one who has observed the commission of the offense. It is sufficient if such person has reasonable grounds to believe the accused has committed the crime. The important issue is not whether the affiant has personal knowledge, but rather whether or not a crime actually has been committed.

**COUNSEL:**

*Gregory J. Brown*, Ashtabula County Prosecuting Attorney, for Appellee.

*Gregory M. Gilson*, for Appellant.

**JUDGES:**

Ford, Presiding Judge. Christley and Joseph E. Mahoney, JJ., concur.

**OPINION BY:**

FORD

**OPINION:**

[\*2] [\*\*954] FORD, Presiding Judge.

This accelerated calendar case comes from the Ashtabula County Court, Eastern Area, and has been submitted on the briefs. n1

n1 Appellee, state of Ohio, did not file a brief. In this case, we read the transcript and are familiar with the testimony. However, we refer appellee to *App.R. 18(C)* which [HN1] states: "If an appellee fails to file his brief, \* \* \* the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

Appellant, Matthew K. Wilson, was charged with speeding, in violation of *R.C. 4511.21*; [\*\*\*2] menacing, in violation of *R.C. 2903.22(A)*; and disorderly conduct, in violation of *R.C. 2917.11(A)(3)*. After a bench trial, he was convicted of all three counts and sentenced.

On May 15, 1993, at approximately 1:00 p.m., Officer Robert D. Houser of the North Kingsville Police Department was monitoring traffic from a stationary position on State Route 20. Houser observed appellant driving a vehicle. From this observation, Houser thought appellant was driving in excess of [\*\*955] the thirty-five m.p.h. posted speed limit. Immediately after his visual observation, Houser activated a K-55 radar unit. It revealed that appellant was driving fifty-two m.p.h.

Houser stopped appellant and asked for his driver's license. Appellant produced a license, but portions of it were illegible due to destruction. Houser could not read appellant's social security number.

Although Houser did not recognize appellant immediately, shortly after the stop was initiated, Houser realized that he had encountered appellant when [\*3] Houser was working at the Cleveland Electric Illuminating Company. Apparently, appellant's wife also worked there, and appellant would drive his wife to work and pick [\*\*\*3] her up at the end of the day.

Houser testified that appellant became belligerent almost immediately after being stopped. When appellant

presented his license, he dropped his wallet and said, "This is really bullshit." Furthermore, appellant was loud and frequently used profanity. Specifically, appellant referred to Houser as "asshole," "Mr. asshole," and "motherfucker." Also, appellant informed Houser eight or nine times that he would "kick [Houser's] ass."

Initially, Houser did not feel threatened. However, after appellant persisted and edged toward him, he felt threatened and thought the altercation would escalate into a "scuffle."

Houser called dispatch and requested a Code Ten, meaning he needed backup as soon as possible. Officer Gentry arrived, and he said that appellant was loud, irritated and very upset. When Gentry was handcuffing appellant, appellant jerked and spun around. However, Gentry subdued appellant and handcuffed him.

Both Douglas and Kitty Williams observed the incident from their residence and corroborated the officers' testimony. Mr. Williams said that appellant was loud, used profanity, and flailed his hands. Furthermore, he testified that he "thought [\*\*\*4] maybe a fight would break out." Ms. Williams also said appellant used profanity.

Appellant appeals his convictions, assigning the following as error:

"1. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of a speeding violation when there was not sufficient testimony as to the calibration of the K-55 radar unit, and there was no expert testimony as to the reliability of the radar.

"2. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of the offense of menacing in violation of *O.R.C. 2903.22(A)*.

"3. The trial court erred in finding beyond a reasonable doubt that the defendant was guilty of aggravated disorderly conduct in violation of *O.R.C. 2917.11(A)(3)*.

"4. The trial court erred in exercising jurisdiction in the criminal cases against the defendant, as the complaints charging the crimes were not executed by the complaining officer, and the jurat was not properly signed under oath."

Regarding the first assignment, appellant argues that there was insufficient testimony to support his speeding conviction because the radar reading should not have been admitted. Specifically, he claims that appellee [\*\*\*5] failed to establish [\*4] that the radar device was properly calibrated, that appellee failed to show that Houser was properly trained to use the K-55 radar, and that appellee failed to present testimony regarding the construction of and method of using the K-55 radar unit.

This court has held that [HN2] a conviction for speeding will not be reversed on sufficiency grounds even if a radar reading was improperly admitted into evidence when the officer testified that, based upon his visual observation, the vehicle was speeding. *Kirtland Hills v. Logan (1984), 21 Ohio App. 3d 67, 69, 21 Ohio B. Rep. 71, 74, 486 N.E.2d 231, 232-233*. Houser said that, based on his visual observation, he thought appellant was driving in excess of the speed limit. Thus, this assignment is without merit.

In the second assignment, appellant contends that the trial court erred in finding appellant guilty of menacing.

[\*\*956] *R.C. 2903.22(A)* states:

[HN3] "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

Clearly, under the facts of this case, appellee proved the elements of [\*\*\*6] this crime. Appellant said eight or nine times that he would "kick [Houser's] ass." Furthermore, as the altercation progressed, Houser thought appellant would cause him physical harm and called for immediate backup. This assignment is meritless.

102 Ohio App. 3d 1, \*4; 656 N.E.2d 954, \*\*956;  
1995 Ohio App. LEXIS 972, \*\*\*6

In the third assignment, appellant claims his conviction for disorderly conduct should be reversed. We agree.

As previously stated, appellant was charged pursuant to *R.C. 2917.11(A)(3)*, which states:

[HN4] "No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

"\* \* \*

"Insulting, taunting, or challenging another, *under circumstances in which such conduct is likely to provoke a violent response* \* \* \*." (Emphasis added.)

Accordingly, appellant could only be convicted if his conduct was likely to provoke a violent response from Houser.

The issue is whether, under the circumstances, a reasonable police officer would find appellant's language such that the officer would want to respond violently. *Warren v. Patrone (1991)*, 75 Ohio App. 3d 595, 598, 600 N.E.2d 344, 345; *State v. Johnson (1982)*, 6 Ohio App. 3d 56, 57, 6 Ohio B. Rep. 268, 269, 453 N.E.2d [\*5] 1101, 1102. [\*\*\*7] [HN5] The standard is objective rather than subjective, and there is no requirement that the arresting officer, in fact, be provoked to a violent response. *Patrone at 598, 600 N.E.2d at 345*.

We find that even though appellant's behavior was obnoxious, under the factual table presented here, a reasonable police officer would not want to respond violently. Thus, this assignment is with merit. We note, however, that while we conclude that appellant's conviction cannot be sustained pursuant to the subsection under which he was charged, it appears that appellant could have been found guilty of disorderly conduct had he been charged under one of the other subsections.

In the fourth assignment, appellant argues that the trial court's judgment is void because the complaints charging the crimes were unsworn complaints.

There were three charging instruments in this case: a traffic ticket charging the speeding violation that was signed by Houser, and two sworn complaints, one charging appellant with menacing, the other charging him with disorderly conduct.

[HN6] Regarding the traffic citation, a signature at the bottom of the ticket is required. However, it need not be sworn. See *Traf.R. 3(C)*. [\*\*\*8] Thus, because the traffic ticket was signed, it was not void.

The complaints charging menacing and disorderly conduct were sworn to by Chief Hitzel. *Crim.R. 3* states:

[HN7] "The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

In this case, because the disorderly conduct and menacing complaints were sworn to, they complied in this respect with *Crim.R. 3*. *State v. Green (1988)*, 48 Ohio App. 3d 121, 548 N.E.2d 334, cited by appellant, is inapplicable since in that case the complaint was unsworn.

Appellant also argues that because the complaint was signed by Chief Hitzel rather than Houser or Gentry, it is void. However, [HN8] "'it is not necessary that the affidavit be executed by one who observed the commission of the offense. It is sufficient if such person has reasonable grounds to believe the accused has committed the crime.'" *State v. Cragon (Apr. 15, 1994)*, 1994 Ohio App. LEXIS 1593, Ashtabula App. No. 93-A-1789, unreported, at 4, 1994 WL 171654, quoting *Sopko v. [\*\*\*9] Maxwell (1965)*, 3 Ohio St. 2d 123, 124, 32 Ohio Op. 2d 99, 99, 209 [\*\*957] N.E.2d 201, 202. "The important issue is not whether the affiant had personal knowledge, but rather whether or [\*\*6]

102 Ohio App. 3d 1, \*6; 656 N.E.2d 954, \*\*957;  
1995 Ohio App. LEXIS 972, \*\*\*9

not a crime was actually committed." *Cragon* at 4-5. Thus, the complaint was not void, and this assignment is meritless.

Based on the foregoing, the judgment of trial court is affirmed in part and reversed in part, and judgment is entered for appellant on the charge of disorderly conduct.

*Judgment accordingly.*

Christley and Joseph E. Mahoney, JJ., concur.

122 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee v. PHILLIP A. DOUGLAS,  
Defendant-Appellant**

**Case No. CA-1044**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, ASHLAND  
COUNTY**

*1993 Ohio App. LEXIS 5513*

**November 1, 1993, Entered**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from the Ashland Municipal Court. Case No. 93-TR-D-25652

**DISPOSITION:**

JUDGMENT: Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the Ashland Municipal Court (Ohio), which convicted defendant of speeding, a violation of *Ohio Rev. Code Ann. § 4511.21(D)(1)*.

**OVERVIEW:** Defendant was charged with speeding. The trial court convicted defendant. On appeal, defendant contended that the prosecution failed to establish the corpus delicti of speeding. The court held that: (1) the prosecution established through the testimony of a trooper that he observed defendant's vehicle southbound at a speed in excess of 65 miles per hour; (2) the trooper activated radar and received audio output that confirmed that the vehicle was traveling in excess of 65 miles per hour, the trooper identified the driver of the vehicle as defendant, and from the trooper's testimony, the corpus delicti was established; (3) the verdict was not against the manifest weight of the evidence; (4) defendant did not have the right to a jury trial; and (5) the trial court did not err in entering a plea of not guilty for defendant after defendant refused to enter a plea.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** traffic, arraignment, radar, municipal, issuance, ticket, traffic citation, sub judice, discovery, speed, corpus delicti, enter a plea, summons, reasonable doubt, jury trial, misdemeanor, southbound, activated, speeding, complied, visual, probable cause hearing, entering a plea, law enforcement officer, pre-plea, designation, audio, fine

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview  
Transportation Law > Commercial Vehicles > Traffic Regulation  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Ohio Traffic R. 3(A)* provides: In traffic cases, the complaint and summons shall be the "Ohio Uniform Traffic Ticket" as set out in the Appendix of Forms. (E) A law enforcement officer who issues a ticket shall complete and sign the ticket, serve a copy of the completed ticket upon a defendant, and, without unnecessary delay, file the court copy with a court.

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution  
Evidence > Hearsay > Exemptions > Confessions > Corpus Delicti Doctrine***

[HN2] Corpus delicti is defined as the objective proof or substantial fact that a crime has been committed. The "corpus delicti" of a crime is the body, foundation or substance of the crime which ordinarily includes two elements: the act and the criminal agency of the act.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN3] An appellate court's examination of the record at trial is limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors  
Criminal Law & Procedure > Sentencing > Fines***

[HN4] *Ohio Rev. Code Ann. § 2945.17* provides: At any trial, in any court, for the violation of any statute of the state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Procedure & Scope  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Refusals to Plea  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Not Guilty***

[HN5] *Ohio Traffic R. 10(A)* states: If a defendant refuses to plead, a court shall enter a plea of not guilty on behalf of the defendant.

***Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Procedure & Scope  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview***

[HN6] *Ohio Traffic R. 8(B)* states: Arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the complaint, or shall acknowledge receipt thereof, before being called upon to plead and may in open court waive the reading of the complaint.

***Civil Procedure > Appeals > Reviewability > Preservation for Review***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN7] In order to preserve an issue for review, one must raise the issue in the trial court.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview*

*Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview*

[HN8] A probable cause hearing under *Ohio R. Crim. P. 4* does not attach to the issuance of a traffic citation.

**COUNSEL:**

For Plaintiff-Appellee: W. DAVID MONTAGUE, Ass't Law Director, 124 Church Street, Ashland, Ohio 44805.

For Defendant-Appellant: PHILLIP A. DOUGLAS, pro se, c/o Box 18147, Fredericktown, Ohio 43019.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. W. Don Reader, J.

**OPINION BY:** SHEILA G. FARMER

**OPINION:**

OPINION

FARMER, J.

On March 21, 1993, Ohio State Highway Patrol Trooper Brad Perry observed appellant, Phillip A. Douglas, operating a motor vehicle southbound on U.S. Route 42 at an excessive speed. After making this observation, Trooper Perry activated his radar unit and used it to confirm his visual observation. The radar indicated that appellant's vehicle was travelling at 68 m.p.h. in a 55 m.p.h. zone. For that reason, appellant was stopped and thereafter issued a citation for speeding in violation of *R.C. 4511.21(D)(1)*.

Arraignment on this charge was held on April 2, 1993. A description of the various pleas that appellant had a right to enter were explained to him. When asked how he pled, appellant refused to enter a plea. [\*2] Consequently, the court entered a plea of not guilty on appellant's behalf.

Appellant proceeded to file a number of motions, notices, demands, orders, briefs, and affidavits. A hearing on these matters was set for April 5, 1993, at 9:00 a.m. With appellant's consent, the trial was held later in the day on April 5, 1993. At the conclusion of the trial, the court entered a finding of guilty and fined appellant \$ 25 plus costs.

Appellant timely filed a notice of appeal and this matter is now before this court for consideration.

Assignments of error are as follows:

ASSIGNMENT OF ERROR NO. I

THE COURT JUDGE NELSON ERRED IN ASSUMING JURISDICTION WHEN THE COURT'S JURISDICTION HAD NOT BEEN INVOKED BY A COMPLAINT SIGNED BY A PROSECUTOR AND SUPPORTED BY AN AFFIDAVIT.

ASSIGNMENT OF ERROR NO. II

NO CORPUS DELICTI WAS PRODUCED AT TRIAL.

ASSIGNMENT OF ERROR NO. III

THE INSTRUMENT USED BY TRIAL JUDGE NELSON AS A FEIGNED COMPLAINT WAS NOT EVEN BROUGHT IN A TRIBUNAL ESTABLISHED BY THE STATE OF OHIO.

## ASSIGNMENT OF ERROR NO. IV

ALLEGED VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

## ASSIGNMENT OF ERROR NO. V

TRIAL COURT JUDGE NELSON ERRED IN DENYING THE [\*3] ACCUSED A TRIAL BY JURY.

## ASSIGNMENT OF ERROR NO. VI

TRIAL JUDGE NELSON DENIED DEFENDANT-APPELLANT THE SUBSTANTIVE RIGHT OF PRE-PLEA DISCOVERY BY ENTERING A PLEA FOR HIM OVER HIS OBJECTION.

## ASSIGNMENT OF ERROR NO. VII

TRIAL JUDGE NELSON ERRED BY PERMITTING THE INTRODUCTION OF ILLEGALLY OBTAINED EVIDENCE.

## ASSIGNMENT OF ERROR NO. VIII

DEFENDANT-APPELLANT WAS NOT AFFORDED A PROBABLE CAUSE HEARING.

## ASSIGNMENT OF ERROR NO. IX

NO MIRANDA WARNING WAS GIVEN TO DEFENDANT-APPELLANT AT THE OUTSET OF THE INITIAL INVESTIGATION.

## I

Appellant claims that the Uniform Traffic Citation issued in the case sub judice was not signed by the "prosecutor," nor supported by affidavit. We disagree.

*Traf.R. 3(A)* establishes the form to be used in a traffic case:

**RULE 3. Complaint and summons; form; use**

**(A). Traffic complaint and summons.** [HN1] In traffic cases, the complaint and summons shall be the "Ohio Uniform Traffic Ticket" as set out in the Appendix of Forms.

Furthermore, *Traf.R. 3(E)* establishes the procedure for ticket issuance:

**(E) Duty of law enforcement officer.** A law enforcement officer who issues a ticket shall complete and [\*4] sign the ticket, serve a copy of the completed ticket upon defendant, and, without unnecessary delay, file the court copy with the court.

In our review of the ticket sub judice, we find that it conforms with the requirements of *Traf.R. 3(A)* and (E). *Crim.R. 3* requirements for a complaint issued under oath does not apply to traffic cases. *City of Cleveland v. Austin (1978)*, 55 Ohio App.2d 215, 380 N.E.2d 1357. *Traf.R. 3* is the proper procedure for issuance of traffic citations. Id. at paragraph two of the syllabus.

Assignment of Error I is denied.

## II

Appellant contends that the State failed to establish the "corpus delicti" of speeding, *R.C. 4511.21*. We disagree.

[HN2] Corpus delicti is defined as:

. . . the objective proof or substantial fact that a crime has been committed. The "corpus delicti" of a crime is the body, foundation or substance of the crime which ordinarily includes two elements: the act and the criminal agency of the act.

From our review of the record, the State established through the testimony of Trooper Perry that he observed appellant's vehicle southbound at a speed in excess of 65 m.p.h. T.13. Trooper Perry activated the radar [\*5] and received audio output which confirmed that the vehicle was in excess of 65 m.p.h. T.13. Trooper Perry identified the driver as appellant. T.14-15.

We conclude from that testimony that the "corpus delicti" was established.

Assignment of Error II is denied.

## III

Appellant contends that the traffic citation issued to him cited him to appear at a non-existent court. We disagree.

The traffic citation cited appellant to appear at "Municipal Court Ashland, Ohio, 44805." *R.C. 1901.02(B)* establishes that the "Ashland municipal court has jurisdiction within Ashland county." As we have previously noted, the citation issued complies with the requirements of *Traf.R. 3*.

We understand appellant's contention that Trooper Perry capitalized Municipal and Court and placed the territorial designation after the naming of the court. However, it appears not to have misled appellant as to the correct judicial district for he did appear at his arraignment. April 2, 1993 T.4.

We find that the designation of "Municipal Court Ashland, Ohio 44805" is the same as designating Ashland Municipal Court pursuant to *R.C. 1901.02(B)*. Therefore, the trial court had jurisdiction over the citation.

Assignment [\*6] of Error III is denied.

## IV

Appellant claims that the verdict of guilty is against the manifest weight of the evidence. We disagree.

[HN3] Our examination of the record at trial is limited to a determination of whether there was evidence presented "which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley (1978)*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, citing *Atkins v. State (1926)*, 115 Ohio St. 542, 546, 155 N.E. 189.

From a review of the record, we find from the visual observations of Trooper Perry (T.13), and the collaborative evidence of the radar detection (T.14), there was sufficient evidence for the trial court to conclude that all the elements of the offense had been proven beyond a reasonable doubt. Eley.

Assignment of Error IV is denied.

## V

Appellant claims that he was denied his right to a jury trial. We disagree.

*R.C. 2945.17* has codified the Sixth Amendment right to jury trial excepting cases in which the fine does not exceed \$ 100:

**§ 2945.17 Right to trial by jury.**

[HN4] At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, [\*7] except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.

Appellant was charged under *R.C. 4511.21(D)(1)* which is classified as a minor misdemeanor. *R.C. 2929.21(D)* establishes the maximum fine for a minor misdemeanor as \$ 100. Therefore, appellant does not have the right to a jury trial.

Assignment of Error V is denied.

VI

Appellant claims the trial court erred in entering a plea of "not guilty" for him, thereby denying him his right to "pre-plea discovery." We disagree.

At appellant's arraignment, he stated the following:

THE COURT: How do you plead to this charge?

THE DEFENDANT: I make no plea on this.

THE COURT: All right. I'll enter a plea of not guilty on your behalf.

*Traf.R. 10 (A)* states:

**RULE 10. Pleas; rights upon plea**

(A) **Pleas.** . . . [HN5] If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

Traffic court arraignment procedures are governed by *Traf.R. 8(B)*:

**RULE 8. Arraignment**

. . .

(B) **Arraignment procedures.** [HN6] Arraignment shall be conducted in open court and [\*8] shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the complaint, or shall acknowledge receipt thereof, before being called upon to plead and may in open court waive the reading of the complaint.

An examination of the April 2, 1993 record reveals that the trial court complied with these rules. *Traf.R. 11(B)(2)(b)* provides that requests and motions for discovery shall be made under *Crim.R. 16*, "Discovery and Inspection." Upon review of said rule, we note no reference to "pre-plea discovery." We find no such "substantive right" under Ohio law.

Assignment of Error VI is denied.

## VII

Appellant claims that the trial court erred in permitting evidence as to the K-55 radar device. We disagree.

We note that there was no objection at trial to the evidence of the radar reading. T.13-15. [HN7] In order to preserve an issue for review, one must raise the issue in the trial court. *State v. Maurer (1984)*, 15 Ohio St.3d 239, 473 N.E.2d 768; *State v. Williams (1977)*, 51 Ohio St.2d 112, 364 N.E.2d 1364.

Nevertheless, we find that Trooper Perry was established at [\*9] trial as a trained, certified operator of the vehicle. T.6-8. Further, the evidence established the calibration procedures and that they were performed on the date of arrest. T.8-11. Trooper Perry visually estimated the speed of appellant's vehicle and received an audio confirmation of the speed. T.13-14. Trooper Perry further testified that the vehicle clocked and observed was one and the same. T.14-15.

The requirements of *Akron v. Gray (1979)*, 60 Ohio Misc. 68, 397 N.E.2d 429, and *State v. Wasner (May 6, 1981)*, Tuscarawas App. No. CA-1475, unreported, were met in the case sub judice.

Assignment of Error VII is denied.

## VIII

Appellant contends that he was not afforded a probable cause hearing. We disagree.

As we have stated in Assignments of Error I and VI, the issuance of a traffic citation is governed by Ohio Traffic Rules, and in particular, *Traf.R. 1* and *3*.

[HN8] A probable cause hearing under *Crim.R. 4* does not attach to the issuance of a traffic citation. The record reveals that the issuance of the citation sub judice, on all matters, complied with the Ohio traffic rules.

Assignment of Error VIII is denied.

## IX

Appellant contends that he was not afforded his [\*10] "Miranda rights" at the traffic stop. We disagree.

From our review of the record, we find no statement of appellant in evidence. There is no testimony as to anything appellant said to Trooper Perry. Therefore, there can be no violation of appellant's right against self-incrimination nor his right to counsel.

Assignment of Error IX is denied.

The judgment of the Ashland Municipal Court of Ashland County, Ohio, is hereby affirmed.

by Farmer J.

Hoffman, P.J. and

Reader, J. concur.

## JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Ashland Municipal Court of Ashland County, Ohio, is affirmed.

Sheila G. Farmer

William B. Hoffman

W. Don Reader

JUDGES

123 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee v. PHILLIP A. DOUGLAS,  
Defendant-Appellant**

**Case No. CA-1044**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, ASHLAND  
COUNTY**

*1993 Ohio App. LEXIS 5513*

**November 1, 1993, Entered**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from the Ashland Municipal Court. Case No. 93-TR-D-25652

**DISPOSITION:**

JUDGMENT: Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the Ashland Municipal Court (Ohio), which convicted defendant of speeding, a violation of *Ohio Rev. Code Ann. § 4511.21(D)(1)*.

**OVERVIEW:** Defendant was charged with speeding. The trial court convicted defendant. On appeal, defendant contended that the prosecution failed to establish the corpus delicti of speeding. The court held that: (1) the prosecution established through the testimony of a trooper that he observed defendant's vehicle southbound at a speed in excess of 65 miles per hour; (2) the trooper activated radar and received audio output that confirmed that the vehicle was traveling in excess of 65 miles per hour, the trooper identified the driver of the vehicle as defendant, and from the trooper's testimony, the corpus delicti was established; (3) the verdict was not against the manifest weight of the evidence; (4) defendant did not have the right to a jury trial; and (5) the trial court did not err in entering a plea of not guilty for defendant after defendant refused to enter a plea.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** traffic, arraignment, radar, municipal, issuance, ticket, traffic citation, sub judice, discovery, speed, corpus delicti, enter a plea, summons, reasonable doubt, jury trial, misdemeanor, southbound, activated, speeding, complied, visual, probable cause hearing, entering a plea, law enforcement officer, pre-plea, designation, audio, fine

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview  
Transportation Law > Commercial Vehicles > Traffic Regulation  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Ohio Traffic R. 3(A)* provides: In traffic cases, the complaint and summons shall be the "Ohio Uniform Traffic Ticket" as set out in the Appendix of Forms. (E) A law enforcement officer who issues a ticket shall complete and sign the ticket, serve a copy of the completed ticket upon a defendant, and, without unnecessary delay, file the court copy with a court.

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution  
Evidence > Hearsay > Exemptions > Confessions > Corpus Delicti Doctrine***

[HN2] Corpus delicti is defined as the objective proof or substantial fact that a crime has been committed. The "corpus delicti" of a crime is the body, foundation or substance of the crime which ordinarily includes two elements: the act and the criminal agency of the act.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN3] An appellate court's examination of the record at trial is limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors  
Criminal Law & Procedure > Sentencing > Fines***

[HN4] *Ohio Rev. Code Ann. § 2945.17* provides: At any trial, in any court, for the violation of any statute of the state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Procedure & Scope  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Refusals to Plea  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Not Guilty***

[HN5] *Ohio Traffic R. 10(A)* states: If a defendant refuses to plead, a court shall enter a plea of not guilty on behalf of the defendant.

***Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Procedure & Scope  
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview***

[HN6] *Ohio Traffic R. 8(B)* states: Arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the complaint, or shall acknowledge receipt thereof, before being called upon to plead and may in open court waive the reading of the complaint.

***Civil Procedure > Appeals > Reviewability > Preservation for Review***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN7] In order to preserve an issue for review, one must raise the issue in the trial court.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview*

*Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview*

[HN8] A probable cause hearing under *Ohio R. Crim. P. 4* does not attach to the issuance of a traffic citation.

**COUNSEL:**

For Plaintiff-Appellee: W. DAVID MONTAGUE, Ass't Law Director, 124 Church Street, Ashland, Ohio 44805.

For Defendant-Appellant: PHILLIP A. DOUGLAS, pro se, c/o Box 18147, Fredericktown, Ohio 43019.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. W. Don Reader, J.

**OPINION BY:** SHEILA G. FARMER

**OPINION:**

OPINION

FARMER, J.

On March 21, 1993, Ohio State Highway Patrol Trooper Brad Perry observed appellant, Phillip A. Douglas, operating a motor vehicle southbound on U.S. Route 42 at an excessive speed. After making this observation, Trooper Perry activated his radar unit and used it to confirm his visual observation. The radar indicated that appellant's vehicle was travelling at 68 m.p.h. in a 55 m.p.h. zone. For that reason, appellant was stopped and thereafter issued a citation for speeding in violation of *R.C. 4511.21(D)(1)*.

Arraignment on this charge was held on April 2, 1993. A description of the various pleas that appellant had a right to enter were explained to him. When asked how he pled, appellant refused to enter a plea. [\*2] Consequently, the court entered a plea of not guilty on appellant's behalf.

Appellant proceeded to file a number of motions, notices, demands, orders, briefs, and affidavits. A hearing on these matters was set for April 5, 1993, at 9:00 a.m. With appellant's consent, the trial was held later in the day on April 5, 1993. At the conclusion of the trial, the court entered a finding of guilty and fined appellant \$ 25 plus costs.

Appellant timely filed a notice of appeal and this matter is now before this court for consideration.

Assignments of error are as follows:

ASSIGNMENT OF ERROR NO. I

THE COURT JUDGE NELSON ERRED IN ASSUMING JURISDICTION WHEN THE COURT'S JURISDICTION HAD NOT BEEN INVOKED BY A COMPLAINT SIGNED BY A PROSECUTOR AND SUPPORTED BY AN AFFIDAVIT.

ASSIGNMENT OF ERROR NO. II

NO CORPUS DELICTI WAS PRODUCED AT TRIAL.

ASSIGNMENT OF ERROR NO. III

THE INSTRUMENT USED BY TRIAL JUDGE NELSON AS A FEIGNED COMPLAINT WAS NOT EVEN BROUGHT IN A TRIBUNAL ESTABLISHED BY THE STATE OF OHIO.

## ASSIGNMENT OF ERROR NO. IV

ALLEGED VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

## ASSIGNMENT OF ERROR NO. V

TRIAL COURT JUDGE NELSON ERRED IN DENYING THE [\*3] ACCUSED A TRIAL BY JURY.

## ASSIGNMENT OF ERROR NO. VI

TRIAL JUDGE NELSON DENIED DEFENDANT-APPELLANT THE SUBSTANTIVE RIGHT OF PRE-PLEA DISCOVERY BY ENTERING A PLEA FOR HIM OVER HIS OBJECTION.

## ASSIGNMENT OF ERROR NO. VII

TRIAL JUDGE NELSON ERRED BY PERMITTING THE INTRODUCTION OF ILLEGALLY OBTAINED EVIDENCE.

## ASSIGNMENT OF ERROR NO. VIII

DEFENDANT-APPELLANT WAS NOT AFFORDED A PROBABLE CAUSE HEARING.

## ASSIGNMENT OF ERROR NO. IX

NO MIRANDA WARNING WAS GIVEN TO DEFENDANT-APPELLANT AT THE OUTSET OF THE INITIAL INVESTIGATION.

## I

Appellant claims that the Uniform Traffic Citation issued in the case sub judice was not signed by the "prosecutor," nor supported by affidavit. We disagree.

*Traf.R. 3(A)* establishes the form to be used in a traffic case:

**RULE 3. Complaint and summons; form; use**

**(A). Traffic complaint and summons.** [HN1] In traffic cases, the complaint and summons shall be the "Ohio Uniform Traffic Ticket" as set out in the Appendix of Forms.

Furthermore, *Traf.R. 3(E)* establishes the procedure for ticket issuance:

**(E) Duty of law enforcement officer.** A law enforcement officer who issues a ticket shall complete and [\*4] sign the ticket, serve a copy of the completed ticket upon defendant, and, without unnecessary delay, file the court copy with the court.

In our review of the ticket sub judice, we find that it conforms with the requirements of *Traf.R. 3(A)* and (E). *Crim.R. 3* requirements for a complaint issued under oath does not apply to traffic cases. *City of Cleveland v. Austin (1978)*, 55 Ohio App.2d 215, 380 N.E.2d 1357. *Traf.R. 3* is the proper procedure for issuance of traffic citations. Id. at paragraph two of the syllabus.

Assignment of Error I is denied.

## II

Appellant contends that the State failed to establish the "corpus delicti" of speeding, *R.C. 4511.21*. We disagree.

[HN2] Corpus delicti is defined as:

. . . the objective proof or substantial fact that a crime has been committed. The "corpus delicti" of a crime is the body, foundation or substance of the crime which ordinarily includes two elements: the act and the criminal agency of the act.

From our review of the record, the State established through the testimony of Trooper Perry that he observed appellant's vehicle southbound at a speed in excess of 65 m.p.h. T.13. Trooper Perry activated the radar [\*5] and received audio output which confirmed that the vehicle was in excess of 65 m.p.h. T.13. Trooper Perry identified the driver as appellant. T.14-15.

We conclude from that testimony that the "corpus delicti" was established.

Assignment of Error II is denied.

## III

Appellant contends that the traffic citation issued to him cited him to appear at a non-existent court. We disagree.

The traffic citation cited appellant to appear at "Municipal Court Ashland, Ohio, 44805." *R.C. 1901.02(B)* establishes that the "Ashland municipal court has jurisdiction within Ashland county." As we have previously noted, the citation issued complies with the requirements of *Traf.R. 3*.

We understand appellant's contention that Trooper Perry capitalized Municipal and Court and placed the territorial designation after the naming of the court. However, it appears not to have misled appellant as to the correct judicial district for he did appear at his arraignment. April 2, 1993 T.4.

We find that the designation of "Municipal Court Ashland, Ohio 44805" is the same as designating Ashland Municipal Court pursuant to *R.C. 1901.02(B)*. Therefore, the trial court had jurisdiction over the citation.

Assignment [\*6] of Error III is denied.

## IV

Appellant claims that the verdict of guilty is against the manifest weight of the evidence. We disagree.

[HN3] Our examination of the record at trial is limited to a determination of whether there was evidence presented "which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley (1978)*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, citing *Atkins v. State (1926)*, 115 Ohio St. 542, 546, 155 N.E. 189.

From a review of the record, we find from the visual observations of Trooper Perry (T.13), and the collaborative evidence of the radar detection (T.14), there was sufficient evidence for the trial court to conclude that all the elements of the offense had been proven beyond a reasonable doubt. Eley.

Assignment of Error IV is denied.

## V

Appellant claims that he was denied his right to a jury trial. We disagree.

*R.C. 2945.17* has codified the Sixth Amendment right to jury trial excepting cases in which the fine does not exceed \$ 100:

**§ 2945.17 Right to trial by jury.**

[HN4] At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, [\*7] except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.

Appellant was charged under *R.C. 4511.21(D)(1)* which is classified as a minor misdemeanor. *R.C. 2929.21(D)* establishes the maximum fine for a minor misdemeanor as \$ 100. Therefore, appellant does not have the right to a jury trial.

Assignment of Error V is denied.

VI

Appellant claims the trial court erred in entering a plea of "not guilty" for him, thereby denying him his right to "pre-plea discovery." We disagree.

At appellant's arraignment, he stated the following:

THE COURT: How do you plead to this charge?

THE DEFENDANT: I make no plea on this.

THE COURT: All right. I'll enter a plea of not guilty on your behalf.

*Traf.R. 10 (A)* states:

**RULE 10. Pleas; rights upon plea**

(A) **Pleas.** . . . [HN5] If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

Traffic court arraignment procedures are governed by *Traf.R. 8(B)*:

**RULE 8. Arraignment**

. . .

(B) **Arraignment procedures.** [HN6] Arraignment shall be conducted in open court and [\*8] shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the complaint, or shall acknowledge receipt thereof, before being called upon to plead and may in open court waive the reading of the complaint.

An examination of the April 2, 1993 record reveals that the trial court complied with these rules. *Traf.R. 11(B)(2)(b)* provides that requests and motions for discovery shall be made under *Crim.R. 16*, "Discovery and Inspection." Upon review of said rule, we note no reference to "pre-plea discovery." We find no such "substantive right" under Ohio law.

Assignment of Error VI is denied.

## VII

Appellant claims that the trial court erred in permitting evidence as to the K-55 radar device. We disagree.

We note that there was no objection at trial to the evidence of the radar reading. T.13-15. [HN7] In order to preserve an issue for review, one must raise the issue in the trial court. *State v. Maurer (1984)*, 15 Ohio St.3d 239, 473 N.E.2d 768; *State v. Williams (1977)*, 51 Ohio St.2d 112, 364 N.E.2d 1364.

Nevertheless, we find that Trooper Perry was established at [\*9] trial as a trained, certified operator of the vehicle. T.6-8. Further, the evidence established the calibration procedures and that they were performed on the date of arrest. T.8-11. Trooper Perry visually estimated the speed of appellant's vehicle and received an audio confirmation of the speed. T.13-14. Trooper Perry further testified that the vehicle clocked and observed was one and the same. T.14-15.

The requirements of *Akron v. Gray (1979)*, 60 Ohio Misc. 68, 397 N.E.2d 429, and *State v. Wasner (May 6, 1981)*, Tuscarawas App. No. CA-1475, unreported, were met in the case sub judice.

Assignment of Error VII is denied.

## VIII

Appellant contends that he was not afforded a probable cause hearing. We disagree.

As we have stated in Assignments of Error I and VI, the issuance of a traffic citation is governed by Ohio Traffic Rules, and in particular, *Traf.R. 1* and *3*.

[HN8] A probable cause hearing under *Crim.R. 4* does not attach to the issuance of a traffic citation. The record reveals that the issuance of the citation sub judice, on all matters, complied with the Ohio traffic rules.

Assignment of Error VIII is denied.

## IX

Appellant contends that he was not afforded his [\*10] "Miranda rights" at the traffic stop. We disagree.

From our review of the record, we find no statement of appellant in evidence. There is no testimony as to anything appellant said to Trooper Perry. Therefore, there can be no violation of appellant's right against self-incrimination nor his right to counsel.

Assignment of Error IX is denied.

The judgment of the Ashland Municipal Court of Ashland County, Ohio, is hereby affirmed.

by Farmer J.

Hoffman, P.J. and

Reader, J. concur.

## JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Ashland Municipal Court of Ashland County, Ohio, is affirmed.

Sheila G. Farmer

William B. Hoffman

W. Don Reader

JUDGES

124 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee, v. MARY LOU SHEPHERD,  
Defendant-Appellant.**

CASE NO. CA92-11-022

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, PREBLE  
COUNTY**

*1993 Ohio App. LEXIS 3850***August 9, 1993, Decided****DISPOSITION:** [\*1]

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed her conviction entered in the Eaton Municipal Court (Ohio) on charges of speeding in violation of *Ohio Rev. Code Ann. § 4511.21(D)(2)*.

**OVERVIEW:** Defendant was seen traveling at a high rate of speed by a state trooper who was in his car in the median of the interstate. He activated his radar, verified that it was sighted on defendant's vehicle, and recorded a speed of 90 miles per hour in a 65 miles per hour zone. At her trial, she did not object to introduction of documents pertaining to the accuracy of the radar unit's tuning forks or its service history. She presented no evidence that the radar display was invalid. On appeal, she claimed that the conviction was against the manifest weight of the evidence, and that it was plain error for the trial court to consider the documents and admit them into evidence. The court held that there was sufficient evidence of defendant's speed, including the accuracy of the radar unit, to convince the trier of fact of her guilt beyond a reasonable doubt. To assert plain error, it must appear on the face of the record that an error was committed and that but for the error the result of the trial would have been otherwise. The court reviewed the trial court's handling of the documents and determined that the procedure did not satisfy the rigorous requirements of the plain error doctrine.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** radar, speed, reasonable doubt, plain error, speeding, assignments of error, manifest, visual, rational trier of fact, proven beyond, motor vehicle, guilt beyond, exceeding, favorable, admit, high pitch, light blue, calibrated, displayed, traveling, activated, tracking, display, cruiser, audible, median, marked

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN1] When analyzing a conviction in the context of the manifest weight of the evidence, the court must determine whether, upon examination of the record, the evidence, if believed, would convince the average mind of defendant's

guilt beyond a reasonable doubt. The court must examine the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN2] The essential elements of one type of a speeding offense are found in *Ohio Rev. Code Ann. § 4511.21(D)(2)*: No person shall operate a motor vehicle at a speed exceeding 65 miles per hour.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Evidence***

[HN3] Where there was no objection made to the documents either during trial or thereafter when they were admitted into evidence, the court is not obligated to consider appellant's challenges to the documents on appeal.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

[HN4] Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Ohio R. Crim. P. 52(B)*. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error the result of the trial clearly would have been otherwise and that not to consider the error would result in a clear miscarriage of justice.

**COUNSEL:**

John L. Petry, Prosecuting Attorney for Eaton Municipal Court, 132 North Barron Street, Eaton, Ohio 45320, for plaintiff-appellee.

Augustus L. Ross, III, 12 East Dayton Street, West Alexandria, Ohio 45381, for defendant-appellant.

**JUDGES:** YOUNG, JONES, KOEHLER

**OPINION BY:** YOUNG

**OPINION:**

OPINION

YOUNG, J. Defendant-appellant, Mary Lou Shepherd, appeals her conviction in Eaton Municipal Court for speeding in violation of *R.C. 4511.21(D)(2)*.

The evidence adduced at trial is as follows: The arresting officer, Trooper Shawn Smart of the Ohio State Highway Patrol, testified that on August 30, 1992 he was seated in a marked cruiser which was parked in a median crossover on I-70 in Preble County. Trooper Smart observed a light blue vehicle in the right lane approaching at a high rate of speed. He then activated his radar unit, which displayed a speed of 90 m.p.h. The radar unit produced a high pitch audible which was consistent with the visual display. Trooper Smart also performed a visual tracking procedure which verified that the radar unit actually clocked the light blue vehicle. Once the vehicle passed, Trooper Smart pulled out of the median, pursued the vehicle with [\*2] his flashing lights activated, and stopped it. Appellant was the driver of the vehicle. Trooper Smart further testified that the radar unit had been correctly calibrated.

Appellant testified that Trooper Smart could not have observed her vehicle because his cruiser was obscured by bushes. Appellant also denied that she was traveling 90 m.p.h., although she failed to provide an estimate of the speed

which she was allegedly traveling.

On October 23, 1992, appellant was found guilty in Eaton Municipal Court of exceeding the posted 65 m.p.h. speed limit in violation of *R.C. 4511.21(D)(2)*. The court fined appellant \$ 75.00 plus costs and assessed two points against her operator's license.

On appeal, appellant presents four assignments of error for review. Because appellant essentially argues in the first and fourth assignments that her conviction was against the manifest weight of the evidence, we consider those assignments together.

[HN1] When analyzing a conviction in the context of the manifest weight of the evidence, this court must determine whether, upon examination of the record, the evidence, if believed, would convince the average mind of appellant's guilt beyond a reasonable doubt. [\*3] *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492*. We must examine the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

[HN2] The essential elements of a speeding offense as they apply in the present case are found in *R.C. 4511.21(D)(2)*: "(D) No person shall operate a motor vehicle \* \* \* (2) At a speed exceeding sixty-five miles per hour \* \* \*."

Upon review of the record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the above elements proven beyond a reasonable doubt. Clearly, appellant operated a motor vehicle in Ohio on the date in question. In addition, a valid radar reading of 90 m.p.h. including a high pitch audible was before the court. The radar unit was properly calibrated and appellant presented no evidence that the radar display was invalid. Also, Trooper Smart described his observations of appellant's speed and the visual tracking procedure which he utilized to ensure that the radar unit actually displayed the speed of appellant's vehicle. Thus, the average mind [\*4] could be convinced of appellant's guilt beyond a reasonable doubt, and, therefore, the speeding conviction was not against the manifest weight of the evidence. Appellant's first and fourth assignments are overruled.

Appellant's second and third assignments of error also involve similar issues and will be combined. Appellant argues that the trial court erred in reviewing the certificate of accuracy for the radar unit's calibration tuning forks and a document outlining the service history of the unit before the documents were marked as exhibits or entered into evidence. Appellant also asserts that the court erred in admitting copies of the documents into evidence after determining her guilt and the corresponding sentence.

We first note, as appellant admits, that [HN3] there was no objection made to the documents either during trial or thereafter when they were admitted into evidence. Therefore, this court is not obligated to consider appellant's challenges to the documents on appeal. See *State v. Black (1978), 54 Ohio St.2d 304, 376 N.E.2d 948*. Appellant, though, proposes that it was plain error for the trial court to consider the documents and admit them into evidence.

[HN4] "Plain errors [\*5] or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Crim.R. 52(B)*. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error the result of the trial clearly would have been otherwise and that not to consider the error would result in a clear miscarriage of justice. *State v. Bock (1984), 16 Ohio App.3d 146, 474 N.E.2d 1228*.

We have reviewed the trial court's handling of the documents and find that the procedure does not satisfy the rigorous requirements of the plain error doctrine. Appellant's second and third assignments of error are overruled.

Judgment affirmed.

JONES, P.J., and KOEHLER, J., concur.

125 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee, v. MARY LOU SHEPHERD,  
Defendant-Appellant.**

**CASE NO. CA92-11-022**

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, PREBLE  
COUNTY**

*1993 Ohio App. LEXIS 3850*

**August 9, 1993, Decided**

**DISPOSITION:** [\*1]

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed her conviction entered in the Eaton Municipal Court (Ohio) on charges of speeding in violation of *Ohio Rev. Code Ann. § 4511.21(D)(2)*.

**OVERVIEW:** Defendant was seen traveling at a high rate of speed by a state trooper who was in his car in the median of the interstate. He activated his radar, verified that it was sighted on defendant's vehicle, and recorded a speed of 90 miles per hour in a 65 miles per hour zone. At her trial, she did not object to introduction of documents pertaining to the accuracy of the radar unit's tuning forks or its service history. She presented no evidence that the radar display was invalid. On appeal, she claimed that the conviction was against the manifest weight of the evidence, and that it was plain error for the trial court to consider the documents and admit them into evidence. The court held that there was sufficient evidence of defendant's speed, including the accuracy of the radar unit, to convince the trier of fact of her guilt beyond a reasonable doubt. To assert plain error, it must appear on the face of the record that an error was committed and that but for the error the result of the trial would have been otherwise. The court reviewed the trial court's handling of the documents and determined that the procedure did not satisfy the rigorous requirements of the plain error doctrine.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** radar, speed, reasonable doubt, plain error, speeding, assignments of error, manifest, visual, rational trier of fact, proven beyond, motor vehicle, guilt beyond, exceeding, favorable, admit, high pitch, light blue, calibrated, displayed, traveling, activated, tracking, display, cruiser, audible, median, marked

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN1] When analyzing a conviction in the context of the manifest weight of the evidence, the court must determine whether, upon examination of the record, the evidence, if believed, would convince the average mind of defendant's

guilt beyond a reasonable doubt. The court must examine the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN2] The essential elements of one type of a speeding offense are found in *Ohio Rev. Code Ann. § 4511.21(D)(2)*: No person shall operate a motor vehicle at a speed exceeding 65 miles per hour.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Evidence***

[HN3] Where there was no objection made to the documents either during trial or thereafter when they were admitted into evidence, the court is not obligated to consider appellant's challenges to the documents on appeal.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

[HN4] Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Ohio R. Crim. P. 52(B)*. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error the result of the trial clearly would have been otherwise and that not to consider the error would result in a clear miscarriage of justice.

**COUNSEL:**

John L. Petry, Prosecuting Attorney for Eaton Municipal Court, 132 North Barron Street, Eaton, Ohio 45320, for plaintiff-appellee.

Augustus L. Ross, III, 12 East Dayton Street, West Alexandria, Ohio 45381, for defendant-appellant.

**JUDGES:** YOUNG, JONES, KOEHLER

**OPINION BY:** YOUNG

**OPINION:**

OPINION

YOUNG, J. Defendant-appellant, Mary Lou Shepherd, appeals her conviction in Eaton Municipal Court for speeding in violation of *R.C. 4511.21(D)(2)*.

The evidence adduced at trial is as follows: The arresting officer, Trooper Shawn Smart of the Ohio State Highway Patrol, testified that on August 30, 1992 he was seated in a marked cruiser which was parked in a median crossover on I-70 in Preble County. Trooper Smart observed a light blue vehicle in the right lane approaching at a high rate of speed. He then activated his radar unit, which displayed a speed of 90 m.p.h. The radar unit produced a high pitch audible which was consistent with the visual display. Trooper Smart also performed a visual tracking procedure which verified that the radar unit actually clocked the light blue vehicle. Once the vehicle passed, Trooper Smart pulled out of the median, pursued the vehicle with [\*2] his flashing lights activated, and stopped it. Appellant was the driver of the vehicle. Trooper Smart further testified that the radar unit had been correctly calibrated.

Appellant testified that Trooper Smart could not have observed her vehicle because his cruiser was obscured by bushes. Appellant also denied that she was traveling 90 m.p.h., although she failed to provide an estimate of the speed

which she was allegedly traveling.

On October 23, 1992, appellant was found guilty in Eaton Municipal Court of exceeding the posted 65 m.p.h. speed limit in violation of *R.C. 4511.21(D)(2)*. The court fined appellant \$ 75.00 plus costs and assessed two points against her operator's license.

On appeal, appellant presents four assignments of error for review. Because appellant essentially argues in the first and fourth assignments that her conviction was against the manifest weight of the evidence, we consider those assignments together.

[HN1] When analyzing a conviction in the context of the manifest weight of the evidence, this court must determine whether, upon examination of the record, the evidence, if believed, would convince the average mind of appellant's guilt beyond a reasonable doubt. [\*3] *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492*. We must examine the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

[HN2] The essential elements of a speeding offense as they apply in the present case are found in *R.C. 4511.21(D)(2)*: "(D) No person shall operate a motor vehicle \* \* \* (2) At a speed exceeding sixty-five miles per hour \* \* \*."

Upon review of the record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the above elements proven beyond a reasonable doubt. Clearly, appellant operated a motor vehicle in Ohio on the date in question. In addition, a valid radar reading of 90 m.p.h. including a high pitch audible was before the court. The radar unit was properly calibrated and appellant presented no evidence that the radar display was invalid. Also, Trooper Smart described his observations of appellant's speed and the visual tracking procedure which he utilized to ensure that the radar unit actually displayed the speed of appellant's vehicle. Thus, the average mind [\*4] could be convinced of appellant's guilt beyond a reasonable doubt, and, therefore, the speeding conviction was not against the manifest weight of the evidence. Appellant's first and fourth assignments are overruled.

Appellant's second and third assignments of error also involve similar issues and will be combined. Appellant argues that the trial court erred in reviewing the certificate of accuracy for the radar unit's calibration tuning forks and a document outlining the service history of the unit before the documents were marked as exhibits or entered into evidence. Appellant also asserts that the court erred in admitting copies of the documents into evidence after determining her guilt and the corresponding sentence.

We first note, as appellant admits, that [HN3] there was no objection made to the documents either during trial or thereafter when they were admitted into evidence. Therefore, this court is not obligated to consider appellant's challenges to the documents on appeal. See *State v. Black (1978), 54 Ohio St.2d 304, 376 N.E.2d 948*. Appellant, though, proposes that it was plain error for the trial court to consider the documents and admit them into evidence.

[HN4] "Plain errors [\*5] or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Crim.R. 52(B)*. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error the result of the trial clearly would have been otherwise and that not to consider the error would result in a clear miscarriage of justice. *State v. Bock (1984), 16 Ohio App.3d 146, 474 N.E.2d 1228*.

We have reviewed the trial court's handling of the documents and find that the procedure does not satisfy the rigorous requirements of the plain error doctrine. Appellant's second and third assignments of error are overruled.

Judgment affirmed.

JONES, P.J., and KOEHLER, J., concur.

126 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee v. THOMAS LOCKE MASON,  
Defendant-Appellant**

**Case No. 93-CA-06**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, KNOX  
COUNTY**

*1993 Ohio App. LEXIS 3404*

**June 24, 1993, Entered**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from Municipal Court, Case No. 93-TRD-00172

**DISPOSITION:**

JUDGMENT: Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a decision of the municipal court (Ohio), which found him guilty of speeding in violation of *Ohio Rev. Code Ann. § 4511.21(C)*.

**OVERVIEW:** A deputy was checking the speed of motor vehicles on a state road while parked on the property of a church. The deputy was not wearing his hat. On this day, defendant was cited with speeding in violation of § 4511.21(C). Defendant entered a plea of not guilty and unsuccessfully filed a motion to suppress. Defendant was found guilty of speeding. On appeal, the court affirmed the conviction. The court rejected defendant's argument that because the arresting officer was parked in front of a church, there existed an excessive entanglement of church and state. The court stated that the trial court did not err in permitting the officer to testify when the evidence clearly established that he was in a distinct uniform at the time of arrest. The court concluded that the trial court did err as to the admission of the certificate of accuracy for the radar forks, but stated that the admission was harmless error because the use of the exhibit was not necessary in the proof of the case. The court rejected defendant's argument that the trial court erred in admitting evidence as to the radar device and in taking judicial notice of the accuracy of the machine.

**OUTCOME:** The court affirmed the speeding violation.

**CORE TERMS:** radar, training, church, excessive entanglement, ticket, speed, motion to suppress, witness testified, deputy sheriff, calibration, accuracy, certificate, wearing, deputy, hat, motor vehicle, parked, competent to testify, admitting evidence, taking judicial notice, time of arrest, sub judice, trained, distinctive, arrest, forks

**LexisNexis(R) Headnotes**

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion***

[HN1] The presence of a police car on a public street, parked on that street, is not an excessive entanglement of church and state. The passive presence of church-owned property and the use of a paved roadway is not excessive entanglement.

***Evidence > Competency > General Overview***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] *Ohio R. Evid. 601(C)*, a general rule of competency, provides that an officer is competent to testify, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting, or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor, where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

***Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule***

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Evidence > Authentication > General Overview***

[HN3] *Ohio R. Evid. 901* requires that exhibits such as a certificate of accuracy for radar forks and a certificate of completion and competency for a deputy sheriff for training in the use of radar be authenticated or identified.

***Evidence > Testimony > Refreshing Recollection > Memory Aids > Writings***

[HN4] Pursuant to *Ohio R. Evid. 612*, the recollection of a witness may be refreshed with the use of a document.

**COUNSEL:**

For Plaintiff-Appellee: WILLIAM D. SMITH, City Law Director, Suite 222, 5 N. Gay St., Mount Vernon, Ohio 43050.

For Defendant-Appellant: THOMAS L. MASON, Pro Se, P.O. Box 345, 153 W. Main St., Ashland, Ohio 44805.

**JUDGES:** Hon. Irene B. Smart, P.J., Hon. Sheila G. Farmer, J., Hon. W. Don Reader, J.

**OPINION BY:** SHEILA G. FARMER

**OPINION:**

OPINION

FARMER, J.

On January 14, 1993, a deputy from the Knox County Sheriff's Department was checking the speed of motor vehicles on Ohio State Route 3 in the Village of Amity, Ohio, on the property of a church. The deputy was not wearing his hat.

On said date, appellant, Thomas Locke Mason, was cited with operating a motor vehicle upon a public highway at a speed of 59 m.p.h. in a 40 m.p.h. zone contrary to and in violation of *R.C. 4511.21(C)*. Appellant entered a plea of not guilty and filed a motion to suppress.

On February 9, 1993, the motion to suppress was heard and summarily denied. On the same date, the matter proceeded to trial to the court, whereupon appellant was found guilty of speeding.

Appellant timely filed [\*2] a notice of appeal, and this matter is now before the court for consideration.

Assignments of error are as follows:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BASED ON THE VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THE DEPUTY SHERIFF COMPETENT TO TESTIFY WHERE HE WAS NOT WEARING A UNIFORM.

ASSIGNMENT OF ERROR NUMBER THREE

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING RECORDS EVIDENCE WHEN SUCH EVIDENCE WAS HEARSAY.

ASSIGNMENT OF ERROR NUMBER FOUR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE WHERE NO FOUNDATION WAS LAID AS TO ITS ACCURACY.

ASSIGNMENT OF ERROR NUMBER FIVE

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE WHERE THERE WAS NO INDEPENDENT RECOLLECTION OF CALIBRATION OF THE RADAR DEVICE.

ASSIGNMENT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE [\*3] WHERE THE DEPUTY SHERIFF WAS TRAINED BY A JUDICIAL PROGRAM IN VIOLATION OF THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT.

I

Appellant claims that the trial court erred in failing to grant his motion to suppress based upon the First Amendment to the United States Constitution. We disagree.

The thrust of appellant's argument is that because the arresting officer was parked in front of a church, there existed an excessive entanglement of church and state. *Lemon v. Kurtzman (1971), 403 U.S. 602*. Appellant argues that there was excessive entanglement because appellee, the State of Ohio, did not establish that the officer was in the State's right-of-way of Wooster Road. We disagree.

[HN1] The presence of a police car on a public street, parked on that street, is not an excessive entanglement of church and state. The recent decision of the United States Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District (1993), Westlaw 18864 (U.S.)*, is illustrative of the type of blend of church and state that will be

tolerated. The passive presence of church-owned property and the use of a paved roadway is not excessive entanglement. [\*4]

Assignment of error one is overruled.

## II

Appellant claims that because the officer was not in uniform, no hat, that he was not competent to testify under *Evid. R. 601(C)*. We disagree.

*Evid. A. 601(C)* states as follows:

### RULE 601. GENERAL RULE OF COMPETENCY

...

(C) [HN2] An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

The testimony in the case sub judice was that the officer was wearing his uniform and that he did not recall if he had his hat on in his car, but that he had it on when he made contact with appellant at the stop. T. 5-7.

The statute specifically states "at the time of arrest" and "a legally distinctive uniform." The trial court did not err in permitting the officer to testify when the evidence clearly established he was in a distinct uniform at the time of arrest.

Assignment of error two is overruled. [\*5]

## III

Appellant claims that the trial court erred in admitting State's Exhibit 1 and Exhibit 2. State's Exhibit 1 is a certificate of accuracy for the radar forks and Exhibit 2 is a certificate of completion and competency for a deputy sheriff for training in the use of radar.

State's Exhibit 2 was the testifying officer's own training certificate and was properly identified as such by the witness. T. 14. The witness testified concerning the exhibit and identified it from his own knowledge pursuant to *Evid. R. 602*.

[HN3] *Evid. R. 901* requires that exhibits such as State's Exhibit 1 be authenticated or identified. No such authentication or identification was done with State's Exhibit 1. We conclude that the trial court did err as to the admission of State's Exhibit 1, but did not err as to the admission of State's Exhibit 2. However, we find that the admission of State's Exhibit 1 was harmless error. *Chapman v. California (1967)*, 386 U.S. 18. Based upon the witness's testimony that two tuning forks were employed to calibrate the instrument, it was not necessary in the proof of this case for appellee to use State's Exhibit 1. *State v. Bechtel (1985)*, 24 Ohio App. 3d 72, [\*6] 493 N.E.2d 318. In addition, the witness testified as to appellant's speed from personal observation regardless of the radar device. T. 12.

Assignment of error three is overruled.

## IV

Appellant claims that the trial court erred in admitting evidence as to the radar device and in taking judicial notice of the accuracy of the machine. We disagree.

The witness testified as to the calibration method employed twice in that particular day. T. 15-16. We find the Bechtel case to be controlling on this point. We find that the trial court did not err in taking judicial notice of the radar device.

Assignment of error four is overruled.

V

Appellant claims that the trial court erred in admitting evidence from the radar device when the witness had no independent recollection of calibration. We disagree.

The witness stated on direct examination the following:

Q: Did you have the opportunity prior to utilizing this radar unit to check the calibration of the radar unit?

A: Yes sir, I did.

Q: And do you recall when you did that?

A: No sir, I do not. I would have to look at the ticket to establish that.

Q: Would you come and take a look at the [\*7] ticket, please? (Witness refers to ticket.)

A: Sir, I've noted times of 11:26 and 1:51 on the day of the violation.

Q: Okay. And what time did you -- did you utilize the radar unit to check Mr. Mason's speed?

A: At 1:32.

T. 15.

[HN4] Pursuant to *Evid. R. 612*, the recollection of a witness may be refreshed with the use of a document, in the case sub judice, the ticket. We find that the witness did just as *Evid. R. 612* suggests, and we fail to find error in the ruling of the trial court as to the radar device.

Assignment of error five is overruled.

VI

Appellant claims that the trial court erred in permitting testimony about the radar device, where the officer was trained in a program established by a previous judge of the court. Appellant contends that is a violation of the doctrine of separation of powers. We disagree.

The only reference to the training received was as follows:

Q: Deputy, what type of training did you receive with regard to the operation of this radar unit?

A: This particular unit, sir?

Q: Yes.

A: I was initially certified on this unit by a member of our department in a program which was established [\*8] by the previous judge of this court.

T. 13.

Appellant objected to the certificate of training, State's Exhibit 2, but the record fails to provide evidentiary materials to address this assignment of error. We cannot consider matters not part of the record from the trial court. *State v. Ishmail (1978), 54 Ohio St. 2d 402, 377 N.E.2d 500.*

Assignment of error six is overruled.

The judgment of the Mount Vernon Municipal Court of Knox County, Ohio, is hereby affirmed.

by Farmer, J.

Smart, P.J. and

Reader, J. concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Mount Vernon Municipal Court of Knox County, Ohio, is affirmed.

Sheila G. Farmer

Irene Balogh Smart

W. Don Reader

JUDGES

127 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee v. THOMAS LOCKE MASON,  
Defendant-Appellant**

**Case No. 93-CA-06**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, KNOX  
COUNTY**

*1993 Ohio App. LEXIS 3404*

**June 24, 1993, Entered**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from Municipal Court, Case No. 93-TRD-00172

**DISPOSITION:**

JUDGMENT: Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a decision of the municipal court (Ohio), which found him guilty of speeding in violation of *Ohio Rev. Code Ann. § 4511.21(C)*.

**OVERVIEW:** A deputy was checking the speed of motor vehicles on a state road while parked on the property of a church. The deputy was not wearing his hat. On this day, defendant was cited with speeding in violation of § 4511.21(C). Defendant entered a plea of not guilty and unsuccessfully filed a motion to suppress. Defendant was found guilty of speeding. On appeal, the court affirmed the conviction. The court rejected defendant's argument that because the arresting officer was parked in front of a church, there existed an excessive entanglement of church and state. The court stated that the trial court did not err in permitting the officer to testify when the evidence clearly established that he was in a distinct uniform at the time of arrest. The court concluded that the trial court did err as to the admission of the certificate of accuracy for the radar forks, but stated that the admission was harmless error because the use of the exhibit was not necessary in the proof of the case. The court rejected defendant's argument that the trial court erred in admitting evidence as to the radar device and in taking judicial notice of the accuracy of the machine.

**OUTCOME:** The court affirmed the speeding violation.

**CORE TERMS:** radar, training, church, excessive entanglement, ticket, speed, motion to suppress, witness testified, deputy sheriff, calibration, accuracy, certificate, wearing, deputy, hat, motor vehicle, parked, competent to testify, admitting evidence, taking judicial notice, time of arrest, sub judice, trained, distinctive, arrest, forks

**LexisNexis(R) Headnotes**

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion***

[HN1] The presence of a police car on a public street, parked on that street, is not an excessive entanglement of church and state. The passive presence of church-owned property and the use of a paved roadway is not excessive entanglement.

***Evidence > Competency > General Overview***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] *Ohio R. Evid. 601(C)*, a general rule of competency, provides that an officer is competent to testify, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting, or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor, where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

***Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule***

***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

***Evidence > Authentication > General Overview***

[HN3] *Ohio R. Evid. 901* requires that exhibits such as a certificate of accuracy for radar forks and a certificate of completion and competency for a deputy sheriff for training in the use of radar be authenticated or identified.

***Evidence > Testimony > Refreshing Recollection > Memory Aids > Writings***

[HN4] Pursuant to *Ohio R. Evid. 612*, the recollection of a witness may be refreshed with the use of a document.

**COUNSEL:**

For Plaintiff-Appellee: WILLIAM D. SMITH, City Law Director, Suite 222, 5 N. Gay St., Mount Vernon, Ohio 43050.

For Defendant-Appellant: THOMAS L. MASON, Pro Se, P.O. Box 345, 153 W. Main St., Ashland, Ohio 44805.

**JUDGES:** Hon. Irene B. Smart, P.J., Hon. Sheila G. Farmer, J., Hon. W. Don Reader, J.

**OPINION BY:** SHEILA G. FARMER

**OPINION:**

OPINION

FARMER, J.

On January 14, 1993, a deputy from the Knox County Sheriff's Department was checking the speed of motor vehicles on Ohio State Route 3 in the Village of Amity, Ohio, on the property of a church. The deputy was not wearing his hat.

On said date, appellant, Thomas Locke Mason, was cited with operating a motor vehicle upon a public highway at a speed of 59 m.p.h. in a 40 m.p.h. zone contrary to and in violation of *R.C. 4511.21(C)*. Appellant entered a plea of not guilty and filed a motion to suppress.

On February 9, 1993, the motion to suppress was heard and summarily denied. On the same date, the matter proceeded to trial to the court, whereupon appellant was found guilty of speeding.

Appellant timely filed [\*2] a notice of appeal, and this matter is now before the court for consideration.

Assignments of error are as follows:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BASED ON THE VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THE DEPUTY SHERIFF COMPETENT TO TESTIFY WHERE HE WAS NOT WEARING A UNIFORM.

ASSIGNMENT OF ERROR NUMBER THREE

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING RECORDS EVIDENCE WHEN SUCH EVIDENCE WAS HEARSAY.

ASSIGNMENT OF ERROR NUMBER FOUR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE WHERE NO FOUNDATION WAS LAID AS TO ITS ACCURACY.

ASSIGNMENT OF ERROR NUMBER FIVE

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE WHERE THERE WAS NO INDEPENDENT RECOLLECTION OF CALIBRATION OF THE RADAR DEVICE.

ASSIGNMENT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE FROM A RADAR DEVICE [\*3] WHERE THE DEPUTY SHERIFF WAS TRAINED BY A JUDICIAL PROGRAM IN VIOLATION OF THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT.

I

Appellant claims that the trial court erred in failing to grant his motion to suppress based upon the First Amendment to the United States Constitution. We disagree.

The thrust of appellant's argument is that because the arresting officer was parked in front of a church, there existed an excessive entanglement of church and state. *Lemon v. Kurtzman (1971), 403 U.S. 602*. Appellant argues that there was excessive entanglement because appellee, the State of Ohio, did not establish that the officer was in the State's right-of-way of Wooster Road. We disagree.

[HN1] The presence of a police car on a public street, parked on that street, is not an excessive entanglement of church and state. The recent decision of the United States Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District (1993), Westlaw 18864 (U.S.)*, is illustrative of the type of blend of church and state that will be

tolerated. The passive presence of church-owned property and the use of a paved roadway is not excessive entanglement. [\*4]

Assignment of error one is overruled.

## II

Appellant claims that because the officer was not in uniform, no hat, that he was not competent to testify under *Evid. R. 601(C)*. We disagree.

*Evid. A. 601(C)* states as follows:

### RULE 601. GENERAL RULE OF COMPETENCY

...

(C) [HN2] An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

The testimony in the case sub judice was that the officer was wearing his uniform and that he did not recall if he had his hat on in his car, but that he had it on when he made contact with appellant at the stop. T. 5-7.

The statute specifically states "at the time of arrest" and "a legally distinctive uniform." The trial court did not err in permitting the officer to testify when the evidence clearly established he was in a distinct uniform at the time of arrest.

Assignment of error two is overruled. [\*5]

## III

Appellant claims that the trial court erred in admitting State's Exhibit 1 and Exhibit 2. State's Exhibit 1 is a certificate of accuracy for the radar forks and Exhibit 2 is a certificate of completion and competency for a deputy sheriff for training in the use of radar.

State's Exhibit 2 was the testifying officer's own training certificate and was properly identified as such by the witness. T. 14. The witness testified concerning the exhibit and identified it from his own knowledge pursuant to *Evid. R. 602*.

[HN3] *Evid. R. 901* requires that exhibits such as State's Exhibit 1 be authenticated or identified. No such authentication or identification was done with State's Exhibit 1. We conclude that the trial court did err as to the admission of State's Exhibit 1, but did not err as to the admission of State's Exhibit 2. However, we find that the admission of State's Exhibit 1 was harmless error. *Chapman v. California (1967)*, 386 U.S. 18. Based upon the witness's testimony that two tuning forks were employed to calibrate the instrument, it was not necessary in the proof of this case for appellee to use State's Exhibit 1. *State v. Bechtel (1985)*, 24 Ohio App. 3d 72, [\*6] 493 N.E.2d 318. In addition, the witness testified as to appellant's speed from personal observation regardless of the radar device. T. 12.

Assignment of error three is overruled.

## IV

Appellant claims that the trial court erred in admitting evidence as to the radar device and in taking judicial notice of the accuracy of the machine. We disagree.

The witness testified as to the calibration method employed twice in that particular day. T. 15-16. We find the Bechtel case to be controlling on this point. We find that the trial court did not err in taking judicial notice of the radar device.

Assignment of error four is overruled.

V

Appellant claims that the trial court erred in admitting evidence from the radar device when the witness had no independent recollection of calibration. We disagree.

The witness stated on direct examination the following:

Q: Did you have the opportunity prior to utilizing this radar unit to check the calibration of the radar unit?

A: Yes sir, I did.

Q: And do you recall when you did that?

A: No sir, I do not. I would have to look at the ticket to establish that.

Q: Would you come and take a look at the [\*7] ticket, please? (Witness refers to ticket.)

A: Sir, I've noted times of 11:26 and 1:51 on the day of the violation.

Q: Okay. And what time did you -- did you utilize the radar unit to check Mr. Mason's speed?

A: At 1:32.

T. 15.

[HN4] Pursuant to *Evid. R. 612*, the recollection of a witness may be refreshed with the use of a document, in the case sub judice, the ticket. We find that the witness did just as *Evid. R. 612* suggests, and we fail to find error in the ruling of the trial court as to the radar device.

Assignment of error five is overruled.

VI

Appellant claims that the trial court erred in permitting testimony about the radar device, where the officer was trained in a program established by a previous judge of the court. Appellant contends that is a violation of the doctrine of separation of powers. We disagree.

The only reference to the training received was as follows:

Q: Deputy, what type of training did you receive with regard to the operation of this radar unit?

A: This particular unit, sir?

Q: Yes.

A: I was initially certified on this unit by a member of our department in a program which was established [\*8] by the previous judge of this court.

T. 13.

Appellant objected to the certificate of training, State's Exhibit 2, but the record fails to provide evidentiary materials to address this assignment of error. We cannot consider matters not part of the record from the trial court. *State v. Ishmail (1978), 54 Ohio St. 2d 402, 377 N.E.2d 500.*

Assignment of error six is overruled.

The judgment of the Mount Vernon Municipal Court of Knox County, Ohio, is hereby affirmed.

by Farmer, J.

Smart, P.J. and

Reader, J. concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Mount Vernon Municipal Court of Knox County, Ohio, is affirmed.

Sheila G. Farmer

Irene Balogh Smart

W. Don Reader

JUDGES

128 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, v. JOHN G. McGUFFEY,  
Defendant-Appellant**

**Case No. 90 CA 44**

**Court of Appeals of Ohio, Fourth Appellate District, Washington County**

*1991 Ohio App. LEXIS 3525*

**July 23, 1991**

**July 23, 1991, Released**

**DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Marietta Municipal Court (Ohio), which found defendant guilty of speeding.

**OVERVIEW:** Subsequent to his conviction, defendant argued that the trial court erred in taking judicial notice of the reliability of the radar gun at issue and that he was denied his right to a trial by jury. On review, the court affirmed the trial court's judgment. In reaching its conclusion, the court relied on prior caselaw in holding that the trial court did not err in taking judicial notice of the reliability of the model of radar gun in question. Additionally, the court held that, because the offense for which defendant was charged was speeding, a petty or misdemeanor offense, defendant did not have a right to a jury trial. The court then held that the evidence supported the adjudication. The court also held that the trial court did not abuse its discretion in sentencing defendant.

**OUTCOME:** The court affirmed the judgment finding defendant guilty of speeding.

**CORE TERMS:** radar, assignments of error, municipal, discovery, sub judice, speed, assignment of error, reliability, training, fine, sentence, judicial notice, speed limit, jury trial, continuance, prosecutor, license, posted, excessive speed, misdemeanor, scientific, traveling, speeding, expert testimony, severe sentence, overruling, convicted, license suspension, reasons stated, motor vehicle

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***  
***Criminal Law & Procedure > Discovery & Inspection > Discovery by Government***

[HN1] *Ohio R. Crim. P. 16(A)* provides that, upon written request, each party shall forthwith provide the discovery allowed. Motions for discovery shall certify that a demand for discovery has been made and the discovery has not been provided. The word "shall" indicates that the procedure is mandatory.

***Civil Procedure > Judicial Officers > Referees > General Overview***  
***Evidence > Judicial Notice > General Overview***  
***Evidence > Testimony > Experts > General Overview***

[HN2] While it is necessary initially to offer expert testimony on the construction and dependability of scientific devices, the trial court may at some point satisfy itself with the dependability of the instrument and take notice thereof. Courts in Ohio uphold the taking of judicial notice of the reliability of the K-55 radar unit.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***  
***Criminal Law & Procedure > Interrogation > Voluntariness***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] An individual must be advised of his constitutional rights when law enforcement officers initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The event triggering the need for the Miranda rights is a custodial interrogation. The Miranda rules are not applicable to statements volunteered to the police. A statement that is voluntary and not in response to police questioning is not barred by the Fifth Amendment. The absence of Miranda warnings will not affect the admissibility of statements made on a suspect's own initiative in absence of questions or other conduct by the police constituting interrogation. Any statement freely and voluntarily given without any compelling influence is admissible into evidence.

***Civil Procedure > Appeals > Reviewability > Preservation for Review***  
***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN4] Generally, a party waives his right to allege error on appeal when that party did not object at the time the alleged error occurred.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial***  
***Constitutional Law > Bill of Rights > State Application***  
***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

[HN5] The right to a trial by jury is secured by the Sixth Amendment to the United States Constitution, Ohio Const. art. I, § 10, and *Ohio Rev. Code Ann. § 2945.17*. The right to trial by jury in a criminal proceeding is a "fundamental right." However, the right to trial by jury is not applicable to all types of criminal offenses. There is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the 14th Amendment jury trial requirement applied to the states. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***  
***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors***  
***Criminal Law & Procedure > Sentencing > Fines***

[HN6] Under *Ohio Rev. Code Ann. § 4511.21*, speeding is a minor misdemeanor. *Ohio Rev. Code Ann. § 2929.21(D)* provides that whoever is convicted of or pleads guilty to a minor misdemeanor shall be fined no more than \$ 100.

Section 2945.17 provides that, at any trial, in any court, for the violation of any statute of Ohio, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Procedural Considerations > Weight & Sufficiency***

[HN7] A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Criminal Law & Procedure > Guilty Pleas > General Overview Governments > State & Territorial Governments > Licenses***

[HN8] *Ohio Rev. Code Ann. § 4507.34* provides that, whenever a person is found guilty under Ohio law of operating a motor vehicle in violation of such laws relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the driver's license of any person so convicted or pleading guilty to such offense for such period as it determines, not to exceed one year. This statute is construed to include speeding offenses. Additionally, a license suspension imposed by a trial court prohibits the operation of a motor vehicle anywhere within the state of Ohio.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process***

[HN9] A trial court may not impose a more severe sentence because a defendant elects to exercise his right to a trial.

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

***Criminal Law & Procedure > Sentencing > Imposition***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN10] Trial courts are vested with broad discretion in the determination of appropriate sentences. Appellate courts should not disturb sentencing decisions of the trial courts unless there is a clear abuse of discretion.

***Civil Procedure > Appeals > Records on Appeal***

***Criminal Law & Procedure > Appeals > General Overview***

[HN11] The duty to provide a transcript for appellate review falls upon appellant. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. Also, *Ohio R. App. P. 9(C)* and (D) set forth alternative procedures that may be used in providing a substitute statement of the evidence rather than providing an entire transcript of the proceedings.

**COUNSEL:**

PRO SE APPELLANT: John G. McGuffey, Parkersburg, West Virginia.

COUNSEL FOR APPELLEE: Robert J. Smith, Marietta Assistant City Law Director, Marietta, Ohio.

**JUDGES:**

For the Court: By: Peter B. Abele, Judge. Stephenson, P.J., Concur in Judgment and Opinion. Grey, J., Concur in Judgment Only.

**OPINION BY:**

ABELE

**OPINION:**

DECISION AND JUDGMENT ENTRY

This is an appeal from a judgment of conviction and sentence entered by the Marietta Municipal Court finding John G. McGuffey, defendant below and pro se appellant herein, guilty of operating a vehicle at an excessive speed in violation of *R.C. 4511.21*, a minor misdemeanor. We affirm.

Appellant assigns the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE JUDGE SHOULD HAVE GRANTED A CONTINUANCE ON RULE 16 AS LESS THAN 24 HOURS IS NOT SUFFICIENT TIME TO GET DISCOVERIES FROM THE PRODUCTION OF DOCUMENTS AND IT GIVES THE PROSECUTION AN UNFAIR ADVANTAGE TO WAIT UNTIL THE LAST MINUTE TO GIVE THE DEFENDANT THE DOCUMENTS ASKED FOR." (SIC)

SECOND ASSIGNMENT OF ERROR:

"THE DEFENDANT SHOULD HAVE THE RIGHT TO SEE THE TUNING FORKS, WITH THE [\*2] SERIAL NUMBERS, AT THE TIME OF THE ARREST TO SEE IF THE OFFICER HAS THEM WITH HIM, AND IF THEY ARE THE ONES DESIGNATED FOR THIS PARTICULAR RADAR."

THIRD ASSIGNMENT OF ERROR:

"THE RADAR IS A SECRET INSTRUMENT THAT ONLY THE POLICE HAS AND WILL NOT BE GIVEN FOR TEST TO THE DEFENDANT. HOW CAN A PERSON DEFEND AGAINST SOMETHING HE CANNOT TEST?" (SIC)

FOURTH ASSIGNMENT OF ERROR:

"THE FACT SHEET WENT BEYOND PROBABLE CAUSE. ALL IT HAD TO SAY WAS THE POLICEMAN SAW ME SPEEDING. THE OTHER STATEMENTS AMOUNTED TO A CONFESSION OF THE DEFENDANT. THE POLICEMAN WAS PLANNING HIS CASE PRIOR TO COURT. IT WAS A ONE WAY CONVERSATION BETWEEN THE POLICEMAN, PROSECUTOR, AND THE JUDGE IN WHICH THE DEFENDANT COULD NOT DEFEND HIMSELF." (SIC)

FIFTH ASSIGNMENT OF ERROR:

"REFER TO P. 13 LINE 13-19 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE OFFICER CANNOT MAKE THIS STATEMENT ON HIS OWN IN THAT HE DID NOT SAY THAT HE HAD A FLASHING LIGHT AND THE MARKINGS MET THE SUPERINTENDENT OF THE STATE HIGHWAY PATROL. THE FACT THAT THIS CAR IS GRAY AND CANNOT BE SEEN AS FAR AS HE CAN CLOCK YOU ON HIS RADAR MEANS THAT HE IS USING UNREASONABLE METHODS OF ENFORCING TRAFFIC LAWS. SEE EXHIBIT A ATTACHED (OHIO CODE [\*3] 4549.13 AND OHIO CODE 4549.14)." (SIC)

SIXTH ASSIGNMENT OF ERROR:

"REFER TO P. 14 LINES 8-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE RADAR WAS IMPROPERLY INSTALLED IN THE POLICE CRUISER IN THAT THE ECM UNIT IS KEPT ON THE SEAT BESIDE THE DRIVER AND HAS NO MEANS OF CONNECTING IT TO THE COUNTING UNIT OR AN ELECTRICAL POWER SOURCE. ANY MENTION FROM HERE ON OF THE ECM UNIT WOULD BE INCORRECT AS IT WOULD HAVE NO POWER." (SIC)

SEVENTH ASSIGNMENT OF ERROR:

"REFER TO P. 16 LINES 1-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE JUDGE SHOULD HAVE ALLOWED THE DEFENDANT TO HAVE DISCOVERIES ON THE POLICEMAN'S TRAINING: HIS BOOKS AND TANGIBLE OBJECTS AS IT DID HAVE RELEVANCE TO A DEFENSE AGAINST THE POLICEMAN'S TRAINING." (SIC)

EIGHTH ASSIGNMENT OF ERROR:

"REFER TO P. 20, LINES 16-25 THROUGH P. 21, LINES 1-10 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THERE IS NO SCIENTIFIC EVIDENCE WHICH STATES THE POLICEMAN IS CAPABLE OF CONDUCTING A VISIBLE ESTIMATION OF THE SPEED OF VEHICLES." (SIC)

NINTH ASSIGNMENT OF ERROR:

"REFER TO P. 24, LINES 12-19 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE COURT TOOK IMPROPER JUDICIAL NOTICE AS A POLICE STATION WHERE THE [\*4] RECORDS ARE FILED IS NOT A PUBLIC OFFICE AND YOU CAN NOT HAVE ACCESS TO THESE RECORDS." (SIC)

TENTH ASSIGNMENT OF ERROR:

"REFER TO P. 27, LINES 6-7 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS SHOULD NOT HAVE BEEN ADMITTED AS EVIDENCE, AND ANYTHING PERTAINING TO HIS NOTES AS HIS NOTES WERE NOT GIVEN IN DISCOVERIES. ALSO THE DEFENDANT DID NOT RECEIVE DISCOVERIES OF THE LOGS KEPT BY THE HIGHWAY PATROL AS TO WERE THE OFFICER STOPPED THE DEFENDANT'S VEHICLE." (SIC)

ELEVENTH ASSIGNMENT OF ERROR:

"REFER TO P. 27, LINES 12-14 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. HERE THE POLICE OFFICER STATES THAT HIS RADAR HAD NOT BEEN TURNED OFF BETWEEN THE TWO CALIBRATION CHECKS. THEN ON P. 28, LINES 13-15 HE STATES, 'AFTER I OBSERVED THE VEHICLE, I ACTIVATED THE RADAR.'" (SIC)

TWELFTH ASSIGNMENT OF ERROR:

"REFER TO P. 30, LINES 2-3 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE OFFICER WAS ASKED IF HE LOCKED IN THE SPEED OF THE OTHER VEHICLE. LINES 13-14. 'OR THE READING THAT WAS ON THERE IN THE AUDIO ALL CLEARED OFF' ON P. 34, LINES 1-5. 'DID HE ASK TO VIEW THE SPEED THAT YOU HAD LOCKED IN?' 'YES. HE DID WALK BACK TO THE CAR, HE LOOKED IN THE PASSENGER WINDOW AND IT WAS [\*5] LAYING ON THE SEAT, ON THE ECM UNIT'. THIS COULD NOT HAVE HAPPENED AS HE HAD CLEARED THE READING OFF AND THE ECM UNIT WAS NOT CONNECTED TO THE COUNTING UNIT AND HAS NO POWER." (SIC)

## THIRTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 32, LINES 20-25 AND P.33 1-22 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS STATEMENT WAS A STATEMENT OF SELF-INCRIMINATION. THE MIRANDA RIGHTS HAD NOT BEEN GIVEN TO THE DEFENDANT, AND IT WOULD BE AGAINST THE 5TH AMENDMENT OF THE CONSTITUTION." (SIC)

## FOURTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 36 AND 37 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE COURT TOOK IMPROPER JUDICIAL NOTICE AND DID NOT AFFORD THE DEFENDANT A HEARING ON THIS NOTICE." (SIC)

## FIFTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 38, LINES 7-13 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. ON THE CROSS-EXAMINE THE FOLLOWING LINES SHOWS THAT THE RADAR HAD BEEN TURNED OFF CONTRARY TO THE OFFICER'S STATEMENT ON P. 27, LINES 12-15. (SIC)

## SIXTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 38, LINES 6-25 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS WOULD VERIFY THAT THE OFFICER HAD NO IDEA IF HIS PATROL CAR MET THE STANDARDS OF THE SUPERINTENDENT OF THE OHIO HIGHWAY PATROL [\*6] AS REFERRED TO ON P. 13, LINES 13-18." (SIC)

## SEVENTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 46, LINES 4-7 AND 17-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. IN THIS STATEMENT THE OFFICER CONTRADICTS HIMSELF." (SIC)

## EIGHTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 50, LINES 12-17 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. HOW CAN AN OFFICER BE PROPERLY TRAINED IN RADAR IF HE HAS NOT BEEN TAUGHT THE SAFETY ASPECTS OF RADAR?" (SIC)

## NINETEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 54-56 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. IN THESE PAGES THE OFFICER STATES THAT THE SPEED LIMIT IS 65 MPH AND DROPS TO 45 MPH AND THAT THERE IS NO SIGN, REDUCE SPEED AHEAD. THE OHIO CODE, 51-10, STATES THAT, 'A SPEED ZONE CANNOT BE ENFORCED UNTIL STANDARD SIGNS HAVE BEEN PROPERLY INSTALLED ALONG THE ROADWAY.' 'THE REDUCED SPEED AHEAD SIGN SHOULD BE ERECTED IN ADVANCE OF ANY SPEED ZONE THAT IS 15 MILES PER HOUR OR MORE UNDER THE SPEED LIMIT IN A PRECEEDING STATUTORY OR ALTERED SPEED ZONE.'" (EXHIBIT B) (SIC)

## TWENTIETH ASSIGNMENT OF ERROR:

"REFER TO P. 57, LINES 1-12 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS

CROSS-EXAMINATION SHOWS THE OFFICER CHANGED HIS ACCOUNT OF THE PLACE [\*7] WHERE HE CLOCKED THE DEFENDANT'S VEHICLE. REFER TO P. 27-28, LINES 21-25 AND P. 28, LINES 1-16. THEREFORE, IF HE CLOCKED THE DEFENDANT AT THE 26 MILE MARKER HE WOULD BE TRAVELING IN THE SAME DIRECTION, AND HIS RADAR IS NOT CAPABLE OF CLOCKING IN THE SAME DIRECTION." (SIC)

TWENTY-FIRST ASSIGNMENT OF ERROR:

"REFER TO P. 58, LINES 1-25 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE CITATION WAS IMPROPERLY WRITTEN AND SHOULD BE DISALLOWED AS THERE IS A DISCREPANCY AS TO WHERE HE CLOCKED THE DEFENDANT." (SIC)

TWENTY-SECOND ASSIGNMENT OF ERROR:

"THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A TRIAL WAS DENIED HIM BY GETTING A LARGER SENTENCE AND SUSPENSION OF LICENSE THAN HE WOULD HAVE IF HE HAD PLEADED GUILTY AND PAID THE FINE AS STATED ON THE CITATION." (SIC)

TWENTY-THIRD ASSIGNMENT OF ERROR:

"THE DEFENDANT WAS PUNISHED IMPROPERLY AS THE JUDGE FAILED TO DISTINGUISH BETWEEN THE DEFENDANT TALKING AND THE DEFENDANT REPRESENTING HIMSELF. THEREFORE, IN CLOSING ARGUMENTS THE DEFENDANT REPRESENTING HIMSELF WAS PRESENTING A DEFENSE AND THE JUDGE SUSPENDED HIS LICENSE FOR 30 DAYS FOR STATING THAT HIS DEFENSE WAS THAT HE FELT HE COULD DRIVE 65 MPH WHEN NO REDUCE SPEED AHEAD SIGN WAS [\*8] POSTED. THIS WAS A DEFENSE BY THE DEFENDANT'S ATTORNEY AND NOT THE DEFENDANT." (SIC)

TWENTY-FOURTH ASSIGNMENT OF ERROR:

"THE JUDGE CANNOT INFLICT A PUNISHMENT THAT GOES OUTSIDE HIS JURISDICTION. HE COULD ONLY SUSPEND DRIVING PRIVILEGES IN WASHINGTON COUNTY AND NOT THE WHOLE STATE." (SIC)

TWENTY-FIFTH ASSIGNMENT OF ERROR:

"IMPROPER SENTENCE." (SIC)

TWENTY-SIXTH ASSIGNMENT OF ERROR:

"JUDGE EDWARD LANE, JR. HAD LED THE DEFENDANT TO BELIEVE THAT HE COULD ONLY GET AN ADDITIONAL \$ 6.00 COST ADDED TO HIS FINE BE CONTESTING IT IN A COURT OF LAW. THEN HE FINED HIM A GREATER FINE, PLUS A 30 DAY SUSPENSION OF LICENSE. ENCLOSED FIND A TAPE RECORDING OF THIS HEARING." (SIC)

TWENTY-SEVENTH ASSIGNMENT OF ERROR:

"THE DEFENDANT RECEIVED A MORE SEVERE PUNISHMENT FOR GOING TO COURT THAN THOUSNADS OF OTHER PEOPLE IN THE SAME SITUATION. THE DEFENDANT CANNOT PROVE THIS BECAUSE HE WAS DENIED ACCESS TO THE RECORDS BY THE CLERK OF THE COURT, ROSANNE M. BUELL." (SIC)

## TWENTY-EIGHTH ASSIGNMENT OF ERROR:

"THE WEIGHT OF THE EVIDENCE DOES NOT WARRANT A CONVICTION."

## TWENTY-NINTH ASSIGNMENT OF ERROR:

"THE DEFENDANT'S CONSTITUTIONAL RIGHTS OF A TRIAL BY JURY WAS DENIED HIM, AND THE JUDGE WENT [\*9] BEYOND HIS RIGHTS BY SUSPENDING THE DEFENDANT'S LICENSE." (SIC)

## THIRTIETH ASSIGNMENT OF ERROR:

"THE RULES OF THE COURT PUTS A UNDUE BURDEN UPON THE PERSON WHO REPRESENTS HIMSELF AS HE CANNOT GET ANY EXPERIENCE IN A COURT ROOM WHEN THE PROSECUTION IS WITH THE JUDGE EVERY DAY AND THE JUDGE, AS IN MY CASE, PROMPTS THE PROSECUTOR IN THE WAY TO GET A CONVICTION IN HIS COURT. WHO WOULD KNOW BETTER THAN THE LAWYERS WHO WORKS THE COURT ALL THE TIME WHEN THEY SAY THE MAN WHO REPRESENTS HIMSELF HAS A FOOL FOR A CLIENT." (SIC)

## THIRTY-FIRST ASSIGNMENT OF ERROR:

"A SPEEDING VIOLATION OF ONLY 15 MPH OVER THE POSTED SPEED DOES NOT CONSTITUTE HAZARDOUS DRIVING IN ACCORDANCE WITH THE NEW U.S. STANDARDS ON THE CDL LICENSE AS IT STATES IN THE DRIVER'S MANUAL THAT IT MUST BE MORE THAN 20 MPH OVER THE SPEED LIMIT BEFORE YOU CAN HAVE YOUR LICENSE SUSPENDED." (SIC)

## THIRTY-SECOND ASSIGNMENT OF ERROR:

"A PERSON'S RIGHT TO AN APPEAL IS DENIED HIM WHEN THE COURT REQUIRES THAT PERSON TO PURCHASE A TRANSCRIPT FROM AN INDEPENDENT CONTRACTOR AND IN CHARGED AN EXHORBANT FEE." (SIC)

## THIRTY-THIRD ASSIGNMENT OF ERROR:

"COURT COSTS CAN ONLY BE ACTUAL COSTS AND NO ADDED TAX ADDED TO HIS CONSTITUTIONAL [\*10] RIGHTS TO A TRIAL." (SIC)

## THIRTY-FOURTH ASSIGNMENT OF ERROR:

"THERE WAS NO EXPERT WITNESSES TO THIS RADAR AS IT IS TURNED ON AND OFF AND WOULD NOT MEET ANY OTHER STANDARDS." (SIC)

## THIRTY-FIFTH ASSIGNMENT OF ERROR:

" *THERE WAS NO EXPERT WITNESSES PERTAINING TO THE RADAR AS CITED IN THE CASE OF STATE OF OHIO V. WILCOX, 319 N.E. 2D 615 (PP. 615-621)*" (SIC)

## THIRTY-SIXTH ASSIGNMENT OF ERROR:

"THE RADAR WAS IMPROPERLY INSTALLED IN THE CRUISER AND THE CALIBRATION WOULD NOT WORK AS THE RADAR WAS TURNED AFTER THE CALIBRATION." (SIC)

## THIRTY-SEVENTH ASSIGNMENT ERROR:

"THE DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED HIM BY GIVING HIM A LARGER FINE AND PUNISHMENT THAN THE \$ 55 AS STATED ON THE TICKET. HE RECEIVED THE ADDITIONAL PUNISHMENT BECAUSE HE EXERCISED HIS CONSTITUTIONAL RIGHTS." (SIC)

## THIRTY-EIGHTH ASSIGNMENT OF ERROR:

"THE SIGNS WERE NOT PROPERLY INSTALLED ON THE HIGHWAY AND THEREFORE, THE SPEED ZONES COULD NOT BE ENFORCED."

## THIRTY-NINTH ASSIGNMENT OF ERROR:

"THE DEFENDANT-APPELLANT WAS GIVEN A 30 DAY LICENSE SUSPENSION FOR PRESENTING A DEFENSE THAT THE SIGNS WERE NOT PROPERLY INSTALLED."

## FORTIETH ASSIGNMENT OF ERROR:

"THE POLICEMAN'S [\*11] CAR WAS NOT PROPERLY MARKED."

## FORTY-FIRST ASSIGNMENT OF ERROR:

"THE RADAR CAN NOT CLOCK A SPEED OF A VEHICLE WHEN IT IS TRAVELING IN THE SAME DIRECTION." (SIC)

## FORTY-SECOND ASSIGNMENT OF ERROR:

"THERE IS NO EVIDENCE PRODUCED OTHER THAN THE POLICEMAN THAT HE CAN ESTIMATE THE SPEED OF A VEHICLE." (SIC)

The record reveals the following facts pertinent to this appeal. On June 10, 1990, at 3:30 P.M., Ohio State Highway Patrol Trooper Paul Pride was traveling south on State Route 7 in Washington County, Ohio. Trooper Pride was wearing the Ohio State Highway Patrol uniform and he was operating an Ohio State Highway Patrol cruiser.

Trooper Pride observed a pickup truck traveling north on State Route 7 in a posted forty-five m.p.h. speed zone. Trooper Pride testified that his attention was drawn to the pickup truck because his visual estimate of the truck's speed was approximately fifty-five m.p.h.

Trooper Pride activated the K-55 radar unit and obtained a reading indicating the vehicle in question was traveling sixty m.p.h. The officer thereupon turned and pursued the vehicle. After the officer stopped the vehicle, the operator, the appellant herein, denied he was traveling sixty [\*12] m.p.h.; however, appellant did state that he may have been operating his vehicle at fifty m.p.h. in the forty-five m.p.h. zone. Trooper Pride subsequently filed a uniform traffic citation in the Marietta Municipal Court, alleging appellant operated his vehicle at an excessive speed in violation of *R.C. 4511.21*.

On October 17, 1990, the court below conducted a bench trial. After hearing the evidence, the court found appellant guilty, fined appellant \$ 65, suspended appellant's operator's license for thirty days, and ordered appellant to pay court costs. It is from this finding that appellant has filed this appeal.

In this appeal the appellant has raised forty-two assignments of error. Because many of the assignments of error

contain similar, and in some cases identical, issues, we will consolidate the assignments of error for purposes of this appeal.

## I

In his first and seventh assignments of error, appellant asserts the state failed to provide, in a timely fashion, discovery materials pertaining to the officer's training in the use of radar. At trial appellant argued the state did not comply with *Crim. R. 16* in providing discovery and appellant requested a continuance. Appellant asserts [\*13] the court below erred in overruling his request for a continuance. This contention is without merit.

In the case sub judice, the court carefully considered appellant's request for a continuance. In overruling appellant's motion the court stated that if, during the course of the trial, appellant could demonstrate the requested information was necessary for the preparation of his defense, appellant could renew his motion for a continuance and the court would re-evaluate the motion at that time. During the direct examination of Trooper Pride, appellant renewed his motion and the court again overruled the motion. During the cross examination of Trooper Pride, appellant made many inquiries regarding various aspects of the case, including a detailed examination of Trooper Pride's training in the use of radar.

[HN1] *Crim. R. 16(A)* provides:

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that a demand for discovery has been made and the discovery has not been provided.

The word "shall" indicates that the procedure is mandatory. See *Lakewood v. Papadelis* (1987), 32 Ohio St. 3d 1.

Additionally, [\*14] we find appellant failed to file a motion for discovery, pursuant to *Crim. R. 16(A)*, certifying that a demand for discovery was made and discovery was not provided. Before the sanctions set forth in *Crim. R. 16(E)* may be imposed, a party must file a motion for discovery pursuant to *Crim. R. 16(A)*. See *State v. Hicks* (1976), 48 Ohio App. 2d 135.

We conclude, based upon a review of the record, that the trial court did not err in overruling appellant's motion for a continuance. Accordingly, appellant's first and seventh assignments of error are overruled.

## II

In his second, third, sixth, ninth, eleventh, twelfth, fourteenth, fifteenth, eighteenth, thirty-fourth, thirty-fifth, thirty-sixth, and forty-first assignments of error, appellant asserts, in part, the court below erred in admitting evidence relating to the radar device.

Trooper Pride testified he had received extensive training in the use and operation of the K-55 radar unit, that he had considerable experience operating the radar device, and that this particular radar unit was properly calibrated and operated.

The trial court took judicial notice of the reliability of the K-55 radar device and did not require [\*15] expert testimony concerning the scientific reliability of the K-55 radar unit. See *Crim. R. 27*, *Civ. R. 44.1*, and *Evid. R. 201(B)*. In *State v. Kline* (Aug. 12, 1981), Lorain App. No. 3182, unreported, the court wrote:

"The referee found 'that Elyria Municipal Court takes judicial notice of the scientific reliability of the K-55 unit.' The trial court accepted the referee's finding. [HN2] While it is necessary initially to offer expert testimony on the construction and dependability of scientific devices, *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, we feel the trial court may at some point satisfy itself with the dependability of the instrument and take notice thereof. e.g. *Akron v. Gray* (1979), 60 Ohio Misc. 68. The Elyria Municipal Court having recognized the reliability of K-55 radar, there was no need to offer expert testimony, and this assignment of error is overruled."

Other courts in Ohio have also upheld the taking of judicial notice of the reliability of the K-55 radar unit. See *State v. Bechtel* (1985), 24 Ohio App. 3d 72; *State v. Ayesch* (1985), 24 Ohio App. 3d 73; *Kettering v. [\*16] Smith* (Apr. 12, 1984), Montgomery App. No. 8383, unreported.

In the case sub judice the following exchange occurred during the trial:

"THE DEFENDANT: Yes, sir. The K-55 is specifically - - not a radar in general, hut the K-55 is specifically specified in this court case - -

THE COURT: And that this Court requires notification at any time that the radar is changed. Now, unless there's some proof that this highway patrolman is sneaking some unapproved system in, it's given that the scientific basis for this radar and its acceptability and reliability in court was established by Judge Hallock, this Court has a long history of taking judicial notice of - - Judge Hallock conducted the hearings that were required. You're not getting any place with this.

THE DEFENDANT: Okay. Now, wait a minute, Judge Hallock done this.

THE COURT: He was the judge before I was. \* \* \*"

Based upon the foregoing, we find the trial court properly took judicial notice of the reliability of the K-55 radar unit.

Additionally, in his ninth assignment of error appellant asserts the court below improperly took judicial notice of certificates of accuracy of the tuning forks. However, the record reveals the [\*17] court admitted the certificates in evidence pursuant to *Evid. R. 803*. Thus, appellant's contention is without merit.

Based upon a review of the record we find appellant's assignments of error relating to the radar device are without merit and are overruled.

### III

In his fourth and thirteenth assignments of error, appellant asserts the court below improperly admitted into evidence appellant's statements made to the officer at the scene of the traffic stop. Appellant maintains he was not advised of his Miranda rights and the admission of appellant's statements violated his Fifth Amendment privilege against self-incrimination. This contention is without merit.

In *Miranda v. Arizona* (1966), 384 U.S. 436, the United States Supreme Court held that [HN3] an individual must be advised of his constitutional rights when law enforcement officers initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The event triggering the need for the Miranda rights is a custodial interrogation. *Id.*, and see, also, *Berkemer v. McCarty* (1984), 468 U.S. 420, and *State v. Buchholz* (1984), 11 Ohio St. 3d 24. [\*18]

The Miranda rules are not applicable to statements volunteered to the police. A statement that is voluntary and not in response to police questioning is not barred by the Fifth Amendment. *Miranda* at 478. In *State v. Coleman* (1989), 45 Ohio St. 3d 298, the court held:

"The law of *Miranda v. Arizona* (1966), 384 U.S. 436, has no application to pure voluntary statements which are not the result of 'express questioning or its functional equivalent.' *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301."

The absence of Miranda warnings will not affect the admissibility of statements made on a suspect's own initiative in absence of questions or other conduct by the police constituting interrogation. *Akron v. Milewski* (1985), 21 Ohio App. 3d 140. Any statement freely and voluntarily given without any compelling influence is admissible into evidence. *State v. Perry* (1968), 14 Ohio St. 2d 256.

In the case sub judice, appellant was not subjected to a custodial interrogation. It is clear from the record that appellant freely and voluntarily offered statements [\*19] establishing his operation of the vehicle in excess of the posted speed limit. Because appellant's statements were purely voluntary and not the result of express questioning or its functional equivalent, the admissions made by appellant were properly admitted into evidence.

Therefore, based upon the reasons stated above appellant's fourth and thirteenth assignments of error are overruled.

#### IV

In his fifth, sixteenth, and fortieth assignments of error, appellant asserts the officer was not competent to testify at the hearing below because the officer's vehicle was not properly "marked," and because the officer was not wearing a "distinctive uniform." See *R.C. 4549.13*, *R.C. 4549.14*, and *4549.15*.

However, our review of the record reveals appellant did not object or otherwise raise this issue in the trial court. [HN4] Generally, a party waives his right to allege error on appeal when that party did not object at the time the alleged error occurred. See *State v. Williams (1977)*, *51 Ohio St. 2d 112*, paragraph one of the syllabus, vacated as to the penalty (1978), *438 U.S. 911*; *State v. Ferrette (1985)*, *18 Ohio St. 3d 106*.

We find, [\*20] therefore, that these alleged errors were not properly preserved for appellate review. Accordingly, based upon the reasons stated above, appellant's fifth, sixteenth, and fortieth assignments of error are overruled.

#### V

In his eighth and forty-second assignments of error, appellant asserts the trial court improperly permitted the officer to testify concerning his visual estimate of the speed of appellant's vehicle. This contention is without merit.

In the case sub judice, the officer used his observation of appellant's vehicle and his prior training and experience to arrive at his opinion of the speed of appellant's vehicle. The trial court, sitting as the trier of facts, could reasonably infer that the officer possessed the knowledge, skill, experience, training or education to express his opinion of appellant's speed. See *Evid. R. 702*.

Accordingly, the court below did not err in admitting into evidence the officer's opinion of the speed of the vehicle. Thus, appellant's eighth and forty-second assignments of error are overruled.

#### VI

In his nineteenth and thirty-eighth assignments of error, appellant asserts the highway speed limit signs were not properly displayed. A review of [\*21] the record indicates the officer's testimony described the placement of signs indicating the posted speed limit in the area where appellant operated his motor vehicle.

In his thirty-first assignment of error appellant asserts the trial court's failure to consider information contained in the Commercial Driver's License Manual was erroneous. We find no merit in appellant's contention. Matters regarding a commercial driver's license and the Commercial Driver's License Manual are not applicable to the case sub judice.

Therefore, appellant's nineteenth, thirty-first, and thirty-eighth assignments of error are overruled.

#### VII

Appellant's twenty-ninth assignment of error asserts, in part, that he was deprived of his constitutional right to a jury trial. This contention is without merit.

[HN5] The right to a trial by jury is secured by the Sixth Amendment to the United States Constitution, Section 10, Article I, Ohio Constitution, and *R.C. 2945.17*. The right to trial by jury in a criminal proceeding is a "fundamental

right." However, the right to trial by jury is not applicable to all types of criminal offenses. In *Duncan v. Louisiana* (1968), 391 U.S. 145, the United [\*22] States Supreme Court stated:

"It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the states. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. *Cheff v. Schnackenberg* (1966), 384 U.S. 373."

Appellant was convicted of speeding in violation of [HN6] R.C. 4511.21, a minor misdemeanor. See R.C. 4511.99(D).

R.C. 2929.21(D) provides:

Whoever is convicted of or pleads guilty to a minor misdemeanor shall be fined no more than one hundred dollars.

Also, R.C. 2945.17 provides:

At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.  
(emphasis added)

In the case sub judice imprisonment was not a possibility and the maximum fine the court could impose was \$ 100. Appellant did not have the right to a jury [\*23] trial. Therefore, appellant's twenty-ninth assignment of error is overruled.

### VIII

In his twenty-third and thirtieth assignments of error appellant asserts the "rules of the court puts an undue burden upon the person who represents himself" and he asserts he did not receive a fair trial because he proceeded pro se in his defense. Appellant further asserts the "prosecutor is with the judge every day and the judge \* \* \* prompts the prosecutor in a way to get a conviction in his court." These contentions by appellant are without merit.

We presume appellant's reference to "rules of court" is a reference to the Ohio Rules of Evidence, the Ohio Rules of Criminal Procedure, and the Ohio Traffic Rules.

The purpose of the Ohio Rules of Evidence is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. *Evid. R. 102*. The purpose of the Ohio Rules of Criminal Procedure is to provide for the just determination of every criminal proceeding. *Crim. R. 1(B)*. The purpose of the Ohio Traffic Rules is to secure the fair, impartial, speedy and sure administration of justice, simplicity and uniformity in procedure, and the [\*24] elimination of unjustifiable expense and delay. *Traff. R. 1(B)*.

A review of the record in the case sub judice reveals the trial court fully and fairly considered all issues raised by appellant and, further, gave appellant wide latitude during the course of the trial in deviating from strict application of the rules of court. Also, appellant exercised his rights during the course of the trial including his right to confront witnesses, to testify in his own behalf, and to make objections to the admissibility of evidence. Appellant had the opportunity to engage counsel to represent him in this matter. However, it appears appellant voluntarily elected to represent himself.

We find no error in the court's actions. The record in the case sub judice does not support appellant's contention that he was prejudiced by his election to represent himself.

Appellant further asserts the trial court judge "prompted" the prosecutor during appellant's trial. Again, a review of the record does not support appellant's assertion.

Therefore, for the foregoing reasons appellant's twenty-third and thirtieth assignments of error are overruled.

## IX

Appellant's seventeenth, twentieth, twenty-first, and [\*25] twenty-eighth assignments of error assert, in essence, that the trial court's judgment was against the manifest weight of the evidence.

[HN7] A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eskridge (1988)*, 38 Ohio St. 3d 56. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts. *State v. Thomas (1982)*, 70 Ohio St. 2d 79, and *State v. DeHass (1967)*, 10 Ohio St. 2d 230.

In the case sub judice, the trial court judge, the trier of fact, was in the best position to weigh the testimony and assess the credibility of the witnesses. A review of the record reveals there was sufficient competent and credible evidence adduced at trial that the trier of fact could conclude that appellant was, beyond a reasonable doubt, driving at an excessive speed. The testimony of the officer coupled with the appellant's admission provide ample evidence whereby the court could conclude appellant was operating his vehicle [\*26] at an excessive speed.

Accordingly, based upon the reasons stated above, appellant's seventeenth, twentieth, twenty-first, and twenty-eighth assignments of error are overruled.

## X

Appellant's twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-ninth, thirty-third, thirty-seventh, and thirty-ninth assignments of error assert, in part, that the trial court erred in sentencing appellant to pay a fine of \$ 65, receive a thirty-day license suspension, and pay court costs.

Appellant was found guilty of speeding in violation of *R.C. 4511.21*. This offense constitutes a minor misdemeanor. See *R.C. 4511.99(D)*. Pursuant to *R.C. 2929.21(D)*, the maximum fine a court could impose for a minor misdemeanor offense is a fine of \$ 100. In addition to the fine, the court assessed court costs. See *R.C. 2335.18* and *2335.27*.

The trial court suspended appellant's operator's license. [HN8] *R.C. 4507.34* provides in pertinent part:

Whenever a person is found guilty under the laws of this state \* \* \* of operating a motor vehicle in violation of such laws \* \* \*, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all [\*27] other penalties provided by law, suspend for any period of time or revoke the driver's license \* \* \* of any person so convicted or pleading guilty to such offense for such period as it determines, not to exceed one year.

This statute has been construed to include speeding offenses. *Akron v. Willingham (1957)*, 166 Ohio St. 337, and *State v. Newkirk (1968)*, 21 Ohio App. 2d 160. Additionally, a license suspension imposed by a trial court prohibits the operation of a motor vehicle anywhere within the state of Ohio.

Appellant contends he received a more severe sentence because he exercised his right to a trial. Clearly, [HN9] a trial court may not impose a more severe sentence because a defendant elects to exercise his right to a trial. *North Carolina v. Pearce (1969)*, 395 U.S. 711. In *U.S. v. Derrick (6 Cir. 1975)*, 519 F. 2d 1, the court wrote at page 3:

"\* \* \* it is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty

and go to trial, no matter how overwhelming the evidence of his guilt."

See also, *State v. Harrison* (1985), [\*28] Highland App. No. 561, unreported.

[HN10] Trial courts are vested with broad discretion in the determination of appropriate sentences. In the case sub judice the sentence issued by the trial court was within the parameters of the applicable statutes. We find nothing in the record to support appellant's assertion that he received a more severe sentence because he exercised his right to a trial. Appellant's argument that his sentence was more severe than the penalty he would have received had he entered either a guilty or no contest plea does not, standing alone, constitute an abuse of discretion. A judge must consider many factors, including the facts and circumstances of an offense, when making a determination of what constitutes an appropriate sentence. Clearly, after hearing the evidence adduced in a contested trial, the court below was fully aware of the facts and circumstances of the offense.

Appellate courts should not disturb sentencing decisions of the trial courts unless there is a clear abuse of discretion. *Miamisburg v. Smith* (1982), 5 Ohio App. 3d 109. We find no abuse of discretion in the case at bar.

Therefore, appellant's assignments of error relating [\*29] to the sentence imposed by the trial court are overruled.

#### XI

In his tenth assignment of error, appellant asserts that testimony regarding the calibration of the radar device was improperly admitted in evidence because " \* \* \* anything pertaining to his notes as his notes were not given in discoveries."

Once again, our review of the record reveals appellant did not object or otherwise raise this issue in the trial court. Consequently, appellant has waived his right to allege error on appeal. See *State v. Williams, supra*; and *State v. Ferrette, supra*. Accordingly, based upon the foregoing appellant's tenth assignment of error is overruled.

#### XII

In his thirty-second assignment of error appellant contends "a persons right to appeal is denied him when the court requires that person to purchase a transcript from and independent contractor and is charged a exhorbant fee (sic)."

[HN11] The duty to provide a transcript for appellate review falls upon appellant. See *App. R. 9(B)*. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. Also, *App. R. 9(C)* and [\*30] (D) set forth alternative procedures that may be used in providing a substitute statement of the evidence rather than providing an entire transcript of the proceedings.

We find no merit to appellant's contention. Therefore, appellant's thirty-second assignment is overruled.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of thirty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme

Court a memorandum in support of jurisdiction accompanied by a motion for a further stay from that court during the pendency of proceedings in that court. The stay as herein continued will terminate at the expiration of the thirty day period. The stay will also terminate if the Supreme Court refuses to hear the appeal prior to the expiration [\*31] of the thirty days. This stay is conditioned upon appellant filing a notice of appeal to the Supreme Court within seven days of entry of this judgment.

A certified copy of this entry shall constitute that mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

#### NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

129 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee, v. JOHN G. McGUFFEY,  
Defendant-Appellant**

**Case No. 90 CA 44**

**Court of Appeals of Ohio, Fourth Appellate District, Washington County**

*1991 Ohio App. LEXIS 3525*

**July 23, 1991**

**July 23, 1991, Released**

**DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Marietta Municipal Court (Ohio), which found defendant guilty of speeding.

**OVERVIEW:** Subsequent to his conviction, defendant argued that the trial court erred in taking judicial notice of the reliability of the radar gun at issue and that he was denied his right to a trial by jury. On review, the court affirmed the trial court's judgment. In reaching its conclusion, the court relied on prior caselaw in holding that the trial court did not err in taking judicial notice of the reliability of the model of radar gun in question. Additionally, the court held that, because the offense for which defendant was charged was speeding, a petty or misdemeanor offense, defendant did not have a right to a jury trial. The court then held that the evidence supported the adjudication. The court also held that the trial court did not abuse its discretion in sentencing defendant.

**OUTCOME:** The court affirmed the judgment finding defendant guilty of speeding.

**CORE TERMS:** radar, assignments of error, municipal, discovery, sub judice, speed, assignment of error, reliability, training, fine, sentence, judicial notice, speed limit, jury trial, continuance, prosecutor, license, posted, excessive speed, misdemeanor, scientific, traveling, speeding, expert testimony, severe sentence, overruling, convicted, license suspension, reasons stated, motor vehicle

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview***  
***Criminal Law & Procedure > Discovery & Inspection > Discovery by Government***

[HN1] *Ohio R. Crim. P. 16(A)* provides that, upon written request, each party shall forthwith provide the discovery allowed. Motions for discovery shall certify that a demand for discovery has been made and the discovery has not been provided. The word "shall" indicates that the procedure is mandatory.

***Civil Procedure > Judicial Officers > Referees > General Overview***  
***Evidence > Judicial Notice > General Overview***  
***Evidence > Testimony > Experts > General Overview***

[HN2] While it is necessary initially to offer expert testimony on the construction and dependability of scientific devices, the trial court may at some point satisfy itself with the dependability of the instrument and take notice thereof. Courts in Ohio uphold the taking of judicial notice of the reliability of the K-55 radar unit.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***  
***Criminal Law & Procedure > Interrogation > Voluntariness***

***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

[HN3] An individual must be advised of his constitutional rights when law enforcement officers initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The event triggering the need for the Miranda rights is a custodial interrogation. The Miranda rules are not applicable to statements volunteered to the police. A statement that is voluntary and not in response to police questioning is not barred by the Fifth Amendment. The absence of Miranda warnings will not affect the admissibility of statements made on a suspect's own initiative in absence of questions or other conduct by the police constituting interrogation. Any statement freely and voluntarily given without any compelling influence is admissible into evidence.

***Civil Procedure > Appeals > Reviewability > Preservation for Review***  
***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview***

[HN4] Generally, a party waives his right to allege error on appeal when that party did not object at the time the alleged error occurred.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial***  
***Constitutional Law > Bill of Rights > State Application***  
***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Petty Offenses***

[HN5] The right to a trial by jury is secured by the Sixth Amendment to the United States Constitution, Ohio Const. art. I, § 10, and *Ohio Rev. Code Ann. § 2945.17*. The right to trial by jury in a criminal proceeding is a "fundamental right." However, the right to trial by jury is not applicable to all types of criminal offenses. There is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the 14th Amendment jury trial requirement applied to the states. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***  
***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors***  
***Criminal Law & Procedure > Sentencing > Fines***

[HN6] Under *Ohio Rev. Code Ann. § 4511.21*, speeding is a minor misdemeanor. *Ohio Rev. Code Ann. § 2929.21(D)* provides that whoever is convicted of or pleads guilty to a minor misdemeanor shall be fined no more than \$ 100.

Section 2945.17 provides that, at any trial, in any court, for the violation of any statute of Ohio, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Procedural Considerations > Weight & Sufficiency***

[HN7] A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Criminal Law & Procedure > Guilty Pleas > General Overview Governments > State & Territorial Governments > Licenses***

[HN8] *Ohio Rev. Code Ann. § 4507.34* provides that, whenever a person is found guilty under Ohio law of operating a motor vehicle in violation of such laws relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the driver's license of any person so convicted or pleading guilty to such offense for such period as it determines, not to exceed one year. This statute is construed to include speeding offenses. Additionally, a license suspension imposed by a trial court prohibits the operation of a motor vehicle anywhere within the state of Ohio.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process***

[HN9] A trial court may not impose a more severe sentence because a defendant elects to exercise his right to a trial.

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

***Criminal Law & Procedure > Sentencing > Imposition***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN10] Trial courts are vested with broad discretion in the determination of appropriate sentences. Appellate courts should not disturb sentencing decisions of the trial courts unless there is a clear abuse of discretion.

***Civil Procedure > Appeals > Records on Appeal***

***Criminal Law & Procedure > Appeals > General Overview***

[HN11] The duty to provide a transcript for appellate review falls upon appellant. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. Also, *Ohio R. App. P. 9(C)* and (D) set forth alternative procedures that may be used in providing a substitute statement of the evidence rather than providing an entire transcript of the proceedings.

**COUNSEL:**

PRO SE APPELLANT: John G. McGuffey, Parkersburg, West Virginia.

COUNSEL FOR APPELLEE: Robert J. Smith, Marietta Assistant City Law Director, Marietta, Ohio.

**JUDGES:**

For the Court: By: Peter B. Abele, Judge. Stephenson, P.J., Concur in Judgment and Opinion. Grey, J., Concur in Judgment Only.

**OPINION BY:**

ABELE

**OPINION:**

DECISION AND JUDGMENT ENTRY

This is an appeal from a judgment of conviction and sentence entered by the Marietta Municipal Court finding John G. McGuffey, defendant below and pro se appellant herein, guilty of operating a vehicle at an excessive speed in violation of *R.C. 4511.21*, a minor misdemeanor. We affirm.

Appellant assigns the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE JUDGE SHOULD HAVE GRANTED A CONTINUANCE ON RULE 16 AS LESS THAN 24 HOURS IS NOT SUFFICIENT TIME TO GET DISCOVERIES FROM THE PRODUCTION OF DOCUMENTS AND IT GIVES THE PROSECUTION AN UNFAIR ADVANTAGE TO WAIT UNTIL THE LAST MINUTE TO GIVE THE DEFENDANT THE DOCUMENTS ASKED FOR." (SIC)

SECOND ASSIGNMENT OF ERROR:

"THE DEFENDANT SHOULD HAVE THE RIGHT TO SEE THE TUNING FORKS, WITH THE [\*2] SERIAL NUMBERS, AT THE TIME OF THE ARREST TO SEE IF THE OFFICER HAS THEM WITH HIM, AND IF THEY ARE THE ONES DESIGNATED FOR THIS PARTICULAR RADAR."

THIRD ASSIGNMENT OF ERROR:

"THE RADAR IS A SECRET INSTRUMENT THAT ONLY THE POLICE HAS AND WILL NOT BE GIVEN FOR TEST TO THE DEFENDANT. HOW CAN A PERSON DEFEND AGAINST SOMETHING HE CANNOT TEST?" (SIC)

FOURTH ASSIGNMENT OF ERROR:

"THE FACT SHEET WENT BEYOND PROBABLE CAUSE. ALL IT HAD TO SAY WAS THE POLICEMAN SAW ME SPEEDING. THE OTHER STATEMENTS AMOUNTED TO A CONFESSION OF THE DEFENDANT. THE POLICEMAN WAS PLANNING HIS CASE PRIOR TO COURT. IT WAS A ONE WAY CONVERSATION BETWEEN THE POLICEMAN, PROSECUTOR, AND THE JUDGE IN WHICH THE DEFENDANT COULD NOT DEFEND HIMSELF." (SIC)

FIFTH ASSIGNMENT OF ERROR:

"REFER TO P. 13 LINE 13-19 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE OFFICER CANNOT MAKE THIS STATEMENT ON HIS OWN IN THAT HE DID NOT SAY THAT HE HAD A FLASHING LIGHT AND THE MARKINGS MET THE SUPERINTENDENT OF THE STATE HIGHWAY PATROL. THE FACT THAT THIS CAR IS GRAY AND CANNOT BE SEEN AS FAR AS HE CAN CLOCK YOU ON HIS RADAR MEANS THAT HE IS USING UNREASONABLE METHODS OF ENFORCING TRAFFIC LAWS. SEE EXHIBIT A ATTACHED (OHIO CODE [\*3] 4549.13 AND OHIO CODE 4549.14)." (SIC)

SIXTH ASSIGNMENT OF ERROR:

"REFER TO P. 14 LINES 8-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE RADAR WAS IMPROPERLY INSTALLED IN THE POLICE CRUISER IN THAT THE ECM UNIT IS KEPT ON THE SEAT BESIDE THE DRIVER AND HAS NO MEANS OF CONNECTING IT TO THE COUNTING UNIT OR AN ELECTRICAL POWER SOURCE. ANY MENTION FROM HERE ON OF THE ECM UNIT WOULD BE INCORRECT AS IT WOULD HAVE NO POWER." (SIC)

SEVENTH ASSIGNMENT OF ERROR:

"REFER TO P. 16 LINES 1-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE JUDGE SHOULD HAVE ALLOWED THE DEFENDANT TO HAVE DISCOVERIES ON THE POLICEMAN'S TRAINING: HIS BOOKS AND TANGIBLE OBJECTS AS IT DID HAVE RELEVANCE TO A DEFENSE AGAINST THE POLICEMAN'S TRAINING." (SIC)

EIGHTH ASSIGNMENT OF ERROR:

"REFER TO P. 20, LINES 16-25 THROUGH P. 21, LINES 1-10 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THERE IS NO SCIENTIFIC EVIDENCE WHICH STATES THE POLICEMAN IS CAPABLE OF CONDUCTING A VISIBLE ESTIMATION OF THE SPEED OF VEHICLES." (SIC)

NINTH ASSIGNMENT OF ERROR:

"REFER TO P. 24, LINES 12-19 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE COURT TOOK IMPROPER JUDICIAL NOTICE AS A POLICE STATION WHERE THE [\*4] RECORDS ARE FILED IS NOT A PUBLIC OFFICE AND YOU CAN NOT HAVE ACCESS TO THESE RECORDS." (SIC)

TENTH ASSIGNMENT OF ERROR:

"REFER TO P. 27, LINES 6-7 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS SHOULD NOT HAVE BEEN ADMITTED AS EVIDENCE, AND ANYTHING PERTAINING TO HIS NOTES AS HIS NOTES WERE NOT GIVEN IN DISCOVERIES. ALSO THE DEFENDANT DID NOT RECEIVE DISCOVERIES OF THE LOGS KEPT BY THE HIGHWAY PATROL AS TO WERE THE OFFICER STOPPED THE DEFENDANT'S VEHICLE." (SIC)

ELEVENTH ASSIGNMENT OF ERROR:

"REFER TO P. 27, LINES 12-14 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. HERE THE POLICE OFFICER STATES THAT HIS RADAR HAD NOT BEEN TURNED OFF BETWEEN THE TWO CALIBRATION CHECKS. THEN ON P. 28, LINES 13-15 HE STATES, 'AFTER I OBSERVED THE VEHICLE, I ACTIVATED THE RADAR.'" (SIC)

TWELFTH ASSIGNMENT OF ERROR:

"REFER TO P. 30, LINES 2-3 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE OFFICER WAS ASKED IF HE LOCKED IN THE SPEED OF THE OTHER VEHICLE. LINES 13-14. 'OR THE READING THAT WAS ON THERE IN THE AUDIO ALL CLEARED OFF' ON P. 34, LINES 1-5. 'DID HE ASK TO VIEW THE SPEED THAT YOU HAD LOCKED IN?' 'YES. HE DID WALK BACK TO THE CAR, HE LOOKED IN THE PASSENGER WINDOW AND IT WAS [\*5] LAYING ON THE SEAT, ON THE ECM UNIT'. THIS COULD NOT HAVE HAPPENED AS HE HAD CLEARED THE READING OFF AND THE ECM UNIT WAS NOT CONNECTED TO THE COUNTING UNIT AND HAS NO POWER." (SIC)

## THIRTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 32, LINES 20-25 AND P.33 1-22 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS STATEMENT WAS A STATEMENT OF SELF-INCRIMINATION. THE MIRANDA RIGHTS HAD NOT BEEN GIVEN TO THE DEFENDANT, AND IT WOULD BE AGAINST THE 5TH AMENDMENT OF THE CONSTITUTION." (SIC)

## FOURTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 36 AND 37 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE COURT TOOK IMPROPER JUDICIAL NOTICE AND DID NOT AFFORD THE DEFENDANT A HEARING ON THIS NOTICE." (SIC)

## FIFTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 38, LINES 7-13 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. ON THE CROSS-EXAMINE THE FOLLOWING LINES SHOWS THAT THE RADAR HAD BEEN TURNED OFF CONTRARY TO THE OFFICER'S STATEMENT ON P. 27, LINES 12-15. (SIC)

## SIXTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 38, LINES 6-25 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS WOULD VERIFY THAT THE OFFICER HAD NO IDEA IF HIS PATROL CAR MET THE STANDARDS OF THE SUPERINTENDENT OF THE OHIO HIGHWAY PATROL [\*6] AS REFERRED TO ON P. 13, LINES 13-18." (SIC)

## SEVENTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 46, LINES 4-7 AND 17-21 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. IN THIS STATEMENT THE OFFICER CONTRADICTS HIMSELF." (SIC)

## EIGHTEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 50, LINES 12-17 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. HOW CAN AN OFFICER BE PROPERLY TRAINED IN RADAR IF HE HAS NOT BEEN TAUGHT THE SAFETY ASPECTS OF RADAR?" (SIC)

## NINETEENTH ASSIGNMENT OF ERROR:

"REFER TO P. 54-56 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. IN THESE PAGES THE OFFICER STATES THAT THE SPEED LIMIT IS 65 MPH AND DROPS TO 45 MPH AND THAT THERE IS NO SIGN, REDUCE SPEED AHEAD. THE OHIO CODE, 51-10, STATES THAT, 'A SPEED ZONE CANNOT BE ENFORCED UNTIL STANDARD SIGNS HAVE BEEN PROPERLY INSTALLED ALONG THE ROADWAY.' 'THE REDUCED SPEED AHEAD SIGN SHOULD BE ERECTED IN ADVANCE OF ANY SPEED ZONE THAT IS 15 MILES PER HOUR OR MORE UNDER THE SPEED LIMIT IN A PRECEEDING STATUTORY OR ALTERED SPEED ZONE.'" (EXHIBIT B) (SIC)

## TWENTIETH ASSIGNMENT OF ERROR:

"REFER TO P. 57, LINES 1-12 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THIS

CROSS-EXAMINATION SHOWS THE OFFICER CHANGED HIS ACCOUNT OF THE PLACE [\*7] WHERE HE CLOCKED THE DEFENDANT'S VEHICLE. REFER TO P. 27-28, LINES 21-25 AND P. 28, LINES 1-16. THEREFORE, IF HE CLOCKED THE DEFENDANT AT THE 26 MILE MARKER HE WOULD BE TRAVELING IN THE SAME DIRECTION, AND HIS RADAR IS NOT CAPABLE OF CLOCKING IN THE SAME DIRECTION." (SIC)

TWENTY-FIRST ASSIGNMENT OF ERROR:

"REFER TO P. 58, LINES 1-25 OF THE TRANSCRIPT OF THE MUNICIPAL COURT CASE. THE CITATION WAS IMPROPERLY WRITTEN AND SHOULD BE DISALLOWED AS THERE IS A DISCREPANCY AS TO WHERE HE CLOCKED THE DEFENDANT." (SIC)

TWENTY-SECOND ASSIGNMENT OF ERROR:

"THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A TRIAL WAS DENIED HIM BY GETTING A LARGER SENTENCE AND SUSPENSION OF LICENSE THAN HE WOULD HAVE IF HE HAD PLEADED GUILTY AND PAID THE FINE AS STATED ON THE CITATION." (SIC)

TWENTY-THIRD ASSIGNMENT OF ERROR:

"THE DEFENDANT WAS PUNISHED IMPROPERLY AS THE JUDGE FAILED TO DISTINGUISH BETWEEN THE DEFENDANT TALKING AND THE DEFENDANT REPRESENTING HIMSELF. THEREFORE, IN CLOSING ARGUMENTS THE DEFENDANT REPRESENTING HIMSELF WAS PRESENTING A DEFENSE AND THE JUDGE SUSPENDED HIS LICENSE FOR 30 DAYS FOR STATING THAT HIS DEFENSE WAS THAT HE FELT HE COULD DRIVE 65 MPH WHEN NO REDUCE SPEED AHEAD SIGN WAS [\*8] POSTED. THIS WAS A DEFENSE BY THE DEFENDANT'S ATTORNEY AND NOT THE DEFENDANT." (SIC)

TWENTY-FOURTH ASSIGNMENT OF ERROR:

"THE JUDGE CANNOT INFLICT A PUNISHMENT THAT GOES OUTSIDE HIS JURISDICTION. HE COULD ONLY SUSPEND DRIVING PRIVILEGES IN WASHINGTON COUNTY AND NOT THE WHOLE STATE." (SIC)

TWENTY-FIFTH ASSIGNMENT OF ERROR:

"IMPROPER SENTENCE." (SIC)

TWENTY-SIXTH ASSIGNMENT OF ERROR:

"JUDGE EDWARD LANE, JR. HAD LED THE DEFENDANT TO BELIEVE THAT HE COULD ONLY GET AN ADDITIONAL \$ 6.00 COST ADDED TO HIS FINE BE CONTESTING IT IN A COURT OF LAW. THEN HE FINED HIM A GREATER FINE, PLUS A 30 DAY SUSPENSION OF LICENSE. ENCLOSED FIND A TAPE RECORDING OF THIS HEARING." (SIC)

TWENTY-SEVENTH ASSIGNMENT OF ERROR:

"THE DEFENDANT RECEIVED A MORE SEVERE PUNISHMENT FOR GOING TO COURT THAN THOUSNADS OF OTHER PEOPLE IN THE SAME SITUATION. THE DEFENDANT CANNOT PROVE THIS BECAUSE HE WAS DENIED ACCESS TO THE RECORDS BY THE CLERK OF THE COURT, ROSANNE M. BUELL." (SIC)

## TWENTY-EIGHTH ASSIGNMENT OF ERROR:

"THE WEIGHT OF THE EVIDENCE DOES NOT WARRANT A CONVICTION."

## TWENTY-NINTH ASSIGNMENT OF ERROR:

"THE DEFENDANT'S CONSTITUTIONAL RIGHTS OF A TRIAL BY JURY WAS DENIED HIM, AND THE JUDGE WENT [\*9] BEYOND HIS RIGHTS BY SUSPENDING THE DEFENDANT'S LICENSE." (SIC)

## THIRTIETH ASSIGNMENT OF ERROR:

"THE RULES OF THE COURT PUTS A UNDUE BURDEN UPON THE PERSON WHO REPRESENTS HIMSELF AS HE CANNOT GET ANY EXPERIENCE IN A COURT ROOM WHEN THE PROSECUTION IS WITH THE JUDGE EVERY DAY AND THE JUDGE, AS IN MY CASE, PROMPTS THE PROSECUTOR IN THE WAY TO GET A CONVICTION IN HIS COURT. WHO WOULD KNOW BETTER THAN THE LAWYERS WHO WORKS THE COURT ALL THE TIME WHEN THEY SAY THE MAN WHO REPRESENTS HIMSELF HAS A FOOL FOR A CLIENT." (SIC)

## THIRTY-FIRST ASSIGNMENT OF ERROR:

"A SPEEDING VIOLATION OF ONLY 15 MPH OVER THE POSTED SPEED DOES NOT CONSTITUTE HAZARDOUS DRIVING IN ACCORDANCE WITH THE NEW U.S. STANDARDS ON THE CDL LICENSE AS IT STATES IN THE DRIVER'S MANUAL THAT IT MUST BE MORE THAN 20 MPH OVER THE SPEED LIMIT BEFORE YOU CAN HAVE YOUR LICENSE SUSPENDED." (SIC)

## THIRTY-SECOND ASSIGNMENT OF ERROR:

"A PERSON'S RIGHT TO AN APPEAL IS DENIED HIM WHEN THE COURT REQUIRES THAT PERSON TO PURCHASE A TRANSCRIPT FROM AN INDEPENDENT CONTRACTOR AND IN CHARGED AN EXHORBANT FEE." (SIC)

## THIRTY-THIRD ASSIGNMENT OF ERROR:

"COURT COSTS CAN ONLY BE ACTUAL COSTS AND NO ADDED TAX ADDED TO HIS CONSTITUTIONAL [\*10] RIGHTS TO A TRIAL." (SIC)

## THIRTY-FOURTH ASSIGNMENT OF ERROR:

"THERE WAS NO EXPERT WITNESSES TO THIS RADAR AS IT IS TURNED ON AND OFF AND WOULD NOT MEET ANY OTHER STANDARDS." (SIC)

## THIRTY-FIFTH ASSIGNMENT OF ERROR:

" *THERE WAS NO EXPERT WITNESSES PERTAINING TO THE RADAR AS CITED IN THE CASE OF STATE OF OHIO V. WILCOX, 319 N.E. 2D 615 (PP. 615-621)*" (SIC)

## THIRTY-SIXTH ASSIGNMENT OF ERROR:

"THE RADAR WAS IMPROPERLY INSTALLED IN THE CRUISER AND THE CALIBRATION WOULD NOT WORK AS THE RADAR WAS TURNED AFTER THE CALIBRATION." (SIC)

## THIRTY-SEVENTH ASSIGNMENT ERROR:

"THE DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED HIM BY GIVING HIM A LARGER FINE AND PUNISHMENT THAN THE \$ 55 AS STATED ON THE TICKET. HE RECEIVED THE ADDITIONAL PUNISHMENT BECAUSE HE EXERCISED HIS CONSTITUTIONAL RIGHTS." (SIC)

## THIRTY-EIGHTH ASSIGNMENT OF ERROR:

"THE SIGNS WERE NOT PROPERLY INSTALLED ON THE HIGHWAY AND THEREFORE, THE SPEED ZONES COULD NOT BE ENFORCED."

## THIRTY-NINTH ASSIGNMENT OF ERROR:

"THE DEFENDANT-APPELLANT WAS GIVEN A 30 DAY LICENSE SUSPENSION FOR PRESENTING A DEFENSE THAT THE SIGNS WERE NOT PROPERLY INSTALLED."

## FORTIETH ASSIGNMENT OF ERROR:

"THE POLICEMAN'S [\*11] CAR WAS NOT PROPERLY MARKED."

## FORTY-FIRST ASSIGNMENT OF ERROR:

"THE RADAR CAN NOT CLOCK A SPEED OF A VEHICLE WHEN IT IS TRAVELING IN THE SAME DIRECTION." (SIC)

## FORTY-SECOND ASSIGNMENT OF ERROR:

"THERE IS NO EVIDENCE PRODUCED OTHER THAN THE POLICEMAN THAT HE CAN ESTIMATE THE SPEED OF A VEHICLE." (SIC)

The record reveals the following facts pertinent to this appeal. On June 10, 1990, at 3:30 P.M., Ohio State Highway Patrol Trooper Paul Pride was traveling south on State Route 7 in Washington County, Ohio. Trooper Pride was wearing the Ohio State Highway Patrol uniform and he was operating an Ohio State Highway Patrol cruiser.

Trooper Pride observed a pickup truck traveling north on State Route 7 in a posted forty-five m.p.h. speed zone. Trooper Pride testified that his attention was drawn to the pickup truck because his visual estimate of the truck's speed was approximately fifty-five m.p.h.

Trooper Pride activated the K-55 radar unit and obtained a reading indicating the vehicle in question was traveling sixty m.p.h. The officer thereupon turned and pursued the vehicle. After the officer stopped the vehicle, the operator, the appellant herein, denied he was traveling sixty [\*12] m.p.h.; however, appellant did state that he may have been operating his vehicle at fifty m.p.h. in the forty-five m.p.h. zone. Trooper Pride subsequently filed a uniform traffic citation in the Marietta Municipal Court, alleging appellant operated his vehicle at an excessive speed in violation of *R.C. 4511.21*.

On October 17, 1990, the court below conducted a bench trial. After hearing the evidence, the court found appellant guilty, fined appellant \$ 65, suspended appellant's operator's license for thirty days, and ordered appellant to pay court costs. It is from this finding that appellant has filed this appeal.

In this appeal the appellant has raised forty-two assignments of error. Because many of the assignments of error

contain similar, and in some cases identical, issues, we will consolidate the assignments of error for purposes of this appeal.

## I

In his first and seventh assignments of error, appellant asserts the state failed to provide, in a timely fashion, discovery materials pertaining to the officer's training in the use of radar. At trial appellant argued the state did not comply with *Crim. R. 16* in providing discovery and appellant requested a continuance. Appellant asserts [\*13] the court below erred in overruling his request for a continuance. This contention is without merit.

In the case sub judice, the court carefully considered appellant's request for a continuance. In overruling appellant's motion the court stated that if, during the course of the trial, appellant could demonstrate the requested information was necessary for the preparation of his defense, appellant could renew his motion for a continuance and the court would re-evaluate the motion at that time. During the direct examination of Trooper Pride, appellant renewed his motion and the court again overruled the motion. During the cross examination of Trooper Pride, appellant made many inquiries regarding various aspects of the case, including a detailed examination of Trooper Pride's training in the use of radar.

[HN1] *Crim. R. 16(A)* provides:

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that a demand for discovery has been made and the discovery has not been provided.

The word "shall" indicates that the procedure is mandatory. See *Lakewood v. Papadelis (1987)*, 32 Ohio St. 3d 1.

Additionally, [\*14] we find appellant failed to file a motion for discovery, pursuant to *Crim. R. 16(A)*, certifying that a demand for discovery was made and discovery was not provided. Before the sanctions set forth in *Crim. R. 16(E)* may be imposed, a party must file a motion for discovery pursuant to *Crim. R. 16(A)*. See *State v. Hicks (1976)*, 48 Ohio App. 2d 135.

We conclude, based upon a review of the record, that the trial court did not err in overruling appellant's motion for a continuance. Accordingly, appellant's first and seventh assignments of error are overruled.

## II

In his second, third, sixth, ninth, eleventh, twelfth, fourteenth, fifteenth, eighteenth, thirty-fourth, thirty-fifth, thirty-sixth, and forty-first assignments of error, appellant asserts, in part, the court below erred in admitting evidence relating to the radar device.

Trooper Pride testified he had received extensive training in the use and operation of the K-55 radar unit, that he had considerable experience operating the radar device, and that this particular radar unit was properly calibrated and operated.

The trial court took judicial notice of the reliability of the K-55 radar device and did not require [\*15] expert testimony concerning the scientific reliability of the K-55 radar unit. See *Crim. R. 27*, *Civ. R. 44.1*, and *Evid. R. 201(B)*. In *State v. Kline* (Aug. 12, 1981), Lorain App. No. 3182, unreported, the court wrote:

"The referee found 'that Elyria Municipal Court takes judicial notice of the scientific reliability of the K-55 unit.' The trial court accepted the referee's finding. [HN2] While it is necessary initially to offer expert testimony on the construction and dependability of scientific devices, *East Cleveland v. Ferrell (1958)*, 168 Ohio St. 298, we feel the trial court may at some point satisfy itself with the dependability of the instrument and take notice thereof. e.g. *Akron v. Gray (1979)*, 60 Ohio Misc. 68. The Elyria Municipal Court having recognized the reliability of K-55 radar, there was no need to offer expert testimony, and this assignment of error is overruled."

Other courts in Ohio have also upheld the taking of judicial notice of the reliability of the K-55 radar unit. See *State v. Bechtel* (1985), 24 Ohio App. 3d 72; *State v. Ayesch* (1985), 24 Ohio App. 3d 73; *Kettering v. [\*16] Smith* (Apr. 12, 1984), Montgomery App. No. 8383, unreported.

In the case sub judice the following exchange occurred during the trial:

"THE DEFENDANT: Yes, sir. The K-55 is specifically - - not a radar in general, hut the K-55 is specifically specified in this court case - -

THE COURT: And that this Court requires notification at any time that the radar is changed. Now, unless there's some proof that this highway patrolman is sneaking some unapproved system in, it's given that the scientific basis for this radar and its acceptability and reliability in court was established by Judge Hallock, this Court has a long history of taking judicial notice of - - Judge Hallock conducted the hearings that were required. You're not getting any place with this.

THE DEFENDANT: Okay. Now, wait a minute, Judge Hallock done this.

THE COURT: He was the judge before I was. \* \* \*"

Based upon the foregoing, we find the trial court properly took judicial notice of the reliability of the K-55 radar unit.

Additionally, in his ninth assignment of error appellant asserts the court below improperly took judicial notice of certificates of accuracy of the tuning forks. However, the record reveals the [\*17] court admitted the certificates in evidence pursuant to *Evid. R. 803*. Thus, appellant's contention is without merit.

Based upon a review of the record we find appellant's assignments of error relating to the radar device are without merit and are overruled.

### III

In his fourth and thirteenth assignments of error, appellant asserts the court below improperly admitted into evidence appellant's statements made to the officer at the scene of the traffic stop. Appellant maintains he was not advised of his Miranda rights and the admission of appellant's statements violated his Fifth Amendment privilege against self-incrimination. This contention is without merit.

In *Miranda v. Arizona* (1966), 384 U.S. 436, the United States Supreme Court held that [HN3] an individual must be advised of his constitutional rights when law enforcement officers initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The event triggering the need for the Miranda rights is a custodial interrogation. *Id.*, and see, also, *Berkemer v. McCarty* (1984), 468 U.S. 420, and *State v. Buchholz* (1984), 11 Ohio St. 3d 24. [\*18]

The Miranda rules are not applicable to statements volunteered to the police. A statement that is voluntary and not in response to police questioning is not barred by the Fifth Amendment. *Miranda* at 478. In *State v. Coleman* (1989), 45 Ohio St. 3d 298, the court held:

"The law of *Miranda v. Arizona* (1966), 384 U.S. 436, has no application to pure voluntary statements which are not the result of 'express questioning or its functional equivalent.' *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301."

The absence of Miranda warnings will not affect the admissibility of statements made on a suspect's own initiative in absence of questions or other conduct by the police constituting interrogation. *Akron v. Milewski* (1985), 21 Ohio App. 3d 140. Any statement freely and voluntarily given without any compelling influence is admissible into evidence. *State v. Perry* (1968), 14 Ohio St. 2d 256.

In the case sub judice, appellant was not subjected to a custodial interrogation. It is clear from the record that appellant freely and voluntarily offered statements [\*19] establishing his operation of the vehicle in excess of the posted speed limit. Because appellant's statements were purely voluntary and not the result of express questioning or its functional equivalent, the admissions made by appellant were properly admitted into evidence.

Therefore, based upon the reasons stated above appellant's fourth and thirteenth assignments of error are overruled.

#### IV

In his fifth, sixteenth, and fortieth assignments of error, appellant asserts the officer was not competent to testify at the hearing below because the officer's vehicle was not properly "marked," and because the officer was not wearing a "distinctive uniform." See *R.C. 4549.13*, *R.C. 4549.14*, and *4549.15*.

However, our review of the record reveals appellant did not object or otherwise raise this issue in the trial court. [HN4] Generally, a party waives his right to allege error on appeal when that party did not object at the time the alleged error occurred. See *State v. Williams (1977)*, *51 Ohio St. 2d 112*, paragraph one of the syllabus, vacated as to the penalty (1978), *438 U.S. 911*; *State v. Ferrette (1985)*, *18 Ohio St. 3d 106*.

We find, [\*20] therefore, that these alleged errors were not properly preserved for appellate review. Accordingly, based upon the reasons stated above, appellant's fifth, sixteenth, and fortieth assignments of error are overruled.

#### V

In his eighth and forty-second assignments of error, appellant asserts the trial court improperly permitted the officer to testify concerning his visual estimate of the speed of appellant's vehicle. This contention is without merit.

In the case sub judice, the officer used his observation of appellant's vehicle and his prior training and experience to arrive at his opinion of the speed of appellant's vehicle. The trial court, sitting as the trier of facts, could reasonably infer that the officer possessed the knowledge, skill, experience, training or education to express his opinion of appellant's speed. See *Evid. R. 702*.

Accordingly, the court below did not err in admitting into evidence the officer's opinion of the speed of the vehicle. Thus, appellant's eighth and forty-second assignments of error are overruled.

#### VI

In his nineteenth and thirty-eighth assignments of error, appellant asserts the highway speed limit signs were not properly displayed. A review of [\*21] the record indicates the officer's testimony described the placement of signs indicating the posted speed limit in the area where appellant operated his motor vehicle.

In his thirty-first assignment of error appellant asserts the trial court's failure to consider information contained in the Commercial Driver's License Manual was erroneous. We find no merit in appellant's contention. Matters regarding a commercial driver's license and the Commercial Driver's License Manual are not applicable to the case sub judice.

Therefore, appellant's nineteenth, thirty-first, and thirty-eighth assignments of error are overruled.

#### VII

Appellant's twenty-ninth assignment of error asserts, in part, that he was deprived of his constitutional right to a jury trial. This contention is without merit.

[HN5] The right to a trial by jury is secured by the Sixth Amendment to the United States Constitution, Section 10, Article I, Ohio Constitution, and *R.C. 2945.17*. The right to trial by jury in a criminal proceeding is a "fundamental

right." However, the right to trial by jury is not applicable to all types of criminal offenses. In *Duncan v. Louisiana* (1968), 391 U.S. 145, the United [\*22] States Supreme Court stated:

"It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the states. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. *Cheff v. Schnackenberg* (1966), 384 U.S. 373."

Appellant was convicted of speeding in violation of [HN6] R.C. 4511.21, a minor misdemeanor. See R.C. 4511.99(D).

R.C. 2929.21(D) provides:

Whoever is convicted of or pleads guilty to a minor misdemeanor shall be fined no more than one hundred dollars.

Also, R.C. 2945.17 provides:

At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.  
(emphasis added)

In the case sub judice imprisonment was not a possibility and the maximum fine the court could impose was \$ 100. Appellant did not have the right to a jury [\*23] trial. Therefore, appellant's twenty-ninth assignment of error is overruled.

### VIII

In his twenty-third and thirtieth assignments of error appellant asserts the "rules of the court puts an undue burden upon the person who represents himself" and he asserts he did not receive a fair trial because he proceeded pro se in his defense. Appellant further asserts the "prosecutor is with the judge every day and the judge \* \* \* prompts the prosecutor in a way to get a conviction in his court." These contentions by appellant are without merit.

We presume appellant's reference to "rules of court" is a reference to the Ohio Rules of Evidence, the Ohio Rules of Criminal Procedure, and the Ohio Traffic Rules.

The purpose of the Ohio Rules of Evidence is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. *Evid. R. 102*. The purpose of the Ohio Rules of Criminal Procedure is to provide for the just determination of every criminal proceeding. *Crim. R. 1(B)*. The purpose of the Ohio Traffic Rules is to secure the fair, impartial, speedy and sure administration of justice, simplicity and uniformity in procedure, and the [\*24] elimination of unjustifiable expense and delay. *Traff. R. 1(B)*.

A review of the record in the case sub judice reveals the trial court fully and fairly considered all issues raised by appellant and, further, gave appellant wide latitude during the course of the trial in deviating from strict application of the rules of court. Also, appellant exercised his rights during the course of the trial including his right to confront witnesses, to testify in his own behalf, and to make objections to the admissibility of evidence. Appellant had the opportunity to engage counsel to represent him in this matter. However, it appears appellant voluntarily elected to represent himself.

We find no error in the court's actions. The record in the case sub judice does not support appellant's contention that he was prejudiced by his election to represent himself.

Appellant further asserts the trial court judge "prompted" the prosecutor during appellant's trial. Again, a review of the record does not support appellant's assertion.

Therefore, for the foregoing reasons appellant's twenty-third and thirtieth assignments of error are overruled.

## IX

Appellant's seventeenth, twentieth, twenty-first, and [\*25] twenty-eighth assignments of error assert, in essence, that the trial court's judgment was against the manifest weight of the evidence.

[HN7] A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eskridge (1988)*, 38 Ohio St. 3d 56. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts. *State v. Thomas (1982)*, 70 Ohio St. 2d 79, and *State v. DeHass (1967)*, 10 Ohio St. 2d 230.

In the case sub judice, the trial court judge, the trier of fact, was in the best position to weigh the testimony and assess the credibility of the witnesses. A review of the record reveals there was sufficient competent and credible evidence adduced at trial that the trier of fact could conclude that appellant was, beyond a reasonable doubt, driving at an excessive speed. The testimony of the officer coupled with the appellant's admission provide ample evidence whereby the court could conclude appellant was operating his vehicle [\*26] at an excessive speed.

Accordingly, based upon the reasons stated above, appellant's seventeenth, twentieth, twenty-first, and twenty-eighth assignments of error are overruled.

## X

Appellant's twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-ninth, thirty-third, thirty-seventh, and thirty-ninth assignments of error assert, in part, that the trial court erred in sentencing appellant to pay a fine of \$ 65, receive a thirty-day license suspension, and pay court costs.

Appellant was found guilty of speeding in violation of *R.C. 4511.21*. This offense constitutes a minor misdemeanor. See *R.C. 4511.99(D)*. Pursuant to *R.C. 2929.21(D)*, the maximum fine a court could impose for a minor misdemeanor offense is a fine of \$ 100. In addition to the fine, the court assessed court costs. See *R.C. 2335.18* and *2335.27*.

The trial court suspended appellant's operator's license. [HN8] *R.C. 4507.34* provides in pertinent part:

Whenever a person is found guilty under the laws of this state \* \* \* of operating a motor vehicle in violation of such laws \* \* \*, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all [\*27] other penalties provided by law, suspend for any period of time or revoke the driver's license \* \* \* of any person so convicted or pleading guilty to such offense for such period as it determines, not to exceed one year.

This statute has been construed to include speeding offenses. *Akron v. Willingham (1957)*, 166 Ohio St. 337, and *State v. Newkirk (1968)*, 21 Ohio App. 2d 160. Additionally, a license suspension imposed by a trial court prohibits the operation of a motor vehicle anywhere within the state of Ohio.

Appellant contends he received a more severe sentence because he exercised his right to a trial. Clearly, [HN9] a trial court may not impose a more severe sentence because a defendant elects to exercise his right to a trial. *North Carolina v. Pearce (1969)*, 395 U.S. 711. In *U.S. v. Derrick (6 Cir. 1975)*, 519 F. 2d 1, the court wrote at page 3:

"\* \* \* it is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty

and go to trial, no matter how overwhelming the evidence of his guilt."

See also, *State v. Harrison* (1985), [\*28] Highland App. No. 561, unreported.

[HN10] Trial courts are vested with broad discretion in the determination of appropriate sentences. In the case sub judice the sentence issued by the trial court was within the parameters of the applicable statutes. We find nothing in the record to support appellant's assertion that he received a more severe sentence because he exercised his right to a trial. Appellant's argument that his sentence was more severe than the penalty he would have received had he entered either a guilty or no contest plea does not, standing alone, constitute an abuse of discretion. A judge must consider many factors, including the facts and circumstances of an offense, when making a determination of what constitutes an appropriate sentence. Clearly, after hearing the evidence adduced in a contested trial, the court below was fully aware of the facts and circumstances of the offense.

Appellate courts should not disturb sentencing decisions of the trial courts unless there is a clear abuse of discretion. *Miamisburg v. Smith* (1982), 5 Ohio App. 3d 109. We find no abuse of discretion in the case at bar.

Therefore, appellant's assignments of error relating [\*29] to the sentence imposed by the trial court are overruled.

#### XI

In his tenth assignment of error, appellant asserts that testimony regarding the calibration of the radar device was improperly admitted in evidence because " \* \* \* anything pertaining to his notes as his notes were not given in discoveries."

Once again, our review of the record reveals appellant did not object or otherwise raise this issue in the trial court. Consequently, appellant has waived his right to allege error on appeal. See *State v. Williams, supra*; and *State v. Ferrette, supra*. Accordingly, based upon the foregoing appellant's tenth assignment of error is overruled.

#### XII

In his thirty-second assignment of error appellant contends "a persons right to appeal is denied him when the court requires that person to purchase a transcript from and independent contractor and is charged a exhorbant fee (sic)."

[HN11] The duty to provide a transcript for appellate review falls upon appellant. See *App. R. 9(B)*. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. Also, *App. R. 9(C)* and [\*30] (D) set forth alternative procedures that may be used in providing a substitute statement of the evidence rather than providing an entire transcript of the proceedings.

We find no merit to appellant's contention. Therefore, appellant's thirty-second assignment is overruled.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of thirty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme

Court a memorandum in support of jurisdiction accompanied by a motion for a further stay from that court during the pendency of proceedings in that court. The stay as herein continued will terminate at the expiration of the thirty day period. The stay will also terminate if the Supreme Court refuses to hear the appeal prior to the expiration [\*31] of the thirty days. This stay is conditioned upon appellant filing a notice of appeal to the Supreme Court within seven days of entry of this judgment.

A certified copy of this entry shall constitute that mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

#### NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

130 of 195 DOCUMENTS

**State of Ohio and City of Wauseon, Appellee v. Tim H. Purdy, Appellant****No. 89FU000015****Court of Appeals of Ohio, Sixth Appellate District, Fulton County***1990 Ohio App. LEXIS 3286***August 10, 1990, Decided****PRIOR HISTORY:** [\*1]

Appeal from Trial Court No. 89TRD02214.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant sought review from an order of the Fulton County Court, Western District (Ohio), which found him guilty of speeding in violation of Wauseon, Ohio, Ordinance § 333.03.**OVERVIEW:** Defendant was found guilty of speeding, after being found not guilty of fleeing. On appeal, the court held that the record reflected evidence that the officer had calibrated his unit when he started his shift and again after defendant's arrest. The court determined that this evidence, plus the certificate of training from the state highway patrol, amply supported the conclusion that the radar unit was in good working condition, properly calibrated, and that the officer was well qualified to use it. The court found that the trial court's decision was supported by substantial, competent evidence and affirmed.**OUTCOME:** The court affirmed the order from the trial court.**CORE TERMS:** radar, reliability, speeding, judicial notice, calibrated, truck, assignment of error, stationary, traffic, speed, training, motor vehicle, patrol car, semi-truck, driver, expertise, visual, beyond a reasonable doubt, expert testimony, speed limit, certificate, well-taken, patrolman, traveling, fleeing, mph**LexisNexis(R) Headnotes***Evidence > Judicial Notice > Scientific & Technical Facts**Evidence > Scientific Evidence > General Overview*

[HN1] The reliability of a radar device may be established through the introduction of expert testimony or by the court taking judicial notice of it. However, in order for the court to take judicial notice of any evidence, the fact must be commonly accepted as true in the community for which the court sits. A court's authority to take judicial notice of a radar device's reliability when a patrol car is in a stationary position has long been established in Ohio. Specifically, the

Supreme Court of Ohio has held that a court may take judicial notice of the construction/scientific reliability and the method of operation in all cases involving stationary, Doppler effect radar devices.

***Evidence > Judicial Notice > General Overview***

***Evidence > Scientific Evidence > General Overview***

[HN2] Once judicial notice is taken as to the construction and reliability of a radar device, the court must further determine that (1) the device is in good condition and properly calibrated, and (2) the operator is one qualified for its use by training and experience. The testimony that a machine was properly calibrated does not need to be in the form of expert testimony, but may be from the officer who calibrated the unit prior to use.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN3] Wauseon, Ohio. Ordinance § 333.03(a) states: No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper having due regard to the traffic, surface and width of the street or highway and any other conditions.

**COUNSEL:**

Albert L. Potter, II, for appellant.

**JUDGES:**

George M. Glasser, Judge, Charles D. Abood, Judge, Melvin L. Resnick, Judge, Concur.

**OPINION:**

**DECISION AND JOURNAL ENTRY**

This case is on appeal from a judgment of the Fulton County Court, Western District, in which appellant, Tim Purdy, was found guilty of speeding in violation of Wauseon Codified Ordinance Section 333.03.

The facts of this case are as follows. On May 4, 1989, at approximately 1:13 p.m., Purdy was driving his semi-truck southbound on Shoop Avenue (Route 108) in the city of Wauseon, Ohio. At that same time, Keith O'Brien, a patrolman for the city of Wauseon, was in a stationary position in Detwiler Manor parking lot, running radar of traffic traveling on Shoop Avenue. The speed limit in this area of Shoop Avenue is thirty-five mph. After visually observing Purdy's truck within the city limits, which O'Brien believed was traveling at a rate of speed in excess of forty-five mph., O'Brien activated the KR-10 radar unit in his patrol car. The radar recorded a reading of fifty-two m.p.h. O'Brien [\*2] then placed the radar on hold, entered Shoop Avenue, turned on his emergency lights and pursued the truck. After activating all three stages of the siren and maneuvering his patrol car in and out of the other lane of traffic to get the truck driver's attention, the truck finally stopped. Purdy, the driver of the truck, was charged with violating Wauseon City Ordinances Section 333.03(a), exceeding the speed limit and Section 303.01(b), fleeing.

On June 27, 1988, in a bench trial, the court found the defendant not guilty of fleeing and delayed the decision on the charge of speeding until the status of the law on the KR-10 radar's reliability could be determined. On August 8, 1988, Purdy was found guilty of speeding.

It is from the judgment entry of August 8, 1988, that Purdy raises the following two assignments of error:

"I. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF SPEEDING WHERE THE STATE FAILED TO PROVE THROUGH INDEPENDENT EXPERT TESTIMONY THE RELIABILITY OF THE MODEL KR-10 RADAR DEVISE [sic] AS TO THE CONSTRUCTION AND METHOD OF OPERATION.

"II. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF SPEEDING WHERE THE STATE FAILED TO ESTABLISH THE ELEMENTS OF [\*3] THE OFFENSE BEYOND A REASONABLE DOUBT."

In Purdy's first assignment of error, he contends that the state failed to establish the reliability of the KR-10 radar device and therefore it was error for the court to find him guilty of speeding.

[HN1] The reliability of a radar device may be established through the introduction of expert testimony or by the court taking judicial notice of it. *State v. Doles (1980)*, 70 Ohio App. 2d 35, 38. However, in order for the court to take judicial notice of any evidence, the fact must be " \* \* \* commonly accepted as true in the community for which the court sits \* \* \* ." *Strain v. Issacs (1938)*, 59 Ohio App. 495, 514. A court's authority to take judicial notice of a radar device's reliability when a patrol car is in a stationary position has long been established in Ohio. Specifically, the Supreme Court of Ohio has held that a court may take judicial notice of the construction/scientific reliability and the method of operation in all cases involving stationary, Doppler effect radar devices. *East Cleveland v. Ferrell (1958)*, 168 Ohio St. 298, 303.

During the trial to the court below, Patrolman O'Brien testified that he was running radar [\*4] from a stationary position on the date of the 'citation. This testimony was not contradicted. The trial court, therefore, could properly take judicial notice of the reliability of the KR-10 radar device. Purdy's claim that the trial court failed to judicially notice the reliability of the radar device is not supported by the record. *Evid. R. 201(D)* and (F) state that judicial notice, whether requested or not, may be taken at any stage of the proceeding. Thus, the trial court, in ruling that Purdy was guilty of speeding, may be said to have judicially noticed the reliability of the radar unit. See *State v. Zeh (1982)*, 7 Ohio App. 3d 235, 237; see, also, *State v. Kinker (Mar. 4, 1983)*, Huron App. No. H-82-24, unreported.

[HN2] Once judicial notice is taken as to the construction and reliability of a radar device, the court must further determine that (1) the device is in good condition and properly calibrated, and (2) the operator is one qualified for its use by training and experience. *East Cleveland v. Ferrell, supra*, at 303. The testimony that a machine was properly calibrated does not need to be in the form of expert testimony, but may be from the officer who calibrated [\*5] the unit prior to use. *State v. Doles, supra*, at 39. See, also, *State v. Shelt (1976)*, 46 Ohio App. 2d 115, 118.

The record reflects evidence (the testimony of O'Brien) that O'Brien calibrated his unit when he started his shift and again after the arrest of Purdy. This evidence, plus the certificate of training from the Ohio State Highway Patrol, amply support the conclusion that the radar unit was in good working condition, properly calibrated, and that O'Brien was well qualified to use it.

O'Brien has had approximately four years experience tracking the speed of moving vehicles through the use of radar devices. Two of those years were spent in Fayette, Ohio, running radar on semi-trucks. The officer also produced a certificate of training in the theory, technical aspects, and practical use of traffic radar issued from the Ohio State Highway Patrol, which qualifies him to use radar.

Assuming arguendo that judicial notice had been improper, visual observation, based on the knowledge and expertise of the officer has been held to be a valid means of determining the speed of a vehicle. *Kirtland Hills v. Logan (1984)*, 21 Ohio App. 3d 67, 69; *State v. [\*6] Harkins (Aug. 5, 1987)*, Vinton App. No. 431, unreported.

Thus, O'Brien's visual observation of Purdy's speed, based on O'Brien's knowledge and expertise, would have been enough to support a guilty verdict on the issue of whether Purdy was speeding.

Accordingly, Purdy's first assignment of error is found not well-taken.

In his second assignment of error, Purdy argues that the state failed to establish the elements of the offense of speeding beyond a reasonable doubt. The Wauseon Codified Ordinance Section 333.03(a) [HN3] states:

"No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper having due regard to the traffic, surface and width of the street or highway and any other conditions \* \* \*."

Purdy claims that the city failed to establish that he was operating a motor vehicle, that the violation occurred on May 4, 1988, and that the violation occurred on a public street within the jurisdiction of the court. The record reflects that O'Brien identified Purdy as the driver of the semi-truck, a motor vehicle, and identified the location where the offense occurred, on Shoop Avenue in the city of Wauseon, a public highway. Purdy, himself, identified [\*7] the citation as being the one given to him by the officer. The citation is dated May 4, 1988, the day the violation occurred. The evidence clearly indicates that a reasonable trier of fact could have found the essential elements of the crime of speeding beyond a reasonable doubt. See *State v. Myers (1955)*, 164 Ohio St. 273; see, also, *Kirtland Hills, supra*, at 69. Therefore, upon review, the appellate court should affirm the judgment supported by substantial, competent evidence. *State v. Eley (1978)*, 56 Ohio St. 2d 169.

Accordingly, appellant's second assignment of error is found not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and the judgment of the Fulton County Court, Western District, is affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. See also Supp. R. 4, amended 1/1/80.

131 of 195 DOCUMENTS

**State of Ohio and City of Wauseon, Appellee v. Tim H. Purdy, Appellant****No. 89FU000015****Court of Appeals of Ohio, Sixth Appellate District, Fulton County***1990 Ohio App. LEXIS 3286***August 10, 1990, Decided****PRIOR HISTORY:** [\*1]

Appeal from Trial Court No. 89TRD02214.

**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant sought review from an order of the Fulton County Court, Western District (Ohio), which found him guilty of speeding in violation of Wauseon, Ohio, Ordinance § 333.03.**OVERVIEW:** Defendant was found guilty of speeding, after being found not guilty of fleeing. On appeal, the court held that the record reflected evidence that the officer had calibrated his unit when he started his shift and again after defendant's arrest. The court determined that this evidence, plus the certificate of training from the state highway patrol, amply supported the conclusion that the radar unit was in good working condition, properly calibrated, and that the officer was well qualified to use it. The court found that the trial court's decision was supported by substantial, competent evidence and affirmed.**OUTCOME:** The court affirmed the order from the trial court.**CORE TERMS:** radar, reliability, speeding, judicial notice, calibrated, truck, assignment of error, stationary, traffic, speed, training, motor vehicle, patrol car, semi-truck, driver, expertise, visual, beyond a reasonable doubt, expert testimony, speed limit, certificate, well-taken, patrolman, traveling, fleeing, mph**LexisNexis(R) Headnotes***Evidence > Judicial Notice > Scientific & Technical Facts**Evidence > Scientific Evidence > General Overview*

[HN1] The reliability of a radar device may be established through the introduction of expert testimony or by the court taking judicial notice of it. However, in order for the court to take judicial notice of any evidence, the fact must be commonly accepted as true in the community for which the court sits. A court's authority to take judicial notice of a radar device's reliability when a patrol car is in a stationary position has long been established in Ohio. Specifically, the

Supreme Court of Ohio has held that a court may take judicial notice of the construction/scientific reliability and the method of operation in all cases involving stationary, Doppler effect radar devices.

***Evidence > Judicial Notice > General Overview***

***Evidence > Scientific Evidence > General Overview***

[HN2] Once judicial notice is taken as to the construction and reliability of a radar device, the court must further determine that (1) the device is in good condition and properly calibrated, and (2) the operator is one qualified for its use by training and experience. The testimony that a machine was properly calibrated does not need to be in the form of expert testimony, but may be from the officer who calibrated the unit prior to use.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN3] Wauseon, Ohio. Ordinance § 333.03(a) states: No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper having due regard to the traffic, surface and width of the street or highway and any other conditions.

**COUNSEL:**

Albert L. Potter, II, for appellant.

**JUDGES:**

George M. Glasser, Judge, Charles D. Abood, Judge, Melvin L. Resnick, Judge, Concur.

**OPINION:**

**DECISION AND JOURNAL ENTRY**

This case is on appeal from a judgment of the Fulton County Court, Western District, in which appellant, Tim Purdy, was found guilty of speeding in violation of Wauseon Codified Ordinance Section 333.03.

The facts of this case are as follows. On May 4, 1989, at approximately 1:13 p.m., Purdy was driving his semi-truck southbound on Shoop Avenue (Route 108) in the city of Wauseon, Ohio. At that same time, Keith O'Brien, a patrolman for the city of Wauseon, was in a stationary position in Detwiler Manor parking lot, running radar of traffic traveling on Shoop Avenue. The speed limit in this area of Shoop Avenue is thirty-five mph. After visually observing Purdy's truck within the city limits, which O'Brien believed was traveling at a rate of speed in excess of forty-five mph., O'Brien activated the KR-10 radar unit in his patrol car. The radar recorded a reading of fifty-two m.p.h. O'Brien [\*2] then placed the radar on hold, entered Shoop Avenue, turned on his emergency lights and pursued the truck. After activating all three stages of the siren and maneuvering his patrol car in and out of the other lane of traffic to get the truck driver's attention, the truck finally stopped. Purdy, the driver of the truck, was charged with violating Wauseon City Ordinances Section 333.03(a), exceeding the speed limit and Section 303.01(b), fleeing.

On June 27, 1988, in a bench trial, the court found the defendant not guilty of fleeing and delayed the decision on the charge of speeding until the status of the law on the KR-10 radar's reliability could be determined. On August 8, 1988, Purdy was found guilty of speeding.

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"II. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF SPEEDING WHERE THE STATE FAILED TO ESTABLISH THE ELEMENTS OF [\*3] THE OFFENSE BEYOND A REASONABLE DOUBT."

In Purdy's first assignment of error, he contends that the state failed to establish the reliability of the KR-10 radar device and therefore it was error for the court to find him guilty of speeding.

[HN1] The reliability of a radar device may be established through the introduction of expert testimony or by the court taking judicial notice of it. *State v. Doles (1980), 70 Ohio App. 2d 35, 38*. However, in order for the court to take judicial notice of any evidence, the fact must be " \* \* \* commonly accepted as true in the community for which the court sits \* \* \* ." *Strain v. Issacs (1938), 59 Ohio App. 495, 514*. A court's authority to take judicial notice of a radar device's reliability when a patrol car is in a stationary position has long been established in Ohio. Specifically, the Supreme Court of Ohio has held that a court may take judicial notice of the construction/scientific reliability and the method of operation in all cases involving stationary, Doppler effect radar devices. *East Cleveland v. Ferrell (1958), 168 Ohio St. 298, 303*.

During the trial to the court below, Patrolman O'Brien testified that he was running radar [\*4] from a stationary position on the date of the 'citation. This testimony was not contradicted. The trial court, therefore, could properly take judicial notice of the reliability of the KR-10 radar device. Purdy's claim that the trial court failed to judicially notice the reliability of the radar device is not supported by the record. *Evid. R. 201(D)* and (F) state that judicial notice, whether requested or not, may be taken at any stage of the proceeding. Thus, the trial court, in ruling that Purdy was guilty of speeding, may be said to have judicially noticed the reliability of the radar unit. See *State v. Zeh (1982), 7 Ohio App. 3d 235, 237*; see, also, *State v. Kinker (Mar. 4, 1983), Huron App. No. H-82-24, unreported*.

[HN2] Once judicial notice is taken as to the construction and reliability of a radar device, the court must further determine that (1) the device is in good condition and properly calibrated, and (2) the operator is one qualified for its use by training and experience. *East Cleveland v. Ferrell, supra, at 303*. The testimony that a machine was properly calibrated does not need to be in the form of expert testimony, but may be from the officer who calibrated [\*5] the unit prior to use. *State v. Doles, supra, at 39*. See, also, *State v. Shelt (1976), 46 Ohio App. 2d 115, 118*.

The record reflects evidence (the testimony of O'Brien) that O'Brien calibrated his unit when he started his shift and again after the arrest of Purdy. This evidence, plus the certificate of training from the Ohio State Highway Patrol, amply support the conclusion that the radar unit was in good working condition, properly calibrated, and that O'Brien was well qualified to use it.

O'Brien has had approximately four years experience tracking the speed of moving vehicles through the use of radar devices. Two of those years were spent in Fayette, Ohio, running radar on semi-trucks. The officer also produced a certificate of training in the theory, technical aspects, and practical use of traffic radar issued from the Ohio State Highway Patrol, which qualifies him to use radar.

Assuming arguendo that judicial notice had been improper, visual observation, based on the knowledge and expertise of the officer has been held to be a valid means of determining the speed of a vehicle. *Kirtland Hills v. Logan (1984), 21 Ohio App. 3d 67, 69*; *State v. [\*6] Harkins (Aug. 5, 1987), Vinton App. No. 431, unreported*.

Thus, O'Brien's visual observation of Purdy's speed, based on O'Brien's knowledge and expertise, would have been enough to support a guilty verdict on the issue of whether Purdy was speeding.

Accordingly, Purdy's first assignment of error is found not well-taken.

In his second assignment of error, Purdy argues that the state failed to establish the elements of the offense of speeding beyond a reasonable doubt. The Wauseon Codified Ordinance Section 333.03(a) [HN3] states:

"No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper having due regard to the traffic, surface and width of the street or highway and any other conditions \* \* \*."

Purdy claims that the city failed to establish that he was operating a motor vehicle, that the violation occurred on May 4, 1988, and that the violation occurred on a public street within the jurisdiction of the court. The record reflects that O'Brien identified Purdy as the driver of the semi-truck, a motor vehicle, and identified the location where the offense occurred, on Shoop Avenue in the city of Wauseon, a public highway. Purdy, himself, identified [\*7] the citation as being the one given to him by the officer. The citation is dated May 4, 1988, the day the violation occurred. The evidence clearly indicates that a reasonable trier of fact could have found the essential elements of the crime of speeding beyond a reasonable doubt. See *State v. Myers (1955)*, 164 Ohio St. 273; see, also, *Kirtland Hills, supra*, at 69. Therefore, upon review, the appellate court should affirm the judgment supported by substantial, competent evidence. *State v. Eley (1978)*, 56 Ohio St. 2d 169.

Accordingly, appellant's second assignment of error is found not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and the judgment of the Fulton County Court, Western District, is affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. See also Supp. R. 4, amended 1/1/80.

132 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Ohio, Plaintiff-Appellee, v. Roger Rinehart, Defendant-Appellant****No. 1547****Court of Appeals of Ohio, Fourth Appellate District, Ross County***1990 Ohio App. LEXIS 2089***May 25, 1990, Released****DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment in the Ross County Court of Common Pleas Court, finding defendant guilty of operating a motor vehicle while under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(3)*.

**OVERVIEW:** Defendant was convicted of operating a motor vehicle while under the influence of alcohol. The breathalyzer test was conducted in January 28, 1988. At trial, he objected to the admission into evidence of the breathalyzer test results, alleging that the computer printout contained the wrong date for the calibration and breath test. A state trooper testified that he amended the report to reflect the correct year, explaining that, at the beginning of each new year, the year on the breath machine had to be manually changed. The trooper testified that the machine was not mistakenly not manually changed to 1988 until mid-February of 1988. The trial court erred admitted the test results. On appeal, the court concluded that the State presented sufficient evidence to support a finding that the instrument was in proper working order on January 28, 1988 and that the trooper had the qualifications to conduct the test. The court noted that the State presented sufficient evidence to support a finding that the requirements of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, *Ohio Rev. Code Ann. § 3701.143*, and controlling precedent.

**OUTCOME:** The court affirmed the judgment convicting defendant of operating a motor vehicle while under the influence of alcohol.

**CORE TERMS:** machine, breath test, working order, calibration, influence of alcohol, motor vehicle, admitting, recorded, verifier, printout, sufficient evidence to support, assignments of error, computer printout, date of filing, patrol, qualifications, administered, calibrated, manually, noticed, arrest, breath, drift, mile

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Scientific Evidence > Blood Alcohol*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN1] The results of a breathalyzer test, administered pursuant to *Ohio Rev. Code Ann. § 4511.19*, may only be admitted in evidence upon the affirmative establishment of facts supporting the following conditions:

- a. The bodily substance must be withdrawn within two hours of the time of such alleged violation.
- b. Such bodily substance shall be analyzed in accordance with methods approved by the director of health.
- c. The analyses shall be conducted by qualified individuals holding permits issued by the director of health pursuant to *Ohio Rev. Code Ann. § 3701.143*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN2] Before the results of a breathalyzer test given an accused are admissible in evidence against him, it is incumbent upon the state to show that the instrument was in proper working order and that its manipulator had the qualifications to conduct the test.

**COUNSEL:**

COUNSEL FOR APPELLANT: Edward R. Bunstine II, Chillicothe, Ohio.

COUNSEL FOR APPELLEE: William Corzine III, Chillicothe, Ohio.

**JUDGES:**

Lawrence Grey, Judge. Abele, P.J. & Harsha, J. concur in Judgment and Opinion.

**OPINION BY:**

GREY

**OPINION:****DECISION & JUDGMENT ENTRY**

This is an appeal from a judgment of the Ross County Common Pleas Court, finding Roger Rinehart guilty of operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(3)*.

The record reveals the following facts. At approximately 2:30 a.m. on January 28, 1988, Trooper James Fisher of the Chillicothe post of the state Highway Patrol, observed Rinehart's motor vehicle northbound on State Route 159. Trooper Fisher's radar device indicated that Rinehart was travelling fifty-five miles per hour in a forty-five mile per hour zone.

Trooper Fisher followed Rinehart and observed his vehicle drift left of the center line at a traffic light and, after acceleration, drift right to the edge of the roadway. Rinehart pulled into a restaurant parking lot. Trooper Fisher followed and asked Rinehart for his driver's license. Trooper Fisher noticed an odor of alcohol. Rinehart failed to satisfactorily [\*2] perform field coordination tests. He was placed under arrest for driving under the influence of alcohol and taken to the patrol post. Rinehart was given a breath test at 2:55 a.m. According to the computer printout of the breath test on the BAC verifier, Rinehart tested .174 grams by weight of alcohol per 210 liters of breath.

At trial, Rinehart objected to the admission into evidence of the test results. Rinehart alleged that the computer printout contained the wrong date for the calibration and breath test. The computer printouts indicate that the machine was calibrated on January 23, 1988 and the test administered on January 28, 1987. The actual dates were January 23, 1988 and January 28, 1988. The January 23, 1988 date had been hand changed from 1987 to 1988.

Trooper Fisher testified that he "emended" (sic) the report to reflect the correct year. Trooper Fisher explained that at the beginning of each new year, the year on the breath machine must be manually changed. According to Trooper Fisher, 1987 was not manually changed to 1988 until mid-February of 1988 when he noticed the error. Trooper Fisher testified that he then altered every test report form that had the incorrect [\*3] year.

Rinehart was convicted of operating a motor vehicle while under the influence of alcohol. Rinehart has filed a timely notice of appeal to this court.

#### "FIRST ASSIGNMENT OF ERROR

The trial court erred in admitting the results of the defendant's breath test where the state violated *Ohio Adm. Code 3701-53-04*, *3701-53-07*, and *Ohio Revised Code Section 3701.143*."

Rinehart argues that the failure to correct the year on the instrument creates a presumption that the operator has not been careful in maintaining the equipment in violation of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, and *R. C. 3701.143*.

The second paragraph of the syllabus of *City of Cincinnati v. Sands (1975)*, *43 Ohio St. 2d 79* provides, as follows:

[HN1] "The results of a Breathalyzer test, administered pursuant to *R.C. 4511.19*, may only be admitted in evidence upon the affirmative establishment of facts supporting the following conditions:

- a. The bodily substance must be withdrawn within two hours of the time of such alleged violation.
- b. Such bodily substance shall be analyzed in accordance with methods approved by the Director of Health.
- c. The analyses shall be conducted by qualified individuals [\*4] holding permits issued by the Director of Health pursuant to *R.C. 3701.143*."

The test was performed within two hours of the time of Rinehart's arrest. The solution was not used for more than three months after the date of the first use. The results of the calibration check were recorded and retained. Trooper Fisher care for and maintained the instrument and performed the calibration checks. The state presented sufficient evidence to support a finding that the requirements of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, *R.C. 3701.143*, and the first paragraph of the syllabus of *Sands, supra* were met.

Appellant's first assignment of error is overruled. Appellant's second and third assignments of error are related and will be jointly addressed.

#### "SECOND ASSIGNMENT OF ERROR

The trial court committed reversible error in admitting the results of appellant's breath test where complete and substantial compliance is required."

#### "THIRD ASSIGNMENT OF ERROR

The trial court erred in admitting a copy of the BAC verifier printout when data contained therein was erroneous and consequently the state failed to prove the BAC verifier was in proper working order."

Rinehart argues that the [\*5] failure to correct the year on the instrument creates a presumption that the machine was not in proper working order.

The sixth paragraph of the syllabus of *Mentor v. Giordano* (1975), 9 Ohio St. 2d 140 states:

[HN2] "Before the results of a Breathalyzer test given an accused are admissible in evidence against him, it is incumbent upon the state to show that the instrument was in proper working order and that its manipulator had the qualifications to conduct the test."

See also, *City of Cincinnati, supra*.

Trooper Fisher testified that he had been employed by the state highway patrol for ten and one-half years. He testified that he was qualified to operate the machine. Trooper Fisher's senior operator's permit was admitted into evidence. He testified that he properly calibrated the machine on January 23, 1988. The results of the calibration were recorded and retained. Trooper Fisher stated that the machine was in good operating order on January 28, 1988, that he properly administered the test in accordance with the regulations of the Ohio Department of Health, and that the machine was in good operating order after the test. The results of the test were recorded and [\*6] retained. Trooper Fisher gave a detailed, plausible explanation of how the error in the year occurred.

We note that the appellant's argument falls of its own weight. He argues the officer's making the handwritten correction of the wrong date is evidence of sloppy work. It is just the opposite. It is proof that the testing officer carefully checked and caught the machine's error, and did not accept the printout without first checking it for accuracy.

The state presented sufficient evidence to support a finding that the instrument was in proper working order on January 28, 1988 and that Trooper Fisher had the qualifications to conduct the test.

Appellant's second and third assignments of error are overruled and the decision of the common pleas court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute [\*7] the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

#### NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

133 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**State of Ohio, Plaintiff-Appellee, v. Roger Rinehart, Defendant-Appellant****No. 1547****Court of Appeals of Ohio, Fourth Appellate District, Ross County***1990 Ohio App. LEXIS 2089***May 25, 1990, Released****DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment in the Ross County Court of Common Pleas Court, finding defendant guilty of operating a motor vehicle while under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(3)*.

**OVERVIEW:** Defendant was convicted of operating a motor vehicle while under the influence of alcohol. The breathalyzer test was conducted in January 28, 1988. At trial, he objected to the admission into evidence of the breathalyzer test results, alleging that the computer printout contained the wrong date for the calibration and breath test. A state trooper testified that he amended the report to reflect the correct year, explaining that, at the beginning of each new year, the year on the breath machine had to be manually changed. The trooper testified that the machine was not mistakenly not manually changed to 1988 until mid-February of 1988. The trial court erred admitted the test results. On appeal, the court concluded that the State presented sufficient evidence to support a finding that the instrument was in proper working order on January 28, 1988 and that the trooper had the qualifications to conduct the test. The court noted that the State presented sufficient evidence to support a finding that the requirements of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, *Ohio Rev. Code Ann. § 3701.143*, and controlling precedent.

**OUTCOME:** The court affirmed the judgment convicting defendant of operating a motor vehicle while under the influence of alcohol.

**CORE TERMS:** machine, breath test, working order, calibration, influence of alcohol, motor vehicle, admitting, recorded, verifier, printout, sufficient evidence to support, assignments of error, computer printout, date of filing, patrol, qualifications, administered, calibrated, manually, noticed, arrest, breath, drift, mile

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Scientific Evidence > Blood Alcohol*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN1] The results of a breathalyzer test, administered pursuant to *Ohio Rev. Code Ann. § 4511.19*, may only be admitted in evidence upon the affirmative establishment of facts supporting the following conditions:

- a. The bodily substance must be withdrawn within two hours of the time of such alleged violation.
- b. Such bodily substance shall be analyzed in accordance with methods approved by the director of health.
- c. The analyses shall be conducted by qualified individuals holding permits issued by the director of health pursuant to *Ohio Rev. Code Ann. § 3701.143*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility*

*Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*

*Evidence > Scientific Evidence > Sobriety Tests*

[HN2] Before the results of a breathalyzer test given an accused are admissible in evidence against him, it is incumbent upon the state to show that the instrument was in proper working order and that its manipulator had the qualifications to conduct the test.

**COUNSEL:**

COUNSEL FOR APPELLANT: Edward R. Bunstine II, Chillicothe, Ohio.

COUNSEL FOR APPELLEE: William Corzine III, Chillicothe, Ohio.

**JUDGES:**

Lawrence Grey, Judge. Abele, P.J. & Harsha, J. concur in Judgment and Opinion.

**OPINION BY:**

GREY

**OPINION:****DECISION & JUDGMENT ENTRY**

This is an appeal from a judgment of the Ross County Common Pleas Court, finding Roger Rinehart guilty of operating a motor vehicle while under the influence of alcohol in violation of *R.C. 4511.19(A)(3)*.

The record reveals the following facts. At approximately 2:30 a.m. on January 28, 1988, Trooper James Fisher of the Chillicothe post of the state Highway Patrol, observed Rinehart's motor vehicle northbound on State Route 159. Trooper Fisher's radar device indicated that Rinehart was travelling fifty-five miles per hour in a forty-five mile per hour zone.

Trooper Fisher followed Rinehart and observed his vehicle drift left of the center line at a traffic light and, after acceleration, drift right to the edge of the roadway. Rinehart pulled into a restaurant parking lot. Trooper Fisher followed and asked Rinehart for his driver's license. Trooper Fisher noticed an odor of alcohol. Rinehart failed to satisfactorily [\*2] perform field coordination tests. He was placed under arrest for driving under the influence of alcohol and taken to the patrol post. Rinehart was given a breath test at 2:55 a.m. According to the computer printout of the breath test on the BAC verifier, Rinehart tested .174 grams by weight of alcohol per 210 liters of breath.

At trial, Rinehart objected to the admission into evidence of the test results. Rinehart alleged that the computer printout contained the wrong date for the calibration and breath test. The computer printouts indicate that the machine was calibrated on January 23, 1988 and the test administered on January 28, 1987. The actual dates were January 23, 1988 and January 28, 1988. The January 23, 1988 date had been hand changed from 1987 to 1988.

Trooper Fisher testified that he "emended" (sic) the report to reflect the correct year. Trooper Fisher explained that at the beginning of each new year, the year on the breath machine must be manually changed. According to Trooper Fisher, 1987 was not manually changed to 1988 until mid-February of 1988 when he noticed the error. Trooper Fisher testified that he then altered every test report form that had the incorrect [\*3] year.

Rinehart was convicted of operating a motor vehicle while under the influence of alcohol. Rinehart has filed a timely notice of appeal to this court.

#### "FIRST ASSIGNMENT OF ERROR

The trial court erred in admitting the results of the defendant's breath test where the state violated *Ohio Adm. Code 3701-53-04*, *3701-53-07*, and *Ohio Revised Code Section 3701.143*."

Rinehart argues that the failure to correct the year on the instrument creates a presumption that the operator has not been careful in maintaining the equipment in violation of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, and *R. C. 3701.143*.

The second paragraph of the syllabus of *City of Cincinnati v. Sands (1975)*, *43 Ohio St. 2d 79* provides, as follows:

[HN1] "The results of a Breathalyzer test, administered pursuant to *R.C. 4511.19*, may only be admitted in evidence upon the affirmative establishment of facts supporting the following conditions:

- a. The bodily substance must be withdrawn within two hours of the time of such alleged violation.
- b. Such bodily substance shall be analyzed in accordance with methods approved by the Director of Health.
- c. The analyses shall be conducted by qualified individuals [\*4] holding permits issued by the Director of Health pursuant to *R.C. 3701.143*."

The test was performed within two hours of the time of Rinehart's arrest. The solution was not used for more than three months after the date of the first use. The results of the calibration check were recorded and retained. Trooper Fisher care for and maintained the instrument and performed the calibration checks. The state presented sufficient evidence to support a finding that the requirements of *Ohio Adm. Code 3701-53-04* and *3701-53-07*, *R.C. 3701.143*, and the first paragraph of the syllabus of *Sands, supra* were met.

Appellant's first assignment of error is overruled. Appellant's second and third assignments of error are related and will be jointly addressed.

#### "SECOND ASSIGNMENT OF ERROR

The trial court committed reversible error in admitting the results of appellant's breath test where complete and substantial compliance is required."

#### "THIRD ASSIGNMENT OF ERROR

The trial court erred in admitting a copy of the BAC verifier printout when data contained therein was erroneous and consequently the state failed to prove the BAC verifier was in proper working order."

Rinehart argues that the [\*5] failure to correct the year on the instrument creates a presumption that the machine was not in proper working order.

The sixth paragraph of the syllabus of *Mentor v. Giordano* (1975), 9 Ohio St. 2d 140 states:

[HN2] "Before the results of a Breathalyzer test given an accused are admissible in evidence against him, it is incumbent upon the state to show that the instrument was in proper working order and that its manipulator had the qualifications to conduct the test."

See also, *City of Cincinnati, supra*.

Trooper Fisher testified that he had been employed by the state highway patrol for ten and one-half years. He testified that he was qualified to operate the machine. Trooper Fisher's senior operator's permit was admitted into evidence. He testified that he properly calibrated the machine on January 23, 1988. The results of the calibration were recorded and retained. Trooper Fisher stated that the machine was in good operating order on January 28, 1988, that he properly administered the test in accordance with the regulations of the Ohio Department of Health, and that the machine was in good operating order after the test. The results of the test were recorded and [\*6] retained. Trooper Fisher gave a detailed, plausible explanation of how the error in the year occurred.

We note that the appellant's argument falls of its own weight. He argues the officer's making the handwritten correction of the wrong date is evidence of sloppy work. It is just the opposite. It is proof that the testing officer carefully checked and caught the machine's error, and did not accept the printout without first checking it for accuracy.

The state presented sufficient evidence to support a finding that the instrument was in proper working order on January 28, 1988 and that Trooper Fisher had the qualifications to conduct the test.

Appellant's second and third assignments of error are overruled and the decision of the common pleas court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute [\*7] the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

#### NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

134 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee v. KERIC J. SHIEPIS,  
Defendant-Appellant**

**Case No. CA-7895**

**Court of Appeals of Ohio, Fifth Appellate District, Stark County**

*1989 Ohio App. LEXIS 4844*

**December 26, 1989, Decided**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from the Canton Municipal Court, Case No. 89-TRC-2289.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Canton Municipal Court, Stark County (Ohio), which convicted him of driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*.

**OVERVIEW:** Defendant's BAC verifier analysis results registered a .13 alcohol concentration level. He filed a motion to suppress the results. The trial court overruled the motion, holding that violations of regulations promulgated by the Ohio Director of Health in DUI cases did not rise to a constitutional level and were thus not bases for pretrial suppression hearings. On appeal, the court reversed. The court agreed with defendant's contention that the State failed to prove that the BAC verifier was properly calibrated and that the calibration solution was maintained in accordance with methods approved by the Director. The court noted that the trial court was not at liberty to disregard the suppression rules that were promulgated by the Ohio Supreme Court. The trial court erred as a matter of law by finding that violations of the regulations promulgated by the Director in DUI cases were not bases for pretrial suppression hearings.

**OUTCOME:** The court reversed the judgment of conviction and remanded the cause.

**CORE TERMS:** verifier, administered, motion to suppress, suppression hearing, admissibility, breath, regulations promulgated, suppression, contest, arresting officer, assignment of error, influence of alcohol, probable cause, speed, assignments of error, overruling, pretrial, alcohol concentration, motor vehicle, initial stop, breath test, cross-examine, particularity, questioned, attacking, arrested, driving, shotgun, twice, mile

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN1] The identity of the accused must be established beyond a reasonable doubt to warrant a conviction. The rule does not require the State to establish the identity of the accused at a suppression hearing, but only requires such at trial in order to convict.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN2] An attack on the admissibility of BAC verifier test results is properly raised in a defendant's pre-trial motion to suppress.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence***

[HN3] Pursuant to *Ohio R. Crim. P. 12(B)(3)*, any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions to suppress evidence must be raised before trial. Otherwise, failure to raise such motions will constitute a waiver by the defendant of his right to object to the admission of such evidence. Nothing in the criminal rules limits those motions to constitutional issues.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

***Criminal Law & Procedure > Trials > Entry of Judgments***

[HN4] *Ohio R. Crim. P. 12(H)* provides that the plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion to suppress evidence.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN5] In order to avoid the suppression of BAC results, the State has the burden of showing that the test was done in accordance with established law to the extent that the defendant takes issue with the legality of the test.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN6] Where defendant, in his motion to suppress, generally questions the accuracy of a BAC test, pursuant to *Ohio Rev. Code Ann. § 4511.19(B)* the State must clearly establish that said BAC verifier test was administered in accordance with the standards established by the Director of Health under *Ohio Rev. Code Ann. § 3701.143*.

**COUNSEL:**

FRANK FORCHIONE, Canton, Ohio, For Plaintiff-Appellee.

J. FRED STERGIOS, STERGIOS, KURTZMAN & STERGIOS CO., L.P.A., Massillon, Ohio, For Defendant-Appellant.

**JUDGES:**

Hon. W. Scott Gwin, J., Hon. Norman J. Putman, P.J., concurs. Hon. John R. Hoffman, J., dissents.

**OPINION BY:**

GWIN

**OPINION:**

OPINION

W. SCOTT GWIN, J.

On March 26, 1989, defendant-appellant, Keric J. Shiepis (appellant), was arrested by Trooper Robin L. Stotzer of the Ohio State Highway Patrol. Appellant's BAC verifier analysis results registered a .13 alcohol concentration level. Subsequently, appellant was charged with driving under the influence of alcohol or drugs in violation of *R.C. 4511.19(A)(1)* and operating a motor vehicle with an alcohol concentration of ten-hundredths of one gram or more per two hundred ten liters of his breath in violation of *R.C. 4511.19(A)(3)*.

Before trial, appellant filed a timely motion to suppress the results of the BAC verifier analysis. On May 12, 1989, a hearing was held on appellant's motion and the trial court, in its judgment entry filed May 16, held:

. . . the basic legal principle that violations of [\*2] regulations promulgated by the Ohio Director of Health in DUI cases do not rise to a constitutional level and are not thus bases for pretrial suppression hearings.

On May 23, 1989, appellant changed his plea to no contest and the trial court found appellant guilty on one count of DUI.

Appellant now seeks our review and raises the following assignments of error:

**ASSIGNMENT OF ERROR NO. I**

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO IDENTIFY APPELLANT AS THE INDIVIDUAL TESTED.

**ASSIGNMENT OF ERROR NO. II**

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO PROVE THAT THE BAC VERIFIER USED TO ADMINISTER THE TEST WAS CALIBRATED IN ACCORDANCE WITH METHODS APPROVED BY THE OHIO DIRECTOR OF HEALTH.

**ASSIGNMENT OF ERROR NO. III**

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO PROVE THE CALIBRATION SOLUTION WAS MAINTAINED IN ACCORDANCE WITH METHODS APPROVED BY THE OHIO DIRECTOR OF HEALTH.

In his first assignment, appellant [\*3] asserts that because the State failed to prove appellant's identity at the suppression hearing, the trial court erred in overruling appellant's motion to suppress the BAC results. In support of this assertion, appellant relies on the case of *State v. Scott (1965)*, 3 Ohio App.2d 239, 32 O.O.2d 360.

Appellant's reliance is misplaced. The rule set out in *Scott* states that [HN1] the identity of the accused must be established beyond a reasonable doubt to warrant a conviction.

Clearly, the above rule does not require the State to establish the identity of the accused at a suppression hearing, but only requires such at trial in order to convict.

Accordingly, appellant's first assignment of error is hereby overruled.

## II & III

In his second and third assignments, appellant claims that the trial court erred in overruling appellant's motion to suppress the BAC results because the State failed to prove that the BAC verifier was properly calibrated and that the calibration solution was maintained in accordance with methods approved by the Ohio Director of Health. We agree.

It has been repeatedly held that [HN2] an attack on the admissibility of BAC verifier test results is properly raised in a defendant's [\*4] pre-trial motion to suppress. *City of Delaware v. Porteus* (April 14, 1989), Delaware App. No. 88-CA-19, unreported; *State v. Rafter (1985)*, 26 Ohio App.3d 39, 40.

[HN3] Pursuant to *Crim. R. 12(B)(3)*, which codifies the rule set out in syllabus one of *State v. Davis (1964)*, 1 Ohio St.2d 28:

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

...

(3) Motions to suppress evidence . . .

(Emphasis added).

Otherwise, failure to raise such motions will constitute a waiver by the defendant of his right to object to the admission of such evidence. Nothing in the criminal rules limits those motions to constitutional issues.

Furthermore, *Crim. R. (12)(H)* [HN4] provides that "[t]he plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a . . . pretrial motion to suppress evidence."

Here, the trial court stated, in its judgment entry, that ". . . courts of appeals are permitting motions to suppress where issues are statutory or involve administrative procedure." However, [\*5] the trial court continues, such motions are "wasteful of the court's resources. . . ."

We note that the suppression rules discussed above were promulgated by the Ohio Supreme Court. The trial court is not at liberty to disregard them.

In practice, they promote judicial economy. The great bulk of DUI cases ends with the determination of the issue of the admissibility of the chemical test, and this is accomplished by a motion to suppress without a comprehensive trial of all other issues. See *State v. Hennessee (1984)*, 13 Ohio App.3d 436.

Therefore, the trial court erred as a matter of law in its judgment finding that violations of regulations promulgated

by the Ohio Director of Health in DUI cases are not bases for pretrial suppression hearings.

[HN5] In order to avoid the suppression of the BAC results, the State has the burden of showing "that the test was done in accordance with established law to the extent that the defendant takes issue with the legality of the test." *State v. Gasser (1980)*, 5 Ohio App.3d 217, 19. In the case sub judice, the record clearly establishes that appellant, [HN6] in his motion to suppress, generally questioned the accuracy of the test. n1 Therefore, pursuant [\*6] to R.C. 4511.19(B) the State must clearly establish that said BAC verifier test was administered in accordance with the standards established by the Director of Health under R.C. 3701.143. *Cincinnati v. Sand (1975)*, 43 Ohio St.2d 79, 86.

n1 We are well aware of the "shotgun" approach in attacking the admissibility of the BAC verifier test results on the grounds of noncompliance with the regulations promulgated by the Ohio Director of Health. However, the trial court has at its disposal *Crim. R. 47* which requires all motions to "state with particularity the grounds upon which it is made. . . ." Instead of the trial court here requiring appellant to file a motion in compliance with *Crim. R. 47*, it erroneously found that motions to suppress are the improper avenue to attack the admissibility of BAC verifier test results.

There is no such evidence in this record, and therefore the trial court erred in overruling appellant's motion to suppress the results of the BAC verifier test.

Accordingly, appellant's second and third assignments of error are hereby sustained and the judgment of the Canton Municipal Court, Stark County, Ohio, is hereby reversed.

**DISSENT BY:**

HOFFMAN

**DISSENT:** HOFFMAN, J. - Dissenting [\*7]

I dissent. The judgment of the trial court must be affirmed.

An appellate court's examination of the trial court record should be limited to a determination as to whether or not the evidence presented which if believed would convince the average mind of the defendant's guilt beyond a reasonable doubt. *Atkins v. State (1926)*, 115 Ohio St. 542, 546, and *State v. Sorgee (1978)*, 54 Ohio St.2d 464, 465.

In this case, the defendant was charged with operating a motor vehicle while under the influence of alcohol in violation of both§ O R.C. 4511.19(A)(1) and R.C. 4511.19(A)(3). Appellant was found guilty of violation of both§ O R.C. 4511.19(A)(1) and R.C. 4511.19(A)(3) after pleading no contest to the charges.

It is self evident from the sole undisputed testimony of the arresting officer and the finding of the trial court (as a result of the suppression hearing on May 12, 1989) that the arresting officer had probable cause for the initial stop of the appellant after observing appellant driving at a speed of seventy miles per hour and twice off the road onto the berm one or two feet.

Q. Okay, please describe to the Court the circumstances of that traffic stop.

A. I was behind [\*8] a '88 Mazda that was travelling from Everhard Road, southbound on 77 at a high rate of speed. I continued to follow the car; I paced it at 70 mile an hour. Also I checked with the radar, the speed and it also said seventy mile an hour. It was consistently seventy mile an hour. He also drove onto the berm, one to two foot, twice. I then . . .

Suppression Hearing, T.9, 10.

It is further self evident from the testimony of the arresting officer and the findings of fact of the trial court that the arresting officer had probable cause to allow a breath analysis test to be administered to appellant after the initial stop. When questioned as to what happened after he stopped the appellant, the officer testified:

A. I arrived at the driver's window, he rolled the window down. I advised him that, why I had stopped him and I asked him if he had been drinking. He stated, no, he had not been drinking. I could then smell a strong odor of an alcoholic beverage on his breath. I could see bloodshot eyes on his eyes. And he looked intoxicated.

T.10.

The officer further testified that after asking appellant for his driver's license which appellant had difficulty producing, the officer gave him [\*9] the gaze nystagmus while appellant was still sitting in the car and which indicated that he would test over .10%.

The officer then proceeded to have appellant perform some coordination tests:

Q. And did you, did you administer these tests?

A. Yes, I did. I administered the walk-and-turn skills; he had difficulty doing them. He had difficulty with his balance, he was swaying, he had to sidestep to catch his balance, he staggered. I had to tell him out loud to count three times, out loud. I also had to tell him to wait until I had explained all the instructions before he started. I had to tell him that a couple times. He had very much difficulty doing the tests. It was obvious he was under the influence of alcohol. I then gave him the gaze and nystagmus again outside the car. He scored a total of six out of a possible six. I then arrested him for DUI, Mirandized him, took him out to the Stark County Sheriff's Office.

T.11, 12. (Emphasis added).

At this point, it is essential to note that whatever the outcome as to the validity of the subsequent breath test administered to appellant (which applies only to *R.C. 4511.19(A)(3)*) probable cause to charge appellant with violation [\*10] of *R.C. 4511.19(A)(1)* was established at the suppression hearing. Appellant's subsequent "no contest" plea to the court prior to the scheduled trial on May 23, 1989, was made to both *R.C. 4511.19(A)(1)* and *R.C. 4511.19(A)(3)*.

" *R.C. 4511.19(A)(1)*, (2), (3), and (4) create separate offenses, i.e., the statute describes these offenses in the disjunctive." *State v. Wilcox (1983)*, 10 Ohio App.3d 11, syllabus 2.

The effect of a plea of "no contest" under *Crim. R. 12* is to admit all the facts alleged in the charging instrument.

Accordingly, none of the assignments of error as to the violation of *R.C. 4511.19(A)(1)* should be well taken and each is overruled by reason that none is affirmatively demonstrated by the record.

In addition to appellant's failure to affirmatively demonstrate error upon the part of the trial court in finding him guilty of the violation of *R.C. 4511.19(A)(1)*, I must also dissent from the majority's opinion as to the adequacy of the State's proof that the breath analysis test was not conducted in accordance with the Department of Health Regulations listed in the Ohio Administrative Code.

From the record, it is clear that that portion of appellant's motion to suppress [\*11] which challenges the proper administration of the breath alcohol test lacks the specificity required by *Crim. R. 47* to do so. The motion does not state with particularity the grounds upon which it is made nor does it support said challenge by memorandum containing citations of authority or affidavit. The transcript of the record made at the suppression hearing clearly demonstrates that appellant did use a "shotgun" approach in attacking the admissibility of the BAC verifier test and, in fact, failed to challenge the testimony of the officer who administered the test by electing not to cross-examine the officer after he had

testified to his competency to administer the test and that the test on the appellant was administered in accord with the rules and regulations as promulgated by the Ohio Department of Health.

Upon conclusion of the State's examination of the officer, appellant elected not to cross-examine the officer, thus leaving his testimony unchallenged.

I agree most wholeheartedly with the majority's opinion that the trial court erred in its finding "that violations of regulations promulgated by the Ohio Director of Health in DUI cases are no basis for pretrial suppression [\*12] hearings." Majority Opinion, p.4. However, from the state of the record, I cannot agree with the majority opinion that the State did not meet its burden of proof in establishing that the breath test administered to the appellant was not in accord with the regulations promulgated by the Ohio Department of Health.

The judgment of the trial court should be affirmed in its entirety.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, and pursuant to *App. R. 12(C)*, final judgment of acquittal is hereby entered.

135 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**STATE OF OHIO, Plaintiff-Appellee v. KERIC J. SHIEPIS,  
Defendant-Appellant**

**Case No. CA-7895**

**Court of Appeals of Ohio, Fifth Appellate District, Stark County**

*1989 Ohio App. LEXIS 4844*

**December 26, 1989, Decided**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal Appeal from the Canton Municipal Court, Case No. 89-TRC-2289.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Canton Municipal Court, Stark County (Ohio), which convicted him of driving under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(1)*.

**OVERVIEW:** Defendant's BAC verifier analysis results registered a .13 alcohol concentration level. He filed a motion to suppress the results. The trial court overruled the motion, holding that violations of regulations promulgated by the Ohio Director of Health in DUI cases did not rise to a constitutional level and were thus not bases for pretrial suppression hearings. On appeal, the court reversed. The court agreed with defendant's contention that the State failed to prove that the BAC verifier was properly calibrated and that the calibration solution was maintained in accordance with methods approved by the Director. The court noted that the trial court was not at liberty to disregard the suppression rules that were promulgated by the Ohio Supreme Court. The trial court erred as a matter of law by finding that violations of the regulations promulgated by the Director in DUI cases were not bases for pretrial suppression hearings.

**OUTCOME:** The court reversed the judgment of conviction and remanded the cause.

**CORE TERMS:** verifier, administered, motion to suppress, suppression hearing, admissibility, breath, regulations promulgated, suppression, contest, arresting officer, assignment of error, influence of alcohol, probable cause, speed, assignments of error, overruling, pretrial, alcohol concentration, motor vehicle, initial stop, breath test, cross-examine, particularity, questioned, attacking, arrested, driving, shotgun, twice, mile

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN1] The identity of the accused must be established beyond a reasonable doubt to warrant a conviction. The rule does not require the State to establish the identity of the accused at a suppression hearing, but only requires such at trial in order to convict.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

[HN2] An attack on the admissibility of BAC verifier test results is properly raised in a defendant's pre-trial motion to suppress.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence***

[HN3] Pursuant to *Ohio R. Crim. P. 12(B)(3)*, any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions to suppress evidence must be raised before trial. Otherwise, failure to raise such motions will constitute a waiver by the defendant of his right to object to the admission of such evidence. Nothing in the criminal rules limits those motions to constitutional issues.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Guilty Pleas > No Contest Pleas***

***Criminal Law & Procedure > Trials > Entry of Judgments***

[HN4] *Ohio R. Crim. P. 12(H)* provides that the plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion to suppress evidence.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN5] In order to avoid the suppression of BAC results, the State has the burden of showing that the test was done in accordance with established law to the extent that the defendant takes issue with the legality of the test.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN6] Where defendant, in his motion to suppress, generally questions the accuracy of a BAC test, pursuant to *Ohio Rev. Code Ann. § 4511.19(B)* the State must clearly establish that said BAC verifier test was administered in accordance with the standards established by the Director of Health under *Ohio Rev. Code Ann. § 3701.143*.

**COUNSEL:**

FRANK FORCHIONE, Canton, Ohio, For Plaintiff-Appellee.

J. FRED STERGIOS, STERGIOS, KURTZMAN & STERGIOS CO., L.P.A., Massillon, Ohio, For Defendant-Appellant.

**JUDGES:**

Hon. W. Scott Gwin, J., Hon. Norman J. Putman, P.J., concurs. Hon. John R. Hoffman, J., dissents.

**OPINION BY:**

GWIN

**OPINION:**

OPINION

W. SCOTT GWIN, J.

On March 26, 1989, defendant-appellant, Keric J. Shiepis (appellant), was arrested by Trooper Robin L. Stotzer of the Ohio State Highway Patrol. Appellant's BAC verifier analysis results registered a .13 alcohol concentration level. Subsequently, appellant was charged with driving under the influence of alcohol or drugs in violation of *R.C. 4511.19(A)(1)* and operating a motor vehicle with an alcohol concentration of ten-hundredths of one gram or more per two hundred ten liters of his breath in violation of *R.C. 4511.19(A)(3)*.

Before trial, appellant filed a timely motion to suppress the results of the BAC verifier analysis. On May 12, 1989, a hearing was held on appellant's motion and the trial court, in its judgment entry filed May 16, held:

. . . the basic legal principle that violations of [\*2] regulations promulgated by the Ohio Director of Health in DUI cases do not rise to a constitutional level and are not thus bases for pretrial suppression hearings.

On May 23, 1989, appellant changed his plea to no contest and the trial court found appellant guilty on one count of DUI.

Appellant now seeks our review and raises the following assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO IDENTIFY APPELLANT AS THE INDIVIDUAL TESTED.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO PROVE THAT THE BAC VERIFIER USED TO ADMINISTER THE TEST WAS CALIBRATED IN ACCORDANCE WITH METHODS APPROVED BY THE OHIO DIRECTOR OF HEALTH.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BREATH ALCOHOL TEST BECAUSE THE STATE FAILED TO PROVE THE CALIBRATION SOLUTION WAS MAINTAINED IN ACCORDANCE WITH METHODS APPROVED BY THE OHIO DIRECTOR OF HEALTH.

In his first assignment, appellant [\*3] asserts that because the State failed to prove appellant's identity at the suppression hearing, the trial court erred in overruling appellant's motion to suppress the BAC results. In support of this assertion, appellant relies on the case of *State v. Scott (1965)*, 3 Ohio App.2d 239, 32 O.O.2d 360.

Appellant's reliance is misplaced. The rule set out in *Scott* states that [HN1] the identity of the accused must be established beyond a reasonable doubt to warrant a conviction.

Clearly, the above rule does not require the State to establish the identity of the accused at a suppression hearing, but only requires such at trial in order to convict.

Accordingly, appellant's first assignment of error is hereby overruled.

## II & III

In his second and third assignments, appellant claims that the trial court erred in overruling appellant's motion to suppress the BAC results because the State failed to prove that the BAC verifier was properly calibrated and that the calibration solution was maintained in accordance with methods approved by the Ohio Director of Health. We agree.

It has been repeatedly held that [HN2] an attack on the admissibility of BAC verifier test results is properly raised in a defendant's [\*4] pre-trial motion to suppress. *City of Delaware v. Porteus* (April 14, 1989), Delaware App. No. 88-CA-19, unreported; *State v. Rafter (1985)*, 26 Ohio App.3d 39, 40.

[HN3] Pursuant to *Crim. R. 12(B)(3)*, which codifies the rule set out in syllabus one of *State v. Davis (1964)*, 1 Ohio St.2d 28:

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

...

(3) Motions to suppress evidence . . .

(Emphasis added).

Otherwise, failure to raise such motions will constitute a waiver by the defendant of his right to object to the admission of such evidence. Nothing in the criminal rules limits those motions to constitutional issues.

Furthermore, *Crim. R. (12)(H)* [HN4] provides that "[t]he plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a . . . pretrial motion to suppress evidence."

Here, the trial court stated, in its judgment entry, that ". . . courts of appeals are permitting motions to suppress where issues are statutory or involve administrative procedure." However, [\*5] the trial court continues, such motions are "wasteful of the court's resources. . . ."

We note that the suppression rules discussed above were promulgated by the Ohio Supreme Court. The trial court is not at liberty to disregard them.

In practice, they promote judicial economy. The great bulk of DUI cases ends with the determination of the issue of the admissibility of the chemical test, and this is accomplished by a motion to suppress without a comprehensive trial of all other issues. See *State v. Hennessee (1984)*, 13 Ohio App.3d 436.

Therefore, the trial court erred as a matter of law in its judgment finding that violations of regulations promulgated

by the Ohio Director of Health in DUI cases are not bases for pretrial suppression hearings.

[HN5] In order to avoid the suppression of the BAC results, the State has the burden of showing "that the test was done in accordance with established law to the extent that the defendant takes issue with the legality of the test." *State v. Gasser (1980)*, 5 Ohio App.3d 217, 19. In the case sub judice, the record clearly establishes that appellant, [HN6] in his motion to suppress, generally questioned the accuracy of the test. n1 Therefore, pursuant [\*6] to R.C. 4511.19(B) the State must clearly establish that said BAC verifier test was administered in accordance with the standards established by the Director of Health under R.C. 3701.143. *Cincinnati v. Sand (1975)*, 43 Ohio St.2d 79, 86.

n1 We are well aware of the "shotgun" approach in attacking the admissibility of the BAC verifier test results on the grounds of noncompliance with the regulations promulgated by the Ohio Director of Health. However, the trial court has at its disposal *Crim. R. 47* which requires all motions to "state with particularity the grounds upon which it is made. . . ." Instead of the trial court here requiring appellant to file a motion in compliance with *Crim. R. 47*, it erroneously found that motions to suppress are the improper avenue to attack the admissibility of BAC verifier test results.

There is no such evidence in this record, and therefore the trial court erred in overruling appellant's motion to suppress the results of the BAC verifier test.

Accordingly, appellant's second and third assignments of error are hereby sustained and the judgment of the Canton Municipal Court, Stark County, Ohio, is hereby reversed.

**DISSENT BY:**

HOFFMAN

**DISSENT:** HOFFMAN, J. - Dissenting [\*7]

I dissent. The judgment of the trial court must be affirmed.

An appellate court's examination of the trial court record should be limited to a determination as to whether or not the evidence presented which if believed would convince the average mind of the defendant's guilt beyond a reasonable doubt. *Atkins v. State (1926)*, 115 Ohio St. 542, 546, and *State v. Sorgee (1978)*, 54 Ohio St.2d 464, 465.

In this case, the defendant was charged with operating a motor vehicle while under the influence of alcohol in violation of both§ O R.C. 4511.19(A)(1) and R.C. 4511.19(A)(3). Appellant was found guilty of violation of both§ O R.C. 4511.19(A)(1) and R.C. 4511.19(A)(3) after pleading no contest to the charges.

It is self evident from the sole undisputed testimony of the arresting officer and the finding of the trial court (as a result of the suppression hearing on May 12, 1989) that the arresting officer had probable cause for the initial stop of the appellant after observing appellant driving at a speed of seventy miles per hour and twice off the road onto the berm one or two feet.

Q. Okay, please describe to the Court the circumstances of that traffic stop.

A. I was behind [\*8] a '88 Mazda that was travelling from Everhard Road, southbound on 77 at a high rate of speed. I continued to follow the car; I paced it at 70 mile an hour. Also I checked with the radar, the speed and it also said seventy mile an hour. It was consistently seventy mile an hour. He also drove onto the berm, one to two foot, twice. I then . . .

Suppression Hearing, T.9, 10.

It is further self evident from the testimony of the arresting officer and the findings of fact of the trial court that the arresting officer had probable cause to allow a breath analysis test to be administered to appellant after the initial stop. When questioned as to what happened after he stopped the appellant, the officer testified:

A. I arrived at the driver's window, he rolled the window down. I advised him that, why I had stopped him and I asked him if he had been drinking. He stated, no, he had not been drinking. I could then smell a strong odor of an alcoholic beverage on his breath. I could see bloodshot eyes on his eyes. And he looked intoxicated.

T.10.

The officer further testified that after asking appellant for his driver's license which appellant had difficulty producing, the officer gave him [\*9] the gaze nystagmus while appellant was still sitting in the car and which indicated that he would test over .10%.

The officer then proceeded to have appellant perform some coordination tests:

Q. And did you, did you administer these tests?

A. Yes, I did. I administered the walk-and-turn skills; he had difficulty doing them. He had difficulty with his balance, he was swaying, he had to sidestep to catch his balance, he staggered. I had to tell him out loud to count three times, out loud. I also had to tell him to wait until I had explained all the instructions before he started. I had to tell him that a couple times. He had very much difficulty doing the tests. It was obvious he was under the influence of alcohol. I then gave him the gaze and nystagmus again outside the car. He scored a total of six out of a possible six. I then arrested him for DUI, Mirandized him, took him out to the Stark County Sheriff's Office.

T.11, 12. (Emphasis added).

At this point, it is essential to note that whatever the outcome as to the validity of the subsequent breath test administered to appellant (which applies only to *R.C. 4511.19(A)(3)*) probable cause to charge appellant with violation [\*10] of *R.C. 4511.19(A)(1)* was established at the suppression hearing. Appellant's subsequent "no contest" plea to the court prior to the scheduled trial on May 23, 1989, was made to both *R.C. 4511.19(A)(1)* and *R.C. 4511.19(A)(3)*.

" *R.C. 4511.19(A)(1)*, (2), (3), and (4) create separate offenses, i.e., the statute describes these offenses in the disjunctive." *State v. Wilcox (1983)*, 10 Ohio App.3d 11, syllabus 2.

The effect of a plea of "no contest" under *Crim. R. 12* is to admit all the facts alleged in the charging instrument.

Accordingly, none of the assignments of error as to the violation of *R.C. 4511.19(A)(1)* should be well taken and each is overruled by reason that none is affirmatively demonstrated by the record.

In addition to appellant's failure to affirmatively demonstrate error upon the part of the trial court in finding him guilty of the violation of *R.C. 4511.19(A)(1)*, I must also dissent from the majority's opinion as to the adequacy of the State's proof that the breath analysis test was not conducted in accordance with the Department of Health Regulations listed in the Ohio Administrative Code.

From the record, it is clear that that portion of appellant's motion to suppress [\*11] which challenges the proper administration of the breath alcohol test lacks the specificity required by *Crim. R. 47* to do so. The motion does not state with particularity the grounds upon which it is made nor does it support said challenge by memorandum containing citations of authority or affidavit. The transcript of the record made at the suppression hearing clearly demonstrates that appellant did use a "shotgun" approach in attacking the admissibility of the BAC verifier test and, in fact, failed to challenge the testimony of the officer who administered the test by electing not to cross-examine the officer after he had

testified to his competency to administer the test and that the test on the appellant was administered in accord with the rules and regulations as promulgated by the Ohio Department of Health.

Upon conclusion of the State's examination of the officer, appellant elected not to cross-examine the officer, thus leaving his testimony unchallenged.

I agree most wholeheartedly with the majority's opinion that the trial court erred in its finding "that violations of regulations promulgated by the Ohio Director of Health in DUI cases are no basis for pretrial suppression [\*12] hearings." Majority Opinion, p.4. However, from the state of the record, I cannot agree with the majority opinion that the State did not meet its burden of proof in establishing that the breath test administered to the appellant was not in accord with the regulations promulgated by the Ohio Department of Health.

The judgment of the trial court should be affirmed in its entirety.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, and pursuant to *App. R. 12(C)*, final judgment of acquittal is hereby entered.

136 of 195 DOCUMENTS

**THE STATE OF OHIO, Plaintiff-Appellee v. CHERILYN A. KNIFE,  
Defendant-Appellant**

Case No. 88 CA 41

Court of Appeals of Ohio, Second Appellate District, Miami County

*1989 Ohio App. LEXIS 3044*

August 2, 1989, Decided

**PRIOR HISTORY:** [\*1]

88-TRD-8239-S-SHER

**DISPOSITION:**

The judgment will be affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed her conviction in the Miami County Municipal Court (Ohio), for speeding in violation of *Ohio Rev. Code Ann. § 4511.21(D)*.

**OVERVIEW:** Defendant was charged with violating § 4511.21, which prohibited driving at a rate of speed in excess of 55 miles per hour. At the trial, a deputy sheriff testified that he observed a silver-colored car traveling at a rather high speed. He stated that he activated his K-55 radar device and that the K-55 read the silver car's speed as 70 miles per hour. The speed limit was 55 miles per hour. Defendant cross-examined the deputy sheriff and offered no other evidence. She appealed her conviction, challenging the accuracy of the K-55 and the qualifications of the deputy sheriff to properly read the K-55. The court held that there was sufficient evidence that the deputy sheriff was qualified to operate the K-55 and that the K-55 was working properly. The court also concluded that defendant's citation was not misleading simply because it failed to state in particular which subsection of § 4511.21 defendant had violated by traveling at 70 miles per hour in a 55 miles per hour speed zone. The court's amendment of the citation to note that she violated subsection (D) of § 4511.21 was proper under *Ohio R. Crim. P. 7(D)*.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** speed, radar, mile, assignment of error, traveling, prima facie, driving, reasonable doubt, qualifications, speedometer, misleading, accuracy, target, patrol, expert testimony, statutory limit, judicial notice, guilt beyond, zone, convince, trier, good operating condition, assignments of error, charging document, failed to prove, speed meter, speed limit, high speed, silver-colored, calibration

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN1] *Ohio Rev. Code Ann. § 4511.21(D)* states, in part, as follows: No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows: (1) At a speed exceeding 55 miles per hour, except upon a freeway as provided in *Ohio Rev. Code Ann. § 4511.21(B)(10)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN2] Expert testimony is no longer necessary in cases involving stationary radar units.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN3] Readings of a radar speed meter may be accepted in evidence, just as photographs, x-rays, and the like are accepted, without the necessity of offering expert testimony as to the scientific principles underlying them.

***Criminal Law & Procedure > Witnesses > Credibility******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence******Evidence > Procedural Considerations > Weight & Sufficiency***

[HN4] The appellate court will not reverse the judgment of a lower court as being against the weight of the evidence if there is evidence that, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Furthermore, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.

***Criminal Law & Procedure > Accusatory Instruments > General Overview******Criminal Law & Procedure > Discovery & Inspection > Bills of Particulars***

[HN5] *Ohio R. Crim. P. 7(D)* states, in part, as follows: The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN6] What is "reasonable and proper under the circumstances," within the meaning of *Ohio Rev. Code Ann. § 4511.21*, is a question of fact. Where there is sufficient evidence to support a finding of guilty, a conviction will not be set aside.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] The single basic requirement of *Ohio Rev. Code Ann. § 4511.21* is that the speed be reasonable under the circumstances existing. The statutory limits for various types of roads or highways furnishes a two pronged presumption affecting the presentation of evidence. A speed in excess of the statutory limit is a prima facie unreasonable speed; a speed at or below that statutory limit is a prima facie reasonable speed. But the ultimate criterion is that the speed be reasonable considering the conditions then existing.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*  
*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview*

[HN8] Whether or not a particular speed was reasonable within the meaning of *Ohio Rev. Code Ann. § 4511.21* is essentially a matter for determination by the trier of facts.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*  
*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN9] The appellate court's review as to whether a speed of driving was unreasonable for the conditions is limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

**COUNSEL:**

TONYA K. THIEMAN, Prosecuting Attorney, Miami County Municipal Court, Troy, Ohio, Attorney for Plaintiff-Appellee.

CHERILYN A. KNIFE, 134 McKinley Avenue, West Milton, Ohio, Defendant-Appellant.

**JUDGES:**

WOLFF, P.J., WILSON, J., and GRADY, J., concur.

**OPINION BY:**

WOLFF

**OPINION:**

WOLFF, P.J.

Cherilyn Knife appeals from the Miami County Municipal Court October 18, 1988, journal entry which stated that a trial was held and that Knife was found guilty of violating *R.C. 4511.21(D)*, and which, accordingly, assessed a fine and costs. Section 4511.21(D) [HN1] states, in pertinent part, as follows:

No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:

(1) At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in division (B)(10) of this section.

At the trial, the state presented testimony by Deputy Sheriff Douglas K. Kirk. Kirk testified that at 7:40 p.m. on September 26, 1988, he observed a silver-colored car traveling westbound on State Route 571 at a "rather high speed." He stated that he activated his K-55 radar device and that the K-55 read the silver car's speed as 70 miles per hour. Kirk [\*2] stated that the speed limit on State Route 571 was 55 miles per hour.

Knife, representing herself, cross-examined Kirk and offered no other evidence.

At the close of the testimony, the court stated:

[This court finds] that the state has shown all those elements they are required to show. Namely, the car was observed before the radar unit was turned on, the Doppler sound was consistent with the speed observed the target window was consistent with the speed observed in the Doppler. The speedometer and the vehicle window were the same and that the officer did not view an incorrect reading, that he has viewed them before and that in his opinion it was a proper reading.

And so the State has shown all the elements as required and therefore would find the Defendant is guilty and will impose a fine of fifteen dollars and costs.

Knife raises four assignments of error in this appeal:

As required by case law in Ohio, the State failed to prove:

(i) that the particular radar unit was properly set up and in good operating condition; (ii) the operator was qualified, both through training and experience, to enable him to properly operate the radar; (iii) and the operator properly read the radar [\*3] unit and identified the target.

The trial court improperly amended the officer's traffic citation, which was vague, misleading, and inaccurate, at the close of evidence, without motion by the prosecution, to comply with the officer's testimony given at trial.

The finding of guilty was in error because the condition of the road at the time and place of the alleged offense was not established at trial as being "unreasonable for conditions" as the charging document indicates the violation to be.

The State failed to prove the defendant guilty beyond a reasonable doubt as there was insufficient evidence concerning the accuracy of the particular radar unit involved in the instant case, and the qualifications of the person checking, calibrating and using the radar unit to support a conviction for speeding based solely upon a reading obtained from such device.

Assignments of error one and four will be discussed together since they both relate to the accuracy of the K-55 and the qualifications of Deputy Kirk to properly read the K-55. Knife does not challenge the use of K-55 radar devices. Knife argues that the state failed to meet its burden of proof by establishing that the K-55 was [\*4] in good operating condition and that Deputy Kirk was qualified to accurately operate the K-55.

It is well settled in Ohio that [HN2] expert testimony is no longer necessary in cases involving stationary radar units. *City of East Cleveland v. Ferrell (1958)*, 168 Ohio St. 298. This court took judicial notice of the K-55 radar device in *City of Kettering v. Smith* (April 12, 1984), Montgomery App. No. 8383, unreported, and in *City of New Carlisle v. Planchak* (May 17, 1988), Clark App. No. 2339, unreported. This court in *Planchak* cited *City of East Cleveland* for the prerequisite to giving judicial notice to a radar device:

We are in accord with the trend in the most recent decisions that [HN3] readings of a radar speed meter may be accepted in evidence, just as we accept photographs, x-rays, . . . and the like, without the necessity of offering expert testimony as to the scientific principles underlying them.

There remains, then, only a determination as to the sufficiency of the evidence concerning the accuracy of the particular speed meter involved in the instant case and the qualifications of the person using it.

Kirk testified that he had had a two-hour training session on [\*5] how to use the K-55. He also said that he had had on the job training with the K-55 for a year. Kirk stated that he checks the calibration of the K-55 when he first starts his shift and after each citation he writes. He stated that on the day that he stopped Knife, September 26, 1988, he checked the calibration of the K-55 at 6:49 p.m. and at 7:54 p.m. Kirk stated on cross-examination that he calibrated the K-55 on September 26, 1988, before and after he stopped Knife and that he used turning forks to calibrate the K-55.

Kirk stated that on September 26, 1988, he noticed a silver-colored car on State Route 571 traveling at a "rather high speed" and so he activated the K-55. He stated that the K-55 read 70 miles per hour and that he heard a high Doppler sound from the K-55. He stated that the K-55 that he used on September 26, 1988, had a target speed reading and a patrol speed reading. He stated that when he clocked Knife's speed, the patrol speed reading on the K-55 matched the speedometer reading on his cruiser which was 45 miles per hour. Kirk testified that he could tell that the K-55 was operating properly because the patrol speed reading on the K-55 and the speedometer reading [\*6] on his patrol car were the same. Kirk said that he stopped the silver car and talked to the driver, Knife, who said that she saw that she

was traveling at 65 miles per hour.

There was sufficient evidence that Kirk was qualified to operate the K-55 and that the K-55 was working properly. [HN4] We will not reverse the judgment of a lower court as being against the weight of the evidence if there is evidence that, if believed, "would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St. 2d 169, 172. Furthermore, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. The first and fourth assignments of error are not well taken.

Knife argues in her third assignment of error that the trial court improperly amended the citation to comply with Deputy Sheriff Kirk's testimony. Knife maintains that the citation was vague and misleading because it did not state which subsection of *R.C. 4511.21* was violated. Knife's citation alleged ". . . SPEED VIOLATION 70/55 SPEED ZONE IN VIOLATION OF SECTION [\*7] 4511.21 OF OHIO R.C. . . ."

*Criminal Rule 7(D)* [HN5] states, in pertinent part, as follows:

The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

At the close of all of the evidence, the court stated that it would "amend the citation to confirm the evidence [sic] which is a violation of 4511.21(D) \* \* \*." The citation was not misleading simply because it failed to state in particular which subsection of *R.C. 4511.21* Knife violated by traveling at 70 miles per hour in a 55 miles per hour speed zone. The court's amendment of the citation to note that Knife violated subsection D of *R.C. 4511.21* was proper under *Crim. R. 7(D)*. The second assignment of error is not well taken.

Knife's third assignment of error states:

The finding of guilty was in error because the condition of the road at the time and place of the alleged offense was not established at trial as being "unreasonable for conditions" as the charging document indicates the [\*8] violation to be.

Knife argues in the third assignment of error that the prosecution failed to present evidence of road conditions, weather, or traffic to support the charge that driving 70 miles per hour in a 55 mile per hour speed zone was "unreasonable for conditions." The Ohio Supreme Court in *State v. Neff* (1975), 41 Ohio St. 2d 17, in discussing *R.C. 4511.21* violations stated:

[HN6] What is 'reasonable and proper under the circumstances,' within the meaning of *R.C. 4511.21*, is a question of fact. Where there is sufficient evidence to support a finding of guilty, a conviction will not be set aside.

41 Ohio St. 2d 17 at syllabus.

The court in *State v. Dehnke* (1974), 40 Ohio App. 2d 194, discussed *R.C. 4511.21* and stated:

In considering the wording of the statute, we find that [HN7] the single basic requirement is that the speed be reasonable under the circumstances existing. The statutory limits for various types of roads or highways furnishes a two pronged presumption affecting the presentation of evidence. A speed in excess of the statutory limit is a prima facie unreasonable speed; a speed at or below that statutory limit is a prima facie reasonable speed. But the ultimate criterion [\*9] is that the speed be reasonable considering the conditions then existing.

40 Ohio App. 2d at 195-96. The court stated that [HN8] whether or not a particular speed was reasonable is "essentially a matter for determination by the trier of facts." *Id.* at 196.

The trial court in this case heard evidence that Knife was clocked by a K-55 radar device as driving 70 miles per

hour in a 55 mile per hour speed limit area. Kirk testified that there was other traffic moving in both directions and that he could see before he turned on the K-55 that Knife was driving fast. Kirk stated that the incident occurred on September 26, 1988, at 7:40 p.m.

[HN9] Our review as to whether Knife's speed of 70 miles per hour was unreasonable for the conditions is "limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley (1978)*, 56 Ohio St. 2d 169, 172. Given the prima facie unreasonableness of speed exceeding the posted limit, the trial court could have properly determined that Knife's speed was unreasonable for the conditions at the time that she was stopped for speeding. This assignment [\*10] of error is not well taken.

137 of 195 DOCUMENTS

**THE STATE OF OHIO, Plaintiff-Appellee v. CHERILYN A. KNIFE,  
Defendant-Appellant**

Case No. 88 CA 41

Court of Appeals of Ohio, Second Appellate District, Miami County

*1989 Ohio App. LEXIS 3044*

August 2, 1989, Decided

**PRIOR HISTORY:** [\*1]

88-TRD-8239-S-SHER

**DISPOSITION:**

The judgment will be affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed her conviction in the Miami County Municipal Court (Ohio), for speeding in violation of *Ohio Rev. Code Ann. § 4511.21(D)*.

**OVERVIEW:** Defendant was charged with violating § 4511.21, which prohibited driving at a rate of speed in excess of 55 miles per hour. At the trial, a deputy sheriff testified that he observed a silver-colored car traveling at a rather high speed. He stated that he activated his K-55 radar device and that the K-55 read the silver car's speed as 70 miles per hour. The speed limit was 55 miles per hour. Defendant cross-examined the deputy sheriff and offered no other evidence. She appealed her conviction, challenging the accuracy of the K-55 and the qualifications of the deputy sheriff to properly read the K-55. The court held that there was sufficient evidence that the deputy sheriff was qualified to operate the K-55 and that the K-55 was working properly. The court also concluded that defendant's citation was not misleading simply because it failed to state in particular which subsection of § 4511.21 defendant had violated by traveling at 70 miles per hour in a 55 miles per hour speed zone. The court's amendment of the citation to note that she violated subsection (D) of § 4511.21 was proper under *Ohio R. Crim. P. 7(D)*.

**OUTCOME:** The court affirmed defendant's conviction.

**CORE TERMS:** speed, radar, mile, assignment of error, traveling, prima facie, driving, reasonable doubt, qualifications, speedometer, misleading, accuracy, target, patrol, expert testimony, statutory limit, judicial notice, guilt beyond, zone, convince, trier, good operating condition, assignments of error, charging document, failed to prove, speed meter, speed limit, high speed, silver-colored, calibration

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements***

[HN1] *Ohio Rev. Code Ann. § 4511.21(D)* states, in part, as follows: No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows: (1) At a speed exceeding 55 miles per hour, except upon a freeway as provided in *Ohio Rev. Code Ann. § 4511.21(B)(10)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN2] Expert testimony is no longer necessary in cases involving stationary radar units.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN3] Readings of a radar speed meter may be accepted in evidence, just as photographs, x-rays, and the like are accepted, without the necessity of offering expert testimony as to the scientific principles underlying them.

***Criminal Law & Procedure > Witnesses > Credibility******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence******Evidence > Procedural Considerations > Weight & Sufficiency***

[HN4] The appellate court will not reverse the judgment of a lower court as being against the weight of the evidence if there is evidence that, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Furthermore, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.

***Criminal Law & Procedure > Accusatory Instruments > General Overview******Criminal Law & Procedure > Discovery & Inspection > Bills of Particulars***

[HN5] *Ohio R. Crim. P. 7(D)* states, in part, as follows: The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN6] What is "reasonable and proper under the circumstances," within the meaning of *Ohio Rev. Code Ann. § 4511.21*, is a question of fact. Where there is sufficient evidence to support a finding of guilty, a conviction will not be set aside.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN7] The single basic requirement of *Ohio Rev. Code Ann. § 4511.21* is that the speed be reasonable under the circumstances existing. The statutory limits for various types of roads or highways furnishes a two pronged presumption affecting the presentation of evidence. A speed in excess of the statutory limit is a prima facie unreasonable speed; a speed at or below that statutory limit is a prima facie reasonable speed. But the ultimate criterion is that the speed be reasonable considering the conditions then existing.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*  
*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview*

[HN8] Whether or not a particular speed was reasonable within the meaning of *Ohio Rev. Code Ann. § 4511.21* is essentially a matter for determination by the trier of facts.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*  
*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN9] The appellate court's review as to whether a speed of driving was unreasonable for the conditions is limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

**COUNSEL:**

TONYA K. THIEMAN, Prosecuting Attorney, Miami County Municipal Court, Troy, Ohio, Attorney for Plaintiff-Appellee.

CHERILYN A. KNIFE, 134 McKinley Avenue, West Milton, Ohio, Defendant-Appellant.

**JUDGES:**

WOLFF, P.J., WILSON, J., and GRADY, J., concur.

**OPINION BY:**

WOLFF

**OPINION:**

WOLFF, P.J.

Cherilyn Knife appeals from the Miami County Municipal Court October 18, 1988, journal entry which stated that a trial was held and that Knife was found guilty of violating *R.C. 4511.21(D)*, and which, accordingly, assessed a fine and costs. Section 4511.21(D) [HN1] states, in pertinent part, as follows:

No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:

(1) At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in division (B)(10) of this section.

At the trial, the state presented testimony by Deputy Sheriff Douglas K. Kirk. Kirk testified that at 7:40 p.m. on September 26, 1988, he observed a silver-colored car traveling westbound on State Route 571 at a "rather high speed." He stated that he activated his K-55 radar device and that the K-55 read the silver car's speed as 70 miles per hour. Kirk [\*2] stated that the speed limit on State Route 571 was 55 miles per hour.

Knife, representing herself, cross-examined Kirk and offered no other evidence.

At the close of the testimony, the court stated:

[This court finds] that the state has shown all those elements they are required to show. Namely, the car was observed before the radar unit was turned on, the Doppler sound was consistent with the speed observed the target window was consistent with the speed observed in the Doppler. The speedometer and the vehicle window were the same and that the officer did not view an incorrect reading, that he has viewed them before and that in his opinion it was a proper reading.

And so the State has shown all the elements as required and therefore would find the Defendant is guilty and will impose a fine of fifteen dollars and costs.

Knife raises four assignments of error in this appeal:

As required by case law in Ohio, the State failed to prove:

(i) that the particular radar unit was properly set up and in good operating condition; (ii) the operator was qualified, both through training and experience, to enable him to properly operate the radar; (iii) and the operator properly read the radar [\*3] unit and identified the target.

The trial court improperly amended the officer's traffic citation, which was vague, misleading, and inaccurate, at the close of evidence, without motion by the prosecution, to comply with the officer's testimony given at trial.

The finding of guilty was in error because the condition of the road at the time and place of the alleged offense was not established at trial as being "unreasonable for conditions" as the charging document indicates the violation to be.

The State failed to prove the defendant guilty beyond a reasonable doubt as there was insufficient evidence concerning the accuracy of the particular radar unit involved in the instant case, and the qualifications of the person checking, calibrating and using the radar unit to support a conviction for speeding based solely upon a reading obtained from such device.

Assignments of error one and four will be discussed together since they both relate to the accuracy of the K-55 and the qualifications of Deputy Kirk to properly read the K-55. Knife does not challenge the use of K-55 radar devices. Knife argues that the state failed to meet its burden of proof by establishing that the K-55 was [\*4] in good operating condition and that Deputy Kirk was qualified to accurately operate the K-55.

It is well settled in Ohio that [HN2] expert testimony is no longer necessary in cases involving stationary radar units. *City of East Cleveland v. Ferrell (1958)*, 168 Ohio St. 298. This court took judicial notice of the K-55 radar device in *City of Kettering v. Smith (April 12, 1984)*, Montgomery App. No. 8383, unreported, and in *City of New Carlisle v. Planchak (May 17, 1988)*, Clark App. No. 2339, unreported. This court in *Planchak* cited *City of East Cleveland* for the prerequisite to giving judicial notice to a radar device:

We are in accord with the trend in the most recent decisions that [HN3] readings of a radar speed meter may be accepted in evidence, just as we accept photographs, x-rays, . . . and the like, without the necessity of offering expert testimony as to the scientific principles underlying them.

There remains, then, only a determination as to the sufficiency of the evidence concerning the accuracy of the particular speed meter involved in the instant case and the qualifications of the person using it.

Kirk testified that he had had a two-hour training session on [\*5] how to use the K-55. He also said that he had had on the job training with the K-55 for a year. Kirk stated that he checks the calibration of the K-55 when he first starts his shift and after each citation he writes. He stated that on the day that he stopped Knife, September 26, 1988, he checked the calibration of the K-55 at 6:49 p.m. and at 7:54 p.m. Kirk stated on cross-examination that he calibrated the K-55 on September 26, 1988, before and after he stopped Knife and that he used turning forks to calibrate the K-55.

Kirk stated that on September 26, 1988, he noticed a silver-colored car on State Route 571 traveling at a "rather high speed" and so he activated the K-55. He stated that the K-55 read 70 miles per hour and that he heard a high Doppler sound from the K-55. He stated that the K-55 that he used on September 26, 1988, had a target speed reading and a patrol speed reading. He stated that when he clocked Knife's speed, the patrol speed reading on the K-55 matched the speedometer reading on his cruiser which was 45 miles per hour. Kirk testified that he could tell that the K-55 was operating properly because the patrol speed reading on the K-55 and the speedometer reading [\*6] on his patrol car were the same. Kirk said that he stopped the silver car and talked to the driver, Knife, who said that she saw that she

was traveling at 65 miles per hour.

There was sufficient evidence that Kirk was qualified to operate the K-55 and that the K-55 was working properly. [HN4] We will not reverse the judgment of a lower court as being against the weight of the evidence if there is evidence that, if believed, "would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St. 2d 169, 172. Furthermore, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. The first and fourth assignments of error are not well taken.

Knife argues in her third assignment of error that the trial court improperly amended the citation to comply with Deputy Sheriff Kirk's testimony. Knife maintains that the citation was vague and misleading because it did not state which subsection of *R.C. 4511.21* was violated. Knife's citation alleged ". . . SPEED VIOLATION 70/55 SPEED ZONE IN VIOLATION OF SECTION [\*7] 4511.21 OF OHIO R.C. . . ."

*Criminal Rule 7(D)* [HN5] states, in pertinent part, as follows:

The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

At the close of all of the evidence, the court stated that it would "amend the citation to confirm the evidence [sic] which is a violation of 4511.21(D) \* \* \*." The citation was not misleading simply because it failed to state in particular which subsection of *R.C. 4511.21* Knife violated by traveling at 70 miles per hour in a 55 miles per hour speed zone. The court's amendment of the citation to note that Knife violated subsection D of *R.C. 4511.21* was proper under *Crim. R. 7(D)*. The second assignment of error is not well taken.

Knife's third assignment of error states:

The finding of guilty was in error because the condition of the road at the time and place of the alleged offense was not established at trial as being "unreasonable for conditions" as the charging document indicates the [\*8] violation to be.

Knife argues in the third assignment of error that the prosecution failed to present evidence of road conditions, weather, or traffic to support the charge that driving 70 miles per hour in a 55 mile per hour speed zone was "unreasonable for conditions." The Ohio Supreme Court in *State v. Neff* (1975), 41 Ohio St. 2d 17, in discussing *R.C. 4511.21* violations stated:

[HN6] What is 'reasonable and proper under the circumstances,' within the meaning of *R.C. 4511.21*, is a question of fact. Where there is sufficient evidence to support a finding of guilty, a conviction will not be set aside.

41 Ohio St. 2d 17 at syllabus.

The court in *State v. Dehnke* (1974), 40 Ohio App. 2d 194, discussed *R.C. 4511.21* and stated:

In considering the wording of the statute, we find that [HN7] the single basic requirement is that the speed be reasonable under the circumstances existing. The statutory limits for various types of roads or highways furnishes a two pronged presumption affecting the presentation of evidence. A speed in excess of the statutory limit is a prima facie unreasonable speed; a speed at or below that statutory limit is a prima facie reasonable speed. But the ultimate criterion [\*9] is that the speed be reasonable considering the conditions then existing.

40 Ohio App. 2d at 195-96. The court stated that [HN8] whether or not a particular speed was reasonable is "essentially a matter for determination by the trier of facts." *Id.* at 196.

The trial court in this case heard evidence that Knife was clocked by a K-55 radar device as driving 70 miles per

hour in a 55 mile per hour speed limit area. Kirk testified that there was other traffic moving in both directions and that he could see before he turned on the K-55 that Knife was driving fast. Kirk stated that the incident occurred on September 26, 1988, at 7:40 p.m.

[HN9] Our review as to whether Knife's speed of 70 miles per hour was unreasonable for the conditions is "limited to a determination of whether there was evidence presented which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Eley (1978)*, 56 Ohio St. 2d 169, 172. Given the prima facie unreasonableness of speed exceeding the posted limit, the trial court could have properly determined that Knife's speed was unreasonable for the conditions at the time that she was stopped for speeding. This assignment [\*10] of error is not well taken.

138 of 195 DOCUMENTS

**City of Mayfield Heights, Plaintiff-Appellee v. Jim L. Spreng,  
Defendant-Appellant**

**No. 52426**

**Court of Appeals of Ohio, Eighth District, Cuyahoga County**

***1987 Ohio App. LEXIS 8382***

**August 13, 1987, Decided**

**PRIOR HISTORY:** [\*1]

Criminal appeal from Lyndhurst Municipal Court; Case No. 86-TRD-2101.

**DISPOSITION:**

AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the Lyndhurst Municipal Court (Ohio) in favor of the City, which convicted him of speeding, in violation of the City of Mayfield Heights, Ohio, Ordinance 333.03 (Ordinance), imposed a fine, and suspended his driver's license for 60 days.

**OVERVIEW:** At defendant's trial for speeding, in violation of the Ordinance, a patrolman testified as to his experience in operating radar equipment. He also testified that his properly operating radar gun clocked defendant speeding at 118 miles per hour in a 55 mile per hour zone. The trial court took judicial notice of the accuracy of the radar gun. Defendant did not testify. Defendant was convicted as charged. The trial court imposed a fine and suspended his driver's license for 60 days. On appeal, the court held that the trial court properly took judicial notice of the accuracy of the radar equipment even though no expert witness testified with regard to its construction, operation, and reliability. The court also held that, pursuant to *Ohio Rev. Code Ann. § 4507.34*, the trial court was authorized to suspend or revoke defendant's driver's license for up to one year. Further, the court rejected defendant's argument that his conviction was against the manifest weight of the evidence and was contrary to law. The court found that the patrolman's probative testimony amply supported the verdict of guilty.

**OUTCOME:** The court affirmed the trial court's judgment in favor of the City, which convicted defendant of speeding, imposed a fine, and suspended his driver's license. The court ordered that the City recover from defendant its costs taxed herein.

**CORE TERMS:** radar, ordinance, assignment of error, speeding, assigned, revoke, suspend, license, driver's, speed

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice > General Overview  
Evidence > Testimony > Experts > General Overview*

[HN1] In the context of a trial for speeding, a trial court may take judicial notice of the accuracy of a radar device in the absence of expert testimony with respect to the construction of the device, its method of operation, and its reliability.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Reckless Driving > Penalties  
Criminal Law & Procedure > Guilty Pleas > General Overview  
Governments > Local Governments > Licenses*

[HN2] In addition to or independent of the penalties provided in a municipal code, *Ohio Rev. Code Ann. § 4507.34* authorizes a trial court to suspend or revoke a driver's license for up to one year. Section 4507.34 provides in part that whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year. This statute is applicable to violations of speeding ordinances.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Weight & Sufficiency*

[HN3] An appellate court cannot reverse a judgment in a criminal case on the sufficiency or weight of the evidence where substantial evidence is offered by a state in support of all of the elements of the offenses charged and where such evidence is of sufficient probative value to sustain a conviction.

**COUNSEL:**

For Plaintiff-Appellee: Vincent A. Feudo, Prosecutor.

For Defendant-Appellant: James G. Dawson.

**JUDGES:**

H J. NAHRA WERREN, J., and RIGGS, J., CONCUR.

Judge Robert B. Werren of the Harrison County Common Pleas, Court, Sitting by Assignment.

Judge Roland W. Riggs, II, Retired, of the Washington County Common Pleas Court, Sitting by Assignment.

**OPINION BY:**

NAHRA

**OPINION:**

JOURNAL ENTRY AND OPINION

NAHRA, C.J.:

Jim L. Spreng, appellant, is appealing his conviction of speeding in violation of ordinance 333.03 of the city of Mayfield Heights.

Patrolman Larry Brazie testified that on March 21, 1986, at approximately 1:45 a.m. he was parked at the 34-mile marker turnaround on I-271 on a radar assignment. He tested his Decatur H.R. 8 hand-held radar equipment both before and at the conclusion of his radar detail and determined that his unit was operating properly. Patrolman Brazie had nine years of on-the-job training in the use of radar equipment and as of January 5, 1984, had successfully completed a police speed radar training course in which he demonstrated an understanding of the installation, calibration [\*2] and operational features of the Decatur Speed Radar system.

At about 1:45 a.m., a white Chevrolet Corvette driven by appellant passed Patrolman Brazie. He independently estimated the car to be travelling in excess of 100 m.p.h. and clocked the speed of the car at 118 m.p.h. with his radar gun. The posted speed limit on I-271 was 55 m.p.h. Patrolman Brazie pursued appellant and issued him a speeding ticket.

Appellant pled not guilty, but following the testimony of Patrolman Brazie, who was the only witness to testify at trial, the court found appellant guilty, fined him \$ 150 and suspended his driver's license for 60 days. Appellant timely appealed.

#### I.

For his first assigned error, appellant contends that:

THE TRIAL COURT COMMITTED ERROR BY TAKING JUDICIAL NOTICE OF THE ACCURACY OF AN ALLEGED SPEED MEASURING DEVICE IN THE ABSENCE OF EXPERT TESTIMONY WITH RESPECT TO THE CONSTRUCTION OF THE DEVICE, ITS METHOD OF OPERATION AND ITS RELIABILITY.

This contention regarding the same [HN1] radar device has been previously overruled, *Village of Woodmere v. Dawson* (Apr. 23, 1981), Cuyahoga App. No. 42701, unreported, and we see no reason to disturb this ruling. Accordingly, this [\*3] assignment of error is overruled.

#### II.

Appellant's second assigned error is that:

THE TRIAL COURT COMMITTED ERROR AND HAS NO AUTHORITY TO SUSPEND THE DEFENDANT'S DRIVER'S LICENSE FOR 60 DAYS.

[HN2] In addition to or independent of the penalties provided in a municipal code, *R.C. 4507.34* authorizes a trial court to suspend or revoke a driver's license for up to one year. *R.C. 4507.34* provides that:

Whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year.

This statute is applicable to violations of speeding ordinances. *City of Akron v. Willingham (1957), 166 Ohio St. 337, 142 N.E.2d 653*. Accordingly, this assignment of error is overruled.

#### III.

Appellant's last assigned error is that:

THE VERDICT AND JUDGMENT [\*4] [SIC] ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AND ARE CONTRARY TO LAW.

This [HN3] court cannot reverse on the sufficiency or weight of the evidence "where substantial evidence is offered by the state in support of all of the elements of the offenses charged and [where] such evidence [is] of sufficient probative value to sustain a conviction." *State v. Barnes (1986)*, 25 Ohio St. 3d 203, 209, 495 N.E.2d 922. Patrolman Brazie's testimony amply supports the verdict in this case. This assignment of error is therefore overruled.

The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lyndhurst Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

WERREN, J., and RIGGS, J., CONCUR.

Judge Robert B. Werren of the Harrison County Common Pleas, Court, Sitting by Assignment.

Judge Roland W. Riggs, II, Retired, of the Washington County Common [\*5] Pleas Court, Sitting by Assignment.

139 of 195 DOCUMENTS

**City of Mayfield Heights, Plaintiff-Appellee v. Jim L. Spreng,  
Defendant-Appellant**

**No. 52426**

**Court of Appeals of Ohio, Eighth District, Cuyahoga County**

*1987 Ohio App. LEXIS 8382*

**August 13, 1987, Decided**

**PRIOR HISTORY:** [\*1]

Criminal appeal from Lyndhurst Municipal Court; Case No. 86-TRD-2101.

**DISPOSITION:**

AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment of the Lyndhurst Municipal Court (Ohio) in favor of the City, which convicted him of speeding, in violation of the City of Mayfield Heights, Ohio, Ordinance 333.03 (Ordinance), imposed a fine, and suspended his driver's license for 60 days.

**OVERVIEW:** At defendant's trial for speeding, in violation of the Ordinance, a patrolman testified as to his experience in operating radar equipment. He also testified that his properly operating radar gun clocked defendant speeding at 118 miles per hour in a 55 mile per hour zone. The trial court took judicial notice of the accuracy of the radar gun. Defendant did not testify. Defendant was convicted as charged. The trial court imposed a fine and suspended his driver's license for 60 days. On appeal, the court held that the trial court properly took judicial notice of the accuracy of the radar equipment even though no expert witness testified with regard to its construction, operation, and reliability. The court also held that, pursuant to *Ohio Rev. Code Ann. § 4507.34*, the trial court was authorized to suspend or revoke defendant's driver's license for up to one year. Further, the court rejected defendant's argument that his conviction was against the manifest weight of the evidence and was contrary to law. The court found that the patrolman's probative testimony amply supported the verdict of guilty.

**OUTCOME:** The court affirmed the trial court's judgment in favor of the City, which convicted defendant of speeding, imposed a fine, and suspended his driver's license. The court ordered that the City recover from defendant its costs taxed herein.

**CORE TERMS:** radar, ordinance, assignment of error, speeding, assigned, revoke, suspend, license, driver's, speed

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice > General Overview  
Evidence > Testimony > Experts > General Overview*

[HN1] In the context of a trial for speeding, a trial court may take judicial notice of the accuracy of a radar device in the absence of expert testimony with respect to the construction of the device, its method of operation, and its reliability.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Reckless Driving > Penalties  
Criminal Law & Procedure > Guilty Pleas > General Overview  
Governments > Local Governments > Licenses*

[HN2] In addition to or independent of the penalties provided in a municipal code, *Ohio Rev. Code Ann. § 4507.34* authorizes a trial court to suspend or revoke a driver's license for up to one year. Section 4507.34 provides in part that whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year. This statute is applicable to violations of speeding ordinances.

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Evidence > Procedural Considerations > Weight & Sufficiency*

[HN3] An appellate court cannot reverse a judgment in a criminal case on the sufficiency or weight of the evidence where substantial evidence is offered by a state in support of all of the elements of the offenses charged and where such evidence is of sufficient probative value to sustain a conviction.

**COUNSEL:**

For Plaintiff-Appellee: Vincent A. Feudo, Prosecutor.

For Defendant-Appellant: James G. Dawson.

**JUDGES:**

H J. NAHRA WERREN, J., and RIGGS, J., CONCUR.

Judge Robert B. Werren of the Harrison County Common Pleas, Court, Sitting by Assignment.

Judge Roland W. Riggs, II, Retired, of the Washington County Common Pleas Court, Sitting by Assignment.

**OPINION BY:**

NAHRA

**OPINION:**

JOURNAL ENTRY AND OPINION

NAHRA, C.J.:

Jim L. Spreng, appellant, is appealing his conviction of speeding in violation of ordinance 333.03 of the city of Mayfield Heights.

Patrolman Larry Brazie testified that on March 21, 1986, at approximately 1:45 a.m. he was parked at the 34-mile marker turnaround on I-271 on a radar assignment. He tested his Decatur H.R. 8 hand-held radar equipment both before and at the conclusion of his radar detail and determined that his unit was operating properly. Patrolman Brazie had nine years of on-the-job training in the use of radar equipment and as of January 5, 1984, had successfully completed a police speed radar training course in which he demonstrated an understanding of the installation, calibration [\*2] and operational features of the Decatur Speed Radar system.

At about 1:45 a.m., a white Chevrolet Corvette driven by appellant passed Patrolman Brazie. He independently estimated the car to be travelling in excess of 100 m.p.h. and clocked the speed of the car at 118 m.p.h. with his radar gun. The posted speed limit on I-271 was 55 m.p.h. Patrolman Brazie pursued appellant and issued him a speeding ticket.

Appellant pled not guilty, but following the testimony of Patrolman Brazie, who was the only witness to testify at trial, the court found appellant guilty, fined him \$ 150 and suspended his driver's license for 60 days. Appellant timely appealed.

#### I.

For his first assigned error, appellant contends that:

THE TRIAL COURT COMMITTED ERROR BY TAKING JUDICIAL NOTICE OF THE ACCURACY OF AN ALLEGED SPEED MEASURING DEVICE IN THE ABSENCE OF EXPERT TESTIMONY WITH RESPECT TO THE CONSTRUCTION OF THE DEVICE, ITS METHOD OF OPERATION AND ITS RELIABILITY.

This contention regarding the same [HN1] radar device has been previously overruled, *Village of Woodmere v. Dawson* (Apr. 23, 1981), Cuyahoga App. No. 42701, unreported, and we see no reason to disturb this ruling. Accordingly, this [\*3] assignment of error is overruled.

#### II.

Appellant's second assigned error is that:

THE TRIAL COURT COMMITTED ERROR AND HAS NO AUTHORITY TO SUSPEND THE DEFENDANT'S DRIVER'S LICENSE FOR 60 DAYS.

[HN2] In addition to or independent of the penalties provided in a municipal code, *R.C. 4507.34* authorizes a trial court to suspend or revoke a driver's license for up to one year. *R.C. 4507.34* provides that:

Whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year.

This statute is applicable to violations of speeding ordinances. *City of Akron v. Willingham (1957), 166 Ohio St. 337, 142 N.E.2d 653*. Accordingly, this assignment of error is overruled.

#### III.

Appellant's last assigned error is that:

THE VERDICT AND JUDGMENT [\*4] [SIC] ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AND ARE CONTRARY TO LAW.

This [HN3] court cannot reverse on the sufficiency or weight of the evidence "where substantial evidence is offered by the state in support of all of the elements of the offenses charged and [where] such evidence [is] of sufficient probative value to sustain a conviction." *State v. Barnes (1986)*, 25 Ohio St. 3d 203, 209, 495 N.E.2d 922. Patrolman Brazie's testimony amply supports the verdict in this case. This assignment of error is therefore overruled.

The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lyndhurst Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

WERREN, J., and RIGGS, J., CONCUR.

Judge Robert B. Werren of the Harrison County Common Pleas, Court, Sitting by Assignment.

Judge Roland W. Riggs, II, Retired, of the Washington County Common [\*5] Pleas Court, Sitting by Assignment.

140 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**CITY OF EUCLID Plaintiff-Appellee -vs- SONDRA BAGLEY  
Defendant-Appellant**

**No. 50457**

**Court of Appeals, Eighth Appellate District of Ohio, Cuyahoga County, Ohio**

*1986 Ohio App. LEXIS 6226*

**April 3, 1986**

**PRIOR HISTORY:** [\*1]

Civil Appeal from Euclid Municipal Court - No. 85-TRD-4831.

**DISPOSITION:**

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Euclid Municipal Court (Ohio), which found her guilty of speeding.

**OVERVIEW:** On appeal, defendant claimed that the officer who testified against her at trial was not competent to testify under *Ohio Rev. Code Ann. §§ 4549.14, 4549.16*, or *Ohio R. Evid. 601(C)* because he was not driving a marked vehicle and was not wearing a legally distinctive uniform. In affirming the judgment below, the court held that a police officer who, while engaged in an assignment unrelated to the enforcement of traffic laws, observed a violation of such laws and made an arrest therefore, was not precluded by *Ohio Rev. Code Ann. §§ 4549.14, 4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of the arrest. Since the testifying officer was not on duty for the exclusive or main duty of enforcing motor vehicle and traffic laws, he was competent to testify as a witness at defendant's trial for the speeding violation.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** arrest, driving, traffic, detective, competent to testify, arrested, motor vehicle, assignments of error, unmarked, speeding, distinctive, enforcing, police officer, narcotics, speed, person charged, main purpose, wearing,

misdemeanor, punishable, arresting, violator, motion to suppress, police vehicle, competency, violating, observe, dressed, driver, clothes

### **LexisNexis(R) Headnotes**

#### ***Evidence > Competency > General Overview***

##### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Ohio R. Evid. 601(C)*, which deals with the competency of witnesses, reads as follows: While on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

#### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

##### ***Evidence > Competency > General Overview***

##### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] *Ohio Rev. Code Ann. § 4549.14*, which deals with the competency of a police officer testifying as a witness, states as follows: Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with *Ohio Rev. Code Ann. § 4549.13*. Similarly, *Ohio Rev. Code Ann. § 4549.16* provides as follows: Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was not wearing a distinctive uniform in accordance with *Ohio Rev. Code Ann. § 4549.15*.

#### ***Evidence > Competency > General Overview***

[HN3] A police officer who, while engaged in an assignment unrelated to the enforcement of traffic laws, observes a violation of such laws and makes an arrest therefore will not be precluded by *Ohio Rev. Code Ann. §§ 4549.14, 4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of arrest.

#### ***Evidence > Relevance > Relevant Evidence***

[HN4] *Ohio R. Evid. 401*, which defines relevancy, provides as follows: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

##### ***Evidence > Relevance > Relevant Evidence***

[HN5] *Ohio R. Evid. 482*, which deals with the admissibility of relevant evidence, states in part as follows: Evidence which is not relevant is not admissible.

**COUNSEL:**

For Plaintiff-Appellee: Patrick R. Rocco, Esq., Director of Law, 585 East 222nd Street, Euclid, Ohio 44123;  
Lawrence R. Hupertz, Esq., Assistant Prosecutor, 545 East 222nd Street, Euclid, Ohio 44123

For Defendant-Appellant: William K. McCarter, Esq., McCarter ad Weaver, 4139 Erie Street, Willoughby, Ohio  
44094

**JUDGES:**

PARRINO, C.J., and MARKUS, J. CONCUR.

**OPINION BY:**

KRUPANSKY

**OPINION:**

KRUPANSKY, J.:

On June 6, 1985 a complaint was issued in the Euclid Municipal Court against defendant Sondra Bagley for violating Euclid City Ordinance 333.03, viz., speeding on the freeway. Defendant plead not guilty to the charge. On June. 14, 1985 defendant filed a motion to suppress testimony evidence. On June 20, 1985 following a hearing on defendant's motion to suppress the trial court overruled defendant's motion and proceeded to hear the case on its merits. At the conclusion of the trial, the trial court found defendant guilty, imposed a fine of \$ 100 plus costs and suspended defendant's driver's license for thirty (30) days. Defendant filed a timely appeal on June 21, 1985.

Officer David H. Schervish, [\*2] the only witness who testified at trial, provided the following information: On June 6, 1985 at approximately 2:40 p.m. Officer David H. Schervish, a narcotics and vice detective for the City of Euclid, and his partner, Detective Payne, were traveling on Interstate 90 (1890) when they observed a red vehicle (driven by appellant) traveling westbound on I-90 at a high rate of speed, weaving in and out of the lanes. Officers Schervish and Payne were driving a 1982 red four-door Ford, an unmarked detective vehicle. The officers were on duty in the narcotics and vice division; they were dressed in plain clothes, not police uniforms. Officers Schervish and Payne followed appellant for approximately one half mile. They determined appellant was driving at a speed of approximately 30 m.p.h. in an area with a 55 m.p.h. speed limit.

The officers arrested appellant for speeding.

The police vehicle had been subjected to a radar unit earlier that week and a certified calibration for the City of Euclid was imprinted on the dash of the police vehicle. At trial Officer Schervish stated if he observes individuals speeding he will arrest them.

I.

Appellant raises two assignments of error on appeal. [\*3] Since both assignments of error raise essentially the same issue, viz., whether Officer Schervish was competent to testify at trial under *R.C. 4549.14*, *R.C. 4549.16* and *Evid. R. 601(C)*, they will be addressed together. Appellant's assignments of error state as follows:

I. THE TESTIMONY OF A LAW ENFORCEMENT OFFICER, BOTH AS TO EVIDENCE PRIOR TO AND AFTER ARREST, OF A PERSON CHARGED WITH A TRAFFIC VIOLATION, IS INCOMPETENT UNDER *R.C. 4549.14*, *4549.16* AND *EVID. R. 601 (C)* WHERE AT THE TIME OF THE ARREST SUCH OFFICER WAS NOT USING A PROPERLY MARKED MOTOR VEHICLE OR WEARING A LEGALLY DISTINCTIVE UNIFORM AS DEFINED BY STATUTE.

II. THE TRIAL COURT ERRED IN DETERMINING (sic) THAT AN EXCEPTION TO *R.C. 4549.14, 4549.16* AND *EVID. R. 601(C)* EXISTS WHEN THE OFFICER ON DUTY DOES NOT HAVE AS HIS MAIN DUTY THE ENFORCING OF TRAFFIC LAWS AND IS COMPETENT TO TESTIFY AND THE COURT DOES NOT PERMIT THE DEFENDANT TO INQUIRE INTO THE SCOPE OF THE OFFICER'S DUTIES TO DETERMINE THE EXTENT OF HIS DUTY TO ENFORCE THE TRAFFIC LAWS.

Appellant's two assignments of error are not well taken.

*Evid. R. 601(C)*, [HN1] which deals with the competency of witnesses, reads as follows:

while on [\*4] duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute." (Emphasis added)

*R.C. 4549.14*, [HN2] which deals with the competency of a police officer testifying as a witness, states as follows:

"Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with *section 4549.13 of the Revised Code*." (Emphasis added)

Similarly, *R.C. 4549.16* provides as follows:

"Any officer arresting, or participating or assisting in the arrest of, a person [\*5] charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was not wearing a distinctive uniform in accordance with *section 4549.15 of the Revised Code*." (Emphasis added)

The precise issue presented in the case sub judice was decided in *Columbus v. Stump* (1974), 41 Ohio App. 2d 81. In *Columbus v. Stump*, supra, an on duty police officer was positioned outside a bar for the purpose of observing illicit activities and observed Stump driving in a reckless fashion. The officer pursued Stump who was subsequently arrested by another police officer when the pursuit ended in an accident. The officer was not dressed in a distinctive police uniform and was driving an unmarked police vehicle. The Court of Appeals determined the officer was competent to testify concerning the traffic violation at Stump's trial and held as follows:

[HN3] "A police officer who, while engaged in an [\*6] assignment unrelated to the enforcement of traffic laws, observes a violation of such laws and makes an arrest therefore will not be precluded by *R.C. 4549.14* and *4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of arrest."

See also: *State v. Thobe* (1961), 191 N.E. 2d 182.

Similarly, in the case sub judice it is undisputed on June 6, 1985 Officer Schervish was driving an unmarked detective vehicle and was dressed in plain clothes, not a distinctive police uniform, when he arrested appellant.

However, the evidence also establishes Officer Schervish was on duty as a narcotics and vice detective on June 6, 1985. Since Officer Schervish was not on duty for the exclusive or main duty of enforcing motor vehicle and traffic laws, he was competent to testify as a witness at appellant's trial for the speed violation.

Furthermore, the legislative intent in enacting *R.C. 4549.14* and *R.C. 4549.16* was twofold: (1) to promote uniformity in traffic control and regulations to make driving safer in all of the political divisions in Ohio and (2) to curb speed traps operated by municipal [\*7] and township police. *City of Dayton v. Adams* (1967), Ohio St. 2d 89. These statutory provisions were not enacted to create the absurd result, whereby an on-duty plain-clothes narcotics detective driving an unmarked vehicle could observe a drunk driver driving in a reckless and dangerous manner, then forego the arrest of the driver since the officer would not be competent to testify against the driver at trial. It is important to note that *R.C. 4549.14* and *R.C. 4549.16* do not prevent the officer from making the arrest of the violator, but rather, render him impotent to testify at trial to sustain the arrest. In effect it emasculates the purpose of the arrest.

Appellant further contends if Officer Schervish is competent to testify then the trial court erred when it refused to permit her counsel to inquire of Officer Schervish on cross-examination as to how many other traffic violators he had arrested on the day he arrested appellant and how many traffic violators he had arrested with that particular detective car. Appellant's contention lacks merit.

Appellant's counsel's inquiries were irrelevant to the central issue at trial, viz., whether appellant was guilty of speeding [\*8] on the freeway. *Evid. R. 401*, [HN4] which defines relevancy, provides as follows:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

*Evid. R. 482*, [HN5] which deals with the admissibility of relevant evidence, states in pertinent party as follows:

"Evidence which is not relevant is not admissible."

Prior to the commencement of appellant's trial the trial court held a hearing on appellant's motion to suppress Officer Schervish's testimony and determined Schervish was competent to testify at appellant's trial. Since the issue of Officer Schervish's competency to testify was resolved before appellant's trial began, the only issue at trial was the determination of appellant's guilt. Counsel's inquiries were not relevant to the crucial question of whether appellant was speeding. Therefore, the trial court did not err when the court refused to allow counsel to pursue that line of questioning on cross-examination.

For these reasons, appellant's assignments of error are overruled.

#### JOURNAL ENTRY

It is ordered that [\*9] appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Euclid Municipal Court to carry this judgment into execution.

141 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**CITY OF EUCLID Plaintiff-Appellee -vs- SONDRA BAGLEY  
Defendant-Appellant**

**No. 50457**

**Court of Appeals, Eighth Appellate District of Ohio, Cuyahoga County, Ohio**

*1986 Ohio App. LEXIS 6226*

**April 3, 1986**

**PRIOR HISTORY:** [\*1]

Civil Appeal from Euclid Municipal Court - No. 85-TRD-4831.

**DISPOSITION:**

Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Euclid Municipal Court (Ohio), which found her guilty of speeding.

**OVERVIEW:** On appeal, defendant claimed that the officer who testified against her at trial was not competent to testify under *Ohio Rev. Code Ann. §§ 4549.14, 4549.16*, or *Ohio R. Evid. 601(C)* because he was not driving a marked vehicle and was not wearing a legally distinctive uniform. In affirming the judgment below, the court held that a police officer who, while engaged in an assignment unrelated to the enforcement of traffic laws, observed a violation of such laws and made an arrest therefore, was not precluded by *Ohio Rev. Code Ann. §§ 4549.14, 4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of the arrest. Since the testifying officer was not on duty for the exclusive or main duty of enforcing motor vehicle and traffic laws, he was competent to testify as a witness at defendant's trial for the speeding violation.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** arrest, driving, traffic, detective, competent to testify, arrested, motor vehicle, assignments of error, unmarked, speeding, distinctive, enforcing, police officer, narcotics, speed, person charged, main purpose, wearing,

misdemeanor, punishable, arresting, violator, motion to suppress, police vehicle, competency, violating, observe, dressed, driver, clothes

### **LexisNexis(R) Headnotes**

#### ***Evidence > Competency > General Overview***

##### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] *Ohio R. Evid. 601(C)*, which deals with the competency of witnesses, reads as follows: While on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

#### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

##### ***Evidence > Competency > General Overview***

##### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] *Ohio Rev. Code Ann. § 4549.14*, which deals with the competency of a police officer testifying as a witness, states as follows: Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with *Ohio Rev. Code Ann. § 4549.13*. Similarly, *Ohio Rev. Code Ann. § 4549.16* provides as follows: Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was not wearing a distinctive uniform in accordance with *Ohio Rev. Code Ann. § 4549.15*.

#### ***Evidence > Competency > General Overview***

[HN3] A police officer who, while engaged in an assignment unrelated to the enforcement of traffic laws, observes a violation of such laws and makes an arrest therefore will not be precluded by *Ohio Rev. Code Ann. §§ 4549.14, 4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of arrest.

#### ***Evidence > Relevance > Relevant Evidence***

[HN4] *Ohio R. Evid. 401*, which defines relevancy, provides as follows: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### ***Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview***

##### ***Evidence > Relevance > Relevant Evidence***

[HN5] *Ohio R. Evid. 482*, which deals with the admissibility of relevant evidence, states in part as follows: Evidence which is not relevant is not admissible.

**COUNSEL:**

For Plaintiff-Appellee: Patrick R. Rocco, Esq., Director of Law, 585 East 222nd Street, Euclid, Ohio 44123;  
Lawrence R. Hupertz, Esq., Assistant Prosecutor, 545 East 222nd Street, Euclid, Ohio 44123

For Defendant-Appellant: William K. McCarter, Esq., McCarter ad Weaver, 4139 Erie Street, Willoughby, Ohio  
44094

**JUDGES:**

PARRINO, C.J., and MARKUS, J. CONCUR.

**OPINION BY:**

KRUPANSKY

**OPINION:**

KRUPANSKY, J.:

On June 6, 1985 a complaint was issued in the Euclid Municipal Court against defendant Sondra Bagley for violating Euclid City Ordinance 333.03, viz., speeding on the freeway. Defendant plead not guilty to the charge. On June 14, 1985 defendant filed a motion to suppress testimony evidence. On June 20, 1985 following a hearing on defendant's motion to suppress the trial court overruled defendant's motion and proceeded to hear the case on its merits. At the conclusion of the trial, the trial court found defendant guilty, imposed a fine of \$ 100 plus costs and suspended defendant's driver's license for thirty (30) days. Defendant filed a timely appeal on June 21, 1985.

Officer David H. Schervish, [\*2] the only witness who testified at trial, provided the following information: On June 6, 1985 at approximately 2:40 p.m. Officer David H. Schervish, a narcotics and vice detective for the City of Euclid, and his partner, Detective Payne, were traveling on Interstate 90 (1890) when they observed a red vehicle (driven by appellant) traveling westbound on I-90 at a high rate of speed, weaving in and out of the lanes. Officers Schervish and Payne were driving a 1982 red four-door Ford, an unmarked detective vehicle. The officers were on duty in the narcotics and vice division; they were dressed in plain clothes, not police uniforms. Officers Schervish and Payne followed appellant for approximately one half mile. They determined appellant was driving at a speed of approximately 30 m.p.h. in an area with a 55 m.p.h. speed limit.

The officers arrested appellant for speeding.

The police vehicle had been subjected to a radar unit earlier that week and a certified calibration for the City of Euclid was imprinted on the dash of the police vehicle. At trial Officer Schervish stated if he observes individuals speeding he will arrest them.

I.

Appellant raises two assignments of error on appeal. [\*3] Since both assignments of error raise essentially the same issue, viz., whether Officer Schervish was competent to testify at trial under *R.C. 4549.14*, *R.C. 4549.16* and *Evid. R. 601(C)*, they will be addressed together. Appellant's assignments of error state as follows:

I. THE TESTIMONY OF A LAW ENFORCEMENT OFFICER, BOTH AS TO EVIDENCE PRIOR TO AND AFTER ARREST, OF A PERSON CHARGED WITH A TRAFFIC VIOLATION, IS INCOMPETENT UNDER *R.C. 4549.14*, *4549.16* AND *EVID. R. 601 (C)* WHERE AT THE TIME OF THE ARREST SUCH OFFICER WAS NOT USING A PROPERLY MARKED MOTOR VEHICLE OR WEARING A LEGALLY DISTINCTIVE UNIFORM AS DEFINED BY STATUTE.

II. THE TRIAL COURT ERRED IN DETERMINING (sic) THAT AN EXCEPTION TO *R.C. 4549.14, 4549.16* AND *EVID. R. 601(C)* EXISTS WHEN THE OFFICER ON DUTY DOES NOT HAVE AS HIS MAIN DUTY THE ENFORCING OF TRAFFIC LAWS AND IS COMPETENT TO TESTIFY AND THE COURT DOES NOT PERMIT THE DEFENDANT TO INQUIRE INTO THE SCOPE OF THE OFFICER'S DUTIES TO DETERMINE THE EXTENT OF HIS DUTY TO ENFORCE THE TRAFFIC LAWS.

Appellant's two assignments of error are not well taken.

*Evid. R. 601(C)*, [HN1] which deals with the competency of witnesses, reads as follows:

while on [\*4] duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute." (Emphasis added)

*R.C. 4549.14*, [HN2] which deals with the competency of a police officer testifying as a witness, states as follows:

"Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with *section 4549.13 of the Revised Code*." (Emphasis added)

Similarly, *R.C. 4549.16* provides as follows:

"Any officer arresting, or participating or assisting in the arrest of, a person [\*5] charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was not wearing a distinctive uniform in accordance with *section 4549.15 of the Revised Code*." (Emphasis added)

The precise issue presented in the case sub judice was decided in *Columbus v. Stump* (1974), 41 Ohio App. 2d 81. In *Columbus v. Stump*, supra, an on duty police officer was positioned outside a bar for the purpose of observing illicit activities and observed Stump driving in a reckless fashion. The officer pursued Stump who was subsequently arrested by another police officer when the pursuit ended in an accident. The officer was not dressed in a distinctive police uniform and was driving an unmarked police vehicle. The Court of Appeals determined the officer was competent to testify concerning the traffic violation at Stump's trial and held as follows:

[HN3] "A police officer who, while engaged in an [\*6] assignment unrelated to the enforcement of traffic laws, observes a violation of such laws and makes an arrest therefore will not be precluded by *R.C. 4549.14* and *4549.16* from testifying with regard to such violation on the basis that he was wearing plain clothes and driving an unmarked vehicle at the time of arrest."

See also: *State v. Thobe* (1961), 191 N.E. 2d 182.

Similarly, in the case sub judice it is undisputed on June 6, 1985 Officer Schervish was driving an unmarked detective vehicle and was dressed in plain clothes, not a distinctive police uniform, when he arrested appellant.

However, the evidence also establishes Officer Schervish was on duty as a narcotics and vice detective on June 6, 1985. Since Officer Schervish was not on duty for the exclusive or main duty of enforcing motor vehicle and traffic laws, he was competent to testify as a witness at appellant's trial for the speed violation.

Furthermore, the legislative intent in enacting *R.C. 4549.14* and *R.C. 4549.16* was twofold: (1) to promote uniformity in traffic control and regulations to make driving safer in all of the political divisions in Ohio and (2) to curb speed traps operated by municipal [\*7] and township police. *City of Dayton v. Adams* (1967), Ohio St. 2d 89. These statutory provisions were not enacted to create the absurd result, whereby an on-duty plain-clothes narcotics detective driving an unmarked vehicle could observe a drunk driver driving in a reckless and dangerous manner, then forego the arrest of the driver since the officer would not be competent to testify against the driver at trial. It is important to note that *R.C. 4549.14* and *R.C. 4549.16* do not prevent the officer from making the arrest of the violator, but rather, render him impotent to testify at trial to sustain the arrest. In effect it emasculates the purpose of the arrest.

Appellant further contends if Officer Schervish is competent to testify then the trial court erred when it refused to permit her counsel to inquire of Officer Schervish on cross-examination as to how many other traffic violators he had arrested on the day he arrested appellant and how many traffic violators he had arrested with that particular detective car. Appellant's contention lacks merit.

Appellant's counsel's inquiries were irrelevant to the central issue at trial, viz., whether appellant was guilty of speeding [\*8] on the freeway. *Evid. R. 401*, [HN4] which defines relevancy, provides as follows:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

*Evid. R. 482*, [HN5] which deals with the admissibility of relevant evidence, states in pertinent party as follows:

"Evidence which is not relevant is not admissible."

Prior to the commencement of appellant's trial the trial court held a hearing on appellant's motion to suppress Officer Schervish's testimony and determined Schervish was competent to testify at appellant's trial. Since the issue of Officer Schervish's competency to testify was resolved before appellant's trial began, the only issue at trial was the determination of appellant's guilt. Counsel's inquiries were not relevant to the crucial question of whether appellant was speeding. Therefore, the trial court did not err when the court refused to allow counsel to pursue that line of questioning on cross-examination.

For these reasons, appellant's assignments of error are overruled.

#### JOURNAL ENTRY

It is ordered that [\*9] appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Euclid Municipal Court to carry this judgment into execution.

142 of 195 DOCUMENTS

**THE CITY OF CONNEAUT, Plaintiff-Appellee, vs NELSON D. CASE,  
Defendant-Appellant**

**CASE NO. 1148**

**COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT, ASHTABULA  
COUNTY**

*1984 Ohio App. LEXIS 10494*

**July 27, 1984**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeal from the Municipal Court, Case No. T-13779

**DISPOSITION:**

JUDGMENT: AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Municipal Court of Conneaut (Ohio), which found him guilty of speeding in violation of Conneaut, Ohio Mun. Ordinance 333.03.

**OVERVIEW:** Defendant was charged with operating his vehicle at 55 miles per hour in a 35 mile per hour zone. The issue before the court was whether the prosecution established, by use of the officer's testimony, that the K-55 radar unit used to measure defendant's speed was operating properly at the time of defendant's arrest for speeding. The court affirmed. The court, upon reviewing the transcript of the officer's testimony at trial, found that the officer established that the radar unit was accurate and functioning properly at the time that defendant's speed was checked. The court concluded that the trial court had before it substantial and reliable evidence of defendant's violation of the municipal speeding ordinance.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** speed, radar, mile, thirty-five, switch, manufacturer, functioning, fifty-five, machine, tuning, target, truck, fork, speeding, struck, eighty, windows, front, assignments of error, motor vehicles, defendant-appellant, calibration, testifying, thirty-two, stationary, speedometer, eastbound, observe, screen, patrol

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***  
***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***  
***Evidence > Scientific Evidence > General Overview***

[HN1] In a prosecution involving speed, where the sole evidence is a reading secured by the use of a radar type speedometer, it is the obligation of the prosecution to establish prima facie that the radar type speedometer was accurate and functioning properly at the time the accused's speed was checked and a failure of such proof shall cause an insufficiency of evidence to support conviction.

**COUNSEL:**

ATTY. STEPHANIE MALBASA, Law Director, 294 Main Street, Conneaut, Ohio 44030, (for Plaintiff-Appellee).

ATTY. DOUGLAS PAINTER, McGinness, Painter & McGinness, 33 Public Square Bldg., Cleveland, Ohio 44113, (for Defendant-Appellant).

**JUDGES:**

COOK, P.J., concurs.

FORD, J., Concurs in judgment only.

**OPINION BY:**

DAHLING, J.

**OPINION:**

OPINION

This is an appeal from a judgment of the Municipal Court of Conneaut, wherein, after a bench trial, the defendant-appellant was found guilty of speeding. He was fined \$50 and costs.

On March 26, 1983, defendant-appellant was charged with operating a motor vehicle in the City of Conneaut in excess of the posted speed limit. The officer, using a K-55 radar unit, clocked the appellant travelling fifty-five miles per hour in a thirty-five mile per hour zone.

The appellant was charged with violation of Conneaut Municipal Ordinance 333.03. After trial to the court, the appellant was found guilty. This appeal followed.

The assignments of error are as follows:

I. THE TRIAL COURT ERRED IN ACCEPTING EXPERT AND TECHNICAL EVIDENTIARY [\*2] TESTIMONY ON THE USE OF RADAR IN A SPEEDING PROSECUTION OVER THE TIMELY OBJECTION OF DEFENSE COUNSEL WHERE THE COURT DID NOT TAKE JUDICIAL NOTICE ON THE RECORD OF THE ACCURACY AND ACCEPTANCE OF THE USE OF RADAR IN OHIO.

II. THE TRIAL COURT ERRED IN ACCEPTING THE ARRESTING OFFICER'S TESTIMONY AS TO HIS KNOWLEDGE AND USE OF THE K-55 M.P.H. RADAR UNIT WHEN IN FACT HE HAD NO KNOWLEDGE OR COMPREHENSION OF WHAT HE WAS ATTEMPTING TO DO.

The assignments of error presented by the appellant will be considered together. They are without merit.

State v. Bonar (1973), 40 Ohio App. 2d 360, states in syllabus one:

[HN1] "In a prosecution involving speed, where the sole evidence is a reading secured by the use of a radar type speedmeter, it is the obligation of the prosecution to establish prima facie that the radar type speedmeter was accurate and functioning properly at the time the accused's speed was checked and a failure of such proof shall cause an insufficiency of evidence to support conviction."

Thus, the primary issue is whether the prosecution established, by use of the officer's testimony, that the K-55 radar unit was operating properly at the time and on the date of the arrest [\*3] of the appellant. The transcript reveals that the officer met the Bonar test. He stated:

"\* \* \*

"A. To make sure that the unit is inserted into the lighter of the car. To make sure there is contact and there is juice getting to the unit. After that, we go through a test of the unit which consist of turning the unit on, making sure it is functioning. There is a switch to the right of the switch that turns the unit on.

MR. PAINTER:

Objection again, your Honor.

JUDGE TITTLE:

Overruled.

A. Which, when you push it in the down position the lights, all of the lights, on the radar unit to insure that all lights are functioning, and the manufacturer has a set calibration.

MR. PAINTER:

Objection again, your Honor.

JUDGE TITTLE:

You don't have to object, you have a continuing objection going. It is this court's ruling that this man can testify as to what he did. You may proceed.

A. And at which time I raised the switch and it should show a designated number in each of the windows. There are two windows in the unit which show a target speed and a patrol speed and the manufacturer sets those at thirty-two.

MR. PAINTER:

Objection, your Honor. This is not, [\*4] he is not testifying what he did, he is testifying what the manufacturer did, and this is hearsay.

JUDGE TITTLE:

Overruled.

A. And at which time I have checked the calibrations by flipping the switch up according to manufacturers specifications. Both windows lit [sic] up with the thirty-two. After that, there is another switch in this in case your moving and also stationary. If flipped the switch into the moving mode, and I used two tuning forks to check the operation of the machine. The one is a thirty-five mile an hour tuning fork. When it is struck and put in front of the machine, it shows the speed of thirty-five. Also, I have one that's set at eighty miles an hour, and when it's struck, put up in front of the screen, I will get a eighty mile an hour reading. In the moving made, I struck both of the tuning forks and

put them into the screen to show the operation, it was functioning properly.

MR. PAINTER:

Objection.

JUDGE TITTLE:

Sustained as to that conclusion.

A. With the two tuning forks in front of it, it gives a reading of thirty-five--

MR. PAINTER:

Objection, a continuing objection.

JUDGE TITTLE:

Noted. Overruled.

A. The thirty-five shows [\*5] in the patrol speed and forty-five will show in the target speed. I then put the machine into the stationary mode and again used the tuning forks, showing a thirty-five in a target speed and the eighty in the target speed. Going by the procedure, the machine was working properly. Over at the right hand there is a violumn control for the audio portion of the radar. I turned it up, making sure it was working properly. I could hear it working.

MR. PAINTER:

Objection. It's a conclusion that it is working properly.

JUDGE TITLE:

Overruled.

A. And at that point, I was, I set my radar unit into action.

MR. NAYLOR:

Q. After you completed all of these procedures, what, if anything, did you determine?

A. I determined that the radar unit was working.

MR. PAINTER:

Objection.

JUDGE TITLE:

Overruled.

MR. NAYLOR:

Q. What, if anything, did you observe with respect to the motor vehicles about 9:30 P.M. in the date of question?

A. I observed two motor vehicles eastbound on East Main Road. One was a car and the other was an old rumble

type vehicle, sitting a little higher than the car. Both vehicles were eastbound, coming from the Furnace Road area. The truck [\*6] vehicle was behind a car vehicle, at that point I read the speed of the car vehicle to be around thirty-eight miles an hour, at which time the truck vehicle pulled into the outer lane and began passing the care just before Peach Street there, and at Bell Street. The truck type vehicle was in the outside lane passing the car and I read the speed to be fifty-five miles an hour, which I locked on the radar.

\* \* \*"

The officer further testified as to his observation:

"Q. So what period, over what distance did you observe the truck vehicle, total?

A. I would say about three quarters of a mile.

Q. Based on your observation, were you able to form an opinion on the speed?

A. Yes.

Q. What was that opinion?

A. My opinion is that the vehicle was going fifty-five miles an hour."

Also, the appellant admitted to the officer that he was going over the limit:

"A. Yes. I asked him for his driver's license and for his registration. I advised Mr. Case what he was being stopped for. I advised him he was being stopped for speeding. He asked me how fast was he going and I said fifty-five in a thirty-five at which time Mr. Case said I was going over the limit, but I wasn't [\*7] going that fast. I said--\* \* \*"

It is clear that the court had before it substantial and reliable evidence of the appellant's violation of the speeding ordinance and his conviction was without error. Counsel for the appellant is to be commended for his zeal, but judgment must be affirmed.

Judgment affirmed.

143 of 195 DOCUMENTS

**THE CITY OF CONNEAUT, Plaintiff-Appellee, vs NELSON D. CASE,  
Defendant-Appellant**

**CASE NO. 1148**

**COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT, ASHTABULA  
COUNTY**

*1984 Ohio App. LEXIS 10494*

**July 27, 1984**

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDINGS: Criminal appeal from the Municipal Court, Case No. T-13779

**DISPOSITION:**

JUDGMENT: AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Municipal Court of Conneaut (Ohio), which found him guilty of speeding in violation of Conneaut, Ohio Mun. Ordinance 333.03.

**OVERVIEW:** Defendant was charged with operating his vehicle at 55 miles per hour in a 35 mile per hour zone. The issue before the court was whether the prosecution established, by use of the officer's testimony, that the K-55 radar unit used to measure defendant's speed was operating properly at the time of defendant's arrest for speeding. The court affirmed. The court, upon reviewing the transcript of the officer's testimony at trial, found that the officer established that the radar unit was accurate and functioning properly at the time that defendant's speed was checked. The court concluded that the trial court had before it substantial and reliable evidence of defendant's violation of the municipal speeding ordinance.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** speed, radar, mile, thirty-five, switch, manufacturer, functioning, fifty-five, machine, tuning, target, truck, fork, speeding, struck, eighty, windows, front, assignments of error, motor vehicles, defendant-appellant, calibration, testifying, thirty-two, stationary, speedometer, eastbound, observe, screen, patrol

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*  
*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*  
*Evidence > Scientific Evidence > General Overview*

[HN1] In a prosecution involving speed, where the sole evidence is a reading secured by the use of a radar type speedometer, it is the obligation of the prosecution to establish prima facie that the radar type speedometer was accurate and functioning properly at the time the accused's speed was checked and a failure of such proof shall cause an insufficiency of evidence to support conviction.

**COUNSEL:**

ATTY. STEPHANIE MALBASA, Law Director, 294 Main Street, Conneaut, Ohio 44030, (for Plaintiff-Appellee).

ATTY. DOUGLAS PAINTER, McGinness, Painter & McGinness, 33 Public Square Bldg., Cleveland, Ohio 44113, (for Defendant-Appellant).

**JUDGES:**

COOK, P.J., concurs.

FORD, J., Concurs in judgment only.

**OPINION BY:**

DAHLING, J.

**OPINION:**

OPINION

This is an appeal from a judgment of the Municipal Court of Conneaut, wherein, after a bench trial, the defendant-appellant was found guilty of speeding. He was fined \$50 and costs.

On March 26, 1983, defendant-appellant was charged with operating a motor vehicle in the City of Conneaut in excess of the posted speed limit. The officer, using a K-55 radar unit, clocked the appellant travelling fifty-five miles per hour in a thirty-five mile per hour zone.

The appellant was charged with violation of Conneaut Municipal Ordinance 333.03. After trial to the court, the appellant was found guilty. This appeal followed.

The assignments of error are as follows:

I. THE TRIAL COURT ERRED IN ACCEPTING EXPERT AND TECHNICAL EVIDENTIARY [\*2] TESTIMONY ON THE USE OF RADAR IN A SPEEDING PROSECUTION OVER THE TIMELY OBJECTION OF DEFENSE COUNSEL WHERE THE COURT DID NOT TAKE JUDICIAL NOTICE ON THE RECORD OF THE ACCURACY AND ACCEPTANCE OF THE USE OF RADAR IN OHIO.

II. THE TRIAL COURT ERRED IN ACCEPTING THE ARRESTING OFFICER'S TESTIMONY AS TO HIS KNOWLEDGE AND USE OF THE K-55 M.P.H. RADAR UNIT WHEN IN FACT HE HAD NO KNOWLEDGE OR COMPREHENSION OF WHAT HE WAS ATTEMPTING TO DO.

The assignments of error presented by the appellant will be considered together. They are without merit.

State v. Bonar (1973), 40 Ohio App. 2d 360, states in syllabus one:

[HN1] "In a prosecution involving speed, where the sole evidence is a reading secured by the use of a radar type speedmeter, it is the obligation of the prosecution to establish prima facie that the radar type speedmeter was accurate and functioning properly at the time the accused's speed was checked and a failure of such proof shall cause an insufficiency of evidence to support conviction."

Thus, the primary issue is whether the prosecution established, by use of the officer's testimony, that the K-55 radar unit was operating properly at the time and on the date of the arrest [\*3] of the appellant. The transcript reveals that the officer met the Bonar test. He stated:

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"A. To make sure that the unit is inserted into the lighter of the car. To make sure there is contact and there is juice getting to the unit. After that, we go through a test of the unit which consist of turning the unit on, making sure it is functioning. There is a switch to the right of the switch that turns the unit on.

MR. PAINTER:

Objection again, your Honor.

JUDGE TITTLE:

Overruled.

A. Which, when you push it in the down position the lights, all of the lights, on the radar unit to insure that all lights are functioning, and the manufacturer has a set calibration.

MR. PAINTER:

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You don't have to object, you have a continuing objection going. It is this court's ruling that this man can testify as to what he did. You may proceed.

A. And at which time I raised the switch and it should show a designated number in each of the windows. There are two windows in the unit which show a target speed and a patrol speed and the manufacturer sets those at thirty-two.

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A. And at which time I have checked the calibrations by flipping the switch up according to manufacturers specifications. Both windows lit [sic] up with the thirty-two. After that, there is another switch in this in case your moving and also stationary. If flipped the switch into the moving mode, and I used two tuning forks to check the operation of the machine. The one is a thirty-five mile an hour tuning fork. When it is struck and put in front of the machine, it shows the speed of thirty-five. Also, I have one that's set at eighty miles an hour, and when it's struck, put up in front of the screen, I will get a eighty mile an hour reading. In the moving made, I struck both of the tuning forks and

put them into the screen to show the operation, it was functioning properly.

MR. PAINTER:

Objection.

JUDGE TITTLE:

Sustained as to that conclusion.

A. With the two tuning forks in front of it, it gives a reading of thirty-five--

MR. PAINTER:

Objection, a continuing objection.

JUDGE TITTLE:

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A. The thirty-five shows [\*5] in the patrol speed and forty-five will show in the target speed. I then put the machine into the stationary mode and again used the tuning forks, showing a thirty-five in a target speed and the eighty in the target speed. Going by the procedure, the machine was working properly. Over at the right hand there is a violumn control for the audio portion of the radar. I turned it up, making sure it was working properly. I could hear it working.

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Objection. It's a conclusion that it is working properly.

JUDGE TITLE:

Overruled.

A. And at that point, I was, I set my radar unit into action.

MR. NAYLOR:

Q. After you completed all of these procedures, what, if anything, did you determine?

A. I determined that the radar unit was working.

MR. PAINTER:

Objection.

JUDGE TITLE:

Overruled.

MR. NAYLOR:

Q. What, if anything, did you observe with respect to the motor vehicles about 9:30 P.M. in the date of question?

A. I observed two motor vehicles eastbound on East Main Road. One was a car and the other was an old rumble

type vehicle, sitting a little higher than the car. Both vehicles were eastbound, coming from the Furnace Road area. The truck [\*6] vehicle was behind a car vehicle, at that point I read the speed of the car vehicle to be around thirty-eight miles an hour, at which time the truck vehicle pulled into the outer lane and began passing the care just before Peach Street there, and at Bell Street. The truck type vehicle was in the outside lane passing the car and I read the speed to be fifty-five miles an hour, which I locked on the radar.

\* \* \*"

The officer further testified as to his observation:

"Q. So what period, over what distance did you observe the truck vehicle, total?

A. I would say about three quarters of a mile.

Q. Based on your observation, were you able to form an opinion on the speed?

A. Yes.

Q. What was that opinion?

A. My opinion is that the vehicle was going fifty-five miles an hour."

Also, the appellant admitted to the officer that he was going over the limit:

"A. Yes. I asked him for his driver's license and for his registration. I advised Mr. Case what he was being stopped for. I advised him he was being stopped for speeding. He asked me how fast was he going and I said fifty-five in a thirty-five at which time Mr. Case said I was going over the limit, but I wasn't [\*7] going that fast. I said--\* \* \*"

It is clear that the court had before it substantial and reliable evidence of the appellant's violation of the speeding ordinance and his conviction was without error. Counsel for the appellant is to be commended for his zeal, but judgment must be affirmed.

Judgment affirmed.

144 of 195 DOCUMENTS

**CITY OF CONNEAUT, Plaintiff-Appellee -vs- NELSON D. CASE,  
Defendant-Appellant**

**No. 1031, No. 1032, No. 1033**

**COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, ASHTABULA  
COUNTY, OHIO**

*1981 Ohio App. LEXIS 14139*

**September 21, 1981**

**DISPOSITION:** [\*1]

Judgment Affirmed in part and reversed in part

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment from the Conneaut Municipal Court (Ohio) wherein defendant was found guilty of two charges of speeding and one charge of an expired license plate. A police officer testified as to his observation of defendant's speeding and the clocking defendant's vehicle on a radar gun. The officer observed that defendant had purchased new license plates, which were lying on his dashboard, but had failed to replace the old ones.

**OVERVIEW:** The first speeding charge involved the officer having clocked defendant with a radar gun. At trial, the officer testified extensively as to the procedures used to calibrate the radar gun and also qualified as to being competent to operate the radar. The second speeding charge involving an incident where the officer testified that he had followed defendant and again clocked him with the radar gun as exceeding the lawful speed limit. Defendant testified that he had informed the officer that the reason defendant had not replaced the expired license plates was because he could not get them off. Specifically, defendant was bound for his father's garage to burn off the screws with a torch when the officer stopped defendant's vehicle. On appeal, defendant's main arguments were manifest weight and that the arresting officer was not qualified to use the radar gun. The court held that: (1) the two speeding convictions were clearly proven beyond a reasonable doubt and were not against the manifest weight of the evidence; and (2) because the material facts as to the expired license plates charges were not in dispute, the trial court should have granted a judgment of acquittal on that charge.

**OUTCOME:** The court affirmed the two speeding convictions. Finding that the trial court should have granted a judgment of acquittal on the expired license plates charge as the material facts were not in dispute, the court reversed and acquitted defendant as to that charge.

**CORE TERMS:** license, plate, speeding, speed, window, radar, traveling, target, mph, stop sign, calibration, distance, driver, conversation, viaduct, clock, plug, gun, pickup truck, high rate, expired, registration, windshield, stationary, suspended, dashboard, manifest, clocking, gaining, pulling

**COUNSEL:**

ROBERT E. NAYLOR, City Hall, 294 Main st, Conneaut, Ohio 44030. COUNSEL FOR APPELLEE.

DOUGLAS PAINTER, 33 Public Square Bldg, Cleveland, Ohio 44113. COUNSEL FOR APPELLANT.

**JUDGES:**

HOFSTETTER, P. J. concurs in judgment only

COOK, J., concurs as to speeding charges and dissens as to the license plate charges.

**OPINION BY:**

DAHLING, J.

**OPINION:**

## OPINION

This is an appeal from a judgment of the Conneaut Municipal Court wherein the defendant was found guilty of two charges of Speeding and one charge of Expired License Plate.

The defendant has presented Assignments of Error as to all charges.

The Assignments of Error as to the speeding charges are without merit and the Assignments of Error as to the expired license is with merit.

The first speeding charge was for an incident on March 1, 1980. The police officer charged defendant with going 50 m.p.h. in a 35 m.p.h. zone. The officer testified as to both his observation and the clocking on the K-55 radar gun. He also qualified as to being competent to operate the radar.

Defendant's main arguments are manifest weight and that the arresting officer, Thomas Robinson, was not [\*2] qualified to use the radar gun.

Officer Robinson testified as follows as to the K-55 radar gun:

"Q. Could you describe the procedure that you use to calibrate it?"

A. Okay. When we put the radar in the patrol vehicle, we plug in the unit, plug in the scope, which is the antenna, into the unit where it has the target and everything on it. We turn the unit on and we use the built-in varification calibration. We turn to the moving mode, turn the switch up, which gives you a 32 in both windows, which is the patrol window and also the target window. We turn the switch down, which tests all the lights in the unit, get an 88 and 188, from the respective windows. And that's after that, and then take it and put it on the stationary road, strike the tunin fork, being a 50 mph tuning fork, plier plug the antenna 'til you reach 50 mph cable controls through the target window, which would verify give calibration.

Q. And what does all this establish, if anything?

A. This establishes that we have verified the calibration to be correct and it is operating properly.

Q. And was this procedure utilized prior to the hour of 11 a.m., on March 1?

A. Yes, sir, it was.

Q. [\*3] And when is that.

A. 7 a.m., beginning of the shift.

Q. Who did that?

A. I did.

Q. Do you recall where you were when you did that?

A. In the police lot.

Q. And what did you determine, if anything?

A. I determined that it was operating properly.

Q. And what, if anything, did you observe at approximately 11:08 a.m., on that particular date, March 1?

A. Well, I was stationary at Peterson's Gas Station, and I observed a red 1978 pickup truck, Ford, traveling eastbound, passing a vehicle on Route 20, East Main Road, and I had the audio turned up on the radar unit and I could hear the unit with a high-pitched sound as it was locking in on the target, which was the Ford pickup truck. As it picked up near Furnace Road, the vehicle, the target locked in at 50 mph. And as the vehicle went by me, it continued to travel at the speed. I observed it, also, traveling at a high rate of speed. I pulled out of the lot, pursued the vehicle, and stopped the vehicle at East Main and Thompson Road. At that time,--

Q. That's in the City of Conneaut?

A. Yes, sir, that is in the City of Conneaut."

We conclude from the above and other testimony relating [\*4] to this arrest that the Assignments of Error are without merit.

The second charge was on April 3, 1980. Officer Robinson testified that he followed behind defendant at about a thirty (30) foot distance and clocked him at 60 m.p.h. in a 25 m.p.h. zone.

His testimony, in part, is as follows:

"THE COURT: Would you describe to the Court, how you secured this clock on the vehicle?

A. Yes, sir. The moving clock I was right behind Mr. Case's vehicle, I had myself--I had approximately a 25-30 foot distance from Mr. Case's vehicle. I was traveling the same speed he was. He was not gaining. I was not gaining on his vehicle. He was not pulling away from me. And that's when I got the 60 mph clocking.

Q. Over what distance was this clock secured?

A. This is approximately midpoint across the viaduct to the end of the viaduct, to the end of the viaduct at which time he was still increasing his speed. And I turned on my lights to stop the vehicle.

Q. Where was the vehicle stopped?

A. I stopped the vehicle across from Bartone's Gas Station which would be East Main, Old Main.

Q. Over what distance would that have been?

A. A tenth of a mile.

Q. And did you--Based [\*5] on your observation and your experience--Strike that.

Were you able to--The unit were operating, in calibration? Checked for the accuracy of speed?

A. The speedometer?

Q. Yes.

A. I do not know.

Q. Based on your observations and experience, are you able to form an opinion as to the speed of the vehicle operated by the defendant?

A. Yes.

Q. And what was that?

A. I believe, the vehicle was traveling around 60 mph.

Q. And once you stopped the vehicle, did you have any conversation with the defendant.

A. Yes, sir, I did.

Q. Where was the conversation?

A. That was on East Main Road by Old Main Road.

Q. Who was present, at that time?

A. Just myself and Mr. Case.

Q. Who commenced that conversation?

A. I did.

Q. And what did you say?

A. I asked Mr. Case for his driver's license and registration again. And again, he stated that I knew who he was and I asked him, I said, 'I still need your registration and I still need your driver's license.' I advised him of the violation. Mr. Case said, 'Okay' I advised him. When Mr. Case said, 'Okay'. He says he wanted a break, that he did not need the ticket, because his driver's [\*6] license was going to be suspended. I advised him that he failed to stop for the stop sign, pulling right out in front of Main could have caused an accident, also that his high rate of speed, I did not feel was called for in that area. And Mr. Case stated that he was late to pick up a load, that he was a truck driver. And I advised Mr. Case that--to stay in his vehicle and I would beright with him. I was going to issue a citation for the stop sign and issue a citation for the speeding. At that time, I returned to my patrol unit. I had started the citation, at which time, Mr. Case came back to my unit, got in on the passenger side, and Mr. Case, more or less, pleaded with me to give him a break on the speeding violation because he was going to end up with his license being suspended. I told him that I could not give a break on the speeding. He had four speeding violations by different police. I told him I would give him a break on the stop sign. So I gave him a verbal warning for the stop sign and issued a citation for the speeding. He thanked me for that, I gave him the citation, and he went on his way."

The Assignments of Error are that the State failed to prove [\*7] the essential elements beyond a reasonable doubt, and manifest weight. The Assignments of Error are obviously without merit.

The other charge was that defendant had purchased new license plates but simply had failed to take the old plates off and put the new plates on. He had the new laying on the dashboard.

The defendant testified as follows:

"A. The day before March 1, I come--I got home from Baltimore, I think, Maryland. I come home it was about, 10 o'clock in the morning, when I got home. I stopped by the AAA, bought my license plates, went home. It was a Friday.

Q. Okay. And where did you put your license plates?

A. On the dashboard, of my pickup.

Q. Were they on the dashboard or were they standing up in the window? The windshield?

A. They were kind of--I had them propped up. I have an air freshener, it's about this long, it's in a plastic container. They were kind of standing up on it, not actually standing up in the windshield, but leaning against this car.

Q. All right. Let the record show, that Mr. Case motioned that there's a box-like cube, of approximately 8 inches, on his dash, which was supporting the license plates; is that true?

A. [\*8] Yes, it is.

Q. Then why did you not install the license plates on your truck?

A. The license plates that were on my truck, I had put on when it was brand-new. The screws--The screw-type head on with 7/16 nuts behind them, and I tried to change them at home and I couldn't get the screws out. So I had to burn the plates in my dad's garage, in Albion, and I burned them off with a torch.

Q. And where were you bound for at the time you were stopped on March 1?

A. To Albion, Pennsylvania, to the garage.

Q. Did you ever tell the officer,--you've heard him testify to today, that you didn't put the license plates on, because you didn't have time?

A. No, I didn't tell him I didn't have time. I told him I couldn't get them off.

Q. You did tell him that?

A. Yes, I did."

In our opinion, the court should have granted a judgment of acquittal on this charge as the material facts are not in dispute.

In conclusion, the two speeding convictions are affirmed and the expired license conviction is reversed and as to this charge, defendant is acquitted.

145 of 195 DOCUMENTS

**CITY OF CONNEAUT, Plaintiff-Appellee -vs- NELSON D. CASE,  
Defendant-Appellant**

**No. 1031, No. 1032, No. 1033**

**COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, ASHTABULA  
COUNTY, OHIO**

*1981 Ohio App. LEXIS 14139*

**September 21, 1981**

**DISPOSITION:** [\*1]

Judgment Affirmed in part and reversed in part

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment from the Conneaut Municipal Court (Ohio) wherein defendant was found guilty of two charges of speeding and one charge of an expired license plate. A police officer testified as to his observation of defendant's speeding and the clocking defendant's vehicle on a radar gun. The officer observed that defendant had purchased new license plates, which were lying on his dashboard, but had failed to replace the old ones.

**OVERVIEW:** The first speeding charge involved the officer having clocked defendant with a radar gun. At trial, the officer testified extensively as to the procedures used to calibrate the radar gun and also qualified as to being competent to operate the radar. The second speeding charge involving an incident where the officer testified that he had followed defendant and again clocked him with the radar gun as exceeding the lawful speed limit. Defendant testified that he had informed the officer that the reason defendant had not replaced the expired license plates was because he could not get them off. Specifically, defendant was bound for his father's garage to burn off the screws with a torch when the officer stopped defendant's vehicle. On appeal, defendant's main arguments were manifest weight and that the arresting officer was not qualified to use the radar gun. The court held that: (1) the two speeding convictions were clearly proven beyond a reasonable doubt and were not against the manifest weight of the evidence; and (2) because the material facts as to the expired license plates charges were not in dispute, the trial court should have granted a judgment of acquittal on that charge.

**OUTCOME:** The court affirmed the two speeding convictions. Finding that the trial court should have granted a judgment of acquittal on the expired license plates charge as the material facts were not in dispute, the court reversed and acquitted defendant as to that charge.

**CORE TERMS:** license, plate, speeding, speed, window, radar, traveling, target, mph, stop sign, calibration, distance, driver, conversation, viaduct, clock, plug, gun, pickup truck, high rate, expired, registration, windshield, stationary, suspended, dashboard, manifest, clocking, gaining, pulling

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**JUDGES:**

HOFSTETTER, P. J. concurs in judgment only

COOK, J., concurs as to speeding charges and dissens as to the license plate charges.

**OPINION BY:**

DAHLING, J.

**OPINION:**

## OPINION

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Officer Robinson testified as follows as to the K-55 radar gun:

"Q. Could you describe the procedure that you use to calibrate it?"

A. Okay. When we put the radar in the patrol vehicle, we plug in the unit, plug in the scope, which is the antenna, into the unit where it has the target and everything on it. We turn the unit on and we use the built-in varification calibration. We turn to the moving mode, turn the switch up, which gives you a 32 in both windows, which is the patrol window and also the target window. We turn the switch down, which tests all the lights in the unit, get an 88 and 188, from the respective windows. And that's after that, and then take it and put it on the stationary road, strike the tunin fork, being a 50 mph tuning fork, plier plug the antenna 'til you reach 50 mph cable controls through the target window, which would verify give calibration.

Q. And what does all this establish, if anything?

A. This establishes that we have verified the calibration to be correct and it is operating properly.

Q. And was this procedure utilized prior to the hour of 11 a.m., on March 1?

A. Yes, sir, it was.

Q. [\*3] And when is that.

A. 7 a.m., beginning of the shift.

Q. Who did that?

A. I did.

Q. Do you recall where you were when you did that?

A. In the police lot.

Q. And what did you determine, if anything?

A. I determined that it was operating properly.

Q. And what, if anything, did you observe at approximately 11:08 a.m., on that particular date, March 1?

A. Well, I was stationary at Peterson's Gas Station, and I observed a red 1978 pickup truck, Ford, traveling eastbound, passing a vehicle on Route 20, East Main Road, and I had the audio turned up on the radar unit and I could hear the unit with a high-pitched sound as it was locking in on the target, which was the Ford pickup truck. As it picked up near Furnace Road, the vehicle, the target locked in at 50 mph. And as the vehicle went by me, it continued to travel at the speed. I observed it, also, traveling at a high rate of speed. I pulled out of the lot, pursued the vehicle, and stopped the vehicle at East Main and Thompson Road. At that time,--

Q. That's in the City of Conneaut?

A. Yes, sir, that is in the City of Conneaut."

We conclude from the above and other testimony relating [\*4] to this arrest that the Assignments of Error are without merit.

The second charge was on April 3, 1980. Officer Robinson testified that he followed behind defendant at about a thirty (30) foot distance and clocked him at 60 m.p.h. in a 25 m.p.h. zone.

His testimony, in part, is as follows:

"THE COURT: Would you describe to the Court, how you secured this clock on the vehicle?

A. Yes, sir. The moving clock I was right behind Mr. Case's vehicle, I had myself--I had approximately a 25-30 foot distance from Mr. Case's vehicle. I was traveling the same speed he was. He was not gaining. I was not gaining on his vehicle. He was not pulling away from me. And that's when I got the 60 mph clocking.

Q. Over what distance was this clock secured?

A. This is approximately midpoint across the viaduct to the end of the viaduct, to the end of the viaduct at which time he was still increasing his speed. And I turned on my lights to stop the vehicle.

Q. Where was the vehicle stopped?

A. I stopped the vehicle across from Bartone's Gas Station which would be East Main, Old Main.

Q. Over what distance would that have been?

A. A tenth of a mile.

Q. And did you--Based [\*5] on your observation and your experience--Strike that.

Were you able to--The unit were operating, in calibration? Checked for the accuracy of speed?

A. The speedometer?

Q. Yes.

A. I do not know.

Q. Based on your observations and experience, are you able to form an opinion as to the speed of the vehicle operated by the defendant?

A. Yes.

Q. And what was that?

A. I believe, the vehicle was traveling around 60 mph.

Q. And once you stopped the vehicle, did you have any conversation with the defendant.

A. Yes, sir, I did.

Q. Where was the conversation?

A. That was on East Main Road by Old Main Road.

Q. Who was present, at that time?

A. Just myself and Mr. Case.

Q. Who commenced that conversation?

A. I did.

Q. And what did you say?

A. I asked Mr. Case for his driver's license and registration again. And again, he stated that I knew who he was and I asked him, I said, 'I still need your registration and I still need your driver's license.' I advised him of the violation. Mr. Case said, 'Okay' I advised him. When Mr. Case said, 'Okay'. He says he wanted a break, that he did not need the ticket, because his driver's [\*6] license was going to be suspended. I advised him that he failed to stop for the stop sign, pulling right out in front of Main could have caused an accident, also that his high rate of speed, I did not feel was called for in that area. And Mr. Case stated that he was late to pick up a load, that he was a truck driver. And I advised Mr. Case that--to stay in his vehicle and I would beright with him. I was going to issue a citation for the stop sign and issue a citation for the speeding. At that time, I returned to my patrol unit. I had started the citation, at which time, Mr. Case came back to my unit, got in on the passenger side, and Mr. Case, more or less, pleaded with me to give him a break on the speeding violation because he was going to end up with his license being suspended. I told him that I could not give a break on the speeding. He had four speeding violations by different police. I told him I would give him a break on the stop sign. So I gave him a verbal warning for the stop sign and issued a citation for the speeding. He thanked me for that, I gave him the citation, and he went on his way."

The Assignments of Error are that the State failed to prove [\*7] the essential elements beyond a reasonable doubt, and manifest weight. The Assignments of Error are obviously without merit.

The other charge was that defendant had purchased new license plates but simply had failed to take the old plates off and put the new plates on. He had the new laying on the dashboard.

The defendant testified as follows:

"A. The day before March 1, I come--I got home from Baltimore, I think, Maryland. I come home it was about, 10 o'clock in the morning, when I got home. I stopped by the AAA, bought my license plates, went home. It was a Friday.

Q. Okay. And where did you put your license plates?

A. On the dashboard, of my pickup.

Q. Were they on the dashboard or were they standing up in the window? The windshield?

A. They were kind of--I had them propped up. I have an air freshener, it's about this long, it's in a plastic container. They were kind of standing up on it, not actually standing up in the windshield, but leaning against this car.

Q. All right. Let the record show, that Mr. Case motioned that there's a box-like cube, of approximately 8 inches, on his dash, which was supporting the license plates; is that true?

A. [\*8] Yes, it is.

Q. Then why did you not install the license plates on your truck?

A. The license plates that were on my truck, I had put on when it was brand-new. The screws--The screw-type head on with 7/16 nuts behind them, and I tried to change them at home and I couldn't get the screws out. So I had to burn the plates in my dad's garage, in Albion, and I burned them off with a torch.

Q. And where were you bound for at the time you were stopped on March 1?

A. To Albion, Pennsylvania, to the garage.

Q. Did you ever tell the officer,--you've heard him testify to today, that you didn't put the license plates on, because you didn't have time?

A. No, I didn't tell him I didn't have time. I told him I couldn't get them off.

Q. You did tell him that?

A. Yes, I did."

In our opinion, the court should have granted a judgment of acquittal on this charge as the material facts are not in dispute.

In conclusion, the two speeding convictions are affirmed and the expired license conviction is reversed and as to this charge, defendant is acquitted.

146 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee, v. JOHN R. COLE, Defendant-Appellant**

**NO. 372**

**COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT,  
ADAMS COUNTY**

*1981 Ohio App. LEXIS 11934*

**June 12, 1981**

**DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the County Court of Adams County (Ohio), which found him guilty by the trial court of driving in excess of the 55 mph speed limit.

**OVERVIEW:** All four of defendant's assignments of error revolved around the real issue of whether or not there was sufficient evidence to convict him of speeding based upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle. The court held that it the MR-7 radar device worked on the scientific principle known as the "Doppler effect," and the validity and accuracy of this scientific principle was a proper subject for judicial notice. The court held that once judicial notice was taken, as long as the court satisfied that the officer had visually identified a speed violation, the monitor indicated a violation, and the audio indicated that the target vehicle was the violator, a conviction based on the reading of the MR-7 was proper.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** radar, speed, assignments of error, judicial notice, reliability, accuracy, speeding, target, evidence obtained, expert testimony, patrolman, scientific principle, patrol vehicle, mounted, assignment of error, properly qualified, prejudicial error, good condition, set forth, calibration, dependable, convicted, violator, monitor, audio

**LexisNexis(R) Headnotes**

*Evidence > Scientific Evidence > General Overview*

[HN1] The MR-7 moving radar device, using the Doppler effect, is acceptable as dependable for its proposed purpose.

*Evidence > Judicial Notice > General Overview*

***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN2] An MR-7 radar device works on the scientific principle known as the "Doppler effect." The validity and accuracy of this scientific principle is a proper subject for judicial notice. Due to the fact that a trial court may take judicial notice of the reliability and accuracy of the MR-7 radar unit, expert testimony on this issue would be merely cumulative and needless. Expert testimony upon the reliability and accuracy of the MR-7 radar unit is not a necessary element to a speeding conviction.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Scientific Evidence > General Overview***

[HN3] The essential elements of a reliable radar reading are: In order to sustain a citation for a radar speed violation the following elements must concur in point of time: (1) The officer must visually identify a speed violation; (2) the monitor must indicate a violation, and, (3) the audio must indicate that the target vehicle is the violator. If the visual identification, monitor reading, and audio all correspond to confirm that the violator was the target vehicle and it is established that the target vehicle was driven by the defendant, the officer has validly cited the driver of the target vehicle for a speed violation. The absence of any of the above elements defeats the validity of the citation. If all of those elements are met, any possibility of misreading is eliminated.

**COUNSEL:**

COUNSEL FOR APPELLANT: John R. Cole, 121 Pasadena Ave., Columbus, Ohio

COUNSEL FOR APPELLEE: Kenneth L. Armstrong, Jr., Asst. Prosecuting Attorney West Union, Ohio

**JUDGES:**

Grey, P. J., Concur In Judgment:

Stephenson, J., Concur:

**OPINION BY:**

ABELE, J.

**OPINION:****OPINION**

This is an appeal from the County Court of Adams County. Appellant, John Cole, was found guilty by the trial court of driving in excess of the 55 mph speed limit, in violation of *R.C. 4511.21*. Appellant has timely filed his appeal and alleges four assignments of error.

"I. The trial court committed prejudicial error by not requiring an expert witness to testify the radar unit in question was in good condition for accurate work.

II. The trial court erred to the prejudice of defendant-appellant in that the decision and judgment dated October 5, 1979, was contrary to law as set forth in the decision.

III. The Defendant is prejudiced and denied due process of law when a trial court does not have a record upon which an appellate court can read and know what was said and by whom.

IV. The Trial Court committed prejudicial error when it found defendant guilty because the evidence as to the [\*2]

radar unit and qualifications of the officer were uncontroverted."

All four of Appellant's assignments of error revolve around the real issue of this appeal; that being whether or not there was sufficient evidence to convict appellant of speeding based upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle. In *State vs. Shelt* (1976), 46 *Ohio App. 2d* 115, 346 *N.E. 2d* 345, the Lucas County Court of Appeals held:

"Upon publication of this opinion, it may be judicially noticed that [HN1] the MR-7 moving radar device, using the Doppler effect, is acceptable as dependable for its proposed purpose." (pg 346)

Appellant argues that one may not be convicted upon evidence obtained from an MR-7 moving radar device unless all of the requirements set forth in the first paragraph of the *Shelt* syllabus are met:

"A person may be convicted of speeding solely upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle where the record contains (1) expert testimony of construction of the device and its method of operation in determining the speed of the approaching vehicle from the opposite direction, and (2) evidence that the [\*3] device is in good condition for accurate work, and (3) evidence that the officer using the device is one qualified for its use by training and experience."

We disagree with appellant's theory. [HN2] An MR-7 radar device works on the scientific principle known as the "Doppler effect". The validity and accuracy of this scientific principle is a proper subject for judicial notice. See *East Cleveland v. Ferrell* (1958), 168 *Ohio St.* 298, 154 *N.E. 2d* 630. In *Shelt*, judicial notice of the MR-7 as dependable for its proposed purpose as set out in *Ferrell* was pronounced. This ruling has been upheld and followed in *City of Akron v. Gray* (1979), 60 *Ohio Misc.* 68, 397 *N.E. 2d* 429 in determining the reliability of another radar unit, known as the K-55. Due to the fact that a trial court may take judicial notice of the reliability and accuracy of the MR-7 radar unit, we find that expert testimony on this issue would be merely cumulative and needless. Until a higher court decides otherwise, we hold that expert testimony upon the reliability and accuracy of the MR-7 radar unit is not a necessary element to a speeding conviction.

*Gray*, does however, set forth three additional [\*4] factors a court must consider in a speeding violation involving radar.

"Having accorded judicial notice to the accuracy and reliability of the K-55 unit in measuring what it purports to measure, this court must still consider: (1) Whether the unit was in good operating condition at the time of the instant use; (2) whether the operator of the unit was properly qualified, and; (3) whether the operator properly read the unit." (pg. 431)

From the evidence presented in the case sub judice, there is no question but that the MR-7 used to clock Appellant's speed had been properly calibrated by the use of the tuning fork certified for its calibration, and by the use of its internal calibration. Other tests were made by the patrolman to verify that the unit was working properly on the date of appellant's arrest. Evidence of any malfunction of this unit was neither presented nor noted.

The patrolman issuing the citation in the instant case had been thoroughly trained to use the MR-7 radar unit and had operated this particular MR-7 for over a month without any false readings. This court finds that the officer was properly qualified to operate the MR-7.

Finally, this court must consider [\*5] whether the use of the MR-7 on this occasion was proper. For the first time, [HN3] the essential elements of a reliable radar reading were specifically set forth in *Gray* as follows:

"In order to sustain a citation for a radar speed violation the following elements must concur in point of time: (1) The officer must visually identify a speed violation; (2) the monitor must indicate a violation, and, (3) the audio must indicate that the target vehicle is the violator.

If the visual identification, monitor reading, and audio all correspond to confirm that the violator was the target vehicle and it is established that the target vehicle was driven by the defendant, the officer has validly cited the driver of the target vehicle for a speed violation. The absence of any of the above elements defeats the validity of the citation. If all of those elements are met, any possibility of misreading is eliminated."

We find all of these elements present and therefore find that the patrolman in the instant case properly read the radar unit. Accordingly, all of appellant's assignments of error are not well taken and all are hereby overruled.

The judgment of the trial court is hereby affirmed.

**CONCUR BY:** [\*6]

STEPHENSON, J.

**CONCUR:**

Stephenson, J., - Concurring

I concur in the judgment and opinion insofar as it addresses the first, second and fourth assignments of error. The opinion does not, however, either address or discuss the third assignment of error wherein complaint is made of the adequacy of the transcript of proceedings prepared by the court reporter.

It appears that not all the testimony at trial was recorded. Whatever the reason, in such a situation it is incumbent upon the appellant to at least attempt to present such omitted testimony pursuant to *App. R. 9(C)* or, alternatively, to present the issues and facts in the appeal by an agreed statement pursuant to *App. R. 9(D)*. This not being done herein, appellant's third assignment of error must be overruled.

147 of 195 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee, v. JOHN R. COLE, Defendant-Appellant**

**NO. 372**

**COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT,  
ADAMS COUNTY**

*1981 Ohio App. LEXIS 11934*

**June 12, 1981**

**DISPOSITION:** [\*1]

JUDGMENT AFFIRMED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the County Court of Adams County (Ohio), which found him guilty by the trial court of driving in excess of the 55 mph speed limit.

**OVERVIEW:** All four of defendant's assignments of error revolved around the real issue of whether or not there was sufficient evidence to convict him of speeding based upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle. The court held that it the MR-7 radar device worked on the scientific principle known as the "Doppler effect," and the validity and accuracy of this scientific principle was a proper subject for judicial notice. The court held that once judicial notice was taken, as long as the court satisfied that the officer had visually identified a speed violation, the monitor indicated a violation, and the audio indicated that the target vehicle was the violator, a conviction based on the reading of the MR-7 was proper.

**OUTCOME:** The court affirmed the judgment of the trial court.

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[HN1] The MR-7 moving radar device, using the Doppler effect, is acceptable as dependable for its proposed purpose.

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***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Criminal Trials***

[HN2] An MR-7 radar device works on the scientific principle known as the "Doppler effect." The validity and accuracy of this scientific principle is a proper subject for judicial notice. Due to the fact that a trial court may take judicial notice of the reliability and accuracy of the MR-7 radar unit, expert testimony on this issue would be merely cumulative and needless. Expert testimony upon the reliability and accuracy of the MR-7 radar unit is not a necessary element to a speeding conviction.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Evidence > Scientific Evidence > General Overview***

[HN3] The essential elements of a reliable radar reading are: In order to sustain a citation for a radar speed violation the following elements must concur in point of time: (1) The officer must visually identify a speed violation; (2) the monitor must indicate a violation, and, (3) the audio must indicate that the target vehicle is the violator. If the visual identification, monitor reading, and audio all correspond to confirm that the violator was the target vehicle and it is established that the target vehicle was driven by the defendant, the officer has validly cited the driver of the target vehicle for a speed violation. The absence of any of the above elements defeats the validity of the citation. If all of those elements are met, any possibility of misreading is eliminated.

**COUNSEL:**

COUNSEL FOR APPELLANT: John R. Cole, 121 Pasadena Ave., Columbus, Ohio

COUNSEL FOR APPELLEE: Kenneth L. Armstrong, Jr., Asst. Prosecuting Attorney West Union, Ohio

**JUDGES:**

Grey, P. J., Concur In Judgment:

Stephenson, J., Concur:

**OPINION BY:**

ABELE, J.

**OPINION:****OPINION**

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II. The trial court erred to the prejudice of defendant-appellant in that the decision and judgment dated October 5, 1979, was contrary to law as set forth in the decision.

III. The Defendant is prejudiced and denied due process of law when a trial court does not have a record upon which an appellate court can read and know what was said and by whom.

IV. The Trial Court committed prejudicial error when it found defendant guilty because the evidence as to the [\*2]

radar unit and qualifications of the officer were uncontroverted."

All four of Appellant's assignments of error revolve around the real issue of this appeal; that being whether or not there was sufficient evidence to convict appellant of speeding based upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle. In *State vs. Shelt* (1976), 46 *Ohio App. 2d* 115, 346 *N.E. 2d* 345, the Lucas County Court of Appeals held:

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We disagree with appellant's theory. [HN2] An MR-7 radar device works on the scientific principle known as the "Doppler effect". The validity and accuracy of this scientific principle is a proper subject for judicial notice. See *East Cleveland v. Ferrell* (1958), 168 *Ohio St.* 298, 154 *N.E. 2d* 630. In *Shelt*, judicial notice of the MR-7 as dependable for its proposed purpose as set out in *Ferrell* was pronounced. This ruling has been upheld and followed in *City of Akron v. Gray* (1979), 60 *Ohio Misc.* 68, 397 *N.E. 2d* 429 in determining the reliability of another radar unit, known as the K-55. Due to the fact that a trial court may take judicial notice of the reliability and accuracy of the MR-7 radar unit, we find that expert testimony on this issue would be merely cumulative and needless. Until a higher court decides otherwise, we hold that expert testimony upon the reliability and accuracy of the MR-7 radar unit is not a necessary element to a speeding conviction.

*Gray*, does however, set forth three additional [\*4] factors a court must consider in a speeding violation involving radar.

"Having accorded judicial notice to the accuracy and reliability of the K-55 unit in measuring what it purports to measure, this court must still consider: (1) Whether the unit was in good operating condition at the time of the instant use; (2) whether the operator of the unit was properly qualified, and; (3) whether the operator properly read the unit." (pg. 431)

From the evidence presented in the case sub judice, there is no question but that the MR-7 used to clock Appellant's speed had been properly calibrated by the use of the tuning fork certified for its calibration, and by the use of its internal calibration. Other tests were made by the patrolman to verify that the unit was working properly on the date of appellant's arrest. Evidence of any malfunction of this unit was neither presented nor noted.

The patrolman issuing the citation in the instant case had been thoroughly trained to use the MR-7 radar unit and had operated this particular MR-7 for over a month without any false readings. This court finds that the officer was properly qualified to operate the MR-7.

Finally, this court must consider [\*5] whether the use of the MR-7 on this occasion was proper. For the first time, [HN3] the essential elements of a reliable radar reading were specifically set forth in *Gray* as follows:

"In order to sustain a citation for a radar speed violation the following elements must concur in point of time: (1) The officer must visually identify a speed violation; (2) the monitor must indicate a violation, and, (3) the audio must indicate that the target vehicle is the violator.

If the visual identification, monitor reading, and audio all correspond to confirm that the violator was the target vehicle and it is established that the target vehicle was driven by the defendant, the officer has validly cited the driver of the target vehicle for a speed violation. The absence of any of the above elements defeats the validity of the citation. If all of those elements are met, any possibility of misreading is eliminated."

We find all of these elements present and therefore find that the patrolman in the instant case properly read the radar unit. Accordingly, all of appellant's assignments of error are not well taken and all are hereby overruled.

The judgment of the trial court is hereby affirmed.

**CONCUR BY:** [\*6]

STEPHENSON, J.

**CONCUR:**

Stephenson, J., - Concurring

I concur in the judgment and opinion insofar as it addresses the first, second and fourth assignments of error. The opinion does not, however, either address or discuss the third assignment of error wherein complaint is made of the adequacy of the transcript of proceedings prepared by the court reporter.

It appears that not all the testimony at trial was recorded. Whatever the reason, in such a situation it is incumbent upon the appellant to at least attempt to present such omitted testimony pursuant to *App. R. 9(C)* or, alternatively, to present the issues and facts in the appeal by an agreed statement pursuant to *App. R. 9(D)*. This not being done herein, appellant's third assignment of error must be overruled.

148 of 195 DOCUMENTS

**CITY OF NAPOLEON, PLAINTIFF-APPELLEE, v. PALE D. MILLER,  
DEFENDANT-APPELLANT****Case No. 7-79-17****Court of Appeals of Ohio, Third Appellate District, Henry County*****1980 Ohio App. LEXIS 9927*****April 1, 1980**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL: Court of Appeals for Henry County

**DISPOSITION:***Judgment Affirmed***CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment from the Napoleon Municipal Court (Ohio). Defendant was charged, convicted, and sentenced for a violation of Napoleon, Ohio, Ordinance § 73.10(C), specifically in operating his passenger car upon a public highway at a speed in excess of the lawful limit. The trial court allowed radar results to be entered into evidence.

**OVERVIEW:** At trial, defendant admitted that he accelerated his speed to go around a truck. A policeman testified that he observed defendant's vehicle traveling at a high rate of speed and verified his observation with a radar gun. The policeman further testified as to his training and experience and as to his testing and calibration of the radar unit. On appeal, defendant argued that the trial court erred in admitting the radar results into evidence, and that the verdict was against the manifest weight of the evidence. The court held that: (1) defendant's admissions against interest sufficiently proved conduct that was prima facie unlawful under § 73.10(C); (2) the establishment of a prima facie violation of the reasonable and proper speed limit placed on defendant the burden of going forward with evidence to overcome such prima facie case; (3) it was for the fact finder, the trial court, to determine what was reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence; and (4) because the evidence was not conclusive in defendant's favor, the court was not permitted to find differently than did the trial court.

**OUTCOME:** The court affirmed the judgment from the trial court.

**CORE TERMS:** speed, miles, pick-up, truck, radar, intersection, clocked, street, front, assignment of error, prima facie, fast, lane, prima facie violation, motor vehicle, speed limit, twenty-five, conclusive, traveling, ordinance, policeman, vicinity, stepped, traffic, surface, highway, posted, night, width, brakes

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

[HN1] Napoleon, Ohio, Ordinance § 73.10 provides: (A) No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions. (B) It is prima facie lawful, for the operator of a motor vehicle to operate the same at a speed not exceeding the following: (2) 25 miles per hour in all other portions of the municipal corporation; (C) It is prima facie unlawful for any person to exceed any of the speed limitations in § 73.10(B), (1), (2), (3), (4), (5), and (6).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview*

*Criminal Law & Procedure > Trials > Burdens of Proof > Defense*

[HN2] The establishment of a prima facie violation of a reasonable and proper speed limit places on a defendant the burden of going forward with evidence to overcome such prima facie case. It is for the fact finder, the trial court, to determine what is reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence.

**COUNSEL:**

Mr. James Hensal, Counsel for Defendant-Appellant

Mr. Keith Muehlfeld, Law Director, counsel for Plaintiff-Appellee

**JUDGES:**

GUERNSEY, P.J., COLE and MILLER, JJ, concur.

**OPINION BY:**

GUERNSEY

**OPINION:**

MEMORANDUM OPINION

GUERNSEY, P.J. Defendant, Dale D. Miller, was charged, convicted and sentenced in the Napoleon Municipal Court for a violation of Sec. 73.10(C) of the codified ordinances of Napoleon, specifically in operating his passenger car on April 9, 1979 upon a public highway, namely Woodlawn at Kolbe, at 9:45 P.M. at a speed of 49 miles per hour in a 25 miles per hour zone. He appeals, assigning error of the trial court (1) in allowing radar results to be entered into evidence, and (2) in that the verdict was against the manifest weight of the evidence revealing that he operated his vehicle in a manner reasonable for the conditions.

The ordinance which he is alleged to have violated [HN1] provides in parts pertinent to this appeal:

"(A) No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due

regard to the traffic, surface, and width of the street or highway [\*2] and any other conditions, \* \* \*.

"(B) It is prima facie lawful, \* \* \* for the operator of a motor vehicle to operate the same at a speed not exceeding the following:

"\* \* \*

"(2) Twenty-five miles per hour in all other portions of the municipal corporation, \* \* \*;

"\* \* \*

"(C) It is prima facie unlawful for any person to exceed any of the speed limitations in divisions (B), (1), (2), (3), (4), (5), and (6) \* \* \*.

"\* \* \*."

According to defendant's testimony on the night in question he was driving his car west on Clinton Street in the City of Napoleon; that at its intersection with Route 108, a north and south street, another street, Woodlawn Avenue, also leaves the intersection in a northwesterly direction at about a forty-five degree angle; that the intersection is controlled by a traffic light and defendant stopped in the left of two right lanes of Clinton Street expecting to proceed on Woodlawn Avenue when the light turned green; that to his right was a pickup truck driven by an elderly person stopped in the right lane of Clinton Street; that when the light turned green the driver of the pickup, instead of proceeding right on Route 108, as the defendant expected, proceeded on [\*3] Woodlawn; that Woodlawn narrowing to one lane the defendant "did step on it to get in front of him, to avoid from hitting anyone or saving my own neck at that point;" that the next thing the defendant looked in the mirror and saw red lights blinking; that "I'm sure that I didn't throw the brakes on as I was - stepped on it to go around this truck, this pick-up truck. I didn't slam the brakes on, which this car has a lot of power and you can get up to a high speed in a short period. And I let it sorta coast along and I have no idea, I'm sure I wasn't going no 49 mph across the railroad tracks;" that "I'm not qualified to say [how fast he reached when he passed the pick-up truck], because this type of car does have enough power to get around."

A Napoleon policeman testified to the effect that immediately prior to his stopping defendant he had been parked in a marked patrol car on Kolbe Street, just off Woodlawn, when he observed a vehicle traveling northwest on Woodlawn at what appeared to be a high rate of speed; that from the intersection to the point where the defendant was clocked Woodlawn Avenue is posted at 25 miles per hour, with no parking or passing permitted; that he clocked [\*4] the defendant's speed on a Custom HR8 hand held stationary radar device at 49 miles per hour; that he advised the defendant that he had clocked him on radar at 49 miles per hour and the defendant "stated that he had to go that fast to pass a pick-up truck that had turned in front of him;" and that he saw no other vehicles in the vicinity and specifically none in front of or following defendant. The policeman further testified as to his previous and current employment and as to his training, experience, knowledge of the theory and application, and as to his testing and calibration, of the radar unit which he used in apprehending the defendant.

There was also evidence that on the night in question the weather was clear and the pavement dry. There is some indication, though not conclusive, that the area in question was residential in character. The evidence was too indefinite for this Court to extract from the record unequivocal evidence as to intersecting streets and distances involved.

On this state of the evidence there is no affirmative showing of error affecting the judgment with relation to the allegations of the first assignment of error. The defendant testified on at least [\*5] two occasions that he "did step on it" and "stepped on it" to get around the pick-up truck and the police officer testified that when advised that he had been clocked at forty-nine miles per hour the defendant "stated that he had to *go that fast* to pass a pick-up truck that had turned in front of him." (Emphasis added.) This evidence constituted admissions against interest, and in and of itself was sufficient to prove conduct of the defendant that was prima facie unlawful, i.e., that he was traveling at 49 miles per hour, a speed of more than twenty-five miles per hour in an area governed by that speed limit and so posted, which is a

prima facie violation of the basic speed limitation that he not operate his vehicle at a speed greater than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions.

Under these circumstances there was no necessity of the prosecution establishing the validity of the radar reading and it is not therefore affirmatively shown that there was error having prejudicial effect on the judgment as assigned in the first assignment of error.

[HN2] The establishment, however, of a prima facie violation [\*6] of the reasonable and proper speed limit placed on the defendant the burden of going forward with evidence to overcome such prima facie case. It was for the fact finder, the trial court, to determine what was reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence. There was evidence which would support a conclusion that the defendant's speed was not reasonable and proper even if he was passing the pick-up and, in view of the officer's testimony that there were no other vehicles in the vicinity the trial court could readily have even disbelieved the defendant's testimony as to his motivation to speed. In these circumstances, the evidence not being conclusive in defendant's favor, this court is not permitted to find differently than did the trial court and the second assignment of error is likewise without merit.

149 of 195 DOCUMENTS

**CITY OF NAPOLEON, PLAINTIFF-APPELLEE, v. PALE D. MILLER,  
DEFENDANT-APPELLANT**

**Case No. 7-79-17**

**Court of Appeals of Ohio, Third Appellate District, Henry County**

*1980 Ohio App. LEXIS 9927*

**April 1, 1980**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL: Court of Appeals for Henry County

**DISPOSITION:**

*Judgment Affirmed*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant challenged a judgment from the Napoleon Municipal Court (Ohio). Defendant was charged, convicted, and sentenced for a violation of Napoleon, Ohio, Ordinance § 73.10(C), specifically in operating his passenger car upon a public highway at a speed in excess of the lawful limit. The trial court allowed radar results to be entered into evidence.

**OVERVIEW:** At trial, defendant admitted that he accelerated his speed to go around a truck. A policeman testified that he observed defendant's vehicle traveling at a high rate of speed and verified his observation with a radar gun. The policeman further testified as to his training and experience and as to his testing and calibration of the radar unit. On appeal, defendant argued that the trial court erred in admitting the radar results into evidence, and that the verdict was against the manifest weight of the evidence. The court held that: (1) defendant's admissions against interest sufficiently proved conduct that was prima facie unlawful under § 73.10(C); (2) the establishment of a prima facie violation of the reasonable and proper speed limit placed on defendant the burden of going forward with evidence to overcome such prima facie case; (3) it was for the fact finder, the trial court, to determine what was reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence; and (4) because the evidence was not conclusive in defendant's favor, the court was not permitted to find differently than did the trial court.

**OUTCOME:** The court affirmed the judgment from the trial court.

**CORE TERMS:** speed, miles, pick-up, truck, radar, intersection, clocked, street, front, assignment of error, prima facie, fast, lane, prima facie violation, motor vehicle, speed limit, twenty-five, conclusive, traveling, ordinance, policeman, vicinity, stepped, traffic, surface, highway, posted, night, width, brakes

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

[HN1] Napoleon, Ohio, Ordinance § 73.10 provides: (A) No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions. (B) It is prima facie lawful, for the operator of a motor vehicle to operate the same at a speed not exceeding the following: (2) 25 miles per hour in all other portions of the municipal corporation; (C) It is prima facie unlawful for any person to exceed any of the speed limitations in § 73.10(B), (1), (2), (3), (4), (5), and (6).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview*

*Criminal Law & Procedure > Trials > Burdens of Proof > Defense*

[HN2] The establishment of a prima facie violation of a reasonable and proper speed limit places on a defendant the burden of going forward with evidence to overcome such prima facie case. It is for the fact finder, the trial court, to determine what is reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence.

**COUNSEL:**

Mr. James Hensal, Counsel for Defendant-Appellant

Mr. Keith Muehlfeld, Law Director, counsel for Plaintiff-Appellee

**JUDGES:**

GUERNSEY, P.J., COLE and MILLER, JJ, concur.

**OPINION BY:**

GUERNSEY

**OPINION:**

MEMORANDUM OPINION

GUERNSEY, P.J. Defendant, Dale D. Miller, was charged, convicted and sentenced in the Napoleon Municipal Court for a violation of Sec. 73.10(C) of the codified ordinances of Napoleon, specifically in operating his passenger car on April 9, 1979 upon a public highway, namely Woodlawn at Kolbe, at 9:45 P.M. at a speed of 49 miles per hour in a 25 miles per hour zone. He appeals, assigning error of the trial court (1) in allowing radar results to be entered into evidence, and (2) in that the verdict was against the manifest weight of the evidence revealing that he operated his vehicle in a manner reasonable for the conditions.

The ordinance which he is alleged to have violated [HN1] provides in parts pertinent to this appeal:

"(A) No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due

regard to the traffic, surface, and width of the street or highway [\*2] and any other conditions, \* \* \*.

"(B) It is prima facie lawful, \* \* \* for the operator of a motor vehicle to operate the same at a speed not exceeding the following:

"\* \* \*

"(2) Twenty-five miles per hour in all other portions of the municipal corporation, \* \* \*;

"\* \* \*

"(C) It is prima facie unlawful for any person to exceed any of the speed limitations in divisions (B), (1), (2), (3), (4), (5), and (6) \* \* \*.

"\* \* \*."

According to defendant's testimony on the night in question he was driving his car west on Clinton Street in the City of Napoleon; that at its intersection with Route 108, a north and south street, another street, Woodlawn Avenue, also leaves the intersection in a northwesterly direction at about a forty-five degree angle; that the intersection is controlled by a traffic light and defendant stopped in the left of two right lanes of Clinton Street expecting to proceed on Woodlawn Avenue when the light turned green; that to his right was a pickup truck driven by an elderly person stopped in the right lane of Clinton Street; that when the light turned green the driver of the pickup, instead of proceeding right on Route 108, as the defendant expected, proceeded on [\*3] Woodlawn; that Woodlawn narrowing to one lane the defendant "did step on it to get in front of him, to avoid from hitting anyone or saving my own neck at that point;" that the next thing the defendant looked in the mirror and saw red lights blinking; that "I'm sure that I didn't throw the brakes on as I was - stepped on it to go around this truck, this pick-up truck. I didn't slam the brakes on, which this car has a lot of power and you can get up to a high speed in a short period. And I let it sorta coast along and I have no idea, I'm sure I wasn't going no 49 mph across the railroad tracks;" that "I'm not qualified to say [how fast he reached when he passed the pick-up truck], because this type of car does have enough power to get around."

A Napoleon policeman testified to the effect that immediately prior to his stopping defendant he had been parked in a marked patrol car on Kolbe Street, just off Woodlawn, when he observed a vehicle traveling northwest on Woodlawn at what appeared to be a high rate of speed; that from the intersection to the point where the defendant was clocked Woodlawn Avenue is posted at 25 miles per hour, with no parking or passing permitted; that he clocked [\*4] the defendant's speed on a Custom HR8 hand held stationary radar device at 49 miles per hour; that he advised the defendant that he had clocked him on radar at 49 miles per hour and the defendant "stated that he had to go that fast to pass a pick-up truck that had turned in front of him;" and that he saw no other vehicles in the vicinity and specifically none in front of or following defendant. The policeman further testified as to his previous and current employment and as to his training, experience, knowledge of the theory and application, and as to his testing and calibration, of the radar unit which he used in apprehending the defendant.

There was also evidence that on the night in question the weather was clear and the pavement dry. There is some indication, though not conclusive, that the area in question was residential in character. The evidence was too indefinite for this Court to extract from the record unequivocal evidence as to intersecting streets and distances involved.

On this state of the evidence there is no affirmative showing of error affecting the judgment with relation to the allegations of the first assignment of error. The defendant testified on at least [\*5] two occasions that he "did step on it" and "stepped on it" to get around the pick-up truck and the police officer testified that when advised that he had been clocked at forty-nine miles per hour the defendant "stated that he had to *go that fast* to pass a pick-up truck that had turned in front of him." (Emphasis added.) This evidence constituted admissions against interest, and in and of itself was sufficient to prove conduct of the defendant that was prima facie unlawful, i.e., that he was traveling at 49 miles per hour, a speed of more than twenty-five miles per hour in an area governed by that speed limit and so posted, which is a

prima facie violation of the basic speed limitation that he not operate his vehicle at a speed greater than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions.

Under these circumstances there was no necessity of the prosecution establishing the validity of the radar reading and it is not therefore affirmatively shown that there was error having prejudicial effect on the judgment as assigned in the first assignment of error.

[HN2] The establishment, however, of a prima facie violation [\*6] of the reasonable and proper speed limit placed on the defendant the burden of going forward with evidence to overcome such prima facie case. It was for the fact finder, the trial court, to determine what was reasonable and proper, having due regard to all the conditions and, in doing so, to determine the weight and credibility of the evidence. There was evidence which would support a conclusion that the defendant's speed was not reasonable and proper even if he was passing the pick-up and, in view of the officer's testimony that there were no other vehicles in the vicinity the trial court could readily have even disbelieved the defendant's testimony as to his motivation to speed. In these circumstances, the evidence not being conclusive in defendant's favor, this court is not permitted to find differently than did the trial court and the second assignment of error is likewise without merit.

150 of 195 DOCUMENTS

**VILLAGE OF MORELAND HILLS, APPELLEE v. NELSON P. BARD,  
APPELLANT****No. 37423****Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County***1978 Ohio App. LEXIS 10446***June 8, 1978**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM BEDFORD MUNICIPAL COURT, No. 76 TRD 7110

**DISPOSITION:**

Judgment Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Bedford Municipal Court (Ohio), which convicted him of speeding in violation of Moreland Hills, Ohio, Ordinances § 333.03.

**OVERVIEW:** A police officer testified that, according to the MR-7 moving radar device in his patrol car, defendant was going 51 miles per hour in a 35-miles-per-hour zone. The officer further stated that such speed was unreasonable for conditions at that time and place. Defendant alleged that he had not been speeding and that the officer could not have kept the car that he clocked in sight while he turned the police car around to pursue it because of a hill in the road. Affirming, the court held that the officer's identification of defendant as the individual clocked was sufficient to establish that defendant's car was the one clocked. The court found that the radar was properly calibrated and in working order at the time because the officer testified so and he was trained and certified in the use of the radar. The court found that there was insufficient evidence that 51 miles per hour was reasonable. The court held that there was no need to present expert testimony as to the construction and reliability of the MR-7 radar because the trial court was free to take judicial notice thereof.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** speed, mile, radar, assignment of error, traveling, clocked, calibrate, patrolman, driving, traffic, highway, street, verdict of guilty, working order, motor vehicle, speed limit, prima facie, police car, automatically,

calibration, stationary, calibrated, training, tuning, forks, expert testimony, insufficient evidence, assignments of error, working condition, police officer

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] Moreland Hills, Ohio, Ordinances § 333.03 provides in part as follows: No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable and proper, having due regard to the traffic, surface and width of the street or highway and any other conditions, and no person shall drive any motor vehicle in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead. It is prima facie lawful for the operator of a motor vehicle to operate the same at speed not exceeding the following: (d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsections (e) and (f) of this section. It is prima facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] Under the provisions of Moreland Hills, Ohio, Ordinance § 333.03, it is prima facie unlawful for any person to exceed any of the speed limitation in any section of the traffic code. The burden is upon the accused to produce evidence that under the circumstances a speed of exceeding the speed limit was reasonable.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN3] A person may be convicted of speeding solely upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle where the record contains: (1) expert testimony of the construction of the device and its method of operation in determining the speed of the approaching vehicle from the opposite direction; (2) evidence that the device is in good condition for accurate work; and (3) evidence that the officer using the device is one qualified for its use by training and experience.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice***

[HN4] It may be judicially noticed that the MR-7 moving radar device is acceptable and dependable for its proposed purpose.

### **COUNSEL:**

For Plaintiff-Appellee: Charles T. Riehl

For Defendant-Appellant: Douglas R. Fouts

### **JUDGES:**

KRENZLER, P.J., PATTON, J., and SILBERT, J. \*, concur.

\* Retired, Eighth Appellate District sitting by assignment

### **OPINION BY:**

KRENZLER

**OPINION:**

JOURNAL ENTRY AND OPINION

KRENZLER, P.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Bedford Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Bedford Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The defendant-appellant, Nelson P. Bard, hereinafter referred to as the appellant, was charged by affidavit for a violation of Section 333.03 of the Ordinances of The Village of Moreland Hills. The affidavit charged that on September 20, 1976, the appellant was traveling west on Miles Road in his automobile at a rate of speed of 51 miles per hour in a 35-miles-per-hour zone and that such speed of 51 miles per hour was unreasonable [\*2] for conditions at that time and place.

The appellant appeared in Bedford Municipal Court on October 6, 1976, and entered a plea of not guilty to the charge. Trial was subsequently held before that court on November 8, 1976, and the following testimony was presented.

Charles Kapral, a police patrolman for the Village of Moreland Hills, testified for the prosecution that on September 20, 1976, at approximately 2:30 P.M. he was on regular traffic patrol duty in a police car and was traveling east on Miles Road in the Village of Moreland Hills; that he was alerted by the MR-7 moving radar device in his automobile that an approaching vehicle traveling west was exceeding the speed limit and was traveling 51 miles per hour in a 35-mile-per-hour zone; that he turned his police car around and pursued the speeding car for at least one mile; and that upon stopping the vehicle he wrote a citation for the driver. Officer Kapral identified the appellant as the individual that he clocked on Miles Road driving at 51 miles per hour and identified the appellant's car as a 1975 beige colored Pontiac, two-door.

Officer Kapral further testified that the MR-7 monitors on-coming traffic, automatically [\*3] calibrates the speed of any on-coming vehicle, and automatically subtracts the speed of the patrol car. He stated that he received training on how to operate the MR-7 and other radar devices and received certification in the operation of moving and stationary radar devices. With regard to testing the MR-7 to determine whether it was in working order, Officer Kapral testified as follows:

Q Now, prior to using this radar device, is there anything you have to do?

A Well, before we put the radar in use we calibrate the unit. We have two tuning forks for the MR-7. I turn it on and calibrate it. There is an internal calibration that registers at 64 miles in stationary mode, and 100 in the moving mode. We have two tuning forks, one at 35, and one at 65 which we use for stationary mode, and then when we moved to the moving mode.

Q Excuse me, slow down just a little bit.

A Then we get the tuning forks and we place them in front of the antenna at 35 miles an hour which is different between 65 to calibrate the moving portion. Then besides that, we get out on the road, we have to verify it, but on that would verify the speed of the cruiser by this radar ourselves. So, [\*4] we have separate functions to make sure it is working properly.

Q Did you go through this calibration prior to clocking?

A Yes, I did.

Q Now, did that calibration indicate to you that the machine is in proper working order?

A Yes, it did.

Officer Kapral also stated that in his opinion the MR-7 was properly calibrated. He testified further that at the time of the incident the pavement was dry and in good to fair condition and that it was daylight.

The appellant testified in his own behalf that on September 20, 1976, at approximately 2:00 P.M. he was driving west on Miles Road when police officer Kapral stopped the appellant's car and that at the time he was stopped he was driving at a rate of 30 miles per hour. The appellant also testified that Officer Kapral's hands were trembling and he looked ill. The appellant stated that he asked the officer if he had been drinking and that the officer replied, "I'd better not have been." According to the appellant, the officer stated that the reason he was unsteady was because in chasing the appellant's car he barely missed two collisions with other automobiles.

The appellant testified further that he was not driving [\*5] in excess of the speed limit and that it was not his car that Officer Kapral clocked at 51 miles per hour. The appellant also stated that because of a hill in the road Officer Kapral could not have kept the car that he clocked in sight while he turned the police car around to pursue it.

At the close of the evidence the trial judge found the appellant guilty as charged and imposed a fine of \$ 25.00 plus costs. Execution of the sentence was stayed pending appeal. The appellant was subsequently granted leave to file a delayed appeal and assigns the following errors:

A. THE VERDICT OF THE TRIAL COURT WAS CONTRA TO THE MANIFEST WEIGHT OF THE EVIDENCE.

B. THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILTY, SPECIFICALLY WITH RESPECT TO TESTIMONY GIVEN BY THE PATROLMAN CONCERNING THE CALIBRATION AND OPERABILITY OF THE MR-7 SPEED MONITORING DEVICE.

C. THE PROSECUTION DID NOT SUSTAIN ITS DUTY TO PROVE BEYOND A REASONABLE DOUBT THAT THERE WAS A PROPER IDENTIFICATION OF DEFENDANT OR HIS AUTOMOBILE BY THE PATROLMAN.

D. THE EVIDENCE DID NOT SHOW THAT THE SPEED ALLEGED ON THE PART OF THE DEFENDANT WAS UNREASONABLE FOR CONDITIONS AT THE TIME AND PLACE [\*6] AS REQUIRED BY ORDINANCES 333.03, SUBSECTION D, OF THE CODIFIED ORDINANCES OF THE VILLAGE OF MORELAND HILLS.

E. THE PROSECUTION UTTERLY FAILED TO QUALIFY THE PATROLMAN KAPRAL AS AN EXPERT WITNESS FOR TESTIMONY DIRECTED TOWARD THE CONSTRUCTION OF THE MR-7 AND ITS ABILITY TO DIFFERENTIATE APPROACHING VEHICLE SPEEDS.

Assignments of error A and C are essentially the same and will be treated together. The appellant argues in these two assignments of error that there is insufficient evidence to support the verdict of guilty because the record does not establish that Officer Kapral identified the appellant's automobile as the one that he clocked traveling in excess of the speed limit. These assignments of error are not well taken.

We have carefully reviewed the record and find that Officer Kapral identified the appellant as the individual

clocked on Miles Road traveling 51 miles per hour. This identification is sufficient to establish that the appellant's car was the one clocked by the police officer. Assignments of error A and C are overruled.

In assignment of error B the appellant argues that the verdict of guilty is unsupported by the evidence because the prosecution presented [\*7] insufficient evidence to show that the MR-7 radar device was properly calibrated and that it was in accurate working condition when the appellant's speed was checked. This assignment of error is not well taken.

The record contains the testimony of Officer Kapral that the MR-7 was properly calibrated and was in working order prior to clocking the appellant. The officer also testified that the device automatically subtracts the speed of the patrol car. He further testified that he had been trained and certified in the operation of the MR-7. Assignment of error C is overruled.

In assignment of error D the appellant argues that the evidence was insufficient to support a verdict of guilty because there was no evidence to show that the speed of 51 miles per hour was unreasonable for conditions at the time and place of the alleged violation. This assignment of error is not well taken.

Section 333.03 [HN1] of the Ordinances of Moreland Hills provides in part as follows:

No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable and proper, having due regard to the traffic, surface and width of the street or highway and any [\*8] other conditions, and no person shall drive any motor vehicle in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It is prima facie lawful for the operator of a motor vehicle to operate the same at speed not exceeding the following:

\* \* \*

(d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsections (e) and (f) of this section.

\* \* \*

It is prima facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code.  
\* \* \*

[HN2] Under the provisions of this ordinance, it is prima facie unlawful for any person to exceed any of the speed limitation in any section of the traffic code. The burden was upon the appellant to produce evidence that under the circumstances a speed of 51 miles an hour was reasonable. The record contains insufficient evidence to establish that such a speed was reasonable. Assignment of error D is overruled.

In assignment of error E the appellant argues that his conviction is reversible error because Officer Kapral was not [\*9] qualified as an expert witness to testify on the construction of the MR-7. This assignment of error is not well taken.

In *State v. Shelt* (1976), 46 *Ohio App. 2d* 115, 119, the Court of Appeals held as follows:

[HN3] A person may be convicted of speeding solely upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle where the record contains: (1) expert testimony of the construction of the device and its method of operation in determining the speed of the approaching vehicle from the opposite direction; (2) evidence that the device is in good condition for accurate work; and (3) evidence that the officer using the device is one qualified for its use by training and experience. Cf. *East Cleveland v. Ferrell*, 168 *Ohio St.* 298.

The court also held that [HN4] it may be judicially noticed that the MR-7 moving radar device is acceptable and

dependable for its proposed purpose. *State v. Shelt*, supra, paragraph two of the syllabus. Therefore, since the trial court was free to take judicial notice of the construction and reliability of the MR-7, there was no need to present expert testimony as to the construction and scientific method of this device. [\*10] See *East Cleveland v. Ferrell* (1958), 168 *Ohio St.* 298.

Further, the record contains testimony from Officer Kapral that the MR-7 was in good working condition and that he was qualified for its use by training and experience.

Assignment of error D is overruled.

It is ordered that appellees recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Bedford Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

151 of 195 DOCUMENTS

**VILLAGE OF MORELAND HILLS, APPELLEE v. NELSON P. BARD,  
APPELLANT**

**No. 37423**

**Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County**

*1978 Ohio App. LEXIS 10446*

**June 8, 1978**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM BEDFORD MUNICIPAL COURT, No. 76 TRD 7110

**DISPOSITION:**

Judgment Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Bedford Municipal Court (Ohio), which convicted him of speeding in violation of Moreland Hills, Ohio, Ordinances § 333.03.

**OVERVIEW:** A police officer testified that, according to the MR-7 moving radar device in his patrol car, defendant was going 51 miles per hour in a 35-miles-per-hour zone. The officer further stated that such speed was unreasonable for conditions at that time and place. Defendant alleged that he had not been speeding and that the officer could not have kept the car that he clocked in sight while he turned the police car around to pursue it because of a hill in the road. Affirming, the court held that the officer's identification of defendant as the individual clocked was sufficient to establish that defendant's car was the one clocked. The court found that the radar was properly calibrated and in working order at the time because the officer testified so and he was trained and certified in the use of the radar. The court found that there was insufficient evidence that 51 miles per hour was reasonable. The court held that there was no need to present expert testimony as to the construction and reliability of the MR-7 radar because the trial court was free to take judicial notice thereof.

**OUTCOME:** The court affirmed the trial court's judgment.

**CORE TERMS:** speed, mile, radar, assignment of error, traveling, clocked, calibrate, patrolman, driving, traffic, highway, street, verdict of guilty, working order, motor vehicle, speed limit, prima facie, police car, automatically,

calibration, stationary, calibrated, training, tuning, forks, expert testimony, insufficient evidence, assignments of error, working condition, police officer

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] Moreland Hills, Ohio, Ordinances § 333.03 provides in part as follows: No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable and proper, having due regard to the traffic, surface and width of the street or highway and any other conditions, and no person shall drive any motor vehicle in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead. It is prima facie lawful for the operator of a motor vehicle to operate the same at speed not exceeding the following: (d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsections (e) and (f) of this section. It is prima facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] Under the provisions of Moreland Hills, Ohio, Ordinance § 333.03, it is prima facie unlawful for any person to exceed any of the speed limitation in any section of the traffic code. The burden is upon the accused to produce evidence that under the circumstances a speed of exceeding the speed limit was reasonable.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN3] A person may be convicted of speeding solely upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle where the record contains: (1) expert testimony of the construction of the device and its method of operation in determining the speed of the approaching vehicle from the opposite direction; (2) evidence that the device is in good condition for accurate work; and (3) evidence that the officer using the device is one qualified for its use by training and experience.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Judicial Notice***

[HN4] It may be judicially noticed that the MR-7 moving radar device is acceptable and dependable for its proposed purpose.

### **COUNSEL:**

For Plaintiff-Appellee: Charles T. Riehl

For Defendant-Appellant: Douglas R. Fouts

### **JUDGES:**

KRENZLER, P.J., PATTON, J., and SILBERT, J. \*, concur.

\* Retired, Eighth Appellate District sitting by assignment

### **OPINION BY:**

KRENZLER

**OPINION:**

JOURNAL ENTRY AND OPINION

KRENZLER, P.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Bedford Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Bedford Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The defendant-appellant, Nelson P. Bard, hereinafter referred to as the appellant, was charged by affidavit for a violation of Section 333.03 of the Ordinances of The Village of Moreland Hills. The affidavit charged that on September 20, 1976, the appellant was traveling west on Miles Road in his automobile at a rate of speed of 51 miles per hour in a 35-miles-per-hour zone and that such speed of 51 miles per hour was unreasonable [\*2] for conditions at that time and place.

The appellant appeared in Bedford Municipal Court on October 6, 1976, and entered a plea of not guilty to the charge. Trial was subsequently held before that court on November 8, 1976, and the following testimony was presented.

Charles Kapral, a police patrolman for the Village of Moreland Hills, testified for the prosecution that on September 20, 1976, at approximately 2:30 P.M. he was on regular traffic patrol duty in a police car and was traveling east on Miles Road in the Village of Moreland Hills; that he was alerted by the MR-7 moving radar device in his automobile that an approaching vehicle traveling west was exceeding the speed limit and was traveling 51 miles per hour in a 35-mile-per-hour zone; that he turned his police car around and pursued the speeding car for at least one mile; and that upon stopping the vehicle he wrote a citation for the driver. Officer Kapral identified the appellant as the individual that he clocked on Miles Road driving at 51 miles per hour and identified the appellant's car as a 1975 beige colored Pontiac, two-door.

Officer Kapral further testified that the MR-7 monitors on-coming traffic, automatically [\*3] calibrates the speed of any on-coming vehicle, and automatically subtracts the speed of the patrol car. He stated that he received training on how to operate the MR-7 and other radar devices and received certification in the operation of moving and stationary radar devices. With regard to testing the MR-7 to determine whether it was in working order, Officer Kapral testified as follows:

Q Now, prior to using this radar device, is there anything you have to do?

A Well, before we put the radar in use we calibrate the unit. We have two tuning forks for the MR-7. I turn it on and calibrate it. There is an internal calibration that registers at 64 miles in stationary mode, and 100 in the moving mode. We have two tuning forks, one at 35, and one at 65 which we use for stationary mode, and then when we moved to the moving mode.

Q Excuse me, slow down just a little bit.

A Then we get the tuning forks and we place them in front of the antenna at 35 miles an hour which is different between 65 to calibrate the moving portion. Then besides that, we get out on the road, we have to verify it, but on that would verify the speed of the cruiser by this radar ourselves. So, [\*4] we have separate functions to make sure it is working properly.

Q Did you go through this calibration prior to clocking?

A Yes, I did.

Q Now, did that calibration indicate to you that the machine is in proper working order?

A Yes, it did.

Officer Kapral also stated that in his opinion the MR-7 was properly calibrated. He testified further that at the time of the incident the pavement was dry and in good to fair condition and that it was daylight.

The appellant testified in his own behalf that on September 20, 1976, at approximately 2:00 P.M. he was driving west on Miles Road when police officer Kapral stopped the appellant's car and that at the time he was stopped he was driving at a rate of 30 miles per hour. The appellant also testified that Officer Kapral's hands were trembling and he looked ill. The appellant stated that he asked the officer if he had been drinking and that the officer replied, "I'd better not have been." According to the appellant, the officer stated that the reason he was unsteady was because in chasing the appellant's car he barely missed two collisions with other automobiles.

The appellant testified further that he was not driving [\*5] in excess of the speed limit and that it was not his car that Officer Kapral clocked at 51 miles per hour. The appellant also stated that because of a hill in the road Officer Kapral could not have kept the car that he clocked in sight while he turned the police car around to pursue it.

At the close of the evidence the trial judge found the appellant guilty as charged and imposed a fine of \$ 25.00 plus costs. Execution of the sentence was stayed pending appeal. The appellant was subsequently granted leave to file a delayed appeal and assigns the following errors:

A. THE VERDICT OF THE TRIAL COURT WAS CONTRA TO THE MANIFEST WEIGHT OF THE EVIDENCE.

B. THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILTY, SPECIFICALLY WITH RESPECT TO TESTIMONY GIVEN BY THE PATROLMAN CONCERNING THE CALIBRATION AND OPERABILITY OF THE MR-7 SPEED MONITORING DEVICE.

C. THE PROSECUTION DID NOT SUSTAIN ITS DUTY TO PROVE BEYOND A REASONABLE DOUBT THAT THERE WAS A PROPER IDENTIFICATION OF DEFENDANT OR HIS AUTOMOBILE BY THE PATROLMAN.

D. THE EVIDENCE DID NOT SHOW THAT THE SPEED ALLEGED ON THE PART OF THE DEFENDANT WAS UNREASONABLE FOR CONDITIONS AT THE TIME AND PLACE [\*6] AS REQUIRED BY ORDINANCES 333.03, SUBSECTION D, OF THE CODIFIED ORDINANCES OF THE VILLAGE OF MORELAND HILLS.

E. THE PROSECUTION UTTERLY FAILED TO QUALIFY THE PATROLMAN KAPRAL AS AN EXPERT WITNESS FOR TESTIMONY DIRECTED TOWARD THE CONSTRUCTION OF THE MR-7 AND ITS ABILITY TO DIFFERENTIATE APPROACHING VEHICLE SPEEDS.

Assignments of error A and C are essentially the same and will be treated together. The appellant argues in these two assignments of error that there is insufficient evidence to support the verdict of guilty because the record does not establish that Officer Kapral identified the appellant's automobile as the one that he clocked traveling in excess of the speed limit. These assignments of error are not well taken.

We have carefully reviewed the record and find that Officer Kapral identified the appellant as the individual

clocked on Miles Road traveling 51 miles per hour. This identification is sufficient to establish that the appellant's car was the one clocked by the police officer. Assignments of error A and C are overruled.

In assignment of error B the appellant argues that the verdict of guilty is unsupported by the evidence because the prosecution presented [\*7] insufficient evidence to show that the MR-7 radar device was properly calibrated and that it was in accurate working condition when the appellant's speed was checked. This assignment of error is not well taken.

The record contains the testimony of Officer Kapral that the MR-7 was properly calibrated and was in working order prior to clocking the appellant. The officer also testified that the device automatically subtracts the speed of the patrol car. He further testified that he had been trained and certified in the operation of the MR-7. Assignment of error C is overruled.

In assignment of error D the appellant argues that the evidence was insufficient to support a verdict of guilty because there was no evidence to show that the speed of 51 miles per hour was unreasonable for conditions at the time and place of the alleged violation. This assignment of error is not well taken.

Section 333.03 [HN1] of the Ordinances of Moreland Hills provides in part as follows:

No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable and proper, having due regard to the traffic, surface and width of the street or highway and any [\*8] other conditions, and no person shall drive any motor vehicle in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It is prima facie lawful for the operator of a motor vehicle to operate the same at speed not exceeding the following:

\* \* \*

(d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsections (e) and (f) of this section.

\* \* \*

It is prima facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code.  
\* \* \*

[HN2] Under the provisions of this ordinance, it is prima facie unlawful for any person to exceed any of the speed limitation in any section of the traffic code. The burden was upon the appellant to produce evidence that under the circumstances a speed of 51 miles an hour was reasonable. The record contains insufficient evidence to establish that such a speed was reasonable. Assignment of error D is overruled.

In assignment of error E the appellant argues that his conviction is reversible error because Officer Kapral was not [\*9] qualified as an expert witness to testify on the construction of the MR-7. This assignment of error is not well taken.

In *State v. Shelt* (1976), 46 *Ohio App. 2d* 115, 119, the Court of Appeals held as follows:

[HN3] A person may be convicted of speeding solely upon evidence obtained from an MR-7 moving radar device mounted on a moving patrol vehicle where the record contains: (1) expert testimony of the construction of the device and its method of operation in determining the speed of the approaching vehicle from the opposite direction; (2) evidence that the device is in good condition for accurate work; and (3) evidence that the officer using the device is one qualified for its use by training and experience. Cf. *East Cleveland v. Ferrell*, 168 *Ohio St.* 298.

The court also held that [HN4] it may be judicially noticed that the MR-7 moving radar device is acceptable and

dependable for its proposed purpose. *State v. Shelt*, supra, paragraph two of the syllabus. Therefore, since the trial court was free to take judicial notice of the construction and reliability of the MR-7, there was no need to present expert testimony as to the construction and scientific method of this device. [\*10] See *East Cleveland v. Ferrell* (1958), 168 *Ohio St.* 298.

Further, the record contains testimony from Officer Kapral that the MR-7 was in good working condition and that he was qualified for its use by training and experience.

Assignment of error D is overruled.

It is ordered that appellees recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Bedford Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

152 of 195 DOCUMENTS

**City of Toledo, APPELLEE v. Richard A. Krueck, APPELLANT****C.A. No. L-76-183****Court of Appeals of Ohio, Sixth Appellate District, Lucas County*****1977 Ohio App. LEXIS 9494*****January 28, 1977**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM Toledo Municipal COURT, NO. TRD 76-10259 & TRD 76-15794

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Toledo Municipal Court (Ohio) which denied defendant's demand for a jury trial and convicted defendant of violating Toledo, Ohio, Municipal Code 21-9-5(b), failure to yield the right-of-way, and Toledo, Ohio, Municipal Code 21-6-1, speeding.

**OVERVIEW:** Defendant was cited for failing to yield the right-of-way. Defendant did not appear in court pursuant to that charge, which resulted in a bench warrant being issued for his arrest. About a month after defendant was first cited, defendant was cited for speeding and arrested on the bench warrant. Reversing defendant's conviction for speeding, the court held that because Toledo, Ohio, Municipal Code 21-24-1 subjected defendant to a fine and days in jail, defendant was entitled pursuant to *Ohio Rev. Code Ann. § 2945.17* as a matter of right to a trial by jury. Affirming defendant's conviction for failure to yield the right-of-way, the court found that the affidavit did not charge a prior offense, thus defendant was not entitled to a jury trial under § 2945.17. The court held that the jury demand regarding the failure to yield right-of-way charge was improper and, as such, was a delay chargeable to defendant. Therefore, the court held that defendant was not denied a speedy trial on the failure to yield right-of-way charge. The court held that the prosecutor made a prima facie case on the failure to yield right-of-way charge.

**OUTCOME:** The court reversed the judgment as to the speeding charge and affirmed the judgment as to the failure to yield the right-of-way charge. The court remanded the cause to the trial court for further proceedings and for execution for costs.

**CORE TERMS:** defendant-appellant, speeding, right-of-way, wit, assignment of error, bench warrant, fine, jury trial, assignments of error, business district, one year, ordinance, dollars, miles, traffic ticket, prior offense, jail time, reckless, traffic, motor vehicle, found guilty, city jail, speed, radar, reconsideration, chargeable, prosecutor, violating, suspended, convicted

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] Toledo, Ohio, Municipal Code 21-24-1 provides, in part, that when any person is found guilty of a first offense for a violation of Toledo, Ohio, Municipal Code 21-6-1 or Toledo, Ohio, Municipal Code 21-6-2 upon a finding that he operated a motor vehicle faster than 35 miles an hour in a business district, the court may, in addition to the penalty herein provided, sentence such offender to the city jail or workhouse for not more than five days.

***Criminal Law & Procedure > Accusatory Instruments > Complaints  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] The traffic ticket is the traffic complaint and summons. *Ohio Traffic R. 2-3*.

***Civil Procedure > Trials > Jury Trials > Right to Jury Trial******Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors***

[HN3] The right to a trial by jury under *Ohio Rev. Code Ann. § 2945.17* can not be vacated by a trial court's assertion that jail time will not be imposed.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Felonies******Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors******Criminal Law & Procedure > Sentencing > Fines***

[HN4] *Ohio Rev. Code Ann. § 2945.17*, entitled "Right of trial by jury," provides that at any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Time Limitations******Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Waiver******Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods***

[HN5] A demand for a jury, to which a defendant-appellant was entitled, does not constitute a delay which could be charged to the defendant-appellant under *Ohio Rev. Code Ann. § 2945.72* to extend the 30 day time period for trial as required by *Ohio Rev. Code Ann. § 2945.71(A)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] Toledo, Ohio, Municipal Code 21-24-1, which addresses traffic offenses, reads, in part: and for the second offense within one year thereafter not less than \$ 10 nor more than \$ 100, or imprisoned in the city jail or workhouse not more than 10 days, or both.

***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN7] In order to sanction a "second offense" penalty, the affidavit must allege a prior offense.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview******Criminal Law & Procedure > Accusatory Instruments > Complaints******Criminal Law & Procedure > Guilty Pleas > General Overview***

[HN8] *Ohio Rev. Code Ann. § 4507.34* provides that whenever a person is found guilty under the laws of Ohio or any

ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year. Section 4507.34 provides for discretionary driver's license suspension by the trial judge upon conviction. Reckless operation does not have to be alleged in the affidavit.

**JUDGES:**

Clifford F. Brown, P.J., John W. Potter and John J. Connors, Jr., JJ., concur.

**OPINION:****DECISION & JOURNAL ENTRY**

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

The defendant, Richard Krueck, was convicted by the Toledo Municipal Court of violating Sec. 21-9-5(b), Toledo Municipal Code, failure to yield the right-of-way, and Sec. 21-6-1, speeding. The court fined the defendant \$ 50 and costs per charge and suspended his driver's license for one year. From that judgment the defendant appeals.

On March 12, 1976, the defendant-appellant was cited for failing to yield the right-of-way. The defendant-appellant did not appear in court on March 16, 1976 pursuant to that charge, which resulted in a bench warrant being issued for his arrest. On April 13, 1976, the defendant-appellant was cited for speeding and arrested on the bench warrant.

Assignments of error Nos. 1 and 2 are, to wit:

"1. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AN ORDER OF DISCHARGE.

"2. THE TRIAL [\*2] COURT ERRED IN DENYING THE DEFENDANT'S DEMAND FOR A JURY TRIAL."

In addressing assignments of error numbers 1 and 2 in relation to the speeding charge, the court finds that the defendant-appellant was charged with violating Sec. 21-6-1 of the Toledo Municipal Code, in that he was traveling 15 miles per hour in excess of the 35 miles per hour limit through a business district. Sec. 21-24-1 of the Toledo Municipal Code provides in pertinent part:

"\* \* \* [HN1] that when any person is found guilty of a first offense for a violation of Sections 21-6-1 or 21-6-2 of this chapter upon a finding that he operated a motor vehicle faster than thirty-five miles an hour in a business district or \* \* \* the court may, in addition to the penalty herein provided, sentence such offender to the city jail or workhouse for not more than five days."

The above section subjected the defendant-appellant to a fine and days in jail. On the defendant's duplicate copy of the defendant-appellant's traffic ticket it was alleged that the violation occurred in a business district. [HN2] The traffic ticket is the traffic complaint and summons. *Ohio Traffic Rules, Rules 2 and 3.* (effective January 1, 1975) Pursuant to [\*3] *R.C. 2945.17*, n1 the defendant-appellant was entitled as a matter of right to a trial by jury. [HN3] This right could not be vacated by a trial court's assertion that jail time would not be imposed. See *The City of Fremont v. Keating* (1917), *96 Ohio St. 468*.

n1 "Sec. 2945.17 Right of trial by jury.

[HN4] "At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

[HN5] A demand for a jury, to which the defendant-appellant was entitled, did not constitute a delay which could be charged to the defendant-appellant under *R.C. 2945.72* to extend the 30 day time period for trial as required by *R.C. 2945.71(A)*. n2 See this court's holding in *State v. Melvin Stancthion*, Lucas County, C.A. L-76-014 (July 16, 1976), where we held a defendant could not be charged with delay due to his failure to waive a preliminary hearing. The record indicates that on the speeding charge numbered TRD76-15794, the defendant-appellant was not brought to trial within 30 days as required by *R.C. 2945.71*. Therefore, [\*4] assignments of error Nos. 1 and 2 as they pertain to the speeding charge are well taken.

n2 The dates relevant to this appeal are:

March 12, 1976: defendant is cited on a charge of failure to yield the right of way.

March 16, 1976: defendant appears in court and case is continued to March 30, 1976.

March 30, 1976: defendant failed to appear, bench warrant is issued

April 13, 1976: defendant is cited for speeding and arrested on bench warrant.

April 14, 1976: cases continued to april 21, 1976.

April 21, 1976: defendant pled not guilty to both charges. Jury demand filed.

May 13, 1976: jury demand denied; case continued to May 27, 1976.

May 27, 1976: affidavit on 21-9-3 T.M.C. amended to violation of 21-9-5(b) T.M.C.

May 27, 1976: case continued for good cause at request of prosecutor Complaining officer on the failure to yield charge had been sick. Case continued to June 16, 1976. The defendant's request for a continuance of the speeding charge was also granted. However, the defendant thought that only the failure to yield case was set for trial on May 27, 1976. The record on the speeding charge shows subpoena issued for the defendant and his attorney on May 18, 1976 and service made.

May 28, 1976: Motion for reconsideration of jury trial; hearing set for June 14, 1976.

June 7, 1976: with consent of counsel Pheils, case continued to June 28, 1976.

June 8, 1976: subpoenas issued for June 28, 1976.

June 25, 1976: Motion filed to discharge offenses.

June 28, 1976: Hearing on motion for reconsideration of jury trial and motion for discharges denied. Trial held. Defendant found guilty of both charges. \$ 50.00 fine and costs, license suspended for one year.

June 29, 1976: Notice of appeal filed.

[\*5]

Assignments of error No. 5 is, to wit:

"5. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF SPEEDING WHEN THE ONLY

EVIDENCE SUBMITTED AS TO HIS SPEED WAS A SPEED INDICATION ON A RADAR UNIT WHICH HAD NOT BEEN INDEPENDENTLY CALIBRATED."

The defendant-appellant did not timely object to the speed reading from the MR-7 radar device or to the calibration of the radar equipment. For this reason, assignment of error No. 5 is not well taken. *State v. Morris* (1975), 42 *Ohio St. 2d.* 307.

Assignment of error No. 6 is, to wit:

"6. THE JUDGMENTS OF THE TRIAL COURT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.",

is not well taken. Reviewing the record, we find substantial, probative evidence to support the trial court's judgment. *State v. Wallen* (1969), 21 *Ohio App. 2d.* 27; 3 O. Jur. 2d. App. Rev., Sec. 821.

As to the speeding charge, TRD76-15794, the judgment of the Toledo Municipal Court is reversed. The defendant-appellant is ordered discharged. Costs assessed against the plaintiff-appellee.

Upon consideration of the failure to yield the right-of-way charge, TRD76-10259, we find assignments of error Nos. 1 and 2, to wit:

"1. THE TRIAL COURT ERRED IN DENYING [\*6] THE DEFENDANT'S MOTION FOR AN ORDER OF DISCHARGE.

"2. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S DEMAND FOR A JURY TRIAL.",

are not well taken.

The defendant argues that pursuant to Sec. 21-24-1 of the Toledo Municipal Code, he will be given jail time due to his two traffic charges in less than a year. Sections 21-24-1 of the Toledo Municipal Code reads, in pertinent part:

"\* \* \* and [HN6] for the second offense within one year thereafter not less than ten dollars nor more than one hundred dollars, or imprisoned in the city jail or workhouse not more than ten days, or both; \* \* \*"

[HN7] In order to sanction a "second offense" penalty, the affidavit must allege a prior offense. See *State v. Gordon* (1971), 28 *Ohio St. 2d.* 45; *State v. Winters* (1965), 2 *Ohio St. 2d.* 325; *State v. Parker* (1973), 46 *Ohio App. 2d.* 189. Since the affidavit in the case sub judice did not charge a prior offense, the defendant-appellant was not entitled to a jury trial under *R.C. 2945.17*.

The jury demand regarding TR76-10259, failure to yield right-of-way, was improper and, as such, was a delay chargeable to the defendant-appellant. In light of this time chargeable to the defendant-appellant, [\*7] he was not denied a speedy trial.

Assignment of error No. 3, is to wit:

"3. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE ON THE CHARGE OF FAILURE TO YIELD THE RIGHT-OF-WAY."

From the record we find that the prosecutor made a prima facie case. Therefore, assignment of error No. 3 is not well taken.

Assignment of error No. 4 is, to wit:

"4. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF RECKLESS OPERATION WHEN THERE HAD BEEN NO CHARGE OF RECKLESS OPERATION MADE AGAINST THE DEFENDANT."

*R.C. 4507.34* states:

[HN8] "Whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year."

*R.C. 4507.34* provides for discretionary driver's license suspension by the [\*8] trial judge upon conviction. *State v. Parker* (1973), *46 Ohio App. 2d. 189, 191*. Reckless operation does not have to be alleged in the affidavit. *State v. Newkirk* (1968), *21 Ohio App. 2d. 160*.

Therefore, assignment of error No. 4 is not well taken.

Assignment of error No. 5 is not relevant to the failure to yield the right-of-way charge.

Assignment of error No. 6 is, to wit:

"6. THE JUDGMENTS OF THE TRIAL COURT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Assignment of error No. 6 is not well taken for the reasons asserted under Assignment of error No. 6 as discussed under the speeding charge.

Therefore, the lower court's judgment regarding the failure to yield the right-of-way charge, numbered TRD76-10259, is affirmed.

On consideration whereof, the judgment of the Toledo Municipal court is affirmed, in part, and reversed, in part. This cause is remanded to said court for further proceedings in accordance with law and for execution for costs. Costs assessed against the defendant-appellant.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

Ten (10) days from the date hereof this document shall [\*9] constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. *App. R. 22(E)*.

153 of 195 DOCUMENTS

**City of Toledo, APPELLEE v. Richard A. Krueck, APPELLANT****C.A. No. L-76-183****Court of Appeals of Ohio, Sixth Appellate District, Lucas County*****1977 Ohio App. LEXIS 9494*****January 28, 1977**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM Toledo Municipal COURT, NO. TRD 76-10259 & TRD 76-15794

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Toledo Municipal Court (Ohio) which denied defendant's demand for a jury trial and convicted defendant of violating Toledo, Ohio, Municipal Code 21-9-5(b), failure to yield the right-of-way, and Toledo, Ohio, Municipal Code 21-6-1, speeding.

**OVERVIEW:** Defendant was cited for failing to yield the right-of-way. Defendant did not appear in court pursuant to that charge, which resulted in a bench warrant being issued for his arrest. About a month after defendant was first cited, defendant was cited for speeding and arrested on the bench warrant. Reversing defendant's conviction for speeding, the court held that because Toledo, Ohio, Municipal Code 21-24-1 subjected defendant to a fine and days in jail, defendant was entitled pursuant to *Ohio Rev. Code Ann. § 2945.17* as a matter of right to a trial by jury. Affirming defendant's conviction for failure to yield the right-of-way, the court found that the affidavit did not charge a prior offense, thus defendant was not entitled to a jury trial under § 2945.17. The court held that the jury demand regarding the failure to yield right-of-way charge was improper and, as such, was a delay chargeable to defendant. Therefore, the court held that defendant was not denied a speedy trial on the failure to yield right-of-way charge. The court held that the prosecutor made a prima facie case on the failure to yield right-of-way charge.

**OUTCOME:** The court reversed the judgment as to the speeding charge and affirmed the judgment as to the failure to yield the right-of-way charge. The court remanded the cause to the trial court for further proceedings and for execution for costs.

**CORE TERMS:** defendant-appellant, speeding, right-of-way, wit, assignment of error, bench warrant, fine, jury trial, assignments of error, business district, one year, ordinance, dollars, miles, traffic ticket, prior offense, jail time, reckless, traffic, motor vehicle, found guilty, city jail, speed, radar, reconsideration, chargeable, prosecutor, violating, suspended, convicted

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] Toledo, Ohio, Municipal Code 21-24-1 provides, in part, that when any person is found guilty of a first offense for a violation of Toledo, Ohio, Municipal Code 21-6-1 or Toledo, Ohio, Municipal Code 21-6-2 upon a finding that he operated a motor vehicle faster than 35 miles an hour in a business district, the court may, in addition to the penalty herein provided, sentence such offender to the city jail or workhouse for not more than five days.

***Criminal Law & Procedure > Accusatory Instruments > Complaints  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] The traffic ticket is the traffic complaint and summons. *Ohio Traffic R. 2-3.*

***Civil Procedure > Trials > Jury Trials > Right to Jury Trial******Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors***

[HN3] The right to a trial by jury under *Ohio Rev. Code Ann. § 2945.17* can not be vacated by a trial court's assertion that jail time will not be imposed.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Felonies******Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > Misdemeanors******Criminal Law & Procedure > Sentencing > Fines***

[HN4] *Ohio Rev. Code Ann. § 2945.17*, entitled "Right of trial by jury," provides that at any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of \$ 100, the accused has the right to be tried by a jury.

***Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Time Limitations******Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Waiver******Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods***

[HN5] A demand for a jury, to which a defendant-appellant was entitled, does not constitute a delay which could be charged to the defendant-appellant under *Ohio Rev. Code Ann. § 2945.72* to extend the 30 day time period for trial as required by *Ohio Rev. Code Ann. § 2945.71(A)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN6] Toledo, Ohio, Municipal Code 21-24-1, which addresses traffic offenses, reads, in part: and for the second offense within one year thereafter not less than \$ 10 nor more than \$ 100, or imprisoned in the city jail or workhouse not more than 10 days, or both.

***Criminal Law & Procedure > Accusatory Instruments > Complaints***

[HN7] In order to sanction a "second offense" penalty, the affidavit must allege a prior offense.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview******Criminal Law & Procedure > Accusatory Instruments > Complaints******Criminal Law & Procedure > Guilty Pleas > General Overview***

[HN8] *Ohio Rev. Code Ann. § 4507.34* provides that whenever a person is found guilty under the laws of Ohio or any

ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year. Section 4507.34 provides for discretionary driver's license suspension by the trial judge upon conviction. Reckless operation does not have to be alleged in the affidavit.

**JUDGES:**

Clifford F. Brown, P.J., John W. Potter and John J. Connors, Jr., JJ., concur.

**OPINION:****DECISION & JOURNAL ENTRY**

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

The defendant, Richard Krueck, was convicted by the Toledo Municipal Court of violating Sec. 21-9-5(b), Toledo Municipal Code, failure to yield the right-of-way, and Sec. 21-6-1, speeding. The court fined the defendant \$ 50 and costs per charge and suspended his driver's license for one year. From that judgment the defendant appeals.

On March 12, 1976, the defendant-appellant was cited for failing to yield the right-of-way. The defendant-appellant did not appear in court on March 16, 1976 pursuant to that charge, which resulted in a bench warrant being issued for his arrest. On April 13, 1976, the defendant-appellant was cited for speeding and arrested on the bench warrant.

Assignments of error Nos. 1 and 2 are, to wit:

"1. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AN ORDER OF DISCHARGE.

"2. THE TRIAL [\*2] COURT ERRED IN DENYING THE DEFENDANT'S DEMAND FOR A JURY TRIAL."

In addressing assignments of error numbers 1 and 2 in relation to the speeding charge, the court finds that the defendant-appellant was charged with violating Sec. 21-6-1 of the Toledo Municipal Code, in that he was traveling 15 miles per hour in excess of the 35 miles per hour limit through a business district. Sec. 21-24-1 of the Toledo Municipal Code provides in pertinent part:

"\* \* \* [HN1] that when any person is found guilty of a first offense for a violation of Sections 21-6-1 or 21-6-2 of this chapter upon a finding that he operated a motor vehicle faster than thirty-five miles an hour in a business district or \* \* \* the court may, in addition to the penalty herein provided, sentence such offender to the city jail or workhouse for not more than five days."

The above section subjected the defendant-appellant to a fine and days in jail. On the defendant's duplicate copy of the defendant-appellant's traffic ticket it was alleged that the violation occurred in a business district. [HN2] The traffic ticket is the traffic complaint and summons. *Ohio Traffic Rules, Rules 2 and 3.* (effective January 1, 1975) Pursuant to [\*3] *R.C. 2945.17*, n1 the defendant-appellant was entitled as a matter of right to a trial by jury. [HN3] This right could not be vacated by a trial court's assertion that jail time would not be imposed. See *The City of Fremont v. Keating* (1917), *96 Ohio St. 468*.

n1 "Sec. 2945.17 Right of trial by jury.

[HN4] "At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

[HN5] A demand for a jury, to which the defendant-appellant was entitled, did not constitute a delay which could be charged to the defendant-appellant under *R.C. 2945.72* to extend the 30 day time period for trial as required by *R.C. 2945.71(A)*. n2 See this court's holding in *State v. Melvin Stancthion*, Lucas County, C.A. L-76-014 (July 16, 1976), where we held a defendant could not be charged with delay due to his failure to waive a preliminary hearing. The record indicates that on the speeding charge numbered TRD76-15794, the defendant-appellant was not brought to trial within 30 days as required by *R.C. 2945.71*. Therefore, [\*4] assignments of error Nos. 1 and 2 as they pertain to the speeding charge are well taken.

n2 The dates relevant to this appeal are:

March 12, 1976: defendant is cited on a charge of failure to yield the right of way.

March 16, 1976: defendant appears in court and case is continued to March 30, 1976.

March 30, 1976: defendant failed to appear, bench warrant is issued

April 13, 1976: defendant is cited for speeding and arrested on bench warrant.

April 14, 1976: cases continued to april 21, 1976.

April 21, 1976: defendant pled not guilty to both charges. Jury demand filed.

May 13, 1976: jury demand denied; case continued to May 27, 1976.

May 27, 1976: affidavit on 21-9-3 T.M.C. amended to violation of 21-9-5(b) T.M.C.

May 27, 1976: case continued for good cause at request of prosecutor Complaining officer on the failure to yield charge had been sick. Case continued to June 16, 1976. The defendant's request for a continuance of the speeding charge was also granted. However, the defendant thought that only the failure to yield case was set for trial on May 27, 1976. The record on the speeding charge shows subpoena issued for the defendant and his attorney on May 18, 1976 and service made.

May 28, 1976: Motion for reconsideration of jury trial; hearing set for June 14, 1976.

June 7, 1976: with consent of counsel Pheils, case continued to June 28, 1976.

June 8, 1976: subpoenas issued for June 28, 1976.

June 25, 1976: Motion filed to discharge offenses.

June 28, 1976: Hearing on motion for reconsideration of jury trial and motion for discharges denied. Trial held. Defendant found guilty of both charges. \$ 50.00 fine and costs, license suspended for one year.

June 29, 1976: Notice of appeal filed.

[\*5]

Assignments of error No. 5 is, to wit:

"5. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF SPEEDING WHEN THE ONLY

EVIDENCE SUBMITTED AS TO HIS SPEED WAS A SPEED INDICATION ON A RADAR UNIT WHICH HAD NOT BEEN INDEPENDENTLY CALIBRATED."

The defendant-appellant did not timely object to the speed reading from the MR-7 radar device or to the calibration of the radar equipment. For this reason, assignment of error No. 5 is not well taken. *State v. Morris* (1975), 42 *Ohio St. 2d.* 307.

Assignment of error No. 6 is, to wit:

"6. THE JUDGMENTS OF THE TRIAL COURT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.",

is not well taken. Reviewing the record, we find substantial, probative evidence to support the trial court's judgment. *State v. Wallen* (1969), 21 *Ohio App. 2d.* 27; 3 O. Jur. 2d. App. Rev., Sec. 821.

As to the speeding charge, TRD76-15794, the judgment of the Toledo Municipal Court is reversed. The defendant-appellant is ordered discharged. Costs assessed against the plaintiff-appellee.

Upon consideration of the failure to yield the right-of-way charge, TRD76-10259, we find assignments of error Nos. 1 and 2, to wit:

"1. THE TRIAL COURT ERRED IN DENYING [\*6] THE DEFENDANT'S MOTION FOR AN ORDER OF DISCHARGE.

"2. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S DEMAND FOR A JURY TRIAL.",

are not well taken.

The defendant argues that pursuant to Sec. 21-24-1 of the Toledo Municipal Code, he will be given jail time due to his two traffic charges in less than a year. Sections 21-24-1 of the Toledo Municipal Code reads, in pertinent part:

"\* \* \* and [HN6] for the second offense within one year thereafter not less than ten dollars nor more than one hundred dollars, or imprisoned in the city jail or workhouse not more than ten days, or both; \* \* \*"

[HN7] In order to sanction a "second offense" penalty, the affidavit must allege a prior offense. See *State v. Gordon* (1971), 28 *Ohio St. 2d.* 45; *State v. Winters* (1965), 2 *Ohio St. 2d.* 325; *State v. Parker* (1973), 46 *Ohio App. 2d.* 189. Since the affidavit in the case sub judice did not charge a prior offense, the defendant-appellant was not entitled to a jury trial under *R.C. 2945.17*.

The jury demand regarding TR76-10259, failure to yield right-of-way, was improper and, as such, was a delay chargeable to the defendant-appellant. In light of this time chargeable to the defendant-appellant, [\*7] he was not denied a speedy trial.

Assignment of error No. 3, is to wit:

"3. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE ON THE CHARGE OF FAILURE TO YIELD THE RIGHT-OF-WAY."

From the record we find that the prosecutor made a prima facie case. Therefore, assignment of error No. 3 is not well taken.

Assignment of error No. 4 is, to wit:

"4. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF RECKLESS OPERATION WHEN THERE HAD BEEN NO CHARGE OF RECKLESS OPERATION MADE AGAINST THE DEFENDANT."

*R.C. 4507.34* states:

[HN8] "Whenever a person is found guilty under the laws of this state or any ordinance of any political subdivision thereof, of operating a motor vehicle in violation of such laws or ordinances, relating to reckless operation, the trial court of any court of record may, in addition to or independent of all other penalties provided by law, suspend for any period of time or revoke the license to drive of any person so convicted or pleading guilty to such offenses for such period as it determines, not to exceed one year."

*R.C. 4507.34* provides for discretionary driver's license suspension by the [\*8] trial judge upon conviction. *State v. Parker* (1973), *46 Ohio App. 2d. 189, 191*. Reckless operation does not have to be alleged in the affidavit. *State v. Newkirk* (1968), *21 Ohio App. 2d. 160*.

Therefore, assignment of error No. 4 is not well taken.

Assignment of error No. 5 is not relevant to the failure to yield the right-of-way charge.

Assignment of error No. 6 is, to wit:

"6. THE JUDGMENTS OF THE TRIAL COURT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Assignment of error No. 6 is not well taken for the reasons asserted under Assignment of error No. 6 as discussed under the speeding charge.

Therefore, the lower court's judgment regarding the failure to yield the right-of-way charge, numbered TRD76-10259, is affirmed.

On consideration whereof, the judgment of the Toledo Municipal court is affirmed, in part, and reversed, in part. This cause is remanded to said court for further proceedings in accordance with law and for execution for costs. Costs assessed against the defendant-appellant.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

Ten (10) days from the date hereof this document shall [\*9] constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. *App. R. 22(E)*.

154 of 195 DOCUMENTS

**City of Independence, PLAINTIFF APPELLEE v. John W. English,  
DEFENDANT APPELLANT**

**No. 34949****Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County***1976 Ohio App. LEXIS 8449***June 17, 1976**

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM Garfield Heights Municipal COURT, No. Cr-102,961 Cr-102,960

**DISPOSITION:**

Judgment Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the Garfield Heights Municipal Court (Ohio), which found him guilty of two traffic offenses, running a red light and speeding. Defendant claimed that the convictions were against the manifest weight of evidence.

**OVERVIEW:** Defendant was pulled over by a city police officer and issued two traffic tickets. The first ticket was for disobeying a traffic signal by running a red light, and the second ticket was for speeding by driving 70 miles per hour in a 35 mile per hour speed zone. Defendant was convicted and appealed. In upholding the judgment, the court ruled that the city adduced sufficient evidence as to each element of the offense of speeding to enable the trial court to conclude beyond a reasonable doubt that defendant was guilty of that offense. The court stated that the fact that the city did not introduce any evidence as to the posted speed limit was not fatal to the prosecution because the city introduced evidence that defendant was driving at a rate of speed in excess of 55 miles per hour. Regardless of the prima facie speed limit on the road on which defendant was driving on the date of the offense, a speed limit in excess of 55 miles per hour was proscribed by *Ohio Rev. Code Ann. § 4511.21*. Further, the court held that the weight to be given to the police officer's testimony, as well as the issue of his credibility, were matters to be determined by the trial court as the trier of fact.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** speed, mile, motorist, traffic signal, speeding, fifty-five, highway, posted, traffic, prima-facie, street,

motor vehicle, speed limit, red light, intersection, disobeying, driver, drive, radar, beyond a reasonable doubt, state statute, handed down, case number, ordinance, ticket, comprising, inclusive, supplied, manifest, cruiser

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] Independence, Ohio, Codified Ordinance § 333.03 provides, in part, that: No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions. It is prima-facie lawful for the operator of a motor vehicle to operate the same at a speed not exceeding the following: 35 miles per hour on all state routes or through streets and through highways within the municipality outside business districts, except as provided in § 333.03(e); 50 miles per hour on controlled-access highways and expressways within the municipality and on state routes outside urban districts unless a lower prima-facie speed is established by *Ohio Rev. Code Ann. § 4511.21*; 60 miles per hour at all times on freeways with paved shoulders inside the municipality, except 50 miles per hour at all times for operators of trucks and commercial tractors weighing in excess of 4,000 pounds empty weight and school buses. It is prima-facie unlawful for any person to exceed any of the speed limitations in any section of the Ohio Traffic Code.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] Independence, Ohio, Codified Ordinance § 333.03 proscribes essentially the same conduct as *Ohio Rev. Code Ann. § 4511.21* does and is based on that state statute. However, Independence, Ohio, Codified Ordinance § 333.03 states that it is prima-facie unlawful for a motorist to exceed the speed limits posted in Independence while *Ohio Rev. Code Ann. § 4511.21*, and its predecessor statute *Ohio Rev. Code Ann. § 4511.211*, provides that no person shall drive a vehicle on the streets and highways of the state at a speed in excess of 55 miles per hour. *Ohio Rev. Code Ann. § 4511.21(K)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Evidence > Inferences & Presumptions > Rebuttal of Presumptions  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] Independence, Ohio, Codified Ordinance § 333.03 provides that a motorist shall operate his vehicle at a speed reasonable under the circumstances and that operation of his vehicle at a speed in excess of the posted limit creates a rebuttable presumption that the motorist has violated the ordinance. Under § 333.03, however, the motorist can challenge the presumption of a violation by showing that although he was traveling at a speed in excess of the posted limit, that nevertheless his speed was reasonable in light of road and other conditions at the time. *Ohio Rev. Code Ann. § 4511.21(K)*, however, provides that in no event shall a motorist operate his vehicle at a speed in excess of 55 miles per hour. Under this portion of the state statute, operation of a vehicle in excess of 55 miles per hour constitutes a speeding violation as a matter of law. The motorist is not permitted to rebut a presumption of unlawfulness by showing his speed was reasonable under the circumstances. If the motorist has travelled at a speed greater than 55 miles per hour, he has violated the statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Governments > Local Governments > Ordinances & Regulations***

[HN4] Independence, Ohio, Codified Ordinance § 333.03 conflicts with *Ohio Rev. Code Ann. § 4511.21* as regards the

effect of a speed in excess of 55 miles per hour. Regarding the situation where a city traffic ordinance conflicts with a state traffic statute, *Ohio Rev. Code Ann. §4511.06* provides as follows: *Ohio Rev. Code Ann. §§ 4511.01 to 4511.78, inclusive, § 4511.99, and §§ 4513.01 to 4513.37, inclusive, shall be applicable and uniform throughout the state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections. Thus, under the authority of Ohio Rev. Code Ann. § 4511.06, the conflict must be resolved in favor of Ohio Rev. Code Ann. § 4511.21.*

*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview*

*Criminal Law & Procedure > Witnesses > Credibility*

[HN5] The weight to be given to a police officer's testimony and his credibility are matters to be determined by the trial court as trier of the facts. It is within a lower court's prerogative to believe all, some, or none of his testimony.

#### **COUNSEL:**

For Plaintiff Appellee: Timothy Koral

For Defendant Appellant: Brian T. Melling

#### **JUDGES:**

DAY, P.J., KRENZLER, J., WASSERMAN, J. CONCUR. (Wasserman, J., Retired, sitting by assignment.)

#### **OPINION:**

##### JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Garfield Heights Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Garfield Heights Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On February 26, 1975 Officer Michael Furlan of the Independence Police Department issued two Ohio Uniform Traffic Tickets to the appellant, John W. English. The first ticket, comprising lower court case number 102,960, charged the appellant with, on February 26, 1975 at 12:50 A.M., disobeying a traffic signal or device, namely a red light, at Rockside Road and Interstate-77 in the City of Independence, in violation of Section 313.01 of the Codified Ordinances [\*2] of Independence, Ohio. The second ticket, comprising lower court case number 102,961, charged the appellant with, on the same date and at the same time, operating a motor vehicle westbound on Rockside Road from Interstate - 77 in the City of Independence at a speed unreasonable for the conditions, namely at 70 miles per hour in a 35 mile per hour zone, in violation of Section 333.03 of the Codified Ordinances of Independence.

At his arraignment in the Garfield Heights Municipal Court on April 7, 1975, the appellant entered a plea of not guilty to the charges.

On April 21, 1975 a trial to the court alone on both charges was conducted. The City of Independence presented one witness in its favor, Officer Furlan, while the defense presented no witnesses. A brief summary of Officer Furlan's testimony is as follows.

Officer Furlan testified that on February 26, 1975 at approximately 1:00 A.M. he was on general patrol; that at that time he was coming out of the Holiday Inn parking lot in Independence in his cruiser when he saw a car go through a red light at a nearby intersection; that he proceeded to follow the car, which was heading west on Rockside Road; that after stopping at the [\*3] intersection, he noted that the other car was starting to move pretty fast so he began to clock

the car; and that while giving chase he determined the speed of the car by use of a moving radar unit he had in the cruiser to be approximately 70 miles per hour. Furlan stated that the intersection with the traffic signal was lighted and repeated that the traffic light he saw the car go through was red. He also testified that it was a clear night on February 26, 1975; that the road conditions were dry; that there was light traffic at the time; that the moving radar unit was properly operating that night; that this particular radar unit is checked by means of a tuning fork and calibration; and that eventually he caught up to the car in Seven Hills, pulled it over, and cited the driver. Officer Furlan identified the appellant as the driver of the car and the person he had cited. He did not testify as to the posted speed limit on Rockside Road in the area where he clocked the appellant's speed.

At the close of the city's case, the trial court overruled the appellant's motion for acquittal. The appellant then rested and the court found him guilty of both traffic offenses as charged in [\*4] the two cases. The trial court fined the appellant the sum of \$ 25.00 and court costs on the traffic signal violation and \$ 75.00 and court costs on the speeding violation. The court also ordered the appellant's driver's license suspended for one year, with the proviso that the appellant could drive for work purposes only.

On May 16, 1975, the appellant filed a timely notice of appeal of the two convictions and assigns two errors for this court's consideration:

- I. The conviction of speeding as handed down by the Garfield Heights Municipal Court is against the manifest weight of the evidence.
- II. The conviction of Disobeying a Traffic Signal as handed down by the Garfield Heights Municipal Court is against the manifest weight of the evidence.

Because they are related, the appellant's two assignments of error will be treated together. In them the appellant contends that the convictions of speeding and of disobeying a traffic signal are against the weight of the evidence. These assigned errors are not well taken.

Regarding the speeding conviction, the appellant was charged with violating Section 333.03 of the Codified Ordinances of Independence. That section provides [\*5] in pertinent part:

[HN1] "No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions . . .

It is prima-facie lawful for the operator of a motor vehicle to operate the same at a speed not exceeding the following:

\* \* \*

(d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsection (e) of this section;

(e) Fifty miles per hour on controlled-access highways and expressways within the Municipality, and on State routes outside urban districts unless a lower prima-facie speed is established by Ohio *R.C. 4511.21*;

(f) Sixty miles per hour at all times on freeways with paved shoulders inside the Municipality, except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of 4,000 pounds empty weight and school buses.

It is prima-facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code. [\*6] . . ." (Emphasis supplied.)

Section 333.03 [HN2] proscribes essentially the same conduct as *R.C. 4511.21* does and is based on that state statute. However, Section 333.03 states that it is prima-facie unlawful for a motorist to exceed the speed limits posted in Independence while *R.C. 4511.21* (and its predecessor statute which was in effect at the time of this offense, *R.C. 4511.211*) provides that no person shall drive a vehicle on the streets and highways of the state at a speed in excess of fifty-five miles per hour. *R.C. 4511.21(K)*.

[HN3] The Independence ordinance provides that a motorist shall operate his vehicle at a speed reasonable under the circumstances, and that operation of his vehicle at a speed in excess of the posted limit creates a rebuttable presumption that the motorist has violated the ordinance. Under Section 333.03, however, the motorist can challenge the presumption of a violation by showing that although he was traveling at a speed in excess of the posted limit, that nevertheless his speed was reasonable in light of road and other conditions at the time. *R.C. 4511.21(K)*, however, provides that in no event shall a motorist operate his vehicle at a speed in excess of [\*7] fifty-five miles per hour. Under this portion of the state statute, operation of a vehicle in excess of fifty-five miles per hour constitutes a speeding violation as a matter of law. The motorist is not permitted to rebut a presumption of unlawfulness by showing his speed was reasonable under the circumstances. If the motorist has travelled at a speed greater than fifty-five miles per hour, he has violated the statute.

Section 333.03 of the Codified Ordinances of Independence [HN4] conflicts with *R.C. 4511.21* as regards the effect of a speed in excess of fifty-five miles per hour. Regarding the situation where a city traffic ordinance conflicts with a state traffic statute, *R.C. 4511.06* provides as follows:

"Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code shall be applicable and uniform throughout the state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections." (Emphasis supplied.)

Under the authority of *R.C. 4511.06* then, the conflict must be resolved in favor of *R.C. 4511.21*. Its provisions apply [\*8] in this case.

In the instant case, a careful review of Officer Furlan's testimony, summarized above, shows that the City of Independence adduced sufficient evidence as to each element of the offense of speeding to enable the trial court to conclude beyond a reasonable doubt that the appellant was guilty of that offense. The fact that the city did not introduce any evidence as to the posted speed limit on Rockside Road on February 26, 1975 was not fatal to the prosecution because the city did introduce evidence that the appellant was driving at a rate of speed in excess of 55 miles per hour. Regardless of the prima facie speed limit on Rockside Road on the date of the offense, a speed in excess of 55 miles per hour was proscribed by *R.C. 4511.21*.

Further, [HN5] the weight to be given to Officer Furlan's testimony, and his credibility were matters to be determined by the trial court as trier of the facts. See *State v. DeHass (1967), 10 Ohio St. 2d 230*. Clearly, it was the lower court's prerogative to believe all, some, or none of his testimony. The lower court obviously chose to believe part of Officer Furlan's testimony, and to disbelieve other parts which did not comport with mathematics [\*9] and logic.

Regarding the traffic signal violation, Officer Furlan's testimony was sufficient to enable the trial court to conclude beyond a reasonable doubt that the appellant was guilty of that offense also. Officer Furlan expressly stated that he saw the appellant drive through a red light on Rockside Road.

For the above stated reasons, the judgment of the Garfield Heights Municipal Court in both cases is affirmed.

It is ordered that appellees recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Garfield Heights Municipal Court to carry

this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to [\*10] run.

155 of 195 DOCUMENTS

**City of Independence, PLAINTIFF APPELLEE v. John W. English,  
DEFENDANT APPELLANT**

No. 34949

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

*1976 Ohio App. LEXIS 8449*

June 17, 1976

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**PRIOR HISTORY:** [\*1]

APPEAL FROM Garfield Heights Municipal COURT, No. Cr-102,961 Cr-102,960

**DISPOSITION:**

Judgment Affirmed

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of a judgment from the Garfield Heights Municipal Court (Ohio), which found him guilty of two traffic offenses, running a red light and speeding. Defendant claimed that the convictions were against the manifest weight of evidence.

**OVERVIEW:** Defendant was pulled over by a city police officer and issued two traffic tickets. The first ticket was for disobeying a traffic signal by running a red light, and the second ticket was for speeding by driving 70 miles per hour in a 35 mile per hour speed zone. Defendant was convicted and appealed. In upholding the judgment, the court ruled that the city adduced sufficient evidence as to each element of the offense of speeding to enable the trial court to conclude beyond a reasonable doubt that defendant was guilty of that offense. The court stated that the fact that the city did not introduce any evidence as to the posted speed limit was not fatal to the prosecution because the city introduced evidence that defendant was driving at a rate of speed in excess of 55 miles per hour. Regardless of the prima facie speed limit on the road on which defendant was driving on the date of the offense, a speed limit in excess of 55 miles per hour was proscribed by *Ohio Rev. Code Ann. § 4511.21*. Further, the court held that the weight to be given to the police officer's testimony, as well as the issue of his credibility, were matters to be determined by the trial court as the trier of fact.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** speed, mile, motorist, traffic signal, speeding, fifty-five, highway, posted, traffic, prima-facie, street,

motor vehicle, speed limit, red light, intersection, disobeying, driver, drive, radar, beyond a reasonable doubt, state statute, handed down, case number, ordinance, ticket, comprising, inclusive, supplied, manifest, cruiser

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN1] Independence, Ohio, Codified Ordinance § 333.03 provides, in part, that: No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions. It is prima-facie lawful for the operator of a motor vehicle to operate the same at a speed not exceeding the following: 35 miles per hour on all state routes or through streets and through highways within the municipality outside business districts, except as provided in § 333.03(e); 50 miles per hour on controlled-access highways and expressways within the municipality and on state routes outside urban districts unless a lower prima-facie speed is established by *Ohio Rev. Code Ann. § 4511.21*; 60 miles per hour at all times on freeways with paved shoulders inside the municipality, except 50 miles per hour at all times for operators of trucks and commercial tractors weighing in excess of 4,000 pounds empty weight and school buses. It is prima-facie unlawful for any person to exceed any of the speed limitations in any section of the Ohio Traffic Code.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] Independence, Ohio, Codified Ordinance § 333.03 proscribes essentially the same conduct as *Ohio Rev. Code Ann. § 4511.21* does and is based on that state statute. However, Independence, Ohio, Codified Ordinance § 333.03 states that it is prima-facie unlawful for a motorist to exceed the speed limits posted in Independence while *Ohio Rev. Code Ann. § 4511.21*, and its predecessor statute *Ohio Rev. Code Ann. § 4511.211*, provides that no person shall drive a vehicle on the streets and highways of the state at a speed in excess of 55 miles per hour. *Ohio Rev. Code Ann. § 4511.21(K)*.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Evidence > Inferences & Presumptions > Rebuttal of Presumptions  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] Independence, Ohio, Codified Ordinance § 333.03 provides that a motorist shall operate his vehicle at a speed reasonable under the circumstances and that operation of his vehicle at a speed in excess of the posted limit creates a rebuttable presumption that the motorist has violated the ordinance. Under § 333.03, however, the motorist can challenge the presumption of a violation by showing that although he was traveling at a speed in excess of the posted limit, that nevertheless his speed was reasonable in light of road and other conditions at the time. *Ohio Rev. Code Ann. § 4511.21(K)*, however, provides that in no event shall a motorist operate his vehicle at a speed in excess of 55 miles per hour. Under this portion of the state statute, operation of a vehicle in excess of 55 miles per hour constitutes a speeding violation as a matter of law. The motorist is not permitted to rebut a presumption of unlawfulness by showing his speed was reasonable under the circumstances. If the motorist has travelled at a speed greater than 55 miles per hour, he has violated the statute.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements  
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence  
Governments > Local Governments > Ordinances & Regulations***

[HN4] Independence, Ohio, Codified Ordinance § 333.03 conflicts with *Ohio Rev. Code Ann. § 4511.21* as regards the

effect of a speed in excess of 55 miles per hour. Regarding the situation where a city traffic ordinance conflicts with a state traffic statute, *Ohio Rev. Code Ann. §4511.06* provides as follows: *Ohio Rev. Code Ann. §§ 4511.01 to 4511.78, inclusive, § 4511.99, and §§ 4513.01 to 4513.37, inclusive, shall be applicable and uniform throughout the state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections. Thus, under the authority of Ohio Rev. Code Ann. § 4511.06, the conflict must be resolved in favor of Ohio Rev. Code Ann. § 4511.21.*

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview***

***Criminal Law & Procedure > Witnesses > Credibility***

[HN5] The weight to be given to a police officer's testimony and his credibility are matters to be determined by the trial court as trier of the facts. It is within a lower court's prerogative to believe all, some, or none of his testimony.

**COUNSEL:**

For Plaintiff Appellee: Timothy Koral

For Defendant Appellant: Brian T. Melling

**JUDGES:**

DAY, P.J., KRENZLER, J., WASSERMAN, J. CONCUR. (Wasserman, J., Retired, sitting by assignment.)

**OPINION:**

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Garfield Heights Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Garfield Heights Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On February 26, 1975 Officer Michael Furlan of the Independence Police Department issued two Ohio Uniform Traffic Tickets to the appellant, John W. English. The first ticket, comprising lower court case number 102,960, charged the appellant with, on February 26, 1975 at 12:50 A.M., disobeying a traffic signal or device, namely a red light, at Rockside Road and Interstate-77 in the City of Independence, in violation of Section 313.01 of the Codified Ordinances [\*2] of Independence, Ohio. The second ticket, comprising lower court case number 102, 961, charged the appellant with, on the same date and at the same time, operating a motor vehicle westbound on Rockside Road from Interstate - 77 in the City of Independence at a speed unreasonable for the conditions, namely at 70 miles per hour in a 35 mile per hour zone, in violation of Section 333.03 of the Codified Ordinances of Independence.

At his arraignment in the Garfield Heights Municipal Court on April 7, 1975, the appellant entered a plea of not guilty to the charges.

On April 21, 1975 a trial to the court alone on both charges was conducted. The City of Independence presented one witness in its favor, Officer Furlan, while the defense presented no witnesses. A brief summary of Officer Furlan's testimony is as follows.

Officer Furlan testified that on February 26, 1975 at approximately 1:00 A.M. he was on general patrol; that at that time he was coming out of the Holiday Inn parking lot in Independence in his cruiser when he saw a car go through a red light at a nearby intersection; that he proceeded to follow the car, which was heading west on Rockside Road; that after stopping at the [\*3] intersection, he noted that the other car was starting to move pretty fast so he began to clock

the car; and that while giving chase he determined the speed of the car by use of a moving radar unit he had in the cruiser to be approximately 70 miles per hour. Furlan stated that the intersection with the traffic signal was lighted and repeated that the traffic light he saw the car go through was red. He also testified that it was a clear night on February 26, 1975; that the road conditions were dry; that there was light traffic at the time; that the moving radar unit was properly operating that night; that this particular radar unit is checked by means of a tuning fork and calibration; and that eventually he caught up to the car in Seven Hills, pulled it over, and cited the driver. Officer Furlan identified the appellant as the driver of the car and the person he had cited. He did not testify as to the posted speed limit on Rockside Road in the area where he clocked the appellant's speed.

At the close of the city's case, the trial court overruled the appellant's motion for acquittal. The appellant then rested and the court found him guilty of both traffic offenses as charged in [\*4] the two cases. The trial court fined the appellant the sum of \$ 25.00 and court costs on the traffic signal violation and \$ 75.00 and court costs on the speeding violation. The court also ordered the appellant's driver's license suspended for one year, with the proviso that the appellant could drive for work purposes only.

On May 16, 1975, the appellant filed a timely notice of appeal of the two convictions and assigns two errors for this court's consideration:

- I. The conviction of speeding as handed down by the Garfield Heights Municipal Court is against the manifest weight of the evidence.
- II. The conviction of Disobeying a Traffic Signal as handed down by the Garfield Heights Municipal Court is against the manifest weight of the evidence.

Because they are related, the appellant's two assignments of error will be treated together. In them the appellant contends that the convictions of speeding and of disobeying a traffic signal are against the weight of the evidence. These assigned errors are not well taken.

Regarding the speeding conviction, the appellant was charged with violating Section 333.03 of the Codified Ordinances of Independence. That section provides [\*5] in pertinent part:

[HN1] "No person shall operate a motor vehicle in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions . . .

It is prima-facie lawful for the operator of a motor vehicle to operate the same at a speed not exceeding the following:

\* \* \*

(d) Thirty-five miles per hour on all State routes or through streets and through highways within the Municipality outside business districts, except as provided in subsection (e) of this section;

(e) Fifty miles per hour on controlled-access highways and expressways within the Municipality, and on State routes outside urban districts unless a lower prima-facie speed is established by Ohio *R.C. 4511.21*;

(f) Sixty miles per hour at all times on freeways with paved shoulders inside the Municipality, except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of 4,000 pounds empty weight and school buses.

It is prima-facie unlawful for any person to exceed any of the speed limitations in any section of this Traffic Code. [\*6] . . ." (Emphasis supplied.)

Section 333.03 [HN2] proscribes essentially the same conduct as *R.C. 4511.21* does and is based on that state statute. However, Section 333.03 states that it is prima-facie unlawful for a motorist to exceed the speed limits posted in Independence while *R.C. 4511.21* (and its predecessor statute which was in effect at the time of this offense, *R.C. 4511.211*) provides that no person shall drive a vehicle on the streets and highways of the state at a speed in excess of fifty-five miles per hour. *R.C. 4511.21(K)*.

[HN3] The Independence ordinance provides that a motorist shall operate his vehicle at a speed reasonable under the circumstances, and that operation of his vehicle at a speed in excess of the posted limit creates a rebuttable presumption that the motorist has violated the ordinance. Under Section 333.03, however, the motorist can challenge the presumption of a violation by showing that although he was traveling at a speed in excess of the posted limit, that nevertheless his speed was reasonable in light of road and other conditions at the time. *R.C. 4511.21(K)*, however, provides that in no event shall a motorist operate his vehicle at a speed in excess of [\*7] fifty-five miles per hour. Under this portion of the state statute, operation of a vehicle in excess of fifty-five miles per hour constitutes a speeding violation as a matter of law. The motorist is not permitted to rebut a presumption of unlawfulness by showing his speed was reasonable under the circumstances. If the motorist has travelled at a speed greater than fifty-five miles per hour, he has violated the statute.

Section 333.03 of the Codified Ordinances of Independence [HN4] conflicts with *R.C. 4511.21* as regards the effect of a speed in excess of fifty-five miles per hour. Regarding the situation where a city traffic ordinance conflicts with a state traffic statute, *R.C. 4511.06* provides as follows:

"Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code shall be applicable and uniform throughout the state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections." (Emphasis supplied.)

Under the authority of *R.C. 4511.06* then, the conflict must be resolved in favor of *R.C. 4511.21*. Its provisions apply [\*8] in this case.

In the instant case, a careful review of Officer Furlan's testimony, summarized above, shows that the City of Independence adduced sufficient evidence as to each element of the offense of speeding to enable the trial court to conclude beyond a reasonable doubt that the appellant was guilty of that offense. The fact that the city did not introduce any evidence as to the posted speed limit on Rockside Road on February 26, 1975 was not fatal to the prosecution because the city did introduce evidence that the appellant was driving at a rate of speed in excess of 55 miles per hour. Regardless of the prima facie speed limit on Rockside Road on the date of the offense, a speed in excess of 55 miles per hour was proscribed by *R.C. 4511.21*.

Further, [HN5] the weight to be given to Officer Furlan's testimony, and his credibility were matters to be determined by the trial court as trier of the facts. See *State v. DeHass (1967), 10 Ohio St. 2d 230*. Clearly, it was the lower court's prerogative to believe all, some, or none of his testimony. The lower court obviously chose to believe part of Officer Furlan's testimony, and to disbelieve other parts which did not comport with mathematics [\*9] and logic.

Regarding the traffic signal violation, Officer Furlan's testimony was sufficient to enable the trial court to conclude beyond a reasonable doubt that the appellant was guilty of that offense also. Officer Furlan expressly stated that he saw the appellant drive through a red light on Rockside Road.

For the above stated reasons, the judgment of the Garfield Heights Municipal Court in both cases is affirmed.

It is ordered that appellees recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Garfield Heights Municipal Court to carry

this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.  
Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to [\*10] run.

156 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. David ELLIOTT, Appellant****No. 00736 Philadelphia, 1991****Superior Court of Pennsylvania*****410 Pa. Super. 354; 599 A.2d 1335; 1991 Pa. Super. LEXIS 3463*****July 31, 1991, Argued****November 7, 1991, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from the Judgment of Sentence in the Court of *Common Pleas of Bucks County, Criminal Division, No. 401 Misc. 1990. Commonwealth v. Elliott, 10 Pa. D. & C.4th 190, 1991 Pa. Dist. & Cnty. Dec. LEXIS 310 (1991)*

**DISPOSITION:**

Judgment of sentence affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant minor sought review of a judgment of the Court of Common Pleas of Bucks County, Pennsylvania that convicted appellant of underage drinking. Appellant asserted that the evidence was insufficient to support the conviction, and that the admission of breathalyzer test results was erroneous.

**OVERVIEW:** Appellant minor was convicted of underage drinking, following a trial de novo. The appeals court affirmed, holding that the evidence was sufficient to find appellant guilty of underage drinking. The court held that the arresting officer had the authority to cite appellant for a summary offense not committed in the officer's presence, and the mere fact that the commonwealth failed to present a certified copy of appellant's birth certificate or driver's license did not mean that it had failed to meet its burden of proof. The trial court did not err when it allowed the admission into evidence of breathalyzer results, as the results were authorized in any proceeding which related to the use of alcohol. The commonwealth presented sufficient evidence to sustain appellant's conviction for the summary offense of underage drinking, and the court affirmed the judgment of sentence.

**OUTCOME:** The court affirmed a judgment of the trial court that convicted appellant of underage drinking, holding that the evidence was sufficient to support the conviction. The court held that the admission of the breathalyzer results was not erroneous because the results were authorized in any proceedings that related to the use of alcohol.

410 Pa. Super. 354, \*; 599 A.2d 1335, \*\*;  
1991 Pa. Super. LEXIS 3463, \*\*\*1

**CORE TERMS:** underage drinking, arrest, suspension, police officer, license, driver, breathalyzer, municipal, probable cause, inclusive, brewed, liquor, malt, blood alcohol, beverage, scene, primary jurisdiction, offense committed, arresting officer, reasonable doubt, guilt beyond, duration, driving, restoration, narrowest, arresting, sentence, proven, guilt, date of birth

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN1] In order to review a claim the evidence introduced by the commonwealth was insufficient to prove appellant's guilt beyond a reasonable doubt, the appeals court must accept all evidence and all reasonable inferences therefrom, upon which the fact finder could have based the verdict, in order to determine whether the commonwealth's evidence was legally sufficient to support the verdict. Only where the evidence, when so viewed, is insufficient to establish guilt beyond a reasonable doubt as to the crimes charged is relief granted.

*Governments > Local Governments > Police Power*

[HN2] See 42 Pa. Cons. Stat. § 8952.

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > General Overview*

*Criminal Law & Procedure > Juvenile Offenders > General Overview*

[HN3] See 18 Pa. Cons. Stat. § 6310.4.

**COUNSEL:**

Carole Kafrisen, Philadelphia, for appellant.

Stephen B. Harris, Asst. Dist. Atty., Warrington, for the Com., appellee.

**JUDGES:**

Montemuro, Tamlia and Brosky, JJ. Concurring and dissenting opinion by Montemuro, J.

**OPINION BY:**

TAMILIA

**OPINION:**

[\*356] [\*\*1336]

Appellant, David Elliott, takes this appeal from his summary conviction for underage drinking, n1 following a trial *de novo* before the Honorable John J. Rufe of the Court of Common Pleas of Bucks County. In this appeal, appellant raises several issues concerning the sufficiency of the evidence to find appellant guilty of underage drinking. [HN1] In order to review a claim the evidence introduced by the Commonwealth was insufficient to prove appellant's guilt beyond a reasonable doubt, we must accept all evidence and all reasonable inferences therefrom, upon which the fact finder could have based the verdict, in order to determine whether the Commonwealth's evidence was legally sufficient to support the verdict. Only where the evidence, [\*357] when so viewed, is insufficient [\*\*\*2] to establish guilt

beyond a reasonable doubt as to the crimes charged is relief granted. *Commonwealth* [\*\*1337] v. *Cody*, 401 Pa. Super. 85, 584 A.2d 992 (1991).

n1 18 Pa.C.S. § 6308.

Viewed in this light, the evidence establishes that shortly after midnight on February 10, 1990, Officer Donald Schwab of the Bensalem Township Police Department arrived at the scene of a two-car automobile accident. At that time, appellant identified himself to Officer Schwab as the driver of one of the vehicles, producing a vehicle registration and a driver's license indicating his date of birth as March 10, 1973. Officer Schwab detected the odor of an alcoholic beverage on appellant's breath and gave him a roadside prearrest breath test, which resulted in a reading of .04 per cent blood alcohol content (BAC). Appellant was taken into custody and transported to police headquarters, where, with appellant's consent, an Intoximeter 3000 breath test was administered twice to appellant, [\*\*\*3] with both tests resulting in a BAC reading of .04 per cent. Following this finding, a citation was issued to appellant charging him with underage drinking. Appellant stipulated at trial to the calibration of the Intoximeter 3000 and the accuracy of the results derived therefrom.

Appellant now argues the evidence was insufficient to sustain a conviction for underage drinking because a summary offense such as underage drinking must be committed in the presence of a police officer, circumstances not present in this case. We do not agree.

The section of the Crimes Code under which appellant was charged states, in pertinent part: "A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages . . ." 18 Pa.C.S. § 6308.

An Act of Assembly which imposes penal sanctions for violations of its provisions must be strictly construed. 1 Pa.C.S. § 1928; *Commonwealth v. Hill*, 481 Pa. 37, [\*358] 391 A.2d 1303 (1978). "However, strict construction does not require that the words of a criminal statute [\*\*\*4] be given their narrowest meaning or that the legislature's evident intent be disregarded." *Commonwealth v. Gordon*, 511 Pa. 481, 487, 515 A.2d 558, 561 (1986). In attempting to ascertain the meaning of a statute we are required to consider the intent of the legislature and are permitted to examine the practical consequences of a particular interpretation. *Commonwealth v. Stewart*, 375 Pa. Super. 585, 544 A.2d 1384 (1988). We are to presume the legislature did not intend a result that is absurd or unreasonable. *Commonwealth v. Martorano*, 387 Pa. Super. 151, 563 A.2d 1229 (1989).

For his part, appellant relies upon *Commonwealth v. Pincavitch*, 206 Pa. Super. 539, 214 A.2d 280 (1965), a case which applied the precursor of section 6308, 18 P.S. § 4675.1 (repealed). In *Pincavitch*, this Court found "no authority that justifies an arrest without a warrant for a . . . summary offense committed beyond the presence of the arresting officer *in the absence of a statute giving that right.*" *Id.*, 206 Pa. Superior Ct. at 544, 214 A.2d at 282 [\*\*\*5] (emphasis added). n2 Subsequent to *Pincavitch*, however, the legislature enacted the following statute:

#### **§ 8952. Primary municipal police jurisdiction**

[HN2] Any duly employed municipal police officer shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office anywhere within his primary jurisdiction as to:

(1) Any offense which the officer views or otherwise has probable cause to believe was committed within his jurisdiction.

[\*359] (2) Any other event that occurs within his primary jurisdiction and which reasonably requires action on [\*\*1338] the part of the police in order to preserve, protect or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth.

42 Pa.C.S. § 8952 (emphasis added), 1982, June 15, P.L. 512, No. 141, § 4, effective in 60 days. Appellant does not dispute Bensalem Township is a municipality or that Officer Schwab was a duly employed municipal police officer. Clearly, then, *Pincavitch* offers no guidance on this issue, and instead section 8952 controls. n3 Further, it does not require any elaborate judicial interpretation of section [\*\*\*6] 8952 to determine the inclusive language of the statute allows a municipal police officer to perform his duties with regard to *any* offense committed within his jurisdiction, be it a felony, misdemeanor or summary offense. This authority is not limited to offenses viewed by the officer but includes those offenses which the officer has probable cause to believe were committed within his jurisdiction. 42 Pa.C.S. § 8952(1). Were such not the case, the practical consequences would be that police officers often would be unable to issue citations for summary offenses otherwise established by the evidence at hand merely because they were called to the scene after the violations occurred. It is unquestionably the legislature's intent to establish a probable cause standard as a means of defining the bounds of police authority in arresting or citing an actor for a summary offense. The Comment to Pa.R.Crim.P. 55, **Issuance of Citation**, states:

[\*360]

A law enforcement officer may issue a citation based upon information that the defendant has committed a summary violation, which information may be received from a personal observation of the commission of the offense; a witness; [\*\*\*7] another police officer; *investigation*; or speed-timing equipment, including radar.

(Emphasis added.) Comments to Rule 70, **Arrest Without Warrant**, provide as follows:

It is intended that these proceedings will be instituted by arrest only in exceptional circumstances such as those involving violence, or the imminent threat of violence, or those involving danger that the defendant will flee.

The Vehicle Code provides the procedures for arresting a defendant without a warrant for a summary offense under that Code.

Therefore, having made the determination Officer Schwab had the authority to cite appellant for a summary offense not committed in the officer's presence, we only need determine whether the evidence was sufficient to sustain a finding of guilt.

n2 Appellant's citations to *Commonwealth v. Pincavitch*, 206 Pa.Super. 539, 214 A.2d 280 (1965), and *Commonwealth v. Shillingford*, 231 Pa.Super. 407, 332 A.2d 824 (1975), are misplaced to the extent that in those cases action was instituted by arrest whereas here, after permissible investigation of DUI charges which includes conducting a breathalyzer test, a citation was issued. There was initial probable cause to take appellant into custody for DUI which is permissible without a warrant under 75 Pa.C.S. § 3731, **Driving under the influence of alcohol or controlled substance**.

[\*\*\*8]

n3 Pennsylvania Rule of Criminal Procedure 70, Part IV. Procedures in Summary Cases When Defendant is Arrested Without Warrant, provides:

**Rule 70. Arrest Without Warrant**

When an arrest without a warrant in a summary case is authorized by law, a police officer who exhibits some sign of authority may institute proceedings by such an arrest.

Thus, whether this case originated pursuant to arrest without a warrant or citation, the sections of the Motor

Vehicle Code and Criminal Code cited above permit such a proceeding. This is also supported by the Rules of Criminal Procedure cited infra.

The Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence, so long as the inferred facts flow, beyond a reasonable doubt, from the proven facts to establish the accused's guilt or elements of the crime. *Commonwealth v. Ramos*, 392 Pa. Super. 583, 573 A.2d 1027 (1990).

Although appellant argues the Commonwealth was required to offer formal proof appellant was under the age of 21 at the time of the offense, we find no support for [\*\*\*9] this position. Officer Schwab presented uncontradicted testimony that the driver's license produced by appellant at the scene of the accident indicated his date of birth as March 10, 1973, making him sixteen years of age. We agree with the trial court's finding that the "mere fact that the Commonwealth failed to present a certified copy of the defendant's birth certificate or driver's license does not mean that it has failed to meet its burden." (Slip Op., Rufe, J., [\*361] 3/26/91, p. 3.) Nothing in the record refutes the authenticity of the driver's license or the accuracy of the birthdate. [\*\*1339] When the Commonwealth presents evidence with adequate probative value to establish the truth of the matter, in the face of the denial of the adequacy of that proof, it becomes a matter for determination by the trial judge, which determination will not be overturned on appeal.

Finally, appellant argues the trial court erred in allowing the admission into evidence of breathalyzer results, which are of no relevance to sustain a charge of underage drinking and are only admissible to prove a charge under the Vehicle Code. The Vehicle Code allows for the admission of blood alcohol tests [\*\*\*10] in "any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3731 or any other violation of this title arising out of the same action . . ." 75 Pa.C.S. § 1547(c). While appellant would have the language of section 1547 bar the admission of appellant's two .04 per cent blood alcohol tests in this case, we find section 1547 far more inclusive. We find the first conjunction "or" used in section 1547(c) to have been used as a function word to indicate an alternative. Summary proceedings, then, are differentiated from criminal proceedings in which the defendant is charged under section 3731, dealing with driving under the influence, and the words of section 1547 are not given their narrowest meaning. We believe such a construction of the language of the statute best comports with the reasonable intent of the legislature and the promotion of justice. 1 Pa.C.S. § 1928, *supra*. Thus, section 1547 authorizes the admission into evidence the results of a breathalyzer in any proceeding, summary or criminal, which in any way related to the use of alcohol. In addition, a unique aspect of this case is the fact that the appellant is a [\*\*\*11] minor. 18 Pa.C.S. § 6310.4, **Restriction of operating privileges**, provides:[HN3]

**(a) General rule.** -- Whenever a person is convicted or is adjudicated delinquent or is admitted to any preadjudication program for a violation of section 6307 (relating to misrepresentation of age to secure liquor or malt or [\*362] brewed beverages), 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) or 6310.3 (relating to carrying a false identification card), the court, including a court not of record if it is exercising jurisdiction pursuant to 42 Pa.C.S. § 1515(a) (relating to jurisdiction and venue), shall order the operating privilege of the person suspended. A copy of the order shall be transmitted to the Department of Transportation.

**(b) Duration of suspension.** -- When the department suspends the operating privilege of a person under subsection (a), the duration of the suspension shall be as follows:

- (1) For a first offense, a period of 90 days from the date of suspension.
- (2) For a second offense, a period of one year from the date of suspension.
- (3) For a third offense, and any offenses thereafter, a period of two years [\*\*\*12] from the date of suspension. Any multiple sentences imposed shall be served consecutively.

Reinstatement of operating privilege shall be governed by 75 Pa.C.S. § 1545 (relating to restoration of operating privilege).

It necessarily follows that an underage drinking violation and conviction implicates the Motor Vehicle Code requiring suspension of the license, if the defendant has one, and restoration pursuant to the Code. Section 1547, therefore, clearly applies to proceedings and convictions under section 6308.

For the foregoing reasons, we find appellant's claim without merit. The Commonwealth presented sufficient evidence to sustain appellant's conviction for the summary offense of underage drinking, and we affirm the judgment of sentence.

Judgment of sentence affirmed.

**CONCUR BY:**

MONTEMURO (In Part)

**DISSENT BY:**

MONTEMURO (In Part)

**DISSENT:**

[\*363]

MONTEMURO, Judge, concurring and dissenting:

While I have no quarrel with the majority's conclusion as to the first two issues in this case, I cannot agree that breathalyzer results are admissible into evidence. The [\*\*1340] Vehicle Code, section § 1547(c), cited in support of admissibility, may well be as inclusive as the Majority would have it, but [\*\*\*13] where no violation under the Code has been charged, its provisions, however broad, are inapplicable. The majority seems to be suggesting that guilty may be proven by implication, as "it necessarily follows that an underage drinking violation and conviction implicates the Motor Vehicle Code." (Majority Opinion at 1339) If this were so, a juvenile too young to have a driver's license, or one stopped for pedestrian trespassing, and found to be in the same condition as appellant, could be tested by Intoximeter and expect to have the results used against him at trial under the aegis of the Vehicle Code. I do not believe the statute was intended to have such a lengthy reach, and therefore dissent.

Having said so much, I would also find that in the case at hand introduction of the Intoximeter evidence was harmless error, as the testimony of the arresting officer, that he smelled alcohol on appellant's breath, would, if believed, be enough to support a finding of underage drinking.

157 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. David ELLIOTT, Appellant****No. 00736 Philadelphia, 1991****Superior Court of Pennsylvania*****410 Pa. Super. 354; 599 A.2d 1335; 1991 Pa. Super. LEXIS 3463*****July 31, 1991, Argued****November 7, 1991, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from the Judgment of Sentence in the Court of *Common Pleas of Bucks County, Criminal Division, No. 401 Misc. 1990. Commonwealth v. Elliott, 10 Pa. D. & C.4th 190, 1991 Pa. Dist. & Cnty. Dec. LEXIS 310 (1991)*

**DISPOSITION:**

Judgment of sentence affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant minor sought review of a judgment of the Court of Common Pleas of Bucks County, Pennsylvania that convicted appellant of underage drinking. Appellant asserted that the evidence was insufficient to support the conviction, and that the admission of breathalyzer test results was erroneous.

**OVERVIEW:** Appellant minor was convicted of underage drinking, following a trial de novo. The appeals court affirmed, holding that the evidence was sufficient to find appellant guilty of underage drinking. The court held that the arresting officer had the authority to cite appellant for a summary offense not committed in the officer's presence, and the mere fact that the commonwealth failed to present a certified copy of appellant's birth certificate or driver's license did not mean that it had failed to meet its burden of proof. The trial court did not err when it allowed the admission into evidence of breathalyzer results, as the results were authorized in any proceeding which related to the use of alcohol. The commonwealth presented sufficient evidence to sustain appellant's conviction for the summary offense of underage drinking, and the court affirmed the judgment of sentence.

**OUTCOME:** The court affirmed a judgment of the trial court that convicted appellant of underage drinking, holding that the evidence was sufficient to support the conviction. The court held that the admission of the breathalyzer results was not erroneous because the results were authorized in any proceedings that related to the use of alcohol.

410 Pa. Super. 354, \*; 599 A.2d 1335, \*\*;  
1991 Pa. Super. LEXIS 3463, \*\*\*1

**CORE TERMS:** underage drinking, arrest, suspension, police officer, license, driver, breathalyzer, municipal, probable cause, inclusive, brewed, liquor, malt, blood alcohol, beverage, scene, primary jurisdiction, offense committed, arresting officer, reasonable doubt, guilt beyond, duration, driving, restoration, narrowest, arresting, sentence, proven, guilt, date of birth

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence*

[HN1] In order to review a claim the evidence introduced by the commonwealth was insufficient to prove appellant's guilt beyond a reasonable doubt, the appeals court must accept all evidence and all reasonable inferences therefrom, upon which the fact finder could have based the verdict, in order to determine whether the commonwealth's evidence was legally sufficient to support the verdict. Only where the evidence, when so viewed, is insufficient to establish guilt beyond a reasonable doubt as to the crimes charged is relief granted.

*Governments > Local Governments > Police Power*

[HN2] See 42 Pa. Cons. Stat. § 8952.

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > General Overview*

*Criminal Law & Procedure > Juvenile Offenders > General Overview*

[HN3] See 18 Pa. Cons. Stat. § 6310.4.

**COUNSEL:**

Carole Kafriksen, Philadelphia, for appellant.

Stephen B. Harris, Asst. Dist. Atty., Warrington, for the Com., appellee.

**JUDGES:**

Montemuro, Tamlia and Brosky, JJ. Concurring and dissenting opinion by Montemuro, J.

**OPINION BY:**

TAMILIA

**OPINION:**

[\*356] [\*\*1336]

Appellant, David Elliott, takes this appeal from his summary conviction for underage drinking, n1 following a trial *de novo* before the Honorable John J. Rufe of the Court of Common Pleas of Bucks County. In this appeal, appellant raises several issues concerning the sufficiency of the evidence to find appellant guilty of underage drinking. [HN1] In order to review a claim the evidence introduced by the Commonwealth was insufficient to prove appellant's guilt beyond a reasonable doubt, we must accept all evidence and all reasonable inferences therefrom, upon which the fact finder could have based the verdict, in order to determine whether the Commonwealth's evidence was legally sufficient to support the verdict. Only where the evidence, [\*357] when so viewed, is insufficient [\*\*\*2] to establish guilt

beyond a reasonable doubt as to the crimes charged is relief granted. *Commonwealth* [\*\*1337] v. *Cody*, 401 Pa. Super. 85, 584 A.2d 992 (1991).

n1 18 Pa.C.S. § 6308.

Viewed in this light, the evidence establishes that shortly after midnight on February 10, 1990, Officer Donald Schwab of the Bensalem Township Police Department arrived at the scene of a two-car automobile accident. At that time, appellant identified himself to Officer Schwab as the driver of one of the vehicles, producing a vehicle registration and a driver's license indicating his date of birth as March 10, 1973. Officer Schwab detected the odor of an alcoholic beverage on appellant's breath and gave him a roadside prearrest breath test, which resulted in a reading of .04 per cent blood alcohol content (BAC). Appellant was taken into custody and transported to police headquarters, where, with appellant's consent, an Intoximeter 3000 breath test was administered twice to appellant, [\*\*\*3] with both tests resulting in a BAC reading of .04 per cent. Following this finding, a citation was issued to appellant charging him with underage drinking. Appellant stipulated at trial to the calibration of the Intoximeter 3000 and the accuracy of the results derived therefrom.

Appellant now argues the evidence was insufficient to sustain a conviction for underage drinking because a summary offense such as underage drinking must be committed in the presence of a police officer, circumstances not present in this case. We do not agree.

The section of the Crimes Code under which appellant was charged states, in pertinent part: "A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages . . ." 18 Pa.C.S. § 6308.

An Act of Assembly which imposes penal sanctions for violations of its provisions must be strictly construed. 1 Pa.C.S. § 1928; *Commonwealth v. Hill*, 481 Pa. 37, [\*358] 391 A.2d 1303 (1978). "However, strict construction does not require that the words of a criminal statute [\*\*\*4] be given their narrowest meaning or that the legislature's evident intent be disregarded." *Commonwealth v. Gordon*, 511 Pa. 481, 487, 515 A.2d 558, 561 (1986). In attempting to ascertain the meaning of a statute we are required to consider the intent of the legislature and are permitted to examine the practical consequences of a particular interpretation. *Commonwealth v. Stewart*, 375 Pa. Super. 585, 544 A.2d 1384 (1988). We are to presume the legislature did not intend a result that is absurd or unreasonable. *Commonwealth v. Martorano*, 387 Pa. Super. 151, 563 A.2d 1229 (1989).

For his part, appellant relies upon *Commonwealth v. Pincavitch*, 206 Pa. Super. 539, 214 A.2d 280 (1965), a case which applied the precursor of section 6308, 18 P.S. § 4675.1 (repealed). In *Pincavitch*, this Court found "no authority that justifies an arrest without a warrant for a . . . summary offense committed beyond the presence of the arresting officer *in the absence of a statute giving that right.*" *Id.*, 206 Pa. Superior Ct. at 544, 214 A.2d at 282 [\*\*\*5] (emphasis added). n2 Subsequent to *Pincavitch*, however, the legislature enacted the following statute:

#### **§ 8952. Primary municipal police jurisdiction**

[HN2] Any duly employed municipal police officer shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office anywhere within his primary jurisdiction as to:

(1) Any offense which the officer views *or otherwise has probable cause to believe* was committed within his jurisdiction.

[\*359] (2) *Any other event that occurs within his primary jurisdiction and which reasonably requires action on* [\*\*1338] *the part of the police in order to preserve, protect or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth.*

42 Pa.C.S. § 8952 (emphasis added), 1982, June 15, P.L. 512, No. 141, § 4, effective in 60 days. Appellant does not dispute Bensalem Township is a municipality or that Officer Schwab was a duly employed municipal police officer. Clearly, then, *Pincavitch* offers no guidance on this issue, and instead section 8952 controls. n3 Further, it does not require any elaborate judicial interpretation of section [\*\*\*6] 8952 to determine the inclusive language of the statute allows a municipal police officer to perform his duties with regard to *any* offense committed within his jurisdiction, be it a felony, misdemeanor or summary offense. This authority is not limited to offenses viewed by the officer but includes those offenses which the officer has probable cause to believe were committed within his jurisdiction. 42 Pa.C.S. § 8952(1). Were such not the case, the practical consequences would be that police officers often would be unable to issue citations for summary offenses otherwise established by the evidence at hand merely because they were called to the scene after the violations occurred. It is unquestionably the legislature's intent to establish a probable cause standard as a means of defining the bounds of police authority in arresting or citing an actor for a summary offense. The Comment to Pa.R.Crim.P. 55, **Issuance of Citation**, states:

[\*360]

A law enforcement officer may issue a citation based upon information that the defendant has committed a summary violation, which information may be received from a personal observation of the commission of the offense; a witness; [\*\*\*7] another police officer; *investigation*; or speed-timing equipment, including radar.

(Emphasis added.) Comments to Rule 70, **Arrest Without Warrant**, provide as follows:

It is intended that these proceedings will be instituted by arrest only in exceptional circumstances such as those involving violence, or the imminent threat of violence, or those involving danger that the defendant will flee.

The Vehicle Code provides the procedures for arresting a defendant without a warrant for a summary offense under that Code.

Therefore, having made the determination Officer Schwab had the authority to cite appellant for a summary offense not committed in the officer's presence, we only need determine whether the evidence was sufficient to sustain a finding of guilt.

n2 Appellant's citations to *Commonwealth v. Pincavitch*, 206 Pa.Super. 539, 214 A.2d 280 (1965), and *Commonwealth v. Shillingford*, 231 Pa.Super. 407, 332 A.2d 824 (1975), are misplaced to the extent that in those cases action was instituted by arrest whereas here, after permissible investigation of DUI charges which includes conducting a breathalyzer test, a citation was issued. There was initial probable cause to take appellant into custody for DUI which is permissible without a warrant under 75 Pa.C.S. § 3731, **Driving under the influence of alcohol or controlled substance**.

[\*\*\*8]

n3 Pennsylvania Rule of Criminal Procedure 70, Part IV. Procedures in Summary Cases When Defendant is Arrested Without Warrant, provides:

**Rule 70. Arrest Without Warrant**

When an arrest without a warrant in a summary case is authorized by law, a police officer who exhibits some sign of authority may institute proceedings by such an arrest.

Thus, whether this case originated pursuant to arrest without a warrant or citation, the sections of the Motor

Vehicle Code and Criminal Code cited above permit such a proceeding. This is also supported by the Rules of Criminal Procedure cited infra.

The Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence, so long as the inferred facts flow, beyond a reasonable doubt, from the proven facts to establish the accused's guilt or elements of the crime. *Commonwealth v. Ramos*, 392 Pa. Super. 583, 573 A.2d 1027 (1990).

Although appellant argues the Commonwealth was required to offer formal proof appellant was under the age of 21 at the time of the offense, we find no support for [\*\*\*9] this position. Officer Schwab presented uncontradicted testimony that the driver's license produced by appellant at the scene of the accident indicated his date of birth as March 10, 1973, making him sixteen years of age. We agree with the trial court's finding that the "mere fact that the Commonwealth failed to present a certified copy of the defendant's birth certificate or driver's license does not mean that it has failed to meet its burden." (Slip Op., Rufe, J., [\*361] 3/26/91, p. 3.) Nothing in the record refutes the authenticity of the driver's license or the accuracy of the birthdate. [\*\*1339] When the Commonwealth presents evidence with adequate probative value to establish the truth of the matter, in the face of the denial of the adequacy of that proof, it becomes a matter for determination by the trial judge, which determination will not be overturned on appeal.

Finally, appellant argues the trial court erred in allowing the admission into evidence of breathalyzer results, which are of no relevance to sustain a charge of underage drinking and are only admissible to prove a charge under the Vehicle Code. The Vehicle Code allows for the admission of blood alcohol tests [\*\*\*10] in "any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3731 or any other violation of this title arising out of the same action . . ." 75 Pa.C.S. § 1547(c). While appellant would have the language of section 1547 bar the admission of appellant's two .04 per cent blood alcohol tests in this case, we find section 1547 far more inclusive. We find the first conjunction "or" used in section 1547(c) to have been used as a function word to indicate an alternative. Summary proceedings, then, are differentiated from criminal proceedings in which the defendant is charged under section 3731, dealing with driving under the influence, and the words of section 1547 are not given their narrowest meaning. We believe such a construction of the language of the statute best comports with the reasonable intent of the legislature and the promotion of justice. 1 Pa.C.S. § 1928, *supra*. Thus, section 1547 authorizes the admission into evidence the results of a breathalyzer in any proceeding, summary or criminal, which in any way related to the use of alcohol. In addition, a unique aspect of this case is the fact that the appellant is a [\*\*\*11] minor. 18 Pa.C.S. § 6310.4, **Restriction of operating privileges**, provides:[HN3]

**(a) General rule.** -- Whenever a person is convicted or is adjudicated delinquent or is admitted to any preadjudication program for a violation of section 6307 (relating to misrepresentation of age to secure liquor or malt or [\*362] brewed beverages), 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) or 6310.3 (relating to carrying a false identification card), the court, including a court not of record if it is exercising jurisdiction pursuant to 42 Pa.C.S. § 1515(a) (relating to jurisdiction and venue), shall order the operating privilege of the person suspended. A copy of the order shall be transmitted to the Department of Transportation.

**(b) Duration of suspension.** -- When the department suspends the operating privilege of a person under subsection (a), the duration of the suspension shall be as follows:

- (1) For a first offense, a period of 90 days from the date of suspension.
- (2) For a second offense, a period of one year from the date of suspension.
- (3) For a third offense, and any offenses thereafter, a period of two years [\*\*\*12] from the date of suspension. Any multiple sentences imposed shall be served consecutively.

Reinstatement of operating privilege shall be governed by 75 Pa.C.S. § 1545 (relating to restoration of operating privilege).

It necessarily follows that an underage drinking violation and conviction implicates the Motor Vehicle Code requiring suspension of the license, if the defendant has one, and restoration pursuant to the Code. Section 1547, therefore, clearly applies to proceedings and convictions under section 6308.

For the foregoing reasons, we find appellant's claim without merit. The Commonwealth presented sufficient evidence to sustain appellant's conviction for the summary offense of underage drinking, and we affirm the judgment of sentence.

Judgment of sentence affirmed.

**CONCUR BY:**

MONTEMURO (In Part)

**DISSENT BY:**

MONTEMURO (In Part)

**DISSENT:**

[\*363]

MONTEMURO, Judge, concurring and dissenting:

While I have no quarrel with the majority's conclusion as to the first two issues in this case, I cannot agree that breathalyzer results are admissible into evidence. The [\*\*1340] Vehicle Code, section § 1547(c), cited in support of admissibility, may well be as inclusive as the Majority would have it, but [\*\*\*13] where no violation under the Code has been charged, its provisions, however broad, are inapplicable. The majority seems to be suggesting that guilty may be proven by implication, as "it necessarily follows that an underage drinking violation and conviction implicates the Motor Vehicle Code." (Majority Opinion at 1339) If this were so, a juvenile too young to have a driver's license, or one stopped for pedestrian trespassing, and found to be in the same condition as appellant, could be tested by Intoximeter and expect to have the results used against him at trial under the aegis of the Vehicle Code. I do not believe the statute was intended to have such a lengthy reach, and therefore dissent.

Having said so much, I would also find that in the case at hand introduction of the Intoximeter evidence was harmless error, as the testimony of the arresting officer, that he smelled alcohol on appellant's breath, would, if believed, be enough to support a finding of underage drinking.

158 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. Jerome R. VISHNESKI, Appellant****No. 1023 Philadelphia 1988****Superior Court of Pennsylvania***380 Pa. Super. 495; 552 A.2d 297; 1989 Pa. Super. LEXIS 10***September 15, 1988, Submitted****January 6, 1989, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from Judgment of Sentence March 8, 1988, in the Court of Common Pleas of Chester County, Criminal No. 2030-87.

**DISPOSITION:**

Judgment of sentence affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his conviction from the Court of Common Pleas of Chester County (Pennsylvania) for driving a vehicle at an unsafe speed in violation of *75 Pa. Cons. Stat. Ann. § 3361* alleging the trial court erred in admitting into evidence the arresting officer's testimony regarding a speed-timing unit.

**OVERVIEW:** Defendant was convicted for a violation of *75 Pa. Cons. Stat. Ann. § 3361*, driving a vehicle at an unsafe speed, and sentenced to pay the statutory fine, plus court costs and the statutory emergency fund fine. Defendant's car was timed at 84.5 miles per hour in a 55 mile per hour zone by using a speed-timing device after his car was followed for a distance of about 0.09 miles. The court affirmed the trial court's judgment of sentence and concluded that the trial court did not err in admitting the unit's speed reading taken over a distance of less than one-tenth of a mile. The court found that the legislature did not indicate a minimum distance requirement for the use of the speed-timing devices nor did it provide the Department of Transportation with the authority to regulate the use of the unit by imposing a distance requirement. As such, the trial court did not err in admitting into evidence a unit's speed-reading taken over a distance less than the distance specified for calibration in *67 Pa. Code § 105.95*. The court concluded that there was sufficient evidence to support a finding that defendant was traveling at an unreasonable speed under the conditions.

**OUTCOME:** The court affirmed the trial court's judgment of sentence and conviction for the offense of driving a vehicle at an unsafe speed. The court concluded that the trial court did not err in admitting into evidence radar unit

speed-reading taken over a distance less than the distance specified for calibration and concluded that the evidence was sufficient to support defendant's conviction under the statute.

**CORE TERMS:** distance, speed, mile, lane, calibration, traveling, one-tenth, route, speed-timing, traffic, highway, electronic devices, speed limit, mechanical, electronic, electrical, hazards, regulation, testing, zone, northbound, exit, beyond a reasonable doubt, admission of evidence, human error, approaching, admitting, roadway, assured, drive

### **LexisNexis(R) Headnotes**

#### ***Governments > Legislation > Interpretation***

[HN1] The court is mindful that when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit, *1 Pa. Cons. Stat. Ann. § 1921(b)*, and every statute will be construed, if possible, to give effect to all its provisions, *1 Pa. Cons. Stat. Ann. § 1921(a)*.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] See *75 Pa. Cons. Stat. Ann. §§ 3368(c)-(e)*.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] See *67 Pa. Code § 105.95(a)(4)*.

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN4] A judgment may be affirmed by the appellate court on any legal theory, regardless of rationale or theory employed by the lower court.

#### ***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

#### ***Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN5] In evaluating a claim that the verdict is against the law for lack of sufficient evidence, the court must determine whether, viewing the evidence in the light most favorable to the commonwealth, and drawing all reasonable inferences favorable to the commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. The commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN6] See *Pa. Cons. Stat. Ann. § 3361*.

### **COUNSEL:**

Frank W. Hayes, West Chester, for appellant.

Thomas J. Wagner, Assistant District Attorney, Phoenixville, for Com., appellee.

### **JUDGES:**

Olszewski, Del Sole and Johnson, JJ.

**OPINION BY:**

OLSZEWSKI

**OPINION:**

[\*496] [\*\*298] This is an appeal from judgment of sentence in the Court of Common Pleas of Chester County entered against appellant for violation of 75 Pa.C.S.A. § 3361. Appellant contends that the trial court erred in: (1) admitting into evidence the arresting officer's testimony regarding a VASCAR-Plus unit speed-timing taken over a distance of less than one-tenth mile, and (2) finding appellant guilty of 75 [\*497] Pa.C.S.A. § 3361. For the reasons below, we affirm the trial court.

On March 22, 1987, appellant was driving north on Route 202 between Paoli Pike and Route 322 in Chester County. Officer Miller observed appellant's car in front of him traveling at a high rate of speed. Consequently, Officer Miller followed appellant's car for a distance of 0.0938 mile and timed the vehicle using a VASCAR-Plus speed-timing device. Appellant's car was timed [\*\*\*2] at 84.5 miles per hour in a 55 mile per hour zone. Thereafter, Officer Miller arrested appellant and charged him with violation of 75 Pa.C.S.A. § 3361, driving vehicle at unsafe speed.

Appellant was found guilty by the District Justice and appealed to the Court of Common Pleas. After a *de novo* trial, appellant was found guilty. Following denial of post-trial motions, appellant was sentenced to pay the statutory fine of \$ 25, plus court costs and the statutory emergency fund fine of \$ 10. This timely appeal follows.

Appellant first maintains that the trial judge erred in admitting into evidence the arresting officer's testimony regarding a VASCAR-Plus unit speed reading taken over a distance of less than one-tenth mile. Specifically, appellant contends that the testimony is inadmissible because the procedure used by the arresting officer is contrary to the one-tenth mile calibration requirement found in 67 Pa.Code § 105.95 and contrary to the holding of *Commonwealth v. Alexion*, 33 Ches.Co.Rep. 37 (1984). In *Alexion*, *supra*, the trial court "[found] the 1/10 of a mile calibration to be reasonable and conclude[d] that it should also apply, [\*\*\*3] as a minimum standard, to the use of VASCAR-PLUS." *Id.* at 38.

In reviewing appellant's contention, we turn to the applicable statutory provisions to determine the legislative intent regarding the use of a VASCAR-Plus unit. In ascertaining the legislature's intent, [HN1] we are mindful that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit," 1 Pa.C.S.A. § 1921(b), and "[e]very [\*498] statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S.A. § 1921(a). [HN2] Section 3368 of the 1976 Vehicle Code, as amended, governs the use of speedtiming devices and reads in pertinent part:

**(c) Mechanical, electrical and electronic devices authorized. --**

\* \* \*

(3) Electronic devices which calculate speed by measuring elapsed time between measured rod surface points by using two sensors and devices which measure and calculate the average speed of a vehicle between any two [\*\*299] points may be used by any police officer.

(4) No person may be convicted upon evidence obtained through the use of devices authorized by [section 3368(c)(3)] [\*\*\*4] unless the speed recorded is six or more miles per hour in excess of the legal speed limit. Furthermore, no person may be convicted upon evidence obtained through the use of devices authorized by [section 3368(c)(3)] in an area

where the legal speed limit is less than 55 miles per hour if the speed recorded is less than ten miles per hour in excess of the legal speed limit. This paragraph shall not apply to evidence obtained through the use of devices authorized by [section 3368(c)(3)] within a school zone.

**(d) Classification, approval and testing of mechanical, electrical and electronic devices.** -- The department may, by regulation, classify specific devices as being mechanical, electrical or electronic. All mechanical, electrical or electronic devices shall be of a type approved by the department, which shall appoint stations for calibrating and testing the devices and may prescribe regulations as to the manner in which calibrations and tests shall be made. The certification and calibration of electronic devices under [section 3368(c)(3)] shall also include the certification and calibration of all equipment, timing strips and other devices which are actually used with [\*\*\*5] the particular electronic device being certified and calibrated. The devices shall have been tested for accuracy within a [\*499] period of 60 days prior to the alleged violation. A certificate from the station showing that the calibration and test were made within the required period, and that the device was accurate, shall be competent and prima facie evidence of those facts in every proceeding in which a violation of this title is charged.

**(e) Distance requirements for use of mechanical, electrical and electronic devices.** -- Mechanical, electrical or electronic devices may not be used to time the rate of speed of vehicles within 500 feet after a speed limit sign indicating a decrease of speed. This limitation on the use of speed timing devices shall not apply to speed limit signs indicating school zones, bridge and elevated structure speed limits, hazardous grade speed limits and work zone speed limits.

75 Pa.C.S.A. § 3368(c)-(e).

In accordance with Section 3368(d), the Department of Transportation has issued regulations classifying speed-timing devices and providing for the certification and calibration of these devices. The VASCAR-Plus unit has been classified [\*\*\*6] as a electronic speed-timing device (nonradar) which calculates average speed between any two points. See 17 Pa.Bulletin 453 (January 24, 1987); *Commonwealth v. Smolow*, 364 Pa.Super. 20, 25 n. 3, 527 A.2d 131, 134 n. 3 (1987) (Department of Transportation has reclassified VASCAR as an electronic speed-timing device and approved its use by any police officer.). Moreover, the Department of Transportation has issued regulations in accordance with 75 Pa.C.S.A. § 3368(d) regarding the calibration and testing of electronic speed-timing devices such as the VASCAR-Plus unit. Appellant specifically refers us to [HN3] 67 Pa.Code § 105.95(a)(4) which reads:

(a) Method. An electronic device governed by this subchapter shall be calibrated and tested as follows:

\* \* \*

(4) A course other than a 1/4 mile can be used, but not less than 1/10 mile.

[\*500] In reviewing the statutory scheme, we find that the legislature did not indicate a minimum distance requirement for the use of a VASCAR-Plus unit nor did it provide the Department of Transportation with the authority to regulate the use of the unit by imposing a distance requirement. Contrary to appellant's [\*\*\*7] contention, 67 Pa.Code § 105.95(a)(4) does not specify a minimum distance requirement for use of the VASCAR-Plus unit. Instead, it sets forth the method to calibrate and test an electronic unit.

In *Alexion*, *supra*, the defendant, appealing from a summary speeding conviction, contended that the timing of his car [\*\*300] by a VASCAR-Plus unit over a distance of less than one-tenth mile was "so fraught with unreliability as to be incapable of sustaining a conviction beyond a reasonable doubt." *Id.* at 37. The trial court agreed. It reasoned that the VASCAR-Plus unit, a device which measures both the distance and the time necessary for a vehicle to pass over a particular distance, is subject to human error because "there is an inevitable lag between the time the operator thinks he

380 Pa. Super. 495, \*500; 552 A.2d 297, \*\*300;  
1989 Pa. Super. LEXIS 10, \*\*\*7

sees the driver begin and end the measured distance and when he actually trips and untrips the device." *Id.* In light of this potential for human error, the court found that it was necessary to establish a minimum distance requirement for use of the unit, and turned to 67 Pa. Code § 105.95(a)(4) for guidance. Finding that the Department of Transportation requires [\*\*\*8] the calibration of "'electricalmechanical' speed devices" over a distance of no less of one-tenth of a mile, the trial court concluded that it is important that such devices be operated, as well as calibrated, over the minimum distance set forth in the regulation. In reaching this conclusion, the trial court in *Alexion, supra*, improperly imposed a requirement that was not intended by the legislature. It is evident from the statutory provisions that the legislature considered the possibility of human error and sought to minimize it, not by imposing a minimum distance requirement for operation of an electronic device, but by requiring: (1) approval of the devices by the Department of Transportation; (2) calibrating and testing of the devices for accuracy, and (3) appointment of [\*501] stations for calibrating and testing. Thus, the trial court in *Alexion, supra*, created a requirement where none existed in the statute. We, therefore, have no choice but to overrule *Alexion, supra*. See *Halko v. Board of Directors of School District of Foster*, 374 Pa. 269, 97 A.2d 793 (1953) (court in construing [\*\*\*9] statute cannot rewrite such statute); *Commonwealth v. Aljia Dumas Private Detective Agency, Inc.*, 246 Pa. Super. 140, 369 A.2d 850 (1977), *allocatur denied*, (additional remedy will not be fabricated from the statute when the legislature has clearly expressed its intent). In overruling *Alexion, supra*, we find the trial court in the instant case did not err in admitting into evidence a VASCAR-Plus unit speed-reading taken over a distance less than the distance specified for calibration in 67 Pa. Code § 105.95. n1

n1 The court below attempted to distinguish *Alexion, supra*, from the instant case. Although the trial court relied on an alternate legal ground to support the admissibility of the speed-reading, we can affirm if for any reason the admission of evidence was proper. See *Commonwealth v. Pettiford*, 265 Pa. Super. 466, 468, 402 A.2d 532, 533 (1979) (appellate court can affirm admission of evidence based upon erroneous grounds, if for any reason admission of evidence was proper); *Commonwealth v. Hinton*, 269 Pa. Super. 43, 48, 409 A.2d 54, 57 (1979) ("... [HN4] judgment may be affirmed by the appellate court on any legal theory, regardless of rationale or theory employed by the lower court.").

[\*\*\*10]

Second, appellant argues that there is insufficient evidence to support appellant's conviction under 75 Pa. C.S.A. § 3361. Specifically, appellant contends that the evidence is insufficient because the Commonwealth presented no evidence of weather and roadway conditions rendering appellant's speed unreasonable nor was there any testimony that appellant was traveling at a speed greater than would permit him to bring his vehicle "to a stop within the assured distance ahead." 75 Pa. C.S.A. § 3361.

[HN5] In evaluating a claim that the verdict is against the law for lack of sufficient evidence, we must determine:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient [\*502] evidence to find every element of the crime beyond a reasonable doubt . . . . The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence . . . . Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered . . . . Finally, the trier of fact, while [\*\*\*11] passing upon the credibility of witnesses and the weight to [\*\*301] be afforded the evidence produced, is free to believe all, part or none of the evidence. (Citations omitted.)

*Commonwealth v. Griscavage*, 512 Pa. 540, 517 A.2d 1256 (1986), quoting *Commonwealth v. Harper*, 485 Pa. 572, 576-577, 403 A.2d 536, 538-539 (1979).

[HN6]

Section 3361 reads:

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

75 Pa.C.S.A. § 3361. Instantly, the record indicates that appellant [\*\*\*12] failed to drive at a speed that was reasonable or prudent under the conditions, and failed to have regard for the potential hazards then existing. The arresting officer described Route 202 North as a limited access highway having a posted speed limit of fifty-five miles per hour. He further explained that the section of Route 202 North between the Paoli Pike on-ramp and Route 322 exit comprises of three lanes and is approximately one-tenth of a mile in distance. Officer Miller testified:

[\*503] Q. Now, . . . can you describe the conditions of the roadway, and the actual and potential hazards which existed at the time you timed the vehicle?

A. Route 202 is a limited access highway, paved concrete. The section we are discussing is a three lane section. We have traffic entering 202 northbound from the Paoli Pike and traffic exiting 202 northbound of 322. *So right at this section here you have traffic coming onto and off of 202 in this stretch.*

Q. Which lane was the vehicle which you time in?

A. Of the three lanes, it was in the middle lane, center lane.

Q. And if you enter Paoli Pike at that location and desire to travel north on 202, . . . what do you have [\*\*\*13] to do in order to travel onto 202 north?

A. You either get in the center lane or passing lane, the far left lane, one of the two. They're the only two that continue past 322.

Q. And if you stay in the far right lane, what -- where do you go in that lane?

A. Down the 322 exit.

N.T. 11/10/87 at 10 (emphasis added). The trial record further indicates that there was a truck traveling on Route 202 North at the same time appellant was traveling on the route. Appellant entered the highway from the Paoli Pike on-ramp and exited at the Route 322 exit. It is apparent from the record that appellant's speed was unreasonable given the conditions of the highway. Appellant was traveling at 84.5 miles per hour in a 55 miles per hour zoned area where traffic must merge and exit while competing with the northbound flow of traffic. In addition, we note that appellant was entering and exiting the northbound highway at a high rate of speed within a distance of approximately one-tenth mile. The potential for hazards and conditions rendering traveling at a speed of 84.5 miles per hour unreasonable is clearly supported by the evidence. Accordingly, we [\*504] find sufficient evidence [\*\*\*14] to support a conviction 4 under Section 3361. n2

n2 Because we find that there is sufficient evidence to support a finding that appellant was traveling at an unreasonable speed "under the conditions," we do not reach appellant's other contention that there was no

380 Pa. Super. 495, \*504; 552 A.2d 297, \*\*301;  
1989 Pa. Super. LEXIS 10, \*\*\*14

testimony regarding whether he could bring his car "to a stop within the assured clear distance ahead."

Judgment of sentence affirmed.

159 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. Jerome R. VISHNESKI, Appellant****No. 1023 Philadelphia 1988****Superior Court of Pennsylvania***380 Pa. Super. 495; 552 A.2d 297; 1989 Pa. Super. LEXIS 10***September 15, 1988, Submitted****January 6, 1989, Filed****PRIOR HISTORY:** [\*\*\*1]

Appeal from Judgment of Sentence March 8, 1988, in the Court of Common Pleas of Chester County, Criminal No. 2030-87.

**DISPOSITION:**

Judgment of sentence affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his conviction from the Court of Common Pleas of Chester County (Pennsylvania) for driving a vehicle at an unsafe speed in violation of *75 Pa. Cons. Stat. Ann. § 3361* alleging the trial court erred in admitting into evidence the arresting officer's testimony regarding a speed-timing unit.

**OVERVIEW:** Defendant was convicted for a violation of *75 Pa. Cons. Stat. Ann. § 3361*, driving a vehicle at an unsafe speed, and sentenced to pay the statutory fine, plus court costs and the statutory emergency fund fine. Defendant's car was timed at 84.5 miles per hour in a 55 mile per hour zone by using a speed-timing device after his car was followed for a distance of about 0.09 miles. The court affirmed the trial court's judgment of sentence and concluded that the trial court did not err in admitting the unit's speed reading taken over a distance of less than one-tenth of a mile. The court found that the legislature did not indicate a minimum distance requirement for the use of the speed-timing devices nor did it provide the Department of Transportation with the authority to regulate the use of the unit by imposing a distance requirement. As such, the trial court did not err in admitting into evidence a unit's speed-reading taken over a distance less than the distance specified for calibration in *67 Pa. Code § 105.95*. The court concluded that there was sufficient evidence to support a finding that defendant was traveling at an unreasonable speed under the conditions.

**OUTCOME:** The court affirmed the trial court's judgment of sentence and conviction for the offense of driving a vehicle at an unsafe speed. The court concluded that the trial court did not err in admitting into evidence radar unit

speed-reading taken over a distance less than the distance specified for calibration and concluded that the evidence was sufficient to support defendant's conviction under the statute.

**CORE TERMS:** distance, speed, mile, lane, calibration, traveling, one-tenth, route, speed-timing, traffic, highway, electronic devices, speed limit, mechanical, electronic, electrical, hazards, regulation, testing, zone, northbound, exit, beyond a reasonable doubt, admission of evidence, human error, approaching, admitting, roadway, assured, drive

### **LexisNexis(R) Headnotes**

#### ***Governments > Legislation > Interpretation***

[HN1] The court is mindful that when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit, *1 Pa. Cons. Stat. Ann. § 1921(b)*, and every statute will be construed, if possible, to give effect to all its provisions, *1 Pa. Cons. Stat. Ann. § 1921(a)*.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN2] See *75 Pa. Cons. Stat. Ann. §§ 3368(c)-(e)*.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] See *67 Pa. Code § 105.95(a)(4)*.

#### ***Criminal Law & Procedure > Appeals > Standards of Review > General Overview***

[HN4] A judgment may be affirmed by the appellate court on any legal theory, regardless of rationale or theory employed by the lower court.

#### ***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

#### ***Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt***

#### ***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN5] In evaluating a claim that the verdict is against the law for lack of sufficient evidence, the court must determine whether, viewing the evidence in the light most favorable to the commonwealth, and drawing all reasonable inferences favorable to the commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. The commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence.

#### ***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN6] See *Pa. Cons. Stat. Ann. § 3361*.

### **COUNSEL:**

Frank W. Hayes, West Chester, for appellant.

Thomas J. Wagner, Assistant District Attorney, Phoenixville, for Com., appellee.

### **JUDGES:**

Olszewski, Del Sole and Johnson, JJ.

**OPINION BY:**

OLSZEWSKI

**OPINION:**

[\*496] [\*\*298] This is an appeal from judgment of sentence in the Court of Common Pleas of Chester County entered against appellant for violation of 75 Pa.C.S.A. § 3361. Appellant contends that the trial court erred in: (1) admitting into evidence the arresting officer's testimony regarding a VASCAR-Plus unit speed-timing taken over a distance of less than one-tenth mile, and (2) finding appellant guilty of 75 [\*497] Pa.C.S.A. § 3361. For the reasons below, we affirm the trial court.

On March 22, 1987, appellant was driving north on Route 202 between Paoli Pike and Route 322 in Chester County. Officer Miller observed appellant's car in front of him traveling at a high rate of speed. Consequently, Officer Miller followed appellant's car for a distance of 0.0938 mile and timed the vehicle using a VASCAR-Plus speed-timing device. Appellant's car was timed [\*\*\*2] at 84.5 miles per hour in a 55 mile per hour zone. Thereafter, Officer Miller arrested appellant and charged him with violation of 75 Pa.C.S.A. § 3361, driving vehicle at unsafe speed.

Appellant was found guilty by the District Justice and appealed to the Court of Common Pleas. After a *de novo* trial, appellant was found guilty. Following denial of post-trial motions, appellant was sentenced to pay the statutory fine of \$ 25, plus court costs and the statutory emergency fund fine of \$ 10. This timely appeal follows.

Appellant first maintains that the trial judge erred in admitting into evidence the arresting officer's testimony regarding a VASCAR-Plus unit speed reading taken over a distance of less than one-tenth mile. Specifically, appellant contends that the testimony is inadmissible because the procedure used by the arresting officer is contrary to the one-tenth mile calibration requirement found in 67 Pa.Code § 105.95 and contrary to the holding of *Commonwealth v. Alexion*, 33 Ches.Co.Rep. 37 (1984). In *Alexion*, *supra*, the trial court "[found] the 1/10 of a mile calibration to be reasonable and conclude[d] that it should also apply, [\*\*\*3] as a minimum standard, to the use of VASCAR-PLUS." *Id.* at 38.

In reviewing appellant's contention, we turn to the applicable statutory provisions to determine the legislative intent regarding the use of a VASCAR-Plus unit. In ascertaining the legislature's intent, [HN1] we are mindful that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit," 1 Pa.C.S.A. § 1921(b), and "[e]very [\*498] statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S.A. § 1921(a). [HN2] Section 3368 of the 1976 Vehicle Code, as amended, governs the use of speedtiming devices and reads in pertinent part:

**(c) Mechanical, electrical and electronic devices authorized. --**

\* \* \*

(3) Electronic devices which calculate speed by measuring elapsed time between measured rod surface points by using two sensors and devices which measure and calculate the average speed of a vehicle between any two [\*\*299] points may be used by any police officer.

(4) No person may be convicted upon evidence obtained through the use of devices authorized by [section 3368(c)(3)] [\*\*\*4] unless the speed recorded is six or more miles per hour in excess of the legal speed limit. Furthermore, no person may be convicted upon evidence obtained through the use of devices authorized by [section 3368(c)(3)] in an area

where the legal speed limit is less than 55 miles per hour if the speed recorded is less than ten miles per hour in excess of the legal speed limit. This paragraph shall not apply to evidence obtained through the use of devices authorized by [section 3368(c)(3)] within a school zone.

**(d) Classification, approval and testing of mechanical, electrical and electronic devices.** -- The department may, by regulation, classify specific devices as being mechanical, electrical or electronic. All mechanical, electrical or electronic devices shall be of a type approved by the department, which shall appoint stations for calibrating and testing the devices and may prescribe regulations as to the manner in which calibrations and tests shall be made. The certification and calibration of electronic devices under [section 3368(c)(3)] shall also include the certification and calibration of all equipment, timing strips and other devices which are actually used with [\*\*\*5] the particular electronic device being certified and calibrated. The devices shall have been tested for accuracy within a [\*499] period of 60 days prior to the alleged violation. A certificate from the station showing that the calibration and test were made within the required period, and that the device was accurate, shall be competent and prima facie evidence of those facts in every proceeding in which a violation of this title is charged.

**(e) Distance requirements for use of mechanical, electrical and electronic devices.** -- Mechanical, electrical or electronic devices may not be used to time the rate of speed of vehicles within 500 feet after a speed limit sign indicating a decrease of speed. This limitation on the use of speed timing devices shall not apply to speed limit signs indicating school zones, bridge and elevated structure speed limits, hazardous grade speed limits and work zone speed limits.

75 Pa.C.S.A. § 3368(c)-(e).

In accordance with Section 3368(d), the Department of Transportation has issued regulations classifying speed-timing devices and providing for the certification and calibration of these devices. The VASCAR-Plus unit has been classified [\*\*\*6] as a electronic speed-timing device (nonradar) which calculates average speed between any two points. See 17 Pa.Bulletin 453 (January 24, 1987); *Commonwealth v. Smolow*, 364 Pa.Super. 20, 25 n. 3, 527 A.2d 131, 134 n. 3 (1987) (Department of Transportation has reclassified VASCAR as an electronic speed-timing device and approved its use by any police officer.). Moreover, the Department of Transportation has issued regulations in accordance with 75 Pa.C.S.A. § 3368(d) regarding the calibration and testing of electronic speed-timing devices such as the VASCAR-Plus unit. Appellant specifically refers us to [HN3] 67 Pa.Code § 105.95(a)(4) which reads:

(a) Method. An electronic device governed by this subchapter shall be calibrated and tested as follows:

\* \* \*

(4) A course other than a 1/4 mile can be used, but not less than 1/10 mile.

[\*500] In reviewing the statutory scheme, we find that the legislature did not indicate a minimum distance requirement for the use of a VASCAR-Plus unit nor did it provide the Department of Transportation with the authority to regulate the use of the unit by imposing a distance requirement. Contrary to appellant's [\*\*\*7] contention, 67 Pa.Code § 105.95(a)(4) does not specify a minimum distance requirement for use of the VASCAR-Plus unit. Instead, it sets forth the method to calibrate and test an electronic unit.

In *Alexion, supra*, the defendant, appealing from a summary speeding conviction, contended that the timing of his car [\*\*300] by a VASCAR-Plus unit over a distance of less than one-tenth mile was "so fraught with unreliability as to be incapable of sustaining a conviction beyond a reasonable doubt." *Id. at 37*. The trial court agreed. It reasoned that the VASCAR-Plus unit, a device which measures both the distance and the time necessary for a vehicle to pass over a particular distance, is subject to human error because "there is an inevitable lag between the time the operator thinks he

380 Pa. Super. 495, \*500; 552 A.2d 297, \*\*300;  
1989 Pa. Super. LEXIS 10, \*\*\*7

sees the driver begin and end the measured distance and when he actually trips and untrips the device." *Id.* In light of this potential for human error, the court found that it was necessary to establish a minimum distance requirement for use of the unit, and turned to 67 Pa. Code § 105.95(a)(4) for guidance. Finding that the Department of Transportation requires [\*\*\*8] the calibration of "'electricalmechanical' speed devices" over a distance of no less of one-tenth of a mile, the trial court concluded that it is important that such devices be operated, as well as calibrated, over the minimum distance set forth in the regulation. In reaching this conclusion, the trial court in *Alexion, supra*, improperly imposed a requirement that was not intended by the legislature. It is evident from the statutory provisions that the legislature considered the possibility of human error and sought to minimize it, not by imposing a minimum distance requirement for operation of an electronic device, but by requiring: (1) approval of the devices by the Department of Transportation; (2) calibrating and testing of the devices for accuracy, and (3) appointment of [\*501] stations for calibrating and testing. Thus, the trial court in *Alexion, supra*, created a requirement where none existed in the statute. We, therefore, have no choice but to overrule *Alexion, supra*. See *Halko v. Board of Directors of School District of Foster*, 374 Pa. 269, 97 A.2d 793 (1953) (court in construing [\*\*\*9] statute cannot rewrite such statute); *Commonwealth v. Aljia Dumas Private Detective Agency, Inc.*, 246 Pa. Super. 140, 369 A.2d 850 (1977), *allocatur denied*, (additional remedy will not be fabricated from the statute when the legislature has clearly expressed its intent). In overruling *Alexion, supra*, we find the trial court in the instant case did not err in admitting into evidence a VASCAR-Plus unit speed-reading taken over a distance less than the distance specified for calibration in 67 Pa. Code § 105.95. n1

n1 The court below attempted to distinguish *Alexion, supra*, from the instant case. Although the trial court relied on an alternate legal ground to support the admissibility of the speed-reading, we can affirm if for any reason the admission of evidence was proper. See *Commonwealth v. Pettiford*, 265 Pa. Super. 466, 468, 402 A.2d 532, 533 (1979) (appellate court can affirm admission of evidence based upon erroneous grounds, if for any reason admission of evidence was proper); *Commonwealth v. Hinton*, 269 Pa. Super. 43, 48, 409 A.2d 54, 57 (1979) ("... [HN4] judgment may be affirmed by the appellate court on any legal theory, regardless of rationale or theory employed by the lower court.").

[\*\*\*10]

Second, appellant argues that there is insufficient evidence to support appellant's conviction under 75 Pa. C.S.A. § 3361. Specifically, appellant contends that the evidence is insufficient because the Commonwealth presented no evidence of weather and roadway conditions rendering appellant's speed unreasonable nor was there any testimony that appellant was traveling at a speed greater than would permit him to bring his vehicle "to a stop within the assured distance ahead." 75 Pa. C.S.A. § 3361.

[HN5] In evaluating a claim that the verdict is against the law for lack of sufficient evidence, we must determine:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient [\*502] evidence to find every element of the crime beyond a reasonable doubt . . . . The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence . . . . Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered . . . . Finally, the trier of fact, while [\*\*\*11] passing upon the credibility of witnesses and the weight to [\*\*301] be afforded the evidence produced, is free to believe all, part or none of the evidence. (Citations omitted.)

*Commonwealth v. Griscavage*, 512 Pa. 540, 517 A.2d 1256 (1986), quoting *Commonwealth v. Harper*, 485 Pa. 572, 576-577, 403 A.2d 536, 538-539 (1979).

[HN6]

Section 3361 reads:

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

75 Pa.C.S.A. § 3361. Instantly, the record indicates that appellant [\*\*\*12] failed to drive at a speed that was reasonable or prudent under the conditions, and failed to have regard for the potential hazards then existing. The arresting officer described Route 202 North as a limited access highway having a posted speed limit of fifty-five miles per hour. He further explained that the section of Route 202 North between the Paoli Pike on-ramp and Route 322 exit comprises of three lanes and is approximately one-tenth of a mile in distance. Officer Miller testified:

[\*503] Q. Now, . . . can you describe the conditions of the roadway, and the actual and potential hazards which existed at the time you timed the vehicle?

A. Route 202 is a limited access highway, paved concrete. The section we are discussing is a three lane section. We have traffic entering 202 northbound from the Paoli Pike and traffic exiting 202 northbound of 322. *So right at this section here you have traffic coming onto and off of 202 in this stretch.*

Q. Which lane was the vehicle which you time in?

A. Of the three lanes, it was in the middle lane, center lane.

Q. And if you enter Paoli Pike at that location and desire to travel north on 202, . . . what do you have [\*\*\*13] to do in order to travel onto 202 north?

A. You either get in the center lane or passing lane, the far left lane, one of the two. They're the only two that continue past 322.

Q. And if you stay in the far right lane, what -- where do you go in that lane?

A. Down the 322 exit.

N.T. 11/10/87 at 10 (emphasis added). The trial record further indicates that there was a truck traveling on Route 202 North at the same time appellant was traveling on the route. Appellant entered the highway from the Paoli Pike on-ramp and exited at the Route 322 exit. It is apparent from the record that appellant's speed was unreasonable given the conditions of the highway. Appellant was traveling at 84.5 miles per hour in a 55 miles per hour zoned area where traffic must merge and exit while competing with the northbound flow of traffic. In addition, we note that appellant was entering and exiting the northbound highway at a high rate of speed within a distance of approximately one-tenth mile. The potential for hazards and conditions rendering traveling at a speed of 84.5 miles per hour unreasonable is clearly supported by the evidence. Accordingly, we [\*504] find sufficient evidence [\*\*\*14] to support a conviction 4 under Section 3361. n2

n2 Because we find that there is sufficient evidence to support a finding that appellant was traveling at an unreasonable speed "under the conditions," we do not reach appellant's other contention that there was no

380 Pa. Super. 495, \*504; 552 A.2d 297, \*\*301;  
1989 Pa. Super. LEXIS 10, \*\*\*14

testimony regarding whether he could bring his car "to a stop within the assured clear distance ahead."

Judgment of sentence affirmed.

160 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. Gail DENNY, Appellant**

**No. 3351 Philadelphia 1986**

**Superior Court of Pennsylvania**

***372 Pa. Super. 317; 539 A.2d 814; 1987 Pa. Super. LEXIS 9249***

**June 25, 1987, Argued  
September 25, 1987, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Reargument Denied November 19, 1987.

**PRIOR HISTORY:**

Appeal from the Judgment of Sentence in the Court of Common Pleas, Criminal Division, of Chester County at No. 1075 of 1985.

**DISPOSITION:**

Judgment of sentence vacated.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver sought review of a judgment of the Court of Common Pleas of Chester County (Pennsylvania), which convicted her of exceeding the maximum speed by travelling 69 miles per hour in a 55 mile per hour speed zone. Appellant claimed error in the admission into evidence of a Certificate of Accuracy of a radar speed timing device because no competent evidence proved it was from an approved testing station.

**OVERVIEW:** Appellant driver contended that her conviction of exceeding the maximum speed by travelling 69 miles per hour in a 55 mile per hour zone should be reversed because the commonwealth failed to prove that a Certificate of Accuracy of a radar speed timing device was from an approved testing station in violation of *75 Pa. Cons. Stat. Ann. § 3368(d)*. The court agreed and reversed the trial court order convicting defendant. The court held that for the results of a radar device to be properly admissible at trial, the commonwealth was required to offer evidence, independent of the Certificate of Accuracy, to show that the testing facility had been approved by the Department of Transportation as an official testing station as required by § 3368(d).

**OUTCOME:** The court reversed the trial court order because the commonwealth failed to prove by competent evidence

that a Certificate of Accuracy for a speed testing device came from an approved testing station. Therefore, the court vacated the judgment against appellant driver for driving 69 miles per hour in a 55 mile per hour zone.

**CORE TERMS:** testing, certificate, station, accuracy, radar, seal, appointed, dictum, speed, judicial notice, sentence, tested, maximum speed, calibrating, calibration, admissible, appointing, calibrated, certifying, photocopy, convicted, exceeding, speeding, appoint, mile, improperly admitted, competent evidence, designated, introduce

#### **LexisNexis(R) Headnotes**

##### ***Evidence > Procedural Considerations > Weight & Sufficiency***

##### ***Evidence > Scientific Evidence > General Overview***

[HN1] See 75 Pa. Cons. Stat. Ann. § 3368(d).

##### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

##### ***Evidence > Scientific Evidence > General Overview***

[HN2] In prosecuting speeding cases where a radar or other electronic device is used to calibrate a defendant's speed that in order to introduce the results of such into evidence the commonwealth must offer a Certificate, certified by the Secretary of Transportation or his designee certifying the agency which performs the tests on the devices as an official testing station, and must introduce a Certificate of Electronic Device (radar) Accuracy into evidence.

##### ***Governments > Courts > Dicta***

##### ***Governments > Courts > Judicial Precedents***

[HN3] What is actually decided and controlling is the law applicable to the particular facts of that particular case and while all other statements and conclusions therein are entitled to great consideration, they are not controlling.

##### ***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

##### ***Evidence > Authentication > General Overview***

##### ***Evidence > Scientific Evidence > General Overview***

[HN4] A certificate of accuracy, if properly authenticated, is evidence of the fact that the radar device has been calibrated and tested pursuant to the requirements 75 Pa. Cons. Stat. Ann. § 3368(d). Section 3368(d) provides that the department shall appoint stations for calibrating and testing. Thus, in order to meet the statutory requirements, the commonwealth must show that the testing station was appointed by the Department of Transportation. Evidence, independent of the certificate itself, is necessary to prove this.

#### **COUNSEL:**

Alan M. Rosen, Philadelphia, for appellant.

Stuart Suss, Assistant District Attorney, West Chester, for Com., appellee.

#### **JUDGES:**

Cirillo, President Judge, and McEwen and Tamilya, JJ.

#### **OPINION BY:**

CIRILLO

**OPINION:**

[\*318] [\*\*814] This is an appeal from a judgment of sentence entered in the Court of Common Pleas, Chester County.

Appellant Gail Denny was convicted of exceeding the maximum speed as proscribed by 75 Pa.C.S.A. § 3362. Her citation indicated that she had been clocked by a KR-10 radar device as travelling at 69 miles per hour in a 55 mile per hour speed zone. Appellant appealed pursuant to Pa.R.Crim.P. 63(b)(3), and a de novo hearing was held before President Judge Stively on March 19, 1986.

On July 22, 1986, appellant's post-trial motions were denied. On September 29, 1986, appellant was sentenced in absentia. Appellant was notified of the sentence and her right to appeal within thirty days when she received a letter from the District Attorney's Office dated November [\*\*\*2] 12, 1986. Denny received this letter on or about November 15. Notice of appeal was filed in this court on December 15, 1986.

We consider the following question on appeal: whether the trial court erred in admitting into evidence a Certificate of Accuracy of a radar speed timing device, where the Commonwealth failed to introduce competent evidence that the issuer of the Certificate was a testing station *approved* [\*319] *by the Department of Transportation at the time it allegedly tested the radar device in question?*

[HN1] Section 3368(d) of the Vehicle Code provides:

All mechanical, electrical or electronic devices shall be of a type *approved by the department, which shall appoint stations for calibrating and testing* the devices and may prescribe regulations as to the manner in which calibrations and [\*\*815] tests shall be made. The devices shall have been tested for accuracy within a period of 60 days prior to the alleged violation. A certificate from the station showing that the calibration and test were made within the required period, and that the device was accurate, shall be competent and prima facie evidence of those facts in every proceeding in which a violation [\*\*\*3] of this title is charged.

75 Pa.C.S.A. § 3368(d) (emphasis added).

Appellant argues that the case of *Commonwealth v. Gernsheimer*, 276 Pa.Super. 418, 419 A.2d 528 (1980) is controlling. In *Gernsheimer*, this court stated:

We hold that [HN2] in prosecuting speeding cases where a radar or other electronic device is used to calibrate a defendant's speed that *in order to introduce the results of such into evidence the Commonwealth must offer a Certificate*, certified by the Secretary of Transportation or his designee *certifying the agency which performs the tests on the devices as an official testing station*, and must introduce a Certificate of Electronic Device (radar) Accuracy into evidence.

*Id.*, 276 Pa.Superior Ct. at 423, 419 A.2d at 530.

In the instant case, the trial court did not find *Gernsheimer* to be controlling, stating, "the *Gernsheimer* court did not squarely address the issue with which we are presented and we are therefore under no obligation to follow its recommendations." In *Gernsheimer*, appellant was convicted of speeding. On appeal, the issue raised was whether the trial court improperly admitted the Certificate of Accuracy [\*\*\*4] because the certificate did not contain an official seal on its face.

[\*320] In *Gernsheimer*, the Commonwealth introduced two exhibits: (1) a certificate from the Secretary of Transportation under seal appointing York Corporation as an official testing station, and (2) a certificate of accuracy, signed by both the person who calibrated the device and the person in charge of the testing station. The latter certificate

372 Pa. Super. 317, \*320; 539 A.2d 814, \*\*815;  
1987 Pa. Super. LEXIS 9249, \*\*\*4

was at issue, and the appellant contended it should not have been admitted into evidence because it did not contain an official seal and the officer who testified at appellant's hearing had not performed the tests nor was he present during its testing. *Gernsheimer*, 276 Pa. Super. at 422-23, 419 A.2d at 530. The *Gernsheimer* court held that an official seal was not needed for admissibility, stating that "[t]here is nothing in [75 Pa.C.S.A. § 3368(d)] which requires that a seal appear on the Certificate of Electronic Device Accuracy." *Id.*, 276 Pa. Superior Ct. at 423, 419 A.2d at 530.

The trial court in the instant case thus concluded that since the language in *Gernsheimer* went beyond the particular issue raised and was not applicable to the [\*\*\*5] particular facts in *Gernsheimer*'s case, it is obiter dictum. *See In re Estate of Pew*, 411 Pa. 96, 103, 191 A.2d 399, 404 (1963) [HN3] (what is actually decided and controlling is the law applicable to the particular facts of that particular case and while all other statements and conclusions therein are entitled to great consideration, they are not controlling).

The language in *Gernsheimer* clearly went beyond the specific issue raised. However, this court has twice restated this "dictum" as setting forth the requirements of 75 Pa.C.S.A. § 3368(d). *See Commonwealth v. Cummings*, 338 Pa. Super. 149, 487 A.2d 897 (1985); *Commonwealth v. Gussey*, 319 Pa. Super. 398, 466 A.2d 219 (1983).

In *Cummings*, the sole issue on appeal was whether in a prosecution for exceeding the maximum speed limit, the Commonwealth may enter into evidence a photocopy of the certificate of accuracy required by 75 Pa.C.S.A. § 3368(d). The court held a photocopy of the certificate was not admissible into evidence because it could not be authenticated. In *Gussey*, the issue on appeal was whether the certificate [\*321] of accuracy was improperly admitted over objection because the date was [\*\*\*6] typed in instead of written by hand, and the Commonwealth did not call the party who executed the certificate to verify the date of execution. The court found no error, holding that "the Commonwealth can utilize any means to fill in the 'certificate of accuracy,' i.e., by typing or hand-writing the required data, except for the signatures of the certifying [\*816] personnel." *Gussey*, 319 Pa. Super. at 409, 466 A.2d at 225.

Like *Gernsheimer*, neither of these cases address the specific issue before us: whether the Commonwealth offered competent evidence that the certificate of accuracy was prepared by a testing station appointed by the Department of Transportation. *See* 75 Pa.C.S.A. § 3368(d). Thus, the trial court was correct in its finding that the dictum in *Gernsheimer*, as well as its reiteration in *Cummings* and *Gussey*, is not binding precedent.

The confusion in establishing a proper foundation for the admission of a certificate of accuracy pursuant to § 3368 is evident from our review of the record. The Commonwealth relies on the certificate of accuracy itself as proof that Thomas Associates has been designated an official testing station, arguing [\*\*\*7] that "the court properly took judicial notice of the fact that . . . the testing station, Thomas Associates, Inc., is an approved testing station since those facts appear in numerous publications of the Pennsylvania Bulletin."

This argument, however, is misleading. It is true that the trial court is required to take judicial notice of this fact pursuant to the Commonwealth Documents Law, 45 P.S. §§ 1501 and 1506 (1986 special Pamphlet). But the trial court specifically stated:

"We are not considering any entry in the Pennsylvania Bulletin because that was not properly before us . . . having been raised long after the evidence of the Commonwealth had closed in this case. So we are not relying on that. We are relying on a reading of [the statute] and [\*322] a fair appraisal of [the certificate of accuracy]." n1

n1 We note that the Commonwealth also requested the court to take judicial notice of the testing stations listed in the Pennsylvania Bulletin prior to the close of its case, though the court made no specific ruling on this request.

[\*\*\*8]

372 Pa. Super. 317, \*322; 539 A.2d 814, \*\*816;  
1987 Pa. Super. LEXIS 9249, \*\*\*8

[HN4] A certificate of accuracy, if properly authenticated, is evidence of the fact that the radar device has been calibrated and tested pursuant to the requirements of § 3368(d). Section 3368(d) provides that the "department shall appoint stations for calibrating and testing." Thus, in order to meet the statutory requirements, the Commonwealth must show that the testing station was appointed by the Department of Transportation. Evidence, independent of the certificate itself, is necessary to prove this. A certificate of accuracy, issued by Thomas Associates, which merely *states* that Thomas Associates has been designated an official testing station, signed by David A. Thomas, is insufficient. We agree with appellant that an employee of the testing center cannot attest to the fact that the testing station has been appointed by the Department of Transportation as an official testing station.

Although the dictum in *Gernsheimer* is not controlling, it is entitled to great consideration. *In re Estate of Pew*, 411 Pa. at 103, 191 A.2d at 404. In light of the confusion in this case, we find the foundational requirements clarified in *Gernsheimer* to be particularly helpful. [\*\*\*9] In *Gernsheimer*, the Commonwealth introduced a separate document from the Secretary of Transportation under seal appointing York Corporation as an official testing station. We recognize the inefficiency of requiring this type of document in the prosecution of such cases, and at the same time recognize the utility of the listings in the Pennsylvania Bulletin.

We therefore hold that in order for results of a radar device to be properly admissible at trial, the Commonwealth must offer evidence, independent of the certificate of accuracy, to show that the testing facility has been appointed by the Department of Transportation as an official testing station pursuant to the requirements of section 3368(d) of [\*323] the Vehicle Code. This independent evidence may consist of either a separate document from the Secretary of Transportation under seal or a citation to the Pennsylvania Bulletin which lists the station as an official testing station.

Judgment of sentence vacated.

161 of 195 DOCUMENTS



Caution

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania v. Gail DENNY, Appellant**

**No. 3351 Philadelphia 1986**

**Superior Court of Pennsylvania**

***372 Pa. Super. 317; 539 A.2d 814; 1987 Pa. Super. LEXIS 9249***

**June 25, 1987, Argued  
September 25, 1987, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Reargument Denied November 19, 1987.

**PRIOR HISTORY:**

Appeal from the Judgment of Sentence in the Court of Common Pleas, Criminal Division, of Chester County at No. 1075 of 1985.

**DISPOSITION:**

Judgment of sentence vacated.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant driver sought review of a judgment of the Court of Common Pleas of Chester County (Pennsylvania), which convicted her of exceeding the maximum speed by travelling 69 miles per hour in a 55 mile per hour speed zone. Appellant claimed error in the admission into evidence of a Certificate of Accuracy of a radar speed timing device because no competent evidence proved it was from an approved testing station.

**OVERVIEW:** Appellant driver contended that her conviction of exceeding the maximum speed by travelling 69 miles per hour in a 55 mile per hour zone should be reversed because the commonwealth failed to prove that a Certificate of Accuracy of a radar speed timing device was from an approved testing station in violation of *75 Pa. Cons. Stat. Ann. § 3368(d)*. The court agreed and reversed the trial court order convicting defendant. The court held that for the results of a radar device to be properly admissible at trial, the commonwealth was required to offer evidence, independent of the Certificate of Accuracy, to show that the testing facility had been approved by the Department of Transportation as an official testing station as required by § 3368(d).

**OUTCOME:** The court reversed the trial court order because the commonwealth failed to prove by competent evidence

that a Certificate of Accuracy for a speed testing device came from an approved testing station. Therefore, the court vacated the judgment against appellant driver for driving 69 miles per hour in a 55 mile per hour zone.

**CORE TERMS:** testing, certificate, station, accuracy, radar, seal, appointed, dictum, speed, judicial notice, sentence, tested, maximum speed, calibrating, calibration, admissible, appointing, calibrated, certifying, photocopy, convicted, exceeding, speeding, appoint, mile, improperly admitted, competent evidence, designated, introduce

#### **LexisNexis(R) Headnotes**

*Evidence > Procedural Considerations > Weight & Sufficiency*

*Evidence > Scientific Evidence > General Overview*

[HN1] See 75 Pa. Cons. Stat. Ann. § 3368(d).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Evidence > Scientific Evidence > General Overview*

[HN2] In prosecuting speeding cases where a radar or other electronic device is used to calibrate a defendant's speed that in order to introduce the results of such into evidence the commonwealth must offer a Certificate, certified by the Secretary of Transportation or his designee certifying the agency which performs the tests on the devices as an official testing station, and must introduce a Certificate of Electronic Device (radar) Accuracy into evidence.

*Governments > Courts > Dicta*

*Governments > Courts > Judicial Precedents*

[HN3] What is actually decided and controlling is the law applicable to the particular facts of that particular case and while all other statements and conclusions therein are entitled to great consideration, they are not controlling.

*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*

*Evidence > Authentication > General Overview*

*Evidence > Scientific Evidence > General Overview*

[HN4] A certificate of accuracy, if properly authenticated, is evidence of the fact that the radar device has been calibrated and tested pursuant to the requirements 75 Pa. Cons. Stat. Ann. § 3368(d). Section 3368(d) provides that the department shall appoint stations for calibrating and testing. Thus, in order to meet the statutory requirements, the commonwealth must show that the testing station was appointed by the Department of Transportation. Evidence, independent of the certificate itself, is necessary to prove this.

#### **COUNSEL:**

Alan M. Rosen, Philadelphia, for appellant.

Stuart Suss, Assistant District Attorney, West Chester, for Com., appellee.

#### **JUDGES:**

Cirillo, President Judge, and McEwen and Tamilya, JJ.

#### **OPINION BY:**

CIRILLO

**OPINION:**

[\*318] [\*\*814] This is an appeal from a judgment of sentence entered in the Court of Common Pleas, Chester County.

Appellant Gail Denny was convicted of exceeding the maximum speed as proscribed by 75 Pa.C.S.A. § 3362. Her citation indicated that she had been clocked by a KR-10 radar device as travelling at 69 miles per hour in a 55 mile per hour speed zone. Appellant appealed pursuant to Pa.R.Crim.P. 63(b)(3), and a de novo hearing was held before President Judge Stively on March 19, 1986.

On July 22, 1986, appellant's post-trial motions were denied. On September 29, 1986, appellant was sentenced in absentia. Appellant was notified of the sentence and her right to appeal within thirty days when she received a letter from the District Attorney's Office dated November [\*\*\*2] 12, 1986. Denny received this letter on or about November 15. Notice of appeal was filed in this court on December 15, 1986.

We consider the following question on appeal: whether the trial court erred in admitting into evidence a Certificate of Accuracy of a radar speed timing device, where the Commonwealth failed to introduce competent evidence that the issuer of the Certificate was a testing station *approved* [\*319] *by the Department of Transportation at the time it allegedly tested the radar device in question?*

[HN1] Section 3368(d) of the Vehicle Code provides:

All mechanical, electrical or electronic devices shall be of a type *approved by the department, which shall appoint stations for calibrating and testing* the devices and may prescribe regulations as to the manner in which calibrations and [\*\*815] tests shall be made. The devices shall have been tested for accuracy within a period of 60 days prior to the alleged violation. A certificate from the station showing that the calibration and test were made within the required period, and that the device was accurate, shall be competent and prima facie evidence of those facts in every proceeding in which a violation [\*\*\*3] of this title is charged.

75 Pa.C.S.A. § 3368(d) (emphasis added).

Appellant argues that the case of *Commonwealth v. Gernsheimer*, 276 Pa.Super. 418, 419 A.2d 528 (1980) is controlling. In *Gernsheimer*, this court stated:

We hold that [HN2] in prosecuting speeding cases where a radar or other electronic device is used to calibrate a defendant's speed that *in order to introduce the results of such into evidence the Commonwealth must offer a Certificate*, certified by the Secretary of Transportation or his designee *certifying the agency which performs the tests on the devices as an official testing station*, and must introduce a Certificate of Electronic Device (radar) Accuracy into evidence.

*Id.*, 276 Pa.Superior Ct. at 423, 419 A.2d at 530.

In the instant case, the trial court did not find *Gernsheimer* to be controlling, stating, "the *Gernsheimer* court did not squarely address the issue with which we are presented and we are therefore under no obligation to follow its recommendations." In *Gernsheimer*, appellant was convicted of speeding. On appeal, the issue raised was whether the trial court improperly admitted the Certificate of Accuracy [\*\*\*4] because the certificate did not contain an official seal on its face.

[\*320] In *Gernsheimer*, the Commonwealth introduced two exhibits: (1) a certificate from the Secretary of Transportation under seal appointing York Corporation as an official testing station, and (2) a certificate of accuracy, signed by both the person who calibrated the device and the person in charge of the testing station. The latter certificate

372 Pa. Super. 317, \*320; 539 A.2d 814, \*\*815;  
1987 Pa. Super. LEXIS 9249, \*\*\*4

was at issue, and the appellant contended it should not have been admitted into evidence because it did not contain an official seal and the officer who testified at appellant's hearing had not performed the tests nor was he present during its testing. *Gernsheimer*, 276 Pa. Super. at 422-23, 419 A.2d at 530. The *Gernsheimer* court held that an official seal was not needed for admissibility, stating that "[t]here is nothing in [75 Pa.C.S.A. § 3368(d)] which requires that a seal appear on the Certificate of Electronic Device Accuracy." *Id.*, 276 Pa. Superior Ct. at 423, 419 A.2d at 530.

The trial court in the instant case thus concluded that since the language in *Gernsheimer* went beyond the particular issue raised and was not applicable to the [\*\*\*5] particular facts in *Gernsheimer's* case, it is obiter dictum. See *In re Estate of Pew*, 411 Pa. 96, 103, 191 A.2d 399, 404 (1963) [HN3] (what is actually decided and controlling is the law applicable to the particular facts of that particular case and while all other statements and conclusions therein are entitled to great consideration, they are not controlling).

The language in *Gernsheimer* clearly went beyond the specific issue raised. However, this court has twice restated this "dictum" as setting forth the requirements of 75 Pa.C.S.A. § 3368(d). See *Commonwealth v. Cummings*, 338 Pa. Super. 149, 487 A.2d 897 (1985); *Commonwealth v. Gussey*, 319 Pa. Super. 398, 466 A.2d 219 (1983).

In *Cummings*, the sole issue on appeal was whether in a prosecution for exceeding the maximum speed limit, the Commonwealth may enter into evidence a photocopy of the certificate of accuracy required by 75 Pa.C.S.A. § 3368(d). The court held a photocopy of the certificate was not admissible into evidence because it could not be authenticated. In *Gussey*, the issue on appeal was whether the certificate [\*321] of accuracy was improperly admitted over objection because the date was [\*\*\*6] typed in instead of written by hand, and the Commonwealth did not call the party who executed the certificate to verify the date of execution. The court found no error, holding that "the Commonwealth can utilize any means to fill in the 'certificate of accuracy,' i.e., by typing or hand-writing the required data, except for the signatures of the certifying [\*816] personnel." *Gussey*, 319 Pa. Super. at 409, 466 A.2d at 225.

Like *Gernsheimer*, neither of these cases address the specific issue before us: whether the Commonwealth offered competent evidence that the certificate of accuracy was prepared by a testing station appointed by the Department of Transportation. See 75 Pa.C.S.A. § 3368(d). Thus, the trial court was correct in its finding that the dictum in *Gernsheimer*, as well as its reiteration in *Cummings* and *Gussey*, is not binding precedent.

The confusion in establishing a proper foundation for the admission of a certificate of accuracy pursuant to § 3368 is evident from our review of the record. The Commonwealth relies on the certificate of accuracy itself as proof that Thomas Associates has been designated an official testing station, arguing [\*\*\*7] that "the court properly took judicial notice of the fact that . . . the testing station, Thomas Associates, Inc., is an approved testing station since those facts appear in numerous publications of the Pennsylvania Bulletin."

This argument, however, is misleading. It is true that the trial court is required to take judicial notice of this fact pursuant to the Commonwealth Documents Law, 45 P.S. §§ 1501 and 1506 (1986 special Pamphlet). But the trial court specifically stated:

"We are not considering any entry in the Pennsylvania Bulletin because that was not properly before us . . . having been raised long after the evidence of the Commonwealth had closed in this case. So we are not relying on that. We are relying on a reading of [the statute] and [\*322] a fair appraisal of [the certificate of accuracy]." n1

n1 We note that the Commonwealth also requested the court to take judicial notice of the testing stations listed in the Pennsylvania Bulletin prior to the close of its case, though the court made no specific ruling on this request.

[\*\*\*8]

[HN4] A certificate of accuracy, if properly authenticated, is evidence of the fact that the radar device has been calibrated and tested pursuant to the requirements of § 3368(d). Section 3368(d) provides that the "department shall appoint stations for calibrating and testing." Thus, in order to meet the statutory requirements, the Commonwealth must show that the testing station was appointed by the Department of Transportation. Evidence, independent of the certificate itself, is necessary to prove this. A certificate of accuracy, issued by Thomas Associates, which merely *states* that Thomas Associates has been designated an official testing station, signed by David A. Thomas, is insufficient. We agree with appellant that an employee of the testing center cannot attest to the fact that the testing station has been appointed by the Department of Transportation as an official testing station.

Although the dictum in *Gernsheimer* is not controlling, it is entitled to great consideration. *In re Estate of Pew*, 411 Pa. at 103, 191 A.2d at 404. In light of the confusion in this case, we find the foundational requirements clarified in *Gernsheimer* to be particularly helpful. [\*\*\*9] In *Gernsheimer*, the Commonwealth introduced a separate document from the Secretary of Transportation under seal appointing York Corporation as an official testing station. We recognize the inefficiency of requiring this type of document in the prosecution of such cases, and at the same time recognize the utility of the listings in the Pennsylvania Bulletin.

We therefore hold that in order for results of a radar device to be properly admissible at trial, the Commonwealth must offer evidence, independent of the certificate of accuracy, to show that the testing facility has been appointed by the Department of Transportation as an official testing station pursuant to the requirements of section 3368(d) of [\*323] the Vehicle Code. This independent evidence may consist of either a separate document from the Secretary of Transportation under seal or a citation to the Pennsylvania Bulletin which lists the station as an official testing station.

Judgment of sentence vacated.

162 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**Commonwealth v. Cook et al., Appellants****Nos. 1551 and 1552, Oct. T., 1972****Superior Court of Pennsylvania*****226 Pa. Super. 273; 308 A.2d 151; 1973 Pa. Super. LEXIS 1355*****December 4, 1972, Submitted****June 14, 1973, Decided****PRIOR HISTORY:** [\*\*\*1]

Appeals from orders of Court of Common Pleas of Wyoming County, March T., 1972, Nos. 36 and 37, in case of Commonwealth of Pennsylvania v. Guy Cook and Bruce E. Daugherty.

**DISPOSITION:**

Order reversed and case remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant drivers appealed the decision of the Court of Common Pleas of Wyoming County (Pennsylvania), which dismissed the praecipe for defendants' writ of certiorari, quashed the writ, and affirmed defendants' conviction on the grounds that defendants' claims were not the proper subject for review on certiorari. Defendants were convicted of speeding; they alleged state failed to satisfy its statutory requirements to sustain their convictions.

**OVERVIEW:** Defendant drivers were convicted of speeding in violation of the Vehicle Code, 75 P.S. § 1002. Defendants alleged state failed to satisfy its statutory requirement of establishing the accuracy of radar equipment used in detecting the offense. Defendants petitioned the trial court for a writ of certiorari. The trial court dismissed the praecipe for the writ, quashed the writ, and affirmed defendants' convictions on the grounds that defendants' claims were not the proper subject for review on certiorari. On review, the court reversed and remanded the cases for further consideration of the petitions for certiorari. The court held the trial court erred in concluding that defendants' contentions were not properly raised on certiorari. The court found that in order to sustain defendants' convictions, state had to prove the accuracy of the radar detecting device and the posting of radar warning signs. The court held that where a statute required an offense to be proven by a specific type of evidence and it was alleged that the record was wholly devoid of any such showing, the assertions raised a question of law reviewable on certiorari.

**OUTCOME:** The court reversed the trial court's holding that defendants' case fell beyond the scope of its review and

remanded the cases for further consideration of the petitions for certiorari. The court held the trial court erred in concluding that defendants' contentions were not properly reviewable on certiorari where defendants' questions raised a question of law.

**CORE TERMS:** radar, accuracy, court of common pleas, highway, apparatus, station, warning, Appeals Act, summary proceedings, certificate, inspection, convicted, secretary, erected, reviewable, statutory requirement, summary proceeding, questions of fact, questions of law, scope of review, trial de novo, admissibility, calibration, regulation, competency, relevancy, detecting, adjusted, raisable, speed

#### **LexisNexis(R) Headnotes**

##### *Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

##### *Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

[HN1] Under the Minor Judiciary Court Appeals Act, 42 P.S. § 3001 et seq. (1968), a defendant, after being convicted in summary proceeding may elect to bring an appeal to the court of common pleas and obtain a trial de novo, 42 P.S. § 3003 (1968) or, in the alternative, may petition the court of common pleas of the district to issue a writ of certiorari and to bring the transcript of the summary proceedings before it for review of that record. 42 P.S. § 3006 (1968).

##### *Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN2] See 42 P.S. § 3006 (1968).

##### *Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment*

[HN3] Generally, summary proceedings must be strictly pursued since they are not only penal in nature but also because they deny the right of trial by jury.

##### *Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

##### *Transportation Law > Private Motor Vehicles > Traffic Regulation*

[HN4] See 75 P.S. § 1002(d.1)(1) (1961).

#### **COUNSEL:**

*M. J. DeSisti*, for appellants.

*James E. Davis*, District Attorney, for Commonwealth, appellee.

#### **JUDGES:**

Wright, P. J., Watkins, Jacobs, Hoffman, Spaulding, Cercone, and Packel, JJ. Opinion by Spaulding, J. Wright, P. J., would affirm on the order of the court below.

#### **OPINION BY:**

SPAULDING

#### **OPINION:**

[\*275] [\*\*152] Appellants Guy Cook and Bruce E. Daugherty were convicted at separate hearings by a

226 Pa. Super. 273, \*275; 308 A.2d 151, \*\*152;  
1973 Pa. Super. LEXIS 1355, \*\*\*1

Wyoming County District Justice of the Peace on charges of speeding in violation of The Vehicle Code. n1 Contending that the Commonwealth has failed to satisfy its statutory requirement of establishing the accuracy of radar equipment used in detecting the offense, appellants petitioned the Court of Common Pleas for a writ of certiorari in order to obtain a view of the transcript of the summary proceedings. The court ordered the praecipe for the writ to be dismissed, the writ quashed and the convictions affirmed on the grounds that appellants' claims were not the proper [\*\*\*2] subject for review on certiorari. Appellants appeal from the order.

n1 Act of April 29, 1959, P. L. 58, § 1002, as amended, 75 P.S. § 1002.

[HN1] Under the Minor Judiciary Court Appeals Act, Act of December 2, 1968, P. L. 1137, § 1, 42 P.S. § 3001 et seq., a defendant, after being convicted in summary proceeding may elect to bring an appeal to the court of common pleas and obtain a trial de novo n2 or, in the alternative, may petition the court of common pleas of the district to issue a writ of certiorari and to bring the transcript of the summary proceedings before it for review of that record. n3 Appellants in this case opted for the latter. n4

n2 Act of December 2, 1968, P. L. 1137, § 3, 42 P.S. § 3003.

n3 Act of December 2, 1968, P. L. 1137, § 6, 42 P.S. § 3006.

n4 Appellants, in seeking review via certiorari, raise the argument that an appeal would not be adequate, arguing that at a trial de novo the Commonwealth will be able to correct errors it is alleged to have made at the hearing before the justice of the peace. While this may render an appeal less advantageous to appellants, we do not find that it detracts from the adequacy of that form of relief.

[\*\*\*3]

The court below, in denying appellants the relief they sought via certiorari, "attempted to settle the [\*276] comparative roles of an appeal from a conviction in a summary proceeding under the Minor Judiciary Court Appeals Act . . . and the device of Certiorari." The court was of the opinion ". . . [a]ny question is raisable [\*\*153] in an appeal under the Minor Judiciary Court Appeals Act, but that Certiorari allows an extremely narrow scope of review. 'Ordinarily Certiorari in a summary criminal matter may deal only with questions of law, not questions of fact, not the admissibility, competency, sufficiency, or relevancy of evidence heard by the Justice of the Peace.' [Citing *Commonwealth v. Rosenberger*, No. 88, January Term (Court of Common Pleas, Wyoming County).]"

While the Court of Common Pleas, in its reviewing capacity on certiorari, is given discretion in granting such relief (by the very terms of the Minor Judiciary Court Appeals Act n5), we find that the court erred in holding that the instant case fell beyond its scope of review. The court below was correct in asserting that where there exists a statutory right of appeal, questions of fact may not be reviewed [\*\*\*4] on certiorari. The latter device, in reviewing the regularity of the record, can only properly entertain questions of law, to the exclusion of issues related to the sufficiency, admissibility, competency or relevancy of evidence presented to the justice of the peace. *Commonwealth v. Quinn*, 215 Pa. Superior Ct. 78, 257 A. 2d 266 (1969); *Wilmington Steamship Co. v. Haas*, 151 Pa. 113, 25 A. 85 (1892). The instant case, however, raises a question of law which is reviewable on certiorari.

n5 [HN2] Section 3006 of the Act reads: "In addition to the right of appeal from minor judiciary courts, the judges of the courts of common pleas, within their respective judicial districts, shall have power to issue writs of certiorari to minor judiciary courts and to cause their proceedings to be brought before them, and right and justice to be done, as heretofore provided by law."

226 Pa. Super. 273, \*276; 308 A.2d 151, \*\*153;  
1973 Pa. Super. LEXIS 1355, \*\*\*4

[\*277] The Act under which appellants were convicted mandates that such convictions cannot be sustained unless the Commonwealth produces proof [\*\*\*5] of, *inter alia*, the accuracy of the radar detecting device used, and the posting of radar warning signs on the highway. n6 Where by statutory requirement the method of proving an offense *must* include the production of evidence of a [\*278] specific *type* and it is alleged that the record is wholly devoid of any such showing, the assertions raise a question [\*\*154] of law reviewable on certiorari. The absence of this required Commonwealth testimony on the face of the transcript returned by the magistrate renders that transcript fatally defective. *Commonwealth v. Simons*, 214 Pa. Superior Ct. 337, 257 A. 2d 694 (1969). See *Commonwealth v. Brose*, 412 Pa. 276, 194 A. 2d 322 (1963). "[HN3] Generally, summary proceedings must be strictly pursued since they are not only penal in nature but also because they deny the right of trial by jury." *Simons*, *supra* at 340-41.

n6 The relevant statutory provisions reads: [HN4] "The rate of speed of any vehicle may be timed on any State highway, including the Pennsylvania Turnpike System, by officers of the Pennsylvania State Police through the use of radio microwaves, commonly referred to as electronic speed meters or radar.

"No conviction shall be had upon evidence obtained through the use of radar apparatus unless --

"(i) it is of a type approved by the secretary, and

"(ii) it has been calibrated and tested for accuracy and found accurate or adjusted for accuracy within a period of thirty days prior to the alleged violation, and

"(iii) official warning signs have been erected on the highway by the proper authority indicating that radar is in operation.

"(iv) the speed recorded is six or more miles per hour in excess of the legal speed limit.

"(2) The secretary shall have the authority to appoint official stations for calibrating and testing radar apparatus, and may prescribe regulations as to the manner in which such calibrations and tests shall be made, and shall issue to such stations official inspection certificate forms.

"An official certificate from an official inspection station, showing that the calibration and tests required by this subsection were made within the required period, and that the radar apparatus was accurate or was adjusted for accuracy, shall be competent and prima facie evidence of the fact that such certificate was issued by an official inspection station appointed by the secretary and of the accuracy of the radar apparatus in every proceeding where an information is brought charging a violation of this section.

"(3) The Secretary of Highways shall have the authority to establish, by rule and regulation, the size, color and type of warning sign to be erected on the highways where radar is in use and to designate the intervals at which such warning signs are erected." Act of April 28, 1961, P. L. 108, § 2, 75 P.S. § 1002 (d.1) (1).

[\*\*\*6]

The court below thus erred in concluding that appellants' contentions were not properly raisable on certiorari. The order of the court below is reversed and the cases remanded for further consideration of the petitions for certiorari.

163 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**Commonwealth v. Cook et al., Appellants****Nos. 1551 and 1552, Oct. T., 1972****Superior Court of Pennsylvania*****226 Pa. Super. 273; 308 A.2d 151; 1973 Pa. Super. LEXIS 1355*****December 4, 1972, Submitted****June 14, 1973, Decided****PRIOR HISTORY:** [\*\*\*1]

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**DISPOSITION:**

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**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant drivers appealed the decision of the Court of Common Pleas of Wyoming County (Pennsylvania), which dismissed the praecipe for defendants' writ of certiorari, quashed the writ, and affirmed defendants' conviction on the grounds that defendants' claims were not the proper subject for review on certiorari. Defendants were convicted of speeding; they alleged state failed to satisfy its statutory requirements to sustain their convictions.

**OVERVIEW:** Defendant drivers were convicted of speeding in violation of the Vehicle Code, 75 P.S. § 1002. Defendants alleged state failed to satisfy its statutory requirement of establishing the accuracy of radar equipment used in detecting the offense. Defendants petitioned the trial court for a writ of certiorari. The trial court dismissed the praecipe for the writ, quashed the writ, and affirmed defendants' convictions on the grounds that defendants' claims were not the proper subject for review on certiorari. On review, the court reversed and remanded the cases for further consideration of the petitions for certiorari. The court held the trial court erred in concluding that defendants' contentions were not properly raised on certiorari. The court found that in order to sustain defendants' convictions, state had to prove the accuracy of the radar detecting device and the posting of radar warning signs. The court held that where a statute required an offense to be proven by a specific type of evidence and it was alleged that the record was wholly devoid of any such showing, the assertions raised a question of law reviewable on certiorari.

**OUTCOME:** The court reversed the trial court's holding that defendants' case fell beyond the scope of its review and

remanded the cases for further consideration of the petitions for certiorari. The court held the trial court erred in concluding that defendants' contentions were not properly reviewable on certiorari where defendants' questions raised a question of law.

**CORE TERMS:** radar, accuracy, court of common pleas, highway, apparatus, station, warning, Appeals Act, summary proceedings, certificate, inspection, convicted, secretary, erected, reviewable, statutory requirement, summary proceeding, questions of fact, questions of law, scope of review, trial de novo, admissibility, calibration, regulation, competency, relevancy, detecting, adjusted, raisable, speed

#### **LexisNexis(R) Headnotes**

##### *Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

##### *Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview*

[HN1] Under the Minor Judiciary Court Appeals Act, 42 P.S. § 3001 et seq. (1968), a defendant, after being convicted in summary proceeding may elect to bring an appeal to the court of common pleas and obtain a trial de novo, 42 P.S. § 3003 (1968) or, in the alternative, may petition the court of common pleas of the district to issue a writ of certiorari and to bring the transcript of the summary proceedings before it for review of that record. 42 P.S. § 3006 (1968).

##### *Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN2] See 42 P.S. § 3006 (1968).

##### *Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment*

[HN3] Generally, summary proceedings must be strictly pursued since they are not only penal in nature but also because they deny the right of trial by jury.

##### *Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

##### *Transportation Law > Private Motor Vehicles > Traffic Regulation*

[HN4] See 75 P.S. § 1002(d.1)(1) (1961).

#### **COUNSEL:**

*M. J. DeSisti*, for appellants.

*James E. Davis*, District Attorney, for Commonwealth, appellee.

#### **JUDGES:**

Wright, P. J., Watkins, Jacobs, Hoffman, Spaulding, Cercone, and Packel, JJ. Opinion by Spaulding, J. Wright, P. J., would affirm on the order of the court below.

#### **OPINION BY:**

SPAULDING

#### **OPINION:**

[\*275] [\*\*152] Appellants Guy Cook and Bruce E. Daugherty were convicted at separate hearings by a

226 Pa. Super. 273, \*275; 308 A.2d 151, \*\*152;  
1973 Pa. Super. LEXIS 1355, \*\*\*1

Wyoming County District Justice of the Peace on charges of speeding in violation of The Vehicle Code. n1 Contending that the Commonwealth has failed to satisfy its statutory requirement of establishing the accuracy of radar equipment used in detecting the offense, appellants petitioned the Court of Common Pleas for a writ of certiorari in order to obtain a view of the transcript of the summary proceedings. The court ordered the praecipe for the writ to be dismissed, the writ quashed and the convictions affirmed on the grounds that appellants' claims were not the proper [\*\*\*2] subject for review on certiorari. Appellants appeal from the order.

n1 Act of April 29, 1959, P. L. 58, § 1002, as amended, 75 P.S. § 1002.

[HN1] Under the Minor Judiciary Court Appeals Act, Act of December 2, 1968, P. L. 1137, § 1, 42 P.S. § 3001 et seq., a defendant, after being convicted in summary proceeding may elect to bring an appeal to the court of common pleas and obtain a trial de novo n2 or, in the alternative, may petition the court of common pleas of the district to issue a writ of certiorari and to bring the transcript of the summary proceedings before it for review of that record. n3 Appellants in this case opted for the latter. n4

n2 Act of December 2, 1968, P. L. 1137, § 3, 42 P.S. § 3003.

n3 Act of December 2, 1968, P. L. 1137, § 6, 42 P.S. § 3006.

n4 Appellants, in seeking review via certiorari, raise the argument that an appeal would not be adequate, arguing that at a trial de novo the Commonwealth will be able to correct errors it is alleged to have made at the hearing before the justice of the peace. While this may render an appeal less advantageous to appellants, we do not find that it detracts from the adequacy of that form of relief.

[\*\*\*3]

The court below, in denying appellants the relief they sought via certiorari, "attempted to settle the [\*276] comparative roles of an appeal from a conviction in a summary proceeding under the Minor Judiciary Court Appeals Act . . . and the device of Certiorari." The court was of the opinion ". . . [a]ny question is raisable [\*\*153] in an appeal under the Minor Judiciary Court Appeals Act, but that Certiorari allows an extremely narrow scope of review. 'Ordinarily Certiorari in a summary criminal matter may deal only with questions of law, not questions of fact, not the admissibility, competency, sufficiency, or relevancy of evidence heard by the Justice of the Peace.' [Citing *Commonwealth v. Rosenberger*, No. 88, January Term (Court of Common Pleas, Wyoming County).]"

While the Court of Common Pleas, in its reviewing capacity on certiorari, is given discretion in granting such relief (by the very terms of the Minor Judiciary Court Appeals Act n5), we find that the court erred in holding that the instant case fell beyond its scope of review. The court below was correct in asserting that where there exists a statutory right of appeal, questions of fact may not be reviewed [\*\*\*4] on certiorari. The latter device, in reviewing the regularity of the record, can only properly entertain questions of law, to the exclusion of issues related to the sufficiency, admissibility, competency or relevancy of evidence presented to the justice of the peace. *Commonwealth v. Quinn*, 215 Pa. Superior Ct. 78, 257 A. 2d 266 (1969); *Wilmington Steamship Co. v. Haas*, 151 Pa. 113, 25 A. 85 (1892). The instant case, however, raises a question of law which is reviewable on certiorari.

n5 [HN2] Section 3006 of the Act reads: "In addition to the right of appeal from minor judiciary courts, the judges of the courts of common pleas, within their respective judicial districts, shall have power to issue writs of certiorari to minor judiciary courts and to cause their proceedings to be brought before them, and right and justice to be done, as heretofore provided by law."

226 Pa. Super. 273, \*276; 308 A.2d 151, \*\*153;  
1973 Pa. Super. LEXIS 1355, \*\*\*4

[\*277] The Act under which appellants were convicted mandates that such convictions cannot be sustained unless the Commonwealth produces proof [\*\*\*5] of, *inter alia*, the accuracy of the radar detecting device used, and the posting of radar warning signs on the highway. n6 Where by statutory requirement the method of proving an offense *must* include the production of evidence of a [\*278] specific *type* and it is alleged that the record is wholly devoid of any such showing, the assertions raise a question [\*\*154] of law reviewable on certiorari. The absence of this required Commonwealth testimony on the face of the transcript returned by the magistrate renders that transcript fatally defective. *Commonwealth v. Simons*, 214 Pa. Superior Ct. 337, 257 A. 2d 694 (1969). See *Commonwealth v. Brose*, 412 Pa. 276, 194 A. 2d 322 (1963). "[HN3] Generally, summary proceedings must be strictly pursued since they are not only penal in nature but also because they deny the right of trial by jury." *Simons*, *supra* at 340-41.

n6 The relevant statutory provisions reads: [HN4] "The rate of speed of any vehicle may be timed on any State highway, including the Pennsylvania Turnpike System, by officers of the Pennsylvania State Police through the use of radio microwaves, commonly referred to as electronic speed meters or radar.

"No conviction shall be had upon evidence obtained through the use of radar apparatus unless --

"(i) it is of a type approved by the secretary, and

"(ii) it has been calibrated and tested for accuracy and found accurate or adjusted for accuracy within a period of thirty days prior to the alleged violation, and

"(iii) official warning signs have been erected on the highway by the proper authority indicating that radar is in operation.

"(iv) the speed recorded is six or more miles per hour in excess of the legal speed limit.

"(2) The secretary shall have the authority to appoint official stations for calibrating and testing radar apparatus, and may prescribe regulations as to the manner in which such calibrations and tests shall be made, and shall issue to such stations official inspection certificate forms.

"An official certificate from an official inspection station, showing that the calibration and tests required by this subsection were made within the required period, and that the radar apparatus was accurate or was adjusted for accuracy, shall be competent and prima facie evidence of the fact that such certificate was issued by an official inspection station appointed by the secretary and of the accuracy of the radar apparatus in every proceeding where an information is brought charging a violation of this section.

"(3) The Secretary of Highways shall have the authority to establish, by rule and regulation, the size, color and type of warning sign to be erected on the highways where radar is in use and to designate the intervals at which such warning signs are erected." Act of April 28, 1961, P. L. 108, § 2, 75 P.S. § 1002 (d.1) (1).

[\*\*\*6]

The court below thus erred in concluding that appellants' contentions were not properly raisable on certiorari. The order of the court below is reversed and the cases remanded for further consideration of the petitions for certiorari.

164 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION,  
BUREAU OF DRIVER LICENSING, Appellant, v. Arbie BANKSTON, Jr.,  
Appellee**

**No. 2192 C.D. 1991**

**COMMONWEALTH COURT OF PENNSYLVANIA**

*156 Pa. Commw. 127; 625 A.2d 1333; 1993 Pa. Commw. LEXIS 329*

**March 8, 1993, Submitted on Briefs**

**May 26, 1993, Decided**

**May 26, 1993, Filed**

**PRIOR HISTORY:** [\*\*\*1]

APPEALED From No. SA 1722 of 1991. Common Pleas Court of Allegheny County. Judge SCHEIB

**DISPOSITION:**

Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant Pennsylvania Department of Transportation, Bureau of Driver Licensing, sought review of an order of the Common Pleas Court, Allegheny County (Pennsylvania) remanding an operator's license suspension appeal to appellant. Appellant had ordered suspension of appellee driver's operator's license for 15 days, but the trial court, in a de novo review, determined that the suspension order was improper.

**OVERVIEW:** Appellee driver was convicted of driving 90 miles per hour in a 55 mile per hour zone. He was subsequently required to attend a hearing conducted by appellant Department of Transportation, Bureau of Driver Licensing. Although *75 Pa. Cons. Stat. § 1538(d)* granted a hearing examiner the discretion to recommend, and appellant the discretion to impose, one or more of three possible sanctions under such circumstances, appellee received a 15-day suspension, the most severe sanction of the three. The trial court conducted a de novo hearing and held that testimony regarding "additional circumstances" warranted remanding the matter to the department with instructions that the special driver's examination sanction be imposed instead of the suspension. The court affirmed, ruling that under recent precedent, hearing examiners were required to exercise their discretion based on the individual facts of a case and not on the basis of administrative concerns. Because appellee was not a habitual offender and testified that he had been having trouble with his speedometer and needed his vehicle for work, the trial court's order was deemed proper.

**OUTCOME:** The court affirmed the trial court's order remanding the matter to appellant Pennsylvania Department of Transportation, Bureau of Driver Licensing, with directions that it impose the special driver's examination sanction on appellee driver rather than a 15-day operator's license suspension.

**CORE TERMS:** suspension, mile, driver, examiner, penalty imposed, modification, hearing examiner, departmental, speed limit, fifteen-day, novo, recommend, driving record, speedometer, convicted, exceeding, license, abuse of discretion, hearing de novo, abused, modify, administrative discretion, required to attend, license suspension, sanction imposed, de novo hearing, suspended, notified, severity, ninety

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN1] See 75 Pa. Cons. Stat. § 1538(d).

*Civil Procedure > Appeals > Standards of Review > De Novo Review  
Transportation Law > Private Motor Vehicles > Licensing & Registration  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN2] When examining an appeal from a court of common pleas decision in motor vehicle operators license suspension cases following a hearing de novo, an appellate court will examine the decision to determine whether necessary findings are supported by competent evidence, an error of law has occurred or whether there has been a manifest abuse of discretion.

*Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN3] A trial court is required to determine if the Department of Transportation (DOT) has treated each case individually when it has discretion as to which penalty to impose. The statutory grant of discretion to the DOT and the hearing examiners carries with it an obligation to exercise that discretion based upon the individual facts of the case. If the trial court, upon consideration of all the facts of the case, determines that the DOT has abused its discretion, it can modify the sanction imposed. A blanket rule improperly restricting the exercise of discretion is such an abuse.

**COUNSEL:**

Timothy P. Wile, Asst. Counsel In-Charge of Appellate Section, for appellant.

No appearance for appellee.

**JUDGES:**

Craig, President Judge, and Doyle and Friedman, JJ.

**OPINION BY:**

DOYLE

**OPINION:**

[\*130] [\*\*1334] The Department of Transportation, Bureau of Driver Licensing (DOT), appeals from an order of the Court of Common Pleas of Allegheny County remanding an operator's license suspension appeal to DOT with direction to impose the lesser sanction of requiring a special driver's examination. DOT contends that the trial court erred when it determined that DOT improperly ordered a fifteen-day suspension in this case. Because of the recently expanded role of the trial court in this area, we affirm its order.

The factual and procedural history of this case is summarized as follows. Arbie Bankston, Jr., was cited on November 5, 1990, for going ninety miles per hour in a fifty-five mile per hour zone. Bankston [\*\*1335] appeared before a magistrate and admitted that he might have been exceeding the speed limit but argued that he was not going as fast as ninety miles per hour. At that hearing, Bankston challenged [\*\*\*2] both the calibration and proper functioning of the radar unit used to record his speed. Bankston was convicted, fined, and five points were assigned to his operator's license. Bankston was notified by DOT that, as a result of that conviction, he would be required to attend a departmental hearing.

The departmental hearing was held on May 16, 1991; Bankston testified that he estimated his speed on the date in question at seventy miles per hour and that he believed he was travelling in a sixty-five mile per hour zone. Bankston argued that his driving record was generally good as he had not been cited for a violation since 1985. DOT presented evidence of Bankston's conviction and his overall driving record. The hearing examiner told Bankston that DOT could [\*131] impose either a fifteen-day suspension or require a special driver's examination. By letter dated May 31, 1991, DOT notified Bankston that based upon the hearing examiner's recommendation, n1 a fifteen-day suspension was being imposed. Bankston filed a timely appeal to the trial court.

n1 [HN1] Section 1538(d) of the Vehicle Code, *75 Pa.C.S. § 1538(d)*, specifically grants a hearing examiner the discretion to recommend, and DOT the discretion to impose, one or more of three sanctions when a person is convicted of operating a vehicle thirty-one miles per hour or more in excess of the speed limit:

**Conviction for excessive speeding. --**

(1) When any person is convicted of driving 31 miles per hour or more in excess of the speed limit, the department shall require the person to attend a departmental hearing. The hearing examiner may recommend one or more of the following:

- (i) That the person be required to attend a driver improvement school.
- (ii) That the person undergo an examination as provided for in section 1508.
- (iii) That the person have his driver's license suspended for a period not exceeding 15 days.

(2) The department shall effect at least one of the sanctions but may not increase any suspension beyond 15 days.

*75 Pa.C.S. § 1538(d)(1)-(d)(2).*

[\*\*\*3]

At a de novo hearing before the trial court, Bankston testified that he recently had his vehicle examined and that his speedometer was "erratic," that he lived in a rural area where alternate transportation was not easily obtained and that he needed his vehicle for work. (Notes of testimony [N.T.], 9/11/91, pp. 4-8.) Bankston again argued that his driving record was generally good and that, having paid the fine for the conviction, he believed an additional punishment in the form of a fifteen day suspension was "just not fair." (N.T., p. 8.) The trial court concluded that there was no reason to impose the suspension in this case in light of the evidence of "additional circumstances" presented at the de novo hearing and remanded the case to DOT with direction that DOT impose the special driver's examination as the

156 Pa. Commw. 127, \*131; 625 A.2d 1333, \*\*1335;  
1993 Pa. Commw. LEXIS 329, \*\*\*3

appropriate sanction. n2

n2 We note that the order of the trial court remands this case to DOT with direction to impose a specific penalty from a list of possible penalties. Ordinarily, remand orders are interlocutory and unappealable. *Roth v. Borough of Verona*, 102 Pa.Commonwealth Ct. 550, 519 A.2d 537 (1986). Where, however, a trial court's remand order directs that a particular adjudication be adopted, it is appealable. *Clapsaddle v. Bethel Park School District*, 103 Pa.Commonwealth Ct. 367, 520 A.2d 537 (1987).

[\*\*\*4]

[\*132] Our standard of review in motor vehicle operators license suspension cases is settled. [HN2] When examining an appeal from a court of common pleas decision following a hearing de novo we will examine the decision to determine whether necessary findings are supported by competent evidence, an error of law has occurred or whether there has been a manifest abuse of discretion. *Department of Transportation, Bureau of Driver Licensing v. Daniels*, 117 Pa.Commonwealth Ct. 640, 544 A.2d 109 (1988).

The trial court's role in these cases has recently been expanded. Previously, the trial court's authority to modify the penalty imposed was limited to instances where the hearing de novo resulted in different findings of fact than those found at the departmental hearing. *Department of Transportation, Bureau of Traffic* [\*1336] *Safety v. Kobaly*, 477 Pa. 525, 384 A.2d 1213 (1978). However, in *Department of Transportation, Bureau of Driver Licensing v. Fiore*, 138 Pa.Commonwealth Ct. 596, 588 A.2d 1332 (1991), we redefined the appropriate role of the [\*\*\*5] trial court when reviewing license suspensions in cases involving departmental discretion as to the sanction to be imposed in light of the purpose of de novo reviews. We held in *Fiore* that the trial court's de novo review acts as a check on the arbitrary exercise of administrative power, and fulfills the legislative intent to grant "the trial court broad discretionary powers in the interest of the administration of justice." De novo review is a "full consideration of the case at another time." *Id. at 601*, 588 A.2d at 1334. We explained the trial court's expanded role as follows:

In order for the trial courts to provide forums which are true and effective checks on the department, the broad discretion granted them to ensure the administration of justice by protecting drivers against the arbitrary exercise of power by the department must extend beyond a mere review of the facts to the modification of sanctions imposed [\*133] where, as here, the department has abused its discretion when choosing from the range of penalties provided. Without such authority, a trial court's ability to protect against abuse of discretion by the department [\*\*\*6] would be meaningless.

*Id. at 603*, 588 A.2d at 1335. We also disapproved sanctions based upon administrative concerns rather than the severity of the offense involved. n3 Thus, [HN3] *Fiore* requires the trial court to determine if DOT has treated each case individually when it has discretion as to which penalty to impose. The statutory grant of discretion to DOT and the hearing examiners carries with it an obligation to exercise that discretion based upon the individual facts of the case. If the trial court, upon consideration of all the facts of the case, determines that DOT has abused its discretion, it can modify the sanction imposed. A blanket rule improperly restricting the exercise of discretion is such an abuse. *Fiore*.

n3 *Fiore* involved a DOT policy of never imposing a suspension of less than fifteen days because it would be difficult to process the shorter suspensions. *Fiore*, 138 Pa.Commonwealth Ct. at 599, 588 A.2d at 1333.

[\*\*\*7]

As noted above, following the de novo hearing where Bankston testified as to the problem with his speedometer and the difficulties a suspension would impose given his circumstances, the trial court remanded to DOT with direction to impose the lesser penalty of the special driver's examination. The trial court explicitly stated:

156 Pa. Commw. 127, \*133; 625 A.2d 1333, \*\*1336;  
1993 Pa. Commw. LEXIS 329, \*\*\*7

We see no reason to impose the suspension in this case. Defendant is not an habitual offender, nor was this particular offense as egregious as previously thought, in light of additional circumstances . . . .

(Trial Court Opinion, p. 1.) This complies with the trial court's obligation under *Fiore* to examine the penalty imposed by DOT in light of the severity of the offense after a full reconsideration of the case.

DOT attempts to distinguish *Fiore* by arguing it is limited to instances where the penalty imposed is solely based on administrative concerns. We disagree. *Fiore* criticized [\*134] DOT's asserted justification for imposing a fifteen-day suspension: the mere impossibility of processing a suspension of lesser duration. The import of *Fiore*, however, is not limited to its precise facts. Implicit in its discussion of the nature [\*\*\*8] of *de novo* review and the protection it offers those affected by administrative decisions is a recognition that the trial court can and should act in the interest of the administration of justice.

Moreover, DOT admits to a somewhat similar justification for the suspension imposed on Bankston here:

In the present matter, the Department suspended Bankston's operating privilege for fifteen days pursuant to its policy of suspending the operating privileges of all motorists who are convicted of exceeding a speed limit by 31 or more miles per hour for fifteen days.

[\*\*1337] (DOT brief, p. 21.) This DOT policy binds its hearing examiners to recommending a suspension in these cases. It is hard to reconcile this requirement with the language of Section 1538(d) of the Vehicle Code providing hearing examiners with a list of penalties from which they may choose. If a hearing examiner must always recommend a suspension regardless of the totality of the circumstances in a case, the discretion of the hearing examiner is really no discretion. While certainly administratively convenient, this policy does not comply with the hearing examiner's obligation under the statute as interpreted [\*\*\*9] in *Fiore*.

DOT also cites a plethora of cases holding that the justification for the modification of the penalty imposed here, economic hardship due to the suspension and a malfunctioning speedometer, are insufficient to allow a modification of the penalty imposed by administrative authorities. Further, DOT cites cases holding that excessive speed alone can justify a suspension. These cases are all distinguishable because they predate the expansion of the trial court's role in *Fiore*.

Moreover, this argument does not address the fact that DOT's policy improperly restricts the hearing examiner's exercise of a statutory grant of discretion. Assuming, *arguendo*, [\*135] that *Fiore* did not change the import of the cases DOT cites, this improper restriction alone justifies the trial court's action. n4

n4 It is not clear whether the trial court based the penalty modification upon DOT's policy requiring a suspension in all such cases. We can however, affirm a correct result which is not based upon a correct analysis. *Friedlander v. Zoning Hearing Board of Sayre Borough*, 119 Pa. Commonwealth Ct. 164, 546 A.2d 755 (1988).

[\*\*\*10]

DOT also argues that the trial court improperly substituted its judicial discretion for the administrative discretion of DOT. This argument overlooks the fact that DOT's policy binds its hearing examiners, preventing them from exercising the discretion provided by the Vehicle Code. In such a situation, the trial court's modification of the sanction imposed following a *de novo* hearing is not an impermissible usurpation of administrative discretion.

Affirmed.

**ORDER**

156 Pa. Commw. 127, \*135; 625 A.2d 1333, \*\*1337;  
1993 Pa. Commw. LEXIS 329, \*\*\*10

NOW, May 26, 1993, the order of the Court of Common Pleas of Allegheny County, in the above-captioned matter is affirmed.

165 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION,  
BUREAU OF DRIVER LICENSING, Appellant, v. Arbie BANKSTON, Jr.,  
Appellee**

**No. 2192 C.D. 1991**

**COMMONWEALTH COURT OF PENNSYLVANIA**

*156 Pa. Commw. 127; 625 A.2d 1333; 1993 Pa. Commw. LEXIS 329*

**March 8, 1993, Submitted on Briefs**

**May 26, 1993, Decided**

**May 26, 1993, Filed**

**PRIOR HISTORY:** [\*\*\*1]

APPEALED From No. SA 1722 of 1991. Common Pleas Court of Allegheny County. Judge SCHEIB

**DISPOSITION:**

Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant Pennsylvania Department of Transportation, Bureau of Driver Licensing, sought review of an order of the Common Pleas Court, Allegheny County (Pennsylvania) remanding an operator's license suspension appeal to appellant. Appellant had ordered suspension of appellee driver's operator's license for 15 days, but the trial court, in a de novo review, determined that the suspension order was improper.

**OVERVIEW:** Appellee driver was convicted of driving 90 miles per hour in a 55 mile per hour zone. He was subsequently required to attend a hearing conducted by appellant Department of Transportation, Bureau of Driver Licensing. Although *75 Pa. Cons. Stat. § 1538(d)* granted a hearing examiner the discretion to recommend, and appellant the discretion to impose, one or more of three possible sanctions under such circumstances, appellee received a 15-day suspension, the most severe sanction of the three. The trial court conducted a de novo hearing and held that testimony regarding "additional circumstances" warranted remanding the matter to the department with instructions that the special driver's examination sanction be imposed instead of the suspension. The court affirmed, ruling that under recent precedent, hearing examiners were required to exercise their discretion based on the individual facts of a case and not on the basis of administrative concerns. Because appellee was not a habitual offender and testified that he had been having trouble with his speedometer and needed his vehicle for work, the trial court's order was deemed proper.

**OUTCOME:** The court affirmed the trial court's order remanding the matter to appellant Pennsylvania Department of Transportation, Bureau of Driver Licensing, with directions that it impose the special driver's examination sanction on appellee driver rather than a 15-day operator's license suspension.

**CORE TERMS:** suspension, mile, driver, examiner, penalty imposed, modification, hearing examiner, departmental, speed limit, fifteen-day, novo, recommend, driving record, speedometer, convicted, exceeding, license, abuse of discretion, hearing de novo, abused, modify, administrative discretion, required to attend, license suspension, sanction imposed, de novo hearing, suspended, notified, severity, ninety

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN1] See 75 Pa. Cons. Stat. § 1538(d).

*Civil Procedure > Appeals > Standards of Review > De Novo Review  
Transportation Law > Private Motor Vehicles > Licensing & Registration  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN2] When examining an appeal from a court of common pleas decision in motor vehicle operators license suspension cases following a hearing de novo, an appellate court will examine the decision to determine whether necessary findings are supported by competent evidence, an error of law has occurred or whether there has been a manifest abuse of discretion.

*Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview  
Transportation Law > Private Motor Vehicles > Operator Licenses*

[HN3] A trial court is required to determine if the Department of Transportation (DOT) has treated each case individually when it has discretion as to which penalty to impose. The statutory grant of discretion to the DOT and the hearing examiners carries with it an obligation to exercise that discretion based upon the individual facts of the case. If the trial court, upon consideration of all the facts of the case, determines that the DOT has abused its discretion, it can modify the sanction imposed. A blanket rule improperly restricting the exercise of discretion is such an abuse.

**COUNSEL:**

Timothy P. Wile, Asst. Counsel In-Charge of Appellate Section, for appellant.

No appearance for appellee.

**JUDGES:**

Craig, President Judge, and Doyle and Friedman, JJ.

**OPINION BY:**

DOYLE

**OPINION:**

[\*130] [\*\*1334] The Department of Transportation, Bureau of Driver Licensing (DOT), appeals from an order of the Court of Common Pleas of Allegheny County remanding an operator's license suspension appeal to DOT with direction to impose the lesser sanction of requiring a special driver's examination. DOT contends that the trial court erred when it determined that DOT improperly ordered a fifteen-day suspension in this case. Because of the recently expanded role of the trial court in this area, we affirm its order.

The factual and procedural history of this case is summarized as follows. Arbie Bankston, Jr., was cited on November 5, 1990, for going ninety miles per hour in a fifty-five mile per hour zone. Bankston [\*\*1335] appeared before a magistrate and admitted that he might have been exceeding the speed limit but argued that he was not going as fast as ninety miles per hour. At that hearing, Bankston challenged [\*\*\*2] both the calibration and proper functioning of the radar unit used to record his speed. Bankston was convicted, fined, and five points were assigned to his operator's license. Bankston was notified by DOT that, as a result of that conviction, he would be required to attend a departmental hearing.

The departmental hearing was held on May 16, 1991; Bankston testified that he estimated his speed on the date in question at seventy miles per hour and that he believed he was travelling in a sixty-five mile per hour zone. Bankston argued that his driving record was generally good as he had not been cited for a violation since 1985. DOT presented evidence of Bankston's conviction and his overall driving record. The hearing examiner told Bankston that DOT could [\*131] impose either a fifteen-day suspension or require a special driver's examination. By letter dated May 31, 1991, DOT notified Bankston that based upon the hearing examiner's recommendation, n1 a fifteen-day suspension was being imposed. Bankston filed a timely appeal to the trial court.

n1 [HN1] Section 1538(d) of the Vehicle Code, *75 Pa.C.S. § 1538(d)*, specifically grants a hearing examiner the discretion to recommend, and DOT the discretion to impose, one or more of three sanctions when a person is convicted of operating a vehicle thirty-one miles per hour or more in excess of the speed limit:

**Conviction for excessive speeding. --**

(1) When any person is convicted of driving 31 miles per hour or more in excess of the speed limit, the department shall require the person to attend a departmental hearing. The hearing examiner may recommend one or more of the following:

- (i) That the person be required to attend a driver improvement school.
- (ii) That the person undergo an examination as provided for in section 1508.
- (iii) That the person have his driver's license suspended for a period not exceeding 15 days.

(2) The department shall effect at least one of the sanctions but may not increase any suspension beyond 15 days.

*75 Pa.C.S. § 1538(d)(1)-(d)(2).*

[\*\*\*3]

At a de novo hearing before the trial court, Bankston testified that he recently had his vehicle examined and that his speedometer was "erratic," that he lived in a rural area where alternate transportation was not easily obtained and that he needed his vehicle for work. (Notes of testimony [N.T.], 9/11/91, pp. 4-8.) Bankston again argued that his driving record was generally good and that, having paid the fine for the conviction, he believed an additional punishment in the form of a fifteen day suspension was "just not fair." (N.T., p. 8.) The trial court concluded that there was no reason to impose the suspension in this case in light of the evidence of "additional circumstances" presented at the de novo hearing and remanded the case to DOT with direction that DOT impose the special driver's examination as the

156 Pa. Commw. 127, \*131; 625 A.2d 1333, \*\*1335;  
1993 Pa. Commw. LEXIS 329, \*\*\*3

appropriate sanction. n2

n2 We note that the order of the trial court remands this case to DOT with direction to impose a specific penalty from a list of possible penalties. Ordinarily, remand orders are interlocutory and unappealable. *Roth v. Borough of Verona*, 102 Pa.Commonwealth Ct. 550, 519 A.2d 537 (1986). Where, however, a trial court's remand order directs that a particular adjudication be adopted, it is appealable. *Clapsaddle v. Bethel Park School District*, 103 Pa.Commonwealth Ct. 367, 520 A.2d 537 (1987).

[\*\*\*4]

[\*132] Our standard of review in motor vehicle operators license suspension cases is settled. [HN2] When examining an appeal from a court of common pleas decision following a hearing de novo we will examine the decision to determine whether necessary findings are supported by competent evidence, an error of law has occurred or whether there has been a manifest abuse of discretion. *Department of Transportation, Bureau of Driver Licensing v. Daniels*, 117 Pa.Commonwealth Ct. 640, 544 A.2d 109 (1988).

The trial court's role in these cases has recently been expanded. Previously, the trial court's authority to modify the penalty imposed was limited to instances where the hearing de novo resulted in different findings of fact than those found at the departmental hearing. *Department of Transportation, Bureau of Traffic* [\*1336] *Safety v. Kobaly*, 477 Pa. 525, 384 A.2d 1213 (1978). However, in *Department of Transportation, Bureau of Driver Licensing v. Fiore*, 138 Pa.Commonwealth Ct. 596, 588 A.2d 1332 (1991), we redefined the appropriate role of the [\*\*\*5] trial court when reviewing license suspensions in cases involving departmental discretion as to the sanction to be imposed in light of the purpose of de novo reviews. We held in *Fiore* that the trial court's de novo review acts as a check on the arbitrary exercise of administrative power, and fulfills the legislative intent to grant "the trial court broad discretionary powers in the interest of the administration of justice." De novo review is a "full consideration of the case at another time." *Id. at 601, 588 A.2d at 1334*. We explained the trial court's expanded role as follows:

In order for the trial courts to provide forums which are true and effective checks on the department, the broad discretion granted them to ensure the administration of justice by protecting drivers against the arbitrary exercise of power by the department must extend beyond a mere review of the facts to the modification of sanctions imposed [\*133] where, as here, the department has abused its discretion when choosing from the range of penalties provided. Without such authority, a trial court's ability to protect against abuse of discretion by the department [\*\*\*6] would be meaningless.

*Id. at 603, 588 A.2d at 1335*. We also disapproved sanctions based upon administrative concerns rather than the severity of the offense involved. n3 Thus, [HN3] *Fiore* requires the trial court to determine if DOT has treated each case individually when it has discretion as to which penalty to impose. The statutory grant of discretion to DOT and the hearing examiners carries with it an obligation to exercise that discretion based upon the individual facts of the case. If the trial court, upon consideration of all the facts of the case, determines that DOT has abused its discretion, it can modify the sanction imposed. A blanket rule improperly restricting the exercise of discretion is such an abuse. *Fiore*.

n3 *Fiore* involved a DOT policy of never imposing a suspension of less than fifteen days because it would be difficult to process the shorter suspensions. *Fiore, 138 Pa.Commonwealth Ct. at 599, 588 A.2d at 1333*.

[\*\*\*7]

As noted above, following the de novo hearing where Bankston testified as to the problem with his speedometer and the difficulties a suspension would impose given his circumstances, the trial court remanded to DOT with direction to impose the lesser penalty of the special driver's examination. The trial court explicitly stated:

156 Pa. Commw. 127, \*133; 625 A.2d 1333, \*\*1336;  
1993 Pa. Commw. LEXIS 329, \*\*\*7

We see no reason to impose the suspension in this case. Defendant is not an habitual offender, nor was this particular offense as egregious as previously thought, in light of additional circumstances . . . .

(Trial Court Opinion, p. 1.) This complies with the trial court's obligation under *Fiore* to examine the penalty imposed by DOT in light of the severity of the offense after a full reconsideration of the case.

DOT attempts to distinguish *Fiore* by arguing it is limited to instances where the penalty imposed is solely based on administrative concerns. We disagree. *Fiore* criticized [\*134] DOT's asserted justification for imposing a fifteen-day suspension: the mere impossibility of processing a suspension of lesser duration. The import of *Fiore*, however, is not limited to its precise facts. Implicit in its discussion of the nature [\*\*\*8] of *de novo* review and the protection it offers those affected by administrative decisions is a recognition that the trial court can and should act in the interest of the administration of justice.

Moreover, DOT admits to a somewhat similar justification for the suspension imposed on Bankston here:

In the present matter, the Department suspended Bankston's operating privilege for fifteen days pursuant to its policy of suspending the operating privileges of all motorists who are convicted of exceeding a speed limit by 31 or more miles per hour for fifteen days.

[\*\*1337] (DOT brief, p. 21.) This DOT policy binds its hearing examiners to recommending a suspension in these cases. It is hard to reconcile this requirement with the language of Section 1538(d) of the Vehicle Code providing hearing examiners with a list of penalties from which they may choose. If a hearing examiner must always recommend a suspension regardless of the totality of the circumstances in a case, the discretion of the hearing examiner is really no discretion. While certainly administratively convenient, this policy does not comply with the hearing examiner's obligation under the statute as interpreted [\*\*\*9] in *Fiore*.

DOT also cites a plethora of cases holding that the justification for the modification of the penalty imposed here, economic hardship due to the suspension and a malfunctioning speedometer, are insufficient to allow a modification of the penalty imposed by administrative authorities. Further, DOT cites cases holding that excessive speed alone can justify a suspension. These cases are all distinguishable because they predate the expansion of the trial court's role in *Fiore*.

Moreover, this argument does not address the fact that DOT's policy improperly restricts the hearing examiner's exercise of a statutory grant of discretion. Assuming, *arguendo*, [\*135] that *Fiore* did not change the import of the cases DOT cites, this improper restriction alone justifies the trial court's action. n4

n4 It is not clear whether the trial court based the penalty modification upon DOT's policy requiring a suspension in all such cases. We can however, affirm a correct result which is not based upon a correct analysis. *Friedlander v. Zoning Hearing Board of Sayre Borough*, 119 Pa. Commonwealth Ct. 164, 546 A.2d 755 (1988).

[\*\*\*10]

DOT also argues that the trial court improperly substituted its judicial discretion for the administrative discretion of DOT. This argument overlooks the fact that DOT's policy binds its hearing examiners, preventing them from exercising the discretion provided by the Vehicle Code. In such a situation, the trial court's modification of the sanction imposed following a *de novo* hearing is not an impermissible usurpation of administrative discretion.

Affirmed.

**ORDER**

156 Pa. Commw. 127, \*135; 625 A.2d 1333, \*\*1337;  
1993 Pa. Commw. LEXIS 329, \*\*\*10

NOW, May 26, 1993, the order of the Court of Common Pleas of Allegheny County, in the above-captioned matter is affirmed.

166 of 195 DOCUMENTS

**Commonwealth v. Peters**

no. 1989-566

**COMMON PLEAS COURT OF CRAWFORD COUNTY, PENNSYLVANIA***1989 Pa. Dist. & Cnty. Dec. LEXIS 97; 4 Pa. D. & C.4th 33***November 2, 1989, Decided****CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a summary conviction at the district justice level (Pennsylvania) for violating *Pa. Stat. Ann. tit. 75, § 3362(a)(2)* by driving in excess of the posted speed limit.

**OVERVIEW:** The police chief used a hand-operated speed chronometer stopwatch to determine defendant's speed across 132 feet that the chief had set out. The chronometer computed defendant's speed to be 77.5 miles per hour (mph) in a 55-mph zone. Defendant argued that in such a short distance, human reaction time in observing the exact time the car crossed both lines and in twice pressing the chronometer's timing button invited inaccuracy and doubt. In a de novo hearing, the court found that it could not find defendant guilty of speeding at 77.5 mph. The current Vehicle Code (Pennsylvania) did not set a minimum distance for the timing of a vehicle. Because a speeding conviction had serious driving-privilege, point-accumulation, and financial implications, the court found that it was essential to have sufficient evidence of a precise speed that left no room for conjecture. The court was presented with no studies of human reaction tests using this type of stopwatch, and the court noted that the calculated speed could vary with slight changes in the time. Thus, the court could not find defendant guilty of speeding at 77.5 mph but accepted defendant's testimony that he was speeding at 63 mph.

**OUTCOME:** The court found defendant guilty of speeding at 63 mph in a 55-mph zone.

**CORE TERMS:** distance, speed, mph, feet, measured, timing, stopwatch, speeding, mile, chronometer, speed limit, regulation, testing, driver, zone, speed-timing, short distance, human error, hand-held, driving, posted, safety factor, automatically, re-enactment, mathematical, pre-measured, calculation, calculated, exceeding, crossed

**LexisNexis(R) Headnotes*****Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN1] *75 Pa. Cons. Stat. § 3368(c)* provides that the rate of speed of a vehicle may be timed by a police officer using a mechanical or electrical speed-timing device.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN2] *75 Pa. Cons. Stat. § 3368(d)* requires the approval and testing of mechanical or electrical speed-timing devices by the Department of Transportation for accuracy at designated testing sites.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview***

[HN3] 67 Pa. Code § 105.71 et seq., permits department-approved and certified stopwatches to time the rate of speed of vehicles and prescribes the procedures for approval and certification. The present code and present transportation regulations do not set a minimum distance for the timing of a vehicle; whereas, the previous statute required a distance of no less than one-eighth or one-quarter of a mile. Former Pa. Stat. Ann. tit. 75, § 1002(d)(1) (1959).

***Governments > Legislation > Effect & Operation > Operability******Governments > Legislation > Interpretation***

[HN4] See the Statutory Construction Act of 1972, 1 Pa. Cons. Stat. § 1961 (1972).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Transportation Law > Commercial Vehicles > Maintenance & Safety***

[HN5] Section 3368(c)(4) of the Vehicle Code (Pennsylvania) has a built-in "safety factor" when arrests for speeding are made by radar or electronic devices using sensor tapes laid across the highway or speed-timing devices. For all speed-timing devices there is a six-mph "safety factor" before a conviction may be had. For highway sensor devices and hand-held devices there is a 10 mph "safety factor," where the speed limit is less than 55 mph, except in a school zone. Thus, the legislature recognizes the possibility of human error when dealing with split-second timing. Unfortunately, the legislature has not prescribed a minimum measured distance requirement before authorized timing devices may be used.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Penalties******Evidence > Privileges > General Overview******Evidence > Procedural Considerations > Weight & Sufficiency***

[HN6] With the amount of the speeding fine based on speed, Pa. Stat. Ann. tit. 75, § 3362, and the catastrophic-loss surcharge, Pa. Stat. Ann. tit. 75, § 6506, and the ever-present emergency medical services added fine of \$ 10, Pa. Stat. Ann. tit. 35, § 6384(a), a conviction of a speeding charge may have serious driving-privilege, point-accumulation and financial implications for the driver. Thus, common sense dictates that it is essential that the factfinder be presented with sufficient evidence of a precise speed that leaves no room for conjecture and doubt.

**COUNSEL:** [\*1] *J. Wesley Rowden, assistant district attorney, for the commonwealth.*

*Jeffrey C. Peters, pro se.*

**JUDGES:** THOMAS, P.J.

**OPINION BY:** THOMAS, P.J.

**OPINION:**

[\*\*33] Appeal from summary conviction.

THOMAS, P.J., November 2, 1989 -- This matter before us is an appeal of a summary speeding conviction in violation of 75 P.S. § 3362(a)(2), for driving in excess of the posted speed limit. Defendant was "clocked" at 77.5 mph in a 55-mph zone by using a measured distance and an approved stopwatch.

**FACTUAL BACKGROUND**

The commonwealth established the following facts through the testimony of its witness, Frank Baranyai, chief of police of the Cochranon Police Department.

Sometime in the early part of 1989, the Cochranon Police Department purchased a hand-operated Acutrak Speek Chronometer stopwatch manufactured by Acutrak. The instructions accompanying the stopwatch required lines to be drawn upon the road so the watch operator could determine when to start and stop the watch.

[\*\*34] The instructions used, as an example, a distance of 132 feet or 0.025 miles to demonstrate the mathematical calculations to determine the speed. However, any distance could be entered into the electronic component [\*2] of the watch, which would then automatically convert seconds elapsed, in traversing a specific measured distance, to a speed in miles per hour. For some unexplained reason Chief Baranyai used 132 feet for his pre-measured course.

The Acutrak stopwatch was certified accurate pursuant to Department of Transportation regulations -- *67 Pa. Code § 105.71 et seq.* -- and was timely tested at Rebold's Service in Harrisburg, Pennsylvania, which was an approved testing station.

On June 23, 1989, Chief Baranyai parked his vehicle near the intersection of Route 322 and Hart Road in Cochranon, Pa. The chief had at some previous time set white lines exactly 132 feet apart on Route 322 to provide him sight markers to start and stop the Chronometer as the vehicles crossed each line.

At approximately 1:54 p.m., while monitoring the speeds of various vehicles on Route 322, defendant's white Chevrolet drove toward Chief Baranyai in a northerly direction. An elapsed time of 1.16 seconds was recorded on the hand-held chronometer when the vehicle crossed the two lines. This was automatically computed by the chronometer to be a speed of 77.5 mph, well in excess of the posted [\*3] speed limit of 55 mph. The chief subsequently stopped defendant's vehicle and issued him a citation for violating the posted speed limit. He was convicted at the district justice level, filed an appeal and competently represented himself at a de novo hearing.

Defendant argues that in such a short distance human reaction time in observing the exact time [\*\*35] the car crossed both lines and in twice pressing the chronometer timing button invites inaccuracy and doubt.

#### ISSUE

Is a pre-measured course of 132 feet, for the purpose of timing traffic to determine the speed of a vehicle, a proper distance under the Vehicle Code or Department of Transportation regulations, or do the code and/or regulations require a course in excess of 132 feet due to the potential for human error in operation of the chronometer?

#### DISCUSSION

Title *75 Pa.C.S. § 3368(c)* [HN1] provides that the rate of speed of a vehicle may be timed by a police officer using a mechanical or electrical speed-timing device. Section 3368(d) [HN2] requires the approval and testing of such devices by the Department of Transportation for accuracy at designated testing sites. *67 Pa. Code § 105.71 et seq.* [HN3] permits [\*4] department-approved and certified stopwatches to time the rate of speed of vehicles and prescribes the procedures for approval and certification. The present code and present transportation regulations do not set a minimum distance for the timing of a vehicle; whereas, the previous statute required a distance of no less than one-eighth or one-quarter of a mile. See former at *75 P.S. § 1002 (d)(1)*, P.L. 58, April 29, 1959.

Defendant postulates that the fallibility of humanity as well as the scientific truism that human reflexes are less than instantaneous, makes his speeding conviction measured over a 132-foot stretch of road and involving only 1.16 seconds grossly suspect. He cites *Commonwealth v. Alexion*, 33 Chester L. Rep. 37 (1984), which held that there [\*\*36] was an inherent potential for human error in a VASCAR-Plus speed timing device because of "an inevitable lag between the time the operator [of the device] thinks he sees the driver and actually trips and untrips the device." *Id.* at 38. In light of this potential of human error, the Chester County court found it necessary to establish a minimum distance requirement and turned to *67 Pa. Code § 105.95(a)(4)* [\*5] for guidance. This regulation was for the testing and calibration of the speed-timing device and utilizes a distance of one-tenth of a mile, or 528 feet, and the Chester County court set this as

the minimum distance.

However, in *Commonwealth v. Vishneski*, 380 Pa. Super. 495, 552 A.2d 297 (1980), the Pennsylvania Superior Court specifically overruled *Alexion*, stating that in *Alexion* the Chester County court improperly created a distance requirement where none existed. *Vishneski*, *supra*.

The Superior Court in *Commonwealth v. Ness and Smith*, 341 Pa. Super. 225, 491 A.2d 234 (1985), held in a case very similar to this one that there was no minimum distance requirement for the use of an approved stopwatch, and there was no impropriety when the officer used a pre-measured course of only 200 feet for the Ness timing and 600 feet for Smith.

The Statutory Construction Act of 1972, P.L. 1339, 1 Pa.C.S. § 1501-1991, states with regard to re-enactments:[HN4]

"Whenever a statute re-enacts a former statute the provisions common to both statutes shall date from their first adoption. Such provisions only of the former statute as are omitted [\*6] from the re-enactment shall be deemed abrogated, and only the new or changed provisions shall be deemed by the law in [\*\*37] the effective date of the re-enactment." 1 Pa.C.S. § 1961. (emphasis supplied)

The court in *Vishneski* went on to conclude that the omitted provisions were intended to be abrogated and held that the one-eighth of a mile distance requirement was not intended to be maintained by the legislature.

Thus, we are faced with statutory and decisional law which seemingly attributes infallibility to a police officer using a hand-held chronometer or stopwatch when measuring the speed of a car over a measured distance of his choice. In this regard, we note that section 3368(c)(4) of the Vehicle Code [HN5] has a built-in "safety factor" when arrests for speeding are made by radar or electronic devices using sensor tapes laid across the highway or speed-timing devices as used here. For all speed-timing devices there is a six-mph "safety factor" before a conviction may be had. For highway sensor devices and hand-held devices there is a 10 mph "safety factor," where the speed limit is less than 55 mph -- except in a school zone. Thus, the legislature recognized the [\*7] possibility of human error when dealing with split-second timing. Unfortunately, the legislature has not prescribed a minimum measured distance requirement before authorized timing devices may be used.

We recently addressed this problem in the unreported case of *Commonwealth v. St. John*, Crawford County 1989-37, where the borough police used a hand-held chronometer and a measured distance of only 75 feet and charged the errant driver with a speed of 58.13 mph in a 35-mph zone. After hearing, we simply could not find that over this short distance, and allowing for the human reaction time factor, that the police officer's reported speed was a mathematical certainty. Accordingly, our verdict [\*\*38] was that the driver had exceeded the prescribed 35-mph limit, but we were not satisfied beyond a reasonable doubt that he was proceeding at the speed calculated by the officer's timing device. Accordingly, we found him guilty of a 47-mph speed.

Likewise in this case, we are apprehensive about the infallible reliability of the reported speed over such a short distance. We intend no criticism of the arresting officer as he is highly trained in the use of this device, and in fact instructs [\*8] other police officers in its proper use. However, if measured-distance (stopwatch) calculations are to be used as a basis for speeding convictions, and if the Vehicle Code remains silent in prescribing a mandatory minimum measured distance, what is to prevent over-zealous police officers from arbitrarily using an unreasonable short distance of their choosing? If the courts of this county were to permit police to convict for speeding at a precise mechanically calculated speed over a measured 75 feet, or the 132 feet used in the instant case, would we then invite convictions by stopwatch when the measured distance was 20, 40 or 60 feet?

In the instant case, defendant testified that he was familiar with the road and was in no great hurry. He frankly admitted he was exceeding the speed limit, and that with his driving experience he could not have been exceeding 63 mph. Defendant, without objection, presented a certificate showing he had his own speedometer checked in a timely

manner by an approved testing station and at 50 and 60 mph his speedometer was reporting two mph in excess of his true speed.

We have no evidence in the case before us of the impact of the conviction of this defendant [\*9] regarding points toward a suspension of his driving privileges [\*\*39] under 75 P.S. § 1539. \* Also, we note it is obvious that [HN6] with the amount of the speeding fine based on speed (75 P.S. § 3362), and the catastrophic-loss surcharge (75 P.S. § 6506) and the ever-present emergency medical services added fine of \$ 10 (35 P.S. § 6384(a)), a conviction of a speeding charge may have serious driving-privilege, point-accumulation and financial implications for the driver. Thus, common sense dictates that it is essential that the factfinder be presented with sufficient evidence of a precise speed that leaves no room for conjecture and doubt.

\* We do not imply that this type of evidence is admissible or relevant in the adjudication of a speeding charge.

We note also that we were presented with no studies or the results of human reaction tests using this type of timing device that would enlighten us and convince us beyond a reasonable doubt that the chance of the officer being mistaken by a fraction of a second [\*10] in his timing was extremely remote. Simple mathematical calculation shows that had the time been 1.64 seconds instead of 1.16 seconds (a difference of 0.48 of a second) the "clocking" would have established defendant's speed at 55 miles per hour. Likewise, for a 132-foot distance clocked in 1.16 seconds, if the timing were in error in favor of or against the driver by a mere 0.16 of a second, it would represent a speed of either 68 miles per hour or 90 miles per hour. Obviously, the greater the measured distance the less impact minor human reflex error would have on the automatically calculated speed.

We conclude therefore, that we cannot find this defendant guilty of speeding at 77.5 mph in a 55-mph zone under the facts of this case, but we are convinced that he exceeded the speed limit and [\*\*40] accept defendant's testimony that he could not have been exceeding the limit by more than eight mph, and find that in fact he is guilty of a 63-mph speed in a 55-mph zone.

We are reluctant to adopt an appropriate minimum measured distance applicable to all cases of this type coming before the courts of this county absent expert opinions resulting from recognized tests. We suggest that [\*11] this measured-distance problem is one for legislative correction by appropriate amendments to section 3368 or other sections of the Vehicle Code.

167 of 195 DOCUMENTS

**Commonwealth v. Peters**

no. 1989-566

**COMMON PLEAS COURT OF CRAWFORD COUNTY, PENNSYLVANIA***1989 Pa. Dist. & Cnty. Dec. LEXIS 97; 4 Pa. D. & C.4th 33***November 2, 1989, Decided****CASE SUMMARY:**

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**OUTCOME:** The court found defendant guilty of speeding at 63 mph in a 55-mph zone.

**CORE TERMS:** distance, speed, mph, feet, measured, timing, stopwatch, speeding, mile, chronometer, speed limit, regulation, testing, driver, zone, speed-timing, short distance, human error, hand-held, driving, posted, safety factor, automatically, re-enactment, mathematical, pre-measured, calculation, calculated, exceeding, crossed

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[HN1] *75 Pa. Cons. Stat. § 3368(c)* provides that the rate of speed of a vehicle may be timed by a police officer using a mechanical or electrical speed-timing device.

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[HN3] 67 Pa. Code § 105.71 et seq., permits department-approved and certified stopwatches to time the rate of speed of vehicles and prescribes the procedures for approval and certification. The present code and present transportation regulations do not set a minimum distance for the timing of a vehicle; whereas, the previous statute required a distance of no less than one-eighth or one-quarter of a mile. Former Pa. Stat. Ann. tit. 75, § 1002(d)(1) (1959).

***Governments > Legislation > Effect & Operation > Operability******Governments > Legislation > Interpretation***

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***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Penalties******Evidence > Privileges > General Overview******Evidence > Procedural Considerations > Weight & Sufficiency***

[HN6] With the amount of the speeding fine based on speed, Pa. Stat. Ann. tit. 75, § 3362, and the catastrophic-loss surcharge, Pa. Stat. Ann. tit. 75, § 6506, and the ever-present emergency medical services added fine of \$ 10, Pa. Stat. Ann. tit. 35, § 6384(a), a conviction of a speeding charge may have serious driving-privilege, point-accumulation and financial implications for the driver. Thus, common sense dictates that it is essential that the factfinder be presented with sufficient evidence of a precise speed that leaves no room for conjecture and doubt.

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**JUDGES:** THOMAS, P.J.

**OPINION BY:** THOMAS, P.J.

**OPINION:**

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[\*\*34] The instructions used, as an example, a distance of 132 feet or 0.025 miles to demonstrate the mathematical calculations to determine the speed. However, any distance could be entered into the electronic component [\*2] of the watch, which would then automatically convert seconds elapsed, in traversing a specific measured distance, to a speed in miles per hour. For some unexplained reason Chief Baranyai used 132 feet for his pre-measured course.

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Defendant argues that in such a short distance human reaction time in observing the exact time [\*\*35] the car crossed both lines and in twice pressing the chronometer timing button invites inaccuracy and doubt.

#### ISSUE

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#### DISCUSSION

Title *75 Pa.C.S. § 3368(c)* [HN1] provides that the rate of speed of a vehicle may be timed by a police officer using a mechanical or electrical speed-timing device. Section 3368(d) [HN2] requires the approval and testing of such devices by the Department of Transportation for accuracy at designated testing sites. *67 Pa. Code § 105.71 et seq.* [HN3] permits [\*4] department-approved and certified stopwatches to time the rate of speed of vehicles and prescribes the procedures for approval and certification. The present code and present transportation regulations do not set a minimum distance for the timing of a vehicle; whereas, the previous statute required a distance of no less than one-eighth or one-quarter of a mile. See former at *75 P.S. § 1002 (d)(1)*, P.L. 58, April 29, 1959.

Defendant postulates that the fallibility of humanity as well as the scientific truism that human reflexes are less than instantaneous, makes his speeding conviction measured over a 132-foot stretch of road and involving only 1.16 seconds grossly suspect. He cites *Commonwealth v. Alexion*, 33 Chester L. Rep. 37 (1984), which held that there [\*\*36] was an inherent potential for human error in a VASCAR-Plus speed timing device because of "an inevitable lag between the time the operator [of the device] thinks he sees the driver and actually trips and untrips the device." *Id.* at 38. In light of this potential of human error, the Chester County court found it necessary to establish a minimum distance requirement and turned to *67 Pa. Code § 105.95(a)(4)* [\*5] for guidance. This regulation was for the testing and calibration of the speed-timing device and utilizes a distance of one-tenth of a mile, or 528 feet, and the Chester County court set this as

the minimum distance.

However, in *Commonwealth v. Vishneski*, 380 Pa. Super. 495, 552 A.2d 297 (1980), the Pennsylvania Superior Court specifically overruled *Alexion*, stating that in *Alexion* the Chester County court improperly created a distance requirement where none existed. *Vishneski*, *supra*.

The Superior Court in *Commonwealth v. Ness and Smith*, 341 Pa. Super. 225, 491 A.2d 234 (1985), held in a case very similar to this one that there was no minimum distance requirement for the use of an approved stopwatch, and there was no impropriety when the officer used a pre-measured course of only 200 feet for the Ness timing and 600 feet for Smith.

The Statutory Construction Act of 1972, P.L. 1339, 1 Pa.C.S. § 1501-1991, states with regard to re-enactments:[HN4]

"Whenever a statute re-enacts a former statute the provisions common to both statutes shall date from their first adoption. Such provisions only of the former statute as are omitted [\*6] from the re-enactment shall be deemed abrogated, and only the new or changed provisions shall be deemed by the law in [\*\*37] the effective date of the re-enactment." 1 Pa.C.S. § 1961. (emphasis supplied)

The court in *Vishneski* went on to conclude that the omitted provisions were intended to be abrogated and held that the one-eighth of a mile distance requirement was not intended to be maintained by the legislature.

Thus, we are faced with statutory and decisional law which seemingly attributes infallibility to a police officer using a hand-held chronometer or stopwatch when measuring the speed of a car over a measured distance of his choice. In this regard, we note that section 3368(c)(4) of the Vehicle Code [HN5] has a built-in "safety factor" when arrests for speeding are made by radar or electronic devices using sensor tapes laid across the highway or speed-timing devices as used here. For all speed-timing devices there is a six-mph "safety factor" before a conviction may be had. For highway sensor devices and hand-held devices there is a 10 mph "safety factor," where the speed limit is less than 55 mph -- except in a school zone. Thus, the legislature recognized the [\*7] possibility of human error when dealing with split-second timing. Unfortunately, the legislature has not prescribed a minimum measured distance requirement before authorized timing devices may be used.

We recently addressed this problem in the unreported case of *Commonwealth v. St. John*, Crawford County 1989-37, where the borough police used a hand-held chronometer and a measured distance of only 75 feet and charged the errant driver with a speed of 58.13 mph in a 35-mph zone. After hearing, we simply could not find that over this short distance, and allowing for the human reaction time factor, that the police officer's reported speed was a mathematical certainty. Accordingly, our verdict [\*\*38] was that the driver had exceeded the prescribed 35-mph limit, but we were not satisfied beyond a reasonable doubt that he was proceeding at the speed calculated by the officer's timing device. Accordingly, we found him guilty of a 47-mph speed.

Likewise in this case, we are apprehensive about the infallible reliability of the reported speed over such a short distance. We intend no criticism of the arresting officer as he is highly trained in the use of this device, and in fact instructs [\*8] other police officers in its proper use. However, if measured-distance (stopwatch) calculations are to be used as a basis for speeding convictions, and if the Vehicle Code remains silent in prescribing a mandatory minimum measured distance, what is to prevent over-zealous police officers from arbitrarily using an unreasonable short distance of their choosing? If the courts of this county were to permit police to convict for speeding at a precise mechanically calculated speed over a measured 75 feet, or the 132 feet used in the instant case, would we then invite convictions by stopwatch when the measured distance was 20, 40 or 60 feet?

In the instant case, defendant testified that he was familiar with the road and was in no great hurry. He frankly admitted he was exceeding the speed limit, and that with his driving experience he could not have been exceeding 63 mph. Defendant, without objection, presented a certificate showing he had his own speedometer checked in a timely

manner by an approved testing station and at 50 and 60 mph his speedometer was reporting two mph in excess of his true speed.

We have no evidence in the case before us of the impact of the conviction of this defendant [\*9] regarding points toward a suspension of his driving privileges [\*\*39] under 75 P.S. § 1539. \* Also, we note it is obvious that [HN6] with the amount of the speeding fine based on speed (75 P.S. § 3362), and the catastrophic-loss surcharge (75 P.S. § 6506) and the ever-present emergency medical services added fine of \$ 10 (35 P.S. § 6384(a)), a conviction of a speeding charge may have serious driving-privilege, point-accumulation and financial implications for the driver. Thus, common sense dictates that it is essential that the factfinder be presented with sufficient evidence of a precise speed that leaves no room for conjecture and doubt.

\* We do not imply that this type of evidence is admissible or relevant in the adjudication of a speeding charge.

We note also that we were presented with no studies or the results of human reaction tests using this type of timing device that would enlighten us and convince us beyond a reasonable doubt that the chance of the officer being mistaken by a fraction of a second [\*10] in his timing was extremely remote. Simple mathematical calculation shows that had the time been 1.64 seconds instead of 1.16 seconds (a difference of 0.48 of a second) the "clocking" would have established defendant's speed at 55 miles per hour. Likewise, for a 132-foot distance clocked in 1.16 seconds, if the timing were in error in favor of or against the driver by a mere 0.16 of a second, it would represent a speed of either 68 miles per hour or 90 miles per hour. Obviously, the greater the measured distance the less impact minor human reflex error would have on the automatically calculated speed.

We conclude therefore, that we cannot find this defendant guilty of speeding at 77.5 mph in a 55-mph zone under the facts of this case, but we are convinced that he exceeded the speed limit and [\*\*40] accept defendant's testimony that he could not have been exceeding the limit by more than eight mph, and find that in fact he is guilty of a 63-mph speed in a 55-mph zone.

We are reluctant to adopt an appropriate minimum measured distance applicable to all cases of this type coming before the courts of this county absent expert opinions resulting from recognized tests. We suggest that [\*11] this measured-distance problem is one for legislative correction by appropriate amendments to section 3368 or other sections of the Vehicle Code.

168 of 195 DOCUMENTS

**STATE OF TENNESSEE v. MICHAEL ORTIZ**

**No. W2005-00474-CCA-R3-CD**

**COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON**

*2006 Tenn. Crim. App. LEXIS 123*

**October 4, 2005, Assigned on Briefs**

**February 8, 2006, Filed**

**PRIOR HISTORY:** [\*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed. Direct Appeal from the Criminal Court for Shelby County. No. 03-00772. James C. Beasley, Jr., Judge.

**DISPOSITION:** Judgment of the Criminal Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted in the Criminal Court for Shelby County (Tennessee) of possession of a controlled substance with intent to sell, to wit: cocaine over 300 grams. Defendant appealed.

**OVERVIEW:** Defendant argued that his consent to search and confession were involuntary and there had been no meaningful evaluation of his mental competency and/or mental illness. The State argued that defendant waived the issue because he failed to take any action to prevent the harmful effect of the alleged error by both failing to raise the issue before the trial court by asking for a competency hearing or in his motion for a new trial. The court of appeals agreed with the State. Defendant neither asked for a competency hearing nor raised any complaint about the court ordered mental evaluation in his motion for a new trial. Accordingly, defendant waived the issue.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** van, cocaine, suppression hearing, public defender, marijuana, consent to search, new trial, competency, presentation, canine, floor, motion to suppress, competency hearing, refused to answer, appointed, arrest, waived, hidden, smell, burnt, mile, conclusions of law, appointed counsel, self-representation, unequivocal, disruptive, convinced, elbow, Tennessee Rule, controlled substance

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Requirements*

[HN1] See Tenn. R. App. P. 3(e).

**COUNSEL:** David Bell and Michael Johnson, Assistant Public Defenders (at trial), and Garland Erguden, Assistant Public Defender (on appeal), for the appellant, Michael Ortiz.

Paul G. Summers, Attorney General and Reporter; Brian C. Johnson, Assistant Attorney General; William L. Gibbons, District Attorney General; and J. Robert Carter and Valerie Smith, Assistant District Attorneys General, for the appellee, State of Tennessee.

**JUDGES:** ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

**OPINION BY:** ALAN E. GLENN

**OPINION:** The defendant, Michael Ortiz, was found guilty by a Shelby County Jury of possession of a controlled substance with intent to sell, to wit: cocaine over 300 grams. He was sentenced as a Range I, standard offender to twenty years in the Department of Correction. On appeal, he argues the trial court erred in denying: (1) his motion to suppress evidence obtained from a search of his vehicle; and (2) [\*2] his motion to suppress his statement given to police. Following our review, we affirm the judgment of the trial court.

## **OPINION**

### **FACTS**

The defendant's conviction is a result of a routine traffic stop in Shelby County, Tennessee. The defendant, who gave police consent to search his van, was arrested after 18.5 pounds of cocaine was located in a hidden compartment of his vehicle. After his arrest, the defendant gave a detailed statement to police officers acknowledging that the cocaine was his and that he was transporting it from Las Vegas, Nevada, to Myrtle Beach, South Carolina, to sell. On February 6, 2003, he was indicted by the Shelby County Grand Jury for possession with intent to sell over 300 grams of cocaine (Count 1) and possession with intent to deliver over 300 grams of cocaine (Count 2). On June 23, 2004, the defendant filed motions to suppress both the cocaine found in his vehicle and his statement to the police. Subsequently, the trial court held a suppression hearing and issued findings and conclusions from the bench, denying the defendant's motions. Following a jury trial, where the defendant was convicted of both counts, the trial court merged Counts [\*3] 1 and 2 and sentenced the defendant to twenty years.

On appeal, the defendant argues that he did not have the mental capacity to consent to the search of his vehicle or give a knowing and voluntary confession.

### **Suppression Hearing**

Officer Chris Jones testified that on November 6, 2002, he and Officer Marco Yzaguirre, both assigned to the West Tennessee Drug Task Force's Interstate Interdiction Unit, n1 stopped the defendant's van after he "clocked" the defendant going 66 miles per hour in a 55 mile per hour zone on Interstate 240 with a calibrated stationary radar unit. n2 Officer Jones's in-car video camera recorded the entire stop. As he approached the driver's side window of the van, Jones "smelled the odor of burnt marijuana coming from the interior of the vehicle." The officer asked the defendant to exit the van, whereupon the defendant acknowledged traveling at 65 miles an hour. Accompanying the defendant was a young female passenger, Ms. Ortiz, n3 whom he claimed was his cousin. n4 The defendant told Jones that he was traveling from Las Vegas, Nevada, to South Carolina for his uncle's funeral, but he did not know which city he was going to.

n1 Officer Jones was employed by the Shelby County Sheriff's Department, and Officer Yzaguirre worked for the Memphis Police Department.

[\*4]

n2 Jones testified that he was certified to use the radar unit and explained that he "checked the internal calibration on the unit itself" prior to starting his shift that same morning.

n3 Ms. Ortiz's first name is not clear from the record. She was variously addressed as "Elisha," "Angelica," "Angelina," "Angela," and "Angelique" by different witnesses. For ease of writing this opinion, we will refer to her as Ms. Ortiz.

n4 Ms. Ortiz's exact relationship to the defendant is also unclear from the record. She was ultimately best described as "the unrelated-to-[the defendant]-by-blood-or-birth, ride-along friend." Ms. Ortiz was never charged, nor did she testify at the suppression hearing or trial.

Jones, after placing the defendant in the backseat of his police car, approached the passenger side of the van to talk to Ms. Ortiz, where he again smelled "burnt marijuana." Ms. Ortiz told the officer that the defendant was her brother and that the smell he detected "may have been a cigarette burning." While Jones was talking to Ms. Ortiz, Officer Yzaguirre asked the defendant for consent [\*5] to search the van. The officers had also contacted a canine officer "to bring his trained narcotic canine to the scene." Prior to searching the van, Jones discussed the marijuana smell with the defendant who acknowledged having marijuana in the car. Jones immediately advised the defendant of his Miranda rights and the defendant said there was a "joint" in the van and offered to show the officers its location. After the canine unit arrived, the van was searched and Jones found "hidden in the floor of the vehicle, approximately, 11 bundles of suspected cocaine. It did field test positive for cocaine. And the gross total weight was 18.5 pounds." The cocaine was packaged in "gray duct tape." There was also "approximately [] 4 grams of marijuana in a sock, in [the defendant's] clothing, in his luggage."

Officer Marco Yzaguirre testified that while the defendant was seated in the backseat of the police car, the officer asked for and obtained the defendant's written consent to search the van. Yzaguirre said he explained to the defendant that he did not have to give consent to search and that this was a voluntary search.

Sergeant Michael McCord, a Memphis police officer assigned [\*6] to the West Tennessee Drug Task Force, testified his canine partner, Jax, is certified and trained to detect various drugs, including cocaine. Jax makes an "aggressive indication" when he comes into contact with the smell of illegal drugs. McCord said when Jax encountered the defendant's van, "he had an aggressive bark, almost, . . . all the way around the vehicle. And he actually indicated on the, . . . both driver and passenger side rocker panels. He actually went underneath the vehicle and tried to bite at the floor of the vehicle." After Jax indicated the presence of drugs, McCord assisted Jones and Yzaguirre in searching the van where they found the cocaine hidden "in the floor of the vehicle" in an "after-market compartment" that was built into the van.

David McGriff, a supervisor with the West Tennessee Drug Task Force, interviewed the defendant following his arrest. After being readvised of his Miranda rights, the defendant gave a recorded statement to McGriff wherein he acknowledged placing more than seven kilos of cocaine wrapped in plastic wrap underneath the floor panel of his van to transport it from Las Vegas, Nevada, to Myrtle Beach, South Carolina. The defendant [\*7] said he was to receive "in the thousands of dollars" for transporting the cocaine. The defendant also told McGriff that his passenger, Ms. Ortiz, had no knowledge of the cocaine being in the van.

At the conclusion of the suppression hearing, the trial court issued oral findings from the bench. Based on the officer's smelling "burnt marijuana," the defendant's uncoerced consent, and the drug dog indicating drugs were present, the court found probable cause existed to search the defendant's van and denied the defendant's motion to suppress the cocaine. In addition, finding the defendant was advised of his rights and chose to make a statement to police "freely and voluntarily," the trial court denied the defendant's motion to suppress his statement.

## **Trial**

Officers Jones, Yzaguirre, McCord, and McGriff testified again at the trial. Each basically gave the same testimony they offered at the suppression hearing. In addition, Tara Barker, a special agent forensic scientist with the Tennessee Bureau of Investigation Crime Laboratory, testified that she tested a sample of the substance taken from the defendant's van and said it was "found to be cocaine, Schedule II."

The defendant [\*8] did not testify at either the suppression hearing or at trial.

## ANALYSIS

### I. Defendant's Competency

On appeal, the defendant's sole argument is that "under the totality of circumstances, both [his] consent to search and confession were involuntary" because "circumstances combined to overwhelm [the defendant's] will to resist." Specifically, the defendant maintains that "his consent to search and statement of admission can not be deemed knowing and voluntary without a meaningful evaluation of his mental competency and/or mental illness." The State argues the defendant waived this issue for appeal because he failed, pursuant to Tennessee Rule of Appellate Procedure 36(a), to take any action to prevent the harmful effect of the alleged error by both failing to raise this issue before the trial court by asking for a competency hearing or in his motion for a new trial. We agree with the State.

The record on appeal includes transcripts of all the defendant's pretrial proceedings. These transcripts show an articulate but uncooperative defendant who insisted upon representing himself despite the trial court's numerous advisements against doing so. In response to the trial [\*9] court's questions to determine if the defendant could in fact represent himself, the defendant either did not answer or said that "[he] would be happy to assist this Court in any way possible if he could just see [his] certificate of claim." In addition, the defendant made the following claims and requests: his name was not Michael Ortiz; n5 he was not a "Person" who was subject to the court's jurisdiction; the court should "dismiss this case for lack of evidence and failure to state a claim and want of jurisdiction;" he would accept a lawyer only if the lawyer would show him his license and "sign a contract to represent [him] zealously and rescind all contracts . . . with the State;" that the "flags [in the courtroom] get taken down immediately and have the United States peace flag brought in here with no yellow fringe around it;" and for the "prosecutor to provide serial placement number of their bar card." Early on in the proceedings, as a precaution, the trial court appointed a public defender to "sit as armchair counsel to assist" the defendant.

n5 When asked by the court what his name was, the defendant simply answered "No, it's not."

[\*10]

In November 2003, as a result of his actions and statements to the trial court during the pretrial proceedings, the defendant underwent a court-ordered mental evaluation at Memphis Mental Health Institute ("M.M.H.I.") to determine his competency to stand trial. n6 In a letter to the trial court, n7 M.M.H.I. noted that "it is the opinion of the staff that there are no known impediments that would preclude [the defendant] from adequately defending himself in a court of law" and, furthermore, the staff's "impression is [the defendant] is intentionally attempting to foil his case from progressing through the legal system by being uncooperative. His behaviors seems to be driven by secondary motives rather than mental illness."

n6 The defendant was initially evaluated at Midtown Mental Health Center. The forensic director who evaluated him informed the trial court that the defendant's "ability to confer with counsel and participate in his defense was questionable." He was then transferred to M.M.H.I. for further evaluation.

n7 Although the appellate record contains the letters to the trial court from both Midtown Mental Health Center and M.M.H.I., the letters are not marked as exhibits. However, the trial court discussed these mental

evaluations in its July 8, 2004, findings of facts and conclusions of law. Therefore, this court determines that the letters, both of which are contained in a sealed envelope, are part of the appellate record. See *State v. Bobadilla*, 181 S.W.3d 641, 2005 Tenn. LEXIS 1043, 2005 WL 3193823, at \*3 (Tenn. 2005).

[\*11]

On February 20, 2004, the defendant acknowledged to the trial court that he did "need counsel" and did not want to represent himself. The trial court immediately appointed the public defender to represent the defendant. In addition, on July 8, 2004, the trial court entered written findings of facts and conclusions of law detailing the events that led to the court's appointing the public defender's office to represent the defendant at his suppression hearing and trial:

This cause came on to be heard upon the returning of an indictment charging the defendant with the Unlawful Possession of a Controlled Substance with the intent to Sell or Deliver on February 6, 2003. Upon arraignment, February 13, 2003, the defendant refused to answer the Court's questions about his ability to employ counsel. The defendant indicated he wanted to represent himself, however as the Court attempted to question the defendant about his understanding of the law regarding self representation he refused to answer the questions in a proper manner. Even though the defendant refused to answer questions he indicated that he wanted to represent himself and the Court agreed to allow him to represent himself at [\*12] trial. On February 27, 2003, the Court designated the Public Defender's Office to assist the defendant in trial preparation. The defendant resisted any help. The case was set for trial for June 2003. The case involved a video taped arrest and search. The defendant was brought into court and allowed to watch the video as part of discovery. As a precaution the Court entered an order to have the defendant's competency determined. After examination the Doctors recommended further evaluations based on the defendant's actions. After a 30 day evaluation the Doctors concluded that the defendant was competent and that his actions and lack of cooperation were calculated and they recommended that his proceedings proceed. The case had to be reset for several months during this process and eventually in November, 2003, the matter was set for trial May 3, 2004. The Court had continually brought the defendant into Court to discuss the pitfalls of representing himself and to try to discourage such action. However, on each occasion the defendant continued with a litany of statements which had been prepared by the defendant and were read into the record by the defendant. The statements were non responsive [\*13] and the demands were immaterial and improper as regards this criminal proceeding. The defendant continued on each occasion with the same presentation and continuously filed pro se documents which had no bearing on this proceeding. On February 20, 2004, the defendant in one of his presentations advised the Court that he did not want to represent himself and that he did want an attorney, although as usual he had certain demands on that attorney which the Court would not grant. However, the Court at that point determined that the defendant was in need of legal assistance and that from that date forward the Public Defender would be handling the case and the defendant would no longer be allowed to represent himself. Since that date motions have been filed including a Motion to Suppress evidence which is set for a hearing in September and a new trial date has been set for November 1, 2004. The defendant continues to refuse to cooperate with counsel and refuses to recognize counsel without counsel complying with defendant's demands. The requirements are unrealistic and not required by law and will not be ordered by this Court. Therefore the Public Defender is proceeding without the help or [\*14] cooperation of the defendant.

"The right to assistance of counsel in preparation and presentation of a defense to a criminal charge is grounded in both the Tennessee and the United States Constitutions.' (Neither of which the defendant recognizes as authority over him) *State v. Northington*, [667] S.W.2d 57, 60 (Tenn. 1984). An accused also possesses a right to self-representation, see *State v. Gillespie*, 898 S.W.2d 738, 740 (Tenn. Crim. App. 1994),

but a 'strong presumption against waiver of the constitutional right to counsel' exists, *Northington*, 667 S.W.2d at 60. An accused's request for self-representation in a criminal proceeding must be timely, as well as clear and unequivocal. See *State v. Herrod*, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988). The defendant must know why 'he should have counsel and what he risks by refusing appointed counsel' and thus 'clearly understand the hazards of representing himself.' Further, 'the record must show that the defendant made his decision to waive counsel knowing the disadvantages and dangers of representing himself.' *State v. Goodwin*, 909 S.W.2d 35, 40-41 (Tenn. Crim. App. 1995). [\*15] *State v. Ruff*, 1999 Tenn. Crim. App. LEXIS 452, C.C.A. No. 02C01-9801-CR-00006 [ , 1999 WL 281072 (Tenn. Crim. App.) May 7, 1999).

Included in the Ruff opinion is an Appendix citing *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir. 1987) (quoting Guidelines for District Judges from (Bench Book for United States District Judges 1.02-2 to 5 (3d ed. 1986)). This court went over those exact questions and got non responsive answers from the defendant. As a result of questioning and listening to the defendant's presentations[,] this Court is not convinced that the defendant has clearly and unequivocally stated in writing or otherwise that he desires to represent himself or that he has the ability to do so. Further in light of recent cases by the Court of Criminal Appeals regarding pro se litigants who act up in Court and are removed from the proceedings and left unrepresented if elbow counsel has not been appointed, this Court concluded early on that the defendant needed elbow counsel. The defendant has stated that he refuses to recognize the Public Defender as his counsel and has refused to cooperate with his defense, as a result the Court is not convinced that the [\*16] defendant would act properly in the Trial of his cause and as a result could be removed from the proceedings. Although the defendant has not shown disrespect for nor been disruptive in the courtroom his actions although civil could be disruptive to trial proceedings. This Court is satisfied that the Public Defender will be prepared to handle the Motion to Suppress and if necessary the Trial of this cause with or without the assistance of the defendant. This Court fully recognizes the defendant's right to think as he pleases with regard to the United States and Tennessee Constitution and the authority of this Court to have jurisdiction over him, however the Court has taken an oath to uphold those Constitutions and included therein are the rights to representation or self representation.

This Court is not satisfied that the defendant has made a clear and unequivocal waiver of his right to representation and therefore the Court will Order that the defendant will not be allowed to represent himself and the case will proceed with appointed counsel.

On appeal, the defendant argues that "the M.M.H.I. report is frighteningly inept and a real abuse of State funds meant to assist the court [\*17] in making a determination of a defendant's competency." The defendant, however, neither asked for a competency hearing nor raised any complaint about the M.M.H.I. mental evaluation in his motion for a new trial. Accordingly, we agree with the State that the defendant has waived this issue. See *State v. Estes*, 655 S.W.2d 179, 182 (Tenn. Crim. App. 1983) (holding that although a court-ordered mental evaluation of the defendant was conducted, trial counsel's failure to seek a competency hearing "to insure that the matter of competency was settled before trial amounted to a waiver of that issue" under Tennessee Rule of Appellate Procedure 36(a)); Tenn. R. App. P. 3(e) (providing that [HN1] "no issue . . . shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial").

In addition, even if we had not found this issue to be waived, there is no proof in the record that the M.M.H.I. report is inaccurate. [\*18] The trial court relied on the M.M.H.I report to conclude that the defendant was competent to stand trial. The defendant is now asking us to find the report insufficient on its face. There is no basis in the record for us to make such findings, and we decline to do so. As we explained in *State v. Green*, 2000 Tenn. Crim. App. LEXIS

954, No. E1999-02204-CCA-R3-CD, 2000 WL 1839130, at \*3 (Tenn. Crim. App. Dec. 14, 2000), perm. to appeal denied (Tenn. May 21, 2001), "witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the court is not an appellate surrogate for the trier of fact."

## **II. Motions to Suppress**

As discussed above, the defendant's sole argument on appeal is that he lacked the mental capacity to consent to the search of his van and give a knowing and voluntary confession. As we have determined that this issue is without merit, we conclude that the trial court properly [\*19] denied both motions.

## **CONCLUSION**

Based on the forgoing authorities and reasoning, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE

169 of 195 DOCUMENTS

**STATE OF TENNESSEE v. MICHAEL ORTIZ**

**No. W2005-00474-CCA-R3-CD**

**COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON**

*2006 Tenn. Crim. App. LEXIS 123*

**October 4, 2005, Assigned on Briefs**

**February 8, 2006, Filed**

**PRIOR HISTORY:** [\*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed. Direct Appeal from the Criminal Court for Shelby County. No. 03-00772. James C. Beasley, Jr., Judge.

**DISPOSITION:** Judgment of the Criminal Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted in the Criminal Court for Shelby County (Tennessee) of possession of a controlled substance with intent to sell, to wit: cocaine over 300 grams. Defendant appealed.

**OVERVIEW:** Defendant argued that his consent to search and confession were involuntary and there had been no meaningful evaluation of his mental competency and/or mental illness. The State argued that defendant waived the issue because he failed to take any action to prevent the harmful effect of the alleged error by both failing to raise the issue before the trial court by asking for a competency hearing or in his motion for a new trial. The court of appeals agreed with the State. Defendant neither asked for a competency hearing nor raised any complaint about the court ordered mental evaluation in his motion for a new trial. Accordingly, defendant waived the issue.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** van, cocaine, suppression hearing, public defender, marijuana, consent to search, new trial, competency, presentation, canine, floor, motion to suppress, competency hearing, refused to answer, appointed, arrest, waived, hidden, smell, burnt, mile, conclusions of law, appointed counsel, self-representation, unequivocal, disruptive, convinced, elbow, Tennessee Rule, controlled substance

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Requirements*

[HN1] See Tenn. R. App. P. 3(e).

**COUNSEL:** David Bell and Michael Johnson, Assistant Public Defenders (at trial), and Garland Erguden, Assistant Public Defender (on appeal), for the appellant, Michael Ortiz.

Paul G. Summers, Attorney General and Reporter; Brian C. Johnson, Assistant Attorney General; William L. Gibbons, District Attorney General; and J. Robert Carter and Valerie Smith, Assistant District Attorneys General, for the appellee, State of Tennessee.

**JUDGES:** ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

**OPINION BY:** ALAN E. GLENN

**OPINION:** The defendant, Michael Ortiz, was found guilty by a Shelby County Jury of possession of a controlled substance with intent to sell, to wit: cocaine over 300 grams. He was sentenced as a Range I, standard offender to twenty years in the Department of Correction. On appeal, he argues the trial court erred in denying: (1) his motion to suppress evidence obtained from a search of his vehicle; and (2) [\*2] his motion to suppress his statement given to police. Following our review, we affirm the judgment of the trial court.

## **OPINION**

### **FACTS**

The defendant's conviction is a result of a routine traffic stop in Shelby County, Tennessee. The defendant, who gave police consent to search his van, was arrested after 18.5 pounds of cocaine was located in a hidden compartment of his vehicle. After his arrest, the defendant gave a detailed statement to police officers acknowledging that the cocaine was his and that he was transporting it from Las Vegas, Nevada, to Myrtle Beach, South Carolina, to sell. On February 6, 2003, he was indicted by the Shelby County Grand Jury for possession with intent to sell over 300 grams of cocaine (Count 1) and possession with intent to deliver over 300 grams of cocaine (Count 2). On June 23, 2004, the defendant filed motions to suppress both the cocaine found in his vehicle and his statement to the police. Subsequently, the trial court held a suppression hearing and issued findings and conclusions from the bench, denying the defendant's motions. Following a jury trial, where the defendant was convicted of both counts, the trial court merged Counts [\*3] 1 and 2 and sentenced the defendant to twenty years.

On appeal, the defendant argues that he did not have the mental capacity to consent to the search of his vehicle or give a knowing and voluntary confession.

### **Suppression Hearing**

Officer Chris Jones testified that on November 6, 2002, he and Officer Marco Yzaguirre, both assigned to the West Tennessee Drug Task Force's Interstate Interdiction Unit, n1 stopped the defendant's van after he "clocked" the defendant going 66 miles per hour in a 55 mile per hour zone on Interstate 240 with a calibrated stationary radar unit. n2 Officer Jones's in-car video camera recorded the entire stop. As he approached the driver's side window of the van, Jones "smelled the odor of burnt marijuana coming from the interior of the vehicle." The officer asked the defendant to exit the van, whereupon the defendant acknowledged traveling at 65 miles an hour. Accompanying the defendant was a young female passenger, Ms. Ortiz, n3 whom he claimed was his cousin. n4 The defendant told Jones that he was traveling from Las Vegas, Nevada, to South Carolina for his uncle's funeral, but he did not know which city he was going to.

n1 Officer Jones was employed by the Shelby County Sheriff's Department, and Officer Yzaguirre worked for the Memphis Police Department.

[\*4]

n2 Jones testified that he was certified to use the radar unit and explained that he "checked the internal calibration on the unit itself" prior to starting his shift that same morning.

n3 Ms. Ortiz's first name is not clear from the record. She was variously addressed as "Elisha," "Angelica," "Angelina," "Angela," and "Angelique" by different witnesses. For ease of writing this opinion, we will refer to her as Ms. Ortiz.

n4 Ms. Ortiz's exact relationship to the defendant is also unclear from the record. She was ultimately best described as "the unrelated-to-[the defendant]-by-blood-or-birth, ride-along friend." Ms. Ortiz was never charged, nor did she testify at the suppression hearing or trial.

Jones, after placing the defendant in the backseat of his police car, approached the passenger side of the van to talk to Ms. Ortiz, where he again smelled "burnt marijuana." Ms. Ortiz told the officer that the defendant was her brother and that the smell he detected "may have been a cigarette burning." While Jones was talking to Ms. Ortiz, Officer Yzaguirre asked the defendant for consent [\*5] to search the van. The officers had also contacted a canine officer "to bring his trained narcotic canine to the scene." Prior to searching the van, Jones discussed the marijuana smell with the defendant who acknowledged having marijuana in the car. Jones immediately advised the defendant of his Miranda rights and the defendant said there was a "joint" in the van and offered to show the officers its location. After the canine unit arrived, the van was searched and Jones found "hidden in the floor of the vehicle, approximately, 11 bundles of suspected cocaine. It did field test positive for cocaine. And the gross total weight was 18.5 pounds." The cocaine was packaged in "gray duct tape." There was also "approximately [] 4 grams of marijuana in a sock, in [the defendant's] clothing, in his luggage."

Officer Marco Yzaguirre testified that while the defendant was seated in the backseat of the police car, the officer asked for and obtained the defendant's written consent to search the van. Yzaguirre said he explained to the defendant that he did not have to give consent to search and that this was a voluntary search.

Sergeant Michael McCord, a Memphis police officer assigned [\*6] to the West Tennessee Drug Task Force, testified his canine partner, Jax, is certified and trained to detect various drugs, including cocaine. Jax makes an "aggressive indication" when he comes into contact with the smell of illegal drugs. McCord said when Jax encountered the defendant's van, "he had an aggressive bark, almost, . . . all the way around the vehicle. And he actually indicated on the, . . . both driver and passenger side rocker panels. He actually went underneath the vehicle and tried to bite at the floor of the vehicle." After Jax indicated the presence of drugs, McCord assisted Jones and Yzaguirre in searching the van where they found the cocaine hidden "in the floor of the vehicle" in an "after-market compartment" that was built into the van.

David McGriff, a supervisor with the West Tennessee Drug Task Force, interviewed the defendant following his arrest. After being readvised of his Miranda rights, the defendant gave a recorded statement to McGriff wherein he acknowledged placing more than seven kilos of cocaine wrapped in plastic wrap underneath the floor panel of his van to transport it from Las Vegas, Nevada, to Myrtle Beach, South Carolina. The defendant [\*7] said he was to receive "in the thousands of dollars" for transporting the cocaine. The defendant also told McGriff that his passenger, Ms. Ortiz, had no knowledge of the cocaine being in the van.

At the conclusion of the suppression hearing, the trial court issued oral findings from the bench. Based on the officer's smelling "burnt marijuana," the defendant's uncoerced consent, and the drug dog indicating drugs were present, the court found probable cause existed to search the defendant's van and denied the defendant's motion to suppress the cocaine. In addition, finding the defendant was advised of his rights and chose to make a statement to police "freely and voluntarily," the trial court denied the defendant's motion to suppress his statement.

## **Trial**

Officers Jones, Yzaguirre, McCord, and McGriff testified again at the trial. Each basically gave the same testimony they offered at the suppression hearing. In addition, Tara Barker, a special agent forensic scientist with the Tennessee Bureau of Investigation Crime Laboratory, testified that she tested a sample of the substance taken from the defendant's van and said it was "found to be cocaine, Schedule II."

The defendant [\*8] did not testify at either the suppression hearing or at trial.

## ANALYSIS

### I. Defendant's Competency

On appeal, the defendant's sole argument is that "under the totality of circumstances, both [his] consent to search and confession were involuntary" because "circumstances combined to overwhelm [the defendant's] will to resist." Specifically, the defendant maintains that "his consent to search and statement of admission can not be deemed knowing and voluntary without a meaningful evaluation of his mental competency and/or mental illness." The State argues the defendant waived this issue for appeal because he failed, pursuant to Tennessee Rule of Appellate Procedure 36(a), to take any action to prevent the harmful effect of the alleged error by both failing to raise this issue before the trial court by asking for a competency hearing or in his motion for a new trial. We agree with the State.

The record on appeal includes transcripts of all the defendant's pretrial proceedings. These transcripts show an articulate but uncooperative defendant who insisted upon representing himself despite the trial court's numerous advisements against doing so. In response to the trial [\*9] court's questions to determine if the defendant could in fact represent himself, the defendant either did not answer or said that "[he] would be happy to assist this Court in any way possible if he could just see [his] certificate of claim." In addition, the defendant made the following claims and requests: his name was not Michael Ortiz; n5 he was not a "Person" who was subject to the court's jurisdiction; the court should "dismiss this case for lack of evidence and failure to state a claim and want of jurisdiction;" he would accept a lawyer only if the lawyer would show him his license and "sign a contract to represent [him] zealously and rescind all contracts . . . with the State;" that the "flags [in the courtroom] get taken down immediately and have the United States peace flag brought in here with no yellow fringe around it;" and for the "prosecutor to provide serial placement number of their bar card." Early on in the proceedings, as a precaution, the trial court appointed a public defender to "sit as armchair counsel to assist" the defendant.

n5 When asked by the court what his name was, the defendant simply answered "No, it's not."

[\*10]

In November 2003, as a result of his actions and statements to the trial court during the pretrial proceedings, the defendant underwent a court-ordered mental evaluation at Memphis Mental Health Institute ("M.M.H.I.") to determine his competency to stand trial. n6 In a letter to the trial court, n7 M.M.H.I. noted that "it is the opinion of the staff that there are no known impediments that would preclude [the defendant] from adequately defending himself in a court of law" and, furthermore, the staff's "impression is [the defendant] is intentionally attempting to foil his case from progressing through the legal system by being uncooperative. His behaviors seems to be driven by secondary motives rather than mental illness."

n6 The defendant was initially evaluated at Midtown Mental Health Center. The forensic director who evaluated him informed the trial court that the defendant's "ability to confer with counsel and participate in his defense was questionable." He was then transferred to M.M.H.I. for further evaluation.

n7 Although the appellate record contains the letters to the trial court from both Midtown Mental Health Center and M.M.H.I., the letters are not marked as exhibits. However, the trial court discussed these mental

evaluations in its July 8, 2004, findings of facts and conclusions of law. Therefore, this court determines that the letters, both of which are contained in a sealed envelope, are part of the appellate record. See *State v. Bobadilla*, 181 S.W.3d 641, 2005 Tenn. LEXIS 1043, 2005 WL 3193823, at \*3 (Tenn. 2005).

[\*11]

On February 20, 2004, the defendant acknowledged to the trial court that he did "need counsel" and did not want to represent himself. The trial court immediately appointed the public defender to represent the defendant. In addition, on July 8, 2004, the trial court entered written findings of facts and conclusions of law detailing the events that led to the court's appointing the public defender's office to represent the defendant at his suppression hearing and trial:

This cause came on to be heard upon the returning of an indictment charging the defendant with the Unlawful Possession of a Controlled Substance with the intent to Sell or Deliver on February 6, 2003. Upon arraignment, February 13, 2003, the defendant refused to answer the Court's questions about his ability to employ counsel. The defendant indicated he wanted to represent himself, however as the Court attempted to question the defendant about his understanding of the law regarding self representation he refused to answer the questions in a proper manner. Even though the defendant refused to answer questions he indicated that he wanted to represent himself and the Court agreed to allow him to represent himself at [\*12] trial. On February 27, 2003, the Court designated the Public Defender's Office to assist the defendant in trial preparation. The defendant resisted any help. The case was set for trial for June 2003. The case involved a video taped arrest and search. The defendant was brought into court and allowed to watch the video as part of discovery. As a precaution the Court entered an order to have the defendant's competency determined. After examination the Doctors recommended further evaluations based on the defendant's actions. After a 30 day evaluation the Doctors concluded that the defendant was competent and that his actions and lack of cooperation were calculated and they recommended that his proceedings proceed. The case had to be reset for several months during this process and eventually in November, 2003, the matter was set for trial May 3, 2004. The Court had continually brought the defendant into Court to discuss the pitfalls of representing himself and to try to discourage such action. However, on each occasion the defendant continued with a litany of statements which had been prepared by the defendant and were read into the record by the defendant. The statements were non responsive [\*13] and the demands were immaterial and improper as regards this criminal proceeding. The defendant continued on each occasion with the same presentation and continuously filed pro se documents which had no bearing on this proceeding. On February 20, 2004, the defendant in one of his presentations advised the Court that he did not want to represent himself and that he did want an attorney, although as usual he had certain demands on that attorney which the Court would not grant. However, the Court at that point determined that the defendant was in need of legal assistance and that from that date forward the Public Defender would be handling the case and the defendant would no longer be allowed to represent himself. Since that date motions have been filed including a Motion to Suppress evidence which is set for a hearing in September and a new trial date has been set for November 1, 2004. The defendant continues to refuse to cooperate with counsel and refuses to recognize counsel without counsel complying with defendant's demands. The requirements are unrealistic and not required by law and will not be ordered by this Court. Therefore the Public Defender is proceeding without the help or [\*14] cooperation of the defendant.

"The right to assistance of counsel in preparation and presentation of a defense to a criminal charge is grounded in both the Tennessee and the United States Constitutions.' (Neither of which the defendant recognizes as authority over him) *State v. Northington*, [667] S.W.2d 57, 60 (Tenn. 1984). An accused also possesses a right to self-representation, see *State v. Gillespie*, 898 S.W.2d 738, 740 (Tenn. Crim. App. 1994),

but a 'strong presumption against waiver of the constitutional right to counsel' exists, *Northington*, 667 S.W.2d at 60. An accused's request for self-representation in a criminal proceeding must be timely, as well as clear and unequivocal. See *State v. Herrod*, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988). The defendant must know why 'he should have counsel and what he risks by refusing appointed counsel' and thus 'clearly understand the hazards of representing himself.' Further, 'the record must show that the defendant made his decision to waive counsel knowing the disadvantages and dangers of representing himself.' *State v. Goodwin*, 909 S.W.2d 35, 40-41 (Tenn. Crim. App. 1995). [\*15] *State v. Ruff*, 1999 Tenn. Crim. App. LEXIS 452, C.C.A. No. 02C01-9801-CR-00006 [ , 1999 WL 281072 (Tenn. Crim. App.) May 7, 1999).

Included in the Ruff opinion is an Appendix citing *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir. 1987) (quoting Guidelines for District Judges from (Bench Book for United States District Judges 1.02-2 to 5 (3d ed. 1986)). This court went over those exact questions and got non responsive answers from the defendant. As a result of questioning and listening to the defendant's presentations[,] this Court is not convinced that the defendant has clearly and unequivocally stated in writing or otherwise that he desires to represent himself or that he has the ability to do so. Further in light of recent cases by the Court of Criminal Appeals regarding pro se litigants who act up in Court and are removed from the proceedings and left unrepresented if elbow counsel has not been appointed, this Court concluded early on that the defendant needed elbow counsel. The defendant has stated that he refuses to recognize the Public Defender as his counsel and has refused to cooperate with his defense, as a result the Court is not convinced that the [\*16] defendant would act properly in the Trial of his cause and as a result could be removed from the proceedings. Although the defendant has not shown disrespect for nor been disruptive in the courtroom his actions although civil could be disruptive to trial proceedings. This Court is satisfied that the Public Defender will be prepared to handle the Motion to Suppress and if necessary the Trial of this cause with or without the assistance of the defendant. This Court fully recognizes the defendant's right to think as he pleases with regard to the United States and Tennessee Constitution and the authority of this Court to have jurisdiction over him, however the Court has taken an oath to uphold those Constitutions and included therein are the rights to representation or self representation.

This Court is not satisfied that the defendant has made a clear and unequivocal waiver of his right to representation and therefore the Court will Order that the defendant will not be allowed to represent himself and the case will proceed with appointed counsel.

On appeal, the defendant argues that "the M.M.H.I. report is frighteningly inept and a real abuse of State funds meant to assist the court [\*17] in making a determination of a defendant's competency." The defendant, however, neither asked for a competency hearing nor raised any complaint about the M.M.H.I. mental evaluation in his motion for a new trial. Accordingly, we agree with the State that the defendant has waived this issue. See *State v. Estes*, 655 S.W.2d 179, 182 (Tenn. Crim. App. 1983) (holding that although a court-ordered mental evaluation of the defendant was conducted, trial counsel's failure to seek a competency hearing "to insure that the matter of competency was settled before trial amounted to a waiver of that issue" under Tennessee Rule of Appellate Procedure 36(a)); Tenn. R. App. P. 3(e) (providing that [HN1] "no issue . . . shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial").

In addition, even if we had not found this issue to be waived, there is no proof in the record that the M.M.H.I. report is inaccurate. [\*18] The trial court relied on the M.M.H.I report to conclude that the defendant was competent to stand trial. The defendant is now asking us to find the report insufficient on its face. There is no basis in the record for us to make such findings, and we decline to do so. As we explained in *State v. Green*, 2000 Tenn. Crim. App. LEXIS

954, No. E1999-02204-CCA-R3-CD, 2000 WL 1839130, at \*3 (Tenn. Crim. App. Dec. 14, 2000), perm. to appeal denied (Tenn. May 21, 2001), "witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the court is not an appellate surrogate for the trier of fact."

## **II. Motions to Suppress**

As discussed above, the defendant's sole argument on appeal is that he lacked the mental capacity to consent to the search of his van and give a knowing and voluntary confession. As we have determined that this issue is without merit, we conclude that the trial court properly [\*19] denied both motions.

## **CONCLUSION**

Based on the forgoing authorities and reasoning, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE

170 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF TENNESSEE v. ZANE ALLEN DAVIS, JR.****No. M2000-00737-CCA-R3-CD****COURT OF CRIMINAL APPEALS OF TENNESSEE, MIDDLE SECTION, AT  
NASHVILLE***2000 Tenn. Crim. App. LEXIS 986***July 19, 2000, Assigned on Briefs  
December 28, 2000, Decided**

**PRIOR HISTORY:** [\*1] Direct Appeal from the Circuit Court for Williamson County No. 11-108-598 Timothy L. Easter, Judge.

**DISPOSITION:** Judgment of the Circuit Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Circuit Court for Williamson County (Tennessee) that convicted him of driving with blood alcohol of .10 percent or more.

**OVERVIEW:** An officer observed defendant drag racing and subjected him to field sobriety tests, which he failed. A blood test indicated his blood alcohol level was .23 percent. Defendant was convicted for driving under the influence and appealed. Defendant argued that the trial court erred in the following ways, it ruled that the State was not required to provide him with documentation pertaining to the reliability of his blood alcohol test, it quashed his subpoena duces tecum requesting the State's expert to bring documentation previously ruled undiscoverable under Tenn. R. Crim. P. 16 to trial, it allowed the State's expert witness to testify without laying the proper foundation, and it limited his proof regarding the arresting officer's motive. The court found that defendant failed to make offers of proof regarding the reliability of the blood test or his quashed subpoena. Testimony regarding the blood test was proper, as the tests were routinely used to determine whether a person was driving while intoxicated and were reliable. The motive of the arresting officer was not relevant where the officer showed that sufficient probable cause existed to believe that a crime had been committed.

**OUTCOME:** Judgment affirmed; defendant failed to make offers of proof regarding the reliability of the blood testing equipment and his quashed subpoena duces tecum, testimony regarding the blood alcohol test was proper, and the motive of the arresting officer was irrelevant where sufficient probable cause existed to believe that a crime had been committed.

**CORE TERMS:** blood alcohol, driving, subpoena, subpoena duces tecum, driver, blood, testing, reliability, motive,

scientific evidence, lab, intoxicated, laboratory, scientific, admissibility, documentation, non-discoverable, discovery, analyzed, trier of fact, motion to quash, accuracy, license, arrest, tested, expert witness, arresting, entitled to relief, blood sample, trustworthiness

#### **LexisNexis(R) Headnotes**

##### ***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Jencks Act***

[HN1] See Tenn. R. Crim. P. 16(a)(1)(C).

##### ***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests***

[HN2] See Tenn. R. Crim. P. 16(a)(1)(D).

##### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

###### ***Evidence > Scientific Evidence > Blood Alcohol***

[HN3] Blood alcohol tests are routinely used in Tennessee to determine whether a person was intoxicated at a certain time. And, Tennessee state law provides for admissibility of such tests in cases involving driving under the influence of an intoxicant. *Tenn. Code Ann. § 55-10-407(a)* (1997). However, such tests are admissible only when it can be proven that the sample was taken by a properly trained person and that a proper chain of custody was established for the period of time between when the blood was drawn and the time it was analyzed. *Tenn. Code Ann. § 55-10-410* (1997). Furthermore, it must be shown the testing device is scientifically acceptable and accurate for the purpose that it is being employed.

##### ***Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

###### ***Evidence > Scientific Evidence > Blood & Bodily Fluids***

###### ***Evidence > Scientific Evidence > Daubert Standard***

[HN4] It is the quality, objectiveness, which makes scientific evidence highly consequential, as science cannot be readily impugned, and it can be similarly fruitless to argue against results acquired from a machine. In the interests of justice, a court must do everything reasonably within its power to ensure that scientific evidence is accurate so as not to mislead the finders of fact. When discovered, inaccuracies in particular test results go only to the weight of the evidence, not its admissibility, with the weight to be given the evidence a question of fact for the trier of fact in each case.

##### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

###### ***Evidence > Scientific Evidence > General Overview***

[HN5] Accuracy is important when determining admissibility of any scientific test results and, therefore, it is logical to consider information concerning the accuracy of the test instruments as important for defense purposes.

##### ***Criminal Law & Procedure > Discovery & Inspection > Subpoenas***

[HN6] See Tenn. R. Crim. P. 17(c).

##### ***Criminal Law & Procedure > Discovery & Inspection > Subpoenas***

[HN7] The trial court is permitted to quash or modify a subpoena duces tecum if compliance would be unreasonable or oppressive.

***Evidence > Relevance > Relevant Evidence***

[HN8] Generally, the admissibility of evidence is governed by standards of relevancy and reliability. Tenn. R. Evid. 402.

***Evidence > Scientific Evidence > General Overview***

[HN9] The standards governing admissibility of expert scientific proof are as follows: under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

***Evidence > Scientific Evidence > Daubert Standard******Evidence > Testimony > Experts > Kelly-Frye Process***

[HN10] The non-exclusive list of factors to determine reliability of scientific evidence are useful in applying Tenn. R. Evid. 702, 703. A trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. Although the trial court must analyze the science and not merely the qualifications, demeanor or conclusions of experts, the court need not weigh or choose between two legitimate but conflicting scientific views. The court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation.

***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN11] The admissibility of expert and scientific evidence in particular is also governed by Tenn. R. Evid. 702, 703.

***Evidence > Testimony > Experts > General Overview***

[HN12] See Tenn. R. Evid. 702.

***Evidence > Testimony > Experts > General Overview***

[HN13] See Tenn. R. Evid. 703.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence******Evidence > Scientific Evidence > Daubert Standard******Evidence > Testimony > Experts > Admissibility***

[HN14] The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. The trial court rules on questions regarding the admissibility, qualifications, relevancy and competency of expert testimony.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence******Evidence > Scientific Evidence > Daubert Standard***

[HN15] A trial court must first determine (1) whether the evidence will substantially assist the trier of fact to determine a fact in issue and (2) whether the facts and data underlying the evidence indicate a lack of trustworthiness.

*Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Search & Seizure > General Overview*

[HN16] The motive of an arresting officer is not relevant where the officer can show that sufficient probable cause existed to believe that a crime had been committed. Put another way, the underlying intent or motivation of officers involved in an arrest or seizure is immaterial where the activity undertaken is precisely the same as would have occurred had the intent or motivation been entirely absent from the case.

**COUNSEL:** Lee Ofman, Franklin, Tennessee, for the appellant, Zane Allen Davis, Jr.

Paul G. Summers, Attorney General and Reporter; Marvin S. Blair, Jr., Assistant Attorney General; Ronald L. Davis, District Attorney General; Lee E. Dryer, Assistant District Attorney.

**JUDGES:** THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J., and NORMA MCGEE OGLE, J., joined.

**OPINION BY:** THOMAS T. WOODALL

**OPINION:** Defendant Zane Allen Davis was found guilty by a Williamson County jury of violating *Tenn. Code Ann. § 55-10-401(a)(2)*, driving a vehicle while the alcohol concentration in the driver's blood or breath was ten-hundredths of one percent (0.10%) or more, a Class A misdemeanor. The trial court sentenced Defendant to eleven months and twenty-nine days, with the sentence suspended after Defendant served thirty days in the County Jail, and a \$ 1250 fine. Defendant raises the following issues in his appeal: (1) whether the trial court erred when it ruled that the State was not required [\*2] under Tenn. R. Crim. P. 16 to provide Defendant with documentation pertaining to the reliability of his blood alcohol test results; (2) whether the trial court erred when it quashed Defendant's subpoena duces tecum requesting the State's expert to bring documentation, previously ruled undiscoverable under Tenn. R. Crim. P. 16, to trial; (3) whether the trial court erred by allowing the State's expert witness to testify without first laying the proper foundation; and (4) whether the trial court erred when it limited Defendant's proof at trial regarding the arresting officer's motive. After a review of the record, we affirm the judgment of the trial court.

On May 11, 1998, the Williamson County Grand Jury indicted Defendant Zane Allen Davis for driving under the influence ("DUI") of an intoxicant, driving while the alcohol concentration in Defendant's blood or breath was ten-hundredths of one percent (0.10%) or more, driving on a revoked license, second-offense DUI, and second-offense unlawfully driving on a revoked license as a result of prior offense. On November 18, 1999, a Williamson County jury found Defendant guilty of driving with blood alcohol of ten-hundredths of one percent [\*3] or more, a Class A misdemeanor, and not guilty of driving on a revoked license; the remaining charges were dismissed.

In his motion for a new trial, Defendant claimed that the State suppressed evidence material to the preparation of his defense. Specifically, this evidence consisted of data concerning the reliability of the instrument used to acquire the blood alcohol test results used in evidence against Defendant at trial. This information was requested in a discovery motion and through subpoena duces tecum which were denied and quashed, respectively. After a sentencing hearing, the trial court sentenced Defendant to eleven months and twenty-nine days, with the sentence to be suspended after Defendant serves thirty days in the County Jail. In addition, the trial court revoked Defendant's license for a period of one year (with application for restricted license available) and required that Defendant attend Alcohol Safety School. Defendant raises the following issues in his appeal: (1) whether the trial court erred when it ruled that the State was not required under Tenn. R. Crim. P. 16 to provide Defendant with documentation pertaining to the reliability of his blood alcohol test; [\*4] (2) whether the trial court erred when it quashed Defendant's subpoena duces tecum requesting the State's expert to bring documentation previously ruled undiscoverable under Rule 16 to trial; (3) whether the trial court erred by allowing the State's expert witness to testify without first laying the proper foundation; and (4) whether the trial court erred when it limited Defendant's proof regarding the arresting officer's motive. After a review of the record, we

affirm the judgment of the trial court.

## I. FACTS

Adrian Breedlove, an officer with the Brentwood Police Department, testified at trial that he was on duty the evening of February 17, 1998, when he observed two trucks traveling in excess of the posted speed limit. Using radar, Breedlove clocked the speed of the vehicles at fifty-two miles per hour, twenty-two miles per hour over the posted maximum speed. Breedlove testified that he pursued the vehicles, using his lights and siren, but the drivers of both trucks ignored him. Ultimately, Breedlove caught up with them when they stopped in the parking lot of O'Charley's restaurant.

Officer Breedlove testified that the drivers of the trucks were identified as Zane Allen [\*5] Davis, the Defendant, and a friend of Defendant's named Thorpe Weber. When Breedlove first confronted the two men, both drivers "smelled like alcohol." Consequently, Breedlove questioned them both and administered standard field sobriety tests ("FST") to determine whether they were fit to drive. Weber passed the sobriety tests and was released with a citation for speeding. Defendant, on the other hand, failed both tests given him: the one-leg-stand and the walk-and-turn test. Breedlove further testified that Defendant also had bloodshot, watery eyes and that his speech was slurred. Moreover, Defendant was unsteady on his feet and admitted that he had been drinking earlier. For the foregoing reasons, Breedlove arrested Defendant and explained the Implied Consent Law to him. When Defendant agreed to submit to a blood alcohol test, Breedlove accompanied him to the Williamson Medical Center for testing. Breedlove received the blood sample from the hospital technician, sealed and initialed the tube, then placed it into a tamper-proof Tennessee Bureau of Investigation evidence box for storage at the police department until it could be taken to the crime laboratory for analysis.

In addition [\*6] to his duties as a police officer, Officer Breedlove testified that he is a certified DUI Instructor. As such, Breedlove is qualified to train other officers in methods of detecting and apprehending intoxicated drivers. Breedlove explained that the standardized FSTs given Tennessee drivers are recognized and administered nationally. To fail a test, the driver must exhibit two or more "clues" indicating intoxication while he being tested. For instance, eight "clues" exist for the walk-and-turn test. These include losing one's balance, starting too early, raising one's arms, stopping without reason, and not following the officer's directions. The National Highway Transportation & Safety Administration has determined that a suspect who evinces two or more clues for either FST can be considered too intoxicated to lawfully drive. Breedlove testified that Defendant exhibited more than two "clues" for both tests: during the one-leg stand test Defendant swayed and repeatedly dropped his foot; during the walk-and-turn test, Defendant turned improperly, raised his arms, and then finally gave up, stating that he was unable to complete the exercise. As a result of Defendant's performance on the [\*7] FSTs and Breedlove's experience, he concluded that Defendant was too intoxicated to drive.

John Harrison, a forensic toxicologist working in the Tennessee Bureau of Investigation crime laboratory, testified that he analyzed Defendant's blood. Harrison testified that he has worked as a toxicologist with the TBI for twelve years and that he has analyzed in excess of 40,000 samples in that time period. Harrison earned a B.S. degree in medical technology and also worked in a hospital laboratory for twelve years prior to his job with the TBI. The TBI crime laboratory which tested Defendant's sample received national accreditation from the American Society of Crime Lab Directors in 1994. Harrison testified that the lab must be periodically scrutinized by forensic specialists across the nation concerning numerous aspects of its work including procedures, security, personnel qualifications, and quality control in order for the lab to maintain its accreditation status. In addition, the lab is required to use standards to periodically check proficiency. Instruments are calibrated and equipment is checked on a daily basis.

Harrison testified at length regarding his analysis of Defendant's blood--the [\*8] various steps he took and the theories underlying many of the lab's testing procedures. Harrison described how proficiency standards are run and gave a cursory explanation of gas chromatography, which is the scientific method used by the TBI for separating mixtures during blood testing procedures. Harrison testified that, prior to all tests, he notes the condition of the sample when

received and runs a series of standards through the instrument to insure proper functioning and accuracy of the instrument. Harrison said that standards are typically run after every ten samples and also upon completion of an analysis. Regarding Defendant's blood sample, Harrison testified that it was received in good condition and that the standards which were run before and after Defendant's blood analysis showed that the instrument was operating properly. Harrison further testified as to the crime lab's chain of custody procedures: upon receipt of a sample (usually via U.S. Postal Service), responsibility for its care belongs to the evidence technician who assigns the sample a number and gives it to Harrison. Harrison testified that he then analyzed Defendant's blood sample and prepared a report of the [\*9] test results: Defendant's blood contained 0.23 gram percent ethyl alcohol.

Regarding the numerous requests for documents which Harrison received from Defendant's counsel, Harrison testified that he did not have the time to give Defendant's case the "special attention" that counsel wanted from him. Harrison explained that since he frequently works on thousands of cases at a time, he was waiting for Defendant's counsel to "go through channels" and obtain a court order for the records he wanted. Harrison testified that if and when he received a court order, he would then comply with counsel's requests. Otherwise, he claimed that he could not accommodate him because counsel's requests were too numerous. Harrison testified that the Defendant received copies of the instrument calibration record for the actual day of testing, but he also wanted information for the six-month period of time starting three months prior to the date of Defendant's test and extending three months afterward. Harrison admitted that there was no way for Defendant to "check Harrison's work" without the documents he requested. Harrison also testified that it is TBI laboratory policy to keep samples for sixty days [\*10] after testing so that defendants may request samples for independent analysis. Harrison said that he received no such request from Defendant.

## II. FAILURE TO PROVIDE DISCOVERY MATERIALS

Defendant first contends that the trial court erred when it did not compel the State to comply with Defendant's discovery request and provide him with numerous documents concerning Defendant's blood alcohol test. Defendant argues that Tenn. R. Crim. P. 16 requires disclosure of this type of information and that the State's failure to comply constitutes a discovery violation.

In a letter to the State, Defendant requested the following information which he believed was in the possession of the TBI crime laboratory: chain of custody documents; raw data from blood testing, including handwritten notes; line graphs and tabulated data printed by testing equipment; sample runs and associated calibration runs of testing equipment; TBI standing operating procedure for blood alcohol samples, and methods approved by TBI for such testing; the techniques and methods promulgated by the TBI to ascertain the qualifications and competence of the individuals to conduct analysis, to operate and to maintain blood [\*11] alcohol testing instruments; and any other document generated as a result of the testing of Defendant's blood sample. Defendant already possessed the TBI crime lab test results indicating that Defendant's blood alcohol level was 0.23%.

When the State replied that the defense was not entitled to additional information under Tenn. R. Crim. P. 16, Defendant filed a motion to compel. After hearing argument and reviewing briefs from both sides on the matter, the trial court denied Defendant's motion on the ground that the information requested was not discoverable pursuant to Rule 16 and held that the reports and results which had already been given Defendant were all he was entitled to receive.

With some limitations, Tennessee Rule of Criminal Procedure 16 requires the State to disclose certain evidence to a defendant prior to trial. [HN1] Section 16(a)(1)(C) provides:

Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the [\*12] possession, custody or control of the state, and which are material to the preparation of the Defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

Tenn. R. Crim. P. 16(a)(1)(C). Furthermore, [HN2] section 16(a)(1)(D) states the following:

Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state ... and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

Tenn. R. Crim. P. 16(a)(1)(D).

Before we address Defendant's discovery issue, we note that [HN3] blood alcohol tests such as that performed on Defendant are routinely used in Tennessee to determine whether a person was intoxicated at a certain time. See Neil P. Cohen, [\*13] Tennessee Law of Evidence § 401.25 (1995). And, Tennessee state law provides for admissibility of such tests in cases involving driving under the influence of an intoxicant. *Tenn. Code Ann. § 55-10-407(a)* (1997). However, such tests are admissible only when it can be proven that the sample was taken by a properly trained person and that a proper chain of custody was established for the period of time between when the blood was drawn and the time it was analyzed. See *Tenn. Code Ann. § 55-10-410* (1997). Furthermore, the Tennessee Supreme Court has held that it must be shown the testing device is scientifically acceptable and accurate for the purpose that it is being employed. *State v. Johnson*, 717 S.W.2d 298, 303 (Tenn. Crim. App. 1986) (citing *Crawley v. State*, 219 Tenn. 707, 413 S.W.2d 370, 373 (Tenn. 1967)); *Pruitt v. State*, 216 Tenn. 686, 393 S.W.2d 747, 751 (Tenn. 1965) (overruled on other grounds). Indeed, the purpose of the testing is "to provide *objective* scientific data to eliminate guesswork and speculation and to supplement the fallible observations of [\*14] humans." *State v. Sensing*, 843 S.W.2d 412, 417 (Tenn. 1992) (citing *Peterson v. State*, 261 N.W.2d 405, 409 (S.D. 1977) (emphasis added)). [HN4] It is this quality, objectiveness, which makes scientific evidence highly consequential--science cannot be readily impugned, and it can be similarly fruitless to argue against results acquired from a machine. In the interests of justice, a court must do everything reasonably within its power to ensure that scientific evidence is accurate so as not to mislead the finders of fact. When discovered, inaccuracies in particular test results go only to the weight of the evidence, not its admissibility, with the weight to be given the evidence a question of fact for the trier of fact in each case. *State v. Johnson*, 717 S.W.2d 298, 305 (Tenn. Crim. App. 1986).

The State argues that the trial court did not err in ruling that the State was not obligated under Tenn. R. Crim. P. 16 to provide Defendant with the documents he requested. The State further points out that Defendant did not offer any proof to establish [\*15] that the requested information was material to the preparation of his defense; defendant merely claimed that he was entitled to the requested information and that it was material.

The State's argument further relies, in part, on the Tennessee Supreme Court's ruling in *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988). The defendant in *Irick* wanted copies of the expert's "rough results" pertaining to individual characteristics of hair samples analyzed as part of a scientific test admitted into evidence against him at trial. The trial court denied the defendant's request, holding that the reports and results already submitted to the defendant were all he was entitled to have. *Id. at 126*. Our supreme court affirmed the ruling of the trial court, stating that there was "no violation of [Rule 16] and the defendant received all to which he was entitled in the way of discovery." *Id.*

We agree with Defendant that [HN5] accuracy is important when determining admissibility of any scientific test results and, therefore, it is logical to consider information concerning [\*16] the accuracy of the test instruments as important for defense purposes. See *State v. Sensing*, 843 S.W.2d 412, 416 (Tenn. 1992) (Court declared that the "defense is [] free to rebut the State's evidence by calling witnesses to challenge the accuracy of the particular machine..." and "expert testimony and the records of such procedures [regarding the manner in which the instrument performs its function] are available for examination."); *State v. Davis*, 823 S.W.2d 217, 219 (Tenn. Crim. App. 1991) (evidence of experiments and examinations of the intoxilyzer which revealed substantial malfunctions was material to issue of guilt). Moreover, we observe that the State's expert candidly admitted on cross-examination that there was no way for the accuracy of his work to be checked without access to the documents Defendant requested. Nevertheless, this one concession by the State's expert does not rise to the level of proof necessary to show that the requested

documentation was discoverable.

After careful consideration, this Court is drawn to the logic of the State's argument. This is primarily because Defendant failed to make an offer of proof regarding [\*17] the materiality of the documents requested. After a thorough examination of the video tape record, we conclude that Defendant's counsel has not provided us with any information which gives us a basis to rule in his favor. Not only is the record of the hearing on Defendant's motion to compel and Defendant's brief devoid of any proof establishing that the requested information was material, the trial record is deficient in this regard as well. Namely, we do not have before us any proof concerning what Defendant's expert would specifically require in the way of pertinent facts nor what he would do with them if he had them. We similarly lack proof of what particular documents the TBI has in its possession that would be helpful and how the documents would assist Defendant's case. Neither has Defendant offered any proof such as incompetency concerning the TBI's lab personnel or historical proof of inaccuracies or unreliable results with respect to the lab's instruments or equipment. We further observe that counsel could have asked that the trial court perform an in camera examination of the requested documents. In sum, since the State did not present the information in issue as evidence [\*18] during trial and Defendant did not offer any proof as described above, we find no evidence that the requested documents were material. Defendant is not entitled to relief on this issue.

### III. MOTION TO QUASH

Defendant also contends that the trial court erred when it quashed Defendant's subpoena duces tecum which requested the State's expert to bring the documentation previously ruled non-discoverable under Tenn. R. Crim. P. 16 to trial. We disagree.

After the State denied Defendant's request for additional discovery information pursuant to Tenn. R. Crim. P. 16, Defendant filed a motion to compel on November 6, 1998. When the court denied this motion on December 28, 1998, Defendant thereafter requested five subpoenas duces tecum for service upon the State's expert witness, requiring him to bring the documents previously ruled non-discoverable under Rule 16 with him when he testified at trial. The State filed a motion to quash on November 15, 1999, which was granted in a jury-out hearing held during the trial which began on November 16, 1999.

The State argues that Defendant should not be allowed to use Rule 17 to skirt the court's denial of discovery under Rule 16. In so arguing, [\*19] the State relies on *State v. Cage, 1999 Tenn. Crim. App. LEXIS 62, No. 01 C01-9605-CC-00179, 1999 WL 30595*, Montgomery County (Tenn. Crim. App., Nashville, Jan. 26, 1999), perm. to appeal denied (Tenn. 1999). In *Cage*, the defendant filed a motion for discovery pursuant to Rule 16 requesting that the State provide the materials used by the State's DNA expert to arrive at his test conclusions. This motion and a subsequent motion to compel were both denied on the ground that the materials requested were non-discoverable "work product." Thereafter, the defendant caused to be issued a subpoena duces tecum, directing the State's expert to appear at trial with the exact same materials previously ruled non-discoverable. The trial court granted the State's motion to quash the subpoena duces tecum, declaring that the defendant "could not circumvent the discovery protections of Rule 16 by issuing a subpoena for the same materials under Rule 17." *Id.* at \*8. This Court affirmed the trial court's judgment on appeal, remarking that "the limits of Rule 16(a)(2) would be meaningless if a defendant could simply subpoena the protected materials under Rule 17(c). [\*20] " *Id.* at \*9.

Following a review of the record and the parties' briefs, we agree with the State that the trial court correctly granted the State's motion to quash Defendant's subpoenas duces tecum, but for different reasons. We do not agree with the State's contention that materials previously ruled non-discoverable under Rule 16 are never subject to a subpoena duces tecum for trial. This Court's holding in *Cage*, upon which the State heavily relies for that assertion, is distinguishable from the present case on the facts. Some information non-discoverable under Rule 16 may be legitimately acquired by subpoena duces tecum. For example, material not "within the possession, custody or control of the state" is non-discoverable under Rule 16. This, *in itself*, does not prevent a defendant from acquiring the material by subpoena duces tecum if the circumstances otherwise permit.

[HN6] Rule 17(c) of the Tennessee Rules of Criminal Procedure provides as follows:

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command a person to whom it is directed to produce [\*21] the books, papers, documents, or tangible things designated therein. The court, upon motion made promptly and in any event by the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may condition denial of the motion upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. The court may direct that books, papers, documents or tangible things designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them to be inspected by the parties and their attorneys.

As can be seen, [HN7] the trial court is permitted to quash or modify a subpoena duces tecum if compliance would be unreasonable or oppressive. The appellate record indicates that the State argued in the trial court that compliance would be unduly burdensome, i.e., "unreasonable and oppressive," in conjunction with arguing that [\*22] the documents were not discoverable and therefore not subject to being subpoenaed for trial. Defendant did not offer any proof that compliance with the subpoena was not "unreasonable or oppressive." Neither did he offer to advance the costs of producing the documents (he was not indigent). In other words, the record is inadequate to permit this Court to hold that the trial court erred by granting the motion to quash. Even if we held that it was error to quash the subpoena, there is nothing in the record to indicate that the trial court's decision was anything more than harmless error.

As in the situation involving Defendant's motion to compel discovery under Rule 16, Defendant failed to offer any proof, in an "offer of proof" or otherwise, which would allow this court to grant him the relief he seeks on appeal. Therefore, Defendant is not entitled to relief.

#### IV. ADMISSIBILITY OF EXPERT TESTIMONY

Next, Defendant contends that the trial court erred when it permitted the State's expert to testify. Specifically, Defendant argues that the State offered expert opinion evidence without laying a proper foundation as required under Tennessee Rules of Evidence 702 and 703. We disagree. [\*23]

[HN8] Generally, the admissibility of evidence is governed by standards of relevancy and reliability. *State v. Begley*, 956 S.W.2d 471, 475 (Tenn. 1997); Tenn. R. Evid. 402. Our supreme court set [HN9] the standards governing admissibility of expert scientific proof in Tennessee in *McDaniel v. CSX Transp. Inc.*, 955 S.W.2d 257 (Tenn. 1997):

In Tennessee, under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

. . . [\*24] [HN10] The non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703. A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Although the trial court must analyze the science and not merely the qualifications, demeanor or conclusions of experts, the court need not weigh or choose between two legitimate but conflicting scientific views. The court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation.

*McDaniel*, 955 S.W.2d at 265.

[HN11] The admissibility of expert [\*25] and scientific evidence in particular is also governed by Rules 702 and 703 of the Tennessee Rules of Evidence noted above. [HN12] The former provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702. And, [HN13] Tenn. R. Evid. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. [\*26] Evid. 703.

[HN14] The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Begley*, 956 S.W.2d 471, 475 (Tenn. 1997). The trial court rules on questions regarding the admissibility, qualifications, relevancy and competency of expert testimony. *McDaniel*, 955 S.W.2d at 263.

In Tennessee, therefore, [HN15] a trial court must first determine (1) whether the evidence will substantially assist the trier of fact to determine a fact in issue and (2) whether the facts and data underlying the evidence indicate a lack of trustworthiness. *Id.* at 265. After a review of the record, we conclude that the expert's testimony regarding Defendant's blood alcohol content was relevant and substantially assisted the jury as required under *McDaniel*. The relevance of the driver's blood alcohol in a DUI case is plain-it is an element of the offense. Consequently, reliable information [\*27] regarding Defendant's blood alcohol content is helpful to a jury.

Additionally, we find no facts or data which would indicate a lack of trustworthiness respecting the State's expert witness. The trial court determined that the State's witness was "qualified as an expert by knowledge, skill, experience, training, or education" in accordance with Rule 702 and, after a review of the record, we agree. Harrison appeared to be knowledgeable and experienced in his field of work: he has worked as a TBI toxicologist for twelve years and analyzed in excess of 40,000 blood samples. Furthermore, Harrison testified at length regarding his analysis of Defendant's blood, the steps he took and the theories underlying many of the testing procedures. In order for the TBI crime lab to maintain its accreditation, Harrison's test results are continually monitored and checked by independent agencies. In short, we concur with the trial court's view that Harrison's education and training, which includes a B.S. degree in medical technology and work in a hospital laboratory for twelve years prior to his extensive experience with the TBI, are sufficient to qualify him as an expert.

Again, we note that blood [\*28] alcohol tests are routinely used in Tennessee to determine whether a person was driving while intoxicated. These types of standardized tests have long been recognized by experts in the field as scientifically valid and reliable; thus, they fulfill the requirements outlined in *McDaniel* and meet the trustworthiness standard in Rule 703. The fact that the TBI's crime lab is accredited satisfies two "reliability" factors under *McDaniel*: (1) the scientific evidence and methodology has been tested and (2) the rate of error is acceptable as a matter of record. For the reasons stated above, we find that the trial court did not abuse its discretion. Defendant is not entitled to relief on this issue.

## V. LIMITATION OF PROOF

Defendant contends that the trial court erred when it limited Defendant's proof at trial regarding the arresting officer's motive. Defendant argues that this limitation deprived Defendant of his right to due process and a fair trial. We disagree.

Specifically, Defendant sought to question Officer Breedlove about his motive for Defendant's arrest. It was Defendant's contention that Officer Breedlove did not arrest Defendant because he was driving while intoxicated, [\*29] but because the officer wanted to seize Defendant's expensive new truck. Defendant maintained that the other driver escaped arrest because he was driving an older model. The trial court sustained the State's objection to defense counsel's line of questioning concerning motive, then informed counsel during a sidebar conference that, if he were to persist, it would open the door for the State to introduce evidence of Defendant's prior DUI conviction. Based on this ruling, defense counsel abandoned the discussion of the officer's motive.

[HN16] The motive of an arresting officer is not relevant where the officer can show that sufficient probable cause existed to believe that a crime had been committed. Put another way, the underlying intent or motivation of officers involved in an arrest or seizure is immaterial where the activity undertaken is precisely the same as would have occurred had the intent or motivation been entirely absent from the case. See *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); *State v. Vineyard*, 958 S.W.2d 730, 736 (Tenn. 1997) [\*30] (probable cause justifies a traffic stop under Article I, Section 7 of the Tennessee Constitution without regard to the subjective motivations of police officers).

Officer Breedlove's alleged subjective intent concerning Defendant's vehicle is not relevant if Breedlove had sufficient probable cause to stop Defendant. Clearly, Breedlove had the requisite probable cause when he observed Defendant and his friend driving at twenty miles per hour over the posted speed limit. Moreover, Defendant gave Breedlove probable cause for arresting him when he failed the field sobriety tests and presented the appearance of a man who was intoxicated. Thus, Defendant's argument that the trial court erred when it limited Defendant's proof at trial regarding the Officer Breedlove's motive for Defendant's arrest and subsequent seizure of his vehicle is without merit. Defendant is not entitled to relief on this issue.

## VI. CONCLUSION

For the forgoing reasons, we affirm the judgment of the trial court.  
THOMAS T. WOODALL, JUDGE

171 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**STATE OF TENNESSEE v. ZANE ALLEN DAVIS, JR.****No. M2000-00737-CCA-R3-CD****COURT OF CRIMINAL APPEALS OF TENNESSEE, MIDDLE SECTION, AT  
NASHVILLE***2000 Tenn. Crim. App. LEXIS 986***July 19, 2000, Assigned on Briefs  
December 28, 2000, Decided**

**PRIOR HISTORY:** [\*1] Direct Appeal from the Circuit Court for Williamson County No. 11-108-598 Timothy L. Easter, Judge.

**DISPOSITION:** Judgment of the Circuit Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Circuit Court for Williamson County (Tennessee) that convicted him of driving with blood alcohol of .10 percent or more.

**OVERVIEW:** An officer observed defendant drag racing and subjected him to field sobriety tests, which he failed. A blood test indicated his blood alcohol level was .23 percent. Defendant was convicted for driving under the influence and appealed. Defendant argued that the trial court erred in the following ways, it ruled that the State was not required to provide him with documentation pertaining to the reliability of his blood alcohol test, it quashed his subpoena duces tecum requesting the State's expert to bring documentation previously ruled undiscoverable under Tenn. R. Crim. P. 16 to trial, it allowed the State's expert witness to testify without laying the proper foundation, and it limited his proof regarding the arresting officer's motive. The court found that defendant failed to make offers of proof regarding the reliability of the blood test or his quashed subpoena. Testimony regarding the blood test was proper, as the tests were routinely used to determine whether a person was driving while intoxicated and were reliable. The motive of the arresting officer was not relevant where the officer showed that sufficient probable cause existed to believe that a crime had been committed.

**OUTCOME:** Judgment affirmed; defendant failed to make offers of proof regarding the reliability of the blood testing equipment and his quashed subpoena duces tecum, testimony regarding the blood alcohol test was proper, and the motive of the arresting officer was irrelevant where sufficient probable cause existed to believe that a crime had been committed.

**CORE TERMS:** blood alcohol, driving, subpoena, subpoena duces tecum, driver, blood, testing, reliability, motive,

scientific evidence, lab, intoxicated, laboratory, scientific, admissibility, documentation, non-discoverable, discovery, analyzed, trier of fact, motion to quash, accuracy, license, arrest, tested, expert witness, arresting, entitled to relief, blood sample, trustworthiness

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Jencks Act***

[HN1] See Tenn. R. Crim. P. 16(a)(1)(C).

#### ***Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Reports of Examinations & Tests***

[HN2] See Tenn. R. Crim. P. 16(a)(1)(D).

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

##### ***Evidence > Scientific Evidence > Blood Alcohol***

[HN3] Blood alcohol tests are routinely used in Tennessee to determine whether a person was intoxicated at a certain time. And, Tennessee state law provides for admissibility of such tests in cases involving driving under the influence of an intoxicant. *Tenn. Code Ann. § 55-10-407(a)* (1997). However, such tests are admissible only when it can be proven that the sample was taken by a properly trained person and that a proper chain of custody was established for the period of time between when the blood was drawn and the time it was analyzed. *Tenn. Code Ann. § 55-10-410* (1997). Furthermore, it must be shown the testing device is scientifically acceptable and accurate for the purpose that it is being employed.

#### ***Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***

##### ***Evidence > Scientific Evidence > Blood & Bodily Fluids***

##### ***Evidence > Scientific Evidence > Daubert Standard***

[HN4] It is the quality, objectiveness, which makes scientific evidence highly consequential, as science cannot be readily impugned, and it can be similarly fruitless to argue against results acquired from a machine. In the interests of justice, a court must do everything reasonably within its power to ensure that scientific evidence is accurate so as not to mislead the finders of fact. When discovered, inaccuracies in particular test results go only to the weight of the evidence, not its admissibility, with the weight to be given the evidence a question of fact for the trier of fact in each case.

#### ***Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview***

##### ***Evidence > Scientific Evidence > General Overview***

[HN5] Accuracy is important when determining admissibility of any scientific test results and, therefore, it is logical to consider information concerning the accuracy of the test instruments as important for defense purposes.

#### ***Criminal Law & Procedure > Discovery & Inspection > Subpoenas***

[HN6] See Tenn. R. Crim. P. 17(c).

#### ***Criminal Law & Procedure > Discovery & Inspection > Subpoenas***

[HN7] The trial court is permitted to quash or modify a subpoena duces tecum if compliance would be unreasonable or oppressive.

***Evidence > Relevance > Relevant Evidence***

[HN8] Generally, the admissibility of evidence is governed by standards of relevancy and reliability. Tenn. R. Evid. 402.

***Evidence > Scientific Evidence > General Overview***

[HN9] The standards governing admissibility of expert scientific proof are as follows: under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

***Evidence > Scientific Evidence > Daubert Standard******Evidence > Testimony > Experts > Kelly-Frye Process***

[HN10] The non-exclusive list of factors to determine reliability of scientific evidence are useful in applying Tenn. R. Evid. 702, 703. A trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. Although the trial court must analyze the science and not merely the qualifications, demeanor or conclusions of experts, the court need not weigh or choose between two legitimate but conflicting scientific views. The court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation.

***Evidence > Scientific Evidence > General Overview******Evidence > Testimony > Experts > Admissibility***

[HN11] The admissibility of expert and scientific evidence in particular is also governed by Tenn. R. Evid. 702, 703.

***Evidence > Testimony > Experts > General Overview***

[HN12] See Tenn. R. Evid. 702.

***Evidence > Testimony > Experts > General Overview***

[HN13] See Tenn. R. Evid. 703.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence******Evidence > Scientific Evidence > Daubert Standard******Evidence > Testimony > Experts > Admissibility***

[HN14] The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. The trial court rules on questions regarding the admissibility, qualifications, relevancy and competency of expert testimony.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Elements******Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence******Evidence > Scientific Evidence > Daubert Standard***

[HN15] A trial court must first determine (1) whether the evidence will substantially assist the trier of fact to determine a fact in issue and (2) whether the facts and data underlying the evidence indicate a lack of trustworthiness.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause  
Criminal Law & Procedure > Arrests > Probable Cause  
Criminal Law & Procedure > Search & Seizure > General Overview***

[HN16] The motive of an arresting officer is not relevant where the officer can show that sufficient probable cause existed to believe that a crime had been committed. Put another way, the underlying intent or motivation of officers involved in an arrest or seizure is immaterial where the activity undertaken is precisely the same as would have occurred had the intent or motivation been entirely absent from the case.

**COUNSEL:** Lee Ofman, Franklin, Tennessee, for the appellant, Zane Allen Davis, Jr.

Paul G. Summers, Attorney General and Reporter; Marvin S. Blair, Jr., Assistant Attorney General; Ronald L. Davis, District Attorney General; Lee E. Dryer, Assistant District Attorney.

**JUDGES:** THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J., and NORMA MCGEE OGLE, J., joined.

**OPINION BY:** THOMAS T. WOODALL

**OPINION:** Defendant Zane Allen Davis was found guilty by a Williamson County jury of violating *Tenn. Code Ann. § 55-10-401(a)(2)*, driving a vehicle while the alcohol concentration in the driver's blood or breath was ten-hundredths of one percent (0.10%) or more, a Class A misdemeanor. The trial court sentenced Defendant to eleven months and twenty-nine days, with the sentence suspended after Defendant served thirty days in the County Jail, and a \$ 1250 fine. Defendant raises the following issues in his appeal: (1) whether the trial court erred when it ruled that the State was not required [\*2] under Tenn. R. Crim. P. 16 to provide Defendant with documentation pertaining to the reliability of his blood alcohol test results; (2) whether the trial court erred when it quashed Defendant's subpoena duces tecum requesting the State's expert to bring documentation, previously ruled undiscoverable under Tenn. R. Crim. P. 16, to trial; (3) whether the trial court erred by allowing the State's expert witness to testify without first laying the proper foundation; and (4) whether the trial court erred when it limited Defendant's proof at trial regarding the arresting officer's motive. After a review of the record, we affirm the judgment of the trial court.

On May 11, 1998, the Williamson County Grand Jury indicted Defendant Zane Allen Davis for driving under the influence ("DUI") of an intoxicant, driving while the alcohol concentration in Defendant's blood or breath was ten-hundredths of one percent (0.10%) or more, driving on a revoked license, second-offense DUI, and second-offense unlawfully driving on a revoked license as a result of prior offense. On November 18, 1999, a Williamson County jury found Defendant guilty of driving with blood alcohol of ten-hundredths of one percent [\*3] or more, a Class A misdemeanor, and not guilty of driving on a revoked license; the remaining charges were dismissed.

In his motion for a new trial, Defendant claimed that the State suppressed evidence material to the preparation of his defense. Specifically, this evidence consisted of data concerning the reliability of the instrument used to acquire the blood alcohol test results used in evidence against Defendant at trial. This information was requested in a discovery motion and through subpoena duces tecum which were denied and quashed, respectively. After a sentencing hearing, the trial court sentenced Defendant to eleven months and twenty-nine days, with the sentence to be suspended after Defendant serves thirty days in the County Jail. In addition, the trial court revoked Defendant's license for a period of one year (with application for restricted license available) and required that Defendant attend Alcohol Safety School. Defendant raises the following issues in his appeal: (1) whether the trial court erred when it ruled that the State was not required under Tenn. R. Crim. P. 16 to provide Defendant with documentation pertaining to the reliability of his blood alcohol test; [\*4] (2) whether the trial court erred when it quashed Defendant's subpoena duces tecum requesting the State's expert to bring documentation previously ruled undiscoverable under Rule 16 to trial; (3) whether the trial court erred by allowing the State's expert witness to testify without first laying the proper foundation; and (4) whether the trial court erred when it limited Defendant's proof regarding the arresting officer's motive. After a review of the record, we

affirm the judgment of the trial court.

## I. FACTS

Adrian Breedlove, an officer with the Brentwood Police Department, testified at trial that he was on duty the evening of February 17, 1998, when he observed two trucks traveling in excess of the posted speed limit. Using radar, Breedlove clocked the speed of the vehicles at fifty-two miles per hour, twenty-two miles per hour over the posted maximum speed. Breedlove testified that he pursued the vehicles, using his lights and siren, but the drivers of both trucks ignored him. Ultimately, Breedlove caught up with them when they stopped in the parking lot of O'Charley's restaurant.

Officer Breedlove testified that the drivers of the trucks were identified as Zane Allen [\*5] Davis, the Defendant, and a friend of Defendant's named Thorpe Weber. When Breedlove first confronted the two men, both drivers "smelled like alcohol." Consequently, Breedlove questioned them both and administered standard field sobriety tests ("FST") to determine whether they were fit to drive. Weber passed the sobriety tests and was released with a citation for speeding. Defendant, on the other hand, failed both tests given him: the one-leg-stand and the walk-and-turn test. Breedlove further testified that Defendant also had bloodshot, watery eyes and that his speech was slurred. Moreover, Defendant was unsteady on his feet and admitted that he had been drinking earlier. For the foregoing reasons, Breedlove arrested Defendant and explained the Implied Consent Law to him. When Defendant agreed to submit to a blood alcohol test, Breedlove accompanied him to the Williamson Medical Center for testing. Breedlove received the blood sample from the hospital technician, sealed and initialed the tube, then placed it into a tamper-proof Tennessee Bureau of Investigation evidence box for storage at the police department until it could be taken to the crime laboratory for analysis.

In addition [\*6] to his duties as a police officer, Officer Breedlove testified that he is a certified DUI Instructor. As such, Breedlove is qualified to train other officers in methods of detecting and apprehending intoxicated drivers. Breedlove explained that the standardized FSTs given Tennessee drivers are recognized and administered nationally. To fail a test, the driver must exhibit two or more "clues" indicating intoxication while he being tested. For instance, eight "clues" exist for the walk-and-turn test. These include losing one's balance, starting too early, raising one's arms, stopping without reason, and not following the officer's directions. The National Highway Transportation & Safety Administration has determined that a suspect who evinces two or more clues for either FST can be considered too intoxicated to lawfully drive. Breedlove testified that Defendant exhibited more than two "clues" for both tests: during the one-leg stand test Defendant swayed and repeatedly dropped his foot; during the walk-and-turn test, Defendant turned improperly, raised his arms, and then finally gave up, stating that he was unable to complete the exercise. As a result of Defendant's performance on the [\*7] FSTs and Breedlove's experience, he concluded that Defendant was too intoxicated to drive.

John Harrison, a forensic toxicologist working in the Tennessee Bureau of Investigation crime laboratory, testified that he analyzed Defendant's blood. Harrison testified that he has worked as a toxicologist with the TBI for twelve years and that he has analyzed in excess of 40,000 samples in that time period. Harrison earned a B.S. degree in medical technology and also worked in a hospital laboratory for twelve years prior to his job with the TBI. The TBI crime laboratory which tested Defendant's sample received national accreditation from the American Society of Crime Lab Directors in 1994. Harrison testified that the lab must be periodically scrutinized by forensic specialists across the nation concerning numerous aspects of its work including procedures, security, personnel qualifications, and quality control in order for the lab to maintain its accreditation status. In addition, the lab is required to use standards to periodically check proficiency. Instruments are calibrated and equipment is checked on a daily basis.

Harrison testified at length regarding his analysis of Defendant's blood--the [\*8] various steps he took and the theories underlying many of the lab's testing procedures. Harrison described how proficiency standards are run and gave a cursory explanation of gas chromatography, which is the scientific method used by the TBI for separating mixtures during blood testing procedures. Harrison testified that, prior to all tests, he notes the condition of the sample when

received and runs a series of standards through the instrument to insure proper functioning and accuracy of the instrument. Harrison said that standards are typically run after every ten samples and also upon completion of an analysis. Regarding Defendant's blood sample, Harrison testified that it was received in good condition and that the standards which were run before and after Defendant's blood analysis showed that the instrument was operating properly. Harrison further testified as to the crime lab's chain of custody procedures: upon receipt of a sample (usually via U.S. Postal Service), responsibility for its care belongs to the evidence technician who assigns the sample a number and gives it to Harrison. Harrison testified that he then analyzed Defendant's blood sample and prepared a report of the [\*9] test results: Defendant's blood contained 0.23 gram percent ethyl alcohol.

Regarding the numerous requests for documents which Harrison received from Defendant's counsel, Harrison testified that he did not have the time to give Defendant's case the "special attention" that counsel wanted from him. Harrison explained that since he frequently works on thousands of cases at a time, he was waiting for Defendant's counsel to "go through channels" and obtain a court order for the records he wanted. Harrison testified that if and when he received a court order, he would then comply with counsel's requests. Otherwise, he claimed that he could not accommodate him because counsel's requests were too numerous. Harrison testified that the Defendant received copies of the instrument calibration record for the actual day of testing, but he also wanted information for the six-month period of time starting three months prior to the date of Defendant's test and extending three months afterward. Harrison admitted that there was no way for Defendant to "check Harrison's work" without the documents he requested. Harrison also testified that it is TBI laboratory policy to keep samples for sixty days [\*10] after testing so that defendants may request samples for independent analysis. Harrison said that he received no such request from Defendant.

## II. FAILURE TO PROVIDE DISCOVERY MATERIALS

Defendant first contends that the trial court erred when it did not compel the State to comply with Defendant's discovery request and provide him with numerous documents concerning Defendant's blood alcohol test. Defendant argues that Tenn. R. Crim. P. 16 requires disclosure of this type of information and that the State's failure to comply constitutes a discovery violation.

In a letter to the State, Defendant requested the following information which he believed was in the possession of the TBI crime laboratory: chain of custody documents; raw data from blood testing, including handwritten notes; line graphs and tabulated data printed by testing equipment; sample runs and associated calibration runs of testing equipment; TBI standing operating procedure for blood alcohol samples, and methods approved by TBI for such testing; the techniques and methods promulgated by the TBI to ascertain the qualifications and competence of the individuals to conduct analysis, to operate and to maintain blood [\*11] alcohol testing instruments; and any other document generated as a result of the testing of Defendant's blood sample. Defendant already possessed the TBI crime lab test results indicating that Defendant's blood alcohol level was 0.23%.

When the State replied that the defense was not entitled to additional information under Tenn. R. Crim. P. 16, Defendant filed a motion to compel. After hearing argument and reviewing briefs from both sides on the matter, the trial court denied Defendant's motion on the ground that the information requested was not discoverable pursuant to Rule 16 and held that the reports and results which had already been given Defendant were all he was entitled to receive.

With some limitations, Tennessee Rule of Criminal Procedure 16 requires the State to disclose certain evidence to a defendant prior to trial. [HN1] Section 16(a)(1)(C) provides:

Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the [\*12] possession, custody or control of the state, and which are material to the preparation of the Defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

Tenn. R. Crim. P. 16(a)(1)(C). Furthermore, [HN2] section 16(a)(1)(D) states the following:

Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state ... and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

Tenn. R. Crim. P. 16(a)(1)(D).

Before we address Defendant's discovery issue, we note that [HN3] blood alcohol tests such as that performed on Defendant are routinely used in Tennessee to determine whether a person was intoxicated at a certain time. See Neil P. Cohen, [\*13] Tennessee Law of Evidence § 401.25 (1995). And, Tennessee state law provides for admissibility of such tests in cases involving driving under the influence of an intoxicant. *Tenn. Code Ann. § 55-10-407(a)* (1997). However, such tests are admissible only when it can be proven that the sample was taken by a properly trained person and that a proper chain of custody was established for the period of time between when the blood was drawn and the time it was analyzed. See *Tenn. Code Ann. § 55-10-410* (1997). Furthermore, the Tennessee Supreme Court has held that it must be shown the testing device is scientifically acceptable and accurate for the purpose that it is being employed. *State v. Johnson*, 717 S.W.2d 298, 303 (Tenn. Crim. App. 1986) (citing *Crawley v. State*, 219 Tenn. 707, 413 S.W.2d 370, 373 (Tenn. 1967)); *Pruitt v. State*, 216 Tenn. 686, 393 S.W.2d 747, 751 (Tenn. 1965) (overruled on other grounds). Indeed, the purpose of the testing is "to provide *objective* scientific data to eliminate guesswork and speculation and to supplement the fallible observations of [\*14] humans." *State v. Sensing*, 843 S.W.2d 412, 417 (Tenn. 1992) (citing *Peterson v. State*, 261 N.W.2d 405, 409 (S.D. 1977) (emphasis added)). [HN4] It is this quality, objectiveness, which makes scientific evidence highly consequential--science cannot be readily impugned, and it can be similarly fruitless to argue against results acquired from a machine. In the interests of justice, a court must do everything reasonably within its power to ensure that scientific evidence is accurate so as not to mislead the finders of fact. When discovered, inaccuracies in particular test results go only to the weight of the evidence, not its admissibility, with the weight to be given the evidence a question of fact for the trier of fact in each case. *State v. Johnson*, 717 S.W.2d 298, 305 (Tenn. Crim. App. 1986).

The State argues that the trial court did not err in ruling that the State was not obligated under Tenn. R. Crim. P. 16 to provide Defendant with the documents he requested. The State further points out that Defendant did not offer any proof to establish [\*15] that the requested information was material to the preparation of his defense; defendant merely claimed that he was entitled to the requested information and that it was material.

The State's argument further relies, in part, on the Tennessee Supreme Court's ruling in *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988). The defendant in *Irick* wanted copies of the expert's "rough results" pertaining to individual characteristics of hair samples analyzed as part of a scientific test admitted into evidence against him at trial. The trial court denied the defendant's request, holding that the reports and results already submitted to the defendant were all he was entitled to have. *Id. at 126*. Our supreme court affirmed the ruling of the trial court, stating that there was "no violation of [Rule 16] and the defendant received all to which he was entitled in the way of discovery." *Id.*

We agree with Defendant that [HN5] accuracy is important when determining admissibility of any scientific test results and, therefore, it is logical to consider information concerning [\*16] the accuracy of the test instruments as important for defense purposes. See *State v. Sensing*, 843 S.W.2d 412, 416 (Tenn. 1992) (Court declared that the "defense is [] free to rebut the State's evidence by calling witnesses to challenge the accuracy of the particular machine..." and "expert testimony and the records of such procedures [regarding the manner in which the instrument performs its function] are available for examination."); *State v. Davis*, 823 S.W.2d 217, 219 (Tenn. Crim. App. 1991) (evidence of experiments and examinations of the intoxilyzer which revealed substantial malfunctions was material to issue of guilt). Moreover, we observe that the State's expert candidly admitted on cross-examination that there was no way for the accuracy of his work to be checked without access to the documents Defendant requested. Nevertheless, this one concession by the State's expert does not rise to the level of proof necessary to show that the requested

documentation was discoverable.

After careful consideration, this Court is drawn to the logic of the State's argument. This is primarily because Defendant failed to make an offer of proof regarding [\*17] the materiality of the documents requested. After a thorough examination of the video tape record, we conclude that Defendant's counsel has not provided us with any information which gives us a basis to rule in his favor. Not only is the record of the hearing on Defendant's motion to compel and Defendant's brief devoid of any proof establishing that the requested information was material, the trial record is deficient in this regard as well. Namely, we do not have before us any proof concerning what Defendant's expert would specifically require in the way of pertinent facts nor what he would do with them if he had them. We similarly lack proof of what particular documents the TBI has in its possession that would be helpful and how the documents would assist Defendant's case. Neither has Defendant offered any proof such as incompetency concerning the TBI's lab personnel or historical proof of inaccuracies or unreliable results with respect to the lab's instruments or equipment. We further observe that counsel could have asked that the trial court perform an in camera examination of the requested documents. In sum, since the State did not present the information in issue as evidence [\*18] during trial and Defendant did not offer any proof as described above, we find no evidence that the requested documents were material. Defendant is not entitled to relief on this issue.

### III. MOTION TO QUASH

Defendant also contends that the trial court erred when it quashed Defendant's subpoena duces tecum which requested the State's expert to bring the documentation previously ruled non-discoverable under Tenn. R. Crim. P. 16 to trial. We disagree.

After the State denied Defendant's request for additional discovery information pursuant to Tenn. R. Crim. P. 16, Defendant filed a motion to compel on November 6, 1998. When the court denied this motion on December 28, 1998, Defendant thereafter requested five subpoenas duces tecum for service upon the State's expert witness, requiring him to bring the documents previously ruled non-discoverable under Rule 16 with him when he testified at trial. The State filed a motion to quash on November 15, 1999, which was granted in a jury-out hearing held during the trial which began on November 16, 1999.

The State argues that Defendant should not be allowed to use Rule 17 to skirt the court's denial of discovery under Rule 16. In so arguing, [\*19] the State relies on *State v. Cage, 1999 Tenn. Crim. App. LEXIS 62, No. 01 C01-9605-CC-00179, 1999 WL 30595*, Montgomery County (Tenn. Crim. App., Nashville, Jan. 26, 1999), perm. to appeal denied (Tenn. 1999). In *Cage*, the defendant filed a motion for discovery pursuant to Rule 16 requesting that the State provide the materials used by the State's DNA expert to arrive at his test conclusions. This motion and a subsequent motion to compel were both denied on the ground that the materials requested were non-discoverable "work product." Thereafter, the defendant caused to be issued a subpoena duces tecum, directing the State's expert to appear at trial with the exact same materials previously ruled non-discoverable. The trial court granted the State's motion to quash the subpoena duces tecum, declaring that the defendant "could not circumvent the discovery protections of Rule 16 by issuing a subpoena for the same materials under Rule 17." *Id.* at \*8. This Court affirmed the trial court's judgment on appeal, remarking that "the limits of Rule 16(a)(2) would be meaningless if a defendant could simply subpoena the protected materials under Rule 17(c). [\*20] " *Id.* at \*9.

Following a review of the record and the parties' briefs, we agree with the State that the trial court correctly granted the State's motion to quash Defendant's subpoenas duces tecum, but for different reasons. We do not agree with the State's contention that materials previously ruled non-discoverable under Rule 16 are never subject to a subpoena duces tecum for trial. This Court's holding in *Cage*, upon which the State heavily relies for that assertion, is distinguishable from the present case on the facts. Some information non-discoverable under Rule 16 may be legitimately acquired by subpoena duces tecum. For example, material not "within the possession, custody or control of the state" is non-discoverable under Rule 16. This, *in itself*, does not prevent a defendant from acquiring the material by subpoena duces tecum if the circumstances otherwise permit.

[HN6] Rule 17(c) of the Tennessee Rules of Criminal Procedure provides as follows:

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command a person to whom it is directed to produce [\*21] the books, papers, documents, or tangible things designated therein. The court, upon motion made promptly and in any event by the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may condition denial of the motion upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. The court may direct that books, papers, documents or tangible things designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them to be inspected by the parties and their attorneys.

As can be seen, [HN7] the trial court is permitted to quash or modify a subpoena duces tecum if compliance would be unreasonable or oppressive. The appellate record indicates that the State argued in the trial court that compliance would be unduly burdensome, i.e., "unreasonable and oppressive," in conjunction with arguing that [\*22] the documents were not discoverable and therefore not subject to being subpoenaed for trial. Defendant did not offer any proof that compliance with the subpoena was not "unreasonable or oppressive." Neither did he offer to advance the costs of producing the documents (he was not indigent). In other words, the record is inadequate to permit this Court to hold that the trial court erred by granting the motion to quash. Even if we held that it was error to quash the subpoena, there is nothing in the record to indicate that the trial court's decision was anything more than harmless error.

As in the situation involving Defendant's motion to compel discovery under Rule 16, Defendant failed to offer any proof, in an "offer of proof" or otherwise, which would allow this court to grant him the relief he seeks on appeal. Therefore, Defendant is not entitled to relief.

#### IV. ADMISSIBILITY OF EXPERT TESTIMONY

Next, Defendant contends that the trial court erred when it permitted the State's expert to testify. Specifically, Defendant argues that the State offered expert opinion evidence without laying a proper foundation as required under Tennessee Rules of Evidence 702 and 703. We disagree. [\*23]

[HN8] Generally, the admissibility of evidence is governed by standards of relevancy and reliability. *State v. Begley*, 956 S.W.2d 471, 475 (Tenn. 1997); Tenn. R. Evid. 402. Our supreme court set [HN9] the standards governing admissibility of expert scientific proof in Tennessee in *McDaniel v. CSX Transp. Inc.*, 955 S.W.2d 257 (Tenn. 1997):

In Tennessee, under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

. . . [\*24] [HN10] The non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703. A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Although the trial court must analyze the science and not merely the qualifications, demeanor or conclusions of experts, the court need not weigh or choose between two legitimate but conflicting scientific views. The court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation.

*McDaniel*, 955 S.W.2d at 265.

[HN11] The admissibility of expert [\*25] and scientific evidence in particular is also governed by Rules 702 and 703 of the Tennessee Rules of Evidence noted above. [HN12] The former provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702. And, [HN13] Tenn. R. Evid. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. [\*26] Evid. 703.

[HN14] The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Begley*, 956 S.W.2d 471, 475 (Tenn. 1997). The trial court rules on questions regarding the admissibility, qualifications, relevancy and competency of expert testimony. *McDaniel*, 955 S.W.2d at 263.

In Tennessee, therefore, [HN15] a trial court must first determine (1) whether the evidence will substantially assist the trier of fact to determine a fact in issue and (2) whether the facts and data underlying the evidence indicate a lack of trustworthiness. *Id.* at 265. After a review of the record, we conclude that the expert's testimony regarding Defendant's blood alcohol content was relevant and substantially assisted the jury as required under *McDaniel*. The relevance of the driver's blood alcohol in a DUI case is plain-it is an element of the offense. Consequently, reliable information [\*27] regarding Defendant's blood alcohol content is helpful to a jury.

Additionally, we find no facts or data which would indicate a lack of trustworthiness respecting the State's expert witness. The trial court determined that the State's witness was "qualified as an expert by knowledge, skill, experience, training, or education" in accordance with Rule 702 and, after a review of the record, we agree. Harrison appeared to be knowledgeable and experienced in his field of work: he has worked as a TBI toxicologist for twelve years and analyzed in excess of 40,000 blood samples. Furthermore, Harrison testified at length regarding his analysis of Defendant's blood, the steps he took and the theories underlying many of the testing procedures. In order for the TBI crime lab to maintain its accreditation, Harrison's test results are continually monitored and checked by independent agencies. In short, we concur with the trial court's view that Harrison's education and training, which includes a B.S. degree in medical technology and work in a hospital laboratory for twelve years prior to his extensive experience with the TBI, are sufficient to qualify him as an expert.

Again, we note that blood [\*28] alcohol tests are routinely used in Tennessee to determine whether a person was driving while intoxicated. These types of standardized tests have long been recognized by experts in the field as scientifically valid and reliable; thus, they fulfill the requirements outlined in *McDaniel* and meet the trustworthiness standard in Rule 703. The fact that the TBI's crime lab is accredited satisfies two "reliability" factors under *McDaniel*: (1) the scientific evidence and methodology has been tested and (2) the rate of error is acceptable as a matter of record. For the reasons stated above, we find that the trial court did not abuse its discretion. Defendant is not entitled to relief on this issue.

## V. LIMITATION OF PROOF

Defendant contends that the trial court erred when it limited Defendant's proof at trial regarding the arresting officer's motive. Defendant argues that this limitation deprived Defendant of his right to due process and a fair trial. We disagree.

Specifically, Defendant sought to question Officer Breedlove about his motive for Defendant's arrest. It was Defendant's contention that Officer Breedlove did not arrest Defendant because he was driving while intoxicated, [\*29] but because the officer wanted to seize Defendant's expensive new truck. Defendant maintained that the other driver escaped arrest because he was driving an older model. The trial court sustained the State's objection to defense counsel's line of questioning concerning motive, then informed counsel during a sidebar conference that, if he were to persist, it would open the door for the State to introduce evidence of Defendant's prior DUI conviction. Based on this ruling, defense counsel abandoned the discussion of the officer's motive.

[HN16] The motive of an arresting officer is not relevant where the officer can show that sufficient probable cause existed to believe that a crime had been committed. Put another way, the underlying intent or motivation of officers involved in an arrest or seizure is immaterial where the activity undertaken is precisely the same as would have occurred had the intent or motivation been entirely absent from the case. See *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); *State v. Vineyard*, 958 S.W.2d 730, 736 (Tenn. 1997) [\*30] (probable cause justifies a traffic stop under Article I, Section 7 of the Tennessee Constitution without regard to the subjective motivations of police officers).

Officer Breedlove's alleged subjective intent concerning Defendant's vehicle is not relevant if Breedlove had sufficient probable cause to stop Defendant. Clearly, Breedlove had the requisite probable cause when he observed Defendant and his friend driving at twenty miles per hour over the posted speed limit. Moreover, Defendant gave Breedlove probable cause for arresting him when he failed the field sobriety tests and presented the appearance of a man who was intoxicated. Thus, Defendant's argument that the trial court erred when it limited Defendant's proof at trial regarding the Officer Breedlove's motive for Defendant's arrest and subsequent seizure of his vehicle is without merit. Defendant is not entitled to relief on this issue.

## VI. CONCLUSION

For the forgoing reasons, we affirm the judgment of the trial court.  
THOMAS T. WOODALL, JUDGE

172 of 195 DOCUMENTS

**STATE OF TENNESSEE v. KIMBERLY M. LARSON****No. M1999-00507-CCA-R3-CD****COURT OF CRIMINAL APPEALS OF TENNESSEE, MIDDLE SECTION, AT  
NASHVILLE***2000 Tenn. Crim. App. LEXIS 603***August 4, 2000, Filed**

**PRIOR HISTORY:** [\*1] Direct Appeal from the Criminal Court for Davidson County. Seth Norman, Judge. No. 97-T-937.

**DISPOSITION:** Judgment of the Criminal Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Criminal Court for Davidson County, Tennessee, convicting her of driving under the influence per se. Defendant argued the lower court erred in denying her motion for acquittal or new trial based upon the improper admittance of scientific evidence. Defendant argued the lower court imposed an excessive sentence.

**OVERVIEW:** Defendant was convicted of driving under the influence per se. The court affirmed the judgment of the lower court and held that defendant's alcohol breath tests were admissible, as the Sensing requirements were met. The court held it could not consider defendant's sentence under Tenn. R. App. P. 24 (b) because there was no transcript of the sentencing hearing within the record. The Sensing standard showed that the breath tests were properly performed, that the officer was certified, the breath testing device was accurate, defendant was observed for 20 minutes prior to the test, the officer followed procedure, and the officer identified the printout record as being defendant's test results. The evidence did not preponderate against the lower court's decision to admit the Intoxilyzer results. The state's proof established all the elements of defendant's offense, thus it was not error to deny defendant's motion for acquittal or new trial based upon improper admittance of scientific evidence. The court was precluded from considering defendant's sentence by Tenn. R. App. P. 24 (b), as no transcript of the sentencing hearing was within the record.

**OUTCOME:** The judgment of the lower court was affirmed. The court held there was not a preponderance of evidence against the lower court's judgment that defendant's alcohol breath tests met all the requirements and were admissible. It was not error to deny defendant's motion for new trial or acquittal, as the state met its burden of proof. The court could not consider defendant's sentence because no transcript of the hearing was contained in the record.

**CORE TERMS:** machine, mouth, alcohol, breath, breath test, calibration, videotape, arrest, certification, blow, arms, blood test, printout, walk, testing, preponderate, driving, minutes, cues, calibrated, forensic, new trial, cross-examination, administered, certificate, sobriety, sentence, one-leg, air, leg

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN1] The controlling rule requires that an officer be able to testify that: (1) the breath tests were performed in accordance with standards and procedures promulgated by Tennessee Bureau of Investigation's (TBI) forensic services division; (2) the testing officer was properly certified; (3) the breath testing instrument used was certified by the TBI, was regularly tested for accuracy, and was working properly when the test was performed; (4) the subject was observed for twenty minutes prior to the test and, during this time, did not have foreign matter in his mouth, did not consume alcohol, smoke, or regurgitate; (5) the officer followed the prescribed operational procedure; and (6) the testing officer identified the printout record offered into evidence as being the test result of the subject involved.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview Evidence > Scientific Evidence > Sobriety Tests***

[HN2] Once the state has shown all six requirements by a preponderance of the evidence, the test results are admitted. A trial court's decision to admit breath alcohol test evidence will not be disturbed on appeal unless the preponderance of the evidence is contrary to that decision.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Criminal Law & Procedure > Search & Seizure > General Overview***

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN3] An officer is not required to search a subject's mouth visually if he: (1) has determined that foreign matter has been removed prior to the twenty-minute observation period and (2) testifies that he continuously observed the test subject for the required period, during which the subject's mouth remained clear. This procedure insures that nothing new or unknown enters the subject's mouth that would skew the test results.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN4] It is the statutory duty of the forensic services division to maintain and certify alcohol breath testing instruments of those police departments participating in the purchasing program with the state. *Tenn. Code Ann. § 38-6-103(d)(2), (g)* (1997).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN5] When a motion for acquittal is presented to the trial court, the court is only concerned with the legal sufficiency of the evidence, rather than the weight of the evidence presented. In determining sufficiency, the trial court must consider the parties' evidence, disregard the defendant's evidence which conflicts with that of the state, and afford the state the strongest legitimate view of the evidence, including all reasonable inferences.

**COUNSEL:** V. Michael Fox, Nashville, Tennessee, for the appellant, Kimberly M. Larson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson,

III, District Attorney General; and Edward S. Ryan, Assistant District Attorney General, for the appellee, State of Tennessee.

**JUDGES:** ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY, J., and WILLIAM B. ACREE, JR., SP.J., joined.

**OPINION BY:** ALAN E. GLENN

**OPINION:** This appeal arises from a guilty verdict returned against the defendant for DUI per se for which she received a sentence of eleven months and twenty-nine days, with all but ten days suspended, a \$ 350 fine, court-ordered rehabilitation, and suspension of driving privileges for one year. On appeal, the defendant challenges the admittance of her breathalyzer test results at trial and alleges that her sentence was excessive. After a review of the record, we affirm the judgment of the trial court.

On June 10, 1998, the defendant, Kimberly Larson, was found [\*2] guilty by a Davidson County jury of driving under the influence per se. She was subsequently sentenced to eleven months and twenty-nine days incarceration, all except ten days suspended, ordered to participate in a rehabilitation program, and prohibited from driving for one year. The defendant then filed a motion for a new trial or acquittal, which was denied by the trial court on April 30, 1999. She has appealed to this court on two issues: (1) whether the trial court erred in denying the motion for acquittal or new trial based upon the improper admittance of scientific evidence; and (2) whether the trial court imposed an excessive sentence. Upon our *de novo* review of the record, we affirm the judgment of the trial court.

## FACTS

The only witness to testify in this case was Officer Harold R. Taylor, a ten-year veteran of the Metropolitan Police Department. At the time of the defendant's arrest, Officer Taylor was assigned to the Breath Alcohol Testing ("BAT") Division of the Traffic Enforcement Unit. He testified that, on the night of April 10, 1997, he was performing a routine patrol of West End Avenue. Just past midnight, Officer Taylor observed the defendant's vehicle [\*3] traveling toward him at what appeared to be a speed greater than the posted speed limit. Using a radar unit, he was able to determine that the defendant's car was going fifty miles per hour in a thirty miles per hour zone. The officer activated his lights and sirens and pulled in behind the defendant's car, but the defendant traveled another six blocks before a second patrolman forced the vehicle to stop by using a public address system to order the defendant to pull over. Officer Taylor approached the defendant's car, got her driver's license, and asked her to exit the vehicle, because she had refused to stop for him. The officer testified that the defendant appeared intoxicated as she got out of her car. He stated that her eyes were red, her face was flushed, and he detected the odor of alcohol. Although her speech was not slurred, Officer Taylor noticed that her mouth was dry, and she kept licking her lips to keep her mouth wet. When asked, the defendant initially denied having consumed any alcohol, but the officer noticed unsteadiness when she walked.

After obtaining the defendant's consent to perform a field sobriety test, the officer instructed and demonstrated for the defendant [\*4] the various maneuvers he asked her to perform. n1 He stated that she did "okay" on the "one-leg stand" n2 until she reached somewhere between eleven and twenty seconds. At that point, the defendant raised her arms to maintain her balance. Somewhere between twenty-one to thirty seconds, the defendant swayed somewhat and kept her arms away from her body to keep her balance. She counted incorrectly in the process of reaching thirty seconds and did not follow the officer's instructions, which indicated to the officer that she was somewhat confused. When Officer Taylor had her perform the "walk and turn" task, n3 the defendant was unable to maintain her balance. Instead of walking the first nine steps and then doing a two-step pivot, the defendant went twelve steps. She raised her arms and missed a couple of heel-to-toe steps. After the "two-step pivot," the defendant then went ten steps instead of nine and raised her arms again to maintain her balance. Based on cues he observed during the defendant's performance on the field sobriety tests, n4 her slow response to his emergency equipment, the odor of alcohol, and her red, glassy eyes, Officer Taylor felt that the defendant was impaired [\*5] and should not be operating a motor vehicle.

n1 According to the Intoxilyzer Alcohol Analyzer results attached to the Form # 132 filled out by Officer Taylor, the breath alcohol test was administered at 1:02 a.m.

n2 Officer Taylor explained that this test requires subjects to stand on whichever leg they choose, hold the other leg approximately six inches off the ground while keeping the hands down to the sides, and count "one thousand one, one thousand two . . . etc." up to "one thousand thirty." This test is administered according to National Highway Traffic Safety Administration (NHTSA). standards. See infra note 7.

n3 This test requires the subject to stand on a line with one foot in front of the other one, heel-to-toe, and walk nine steps with the heel touching the toe of the other foot. At the end of the ninth step, the subject is instructed to do a "two-step pivot," by which the subject brings the back foot around one time and completes the turn on the second step. The subject then begins the "heel-toe" walk again for the nine steps. This test is administered according to NHTSA standards.

[\*6]

n4 Officer Taylor testified that the defendant showed four cues during the "walk and turn" test, which tests the subject's performance of divided attention or multi-tasking, balance, following instructions, and reactions. Checked on the Form # 132 were: "cannot keep balance"; "misses heel-toe" during the first nine steps; "raises arms" during both the first and second nine steps; and "actual steps taken" were twelve during the first set of nine steps and ten during the second set. Our review of the Form # 132 and Officer Taylor's testimony during cross-examination reveals that the defendant also had two cues during the "one-leg stand" test. These were: "sways while on one leg" between twenty-one and thirty seconds and "raises arms while on one leg" between eleven and twenty seconds and also between twenty-one seconds and thirty seconds.

At that point, Officer Taylor read the Tennessee Implied Consent Law to the defendant and asked her if she would submit to a breath test. The defendant agreed to do so. She was placed in the back of Officer Taylor's police car, and he sat in the driver's seat [\*7] so he could turn around. At this point, Officer Taylor asked the defendant the questions on the back of the Form # 132 n5 used by police. She responded that she did not have any illness or injuries, did not take any medications or drugs, had her last meal at 8:00 p.m., and had one mixed drink at approximately 9:00 p.m. The defendant told the officer that she had the mixed drink at Club Platinum on Hayes Street. Because the defendant's eyes were red, Officer Taylor asked how much sleep she had gotten in the past twenty-four hours, to which she replied seven hours. Officer Taylor testified that he did not do any paperwork during his observation of the defendant, which lasted approximately twenty-eight minutes. At the end of the observation period, Officer Taylor administered the breath test to the defendant, and she registered a 0.16%. After advising the defendant of the results, Officer Taylor asked if she wanted to submit to a blood test. He testified that he did not remember if the defendant stated that she wanted a blood test at that time, but she would have been given one if she had indicated that she wanted one. He remembered the defendant asking about the cost, and Taylor told [\*8] her the cost. Taylor stated that if the defendant had said, "That's all right," he would have interpreted her response to mean "no," which he marked on the Form # 132. He took the defendant straight to the jail.

n5 Defense counsel explained to the trial court that this form is the Metropolitan Police Department's DUI report.

Officer Taylor stated that he was trained and certified by the Tennessee Bureau of Investigation to give breath alcohol tests. His certification in the operation of the Intoxilyzer 1400 was entered into evidence. Although the trial judge would not allow the certificate of calibration from CMI, Inc., the maker of the particular Intoxilyzer 1400 used on

the defendant, or the certification of calibration by the TBI for that machine into evidence based on a hearsay objection from defense counsel, the defendant made no objection to the officer's testimony that the machine (number 130) had been certified by the TBI on February 21, 1997. The printout for the defendant's breath test results of 0.167 [\*9] was also entered into evidence through this witness. The videotape of the stop, field sobriety test, and arrest of the defendant was shown to the jury and entered into evidence. n6

n6 Our review of the videotape reveals that the camera in Officer Taylor's car was pointed forward throughout the observation period and administration of the alcohol breath test. This prevents us from observing the defendant during this time. However, the audio portion of the videotape, which contained the conversation between the officer and the defendant, is clearly audible.

The officer explained why the video showed that the defendant had to retake the breath test after a first unsuccessful attempt. He stated that the Intoxilyzer Pack 1400 has a tone meter which indicates when a sufficient sample is being injected into the machine's chamber. To do the test correctly, the subject must blow a constant, steady breath for about eight to ten seconds. Once the chamber has been filled, the machine will cut off the test, and the subject [\*10] stops blowing into it. The Intoxilyzer goes through some internal checks and gives a printout of the alcohol content of the subject's breath. On her first try, the defendant did not give a sufficient breath sample, and the machine self-aborted the first test. The procedure at this point was to recycle the Intoxilyzer and instruct the subject to perform again. The second time the defendant blew, a sufficient sample was obtained for the machine to analyze. Officer Taylor explained that the machine does all of the work internally, so if there is any interference or anything other than alcohol detected, the machine will self-abort the test. The printout will show that there was an insufficient sample and, in the defendant's case, the useless printout from the first test was destroyed. Officer Taylor testified that the defendant did not put anything into her mouth, smoke anything, belch, regurgitate, or do anything else that would upset the test while he was observing her. He also stated that he followed all of the appropriate procedures to get the results of the second test. After taking the defendant into custody, Officer Taylor attempted to secure her vehicle and found an open bottle [\*11] of beer in the passenger side floorboard. After viewing the video, the officer acknowledged that the defendant initially stated that she wanted a blood test, but later said that she did not after talking to another officer on the scene.

On cross-examination, a copy of the Form # 132 was entered into evidence through Officer Taylor. He stated that he could not tell if the defendant's driving was erratic or unlawful in any other way besides speeding, because she was so far ahead of him. The officer was confronted with his statement at the preliminary hearing in which he stated that the defendant did not weave in her lane as far as he could see. He stated that his trial testimony was the same.

After viewing the tape, Officer Taylor still was of the opinion that the defendant was unsteady as she exited her vehicle. He admitted that the defendant did not attempt to flee, did not lean against her car, or fall out of her vehicle. He also admitted that, from the odor of alcohol alone, he cannot tell what a subject has had to drink, how much, or over what period of time. He agreed that his training has taught him that ethyl alcohol has no odor but still stated that he smelled alcohol on [\*12] the defendant. He did not form an opinion that probable cause existed to arrest the defendant at the time he smelled alcohol on her or when he saw her speeding but felt he might arrest her for reckless driving.

Defense counsel reviewed with Officer Taylor the NHTSA n7 standard demonstrations and instructions given to the defendant before each field sobriety task, who said that he did not give her the instruction, "Do not hop or sway." The officer testified that the defendant said that she understood his instructions, and it was his opinion that she did understand. He explained that there are four cues in the "one-leg stand" test that are signs of intoxication, namely, the sway, raised arms, hopping on one leg, and putting the foot down before time is up. After observing the defendant's performance on the "one-leg stand" test, Officer Taylor had not yet formed an opinion as to whether probable cause existed to place the defendant under arrest. He testified that he had one more task to perform before doing so. The defendant was instructed on how to do the "walk and turn" test, and she seemed to understand. After observing four cues during the defendant's performance of this test, Officer [\*13] Taylor then formed his opinion that probable cause

existed for the defendant's arrest. Taylor agreed that the videotape showed that the defendant was not under arrest when he read her the Implied Consent Law but that she was placed under arrest after he read it. She was not handcuffed. He agreed with defense counsel that the defendant cooperated with him and did not have trouble getting into his patrol car. He stated that she had dry mouth and had discarded the gum she was chewing after finishing the field sobriety tests.

n7 This stands for the National Highway Traffic Safety Administration. *State v. Sensing*, 843 S.W.2d 412, 414 (Tenn. 1992).

After seeing the videotape, Taylor admitted on cross-examination that his recollection at the preliminary hearing that he conducted the period of observation on the defendant outside his car was incorrect. He explained that he put the defendant in the back seat on the right-hand side and began his observation after he got into the car and observed the [\*14] defendant until he started the Intoxilyzer. During the observation period, Officer Taylor read the defendant her Miranda rights. He testified that he had a card with those rights printed on it but did not get the card out to look at it. When he asked the defendant the questions listed on the Form # 132 under "Suspect's General Health and Investigative Questions," Officer Taylor did not record her answers at that time. According to the Form # 132, he observed the defendant for a little longer than twenty minutes before the breath test was given. Officer Taylor admitted that he could not verify the documents certifying the machine he used, but he could say those are the documents that are given out for the machines and that the machines are sent to the TBI lab.

Although he admitted that checking a subject's mouth prior to the breath test is part of the routine that an officer is supposed to follow, Officer Taylor stated that he did not check the defendant's mouth before he asked her to blow; however, he stated he had been watching her, and she did not put anything into her mouth. When Officer Taylor handed the defendant a new mouthpiece to use in the test, he did not look down [\*15] into the box, because he could reach down and get it. The defendant had a problem with her first attempt to blow, and the machine was heard on the videotape to be printing something out. Officer Taylor stated that the machine printed out "insufficient sample." He explained that the portion of the printout for "subject test" would be blank and "insufficient sample" would be printed at the bottom with an asterisk right above it. The reading would be zero. He then had to start the sequence over again. Because the machine was between the seats, near the officer's lap, and the mouthpieces are kept on the floorboard, Officer Taylor stated that he never took his eyes off the defendant. He explained that several times on her second attempt to complete the test, the defendant would blow up to a certain point and then stop. The Intoxilyzer would show "please blow," and Officer Taylor would instruct her again to blow out a steady, continuous breath.

In his testimony, Officer Taylor explained that a steady, continuous breath is necessary to get a sufficient sample to get an accurate breath count. He agreed that deep lung air is the type of sample needed by the computer in the machine to convert [\*16] a breath alcohol reading into blood alcohol content. He stated that the machine is so sensitive that it can distinguish between deep lung air and regular air, and the Intoxilyzer will abort the test if deep lung air is not in the sample obtained. The videotape also showed Officer Taylor telling another officer at the scene that he expected the defendant to "blow a ten" (0.10) on the machine. He testified that he did not question the machine when the results showed the defendant had a 0.16% blood alcohol content, but he denied that he was relying on the machine over his ability as a police officer to recognize that someone is under the influence. He stated that he had been a police officer for sixteen years, six of those as a DUI Task Force officer. Officer Taylor testified he had attended classes where people drink, and he was supposed to guess their breath alcohol content. He felt he was good at doing so.

When asked by defense counsel if he allowed the defendant to practice the field sobriety tests, Officer Taylor stated that he did not. He also stated that it is not normal to walk heel-to-toe, and agreed that, if a person were allowed to practice, he or she would be able to do it [\*17] better. He stated that he did not tell the defendant what she had to do to pass the tests. It was his opinion that the defendant was under the influence and that he had probable cause to believe she was under the influence, although he agreed that the jury makes that determination.

Defense counsel further cross-examined the officer about the videotaped conversation with the defendant concerning her desire to take a blood test after the breath test. Officer Taylor agreed that the videotape showed that the defendant responded, "Yes, I do." When the officer told her it would be at her own expense, she replied, "That's okay." It was Officer Taylor's recollection that the defendant decided not to take a blood test after another officer, who was a friend of the defendant, came to the scene and talked with her. He acknowledged that there was a break in the recording where the audio was off during the time that the defendant was talking with her friend but testified that the defendant stated she did not want the blood test before Officer Taylor got back in the car and turned the tape back on. The other officer was driving off at that time.

The State then rested its case. The defense called [\*18] no witnesses, and the case went to the jury for deliberations. The jury ultimately found the defendant guilty of DUI per se.

## ANALYSIS

### Admission of Intoxilyzer Test Results

The general fundamental requirements for the admission of breath alcohol test results were established in *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992); *State v. Bobo*, 909 S.W.2d 788, 790 (Tenn. 1995); and *State v. Deloit*, 964 S.W.2d 909, 912 (Tenn. Crim. App. 1997). [HN1] The Sensing standard requires that an officer be able to testify that: (1) the tests were performed in accordance with standards and procedures promulgated by TBI's forensic services division; (2) the testing officer was properly certified; (3) the breath testing instrument used was certified by the TBI, was regularly tested for accuracy, and was working properly when the test was performed; (4) the subject was observed for twenty minutes prior to the test and, during this time, did not have foreign matter in his mouth, did not consume alcohol, smoke, or regurgitate; (5) the officer followed [\*19] the prescribed operational procedure; and (6) the testing officer identified the printout record offered into evidence as being the test result of the subject involved. *Sensing*, 843 S.W.2d at 416; *Deloit*, 964 S.W.2d at 912.

[HN2]

Once the State has shown all six Sensing requirements by a preponderance of the evidence, the test results are admitted. A trial court's decision to admit breath alcohol test evidence will not be disturbed on appeal unless the preponderance of the evidence is contrary to that decision. *State v. Edison*, 9 S.W.3d 75, 77-78 (Tenn. 1999).

The defendant contends that the trial court erred in admitting the results of the defendant's Intoxilyzer test, because the State failed to meet four of the Sensing requirements. Specifically, the defendant argues that the reliability of the test was compromised, because: (1) the test was not performed in accordance with the TBI's standards and operating procedure; (2) Officer Taylor did not properly observe the defendant for twenty minutes and failed to visually check the [\*20] defendant's mouth before giving the test; (3) there was no evidence that the Intoxilyzer was properly certified, regularly calibrated, and working properly; and (4) there was no evidence that Officer Taylor followed the prescribed operational procedure. The defendant correctly argues that, if the State failed to satisfy Sensing, it could only get the test results admitted under traditional rules of evidence that would assure the reliability of the test. *Deloit*, 964 S.W.2d at 913. This would require a showing that the device was scientifically acceptable and accurate and that Officer Taylor was qualified to interpret the results for the jury. 964 S.W.2d at 911. According to the defendant, this was not done at trial; and, therefore, the evidence was not admissible.

We do not agree that the breath alcohol test results were inadmissible. After a careful review of the record, we conclude that the evidence does not preponderate against the trial court's decision to admit the Intoxilyzer results.

The defendant's contention that the State failed to establish that the defendant's test was performed according to TBI standards and procedures (Sensing [\*21] requirement # 1), as well as her contention that Officer Taylor did not properly observe her or check her mouth before giving the test (requirement # 4), are without merit. Officer Taylor testified that he was trained and certified by the TBI to operate the Intoxilyzer 1400 and administer breath alcohol tests. His certification was entered into evidence. He then described how he conducted the test on the defendant and what

procedure he used to get an accurate reading. He testified that he observed the defendant uninterrupted for over twenty minutes and that she put nothing in her mouth during that time. n8 When the defendant's first breath test was insufficient, Officer Taylor testified that the procedure was to recycle the Intoxilyzer and try again. In addition, he stated that he followed all of the appropriate procedures in obtaining the test results from the second test. This testimony is stronger than that of the officer in *State v. Edison*, in which the supreme court determined that the Sensing requirement was met that proper procedures be followed during the test. In that case, the officer testified that he could not remember if he followed the proper procedures but knew [\*22] he must have, since there are "just certain procedures that you have to follow to run the test." *Edison*, 9 S.W.3d at 79. In the present case, Officer Taylor testified that he did follow all the proper procedures, which was more definite than the officer's testimony in *Edison*.

n8 The audio portion of the videotape of the defendant's arrest reveals that on three occasions Officer Taylor advised the defendant regarding any foreign objects in her mouth: "Do you have anything in your mouth?"; "Make sure you put nothing in your mouth"; and "Put nothing in your mouth."

Although Officer Taylor admitted on cross-examination that he did not visually inspect the defendant's mouth before giving the breath test, this is not fatal to the State's Sensing proof. This court has not required that [HN3] an officer search a subject's mouth visually if he: (1) has determined that foreign matter has been removed prior to [\*23] the twenty-minute observation period and (2) testifies that he continuously observed the test subject for the required period, during which the subject's mouth remained clear. See *State v. Deloit*, 964 S.W.2d 909, 916-17 (Tenn. Crim. App. 1997) (discussing *State v. Fields*, 1996 Tenn. Crim. App. LEXIS 219, No. 01 C01-9412-CC-00438, 1996 WL 180706 (Tenn. Crim. App., Nashville, Apr. 12, 1996)); *State v. Jarnagin*, 2000 Tenn. Crim. App. LEXIS 378, No. E1998-00892-CCA-R8-CD, 2000 WL 575232 (Tenn. Crim. App., Knoxville, May 12, 2000). This procedure insures that nothing new or unknown enters the subject's mouth that would skew the test results. *State v. Cook*, 9 S.W.3d 98, 100-01 (Tenn. 1999). In the present case, Officer Taylor testified that the defendant spit out her gum before he continuously observed her for the required twenty-minute period. He did not look away from her to do paperwork or to administer the breath test. Therefore, we cannot conclude that the evidence in the record preponderates against the trial court's determination that the proper procedures and observation of the defendant [\*24] were followed.

Evidence was also presented that the particular Intoxilyzer used in the defendant's test was properly certified, calibrated, and working properly (Sensing requirement # 3). Officer Taylor testified that the machine had been certified by the TBI on February 21, 1997, less than two months before it was used on the defendant. He also stated he knew that the machine was sent to the TBI lab and that the certification of calibration from the TBI was returned with the machine. Again, this testimony is more specific than that presented in *State v. Edison*, in which this Sensing requirement was met by an officer's testimony that the certification of calibration was posted at the jail, and the machine was checked every three months, although he did not know the date of the last calibration. *State v. Edison*, 9 S.W.3d 75, 78 (Tenn. 1999). We conclude that the evidence does not preponderate against the trial court's finding that the Sensing requirement of a properly calibrated and working instrument was met by the State.

Further bolstering the State's argument, we conclude that the trial court should have allowed the certificate of calibration [\*25] to be entered into evidence. In Sensing, the court stated:

The forensic services division inspects, repairs and maintains all units previously certified, including use of a laboratory computer controller to poll each instrument and correlate all test data of each instrument for clarification of instrument performance. Every 90 days forensic services division personnel conduct tests of each instrument under laboratory control conditions and record the results, noting any required adjustments or repairs of each unit. The certification also provides that upon request of the court, district attorney, defendant, or other person or party having an interest in the use of the test performed on an approved breath testing instrument an official copy of those standards and procedures will be certified pursuant to *T.C.A. § 38-6-107* and delivered to the requesting party. We are of the opinion that this procedure to supply records also conforms with the provisions of Tennessee Rule of Evidence, 803(8) as an

exception to the hearsay evidence rule.

843 S.W.2d at 415-16. [HN4] [\*26] It is the statutory duty of the forensic services division to maintain and certify alcohol breath testing instruments of those police departments participating in the purchasing program with the state. *Tenn. Code Ann. § 38-6-103(d)(2), (g)* (1997). The certificate of calibration from the bureau is part of this process and is given to the police departments when the instrument is calibrated. At trial, Officer Taylor testified that this certification was given back to the department after the machine was sent to the TBI for calibration. Barring any other evidentiary defects, this appears to fit within Tennessee Rule of Evidence 803(8), which carves out an exception to hearsay for a report from a public agency issued pursuant to a duty imposed by law. However, in the present case, the testimony of Officer Taylor was sufficient to establish that the machine was working properly, even in the absence of the certificate of calibration.

We conclude that the evidence does not preponderate against the trial court's determination that the State met its burden of proving all of the Sensing requirements to admit the alcohol breath test.

Since we have concluded [\*27] that the Intoxilyzer results were properly admitted into evidence, we now turn to the defendant's contention that the trial court erred in denying her motion for acquittal or a new trial. [HN5] When a motion for acquittal is presented to the trial court, the court is only concerned with the legal sufficiency of the evidence, rather than the weight of the evidence presented. *State v. Blanton, 926 S.W.2d 953, 957 (Tenn. Crim. App. 1996)*. In determining sufficiency, the trial court must consider the parties' evidence, disregard the defendant's evidence which conflicts with that of the State, and afford the State the strongest legitimate view of the evidence, including all reasonable inferences. 926 S.W.2d at 957-58. The State's proof was sufficient to establish all elements of the offense of DUI, and the trial court was correct in denying the defendant's motion for acquittal or for a new trial based upon improper admittance of scientific evidence.

#### **Excessive Sentence**

The defendant further contends that the trial court imposed too harsh a sentence for the [\*28] DUI per se conviction. From the record provided, we cannot determine whether the trial court acted properly or not. It is the appellant's obligation to prepare an adequate record on appeal in order to have an issue considered by this court. No transcript of the sentencing hearing is contained within the record, which precludes us from considering this issue. *Tenn. R. App. P. 24(b); State v. Draper, 800 S.W.2d 489 (Tenn. Crim. App. 1990)*.

#### **CONCLUSION**

Upon our review, we conclude that the evidence does not preponderate against the trial court's determination that the defendant's alcohol breath test results met all the requirements of Sensing and were admissible. Further, we hold that we are precluded from considering the defendant's sentence under Rule 24 of the Tennessee Rules of Appellate Procedure. Therefore, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE

173 of 195 DOCUMENTS

**STATE OF TENNESSEE v. KIMBERLY M. LARSON****No. M1999-00507-CCA-R3-CD****COURT OF CRIMINAL APPEALS OF TENNESSEE, MIDDLE SECTION, AT  
NASHVILLE***2000 Tenn. Crim. App. LEXIS 603***August 4, 2000, Filed**

**PRIOR HISTORY:** [\*1] Direct Appeal from the Criminal Court for Davidson County. Seth Norman, Judge. No. 97-T-937.

**DISPOSITION:** Judgment of the Criminal Court Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Criminal Court for Davidson County, Tennessee, convicting her of driving under the influence per se. Defendant argued the lower court erred in denying her motion for acquittal or new trial based upon the improper admittance of scientific evidence. Defendant argued the lower court imposed an excessive sentence.

**OVERVIEW:** Defendant was convicted of driving under the influence per se. The court affirmed the judgment of the lower court and held that defendant's alcohol breath tests were admissible, as the Sensing requirements were met. The court held it could not consider defendant's sentence under Tenn. R. App. P. 24 (b) because there was no transcript of the sentencing hearing within the record. The Sensing standard showed that the breath tests were properly performed, that the officer was certified, the breath testing device was accurate, defendant was observed for 20 minutes prior to the test, the officer followed procedure, and the officer identified the printout record as being defendant's test results. The evidence did not preponderate against the lower court's decision to admit the Intoxilyzer results. The state's proof established all the elements of defendant's offense, thus it was not error to deny defendant's motion for acquittal or new trial based upon improper admittance of scientific evidence. The court was precluded from considering defendant's sentence by Tenn. R. App. P. 24 (b), as no transcript of the sentencing hearing was within the record.

**OUTCOME:** The judgment of the lower court was affirmed. The court held there was not a preponderance of evidence against the lower court's judgment that defendant's alcohol breath tests met all the requirements and were admissible. It was not error to deny defendant's motion for new trial or acquittal, as the state met its burden of proof. The court could not consider defendant's sentence because no transcript of the hearing was contained in the record.

**CORE TERMS:** machine, mouth, alcohol, breath, breath test, calibration, videotape, arrest, certification, blow, arms, blood test, printout, walk, testing, preponderate, driving, minutes, cues, calibrated, forensic, new trial, cross-examination, administered, certificate, sobriety, sentence, one-leg, air, leg

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN1] The controlling rule requires that an officer be able to testify that: (1) the breath tests were performed in accordance with standards and procedures promulgated by Tennessee Bureau of Investigation's (TBI) forensic services division; (2) the testing officer was properly certified; (3) the breath testing instrument used was certified by the TBI, was regularly tested for accuracy, and was working properly when the test was performed; (4) the subject was observed for twenty minutes prior to the test and, during this time, did not have foreign matter in his mouth, did not consume alcohol, smoke, or regurgitate; (5) the officer followed the prescribed operational procedure; and (6) the testing officer identified the printout record offered into evidence as being the test result of the subject involved.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview Evidence > Scientific Evidence > Sobriety Tests***

[HN2] Once the state has shown all six requirements by a preponderance of the evidence, the test results are admitted. A trial court's decision to admit breath alcohol test evidence will not be disturbed on appeal unless the preponderance of the evidence is contrary to that decision.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

***Criminal Law & Procedure > Search & Seizure > General Overview***

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

[HN3] An officer is not required to search a subject's mouth visually if he: (1) has determined that foreign matter has been removed prior to the twenty-minute observation period and (2) testifies that he continuously observed the test subject for the required period, during which the subject's mouth remained clear. This procedure insures that nothing new or unknown enters the subject's mouth that would skew the test results.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

[HN4] It is the statutory duty of the forensic services division to maintain and certify alcohol breath testing instruments of those police departments participating in the purchasing program with the state. *Tenn. Code Ann. § 38-6-103(d)(2), (g)* (1997).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN5] When a motion for acquittal is presented to the trial court, the court is only concerned with the legal sufficiency of the evidence, rather than the weight of the evidence presented. In determining sufficiency, the trial court must consider the parties' evidence, disregard the defendant's evidence which conflicts with that of the state, and afford the state the strongest legitimate view of the evidence, including all reasonable inferences.

**COUNSEL:** V. Michael Fox, Nashville, Tennessee, for the appellant, Kimberly M. Larson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson,

III, District Attorney General; and Edward S. Ryan, Assistant District Attorney General, for the appellee, State of Tennessee.

**JUDGES:** ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY, J., and WILLIAM B. ACREE, JR., SP.J., joined.

**OPINION BY:** ALAN E. GLENN

**OPINION:** This appeal arises from a guilty verdict returned against the defendant for DUI per se for which she received a sentence of eleven months and twenty-nine days, with all but ten days suspended, a \$ 350 fine, court-ordered rehabilitation, and suspension of driving privileges for one year. On appeal, the defendant challenges the admittance of her breathalyzer test results at trial and alleges that her sentence was excessive. After a review of the record, we affirm the judgment of the trial court.

On June 10, 1998, the defendant, Kimberly Larson, was found [\*2] guilty by a Davidson County jury of driving under the influence per se. She was subsequently sentenced to eleven months and twenty-nine days incarceration, all except ten days suspended, ordered to participate in a rehabilitation program, and prohibited from driving for one year. The defendant then filed a motion for a new trial or acquittal, which was denied by the trial court on April 30, 1999. She has appealed to this court on two issues: (1) whether the trial court erred in denying the motion for acquittal or new trial based upon the improper admittance of scientific evidence; and (2) whether the trial court imposed an excessive sentence. Upon our *de novo* review of the record, we affirm the judgment of the trial court.

## FACTS

The only witness to testify in this case was Officer Harold R. Taylor, a ten-year veteran of the Metropolitan Police Department. At the time of the defendant's arrest, Officer Taylor was assigned to the Breath Alcohol Testing ("BAT") Division of the Traffic Enforcement Unit. He testified that, on the night of April 10, 1997, he was performing a routine patrol of West End Avenue. Just past midnight, Officer Taylor observed the defendant's vehicle [\*3] traveling toward him at what appeared to be a speed greater than the posted speed limit. Using a radar unit, he was able to determine that the defendant's car was going fifty miles per hour in a thirty miles per hour zone. The officer activated his lights and sirens and pulled in behind the defendant's car, but the defendant traveled another six blocks before a second patrolman forced the vehicle to stop by using a public address system to order the defendant to pull over. Officer Taylor approached the defendant's car, got her driver's license, and asked her to exit the vehicle, because she had refused to stop for him. The officer testified that the defendant appeared intoxicated as she got out of her car. He stated that her eyes were red, her face was flushed, and he detected the odor of alcohol. Although her speech was not slurred, Officer Taylor noticed that her mouth was dry, and she kept licking her lips to keep her mouth wet. When asked, the defendant initially denied having consumed any alcohol, but the officer noticed unsteadiness when she walked.

After obtaining the defendant's consent to perform a field sobriety test, the officer instructed and demonstrated for the defendant [\*4] the various maneuvers he asked her to perform. n1 He stated that she did "okay" on the "one-leg stand" n2 until she reached somewhere between eleven and twenty seconds. At that point, the defendant raised her arms to maintain her balance. Somewhere between twenty-one to thirty seconds, the defendant swayed somewhat and kept her arms away from her body to keep her balance. She counted incorrectly in the process of reaching thirty seconds and did not follow the officer's instructions, which indicated to the officer that she was somewhat confused. When Officer Taylor had her perform the "walk and turn" task, n3 the defendant was unable to maintain her balance. Instead of walking the first nine steps and then doing a two-step pivot, the defendant went twelve steps. She raised her arms and missed a couple of heel-to-toe steps. After the "two-step pivot," the defendant then went ten steps instead of nine and raised her arms again to maintain her balance. Based on cues he observed during the defendant's performance on the field sobriety tests, n4 her slow response to his emergency equipment, the odor of alcohol, and her red, glassy eyes, Officer Taylor felt that the defendant was impaired [\*5] and should not be operating a motor vehicle.

n1 According to the Intoxilyzer Alcohol Analyzer results attached to the Form # 132 filled out by Officer Taylor, the breath alcohol test was administered at 1:02 a.m.

n2 Officer Taylor explained that this test requires subjects to stand on whichever leg they choose, hold the other leg approximately six inches off the ground while keeping the hands down to the sides, and count "one thousand one, one thousand two . . . etc." up to "one thousand thirty." This test is administered according to National Highway Traffic Safety Administration (NHTSA). standards. See infra note 7.

n3 This test requires the subject to stand on a line with one foot in front of the other one, heel-to-toe, and walk nine steps with the heel touching the toe of the other foot. At the end of the ninth step, the subject is instructed to do a "two-step pivot," by which the subject brings the back foot around one time and completes the turn on the second step. The subject then begins the "heel-toe" walk again for the nine steps. This test is administered according to NHTSA standards.

[\*6]

n4 Officer Taylor testified that the defendant showed four cues during the "walk and turn" test, which tests the subject's performance of divided attention or multi-tasking, balance, following instructions, and reactions. Checked on the Form # 132 were: "cannot keep balance"; "misses heel-toe" during the first nine steps; "raises arms" during both the first and second nine steps; and "actual steps taken" were twelve during the first set of nine steps and ten during the second set. Our review of the Form # 132 and Officer Taylor's testimony during cross-examination reveals that the defendant also had two cues during the "one-leg stand" test. These were: "sways while on one leg" between twenty-one and thirty seconds and "raises arms while on one leg" between eleven and twenty seconds and also between twenty-one seconds and thirty seconds.

At that point, Officer Taylor read the Tennessee Implied Consent Law to the defendant and asked her if she would submit to a breath test. The defendant agreed to do so. She was placed in the back of Officer Taylor's police car, and he sat in the driver's seat [\*7] so he could turn around. At this point, Officer Taylor asked the defendant the questions on the back of the Form # 132 n5 used by police. She responded that she did not have any illness or injuries, did not take any medications or drugs, had her last meal at 8:00 p.m., and had one mixed drink at approximately 9:00 p.m. The defendant told the officer that she had the mixed drink at Club Platinum on Hayes Street. Because the defendant's eyes were red, Officer Taylor asked how much sleep she had gotten in the past twenty-four hours, to which she replied seven hours. Officer Taylor testified that he did not do any paperwork during his observation of the defendant, which lasted approximately twenty-eight minutes. At the end of the observation period, Officer Taylor administered the breath test to the defendant, and she registered a 0.16%. After advising the defendant of the results, Officer Taylor asked if she wanted to submit to a blood test. He testified that he did not remember if the defendant stated that she wanted a blood test at that time, but she would have been given one if she had indicated that she wanted one. He remembered the defendant asking about the cost, and Taylor told [\*8] her the cost. Taylor stated that if the defendant had said, "That's all right," he would have interpreted her response to mean "no," which he marked on the Form # 132. He took the defendant straight to the jail.

n5 Defense counsel explained to the trial court that this form is the Metropolitan Police Department's DUI report.

Officer Taylor stated that he was trained and certified by the Tennessee Bureau of Investigation to give breath alcohol tests. His certification in the operation of the Intoxilyzer 1400 was entered into evidence. Although the trial judge would not allow the certificate of calibration from CMI, Inc., the maker of the particular Intoxilyzer 1400 used on

the defendant, or the certification of calibration by the TBI for that machine into evidence based on a hearsay objection from defense counsel, the defendant made no objection to the officer's testimony that the machine (number 130) had been certified by the TBI on February 21, 1997. The printout for the defendant's breath test results of 0.167 [\*9] was also entered into evidence through this witness. The videotape of the stop, field sobriety test, and arrest of the defendant was shown to the jury and entered into evidence. n6

n6 Our review of the videotape reveals that the camera in Officer Taylor's car was pointed forward throughout the observation period and administration of the alcohol breath test. This prevents us from observing the defendant during this time. However, the audio portion of the videotape, which contained the conversation between the officer and the defendant, is clearly audible.

The officer explained why the video showed that the defendant had to retake the breath test after a first unsuccessful attempt. He stated that the Intoxilyzer Pack 1400 has a tone meter which indicates when a sufficient sample is being injected into the machine's chamber. To do the test correctly, the subject must blow a constant, steady breath for about eight to ten seconds. Once the chamber has been filled, the machine will cut off the test, and the subject [\*10] stops blowing into it. The Intoxilyzer goes through some internal checks and gives a printout of the alcohol content of the subject's breath. On her first try, the defendant did not give a sufficient breath sample, and the machine self-aborted the first test. The procedure at this point was to recycle the Intoxilyzer and instruct the subject to perform again. The second time the defendant blew, a sufficient sample was obtained for the machine to analyze. Officer Taylor explained that the machine does all of the work internally, so if there is any interference or anything other than alcohol detected, the machine will self-abort the test. The printout will show that there was an insufficient sample and, in the defendant's case, the useless printout from the first test was destroyed. Officer Taylor testified that the defendant did not put anything into her mouth, smoke anything, belch, regurgitate, or do anything else that would upset the test while he was observing her. He also stated that he followed all of the appropriate procedures to get the results of the second test. After taking the defendant into custody, Officer Taylor attempted to secure her vehicle and found an open bottle [\*11] of beer in the passenger side floorboard. After viewing the video, the officer acknowledged that the defendant initially stated that she wanted a blood test, but later said that she did not after talking to another officer on the scene.

On cross-examination, a copy of the Form # 132 was entered into evidence through Officer Taylor. He stated that he could not tell if the defendant's driving was erratic or unlawful in any other way besides speeding, because she was so far ahead of him. The officer was confronted with his statement at the preliminary hearing in which he stated that the defendant did not weave in her lane as far as he could see. He stated that his trial testimony was the same.

After viewing the tape, Officer Taylor still was of the opinion that the defendant was unsteady as she exited her vehicle. He admitted that the defendant did not attempt to flee, did not lean against her car, or fall out of her vehicle. He also admitted that, from the odor of alcohol alone, he cannot tell what a subject has had to drink, how much, or over what period of time. He agreed that his training has taught him that ethyl alcohol has no odor but still stated that he smelled alcohol on [\*12] the defendant. He did not form an opinion that probable cause existed to arrest the defendant at the time he smelled alcohol on her or when he saw her speeding but felt he might arrest her for reckless driving.

Defense counsel reviewed with Officer Taylor the NHTSA n7 standard demonstrations and instructions given to the defendant before each field sobriety task, who said that he did not give her the instruction, "Do not hop or sway." The officer testified that the defendant said that she understood his instructions, and it was his opinion that she did understand. He explained that there are four cues in the "one-leg stand" test that are signs of intoxication, namely, the sway, raised arms, hopping on one leg, and putting the foot down before time is up. After observing the defendant's performance on the "one-leg stand" test, Officer Taylor had not yet formed an opinion as to whether probable cause existed to place the defendant under arrest. He testified that he had one more task to perform before doing so. The defendant was instructed on how to do the "walk and turn" test, and she seemed to understand. After observing four cues during the defendant's performance of this test, Officer [\*13] Taylor then formed his opinion that probable cause

existed for the defendant's arrest. Taylor agreed that the videotape showed that the defendant was not under arrest when he read her the Implied Consent Law but that she was placed under arrest after he read it. She was not handcuffed. He agreed with defense counsel that the defendant cooperated with him and did not have trouble getting into his patrol car. He stated that she had dry mouth and had discarded the gum she was chewing after finishing the field sobriety tests.

n7 This stands for the National Highway Traffic Safety Administration. *State v. Sensing*, 843 S.W.2d 412, 414 (Tenn. 1992).

After seeing the videotape, Taylor admitted on cross-examination that his recollection at the preliminary hearing that he conducted the period of observation on the defendant outside his car was incorrect. He explained that he put the defendant in the back seat on the right-hand side and began his observation after he got into the car and observed the [\*14] defendant until he started the Intoxilyzer. During the observation period, Officer Taylor read the defendant her Miranda rights. He testified that he had a card with those rights printed on it but did not get the card out to look at it. When he asked the defendant the questions listed on the Form # 132 under "Suspect's General Health and Investigative Questions," Officer Taylor did not record her answers at that time. According to the Form # 132, he observed the defendant for a little longer than twenty minutes before the breath test was given. Officer Taylor admitted that he could not verify the documents certifying the machine he used, but he could say those are the documents that are given out for the machines and that the machines are sent to the TBI lab.

Although he admitted that checking a subject's mouth prior to the breath test is part of the routine that an officer is supposed to follow, Officer Taylor stated that he did not check the defendant's mouth before he asked her to blow; however, he stated he had been watching her, and she did not put anything into her mouth. When Officer Taylor handed the defendant a new mouthpiece to use in the test, he did not look down [\*15] into the box, because he could reach down and get it. The defendant had a problem with her first attempt to blow, and the machine was heard on the videotape to be printing something out. Officer Taylor stated that the machine printed out "insufficient sample." He explained that the portion of the printout for "subject test" would be blank and "insufficient sample" would be printed at the bottom with an asterisk right above it. The reading would be zero. He then had to start the sequence over again. Because the machine was between the seats, near the officer's lap, and the mouthpieces are kept on the floorboard, Officer Taylor stated that he never took his eyes off the defendant. He explained that several times on her second attempt to complete the test, the defendant would blow up to a certain point and then stop. The Intoxilyzer would show "please blow," and Officer Taylor would instruct her again to blow out a steady, continuous breath.

In his testimony, Officer Taylor explained that a steady, continuous breath is necessary to get a sufficient sample to get an accurate breath count. He agreed that deep lung air is the type of sample needed by the computer in the machine to convert [\*16] a breath alcohol reading into blood alcohol content. He stated that the machine is so sensitive that it can distinguish between deep lung air and regular air, and the Intoxilyzer will abort the test if deep lung air is not in the sample obtained. The videotape also showed Officer Taylor telling another officer at the scene that he expected the defendant to "blow a ten" (0.10) on the machine. He testified that he did not question the machine when the results showed the defendant had a 0.16% blood alcohol content, but he denied that he was relying on the machine over his ability as a police officer to recognize that someone is under the influence. He stated that he had been a police officer for sixteen years, six of those as a DUI Task Force officer. Officer Taylor testified he had attended classes where people drink, and he was supposed to guess their breath alcohol content. He felt he was good at doing so.

When asked by defense counsel if he allowed the defendant to practice the field sobriety tests, Officer Taylor stated that he did not. He also stated that it is not normal to walk heel-to-toe, and agreed that, if a person were allowed to practice, he or she would be able to do it [\*17] better. He stated that he did not tell the defendant what she had to do to pass the tests. It was his opinion that the defendant was under the influence and that he had probable cause to believe she was under the influence, although he agreed that the jury makes that determination.

Defense counsel further cross-examined the officer about the videotaped conversation with the defendant concerning her desire to take a blood test after the breath test. Officer Taylor agreed that the videotape showed that the defendant responded, "Yes, I do." When the officer told her it would be at her own expense, she replied, "That's okay." It was Officer Taylor's recollection that the defendant decided not to take a blood test after another officer, who was a friend of the defendant, came to the scene and talked with her. He acknowledged that there was a break in the recording where the audio was off during the time that the defendant was talking with her friend but testified that the defendant stated she did not want the blood test before Officer Taylor got back in the car and turned the tape back on. The other officer was driving off at that time.

The State then rested its case. The defense called [\*18] no witnesses, and the case went to the jury for deliberations. The jury ultimately found the defendant guilty of DUI per se.

## ANALYSIS

### Admission of Intoxilyzer Test Results

The general fundamental requirements for the admission of breath alcohol test results were established in *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992); *State v. Bobo*, 909 S.W.2d 788, 790 (Tenn. 1995); and *State v. Deloit*, 964 S.W.2d 909, 912 (Tenn. Crim. App. 1997). [HN1] The Sensing standard requires that an officer be able to testify that: (1) the tests were performed in accordance with standards and procedures promulgated by TBI's forensic services division; (2) the testing officer was properly certified; (3) the breath testing instrument used was certified by the TBI, was regularly tested for accuracy, and was working properly when the test was performed; (4) the subject was observed for twenty minutes prior to the test and, during this time, did not have foreign matter in his mouth, did not consume alcohol, smoke, or regurgitate; (5) the officer followed [\*19] the prescribed operational procedure; and (6) the testing officer identified the printout record offered into evidence as being the test result of the subject involved. *Sensing*, 843 S.W.2d at 416; *Deloit*, 964 S.W.2d at 912.

[HN2]

Once the State has shown all six Sensing requirements by a preponderance of the evidence, the test results are admitted. A trial court's decision to admit breath alcohol test evidence will not be disturbed on appeal unless the preponderance of the evidence is contrary to that decision. *State v. Edison*, 9 S.W.3d 75, 77-78 (Tenn. 1999).

The defendant contends that the trial court erred in admitting the results of the defendant's Intoxilyzer test, because the State failed to meet four of the Sensing requirements. Specifically, the defendant argues that the reliability of the test was compromised, because: (1) the test was not performed in accordance with the TBI's standards and operating procedure; (2) Officer Taylor did not properly observe the defendant for twenty minutes and failed to visually check the [\*20] defendant's mouth before giving the test; (3) there was no evidence that the Intoxilyzer was properly certified, regularly calibrated, and working properly; and (4) there was no evidence that Officer Taylor followed the prescribed operational procedure. The defendant correctly argues that, if the State failed to satisfy Sensing, it could only get the test results admitted under traditional rules of evidence that would assure the reliability of the test. *Deloit*, 964 S.W.2d at 913. This would require a showing that the device was scientifically acceptable and accurate and that Officer Taylor was qualified to interpret the results for the jury. 964 S.W.2d at 911. According to the defendant, this was not done at trial; and, therefore, the evidence was not admissible.

We do not agree that the breath alcohol test results were inadmissible. After a careful review of the record, we conclude that the evidence does not preponderate against the trial court's decision to admit the Intoxilyzer results.

The defendant's contention that the State failed to establish that the defendant's test was performed according to TBI standards and procedures (Sensing [\*21] requirement # 1), as well as her contention that Officer Taylor did not properly observe her or check her mouth before giving the test (requirement # 4), are without merit. Officer Taylor testified that he was trained and certified by the TBI to operate the Intoxilyzer 1400 and administer breath alcohol tests. His certification was entered into evidence. He then described how he conducted the test on the defendant and what

procedure he used to get an accurate reading. He testified that he observed the defendant uninterrupted for over twenty minutes and that she put nothing in her mouth during that time. n8 When the defendant's first breath test was insufficient, Officer Taylor testified that the procedure was to recycle the Intoxilyzer and try again. In addition, he stated that he followed all of the appropriate procedures in obtaining the test results from the second test. This testimony is stronger than that of the officer in *State v. Edison*, in which the supreme court determined that the Sensing requirement was met that proper procedures be followed during the test. In that case, the officer testified that he could not remember if he followed the proper procedures but knew [\*22] he must have, since there are "just certain procedures that you have to follow to run the test." *Edison*, 9 S.W.3d at 79. In the present case, Officer Taylor testified that he did follow all the proper procedures, which was more definite than the officer's testimony in *Edison*.

n8 The audio portion of the videotape of the defendant's arrest reveals that on three occasions Officer Taylor advised the defendant regarding any foreign objects in her mouth: "Do you have anything in your mouth?"; "Make sure you put nothing in your mouth"; and "Put nothing in your mouth."

Although Officer Taylor admitted on cross-examination that he did not visually inspect the defendant's mouth before giving the breath test, this is not fatal to the State's Sensing proof. This court has not required that [HN3] an officer search a subject's mouth visually if he: (1) has determined that foreign matter has been removed prior to [\*23] the twenty-minute observation period and (2) testifies that he continuously observed the test subject for the required period, during which the subject's mouth remained clear. See *State v. Deloit*, 964 S.W.2d 909, 916-17 (Tenn. Crim. App. 1997) (discussing *State v. Fields*, 1996 Tenn. Crim. App. LEXIS 219, No. 01 C01-9412-CC-00438, 1996 WL 180706 (Tenn. Crim. App., Nashville, Apr. 12, 1996)); *State v. Jarnagin*, 2000 Tenn. Crim. App. LEXIS 378, No. E1998-00892-CCA-R8-CD, 2000 WL 575232 (Tenn. Crim. App., Knoxville, May 12, 2000). This procedure insures that nothing new or unknown enters the subject's mouth that would skew the test results. *State v. Cook*, 9 S.W.3d 98, 100-01 (Tenn. 1999). In the present case, Officer Taylor testified that the defendant spit out her gum before he continuously observed her for the required twenty-minute period. He did not look away from her to do paperwork or to administer the breath test. Therefore, we cannot conclude that the evidence in the record preponderates against the trial court's determination that the proper procedures and observation of the defendant [\*24] were followed.

Evidence was also presented that the particular Intoxilyzer used in the defendant's test was properly certified, calibrated, and working properly (Sensing requirement # 3). Officer Taylor testified that the machine had been certified by the TBI on February 21, 1997, less than two months before it was used on the defendant. He also stated he knew that the machine was sent to the TBI lab and that the certification of calibration from the TBI was returned with the machine. Again, this testimony is more specific than that presented in *State v. Edison*, in which this Sensing requirement was met by an officer's testimony that the certification of calibration was posted at the jail, and the machine was checked every three months, although he did not know the date of the last calibration. *State v. Edison*, 9 S.W.3d 75, 78 (Tenn. 1999). We conclude that the evidence does not preponderate against the trial court's finding that the Sensing requirement of a properly calibrated and working instrument was met by the State.

Further bolstering the State's argument, we conclude that the trial court should have allowed the certificate of calibration [\*25] to be entered into evidence. In Sensing, the court stated:

The forensic services division inspects, repairs and maintains all units previously certified, including use of a laboratory computer controller to poll each instrument and correlate all test data of each instrument for clarification of instrument performance. Every 90 days forensic services division personnel conduct tests of each instrument under laboratory control conditions and record the results, noting any required adjustments or repairs of each unit. The certification also provides that upon request of the court, district attorney, defendant, or other person or party having an interest in the use of the test performed on an approved breath testing instrument an official copy of those standards and procedures will be certified pursuant to *T.C.A. § 38-6-107* and delivered to the requesting party. We are of the opinion that this procedure to supply records also conforms with the provisions of Tennessee Rule of Evidence, 803(8) as an

exception to the hearsay evidence rule.

843 S.W.2d at 415-16. [HN4] [\*26] It is the statutory duty of the forensic services division to maintain and certify alcohol breath testing instruments of those police departments participating in the purchasing program with the state. *Tenn. Code Ann. § 38-6-103(d)(2), (g)* (1997). The certificate of calibration from the bureau is part of this process and is given to the police departments when the instrument is calibrated. At trial, Officer Taylor testified that this certification was given back to the department after the machine was sent to the TBI for calibration. Barring any other evidentiary defects, this appears to fit within Tennessee Rule of Evidence 803(8), which carves out an exception to hearsay for a report from a public agency issued pursuant to a duty imposed by law. However, in the present case, the testimony of Officer Taylor was sufficient to establish that the machine was working properly, even in the absence of the certificate of calibration.

We conclude that the evidence does not preponderate against the trial court's determination that the State met its burden of proving all of the Sensing requirements to admit the alcohol breath test.

Since we have concluded [\*27] that the Intoxilyzer results were properly admitted into evidence, we now turn to the defendant's contention that the trial court erred in denying her motion for acquittal or a new trial. [HN5] When a motion for acquittal is presented to the trial court, the court is only concerned with the legal sufficiency of the evidence, rather than the weight of the evidence presented. *State v. Blanton, 926 S.W.2d 953, 957 (Tenn. Crim. App. 1996)*. In determining sufficiency, the trial court must consider the parties' evidence, disregard the defendant's evidence which conflicts with that of the State, and afford the State the strongest legitimate view of the evidence, including all reasonable inferences. 926 S.W.2d at 957-58. The State's proof was sufficient to establish all elements of the offense of DUI, and the trial court was correct in denying the defendant's motion for acquittal or for a new trial based upon improper admittance of scientific evidence.

#### **Excessive Sentence**

The defendant further contends that the trial court imposed too harsh a sentence for the [\*28] DUI per se conviction. From the record provided, we cannot determine whether the trial court acted properly or not. It is the appellant's obligation to prepare an adequate record on appeal in order to have an issue considered by this court. No transcript of the sentencing hearing is contained within the record, which precludes us from considering this issue. *Tenn. R. App. P. 24(b); State v. Draper, 800 S.W.2d 489 (Tenn. Crim. App. 1990)*.

#### **CONCLUSION**

Upon our review, we conclude that the evidence does not preponderate against the trial court's determination that the defendant's alcohol breath test results met all the requirements of Sensing and were admissible. Further, we hold that we are precluded from considering the defendant's sentence under Rule 24 of the Tennessee Rules of Appellate Procedure. Therefore, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE

174 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**TERRANCE LAMONT LIPSCOMB, Appellant v. THE STATE OF TEXAS,  
Appellee**

**No. 06-04-00175-CR**

**COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA**

*2005 Tex. App. LEXIS 7119*

**July 12, 2005, Submitted**

**August 31, 2005, Decided**

**NOTICE:** [\*1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** Related proceeding at *Lipscomb v. State*, 2005 Tex. App. LEXIS 7114 (Tex. App. Texarkana, Aug. 31, 2005)

Petition for discretionary review refused by *In re Lipscomb*, 2006 Tex. Crim. App. LEXIS 310 (Tex. Crim. App., Feb. 8, 2006)

**PRIOR HISTORY:** On Appeal from the 124th Judicial District Court. Gregg County, Texas. Trial Court No. 30927-B.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** After defendant's motion to suppress the State's evidence as the product of an illegal traffic stop was denied, he pled guilty to unlawful possession of a firearm by a felon, among other various charges, and the 124th Judicial District Court of Gregg County, Texas, sentenced him to 10 years' confinement. Defendant appealed.

**OVERVIEW:** On review, defendant contended the trial court erred in denying his motion to suppress. The appellate court disagreed, finding that because there was sufficient evidence to provide the officer probable cause to believe defendant was speeding, he was authorized to stop defendant. Thus, the initial traffic stop was lawful. Further, the videotape from the officer's vehicle clearly showed defendant gave willing consent to the officer's request to search the vehicle. And, less than 10 seconds passed between the time the officer informed defendant that he would receive a warning citation and the moment when defendant consented to a search of the vehicle. The lapse of 10 seconds did not amount to an unreasonable extension of the duration of the traffic stop. Finally, defendant made no effort to point to any evidence in the record showing a causal connection between the delay in being brought before a magistrate and his confession. Moreover, defendant's written statement showed that he was warned of his rights before the statement was taken. As such, *Tex. Code Crim. Proc. Ann. art. 15.17* (2005) did not bar the statement's admissibility.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** radar, traffic stop, confession, speed, calibration, traveling, case number, speeding, possessing, suspicion, license, fork, weapon, tuning fork, interstate, calibrated, frequency, external, tuning, warned, probable cause, dispatcher, videotape, warning, minute, rear, controlled substance, motion to suppress, causal connection, unauthorized use

### **LexisNexis(R) Headnotes**

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

[HN1] An appellate court reviews a trial court's ruling on a motion to suppress for abuse of discretion. A trial court abuses its discretion when it acts unreasonably or arbitrarily, if it acts outside the zone of reasonable disagreement, or if its decision is made without reference to guiding rules and principles. As the finder of historical fact, the trial court is free to believe or disbelieve the testimony or evidence from any witness, even if that witness's testimony or a piece of evidence is otherwise not controverted by the opposing side. An appellate court reviews the trial court's application of law to the lower court's findings of historical fact under a de novo standard. If the trial court does not issue written findings of fact and conclusions of law regarding the ruling on a motion to suppress, the reviewing court should assume the trial court made implicit findings to support its ruling, so long as those implied findings are supported by the record. If the trial court's decision can be upheld under any theory applicable to the case, the reviewing court must affirm that judgment.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

*Transportation Law > Private Motor Vehicles > Traffic Regulation*

[HN2] Seventy miles per hour is the maximum lawful speed during daytime hours on Texas interstate roadways. *Tex. Transp. Code Ann. § 545.352(b)* (Supp. 2004-2005). Traveling in excess of that speed on a Texas interstate is unlawful. *Tex. Transp. Code Ann. § 545.352(a)* (Supp. 2004-2005).

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > License Violations > General Overview*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops*

[HN3] Officers are permitted to ask for identification, a valid driver's license, and proof of insurance during a traffic stop. Officers may also check for outstanding warrants. The officer must, however, use the least intrusive means reasonably available to verify or dispel his suspicion in a short period of time.

*Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause*

*Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > General Overview*

[HN4] Consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause.

*Civil Procedure > Judicial Officers > General Overview*

*Criminal Law & Procedure > Preliminary Proceedings > General Overview*

*Evidence > Hearsay > Exemptions > Confessions > General Overview*

[HN5] It is well settled that the failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal connection between the delay and the confession. Additionally, when a person is properly warned of his rights by the person taking his confession, the failure to take the accused before a

magistrate before taking the confession does not invalidate the confession.

**JUDGES:** Before Morriss, C.J., Ross and Carter, JJ. Memorandum Opinion by Chief Justice Morriss.

**OPINION BY:** Josh R. Morriss, III

**OPINION:**

Opinion by Chief Justice Morriss

MEMORANDUM OPINION

When Deputy Tracy Freeman of the Gregg County Sheriff's Office saw Terrance Lamont Lipscomb's car traveling along Interstate 20, Freeman believed Lipscomb was traveling in excess of the seventy mile-per-hour posted speed limit. Freeman verified his suspicions using radar, which indicated Lipscomb was traveling at seventy-five miles per hour. Freeman then initiated a traffic stop based on Lipscomb's speed. Events following the traffic stop n1 resulted in Lipscomb being arrested for several offenses, including the one at issue in this case: unlawful possession of a firearm by a felon. n2 *See TEX. PEN. CODE ANN. § 46.04* (Vernon Supp. 2004-2005). Lipscomb moved to suppress the State's evidence as the product of an illegal traffic stop. The trial court denied Lipscomb's motion [\*2] after conducting a hearing, and Lipscomb subsequently pled guilty to the various charges without the benefit of a plea agreement. Lipscomb was sentenced in this case to ten years' confinement. n3 He now appeals the trial court's denial of his motion to suppress evidence. For the reasons stated, we affirm the trial court's judgment.

n1 Shortly after Lipscomb exited his vehicle, a struggle ensued pitting Lipscomb against Freeman and several other police officers who had arrived at the scene. During the scuffle, Lipscomb was able to get an officer's service weapon and, using that weapon, threatened to commit suicide. Had it not been for the intervention of one of the officers, who was able to put his hand between the gun's firing pin and the hammer, Lipscomb might have succeeded in that suicide attempt.

n2 Lipscomb has also appealed his conviction and sentence in five companion cases. Our disposition in those cases is presented by way of separate opinions. *See Lipscomb v. State, 2005 Tex. App. LEXIS 7120, No. 06-04-00176-CR* (taking weapon from police officer); *Lipscomb v. State, 2005 Tex. App. LEXIS 7114, No. 06-04-00177-CR* (possessing marihuana); *Lipscomb v. State, 2005 Tex. App. LEXIS 7116, No. 06-04-00178-CR* (unauthorized use of motor vehicle); *Lipscomb v. State, 2005 Tex. App. LEXIS 7117, No. 06-04-00179-CR* (possessing controlled substance with intent to deliver); and *Lipscomb v. State, 2005 Tex. App. LEXIS 7115, No. 06-04-00180-CR* (assault on public servant).

[\*3]

n3 In the five companion cases, Lipscomb was sentenced as follows: case number 06-04-00176-CR (taking weapon from police officer), twenty years' imprisonment; case number 06-04-00177-CR (possessing marihuana), eighteen months in a state jail facility; case number 06-04-00178-CR (unauthorized use of motor vehicle), eighteen months in a state jail facility; case number 06-04-00179-CR (possessing controlled substance with intent to deliver), life imprisonment; and case number 06-04-00180-CR (assault on public servant), twenty years' imprisonment, to run consecutively to the other sentences.

[HN1] An appellate court reviews a trial court's ruling on a motion to suppress for abuse of discretion. *Oles v. State, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999)*; *Maysonet v. State, 91 S.W.3d 365, 369 (Tex. App.--Texarkana 2002, pet. ref'd)*. A trial court abuses its discretion when it acts unreasonably or arbitrarily, if it acts outside the zone of reasonable

disagreement, or if its decision is made without reference to guiding rules and principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). [\*4] As the finder of historical fact, the trial court is free to believe or disbelieve the testimony or evidence from any witness, even if that witness' testimony or a piece of evidence is otherwise not controverted by the opposing side. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). An appellate court reviews the trial court's application of law to the lower court's findings of historical fact under a de novo standard. *Id.* at 856. If the trial court does not issue written findings of fact and conclusions of law regarding the ruling on a motion to suppress, the reviewing court should assume the trial court made implicit findings to support its ruling, so long as those implied findings are supported by the record. *Id.*; *Maysonet*, 91 S.W.3d at 369. If the trial court's decision can be upheld under any theory applicable to the case, the reviewing court must affirm that judgment. *Ross*, 32 S.W.3d at 855-56.

(1) *The Initial Traffic Stop Was Valid*

Lipscomb first contends Freeman was without probable cause to initiate a traffic stop. Lipscomb argues Freeman failed to testify that he properly used his radar [\*5] unit in this case (in accordance with widely accepted police techniques), and that Freeman's failure to so testify violates the requirements set forth in this Court's opinion in *Maysonet* regarding the admissibility of radar evidence. Lipscomb next asserts that because there were other cars nearby, of which Freeman also checked the speed, it is possible Freeman's radar measured only the speed of these other cars and not the speed of Lipscomb's car. Because there was sufficient evidence to provide Freeman probable cause to believe Lipscomb was speeding, we reject these arguments.

Freeman's testimony, if believed by the trial court--and we assume it was because the trial court ruled against Lipscomb--would support a finding that Lipscomb was committing a crime by speeding. [HN2] Seventy miles per hour is the maximum lawful speed during daytime hours on Texas interstate roadways. *TEX. TRANSP. CODE ANN.* § 545.352(b) (Vernon Supp. 2004-2005). Traveling in excess of that speed on a Texas interstate is unlawful. *TEX. TRANSP. CODE ANN.* § 545.352(a) (Vernon Supp. 2004-2005). Freeman, a certified peace officer and a fourteen-year veteran [\*6] of the sheriff's department, testified he first observed Lipscomb traveling at a speed Freeman believed to be in excess of the posted speed limit. Freeman also testified that, based on his experience, he "can get pretty close to telling that a vehicle is traveling faster than the normal flow of traffic." Freeman subsequently verified his suspicions using "calibrated" radar. n4 Based on his visual observations and the confirmation he received from his radar unit, Freeman had specific information that would logically lead him to conclude Lipscomb was unlawfully speeding. We believe Freeman's testimony about using *calibrated* radar, testimony which the trial court could have properly interpreted to mean the radar was operating correctly, when combined with the officer's earlier testimony that he had visually estimated Lipscomb's speed to be excessive, was sufficient to satisfy the requirements we set forth in *Maysonet*. And, to the extent that there may have been conflicting evidence about which car Freeman's radar measured, the trial court resolved such factual conflicts against Lipscomb. Because, here, that conflict resolution is supported by the record, we will not disturb it. [\*7]

n4 Radar "calibration" typically involves a two-step process. The first step, called "external" calibration, involves the use of one or more special tuning forks that are designed to resonate at specific, different frequencies. The tuning forks are struck and then placed in front of the radar unit. The vibrations from the forks resonate at predictable, specific frequencies. If the radar unit is operating properly, the unit will be able to detect the different, specific frequency generated by each tuning fork, which will then alert the officer whether the radar unit is operating properly. The second step, called "internal" calibration, is performed by pushing a button on the radar unit, which causes the unit to cycle through several internal checks and then display specific numbers on a display panel. The officer then verifies that these numbers indicate the radar unit is working properly. If the radar unit is properly calibrated, then the officer may assume the unit is in proper working order. See generally *United States v. Charles*, No. 03-15-SLR, 2003 U.S. Dist. LEXIS 13477, at \* 2-3 (D. Del. July 23, 2003) (not designated for publication) (describing process of using tuning fork to calibrate radar); *Aurora v. McIntyre*, 719 P.2d 727, 728-29 (Colo. 1986) (discussing process of certifying tuning forks); *Connecticut v.*

*Trantolo*, 37 Conn. Supp. 601, 430 A.2d 465, 466 (Conn. Super. Ct. 1981) (using tuning fork to calibrate radar); *State v. Tailo*, 70 Haw. 580, 779 P.2d 11, 12 (Haw. 1989) (describing process of both external and internal calibration); *Louisiana v. Creel*, 490 So. 2d 711, 714 (La. Ct. App. 1986); *Mills v. State*, 99 S.W.3d 200, 203 (Tex. App.--Fort Worth 2002, *pet. ref'd*) (discussing process of internal calibration); *Untiedt v. Virginia*, 18 Va. App. 836, 447 S.E.2d 537, 539, 11 Va. Law Rep. 131 (Va. Ct. App. 1994) (external calibration process).

[\*8]

Accordingly, we cannot say the trial court erred by holding Freeman was authorized to stop Lipscomb for speeding. The initial traffic stop was, therefore, lawful.

(2) *The Traffic Stop Was of Reasonable Length*

In his second and third points of error, Lipscomb contends Freeman unnecessarily prolonged the traffic stop and searched Lipscomb's vehicle without valid consent. [HN3] Officers are permitted to ask for identification, a valid driver's license, and proof of insurance during a traffic stop. *Davis v. State*, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997). Officers may also check for outstanding warrants. *Id.* The officer must, however, use "the least intrusive means reasonably available to verify or dispel his suspicion in a short period of time." *Id.* Under *Davis*, Freeman's detention of Lipscomb "was required to be temporary and could last no longer than was necessary" to satisfy or dispel the officer's original suspicion of speeding and to conclude the stop. *Id.*

In this case, a videotape of the traffic stop was entered into evidence. A review of that videotape shows Freeman initiated the stop and made first contact with Lipscomb at 7:53 a.m. [\*9] Freeman informed Lipscomb of the purpose of the stop, asked for Lipscomb's license and proof of insurance, and briefly inquired into Lipscomb's driving and criminal histories. This initial conversation lasted barely one minute. Freeman then returned to his patrol car, contacted a dispatcher, and requested a criminal and out-of-state license history on Lipscomb. Eight to nine minutes later, the dispatcher contacted Freeman with those histories, including verification that Lipscomb had spent time in the penitentiary for narcotics trafficking. Freeman then returned to the rear of Lipscomb's car and asked Lipscomb to step to the rear of that vehicle. Freeman then appears to tell Lipscomb he will receive only a warning citation, and Freeman then asks for consent to search, which Lipscomb provides.

[HN4] Consent to search is "one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause." *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *State v. Ibarra*, 953 S.W.2d 242, 243 (Tex. Crim. App. 1997)). The videotape [\*10] clearly shows Lipscomb gave willing consent to the officer's request to search the vehicle. Lipscomb's contention on appeal to the contrary is disingenuous and not supported by the evidence. Less than ten seconds passed between the time Freeman informed Lipscomb (at the rear of the car) that the latter would receive a warning citation and the moment when Lipscomb consented to a search of the vehicle. Thus, we cannot conclude, given the sequence of discrete facts of this case, that the lapse of ten seconds amounted to an unreasonable extension of the duration of the traffic stop. n5 We therefore overrule Lipscomb's second and third points of error.

n5 The previous period of eight to nine minutes, between the time Lipscomb's driver's license and criminal history information were requested from the police dispatcher and the time the information was provided to the officer on the scene, is a legitimate period of investigation by the officer. *See Davis*, 947 S.W.2d at 245 n.6.

(3) *The Confession* [\*11] *Was Admissible*

In his final point of error, Lipscomb contends his written custodial confession should have been inadmissible because it was taken before he was taken to a magistrate to receive the warnings required by *Article 15.17 of the Texas Code of Criminal Procedure*. See *TEX. CODE CRIM. PROC. ANN. art. 15.17* (Vernon 2005). [HN5] "It is well settled that the failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal connection between the delay and the confession." *Renfro v. State*, 958 S.W.2d 880, 887 (Tex. App.--Texarkana 1997, pet. ref'd) (citing *Cantu v. State*, 842 S.W.2d 667, 680 (Tex. Crim. App. 1992)). "Additionally, when a person is properly warned of his rights by the person taking his confession, the failure to take the accused before a magistrate before taking the confession does not invalidate the confession." *Id.* (citing *Self v. State*, 709 S.W.2d 662, 667 (Tex. Crim. App. 1986)).

Lipscomb has made no effort to point to any evidence in the record showing a causal connection [\*12] between the delay in being brought before a magistrate and his confession, nor has any been shown by our review of the record. Moreover, the first paragraph of Lipscomb's confession reads,

I, TERRENCE [sic] LAMONTE LIPSCOMB, do freely and voluntarily make the following statement to Investigator MIKE CLAXTON and Ranger RONNY GRIFFITH after having been warned by him on the 18th day of August 2003 at 9:30 AM at the Gregg County Sheriff's Office CID, that I have the right to remain silent and not make any statement at all and that any statement I make may be used against me at my trial; any statement I make may be used as evidence against me in court; I have the right to have a lawyer present to advise me prior to and during any questioning; if I am unable to employ a lawyer, and I have the right to have a lawyer appointed to advise me prior to and during questioning; and I have the right to terminate the interview at any time. Knowing and intelligently understanding my rights, I freely and voluntarily wish to waive the above rights and do hereby make this statement . . . .

The statement itself shows Lipscomb was warned of his rights before the statement was taken; [\*13] *Article 15.17* therefore does not bar the statement's admissibility. We overrule Lipscomb's final point of error.

For the reasons stated, we affirm the trial court's judgment.

Josh R. Morriss, III

Chief Justice

175 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**TERRANCE LAMONT LIPSCOMB, Appellant v. THE STATE OF TEXAS,  
Appellee**

**No. 06-04-00175-CR**

**COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA**

*2005 Tex. App. LEXIS 7119*

**July 12, 2005, Submitted**

**August 31, 2005, Decided**

**NOTICE:** [\*1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** Related proceeding at *Lipscomb v. State*, 2005 Tex. App. LEXIS 7114 (Tex. App. Texarkana, Aug. 31, 2005)

Petition for discretionary review refused by *In re Lipscomb*, 2006 Tex. Crim. App. LEXIS 310 (Tex. Crim. App., Feb. 8, 2006)

**PRIOR HISTORY:** On Appeal from the 124th Judicial District Court. Gregg County, Texas. Trial Court No. 30927-B.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** After defendant's motion to suppress the State's evidence as the product of an illegal traffic stop was denied, he pled guilty to unlawful possession of a firearm by a felon, among other various charges, and the 124th Judicial District Court of Gregg County, Texas, sentenced him to 10 years' confinement. Defendant appealed.

**OVERVIEW:** On review, defendant contended the trial court erred in denying his motion to suppress. The appellate court disagreed, finding that because there was sufficient evidence to provide the officer probable cause to believe defendant was speeding, he was authorized to stop defendant. Thus, the initial traffic stop was lawful. Further, the videotape from the officer's vehicle clearly showed defendant gave willing consent to the officer's request to search the vehicle. And, less than 10 seconds passed between the time the officer informed defendant that he would receive a warning citation and the moment when defendant consented to a search of the vehicle. The lapse of 10 seconds did not amount to an unreasonable extension of the duration of the traffic stop. Finally, defendant made no effort to point to any evidence in the record showing a causal connection between the delay in being brought before a magistrate and his confession. Moreover, defendant's written statement showed that he was warned of his rights before the statement was taken. As such, *Tex. Code Crim. Proc. Ann. art. 15.17* (2005) did not bar the statement's admissibility.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** radar, traffic stop, confession, speed, calibration, traveling, case number, speeding, possessing, suspicion, license, fork, weapon, tuning fork, interstate, calibrated, frequency, external, tuning, warned, probable cause, dispatcher, videotape, warning, minute, rear, controlled substance, motion to suppress, causal connection, unauthorized use

### **LexisNexis(R) Headnotes**

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence*

[HN1] An appellate court reviews a trial court's ruling on a motion to suppress for abuse of discretion. A trial court abuses its discretion when it acts unreasonably or arbitrarily, if it acts outside the zone of reasonable disagreement, or if its decision is made without reference to guiding rules and principles. As the finder of historical fact, the trial court is free to believe or disbelieve the testimony or evidence from any witness, even if that witness's testimony or a piece of evidence is otherwise not controverted by the opposing side. An appellate court reviews the trial court's application of law to the lower court's findings of historical fact under a de novo standard. If the trial court does not issue written findings of fact and conclusions of law regarding the ruling on a motion to suppress, the reviewing court should assume the trial court made implicit findings to support its ruling, so long as those implied findings are supported by the record. If the trial court's decision can be upheld under any theory applicable to the case, the reviewing court must affirm that judgment.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > Elements*

*Transportation Law > Private Motor Vehicles > Traffic Regulation*

[HN2] Seventy miles per hour is the maximum lawful speed during daytime hours on Texas interstate roadways. *Tex. Transp. Code Ann. § 545.352(b)* (Supp. 2004-2005). Traveling in excess of that speed on a Texas interstate is unlawful. *Tex. Transp. Code Ann. § 545.352(a)* (Supp. 2004-2005).

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[HN3] Officers are permitted to ask for identification, a valid driver's license, and proof of insurance during a traffic stop. Officers may also check for outstanding warrants. The officer must, however, use the least intrusive means reasonably available to verify or dispel his suspicion in a short period of time.

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[HN5] It is well settled that the failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal connection between the delay and the confession. Additionally, when a person is properly warned of his rights by the person taking his confession, the failure to take the accused before a

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**JUDGES:** Before Morriss, C.J., Ross and Carter, JJ. Memorandum Opinion by Chief Justice Morriss.

**OPINION BY:** Josh R. Morriss, III

**OPINION:**

Opinion by Chief Justice Morriss

MEMORANDUM OPINION

When Deputy Tracy Freeman of the Gregg County Sheriff's Office saw Terrance Lamont Lipscomb's car traveling along Interstate 20, Freeman believed Lipscomb was traveling in excess of the seventy mile-per-hour posted speed limit. Freeman verified his suspicions using radar, which indicated Lipscomb was traveling at seventy-five miles per hour. Freeman then initiated a traffic stop based on Lipscomb's speed. Events following the traffic stop n1 resulted in Lipscomb being arrested for several offenses, including the one at issue in this case: unlawful possession of a firearm by a felon. n2 *See TEX. PEN. CODE ANN. § 46.04* (Vernon Supp. 2004-2005). Lipscomb moved to suppress the State's evidence as the product of an illegal traffic stop. The trial court denied Lipscomb's motion [\*2] after conducting a hearing, and Lipscomb subsequently pled guilty to the various charges without the benefit of a plea agreement. Lipscomb was sentenced in this case to ten years' confinement. n3 He now appeals the trial court's denial of his motion to suppress evidence. For the reasons stated, we affirm the trial court's judgment.

n1 Shortly after Lipscomb exited his vehicle, a struggle ensued pitting Lipscomb against Freeman and several other police officers who had arrived at the scene. During the scuffle, Lipscomb was able to get an officer's service weapon and, using that weapon, threatened to commit suicide. Had it not been for the intervention of one of the officers, who was able to put his hand between the gun's firing pin and the hammer, Lipscomb might have succeeded in that suicide attempt.

n2 Lipscomb has also appealed his conviction and sentence in five companion cases. Our disposition in those cases is presented by way of separate opinions. *See Lipscomb v. State, 2005 Tex. App. LEXIS 7120, No. 06-04-00176-CR* (taking weapon from police officer); *Lipscomb v. State, 2005 Tex. App. LEXIS 7114, No. 06-04-00177-CR* (possessing marihuana); *Lipscomb v. State, 2005 Tex. App. LEXIS 7116, No. 06-04-00178-CR* (unauthorized use of motor vehicle); *Lipscomb v. State, 2005 Tex. App. LEXIS 7117, No. 06-04-00179-CR* (possessing controlled substance with intent to deliver); and *Lipscomb v. State, 2005 Tex. App. LEXIS 7115, No. 06-04-00180-CR* (assault on public servant).

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(1) *The Initial Traffic Stop Was Valid*

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n4 Radar "calibration" typically involves a two-step process. The first step, called "external" calibration, involves the use of one or more special tuning forks that are designed to resonate at specific, different frequencies. The tuning forks are struck and then placed in front of the radar unit. The vibrations from the forks resonate at predictable, specific frequencies. If the radar unit is operating properly, the unit will be able to detect the different, specific frequency generated by each tuning fork, which will then alert the officer whether the radar unit is operating properly. The second step, called "internal" calibration, is performed by pushing a button on the radar unit, which causes the unit to cycle through several internal checks and then display specific numbers on a display panel. The officer then verifies that these numbers indicate the radar unit is working properly. If the radar unit is properly calibrated, then the officer may assume the unit is in proper working order. See generally *United States v. Charles*, No. 03-15-SLR, 2003 U.S. Dist. LEXIS 13477, at \* 2-3 (D. Del. July 23, 2003) (not designated for publication) (describing process of using tuning fork to calibrate radar); *Aurora v. McIntyre*, 719 P.2d 727, 728-29 (Colo. 1986) (discussing process of certifying tuning forks); *Connecticut v.*

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[\*8]

Accordingly, we cannot say the trial court erred by holding Freeman was authorized to stop Lipscomb for speeding. The initial traffic stop was, therefore, lawful.

(2) *The Traffic Stop Was of Reasonable Length*

In his second and third points of error, Lipscomb contends Freeman unnecessarily prolonged the traffic stop and searched Lipscomb's vehicle without valid consent. [HN3] Officers are permitted to ask for identification, a valid driver's license, and proof of insurance during a traffic stop. *Davis v. State*, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997). Officers may also check for outstanding warrants. *Id.* The officer must, however, use "the least intrusive means reasonably available to verify or dispel his suspicion in a short period of time." *Id.* Under *Davis*, Freeman's detention of Lipscomb "was required to be temporary and could last no longer than was necessary" to satisfy or dispel the officer's original suspicion of speeding and to conclude the stop. *Id.*

In this case, a videotape of the traffic stop was entered into evidence. A review of that videotape shows Freeman initiated the stop and made first contact with Lipscomb at 7:53 a.m. [\*9] Freeman informed Lipscomb of the purpose of the stop, asked for Lipscomb's license and proof of insurance, and briefly inquired into Lipscomb's driving and criminal histories. This initial conversation lasted barely one minute. Freeman then returned to his patrol car, contacted a dispatcher, and requested a criminal and out-of-state license history on Lipscomb. Eight to nine minutes later, the dispatcher contacted Freeman with those histories, including verification that Lipscomb had spent time in the penitentiary for narcotics trafficking. Freeman then returned to the rear of Lipscomb's car and asked Lipscomb to step to the rear of that vehicle. Freeman then appears to tell Lipscomb he will receive only a warning citation, and Freeman then asks for consent to search, which Lipscomb provides.

[HN4] Consent to search is "one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause." *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *State v. Ibarra*, 953 S.W.2d 242, 243 (Tex. Crim. App. 1997)). The videotape [\*10] clearly shows Lipscomb gave willing consent to the officer's request to search the vehicle. Lipscomb's contention on appeal to the contrary is disingenuous and not supported by the evidence. Less than ten seconds passed between the time Freeman informed Lipscomb (at the rear of the car) that the latter would receive a warning citation and the moment when Lipscomb consented to a search of the vehicle. Thus, we cannot conclude, given the sequence of discrete facts of this case, that the lapse of ten seconds amounted to an unreasonable extension of the duration of the traffic stop. n5 We therefore overrule Lipscomb's second and third points of error.

n5 The previous period of eight to nine minutes, between the time Lipscomb's driver's license and criminal history information were requested from the police dispatcher and the time the information was provided to the officer on the scene, is a legitimate period of investigation by the officer. *See Davis*, 947 S.W.2d at 245 n.6.

(3) *The Confession* [\*11] *Was Admissible*

In his final point of error, Lipscomb contends his written custodial confession should have been inadmissible because it was taken before he was taken to a magistrate to receive the warnings required by *Article 15.17 of the Texas Code of Criminal Procedure*. See *TEX. CODE CRIM. PROC. ANN. art. 15.17* (Vernon 2005). [HN5] "It is well settled that the failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal connection between the delay and the confession." *Renfro v. State*, 958 S.W.2d 880, 887 (Tex. App.--Texarkana 1997, pet. ref'd) (citing *Cantu v. State*, 842 S.W.2d 667, 680 (Tex. Crim. App. 1992)). "Additionally, when a person is properly warned of his rights by the person taking his confession, the failure to take the accused before a magistrate before taking the confession does not invalidate the confession." *Id.* (citing *Self v. State*, 709 S.W.2d 662, 667 (Tex. Crim. App. 1986)).

Lipscomb has made no effort to point to any evidence in the record showing a causal connection [\*12] between the delay in being brought before a magistrate and his confession, nor has any been shown by our review of the record. Moreover, the first paragraph of Lipscomb's confession reads,

I, TERRENCE [sic] LAMONTE LIPSCOMB, do freely and voluntarily make the following statement to Investigator MIKE CLAXTON and Ranger RONNY GRIFFITH after having been warned by him on the 18th day of August 2003 at 9:30 AM at the Gregg County Sheriff's Office CID, that I have the right to remain silent and not make any statement at all and that any statement I make may be used against me at my trial; any statement I make may be used as evidence against me in court; I have the right to have a lawyer present to advise me prior to and during any questioning; if I am unable to employ a lawyer, and I have the right to have a lawyer appointed to advise me prior to and during questioning; and I have the right to terminate the interview at any time. Knowing and intelligently understanding my rights, I freely and voluntarily wish to waive the above rights and do hereby make this statement . . . .

The statement itself shows Lipscomb was warned of his rights before the statement was taken; [\*13] *Article 15.17* therefore does not bar the statement's admissibility. We overrule Lipscomb's final point of error.

For the reasons stated, we affirm the trial court's judgment.

Josh R. Morriss, III

Chief Justice

176 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**ROBERTO PENA, Appellant, v. THE STATE OF TEXAS, Appellee.****No. 08-02-00361-CR****COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO***155 S.W.3d 238; 2004 Tex. App. LEXIS 911***January 29, 2004, Decided****NOTICE:** [\*\*1] (PUBLISH)**SUBSEQUENT HISTORY:** Released for Publication February 22, 2005.**PRIOR HISTORY:** Appeal from the 41st District Court of El Paso County, Texas. (TC # 20010D03736).**DISPOSITION:** Affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant challenged a decision from the 41st District Court of El Paso County (Texas), which convicted him of two counts of intoxicated manslaughter and two counts of failure to stop and render aid.**OVERVIEW:** Witnesses observed defendant operating a vehicle at a high rate of speed before crashing into three cars at an intersection. Two persons were killed in the crash, and defendant fled the scene. He later pled guilty to several crimes before a jury, which determined that defendant had used the vehicle as a deadly weapon. Thereafter, defendant sought review. Specifically, defendant challenged the admission of a police officer's testimony regarding the speed of his vehicle at the time of the accident. In affirming, the court determined that the evidence was properly admitted as expert testimony under *Tex. R. Evid. 702*. The officer had extensive training in accident reconstruction. The officer determined the speed by using formulas he was taught to use for specific types of collisions. Further, the officer also used an accident investigation measuring system (AIMS) to make certain calculations. The trial court should have required the State to offer evidence concerning the scientific principals behind AIMS. However, the failure to show reliability was harmless because the evidence was sufficient to support the jury's finding that defendant used his vehicle as a deadly weapon.**OUTCOME:** The court affirmed defendant's convictions.**CORE TERMS:** speed, formula, reconstruction, scientific, skid, reliability, front, measurement, collision, training, motor vehicle, expert witness, intoxication, traveling, distance, post-impact, utilized, driving, miles, lane, expert testimony, traveled, manslaughter, calculation, admitting, recalled, struck, judicial notice, pre-impact, reliable

**LexisNexis(R) Headnotes*****Civil Procedure > Appeals > Standards of Review > Abuse of Discretion******Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Criminal Trials***

[HN1] A trial court's ruling to admit or exclude evidence is reviewed under an abuse of discretion standard. Absent a clear abuse of discretion, a trial court's decision to admit or exclude expert testimony will not be disturbed. An abuse of discretion exists when the trial court's decision was so clearly wrong as to lie outside the zone of reasonable disagreement, in other words, the trial court's decision or action was arbitrary, unreasonable, and made without reference to any guiding rules or principles.

***Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Criminal Trials******Evidence > Testimony > Experts > Qualifications***

[HN2] For a witness's expert testimony to be admissible, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. Tex. R. Evid. 702.

***Evidence > Testimony > Experts > Criminal Trials***

[HN3] See *Tex. R. Evid. 702*.

***Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof******Evidence > Scientific Evidence > General Overview******Evidence > Testimony > General Overview***

[HN4] The party offering the evidence has the burden of showing the witness is qualified as an expert on the specific matter in question. The proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is: (1) reliable and (2) relevant to assist the trier of fact in its fact-finding duty. To be reliable, the proffered evidence must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. The trial court's determination of reliability could be affected by the following non-exclusive factors: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

***Evidence > Testimony > Experts > Criminal Trials***

[HN5] Police officers are qualified to testify regarding accident reconstruction if they are trained in the science about which they will testify and possess a high degree of knowledge sufficient to qualify as an expert.

***Criminal Law & Procedure > Appeals > Reversible Errors > General Overview******Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***

[HN6] A nonconstitutional error that does not affect the substantial rights of the defendant must be disregarded. *Tex. R. App. P. 44.2(b)*. A substantial right is affected when the error had a substantial and injurious effect or influence in

determining the jury's verdict. A criminal conviction should not be overturned for nonconstitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview***  
***Criminal Law & Procedure > Guilty Pleas > General Overview***  
***Torts > Transportation Torts > General Overview***

[HN7] A person commits the offense of intoxication manslaughter if the person: (1) operates a motor vehicle in a public place; (2) is intoxicated; and (3) by reason of that intoxication causes the death of another by accident or mistake. *Tex. Penal Code Ann. § 49.08(a)*(2003).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Vehicular Homicide > General Overview***  
***Criminal Law & Procedure > Criminal Offenses > Weapons > Definitions***  
***Torts > Transportation Torts > Motor Vehicles > General Overview***

[HN8] A deadly weapon is defined as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. *Tex. Penal Code Ann. § 1.07(a)(17)(B)*(2003). Anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. This is necessarily so because a thing which actually causes death is, by definition, capable of causing death.

**COUNSEL:** For APPELLANT: Hon. Joseph (Sib) Abraham Jr., El Paso, TX.

For STATE: Hon. Jaime E. Esparza, DISTRICT ATTORNEY, El Paso, TX.

**JUDGES:** Before Panel No. 2. Barajas, C.J., McClure, and Chew, JJ. McClure, J., Concurring.

**OPINION BY:** DAVID WELLINGTON CHEW

**OPINION:**

[\*240] Appellant Roberto Pena was indicted with two counts of intoxication manslaughter [\*241] and two counts of failure to stop and render aid. Before a jury, Appellant pled guilty to all four counts, but pled "not true" to the allegation that he used or exhibited a deadly weapon during the commission of the offense as alleged in each count. The jury found Appellant guilty of all four counts and made an affirmative finding on the use of a deadly weapon for each count. The jury assessed punishment at twenty years' imprisonment and a \$ 10,000 fine for each intoxication manslaughter count and five years' imprisonment and a \$ 5,000 fine for each failure to stop and render aid count. Upon the State's motion, the trial court ordered that the intoxication manslaughter counts be served consecutively, with the failure to stop and render aid counts to be served concurrently. The trial court sentenced Appellant in accordance with the jury's assessment, however we observe the court's final judgments [\*\*2] and sentences only contain deadly weapon findings for the intoxication manslaughter offenses. In his sole issue on appeal, Appellant contends the trial court committed reversible error by admitting testimony from a State's witness concerning the speed his vehicle was traveling when it struck the victims' vehicle and that this testimony severely prejudiced him. We affirm.

On June 17, 2001, between 12:30 and 1 a.m., Zachary Valenzuela was driving in the center lane on Gateway West when he noticed headlights in his rear view mirror. The rate of speed at which the car was coming at him from behind was the reason the headlights caught his attention. Mr. Valenzuela was driving between 55 to 60 miles per hour. He considered changing lane, but at the rate of speed the vehicle was approaching, he decided to stay in the center lane. When the approaching vehicle pulled up behind Mr. Valenzuela, it switched lanes, "flew by him," and pulled back into the center lane. Mr. Valenzuela recalled that the vehicle approached him from behind at a constant speed and was easily going over 60 miles per hour because it quickly passed him. As it passed, Mr. Valenzuela observed that the vehicle was

a green [\*\*3] Corvette driven by a male driver, later identified as Appellant.

As the Corvette traveled ahead to the Lee Trevino intersection, Mr. Valenzuela kept the vehicle's taillights in his line of sight and recalled there was nothing between him and the Corvette. Mr. Valenzuela saw cars stopped at the lights ahead. He then saw the Corvette's taillights swerve to one side and for a split second, saw car headlights turn quickly facing his direction before they turned. Mr. Valenzuela hit his brakes when he saw the headlights because he knew he was traveling on a one-way street. He knew there had been an accident, but did not see the actual impact. Mr. Valenzuela recalled that the Corvette's brake lights did not go on before the accident.

Veronica Huerta Garcia was at the Lee Trevino and Gateway West intersection at the time of the accident. Ms. Garcia was in the middle lane behind a green Eclipse and in front of a black Pontiac, waiting for the light to change. All the cars waiting for the light were in the middle lane. When the light turned green, Ms. Garcia drove a little bit forward and then heard a loud impact of vehicles being struck behind her. She looked at her rearview mirror and saw [\*\*4] a car, a Honda CRX pop up, go airborne, and then land with its headlights facing the opposite direction. To her left, Ms. Garcia saw a green Corvette slam against the guardrail, causing sparks to fly. She noticed that the Corvette hit the guardrail at a high rate of speed and then came to a sudden stop. When Ms. Garcia saw everything right behind her, she quickly swerved to the right to avoid being [\*\*242] hit in the chain reaction. She then called 911 on her cell phone.

Within seconds, Ms. Garcia checked on some of the cars involved in the accident. The Corvette was damaged in the front of the hood and on the side that hit the guardrail. Ms. Garcia had contact with the driver, Appellant, and recalled that he was drunk and smelled strongly of alcohol. She helped Appellant exit the Corvette, before going to assist the injured passenger and driver of the Honda CRX.

Robert Herrera, his wife, and their two children, were also at the Lee Trevino-Gateway West intersection at the time of the accident. Mr. Herrera recalled there was one car in front of him and two cars behind him. While he was waiting in the center lane for the light to change, Mr. Herrera heard a loud crash and felt the impact. [\*\*5] Right after the accident, Mr. Herrera went straight to the Corvette and observed Appellant trying to get out of the vehicle. Mr. Herrera was yelling at Appellant and tried to take off the car window before his wife called him away.

Miguel Garcia, Jr. and his spouse were traveling home from Horizon City on Interstate-10 and exited at Lee Trevino. Mr. Garcia recalled that it was a nice evening with no inclement weather. As he exited, he saw that an accident had just occurred right in front of the Shamaley Ford dealership, a very well lit area. Mr. Garcia saw a Honda Civic turned around facing oncoming traffic, a Corvette to his left, and some other cars in front. As he approached the scene, he veered off to the Shamaley Ford entranceway toward Gateway West. Mr. Garcia got out of his car and went over to assist the passengers in the Honda Civic. Mr. Garcia then approached the Corvette and made contact with Appellant. He observed that Appellant was talking on a cell phone in Spanish, smelled of alcohol, and was very disoriented. Mr. Garcia recalled Appellant telling him to go to the other guys because they looked pretty bad. Mr. Garcia then left Appellant and later noticed that he had [\*\*6] fled the scene.

Ronald Drake, a security guard for Shamaley Ford on duty at the time of the accident, observed a man running through the dealership's parking lot. As the man ran, he was bouncing off the cars, stumbling, and fell twice. Mr. Drake saw the man drop his cell phone twice as he ran. As he started to approach the individual who had stumbled and fallen down, Mr. Drake smelled a lot of alcohol and backed off. The man ran across the back lot and then headed east on Rojas. Mr. Drake then observed the fire department, an ambulance, and police coming down Lee Trevino and traveling on Gateway West the wrong way. Mr. Drake went to the accident scene and informed the police about the man running through the parking lot.

El Paso Police Officer Steve Smith was dispatched to the multi-car accident scene at approximately 12:35 a.m. Officer Smith recalled that it was a clear night, the roadway was dry, and the location was well-lit by the Shamaley Ford dealership. From his preliminary investigation, he determined that the green Corvette had traveled westbound on Gateway West in the center lane and had struck the Honda vehicle in front of it, which then struck the vehicle in front of

[\*\*7] it, which in turn struck another vehicle in front of that one. Of the four vehicles involved in the accident, three were facing west and one, the Honda vehicle, was facing eastbound as it had spun around due to the impact. Officer Smith observed extensive damage to the rear of the Honda vehicle.

The most critically injured in the accident were the two occupants of the Honda vehicle first struck by the Corvette. The front passenger, Mario Sandoval, was not [\*243] breathing and was pronounced dead at the scene. Dr. Juan Contin, the county medical examiner, determined that Mario Sandoval bled to death from a torn aorta in the chest, which resulted from the collision. After the accident, the driver, Roberto Sandoval, was not conscious and had a very faint pulse. Mr. Sandoval was taken to the hospital, but died the following day from massive brain injuries sustained in the accident.

Around 2:12 a.m., police officers apprehended Appellant as he stumbled towards his house on Tony Tejada. Appellant was arrested and taken to the accident scene where he was identified by witnesses as the individual driving the Corvette. Appellant was later taken to Del Sol Medical Center where his blood was drawn. [\*\*8] The blood test results showed Appellant had a blood-alcohol level of .23.

Ruben Cisneros, an El Paso police officer assigned to the special traffic investigations section, testified that based on his accident reconstruction analysis, he found no pre-impact brake marks nor any pre-impact skid marks for the Corvette. Officer Cisneros observed extensive front end damage to the Corvette, extensive rear damage to the Honda, and paint transfer from the Honda to the Corvette. Based on his observations and the skid marks, Officer Cisneros determined the front end of the Corvette collided with the back end of the Honda Civic CRX. After the initial impact, the rear end of the Honda "climbed up" on the front end of the Corvette, causing the vehicle to spin clockwise 80 degrees and go airborne before coming to a stop. When the Corvette struck the Honda, its left front tire locked up due to front end damage. The Corvette then veered to the left lane and collided with the guardrail, leaving a post-impact skid mark from the left front tire.

At trial, Appellant objected to Officer Cisneros' testimony as an expert witness concerning the speed of the vehicles involved in the accident. Over Appellant's [\*\*9] objection, Officer Cisneros testified that based on his accident reconstruction formula calculations, he determined the initial impacting vehicle, the Corvette, was traveling 104 miles per hour. He also determined the Honda was impacted from zero speed to a post-impact speed of 28 miles per hour.

### ***Expert Testimony***

In his sole issue for review, Appellant argues the trial court committed reversible error by admitting Officer Cisneros' testimony concerning the speed his vehicle was traveling on June 17, 2001 and that this testimony severely prejudiced him. Specifically, Appellant contends the State did not meet its burden in establishing that Officer Cisneros was qualified as an expert witness nor did it present evidence concerning the reliability of the "AIMS test" used to establish the speed his vehicle was traveling when it struck the Honda CRX.

### ***Standard of Review and Applicable Law***

[HN1] A trial court's ruling to admit or exclude evidence is reviewed under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991)(Op. on reh'g). Absent a clear abuse of discretion, a trial court's decision to admit or exclude expert [\*\*10] testimony will not be disturbed. *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex.Crim.App. 2000); *Morales v. State*, 32 S.W.3d 862, 865 (Tex.Crim.App. 2000). An abuse of discretion exists when the trial court's decision was so clearly wrong as to lie outside the zone of reasonable disagreement, in other words, the trial court's decision or action was arbitrary, unreasonable, and made without reference to any guiding [\*244] rules or principles. See *Montgomery*, 810 S.W.2d at 391.

[HN2] For a witness's expert testimony to be admissible, the witness must be qualified as an expert by "knowledge, skill, experience, training, or education . . ." *TEX.R.EVID. 702. Rule 702* provides:

[HN3] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

*TEX.R.EVID. 702.*

[HN4] The party offering the evidence has the burden of showing the witness is qualified as an expert on the specific matter in question. *Penry v. State*, 903 S.W.2d 715, 762 (Tex.Crim.App. 1995), [\*\*11] *cert. denied*, 516 U.S. 977, 116 S. Ct. 480, 133 L. Ed. 2d 408, 133 L. Ed. 2d 408 (1995).

Pursuant to *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992), the proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is: (1) reliable and (2) relevant to assist the trier of fact in its fact-finding duty. *Id.* at 572; *Ochoa v. State*, 994 S.W.2d 283, 284 (Tex.App.--El Paso 1999, *no pet.*). To be reliable, the proffered evidence must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. The trial court's determination of reliability could be affected by the following non-exclusive factors: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying [\*\*12] scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id.*

#### *Daubert/Kelly Hearing*

At trial, Appellant objected to Officer Cisneros' testimony as an expert witness concerning the speed of the vehicles involved in the accident. Outside the jury's presence, Officer Cisneros testified that on many occasions, he has done speed reconstruction. He has had a variety of training courses in speed reconstruction, specifically the basic accident investigation course offered by the police department, the intermediate accident investigation course, the advanced accident reconstruction course, and the traffic accident reconstruction course. In 1997, Officer Cisneros received approximately 80 hours in accident reconstruction training in San Antonio at the Bexar County Sheriff's Department. He also has had training in bicycle, pedestrian, and motor vehicle collisions. In August 1999, [\*\*13] Officer Cisneros was certified in the 383rd District Court as an expert and again in October 2001 in the 41st District Court.

In this particular case, Officer Cisneros determined the speed of the Corvette and other vehicles by using formulas he had been taught to use for specific types of collisions. Officer Cisneros inserted certain data that was obtained from the scene into these formulas to derive the speeds. Officer Cisneros explained that he worked [\*\*245] the calculations out by hand using a calculator and used a skid speed formula for the post-impact distances and then used a linear momentum in-line collision formula to determine a speed for the Chevrolet Corvette. Based on these findings and his training, experience, and knowledge, Officer Cisneros determined the Corvette was traveling roughly 104 miles per hour at impact. The trial court overruled Appellant's objection to Officer Cisneros' testimony, but allowed Appellant's counsel to further voir dire Officer Cisneros outside the jury's presence.

In voir dire, Officer Cisneros testified that the measurements used in calculating the skid speed and linear momentum in-line collision formulas were taken with a surveying instrument [\*\*14] called an Accident Investigation Measuring System ("AIMS"). Officer Cisneros explained that operation of the AIMS device consists of setting up the equipment and from that initial point, taking shots by aiming the equipment at the particular target you want. The device has a prism that shoots a laser beam to the prism at the target, which shoots it back and gives you the measurement. Officer Cisneros conceded that he could not explain in any detail the scientific principles involved in this type of measuring system. Officer Cisneros stated that his department has two AIMS equipment, which were recently checked for calibration by the manufacturer, but he did not know the last time the AIMS device he used was calibrated. Officer

Cisneros also conceded that he did not know whether or not the accuracy of AIMS results could be validated over and over again by someone who is an expert in the underlying scientific principles of this measuring machine.

Regarding the formulas used in his calculations, Officer Cisneros testified that he obtained the measurements used in the formulas by using the AIMS machine. The formulas were taught to him during the courses mentioned above. Officer Cisneros [\*\*15] explained that the formulas are used internationally by other law enforcement agencies, including the Department of Public Safety in Texas. Officer Cisneros, however, conceded that he did not know who devised the formulas and did not know the scientific principles underlying the values in the formulas.

At the conclusion of the hearing, Appellant's counsel renewed his objection to Officer Cisneros' testimony. In response, the State argued that the AIMS system and formulas have been judicially accepted and noted that the officer testified that the AIMS system is used by other departments. It further noted that there have been no problems with it when used before. The trial court overruled Appellant's objection and allowed the State to offer the officer's expert witness concerning the speed of the Corvette and that of the other vehicle at the time of the collision.

### *Qualifications*

As the party offering Officer Cisneros' testimony, the State had the burden of showing he qualified as an expert on speed based on his accident reconstruction background. *See Penry, 903 S.W.2d at 762.* [HN5] Police officers are qualified to testify regarding accident reconstruction if they [\*\*16] are trained in the science about which they will testify and possess a high degree of knowledge sufficient to qualify as an expert. *DeLarue v. State, 102 S.W.3d 388, 396 (Tex.App.--Houston [14th Dist.] 2003, no pet.).*

Here, Officer Cisneros testified that he has been a police officer with the El Paso Police Department for twenty years. Since April 1994, he has been assigned to the special traffic investigations section. Officer Cisneros has received basic, intermediate, [\*246] and advanced training in accident reconstruction, including speed reconstruction. In addition, Officer Cisneros has eighty hours of accident reconstruction training held at the Bexar County Sheriff's Department in 1997. On many occasions he has done accident reconstruction for the special traffic investigations section. Officer Cisneros has been certified twice as an expert in accident reconstruction by El Paso district courts. For this case, Officer Cisneros was called out to Gateway West on June 17, 2001 and performed an accident reconstruction of the incident. Officer Cisneros clearly demonstrated he had special knowledge on accident reconstruction, including speed reconstruction, based on his [\*\*17] extensive training and his field experience. Therefore, we conclude the trial court did not abuse its discretion in determining Officer Cisneros was qualified to offer his expert opinion in speed reconstruction.

### *Reliability*

The State in this case does not dispute that accident reconstruction, specifically Officer Cisneros' testimony concerning the speed at which Appellant was driving at the time of impact, is a type of scientific evidence subject to *Kelly* requirements for admissibility. By clear and convincing evidence, the State was required to show that with respect to the scientific evidence in this case: (1) the underlying scientific theory was valid; (2) the technique applying the theory was valid; and (3) the technique was properly applied on the occasion in question. n1 *See Kelly, 824 S.W.2d at 573.*

n1 In his sole issue, Appellant does not challenge Officer Cisneros' testimony concerning the Corvette's speed on relevancy grounds. Therefore, we will address its reliability only.

[\*\*18]

Appellant argues on appeal that the State presented no evidence concerning the reliability of the "AIMS test." By

Appellant's complaint we understand him to be challenging the reliability of AIMS equipment-derived distance measurements and the reliability of the speed calculation formulas used by Officer Cisneros in his speed reconstruction analysis.

Here, Officer Cisneros testified that the formulas he used in deriving Appellant's driving speed are also used by other law enforcement agencies. Officer Cisneros, however, conceded that he did not know the scientific principles underlying the values in the formulas used to derive Appellant's speed at the time of impact. He could not explain the underlying scientific principles of how the AIMS equipment provided distance measurements and he did not know whether or not the accuracy of AIMS results could be validated over and over again. In this case, there is no evidence in the record sufficient to satisfy the reliability requirements pursuant to *Kelly*. Therefore, the trial court erred in admitting the evidence concerning Appellant's driving speed. We find, however, that in this case, admission of Officer Cisneros' testimony concerning [\*\*19] Appellant's driving speed at the time of impact was harmless.

[HN6] A nonconstitutional error that does not affect the substantial rights of the defendant must be disregarded. *See TEX.R.APP.P. 44.2(b)*. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997)*. A criminal conviction should not be overturned for nonconstitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect. *Johnson v. State, 967 S.W.2d 410, 417 (Tex.Crim.App. 1998)*.

[\*247] In this case, Appellant pled guilty and was convicted of intoxication manslaughter. n2 [HN7] A person commits the offense of intoxication manslaughter if the person: (1) operates a motor vehicle in a public place; (2) is intoxicated; and (3) by reason of that intoxication causes the death of another by accident or mistake. *See TEX.PEN.CODE ANN. § 49.08(a)*(Vernon 2003). The contested issue at trial was whether Appellant used or exhibited a deadly weapon: to wit [\*\*20] a motor vehicle in commission of the offense. [HN8] A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *TEX.PEN.CODE ANN. § 1.07(a)(17)(B)*(Vernon 2003). Anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. *Tyra v. State, 897 S.W.2d 796, 798 (Tex.Crim.App. 1995)*. This is necessarily so because a thing which actually causes death is, by definition, "capable of causing death." *Id.*

n2 The first count of intoxication manslaughter in the indictment alleged Appellant:

Did then and there, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, to wit: by having an alcohol concentration of .08 or more, and by reason of that intoxication caused the death of MARIO SANDOVAL by then and there driving said motor vehicle into and causing it to collide with a motor vehicle in which MARIO SANDOVAL was a passenger . . . .

The second count of intoxication manslaughter alleged Appellant:

Did then and there, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, to wit: by having an alcohol concentration of .08 or more, and by reason of that intoxication caused the death of ROBERT SANDOVAL by then and there driving said motor vehicle into and causing it to collide with a motor vehicle driven by ROBERT SANDOVAL . . . .

[\*\*21]

The evidence shows that Appellant was driving in excess of 60 miles per hour as he passed Zachary Valenzuela and approached the Lee Trevino-Gateway West intersection. Mr. Valenzuela did not see Appellant attempt to brake prior to the accident and witnesses testified that the intersection was well-lit and the roadway was dry. Physical evidence and witness testimony indicated that the front of Appellant's vehicle collided with the rear end of the victims' vehicle,

causing their vehicle to go airborne and spin around to face oncoming traffic. Through her rearview mirror, Veronica Huerta Garcia saw Appellant's vehicle slam against the guardrail at a high speed, causing sparks to fly. In unchallenged testimony, Officer Cisneros testified that he found no pre-impact brake marks and no pre-impact skid marks at the accident scene. El Paso County Medical Examiner Dr. Juan Contin testified that the passenger victim bled to death from a torn aorta, resulting from the collision. Dr. Contin also testified that the driver victim died the following day in the hospital from injuries sustained in the collision.

After examining the record as a whole, we find the evidence above was sufficient to support [\*\*22] the jury's affirmative finding that Appellant used his motor vehicle in a manner that was capable of causing death or serious bodily injury, without considering the speed evidence introduced through Officer Cisneros' testimony. The trial court's erroneous admission of the speed evidence did not affect Appellant's substantial rights and in light of other properly admitted evidence we are assured that if its admission influenced the jury at all, it did so only slightly. Therefore, we find the trial court's error to be harmless. Issue One is overruled.

Accordingly, we affirm the trial court's judgment.

DAVID WELLINGTON CHEW, Justice

**CONCUR BY:** ANN CRAWFORD McCLURE

**CONCUR:**

[\*248] **CONCURRING OPINION**

The record shows that Appellant waived his complaint about the AIMS device and the measurements derived from it. Therefore, I disagree with the majority's conclusion that the trial court abused its discretion by admitting this particularly testimony. Alternatively, I would find that the State is not required to prove the scientific principles pertaining to the AIMS device in order for an expert to rely on measurements taken with the device. While I agree with the majority's holding that the State [\*\*23] failed to carry its burden under *Kelly* with respect to Cisneros' expert opinion as to the pre-impact speed of Appellant's vehicle, I write separately to discuss the effect of *Hernandez v. State*, 116 S.W.3d 26 (Tex.Crim.App. 2003) on an appellate court's review of this issue. Because the majority opinion ultimately concludes that the errors in admitting the expert testimony is harmless, I concur.

Cisneros utilized two formulas in estimating the speed at which Appellant's car was traveling at the time of impact: the skid speed formula and the linear momentum in-line collision formula. These formulas are used not only by the Texas Department of Public Safety but also internationally by other law enforcement agencies and they were taught to Cisneros at the accident investigation and accident reconstruction courses he attended as part of his training. Pursuant to his training, Cisneros gathered data relevant to the following formula components:

1. weight of the vehicles;
2. the coefficient of friction or drag factor; and
3. the post-impact distances of the vehicles.

Cisneros obtained the weight of the vehicles involved in the accident from the Department of Motor [\*\*24] Vehicles. The drag factor pertains to the friction of the roadway and Cisneros obtained this figure by utilizing a drag sled to find a coefficient of friction for the particular road involved in the accident. For the third factor, Cisneros utilized the AIMS device to measure the distances traveled by the two vehicles after impact. A diagram prepared by Cisneros (State's Exhibit 10) shows that Appellant's vehicle traveled 413 feet from the point of impact to its resting place. There were no pre-impact skid marks because Appellant's vehicle did not skid prior to striking the complainants' car. Consequently, Cisneros utilized the skid speed formula to determine only a post-impact speed for each vehicle involved

in the accident.

As explained by Cisneros, the skid speed formula involves multiplying distance by a constant of thirty by the square root of the roadway drag factor. Cisneros determined that the complainants' Honda went from 0 miles per hour to a post-impact speed of 28 miles per hour. Cisneros was not asked to state the post-impact speed he determined for the Corvette but he included the figure in a written expert's report filed in the case. n1 With the post-impact speeds determined [\*\*25] by the skid speed formula, Cisneros then applied the weights of the vehicles in the linear momentum in-line collision formula in order to obtain the speed of the initial impacting vehicle. Based on this formula, Cisneros estimated that Appellant's Corvette was traveling 104 miles per hour at the point of impact. Cisneros explained the components of the skid speed formula but was not asked to explain the linear momentum in-line collision formula.

n1 Cisneros' written report was not admitted into evidence.

#### [\*249] *Waiver of Complaint About Measurements*

The majority has failed to consider that Appellant waived any complaint about Cisneros' use of the AIMS device to obtain the measurements used in the speed calculation formulas because Appellant did not object to State's Exhibit 10, which is a diagram of the collision including measurements taken at the scene with the AIMS device. It is well established that a party must make a timely and specific objection in order to preserve his complaints for appellate review. [\*\*26] See *TEX.R.APP.P. 33.1*. Further, a party must object every time inadmissible evidence is offered or the complaint is waived. See *Ethington v. State*, 819 S.W.2d 854, 858 (*Tex.Crim.App. 1991*); *Gillum v. State*, 888 S.W.2d 281, 285 (*Tex.App.--El Paso 1994, pet. ref'd*). In the presence of the jury, the State elicited testimony from Cisneros showing that he had training in accident reconstruction and had previously testified as an expert on that topic. Cisneros then identified State's Exhibit 10 as a diagram of the accident which he prepared on the night of the accident. Cisneros explained that he used the Accident Investigation Measuring System (AIMS), which he described as a surveying device, and a software program to prepare State's Exhibit 10. The State then offered State's Exhibit 10 and Appellant's counsel stated that he had no objection to it. State's Exhibit 10 depicts the point of impact and post-impact locations of the vehicles, their direction of travel, the location of various skid marks, and measurements of those skid marks taken by Cisneros using AIMS. The exhibit reflects that Appellant's Corvette traveled 413 feet from the point of impact [\*\*27] with the complainants' Honda. By failing to object to the initial testimony about the AIMS device and State's Exhibit 10, Appellant waived any subsequent complaint he might have had about the measurements taken by Cisneros with the assistance of the AIMS device.

#### *Scientific Validity of AIMS*

Even if Appellant did not waive his complaint about the measurements and the AIMS device, the majority opinion errs by holding that the State was obligated to establish that Cisneros understands the inner-workings of this surveying device. Cisneros was offered as an expert in accident reconstruction, not as an expert in AIMS equipment. Consequently, there was no necessity for the State to prove that he understood exactly how laser measuring devices and surveying equipment work. As aptly noted by appellate counsel for the State, the AIMS device is essentially a high-tech tape measure and Cisneros used the device to measure the distance between two points. I find no requirement in *Rule 703* or elsewhere that an expert witness be able to explain the scientific principles involved in every piece of equipment used by the expert to gather data. To illustrate this point, an expert who relies on photographs [\*\*28] as part of the foundation for his opinion regarding the cause of an accident need not explain precisely how a camera works in order to rely on the data supplied by the photographs. Likewise, an expert witness who utilizes a calculator in performing calculations is not required to relate to the jury the scientific principles involved in an electronic calculator before his expert testimony is permitted. Cisneros sufficiently explained that the AIMS device, using a laser, measured the distance Appellant's car traveled from the point of impact to its resting place and he utilized that measurement in the skid speed formula. For these reasons, I would find that the trial court did not abuse its discretion in admitting Cisneros'

testimony about the measurements taken at the scene of the accident.

[\*250] *Reliability of the Speed Calculation Formulas*

While I would find much of Cisneros' testimony admissible, the State failed to offer sufficient evidence proving the reliability of the two formulas utilized by Cisneros to estimate speed. A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the [\*\*29] *Kelly* test. *Hernandez*, 116 S.W.3d at 28-9. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. *Id.* at 29. Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert/Kelly* n2 hearings, courts subsequently considering the issue may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in the prior hearings. *Id.* at 29; see *Weatherred v. State*, 15 S.W.3d 540, 542 n.4 (Tex.Crim.App. 2000)("once a particular type of scientific evidence is well established as reliable, a court may take judicial notice of that fact, thereby relieving the proponent of the burden of producing evidence on that question"). In other words, trial courts are not required to reinvent the scientific wheel in every trial. *Hernandez*, 116 S.W.3d at 29. The Court of Criminal Appeals has recently [\*\*30] emphasized, however, that some trial courts must conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology before other trial courts may take judicial notice of that determination. *Id.* Although appellate courts may likewise take judicial notice of other appellate opinions concerning a specific scientific theory or methodology in evaluating a trial court's *Daubert/Kelly* gatekeeping decision, judicial notice on appeal cannot serve as the sole source of support for a bare trial court record concerning scientific reliability. *Hernandez*, 116 S.W.3d at 31-2.

n2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Although the trial court held a *Daubert/Kelly* hearing in the instant case, the State did not offer any evidence of the theories underlying the formulas utilized by Cisneros. Further, the State did not show that the issue of the formulas' reliability [\*\*31] has been litigated previously nor did it ask the trial court to take judicial notice of the reliability of the scientific theory and methodology based upon prior hearings or prior appellate decisions. See *Hernandez*, 116 S.W.3d at 30 and n.7. There is evidence that Cisneros has previously qualified as an expert and testified regarding accident reconstruction and perhaps even speed estimation, but the fact that a trial court has allowed some type of scientific testimony by a particular witness previously does not mean that the witness's testimony is, *ipso facto*, scientifically reliable. *Hernandez*, 116 S.W.3d at 30.

The trial court's decision to admit this evidence is understandable as expert testimony regarding accident reconstruction and speed estimation has been previously admitted in Texas civil and criminal cases. See e.g., *Chavers v. State*, 991 S.W.2d 457, 460-61 (Tex.App.--Houston [1st Dist.] 1999, *pet. ref'd*); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex.App.--Corpus Christi 1990, *writ denied*); *Rogers v. Gonzales*, 654 S.W.2d 509, 512 (Tex.App.--Corpus Christi 1983, *writ ref'd n.r.* [\*\*32] e.); *Bates v. [\*\*251] Barclay*, 484 S.W.2d 955, 957-59 (Tex.Civ.App.--Beaumont 1972, *writ ref'd n.r.e.*); *Adams v. Smith*, 479 S.W.2d 390, 395 (Tex.Civ.App.--Amarillo 1972, *no writ*); *Beynon v. Cutberth*, 390 S.W.2d 352, 355-56 (Tex.Civ.App.--Eastland 1965, *no writ*). With the exception of *Chavers*, these decisions pre-date *Daubert* and *Kelly*, and there is no determination in any of the cases that the formulas used to calculate speed are scientifically reliable. Although *Chavers* employs the proper criteria under *Kelly*, the decision is distinguishable because the expert witness based his calculations on yaw marks rather than the two formulas used by Cisneros. Therefore, taking judicial notice of *Chavers* is of no benefit in the instant case.

In *Thomson v. Rook*, a United States District Court conducted a *Daubert* hearing to determine the admissibility of an accident reconstruction expert's opinion regarding speed, distance traveled by vehicles, and the point of impact of the collision. *Thomson v. Rook*, 255 F. Supp. 2d 584, 584-87 (E.D.Tex. 2001). That court determined that the articles,

books, and other [\*\*33] experts in the accident reconstruction field validated the methodology used by the expert witness for calculating speed, distance traveled by the vehicles, and the point of impact. *Id.* at 586. In a footnote, the court noted that the expert witness calculated speed using a "standard physics equation employed by automobile accident reconstruction experts and a coefficient of friction derived from J. Stannard Baker's book, *Traffic Investigation Manual*." *Id.* at 586 n.5. The witness calculated speed and distance traveled by one of the vehicles using a standard rate of acceleration from a standard start as reported by the Baker book. *Id.* The district court admitted the witness's expert opinion on these topics but excluded the witness's opinion about the driver's braking time because the plaintiffs had not produced evidence or articles or books, or other experts that validate the methodology used by the expert witness. *Id.* at 587. It is impossible to determine whether Cisneros used some of the same formulas as the witness in *Thomson*, and therefore, taking judicial notice of this decision would not benefit the State.

I have been [\*\*34] unable to find any Texas appellate decisions at the state or federal level holding that the skid speed formula and linear momentum formulas utilized by Cisneros are reliable.

A cursory review of appellate decisions from other jurisdictions indicates that this type of expert testimony has been often admitted into evidence in other states. *See e.g., State v. Russo*, 38 Conn. Supp. 426, 450 A.2d 857, 866-67 (Conn.Super.Ct. 1982)(holding that an expert in Connecticut may testify as to the speed of a motor vehicle based on skid marks and other factors because the formulas used to calculate speed are based on well-recognized principles of physics that have gained general acceptance in the field of accident reconstruction); *Bryant v. Buerman*, 739 So. 2d 710, 712-13 (Fla.Dist.Ct.App. 1999)(holding that opinion of an accident reconstruction expert witness regarding the speed of a vehicle at the time of an accident is admissible in personal injury action arising out of collision, so long as the expert's testimony is helpful to the jury). *See also* Jerre E. Box, Annotation, *Opinion Testimony as to Speed of Motor Vehicle Based on Skid Marks and Other Facts* [\*\*35] , 29 A.L.R. 3d §§ 248-77 (1970 & Supp. 1996)(discussing numerous decisions admitting and excluding this type of evidence). As is the case with the Texas decisions discussed above, many of the out-of-state decisions pre-date *Daubert* and *Kelly*, and of those cases decided since *Daubert* and *Kelly*, the opinions do not discuss reliability of the same formulas used by Cisneros. Further, none [\*\*252] of these decisions indicates that the formulas utilized by Cisneros have become so widely accepted or persuasively proven that future courts may take judicial notice of their reliability. *See Hernandez*, 116 S.W.3d at 29 n.6. The Connecticut Supreme Court stated in *Russo* that using the coefficient of friction to estimate speed is a well recognized principle that has gained general acceptance in the field of accident reconstruction. *Russo*, 450 A.2d at 866. While Cisneros utilized the coefficient of friction in the skid speed formula to determine post-impact speed, he used a different formula to obtain pre-impact speed and that is the object of Appellant's complaint on appeal. Moreover, the Court of Criminal Appeals cautioned in *Hernandez* about reliance [\*\*36] on judicial opinions from non-Texas jurisdictions because many other jurisdictions utilize the "preponderance of the evidence" standard rather than the "clear and convincing" evidence standard required in Texas. *Hernandez*, 116 S.W.3d at 31 n.13.

In the absence of any evidence showing the reliability of the speed calculation formulas utilized by Cisneros, the trial court erred in admitting Cisneros' conclusion that Appellant's vehicle was traveling 104 miles per hour at the point of impact. However, I would also find the error harmless as stated in the majority opinion. With these additional comments and observations, I concur in the judgment affirming the trial court's judgment.

ANN CRAWFORD McCLURE, Justice

177 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**ROBERTO PENA, Appellant, v. THE STATE OF TEXAS, Appellee.****No. 08-02-00361-CR****COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO***155 S.W.3d 238; 2004 Tex. App. LEXIS 911***January 29, 2004, Decided****NOTICE:** [\*\*1] (PUBLISH)**SUBSEQUENT HISTORY:** Released for Publication February 22, 2005.**PRIOR HISTORY:** Appeal from the 41st District Court of El Paso County, Texas. (TC # 20010D03736).**DISPOSITION:** Affirmed.**CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant challenged a decision from the 41st District Court of El Paso County (Texas), which convicted him of two counts of intoxicated manslaughter and two counts of failure to stop and render aid.**OVERVIEW:** Witnesses observed defendant operating a vehicle at a high rate of speed before crashing into three cars at an intersection. Two persons were killed in the crash, and defendant fled the scene. He later pled guilty to several crimes before a jury, which determined that defendant had used the vehicle as a deadly weapon. Thereafter, defendant sought review. Specifically, defendant challenged the admission of a police officer's testimony regarding the speed of his vehicle at the time of the accident. In affirming, the court determined that the evidence was properly admitted as expert testimony under *Tex. R. Evid. 702*. The officer had extensive training in accident reconstruction. The officer determined the speed by using formulas he was taught to use for specific types of collisions. Further, the officer also used an accident investigation measuring system (AIMS) to make certain calculations. The trial court should have required the State to offer evidence concerning the scientific principals behind AIMS. However, the failure to show reliability was harmless because the evidence was sufficient to support the jury's finding that defendant used his vehicle as a deadly weapon.**OUTCOME:** The court affirmed defendant's convictions.**CORE TERMS:** speed, formula, reconstruction, scientific, skid, reliability, front, measurement, collision, training, motor vehicle, expert witness, intoxication, traveling, distance, post-impact, utilized, driving, miles, lane, expert testimony, traveled, manslaughter, calculation, admitting, recalled, struck, judicial notice, pre-impact, reliable

**LexisNexis(R) Headnotes*****Civil Procedure > Appeals > Standards of Review > Abuse of Discretion******Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Criminal Trials***

[HN1] A trial court's ruling to admit or exclude evidence is reviewed under an abuse of discretion standard. Absent a clear abuse of discretion, a trial court's decision to admit or exclude expert testimony will not be disturbed. An abuse of discretion exists when the trial court's decision was so clearly wrong as to lie outside the zone of reasonable disagreement, in other words, the trial court's decision or action was arbitrary, unreasonable, and made without reference to any guiding rules or principles.

***Evidence > Testimony > Experts > Admissibility******Evidence > Testimony > Experts > Criminal Trials******Evidence > Testimony > Experts > Qualifications***

[HN2] For a witness's expert testimony to be admissible, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. Tex. R. Evid. 702.

***Evidence > Testimony > Experts > Criminal Trials***

[HN3] See *Tex. R. Evid. 702*.

***Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof******Evidence > Scientific Evidence > General Overview******Evidence > Testimony > General Overview***

[HN4] The party offering the evidence has the burden of showing the witness is qualified as an expert on the specific matter in question. The proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is: (1) reliable and (2) relevant to assist the trier of fact in its fact-finding duty. To be reliable, the proffered evidence must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. The trial court's determination of reliability could be affected by the following non-exclusive factors: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

***Evidence > Testimony > Experts > Criminal Trials***

[HN5] Police officers are qualified to testify regarding accident reconstruction if they are trained in the science about which they will testify and possess a high degree of knowledge sufficient to qualify as an expert.

***Criminal Law & Procedure > Appeals > Reversible Errors > General Overview******Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***

[HN6] A nonconstitutional error that does not affect the substantial rights of the defendant must be disregarded. *Tex. R. App. P. 44.2(b)*. A substantial right is affected when the error had a substantial and injurious effect or influence in

determining the jury's verdict. A criminal conviction should not be overturned for nonconstitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview***  
***Criminal Law & Procedure > Guilty Pleas > General Overview***  
***Torts > Transportation Torts > General Overview***

[HN7] A person commits the offense of intoxication manslaughter if the person: (1) operates a motor vehicle in a public place; (2) is intoxicated; and (3) by reason of that intoxication causes the death of another by accident or mistake. *Tex. Penal Code Ann. § 49.08(a)*(2003).

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Vehicular Homicide > General Overview***  
***Criminal Law & Procedure > Criminal Offenses > Weapons > Definitions***  
***Torts > Transportation Torts > Motor Vehicles > General Overview***

[HN8] A deadly weapon is defined as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. *Tex. Penal Code Ann. § 1.07(a)(17)(B)*(2003). Anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. This is necessarily so because a thing which actually causes death is, by definition, capable of causing death.

**COUNSEL:** For APPELLANT: Hon. Joseph (Sib) Abraham Jr., El Paso, TX.

For STATE: Hon. Jaime E. Esparza, DISTRICT ATTORNEY, El Paso, TX.

**JUDGES:** Before Panel No. 2. Barajas, C.J., McClure, and Chew, JJ. McClure, J., Concurring.

**OPINION BY:** DAVID WELLINGTON CHEW

**OPINION:**

[\*240] Appellant Roberto Pena was indicted with two counts of intoxication manslaughter [\*241] and two counts of failure to stop and render aid. Before a jury, Appellant pled guilty to all four counts, but pled "not true" to the allegation that he used or exhibited a deadly weapon during the commission of the offense as alleged in each count. The jury found Appellant guilty of all four counts and made an affirmative finding on the use of a deadly weapon for each count. The jury assessed punishment at twenty years' imprisonment and a \$ 10,000 fine for each intoxication manslaughter count and five years' imprisonment and a \$ 5,000 fine for each failure to stop and render aid count. Upon the State's motion, the trial court ordered that the intoxication manslaughter counts be served consecutively, with the failure to stop and render aid counts to be served concurrently. The trial court sentenced Appellant in accordance with the jury's assessment, however we observe the court's final judgments [\*\*2] and sentences only contain deadly weapon findings for the intoxication manslaughter offenses. In his sole issue on appeal, Appellant contends the trial court committed reversible error by admitting testimony from a State's witness concerning the speed his vehicle was traveling when it struck the victims' vehicle and that this testimony severely prejudiced him. We affirm.

On June 17, 2001, between 12:30 and 1 a.m., Zachary Valenzuela was driving in the center lane on Gateway West when he noticed headlights in his rear view mirror. The rate of speed at which the car was coming at him from behind was the reason the headlights caught his attention. Mr. Valenzuela was driving between 55 to 60 miles per hour. He considered changing lane, but at the rate of speed the vehicle was approaching, he decided to stay in the center lane. When the approaching vehicle pulled up behind Mr. Valenzuela, it switched lanes, "flew by him," and pulled back into the center lane. Mr. Valenzuela recalled that the vehicle approached him from behind at a constant speed and was easily going over 60 miles per hour because it quickly passed him. As it passed, Mr. Valenzuela observed that the vehicle was

a green [\*\*3] Corvette driven by a male driver, later identified as Appellant.

As the Corvette traveled ahead to the Lee Trevino intersection, Mr. Valenzuela kept the vehicle's taillights in his line of sight and recalled there was nothing between him and the Corvette. Mr. Valenzuela saw cars stopped at the lights ahead. He then saw the Corvette's taillights swerve to one side and for a split second, saw car headlights turn quickly facing his direction before they turned. Mr. Valenzuela hit his brakes when he saw the headlights because he knew he was traveling on a one-way street. He knew there had been an accident, but did not see the actual impact. Mr. Valenzuela recalled that the Corvette's brake lights did not go on before the accident.

Veronica Huerta Garcia was at the Lee Trevino and Gateway West intersection at the time of the accident. Ms. Garcia was in the middle lane behind a green Eclipse and in front of a black Pontiac, waiting for the light to change. All the cars waiting for the light were in the middle lane. When the light turned green, Ms. Garcia drove a little bit forward and then heard a loud impact of vehicles being struck behind her. She looked at her rearview mirror and saw [\*\*4] a car, a Honda CRX pop up, go airborne, and then land with its headlights facing the opposite direction. To her left, Ms. Garcia saw a green Corvette slam against the guardrail, causing sparks to fly. She noticed that the Corvette hit the guardrail at a high rate of speed and then came to a sudden stop. When Ms. Garcia saw everything right behind her, she quickly swerved to the right to avoid being [\*242] hit in the chain reaction. She then called 911 on her cell phone.

Within seconds, Ms. Garcia checked on some of the cars involved in the accident. The Corvette was damaged in the front of the hood and on the side that hit the guardrail. Ms. Garcia had contact with the driver, Appellant, and recalled that he was drunk and smelled strongly of alcohol. She helped Appellant exit the Corvette, before going to assist the injured passenger and driver of the Honda CRX.

Robert Herrera, his wife, and their two children, were also at the Lee Trevino-Gateway West intersection at the time of the accident. Mr. Herrera recalled there was one car in front of him and two cars behind him. While he was waiting in the center lane for the light to change, Mr. Herrera heard a loud crash and felt the impact. [\*\*5] Right after the accident, Mr. Herrera went straight to the Corvette and observed Appellant trying to get out of the vehicle. Mr. Herrera was yelling at Appellant and tried to take off the car window before his wife called him away.

Miguel Garcia, Jr. and his spouse were traveling home from Horizon City on Interstate-10 and exited at Lee Trevino. Mr. Garcia recalled that it was a nice evening with no inclement weather. As he exited, he saw that an accident had just occurred right in front of the Shamaley Ford dealership, a very well lit area. Mr. Garcia saw a Honda Civic turned around facing oncoming traffic, a Corvette to his left, and some other cars in front. As he approached the scene, he veered off to the Shamaley Ford entranceway toward Gateway West. Mr. Garcia got out of his car and went over to assist the passengers in the Honda Civic. Mr. Garcia then approached the Corvette and made contact with Appellant. He observed that Appellant was talking on a cell phone in Spanish, smelled of alcohol, and was very disoriented. Mr. Garcia recalled Appellant telling him to go to the other guys because they looked pretty bad. Mr. Garcia then left Appellant and later noticed that he had [\*\*6] fled the scene.

Ronald Drake, a security guard for Shamaley Ford on duty at the time of the accident, observed a man running through the dealership's parking lot. As the man ran, he was bouncing off the cars, stumbling, and fell twice. Mr. Drake saw the man drop his cell phone twice as he ran. As he started to approach the individual who had stumbled and fallen down, Mr. Drake smelled a lot of alcohol and backed off. The man ran across the back lot and then headed east on Rojas. Mr. Drake then observed the fire department, an ambulance, and police coming down Lee Trevino and traveling on Gateway West the wrong way. Mr. Drake went to the accident scene and informed the police about the man running through the parking lot.

El Paso Police Officer Steve Smith was dispatched to the multi-car accident scene at approximately 12:35 a.m. Officer Smith recalled that it was a clear night, the roadway was dry, and the location was well-lit by the Shamaley Ford dealership. From his preliminary investigation, he determined that the green Corvette had traveled westbound on Gateway West in the center lane and had struck the Honda vehicle in front of it, which then struck the vehicle in front of

[\*\*7] it, which in turn struck another vehicle in front of that one. Of the four vehicles involved in the accident, three were facing west and one, the Honda vehicle, was facing eastbound as it had spun around due to the impact. Officer Smith observed extensive damage to the rear of the Honda vehicle.

The most critically injured in the accident were the two occupants of the Honda vehicle first struck by the Corvette. The front passenger, Mario Sandoval, was not [\*243] breathing and was pronounced dead at the scene. Dr. Juan Contin, the county medical examiner, determined that Mario Sandoval bled to death from a torn aorta in the chest, which resulted from the collision. After the accident, the driver, Roberto Sandoval, was not conscious and had a very faint pulse. Mr. Sandoval was taken to the hospital, but died the following day from massive brain injuries sustained in the accident.

Around 2:12 a.m., police officers apprehended Appellant as he stumbled towards his house on Tony Tejada. Appellant was arrested and taken to the accident scene where he was identified by witnesses as the individual driving the Corvette. Appellant was later taken to Del Sol Medical Center where his blood was drawn. [\*\*8] The blood test results showed Appellant had a blood-alcohol level of .23.

Ruben Cisneros, an El Paso police officer assigned to the special traffic investigations section, testified that based on his accident reconstruction analysis, he found no pre-impact brake marks nor any pre-impact skid marks for the Corvette. Officer Cisneros observed extensive front end damage to the Corvette, extensive rear damage to the Honda, and paint transfer from the Honda to the Corvette. Based on his observations and the skid marks, Officer Cisneros determined the front end of the Corvette collided with the back end of the Honda Civic CRX. After the initial impact, the rear end of the Honda "climbed up" on the front end of the Corvette, causing the vehicle to spin clockwise 80 degrees and go airborne before coming to a stop. When the Corvette struck the Honda, its left front tire locked up due to front end damage. The Corvette then veered to the left lane and collided with the guardrail, leaving a post-impact skid mark from the left front tire.

At trial, Appellant objected to Officer Cisneros' testimony as an expert witness concerning the speed of the vehicles involved in the accident. Over Appellant's [\*\*9] objection, Officer Cisneros testified that based on his accident reconstruction formula calculations, he determined the initial impacting vehicle, the Corvette, was traveling 104 miles per hour. He also determined the Honda was impacted from zero speed to a post-impact speed of 28 miles per hour.

### ***Expert Testimony***

In his sole issue for review, Appellant argues the trial court committed reversible error by admitting Officer Cisneros' testimony concerning the speed his vehicle was traveling on June 17, 2001 and that this testimony severely prejudiced him. Specifically, Appellant contends the State did not meet its burden in establishing that Officer Cisneros was qualified as an expert witness nor did it present evidence concerning the reliability of the "AIMS test" used to establish the speed his vehicle was traveling when it struck the Honda CRX.

### ***Standard of Review and Applicable Law***

[HN1] A trial court's ruling to admit or exclude evidence is reviewed under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991)(Op. on reh'g). Absent a clear abuse of discretion, a trial court's decision to admit or exclude expert [\*\*10] testimony will not be disturbed. *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex.Crim.App. 2000); *Morales v. State*, 32 S.W.3d 862, 865 (Tex.Crim.App. 2000). An abuse of discretion exists when the trial court's decision was so clearly wrong as to lie outside the zone of reasonable disagreement, in other words, the trial court's decision or action was arbitrary, unreasonable, and made without reference to any guiding [\*244] rules or principles. See *Montgomery*, 810 S.W.2d at 391.

[HN2] For a witness's expert testimony to be admissible, the witness must be qualified as an expert by "knowledge, skill, experience, training, or education . . ." TEX.R.EVID. 702. Rule 702 provides:

[HN3] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

*TEX.R.EVID. 702.*

[HN4] The party offering the evidence has the burden of showing the witness is qualified as an expert on the specific matter in question. *Penry v. State*, 903 S.W.2d 715, 762 (Tex.Crim.App. 1995), [\*\*11] *cert. denied*, 516 U.S. 977, 116 S. Ct. 480, 133 L. Ed. 2d 408, 133 L. Ed. 2d 408 (1995).

Pursuant to *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992), the proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is: (1) reliable and (2) relevant to assist the trier of fact in its fact-finding duty. *Id.* at 572; *Ochoa v. State*, 994 S.W.2d 283, 284 (Tex.App.--El Paso 1999, *no pet.*). To be reliable, the proffered evidence must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. The trial court's determination of reliability could be affected by the following non-exclusive factors: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying [\*\*12] scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id.*

#### *Daubert/Kelly Hearing*

At trial, Appellant objected to Officer Cisneros' testimony as an expert witness concerning the speed of the vehicles involved in the accident. Outside the jury's presence, Officer Cisneros testified that on many occasions, he has done speed reconstruction. He has had a variety of training courses in speed reconstruction, specifically the basic accident investigation course offered by the police department, the intermediate accident investigation course, the advanced accident reconstruction course, and the traffic accident reconstruction course. In 1997, Officer Cisneros received approximately 80 hours in accident reconstruction training in San Antonio at the Bexar County Sheriff's Department. He also has had training in bicycle, pedestrian, and motor vehicle collisions. In August 1999, [\*\*13] Officer Cisneros was certified in the 383rd District Court as an expert and again in October 2001 in the 41st District Court.

In this particular case, Officer Cisneros determined the speed of the Corvette and other vehicles by using formulas he had been taught to use for specific types of collisions. Officer Cisneros inserted certain data that was obtained from the scene into these formulas to derive the speeds. Officer Cisneros explained that he worked [\*\*245] the calculations out by hand using a calculator and used a skid speed formula for the post-impact distances and then used a linear momentum in-line collision formula to determine a speed for the Chevrolet Corvette. Based on these findings and his training, experience, and knowledge, Officer Cisneros determined the Corvette was traveling roughly 104 miles per hour at impact. The trial court overruled Appellant's objection to Officer Cisneros' testimony, but allowed Appellant's counsel to further voir dire Officer Cisneros outside the jury's presence.

In voir dire, Officer Cisneros testified that the measurements used in calculating the skid speed and linear momentum in-line collision formulas were taken with a surveying instrument [\*\*14] called an Accident Investigation Measuring System ("AIMS"). Officer Cisneros explained that operation of the AIMS device consists of setting up the equipment and from that initial point, taking shots by aiming the equipment at the particular target you want. The device has a prism that shoots a laser beam to the prism at the target, which shoots it back and gives you the measurement. Officer Cisneros conceded that he could not explain in any detail the scientific principles involved in this type of measuring system. Officer Cisneros stated that his department has two AIMS equipment, which were recently checked for calibration by the manufacturer, but he did not know the last time the AIMS device he used was calibrated. Officer

Cisneros also conceded that he did not know whether or not the accuracy of AIMS results could be validated over and over again by someone who is an expert in the underlying scientific principles of this measuring machine.

Regarding the formulas used in his calculations, Officer Cisneros testified that he obtained the measurements used in the formulas by using the AIMS machine. The formulas were taught to him during the courses mentioned above. Officer Cisneros [\*\*15] explained that the formulas are used internationally by other law enforcement agencies, including the Department of Public Safety in Texas. Officer Cisneros, however, conceded that he did not know who devised the formulas and did not know the scientific principles underlying the values in the formulas.

At the conclusion of the hearing, Appellant's counsel renewed his objection to Officer Cisneros' testimony. In response, the State argued that the AIMS system and formulas have been judicially accepted and noted that the officer testified that the AIMS system is used by other departments. It further noted that there have been no problems with it when used before. The trial court overruled Appellant's objection and allowed the State to offer the officer's expert witness concerning the speed of the Corvette and that of the other vehicle at the time of the collision.

### *Qualifications*

As the party offering Officer Cisneros' testimony, the State had the burden of showing he qualified as an expert on speed based on his accident reconstruction background. *See Penry, 903 S.W.2d at 762.* [HN5] Police officers are qualified to testify regarding accident reconstruction if they [\*\*16] are trained in the science about which they will testify and possess a high degree of knowledge sufficient to qualify as an expert. *DeLarue v. State, 102 S.W.3d 388, 396 (Tex.App.--Houston [14th Dist.] 2003, no pet.).*

Here, Officer Cisneros testified that he has been a police officer with the El Paso Police Department for twenty years. Since April 1994, he has been assigned to the special traffic investigations section. Officer Cisneros has received basic, intermediate, [\*246] and advanced training in accident reconstruction, including speed reconstruction. In addition, Officer Cisneros has eighty hours of accident reconstruction training held at the Bexar County Sheriff's Department in 1997. On many occasions he has done accident reconstruction for the special traffic investigations section. Officer Cisneros has been certified twice as an expert in accident reconstruction by El Paso district courts. For this case, Officer Cisneros was called out to Gateway West on June 17, 2001 and performed an accident reconstruction of the incident. Officer Cisneros clearly demonstrated he had special knowledge on accident reconstruction, including speed reconstruction, based on his [\*\*17] extensive training and his field experience. Therefore, we conclude the trial court did not abuse its discretion in determining Officer Cisneros was qualified to offer his expert opinion in speed reconstruction.

### *Reliability*

The State in this case does not dispute that accident reconstruction, specifically Officer Cisneros' testimony concerning the speed at which Appellant was driving at the time of impact, is a type of scientific evidence subject to *Kelly* requirements for admissibility. By clear and convincing evidence, the State was required to show that with respect to the scientific evidence in this case: (1) the underlying scientific theory was valid; (2) the technique applying the theory was valid; and (3) the technique was properly applied on the occasion in question. n1 *See Kelly, 824 S.W.2d at 573.*

n1 In his sole issue, Appellant does not challenge Officer Cisneros' testimony concerning the Corvette's speed on relevancy grounds. Therefore, we will address its reliability only.

[\*\*18]

Appellant argues on appeal that the State presented no evidence concerning the reliability of the "AIMS test." By

Appellant's complaint we understand him to be challenging the reliability of AIMS equipment-derived distance measurements and the reliability of the speed calculation formulas used by Officer Cisneros in his speed reconstruction analysis.

Here, Officer Cisneros testified that the formulas he used in deriving Appellant's driving speed are also used by other law enforcement agencies. Officer Cisneros, however, conceded that he did not know the scientific principles underlying the values in the formulas used to derive Appellant's speed at the time of impact. He could not explain the underlying scientific principles of how the AIMS equipment provided distance measurements and he did not know whether or not the accuracy of AIMS results could be validated over and over again. In this case, there is no evidence in the record sufficient to satisfy the reliability requirements pursuant to *Kelly*. Therefore, the trial court erred in admitting the evidence concerning Appellant's driving speed. We find, however, that in this case, admission of Officer Cisneros' testimony concerning [\*\*19] Appellant's driving speed at the time of impact was harmless.

[HN6] A nonconstitutional error that does not affect the substantial rights of the defendant must be disregarded. *See TEX.R.APP.P. 44.2(b)*. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997)*. A criminal conviction should not be overturned for nonconstitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect. *Johnson v. State, 967 S.W.2d 410, 417 (Tex.Crim.App. 1998)*.

[\*247] In this case, Appellant pled guilty and was convicted of intoxication manslaughter. n2 [HN7] A person commits the offense of intoxication manslaughter if the person: (1) operates a motor vehicle in a public place; (2) is intoxicated; and (3) by reason of that intoxication causes the death of another by accident or mistake. *See TEX.PEN.CODE ANN. § 49.08(a)*(Vernon 2003). The contested issue at trial was whether Appellant used or exhibited a deadly weapon: to wit [\*\*20] a motor vehicle in commission of the offense. [HN8] A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *TEX.PEN.CODE ANN. § 1.07(a)(17)(B)*(Vernon 2003). Anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. *Tyra v. State, 897 S.W.2d 796, 798 (Tex.Crim.App. 1995)*. This is necessarily so because a thing which actually causes death is, by definition, "capable of causing death." *Id.*

n2 The first count of intoxication manslaughter in the indictment alleged Appellant:

Did then and there, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, to wit: by having an alcohol concentration of .08 or more, and by reason of that intoxication caused the death of MARIO SANDOVAL by then and there driving said motor vehicle into and causing it to collide with a motor vehicle in which MARIO SANDOVAL was a passenger . . . .

The second count of intoxication manslaughter alleged Appellant:

Did then and there, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, to wit: by having an alcohol concentration of .08 or more, and by reason of that intoxication caused the death of ROBERT SANDOVAL by then and there driving said motor vehicle into and causing it to collide with a motor vehicle driven by ROBERT SANDOVAL . . . .

[\*\*21]

The evidence shows that Appellant was driving in excess of 60 miles per hour as he passed Zachary Valenzuela and approached the Lee Trevino-Gateway West intersection. Mr. Valenzuela did not see Appellant attempt to brake prior to the accident and witnesses testified that the intersection was well-lit and the roadway was dry. Physical evidence and witness testimony indicated that the front of Appellant's vehicle collided with the rear end of the victims' vehicle,

causing their vehicle to go airborne and spin around to face oncoming traffic. Through her rearview mirror, Veronica Huerta Garcia saw Appellant's vehicle slam against the guardrail at a high speed, causing sparks to fly. In unchallenged testimony, Officer Cisneros testified that he found no pre-impact brake marks and no pre-impact skid marks at the accident scene. El Paso County Medical Examiner Dr. Juan Contin testified that the passenger victim bled to death from a torn aorta, resulting from the collision. Dr. Contin also testified that the driver victim died the following day in the hospital from injuries sustained in the collision.

After examining the record as a whole, we find the evidence above was sufficient to support [\*\*22] the jury's affirmative finding that Appellant used his motor vehicle in a manner that was capable of causing death or serious bodily injury, without considering the speed evidence introduced through Officer Cisneros' testimony. The trial court's erroneous admission of the speed evidence did not affect Appellant's substantial rights and in light of other properly admitted evidence we are assured that if its admission influenced the jury at all, it did so only slightly. Therefore, we find the trial court's error to be harmless. Issue One is overruled.

Accordingly, we affirm the trial court's judgment.

DAVID WELLINGTON CHEW, Justice

**CONCUR BY:** ANN CRAWFORD McCLURE

**CONCUR:**

[\*248] **CONCURRING OPINION**

The record shows that Appellant waived his complaint about the AIMS device and the measurements derived from it. Therefore, I disagree with the majority's conclusion that the trial court abused its discretion by admitting this particularly testimony. Alternatively, I would find that the State is not required to prove the scientific principles pertaining to the AIMS device in order for an expert to rely on measurements taken with the device. While I agree with the majority's holding that the State [\*\*23] failed to carry its burden under *Kelly* with respect to Cisneros' expert opinion as to the pre-impact speed of Appellant's vehicle, I write separately to discuss the effect of *Hernandez v. State*, 116 S.W.3d 26 (Tex.Crim.App. 2003) on an appellate court's review of this issue. Because the majority opinion ultimately concludes that the errors in admitting the expert testimony is harmless, I concur.

Cisneros utilized two formulas in estimating the speed at which Appellant's car was traveling at the time of impact: the skid speed formula and the linear momentum in-line collision formula. These formulas are used not only by the Texas Department of Public Safety but also internationally by other law enforcement agencies and they were taught to Cisneros at the accident investigation and accident reconstruction courses he attended as part of his training. Pursuant to his training, Cisneros gathered data relevant to the following formula components:

1. weight of the vehicles;
2. the coefficient of friction or drag factor; and
3. the post-impact distances of the vehicles.

Cisneros obtained the weight of the vehicles involved in the accident from the Department of Motor [\*\*24] Vehicles. The drag factor pertains to the friction of the roadway and Cisneros obtained this figure by utilizing a drag sled to find a coefficient of friction for the particular road involved in the accident. For the third factor, Cisneros utilized the AIMS device to measure the distances traveled by the two vehicles after impact. A diagram prepared by Cisneros (State's Exhibit 10) shows that Appellant's vehicle traveled 413 feet from the point of impact to its resting place. There were no pre-impact skid marks because Appellant's vehicle did not skid prior to striking the complainants' car. Consequently, Cisneros utilized the skid speed formula to determine only a post-impact speed for each vehicle involved

in the accident.

As explained by Cisneros, the skid speed formula involves multiplying distance by a constant of thirty by the square root of the roadway drag factor. Cisneros determined that the complainants' Honda went from 0 miles per hour to a post-impact speed of 28 miles per hour. Cisneros was not asked to state the post-impact speed he determined for the Corvette but he included the figure in a written expert's report filed in the case. n1 With the post-impact speeds determined [\*\*25] by the skid speed formula, Cisneros then applied the weights of the vehicles in the linear momentum in-line collision formula in order to obtain the speed of the initial impacting vehicle. Based on this formula, Cisneros estimated that Appellant's Corvette was traveling 104 miles per hour at the point of impact. Cisneros explained the components of the skid speed formula but was not asked to explain the linear momentum in-line collision formula.

n1 Cisneros' written report was not admitted into evidence.

#### [\*249] *Waiver of Complaint About Measurements*

The majority has failed to consider that Appellant waived any complaint about Cisneros' use of the AIMS device to obtain the measurements used in the speed calculation formulas because Appellant did not object to State's Exhibit 10, which is a diagram of the collision including measurements taken at the scene with the AIMS device. It is well established that a party must make a timely and specific objection in order to preserve his complaints for appellate review. [\*\*26] See *TEX.R.APP.P. 33.1*. Further, a party must object every time inadmissible evidence is offered or the complaint is waived. See *Ethington v. State*, 819 S.W.2d 854, 858 (*Tex.Crim.App.* 1991); *Gillum v. State*, 888 S.W.2d 281, 285 (*Tex.App.--El Paso* 1994, *pet. ref'd*). In the presence of the jury, the State elicited testimony from Cisneros showing that he had training in accident reconstruction and had previously testified as an expert on that topic. Cisneros then identified State's Exhibit 10 as a diagram of the accident which he prepared on the night of the accident. Cisneros explained that he used the Accident Investigation Measuring System (AIMS), which he described as a surveying device, and a software program to prepare State's Exhibit 10. The State then offered State's Exhibit 10 and Appellant's counsel stated that he had no objection to it. State's Exhibit 10 depicts the point of impact and post-impact locations of the vehicles, their direction of travel, the location of various skid marks, and measurements of those skid marks taken by Cisneros using AIMS. The exhibit reflects that Appellant's Corvette traveled 413 feet from the point of impact [\*\*27] with the complainants' Honda. By failing to object to the initial testimony about the AIMS device and State's Exhibit 10, Appellant waived any subsequent complaint he might have had about the measurements taken by Cisneros with the assistance of the AIMS device.

#### *Scientific Validity of AIMS*

Even if Appellant did not waive his complaint about the measurements and the AIMS device, the majority opinion errs by holding that the State was obligated to establish that Cisneros understands the inner-workings of this surveying device. Cisneros was offered as an expert in accident reconstruction, not as an expert in AIMS equipment. Consequently, there was no necessity for the State to prove that he understood exactly how laser measuring devices and surveying equipment work. As aptly noted by appellate counsel for the State, the AIMS device is essentially a high-tech tape measure and Cisneros used the device to measure the distance between two points. I find no requirement in *Rule 703* or elsewhere that an expert witness be able to explain the scientific principles involved in every piece of equipment used by the expert to gather data. To illustrate this point, an expert who relies on photographs [\*\*28] as part of the foundation for his opinion regarding the cause of an accident need not explain precisely how a camera works in order to rely on the data supplied by the photographs. Likewise, an expert witness who utilizes a calculator in performing calculations is not required to relate to the jury the scientific principles involved in an electronic calculator before his expert testimony is permitted. Cisneros sufficiently explained that the AIMS device, using a laser, measured the distance Appellant's car traveled from the point of impact to its resting place and he utilized that measurement in the skid speed formula. For these reasons, I would find that the trial court did not abuse its discretion in admitting Cisneros'

testimony about the measurements taken at the scene of the accident.

[\*250] *Reliability of the Speed Calculation Formulas*

While I would find much of Cisneros' testimony admissible, the State failed to offer sufficient evidence proving the reliability of the two formulas utilized by Cisneros to estimate speed. A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the [\*\*29] *Kelly* test. *Hernandez*, 116 S.W.3d at 28-9. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. *Id.* at 29. Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert/Kelly* n2 hearings, courts subsequently considering the issue may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in the prior hearings. *Id.* at 29; see *Weatherred v. State*, 15 S.W.3d 540, 542 n.4 (Tex.Crim.App. 2000)("once a particular type of scientific evidence is well established as reliable, a court may take judicial notice of that fact, thereby relieving the proponent of the burden of producing evidence on that question"). In other words, trial courts are not required to reinvent the scientific wheel in every trial. *Hernandez*, 116 S.W.3d at 29. The Court of Criminal Appeals has recently [\*\*30] emphasized, however, that some trial courts must conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology before other trial courts may take judicial notice of that determination. *Id.* Although appellate courts may likewise take judicial notice of other appellate opinions concerning a specific scientific theory or methodology in evaluating a trial court's *Daubert/Kelly* gatekeeping decision, judicial notice on appeal cannot serve as the sole source of support for a bare trial court record concerning scientific reliability. *Hernandez*, 116 S.W.3d at 31-2.

n2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Although the trial court held a *Daubert/Kelly* hearing in the instant case, the State did not offer any evidence of the theories underlying the formulas utilized by Cisneros. Further, the State did not show that the issue of the formulas' reliability [\*\*31] has been litigated previously nor did it ask the trial court to take judicial notice of the reliability of the scientific theory and methodology based upon prior hearings or prior appellate decisions. See *Hernandez*, 116 S.W.3d at 30 and n.7. There is evidence that Cisneros has previously qualified as an expert and testified regarding accident reconstruction and perhaps even speed estimation, but the fact that a trial court has allowed some type of scientific testimony by a particular witness previously does not mean that the witness's testimony is, *ipso facto*, scientifically reliable. *Hernandez*, 116 S.W.3d at 30.

The trial court's decision to admit this evidence is understandable as expert testimony regarding accident reconstruction and speed estimation has been previously admitted in Texas civil and criminal cases. See e.g., *Chavers v. State*, 991 S.W.2d 457, 460-61 (Tex.App.--Houston [1st Dist.] 1999, *pet. ref'd*); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex.App.--Corpus Christi 1990, *writ denied*); *Rogers v. Gonzales*, 654 S.W.2d 509, 512 (Tex.App.--Corpus Christi 1983, *writ ref'd n.r.* [\*\*32] e.); *Bates v. [\*\*251] Barclay*, 484 S.W.2d 955, 957-59 (Tex.Civ.App.--Beaumont 1972, *writ ref'd n.r.e.*); *Adams v. Smith*, 479 S.W.2d 390, 395 (Tex.Civ.App.--Amarillo 1972, *no writ*); *Beynon v. Cutberth*, 390 S.W.2d 352, 355-56 (Tex.Civ.App.--Eastland 1965, *no writ*). With the exception of *Chavers*, these decisions pre-date *Daubert* and *Kelly*, and there is no determination in any of the cases that the formulas used to calculate speed are scientifically reliable. Although *Chavers* employs the proper criteria under *Kelly*, the decision is distinguishable because the expert witness based his calculations on yaw marks rather than the two formulas used by Cisneros. Therefore, taking judicial notice of *Chavers* is of no benefit in the instant case.

In *Thomson v. Rook*, a United States District Court conducted a *Daubert* hearing to determine the admissibility of an accident reconstruction expert's opinion regarding speed, distance traveled by vehicles, and the point of impact of the collision. *Thomson v. Rook*, 255 F. Supp. 2d 584, 584-87 (E.D.Tex. 2001). That court determined that the articles,

books, and other [\*\*33] experts in the accident reconstruction field validated the methodology used by the expert witness for calculating speed, distance traveled by the vehicles, and the point of impact. *Id.* at 586. In a footnote, the court noted that the expert witness calculated speed using a "standard physics equation employed by automobile accident reconstruction experts and a coefficient of friction derived from J. Stannard Baker's book, *Traffic Investigation Manual*." *Id.* at 586 n.5. The witness calculated speed and distance traveled by one of the vehicles using a standard rate of acceleration from a standard start as reported by the Baker book. *Id.* The district court admitted the witness's expert opinion on these topics but excluded the witness's opinion about the driver's braking time because the plaintiffs had not produced evidence or articles or books, or other experts that validate the methodology used by the expert witness. *Id.* at 587. It is impossible to determine whether Cisneros used some of the same formulas as the witness in *Thomson*, and therefore, taking judicial notice of this decision would not benefit the State.

I have been [\*\*34] unable to find any Texas appellate decisions at the state or federal level holding that the skid speed formula and linear momentum formulas utilized by Cisneros are reliable.

A cursory review of appellate decisions from other jurisdictions indicates that this type of expert testimony has been often admitted into evidence in other states. *See e.g., State v. Russo*, 38 Conn. Supp. 426, 450 A.2d 857, 866-67 (Conn.Super.Ct. 1982)(holding that an expert in Connecticut may testify as to the speed of a motor vehicle based on skid marks and other factors because the formulas used to calculate speed are based on well-recognized principles of physics that have gained general acceptance in the field of accident reconstruction); *Bryant v. Buerman*, 739 So. 2d 710, 712-13 (Fla.Dist.Ct.App. 1999)(holding that opinion of an accident reconstruction expert witness regarding the speed of a vehicle at the time of an accident is admissible in personal injury action arising out of collision, so long as the expert's testimony is helpful to the jury). *See also* Jerre E. Box, Annotation, *Opinion Testimony as to Speed of Motor Vehicle Based on Skid Marks and Other Facts* [\*\*35] , 29 A.L.R. 3d §§ 248-77 (1970 & Supp. 1996)(discussing numerous decisions admitting and excluding this type of evidence). As is the case with the Texas decisions discussed above, many of the out-of-state decisions pre-date *Daubert* and *Kelly*, and of those cases decided since *Daubert* and *Kelly*, the opinions do not discuss reliability of the same formulas used by Cisneros. Further, none [\*\*252] of these decisions indicates that the formulas utilized by Cisneros have become so widely accepted or persuasively proven that future courts may take judicial notice of their reliability. *See Hernandez*, 116 S.W.3d at 29 n.6. The Connecticut Supreme Court stated in *Russo* that using the coefficient of friction to estimate speed is a well recognized principle that has gained general acceptance in the field of accident reconstruction. *Russo*, 450 A.2d at 866. While Cisneros utilized the coefficient of friction in the skid speed formula to determine post-impact speed, he used a different formula to obtain pre-impact speed and that is the object of Appellant's complaint on appeal. Moreover, the Court of Criminal Appeals cautioned in *Hernandez* about reliance [\*\*36] on judicial opinions from non-Texas jurisdictions because many other jurisdictions utilize the "preponderance of the evidence" standard rather than the "clear and convincing" evidence standard required in Texas. *Hernandez*, 116 S.W.3d at 31 n.13.

In the absence of any evidence showing the reliability of the speed calculation formulas utilized by Cisneros, the trial court erred in admitting Cisneros' conclusion that Appellant's vehicle was traveling 104 miles per hour at the point of impact. However, I would also find the error harmless as stated in the majority opinion. With these additional comments and observations, I concur in the judgment affirming the trial court's judgment.

ANN CRAWFORD McCLURE, Justice

178 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**HENRY ARTHUR SWEENEY v. COMMONWEALTH OF VIRGINIA****Record No. 7435****Supreme Court of Virginia***211 Va. 668; 179 S.E.2d 509; 1971 Va. LEXIS 239; 47 A.L.R.3d 817***March 8, 1971****PRIOR HISTORY:** [\*\*\*1]

Error to a judgment of the Circuit Court of Greene County. Hon. Lyttelton Waddell, judge presiding.

**DISPOSITION:**

*Reversed and dismissed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff in error driver appealed a judgment from the Circuit Court of Greene County (Virginia), which found the driver guilty of operating a motor vehicle over the public highways of the state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar, in favor of defendant in error the commonwealth.

**OVERVIEW:** The driver was tried in the trial court on the charge of operating a motor vehicle over the public highways of the state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar. The trial court found the driver guilty as charged and fixed his fine. Judgment was entered, and the court granted a writ of error. The court reversed the trial court's judgment and dismissed the warrant. The court found that the trooper did not estimate the speed of the driver's automobile, and the only evidence as to its speed when it passed through the radar zone or beam was that shown by the radar device. The conviction of the driver rested entirely upon the accuracy of the radar. It was not enough that the certificate stated that the speedometer had been calibrated. The certificate which was admitted in evidence did not reflect the accuracy of the radio microwave or other electrical device when tested by officers who used an accurate speedometer to make the test; therefore, the certificate was not in conformity with Va. Code Ann. § 46.1-198. There was no other evidence in the record which showed the accuracy of the speedometer that was used.

**OUTCOME:** The court reversed the judgment of the trial court that had found the driver guilty of speeding as determined by radar and dismissed the warrant against the driver.

**CORE TERMS:** radar, accuracy, speedometer, speed, certificate, motor vehicle, trooper, microwave, radio, mile,

211 Va. 668, \*; 179 S.E.2d 509, \*\*;  
1971 Va. LEXIS 239, \*\*\*1; 47 A.L.R.3d 817

testing, meter, electrical device, calibrated, tested, speeding, apparatus, highway, beam, prima facie evidence, legal proceedings, calibration, admissible, reflecting, measuring, estimated, distance, attested, certify, arrest

#### **LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Search & Seizure > Electronic Eavesdropping > Warrantless Eavesdropping*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches > General Overview*

[HN1] Va. Code Ann. § 46.1-198(a) provides that the speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue. Va. Code Ann. § 46.1-198(a1) provides that in any court or legal proceedings in which any question arises as to the calibration or accuracy of any such radio microwave or other electrical device, a certificate, executed and signed by the officers calibrating or testing such device as to its accuracy as well as to the accuracy of the speedometer of any motor vehicle used in such test, and stating the time of such test, type of test and results of testing, shall be admissible when attested by one such officer who executed and signed it as evidence of the facts therein stated and the results of such testing.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN2] Va. Code Ann. § 46.1-198 must be strictly construed and there should be a full compliance therewith if a certificate is to be used as evidence.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN3] The certificate of the officers testing the radar device must reflect not only its accuracy but also the accuracy of the speedometer of any motor vehicle used in such tests.

#### **HEADNOTES:**

Criminal Law -- Speeding -- Radar Test.

Certificate of officers testing radar device must reflect not only its accuracy but also the accuracy of speedometer of any motor vehicle used in such test. Error to admit in evidence radar check where certificate shows only that accuracy test was conducted by "calibrated speedometer".

#### **COUNSEL:**

*E. C. Wingfield; Paul Lee Sweeny (Wingfield, Barrick & St. John, on brief), for plaintiff in error.*

*A. R. Woodroof, Assistant Attorney General (Andrew P. Miller, Attorney General, on brief), for defendant in error.*

#### **JUDGES:**

Present, All the Justices.

#### **OPINION BY:**

HARRISON

#### **OPINION:**

211 Va. 668, \*668; 179 S.E.2d 509, \*\*510;  
1971 Va. LEXIS 239, \*\*\*1; 47 A.L.R.3d 817

[\*668] [\*\*510] HARRISON, J., delivered the opinion of the court.

Henry Arthur Sweeny was tried in the court below on the charge of operating a motor vehicle over the public highways of this state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar. The court found defendant guilty as charged and fixed his fine at \$25. Judgment was entered, and we granted a writ of error.

We need concern ourselves [\*\*\*2] here only with the action of the trial court in admitting into evidence, over the objection of defendant, the "Department of State Police Certificate of Radar Accuracy Test".

On the night of December 17, 1968, at about 7:40 P.M., Virginia State Troopers R. C. Byram and Larry R. Mayhew placed in operation "a radar apparatus" to check the speed of vehicles traveling north on Highway 29 in Greene County, Virginia. Defendant is [\*669] alleged to have passed through the radar beam about 8:15 P.M. at a speed which registered 75 miles per hour thereon and he was arrested. Sweeny estimated his speed at 55 miles per hour, and a passenger in the back seat of his car estimated the speed at 60 miles per hour.

At defendant's trial the Commonwealth introduced in evidence, pursuant to the provisions of Code § 46.1-198(a1), a Department of State Police "Certificate of Radar Accuracy Test". The certificate, dated December 17, 1968, shows the county, highway and distance at which the apparatus was set up, as well as its height and distance from the pavement. On that part of the certificate, under the heading "Certification of Radar Accuracy Test by Calibrated Speedometer", it shows that [\*\*\*3] the radar was tested on six occasions between 7:40 P.M. and 9:45 P.M. It further shows the reading taken by Officer Byram on the radar meter situated on the ground reflected speeds of 75, 65 and 55 miles per hour [\*\*511] when Officer Mayhew was in his car driving past the meter at speeds of 75, 65 and 55 miles per hour as reflected by the car's speedometer.

The certificate then contains the following certification by Troopers Larry R. Mayhew and R. C. Byram:

"We, the undersigned, certify that we conducted the accuracy test by calibrated speedometer of the radio microwave (radar) device shown above and the information herein is a complete and accurate record of the results of said test."

On April 16, 1969 Trooper Mayhew attested before a notary public "that the above is an accurate record of the tests conducted".

The narrow question for our decision is whether or not this certificate meets the requirements of Code § 46.1-198(a1) and was therefore admissible as "evidence of the facts therein stated and the results of such testing".

We have previously reviewed convictions for speeding based upon radar checks. See *Biesser v. Town of Holland*, 208 Va. 167, 156 [\*\*\*4] S.E.2d 792 (1967); *Thomas v. City of Norfolk*, 207 Va. 12, 147 S.E.2d 727 (1966); *Farmer v. Commonwealth*, 205 Va. 609, 139 S.E.2d 40 (1964); *Crosby v. Commonwealth*, 204 Va. 266, 130 S.E.2d 467 (1963); *Royals v. Commonwealth*, 198 Va. 883, 96 S.E.2d 816 (1957); and *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812 (1957).

[HN1] Code § 46.1-198 reads, in part, as follows:

"Checking on speed with electrical devices; certificate as to accuracy of device; arrest without warrant. -- (a) The speed of any [\*670] motor vehicle may be checked by the use of radio microwaves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue.

"(a1) In any court or legal proceedings in which any question arises as to the calibration or accuracy of any such radio microwave or other electrical device, a certificate, executed and signed by the officers calibrating or testing such device as to its accuracy as well as to the accuracy of the speedometer of any motor vehicle used in such test, and

211 Va. 668, \*670; 179 S.E.2d 509, \*\*511;  
1971 Va. LEXIS 239, \*\*\*4; 47 A.L.R.3d 817

stating the [\*\*\*5] time of such test, type of test and results of testing, shall be admissible when attested by one such officer who executed and signed it as evidence of the facts therein stated and the results of such testing."

In the instant case. Trooper Byram did not estimate the speed of defendant's automobile and the only evidence as to its speed when it passed through the radar zone or beam was that shown by the radar device. The narrative statement of the evidence reflects that: "On cross examination Trooper Byram testified that he made no test of the accuracy of the speedometer used to test the radar speedometer and had no personal knowledge of the speedometer. . . ."

The conviction of Sweeny therefore rests entirely upon the accuracy of the radar. It depends upon the certificate of radar accuracy tests and in particular upon the admissibility of the certificate of the officers as to the accuracy of both the radar apparatus and the accuracy of the speedometer of the trooper's car by which the radar device was tested.

Manifestly Code § 46.1-198 was amended in 1968, following the decision of this court in *Biesser v. Town of Holland, supra*, to obviate the necessity of having [\*\*\*6] two troopers testify in every contested speeding case which involves the use of radar. It was the intention of the General Assembly to provide, in cases where any question arises as to the calibration or accuracy of any radio microwave or any other electrical device, that such accuracy could be shown by a certificate of the officers who conducted the tests of the device, and who had knowledge of its accuracy.

[\*\*512] The statute contemplates that the speed of motor vehicles may be checked by radar; that the results of such checks be accepted as prima facie evidence where speed is an issue; and that persons may be convicted on the certificates filed in accordance with the statute. [\*671] However, [HN2] the statute must be strictly construed and there should be a full compliance therewith if a certificate is to be used as evidence. In prosecutions for speeding arising through the use of radar, the accuracy of the radio microwave, or other electrical device which measures the speed of a vehicle, is critical, for it is the reading reflected by this device which brings about the arrest and the conviction of a defendant.

Therefore the General Assembly provided that [HN3] the certificate [\*\*\*7] of the officers testing the radar device must reflect not only its accuracy *but also the accuracy of the speedometer of any motor vehicle used in such tests.*

In the case under consideration the accuracy of the radar apparatus was tested by, and depended on, the accuracy of the speedometer of the automobile of Trooper Mayhew which was driven through the radar beam on six separate occasions. True, the certificate filed shows that the speeds reflected on the radar meter were identical with those reflected on the vehicle driven by Trooper Mayhew. This would indicate that the radar meter was reflecting the correct speed *provided* the reading of the automobile speedometer was accurate. If the speedometer were defective or inaccurate to the same degree as the radar meter then both would be reflecting an improper speed. While this is unlikely and remote, it demonstrates the necessity that the speedometer of the motor vehicle used to test the radar meter be accurate.

The certificate in the instant case certifies that Byram and Mayhew conducted the accuracy test by "calibrated speedometer of the radio microwave (radar) device". Among the definitions of the word "calibrate" found [\*\*\*8] in Webster's Third New International Dictionary, page 316, is "to standardize (as a measuring instrument) by determining the deviation from standard esp. so as to ascertain the proper correction factors". "Calibrator" is defined as "an instrument for measuring the calibre of any passage". Therefore to say that a speedometer has been "calibrated" is to say that a speedometer has been tested for accuracy. This does not necessarily mean that it was found accurate.

It is not enough that the certificate should say that the speedometer has been calibrated. The certificate should conform to the statute, and such is possible only if it reflects the accuracy of the radio microwave or other electrical device when tested by officers who used an accurate speedometer to make the test.

The certificate which was admitted in evidence in the instant case [\*672] fails to meet this test and is therefore not in conformity with the statute. There is no other evidence in the record which shows the accuracy of the speedometer that was used.

211 Va. 668, \*672; 179 S.E.2d 509, \*\*512;  
1971 Va. LEXIS 239, \*\*\*8; 47 A.L.R.3d 817

Accordingly, the judgment of lower court is reversed and the warrant is dismissed.

179 of 195 DOCUMENTS



Positive

As of: Jan 31, 2007

**HENRY ARTHUR SWEENEY v. COMMONWEALTH OF VIRGINIA****Record No. 7435****Supreme Court of Virginia***211 Va. 668; 179 S.E.2d 509; 1971 Va. LEXIS 239; 47 A.L.R.3d 817***March 8, 1971****PRIOR HISTORY:** [\*\*\*1]

Error to a judgment of the Circuit Court of Greene County. Hon. Lyttelton Waddell, judge presiding.

**DISPOSITION:**

*Reversed and dismissed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff in error driver appealed a judgment from the Circuit Court of Greene County (Virginia), which found the driver guilty of operating a motor vehicle over the public highways of the state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar, in favor of defendant in error the commonwealth.

**OVERVIEW:** The driver was tried in the trial court on the charge of operating a motor vehicle over the public highways of the state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar. The trial court found the driver guilty as charged and fixed his fine. Judgment was entered, and the court granted a writ of error. The court reversed the trial court's judgment and dismissed the warrant. The court found that the trooper did not estimate the speed of the driver's automobile, and the only evidence as to its speed when it passed through the radar zone or beam was that shown by the radar device. The conviction of the driver rested entirely upon the accuracy of the radar. It was not enough that the certificate stated that the speedometer had been calibrated. The certificate which was admitted in evidence did not reflect the accuracy of the radio microwave or other electrical device when tested by officers who used an accurate speedometer to make the test; therefore, the certificate was not in conformity with Va. Code Ann. § 46.1-198. There was no other evidence in the record which showed the accuracy of the speedometer that was used.

**OUTCOME:** The court reversed the judgment of the trial court that had found the driver guilty of speeding as determined by radar and dismissed the warrant against the driver.

**CORE TERMS:** radar, accuracy, speedometer, speed, certificate, motor vehicle, trooper, microwave, radio, mile,

211 Va. 668, \*; 179 S.E.2d 509, \*\*;  
1971 Va. LEXIS 239, \*\*\*1; 47 A.L.R.3d 817

testing, meter, electrical device, calibrated, tested, speeding, apparatus, highway, beam, prima facie evidence, legal proceedings, calibration, admissible, reflecting, measuring, estimated, distance, attested, certify, arrest

### **LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

*Criminal Law & Procedure > Search & Seizure > Electronic Eavesdropping > Warrantless Eavesdropping*

*Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches > General Overview*

[HN1] Va. Code Ann. § 46.1-198(a) provides that the speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue. Va. Code Ann. § 46.1-198(a1) provides that in any court or legal proceedings in which any question arises as to the calibration or accuracy of any such radio microwave or other electrical device, a certificate, executed and signed by the officers calibrating or testing such device as to its accuracy as well as to the accuracy of the speedometer of any motor vehicle used in such test, and stating the time of such test, type of test and results of testing, shall be admissible when attested by one such officer who executed and signed it as evidence of the facts therein stated and the results of such testing.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN2] Va. Code Ann. § 46.1-198 must be strictly construed and there should be a full compliance therewith if a certificate is to be used as evidence.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview*

[HN3] The certificate of the officers testing the radar device must reflect not only its accuracy but also the accuracy of the speedometer of any motor vehicle used in such tests.

### **HEADNOTES:**

Criminal Law -- Speeding -- Radar Test.

Certificate of officers testing radar device must reflect not only its accuracy but also the accuracy of speedometer of any motor vehicle used in such test. Error to admit in evidence radar check where certificate shows only that accuracy test was conducted by "calibrated speedometer".

### **COUNSEL:**

*E. C. Wingfield; Paul Lee Sweeny (Wingfield, Barrick & St. John, on brief), for plaintiff in error.*

*A. R. Woodroof, Assistant Attorney General (Andrew P. Miller, Attorney General, on brief), for defendant in error.*

### **JUDGES:**

Present, All the Justices.

### **OPINION BY:**

HARRISON

### **OPINION:**

211 Va. 668, \*668; 179 S.E.2d 509, \*\*510;  
1971 Va. LEXIS 239, \*\*\*1; 47 A.L.R.3d 817

[\*668] [\*510] HARRISON, J., delivered the opinion of the court.

Henry Arthur Sweeny was tried in the court below on the charge of operating a motor vehicle over the public highways of this state at a speed of 75 miles per hour in a 60 mile speed zone, as determined by radar. The court found defendant guilty as charged and fixed his fine at \$25. Judgment was entered, and we granted a writ of error.

We need concern ourselves [\*\*\*2] here only with the action of the trial court in admitting into evidence, over the objection of defendant, the "Department of State Police Certificate of Radar Accuracy Test".

On the night of December 17, 1968, at about 7:40 P.M., Virginia State Troopers R. C. Byram and Larry R. Mayhew placed in operation "a radar apparatus" to check the speed of vehicles traveling north on Highway 29 in Greene County, Virginia. Defendant is [\*669] alleged to have passed through the radar beam about 8:15 P.M. at a speed which registered 75 miles per hour thereon and he was arrested. Sweeny estimated his speed at 55 miles per hour, and a passenger in the back seat of his car estimated the speed at 60 miles per hour.

At defendant's trial the Commonwealth introduced in evidence, pursuant to the provisions of Code § 46.1-198(a1), a Department of State Police "Certificate of Radar Accuracy Test". The certificate, dated December 17, 1968, shows the county, highway and distance at which the apparatus was set up, as well as its height and distance from the pavement. On that part of the certificate, under the heading "Certification of Radar Accuracy Test by Calibrated Speedometer", it shows that [\*\*\*3] the radar was tested on six occasions between 7:40 P.M. and 9:45 P.M. It further shows the reading taken by Officer Byram on the radar meter situated on the ground reflected speeds of 75, 65 and 55 miles per hour [\*511] when Officer Mayhew was in his car driving past the meter at speeds of 75, 65 and 55 miles per hour as reflected by the car's speedometer.

The certificate then contains the following certification by Troopers Larry R. Mayhew and R. C. Byram:

"We, the undersigned, certify that we conducted the accuracy test by calibrated speedometer of the radio microwave (radar) device shown above and the information herein is a complete and accurate record of the results of said test."

On April 16, 1969 Trooper Mayhew attested before a notary public "that the above is an accurate record of the tests conducted".

The narrow question for our decision is whether or not this certificate meets the requirements of Code § 46.1-198(a1) and was therefore admissible as "evidence of the facts therein stated and the results of such testing".

We have previously reviewed convictions for speeding based upon radar checks. See *Biesser v. Town of Holland*, 208 Va. 167, 156 [\*\*\*4] S.E.2d 792 (1967); *Thomas v. City of Norfolk*, 207 Va. 12, 147 S.E.2d 727 (1966); *Farmer v. Commonwealth*, 205 Va. 609, 139 S.E.2d 40 (1964); *Crosby v. Commonwealth*, 204 Va. 266, 130 S.E.2d 467 (1963); *Royals v. Commonwealth*, 198 Va. 883, 96 S.E.2d 816 (1957); and *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812 (1957).

[HN1] Code § 46.1-198 reads, in part, as follows:

"Checking on speed with electrical devices; certificate as to accuracy of device; arrest without warrant. -- (a) The speed of any [\*670] motor vehicle may be checked by the use of radio microwaves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue.

"(a1) In any court or legal proceedings in which any question arises as to the calibration or accuracy of any such radio microwave or other electrical device, a certificate, executed and signed by the officers calibrating or testing such device as to its accuracy as well as to the accuracy of the speedometer of any motor vehicle used in such test, and

stating the [\*\*\*5] time of such test, type of test and results of testing, shall be admissible when attested by one such officer who executed and signed it as evidence of the facts therein stated and the results of such testing."

In the instant case. Trooper Byram did not estimate the speed of defendant's automobile and the only evidence as to its speed when it passed through the radar zone or beam was that shown by the radar device. The narrative statement of the evidence reflects that: "On cross examination Trooper Byram testified that he made no test of the accuracy of the speedometer used to test the radar speedometer and had no personal knowledge of the speedometer. . . ."

The conviction of Sweeny therefore rests entirely upon the accuracy of the radar. It depends upon the certificate of radar accuracy tests and in particular upon the admissibility of the certificate of the officers as to the accuracy of both the radar apparatus and the accuracy of the speedometer of the trooper's car by which the radar device was tested.

Manifestly Code § 46.1-198 was amended in 1968, following the decision of this court in *Biesser v. Town of Holland, supra*, to obviate the necessity of having [\*\*\*6] two troopers testify in every contested speeding case which involves the use of radar. It was the intention of the General Assembly to provide, in cases where any question arises as to the calibration or accuracy of any radio microwave or any other electrical device, that such accuracy could be shown by a certificate of the officers who conducted the tests of the device, and who had knowledge of its accuracy.

[\*\*512] The statute contemplates that the speed of motor vehicles may be checked by radar; that the results of such checks be accepted as prima facie evidence where speed is an issue; and that persons may be convicted on the certificates filed in accordance with the statute. [\*671] However, [HN2] the statute must be strictly construed and there should be a full compliance therewith if a certificate is to be used as evidence. In prosecutions for speeding arising through the use of radar, the accuracy of the radio microwave, or other electrical device which measures the speed of a vehicle, is critical, for it is the reading reflected by this device which brings about the arrest and the conviction of a defendant.

Therefore the General Assembly provided that [HN3] the certificate [\*\*\*7] of the officers testing the radar device must reflect not only its accuracy *but also the accuracy of the speedometer of any motor vehicle used in such tests.*

In the case under consideration the accuracy of the radar apparatus was tested by, and depended on, the accuracy of the speedometer of the automobile of Trooper Mayhew which was driven through the radar beam on six separate occasions. True, the certificate filed shows that the speeds reflected on the radar meter were identical with those reflected on the vehicle driven by Trooper Mayhew. This would indicate that the radar meter was reflecting the correct speed *provided* the reading of the automobile speedometer was accurate. If the speedometer were defective or inaccurate to the same degree as the radar meter then both would be reflecting an improper speed. While this is unlikely and remote, it demonstrates the necessity that the speedometer of the motor vehicle used to test the radar meter be accurate.

The certificate in the instant case certifies that Byram and Mayhew conducted the accuracy test by "calibrated speedometer of the radio microwave (radar) device". Among the definitions of the word "calibrate" found [\*\*\*8] in Webster's Third New International Dictionary, page 316, is "to standardize (as a measuring instrument) by determining the deviation from standard esp. so as to ascertain the proper correction factors". "Calibrator" is defined as "an instrument for measuring the calibre of any passage". Therefore to say that a speedometer has been "calibrated" is to say that a speedometer has been tested for accuracy. This does not necessarily mean that it was found accurate.

It is not enough that the certificate should say that the speedometer has been calibrated. The certificate should conform to the statute, and such is possible only if it reflects the accuracy of the radio microwave or other electrical device when tested by officers who used an accurate speedometer to make the test.

The certificate which was admitted in evidence in the instant case [\*672] fails to meet this test and is therefore not in conformity with the statute. There is no other evidence in the record which shows the accuracy of the speedometer that was used.

211 Va. 668, \*672; 179 S.E.2d 509, \*\*512;  
1971 Va. LEXIS 239, \*\*\*8; 47 A.L.R.3d 817

Accordingly, the judgment of lower court is reversed and the warrant is dismissed.

180 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**JOHN H. THOMAS v. CITY OF NORFOLK****Record No. 6162****Supreme Court of Virginia***207 Va. 12; 147 S.E.2d 727; 1966 Va. LEXIS 180***April 25, 1966****PRIOR HISTORY:** [\*\*\*1]

Error to a judgment of the Corporation Court of the city of Norfolk. Hon. H. Lawrence Bullock, judge presiding.

**DISPOSITION:**

*Affirmed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The Corporation Court for the City of Norfolk (Virginia), sitting without a jury, convicted defendant of driving an automobile in excess of the speed limit, in violation of an ordinance of the City of Norfolk. The evidence was undisputed and came from witnesses for the city. Defendant did not testify nor did he offer any evidence in his behalf. Defendant appealed.

**OVERVIEW:** The police testified that they were operating a mobile radar unit in an unmarked police car and that defendant drove his car past the radar causing the instrument to register his speed at 46 miles per hour, which was in excess of the posted speed limit of 30 miles per hour. The court on appeal held that evidence of a test of radar equipment by tuning forks was admissible as tending to prove the accuracy of the equipment. In the absence of evidence to the contrary, the trial court properly accepted the evidence of the testings as adequate proof of the accuracy of the radar set. Having accepted the proof of the accuracy of the radar set, the trial court declined to allow defendant to question its accuracy as a reliable method of determining the speed of his car. That ruling, which recognized the reliability of the radar set, was in accord with the terms of Va. Code Ann. § 46.1-198(a) (1958). Proof that the instrument had been checked and found to be operating accurately at 2:30 p.m. and later at 9:30 p.m. warranted the inference that it was operating accurately during the interim, or at 4:00 p.m., the time of defendant's apprehension.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** radar, accuracy, speed, tested, mile, testing, apprehension, site, motor vehicle, reliability, speeding,

207 Va. 12, \*; 147 S.E.2d 727, \*\*;  
1966 Va. LEXIS 180, \*\*\*1

speedometer, accurately, violator, fork, judgment of conviction, calibration, tuning, beam, speedometer, recording, insure, prima facie evidence, absence of evidence, adequate proof, speed limit, police car, apprehended, interfered, registered

### **LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Demonstrative Evidence***

[HN1] Evidence of a test of radar equipment by tuning forks is admissible as tending to prove the accuracy of the equipment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Demonstrative Evidence***

***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN2] See Va. Code Ann. § 46.1-198(a) (1958).

### **HEADNOTES:**

- (1) Speeding -- Accuracy of Radar -- Testing Held Sufficient.
- (2) Speeding -- Reliability of Radar Evidence -- Not Open to Question Where Accuracy of Set Proved.
- (3) Speeding -- Accuracy of Radar -- Need Not be Tested at Site of Operation of Set.

1. After trial at which he presented no evidence Thomas was convicted of speeding on the testimony of the arresting officers that the mobile radar set operated by them had indicated his speed to be 46 miles per hour in a 30 mile zone. On appeal Thomas challenged the sufficiency of the prosecution's evidence, alleging that it failed to show that the radar was properly checked. This contention was not accepted, however, in light of the officers' testimony that they had tested the set before and after use against a calibrated speedometer and by use of factory pre-tested tuning forks. These testings the trial court correctly accepted, in the absence of contrary evidence, as adequate proof of the accuracy of the set.

2. The accuracy of the set having been established, the court properly refused [\*\*\*2] to allow defendant to question its reliability as a method of determining his speed. Code 46.1-198(a) provides that the results of radar checks shall be accepted as prima facie evidence of speed.

3. There was no merit to defendant's argument that his conviction was improper because the set was not tested for accuracy at the site at which it was operating when his speed was checked. The set's accuracy at that time could be inferred from the tests made prior to and after that time; nor did defendant introduce any evidence at variance with such inference or tending to show that relocation of the set affected its accuracy.

### **SYLLABUS:**

The opinion states the case.

### **COUNSEL:**

*John H. Thomas*, for the plaintiff in error.

*Gordon B. Tayloe, Jr., Assistant City Attorney (Leonard H. Davis, City Attorney, on brief), for the defendant in error.*

**JUDGES:**

Present, All the Justices.

**OPINION BY:**

EGGLESTON

**OPINION:**

[\*13] [\*\*728] EGGLESTON, C.J., delivered the opinion of the court.

[1] John H. Thomas has appealed from a judgment of the lower court, sitting by consent without a jury, finding him guilty of driving an automobile in excess of the speed limit, in violation of an ordinance of the City [\*\*\*3] of Norfolk. The substance of his assignments of error is that the judgment is without valid evidence to support it.

The evidence is undisputed and comes from witnesses for the city. The defendant did not testify nor did he offer any evidence in his behalf. Officers E. A. Bennett and E. L. Jackson of the Norfolk police division testified that on September 14, 1964, at approximately 4:00 P.M., they were operating a mobile radar unit in an unmarked police car located in the 3500 block of Chesapeake boulevard in the city of Norfolk; that the defendant drove his car past the radar causing the latter instrument to register his speed at 46 miles per hour, and that this was in excess of the posted speed limit there of 30 miles per hour.

The officers testified that the radar set had been tested by them at another location when they came on duty at 2:30 P.M. the same day, and that they had again tested it at the same location at 9:30 P.M. on the same day when they went off duty. In each instance a police car driven by Officer Jackson passed through the radar beam at speeds of 30, 40 and 50 miles per hour, as indicated on the speedometer of his car and noted by Jackson, and these speeds [\*\*\*4] accorded with those which were indicated on the radar set and noted by Officer Bennett.

Both officers testified that the speedometer on the test car had been calibrated three or four days before the date of the defendant's apprehension and that the records of such calibration were kept at the city garage. Although these officers testified that they took no part in the calibration test, it does not appear from the defendant's brief that he questions the adequacy of the proof of such calibration.

In any event, the officers further testified that the accuracy of the speedometer test in each instance was corroborated by tests which they made at these times with factory pretested tuning forks. One of these forks, when struck and held in front of the radar set, indicated or registered on the latter instrument a speed of 35 miles per hour. In a similar manner, the other tuning fork when struck indicated [\*14] or registered on the radar set a speed of 50 miles per hour. Officer Bennett testified that the tuning-fork tests showed that the radar set accurately recorded these respective speeds.

While the matter has not heretofore been presented to us it is well recognized in [\*\*\*5] other jurisdictions that [HN1] evidence of a test of radar equipment by tuning forks in this manner is admissible as tending to prove the accuracy of the equipment. *State v. Lenzen*, 24 Conn. Supp. 208, 1 Conn. Cir. Ct. 499, 189 A.2d 405; *State v. Graham* (Mo. App.), 322 S.W.2d 188; *People v. Johnson*, 23 Misc. 2d 11, 196 N.Y.S.2d 227; *Cromer v. State* (Tex. Crim.), 374 S.W.2d 884.

In the absence of evidence to the contrary in the present case, the trial court accepted, as it had the right to do, the evidence of these testings as adequate proof of the accuracy of the radar set.

207 Va. 12, \*14; 147 S.E.2d 727, \*\*728;  
1966 Va. LEXIS 180, \*\*\*5

[2] In his brief the defendant argues that the trial court erred in accepting "the evidence of the accuracy tests as valid and that they created a conclusive presumption that the radar set was accurate at the time of the alleged offense." We do not so interpret the court's ruling. Having accepted the proof of the accuracy of the radar set, as testified to by the officers, the trial court declined to allow the defendant to question its accuracy as a reliable [\*\*729] method of determining the speed of his car. Such ruling was in accord with its prior ruling on the defendant's [\*\*\*6] motion for a bill of particulars, in which it said:

"It having been indicated by the defendant in argument that \* \* \* he intends to introduce at the trial of this case the testimony of said expert witness to contest the basic reliability of the radar set in question as opposed to the proper testing thereof, the court doth rule at this time that *no such expert testimony will be admitted into evidence upon trial of this case to contest the reliability of said radar set*, but nothing contained herein shall limit defendant's right to elicit or present testimony as to the proper or improper testing of said radar set." (Emphasis added.)

This ruling, recognizing the reliability of the radar set, was in accord with the terms of the statute, Code, § 46.1-198(a) (Repl. Vol. 1958), [HN2] which provides: "The speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device. *The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle* in any court or legal proceedings where the speed of the motor vehicle is at issue." (Emphasis added.) See *Dooley v. Commonwealth*, 198 Va. 32, 35, 92 S.E.2d 348, 350.

[3] [\*\*\*7] The defendant's principal contention is that the judgment of conviction must fall because there is no evidence that the radar set [\*15] had been tested for accuracy at the site at which it was operating at the time of his apprehension. He argues that proof that the radar set was shown to be accurate by testings at 2:30 P.M. and 9:30 P.M., respectively, at another site is no proof that it was operating accurately at the site of his apprehension at 4:00 P.M.

It is true that the officers testified that prior to and after the defendant's apprehension a number of automobiles had passed through the radar beam and each driver thereof had been apprehended. In each instance, after the violator had passed the radar beam the machine was cut off and the violator chased and apprehended in the radar vehicle, after which the latter was returned to the check point, parked, and set for the next violator. The defendant argues that this change of location of the radar set, from time to time, necessarily interfered with its accuracy. We do not agree with this contention.

In the first place, proof that the instrument was checked and found to be operating accurately at 2:30 P.M. and later [\*\*\*8] at 9:30 P.M., in the absence of evidence to the contrary, warranted the inference that it was operating accurately during the interim, or at 4:00 P.M., the time of the defendant's apprehension.

In the next place, there is no evidence that it was necessary that the radar set be tested for accuracy at the identical site at which it was located at the time of the defendant's apprehension. Nor is there any evidence that the use of the radar car in apprehending other violators interfered with the accuracy of the radar set installed in that car.

We do not agree with the defendant's contention that in *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812, we held that in order to insure the accuracy of the recording of a radar set it must be tested at the exact location at which it was being used at the time of the recording in question. In that case we quoted from an article by Dr. John M. Kopper, appearing in 33 *N.C.L.Rev.* 343, 353, in which he "*recommends* certain operational procedures as far as the speedometer and its use are concerned. Such procedures include the checking of the speedometer before and after use in each location, the keeping of records, and other details." [\*\*\*9] (Emphasis added.) 198 Va. at 881, 96 S.E.2d at 815. The opinion does not hold, as the defendant contends, that these *recommendations* of that author must be followed in order to insure the accuracy of a radar set in determining the speed of a motor vehicle.

[\*\*730] The judgment of conviction in that case was reversed because, as the opinion points out, "the Commonwealth failed to introduce any [\*16] legal evidence tending to show that the radar machine used to measure the speed of defendant motorist had been properly set up and recently tested for accuracy." 198 Va. at 882, 96 S.E.2d at

207 Va. 12, \*16; 147 S.E.2d 727, \*\*730;  
1966 Va. LEXIS 180, \*\*\*9

816. In the present case, the un rebutted evidence on behalf of the city was sufficient to warrant the finding that the radar had been properly set up and recently tested for accuracy.

On the whole we find that the evidence fully supports the judgment of conviction and accordingly it is affirmed.

181 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**JOHN H. THOMAS v. CITY OF NORFOLK****Record No. 6162****Supreme Court of Virginia***207 Va. 12; 147 S.E.2d 727; 1966 Va. LEXIS 180***April 25, 1966****PRIOR HISTORY:** [\*\*\*1]

Error to a judgment of the Corporation Court of the city of Norfolk. Hon. H. Lawrence Bullock, judge presiding.

**DISPOSITION:**

*Affirmed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The Corporation Court for the City of Norfolk (Virginia), sitting without a jury, convicted defendant of driving an automobile in excess of the speed limit, in violation of an ordinance of the City of Norfolk. The evidence was undisputed and came from witnesses for the city. Defendant did not testify nor did he offer any evidence in his behalf. Defendant appealed.

**OVERVIEW:** The police testified that they were operating a mobile radar unit in an unmarked police car and that defendant drove his car past the radar causing the instrument to register his speed at 46 miles per hour, which was in excess of the posted speed limit of 30 miles per hour. The court on appeal held that evidence of a test of radar equipment by tuning forks was admissible as tending to prove the accuracy of the equipment. In the absence of evidence to the contrary, the trial court properly accepted the evidence of the testings as adequate proof of the accuracy of the radar set. Having accepted the proof of the accuracy of the radar set, the trial court declined to allow defendant to question its accuracy as a reliable method of determining the speed of his car. That ruling, which recognized the reliability of the radar set, was in accord with the terms of Va. Code Ann. § 46.1-198(a) (1958). Proof that the instrument had been checked and found to be operating accurately at 2:30 p.m. and later at 9:30 p.m. warranted the inference that it was operating accurately during the interim, or at 4:00 p.m., the time of defendant's apprehension.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** radar, accuracy, speed, tested, mile, testing, apprehension, site, motor vehicle, reliability, speeding,

207 Va. 12, \*; 147 S.E.2d 727, \*\*;  
1966 Va. LEXIS 180, \*\*\*1

speedometer, accurately, violator, fork, judgment of conviction, calibration, tuning, beam, speedometer, recording, insure, prima facie evidence, absence of evidence, adequate proof, speed limit, police car, apprehended, interfered, registered

### **LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Demonstrative Evidence*

[HN1] Evidence of a test of radar equipment by tuning forks is admissible as tending to prove the accuracy of the equipment.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview  
Evidence > Demonstrative Evidence*

*Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor*

[HN2] See Va. Code Ann. § 46.1-198(a) (1958).

### **HEADNOTES:**

- (1) Speeding -- Accuracy of Radar -- Testing Held Sufficient.
- (2) Speeding -- Reliability of Radar Evidence -- Not Open to Question Where Accuracy of Set Proved.
- (3) Speeding -- Accuracy of Radar -- Need Not be Tested at Site of Operation of Set.

1. After trial at which he presented no evidence Thomas was convicted of speeding on the testimony of the arresting officers that the mobile radar set operated by them had indicated his speed to be 46 miles per hour in a 30 mile zone. On appeal Thomas challenged the sufficiency of the prosecution's evidence, alleging that it failed to show that the radar was properly checked. This contention was not accepted, however, in light of the officers' testimony that they had tested the set before and after use against a calibrated speedometer and by use of factory pre-tested tuning forks. These testings the trial court correctly accepted, in the absence of contrary evidence, as adequate proof of the accuracy of the set.

2. The accuracy of the set having been established, the court properly refused [\*\*\*2] to allow defendant to question its reliability as a method of determining his speed. Code 46.1-198(a) provides that the results of radar checks shall be accepted as prima facie evidence of speed.

3. There was no merit to defendant's argument that his conviction was improper because the set was not tested for accuracy at the site at which it was operating when his speed was checked. The set's accuracy at that time could be inferred from the tests made prior to and after that time; nor did defendant introduce any evidence at variance with such inference or tending to show that relocation of the set affected its accuracy.

### **SYLLABUS:**

The opinion states the case.

### **COUNSEL:**

*John H. Thomas*, for the plaintiff in error.

*Gordon B. Tayloe, Jr., Assistant City Attorney (Leonard H. Davis, City Attorney, on brief), for the defendant in error.*

**JUDGES:**

Present, All the Justices.

**OPINION BY:**

EGGLESTON

**OPINION:**

[\*13] [\*\*728] EGGLESTON, C.J., delivered the opinion of the court.

[1] John H. Thomas has appealed from a judgment of the lower court, sitting by consent without a jury, finding him guilty of driving an automobile in excess of the speed limit, in violation of an ordinance of the City [\*\*\*3] of Norfolk. The substance of his assignments of error is that the judgment is without valid evidence to support it.

The evidence is undisputed and comes from witnesses for the city. The defendant did not testify nor did he offer any evidence in his behalf. Officers E. A. Bennett and E. L. Jackson of the Norfolk police division testified that on September 14, 1964, at approximately 4:00 P.M., they were operating a mobile radar unit in an unmarked police car located in the 3500 block of Chesapeake boulevard in the city of Norfolk; that the defendant drove his car past the radar causing the latter instrument to register his speed at 46 miles per hour, and that this was in excess of the posted speed limit there of 30 miles per hour.

The officers testified that the radar set had been tested by them at another location when they came on duty at 2:30 P.M. the same day, and that they had again tested it at the same location at 9:30 P.M. on the same day when they went off duty. In each instance a police car driven by Officer Jackson passed through the radar beam at speeds of 30, 40 and 50 miles per hour, as indicated on the speedometer of his car and noted by Jackson, and these speeds [\*\*\*4] accorded with those which were indicated on the radar set and noted by Officer Bennett.

Both officers testified that the speedometer on the test car had been calibrated three or four days before the date of the defendant's apprehension and that the records of such calibration were kept at the city garage. Although these officers testified that they took no part in the calibration test, it does not appear from the defendant's brief that he questions the adequacy of the proof of such calibration.

In any event, the officers further testified that the accuracy of the speedometer test in each instance was corroborated by tests which they made at these times with factory pretested tuning forks. One of these forks, when struck and held in front of the radar set, indicated or registered on the latter instrument a speed of 35 miles per hour. In a similar manner, the other tuning fork when struck indicated [\*14] or registered on the radar set a speed of 50 miles per hour. Officer Bennett testified that the tuning-fork tests showed that the radar set accurately recorded these respective speeds.

While the matter has not heretofore been presented to us it is well recognized in [\*\*\*5] other jurisdictions that [HN1] evidence of a test of radar equipment by tuning forks in this manner is admissible as tending to prove the accuracy of the equipment. *State v. Lenzen*, 24 Conn. Supp. 208, 1 Conn. Cir. Ct. 499, 189 A.2d 405; *State v. Graham* (Mo. App.), 322 S.W.2d 188; *People v. Johnson*, 23 Misc. 2d 11, 196 N.Y.S.2d 227; *Cromer v. State* (Tex. Crim.), 374 S.W.2d 884.

In the absence of evidence to the contrary in the present case, the trial court accepted, as it had the right to do, the evidence of these testings as adequate proof of the accuracy of the radar set.

207 Va. 12, \*14; 147 S.E.2d 727, \*\*728;  
1966 Va. LEXIS 180, \*\*\*5

[2] In his brief the defendant argues that the trial court erred in accepting "the evidence of the accuracy tests as valid and that they created a conclusive presumption that the radar set was accurate at the time of the alleged offense." We do not so interpret the court's ruling. Having accepted the proof of the accuracy of the radar set, as testified to by the officers, the trial court declined to allow the defendant to question its accuracy as a reliable [\*\*729] method of determining the speed of his car. Such ruling was in accord with its prior ruling on the defendant's [\*\*\*6] motion for a bill of particulars, in which it said:

"It having been indicated by the defendant in argument that \* \* \* he intends to introduce at the trial of this case the testimony of said expert witness to contest the basic reliability of the radar set in question as opposed to the proper testing thereof, the court doth rule at this time that *no such expert testimony will be admitted into evidence upon trial of this case to contest the reliability of said radar set*, but nothing contained herein shall limit defendant's right to elicit or present testimony as to the proper or improper testing of said radar set." (Emphasis added.)

This ruling, recognizing the reliability of the radar set, was in accord with the terms of the statute, Code, § 46.1-198(a) (Repl. Vol. 1958), [HN2] which provides: "The speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device. *The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle* in any court or legal proceedings where the speed of the motor vehicle is at issue." (Emphasis added.) See *Dooley v. Commonwealth*, 198 Va. 32, 35, 92 S.E.2d 348, 350.

[3] [\*\*\*7] The defendant's principal contention is that the judgment of conviction must fall because there is no evidence that the radar set [\*15] had been tested for accuracy at the site at which it was operating at the time of his apprehension. He argues that proof that the radar set was shown to be accurate by testings at 2:30 P.M. and 9:30 P.M., respectively, at another site is no proof that it was operating accurately at the site of his apprehension at 4:00 P.M.

It is true that the officers testified that prior to and after the defendant's apprehension a number of automobiles had passed through the radar beam and each driver thereof had been apprehended. In each instance, after the violator had passed the radar beam the machine was cut off and the violator chased and apprehended in the radar vehicle, after which the latter was returned to the check point, parked, and set for the next violator. The defendant argues that this change of location of the radar set, from time to time, necessarily interfered with its accuracy. We do not agree with this contention.

In the first place, proof that the instrument was checked and found to be operating accurately at 2:30 P.M. and later [\*\*\*8] at 9:30 P.M., in the absence of evidence to the contrary, warranted the inference that it was operating accurately during the interim, or at 4:00 P.M., the time of the defendant's apprehension.

In the next place, there is no evidence that it was necessary that the radar set be tested for accuracy at the identical site at which it was located at the time of the defendant's apprehension. Nor is there any evidence that the use of the radar car in apprehending other violators interfered with the accuracy of the radar set installed in that car.

We do not agree with the defendant's contention that in *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812, we held that in order to insure the accuracy of the recording of a radar set it must be tested at the exact location at which it was being used at the time of the recording in question. In that case we quoted from an article by Dr. John M. Kopper, appearing in 33 *N.C.L.Rev.* 343, 353, in which he "*recommends* certain operational procedures as far as the speedometer and its use are concerned. Such procedures include the checking of the speedometer before and after use in each location, the keeping of records, and other details." [\*\*\*9] (Emphasis added.) 198 Va. at 881, 96 S.E.2d at 815. The opinion does not hold, as the defendant contends, that these *recommendations* of that author must be followed in order to insure the accuracy of a radar set in determining the speed of a motor vehicle.

[\*\*730] The judgment of conviction in that case was reversed because, as the opinion points out, "the Commonwealth failed to introduce any [\*16] legal evidence tending to show that the radar machine used to measure the speed of defendant motorist had been properly set up and recently tested for accuracy." 198 Va. at 882, 96 S.E.2d at

207 Va. 12, \*16; 147 S.E.2d 727, \*\*730;  
1966 Va. LEXIS 180, \*\*\*9

816. In the present case, the un rebutted evidence on behalf of the city was sufficient to warrant the finding that the radar had been properly set up and recently tested for accuracy.

On the whole we find that the evidence fully supports the judgment of conviction and accordingly it is affirmed.

182 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**BILLY DEAN WILLIAMS v. COMMONWEALTH OF VIRGINIA****No. 0974-86****Court of Appeals of Virginia***5 Va. App. 514; 365 S.E.2d 340; 1988 Va. App. LEXIS 36; 4 Va. Law Rep. 1872***February 16, 1988, Decided****PRIOR HISTORY:** [\*\*\*1]

Circuit Court of Botetourt County, Duncan M. Byrd, Jr., Judge.

**DISPOSITION:***Affirmed.***CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant appealed a judgment of the Circuit Court of Botetourt County (Virginia), which convicted him of speeding in violation of Va. Code Ann. § 46.1-193.**OVERVIEW:** Defendant was convicted of speeding, despite evidence that his speedometer was incorrectly calibrated. On appeal, the court affirmed. The court held that although the summons incorrectly identified the subsection of the statute under which defendant was charged, defendant was not prejudiced because the summons gave him notice of the speeding offense. The court further held that Va. Code Ann. § 46.1-193.1 did not require the trial court to instruct the jury that if defendant's speedometer was improperly calibrated, then the jury must find defendant not guilty, nor did it make knowledge or intent an element of the speeding charge. The trial court correctly instructed the jury that a police officer's radar check established a prima facie case of speeding, and that the jury should consider whether defendant's calibration evidence established his innocence. Finally, the court held that the trial court correctly advised the jury to disregard defendant's reference to court costs in its closing arguments, because court costs were irrelevant to the offense.**OUTCOME:** The court affirmed the trial court's conviction of defendant for speeding.**CORE TERMS:** speeding, speedometer, speed, calibration, guilt, fact finder, radar, innocence, mile, incorrect, summons, final argument, maximum speed, notice, traveling, truck, motor vehicle, speed limit, forty-five, exceeding, instruct, lawful, fixing, offense charged, nonexistent, inaccurate, accuracy, tendered, drivers, breath test**LexisNexis(R) Headnotes**

5 Va. App. 514, \*, 365 S.E.2d 340, \*\*;  
1988 Va. App. LEXIS 36, \*\*\*1; 4 Va. Law Rep. 1872

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Warning Requirements***

***Criminal Law & Procedure > Accusatory Instruments > Indictments***

[HN1] A summons must describe the offense charged. Va. Sup. Ct. R. 3A:4(b). This description must comply with Va. Sup. Ct. R. 3A:6(a), which provides that an indictment must give an accused notice of the nature and character of the offense charged against him.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN2] Va. Code Ann. § 46.1-193.1 provides that in the trial of any person charged with exceeding any maximum speed limit in Virginia, the court shall receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense. Such report shall be considered by the court or jury in both determining guilt or innocence and in fixing punishment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Governments > Legislation > Interpretation***

[HN3] In enacting Va. Code Ann. § 46.1-193, the legislature did not intend to bar a conviction for speeding for persons with inaccurate speedometers.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > Elements***

[HN4] Va. Code Ann. § 46.1-308(ii) makes it illegal to operate a motor vehicle with a defective speedometer.

***Criminal Law & Procedure > Trials > Closing Arguments > General Overview***

[HN5] A defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and, therefore, should not be addressed or alluded to in the final argument. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense.

**HEADNOTES: (1) Criminal Procedure -- Notice of the Offense -- Standard.** --A summons must describe the offense charged and must give the accused notice of the nature and character of the offense.

**(2) Motor Vehicles -- Speeding -- Calibration Evidence.** --Code § 46.1-193 was not intended to bar a conviction for speeding for persons with inaccurate speedometers.

**(3) Motor Vehicles -- Speeding -- Calibration Evidence.** --Calibration report evidence is admissible and the fact finder may give it such weight as it deems proper.

**(4) Motor Vehicles -- Speeding -- Calibration Evidence.** --The weight attached to calibration report evidence is solely for the determination of the fact finder.

**(5) Motor Vehicles -- Speeding -- Elements.** --Nothing in the Code suggests that the legislature intended knowledge or intent as an element of the offense of speeding.

**(6) Courts -- Final Argument -- Standard.** --The defendant's liability for court costs is irrelevant in the jury's determination of guilt and punishment and therefore, may not be addressed or alluded to in final argument.

**SYLLABUS:**

Defendant was convicted [\*\*\*2] of speeding. He argued that he was tried under an nonexistent code section, that the jury was improperly instructed upon the effect of calibration evidence, and that the court erred in not allowing

defense counsel to discuss defendant's potential liability for court costs.

The Court of Appeals affirmed, holding that despite the misrecital of the applicable Code section, the description of the offense in the summons gave the defendant notice of the offense of which he was charged. The Court also held that a malfunctioning speedometer does not provide an absolute defense, and that the jury was properly instructed. Finally, the Court held that the trial court properly refused to allow defense counsel to argue the defendant's potential liability for court costs.

#### **COUNSEL:**

Martin F. Clark, Jr. (Clark & Clark, P.C., on brief), for appellant.

Leah A. Darron, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

#### **JUDGES:**

Cole, J. Koontz, C.J., and Barrow, J., concurred.

#### **OPINION BY:**

COLE

#### **OPINION:**

[\*515] [\*\*\*340] Appellant, Billy Dean Williams, was convicted in a jury trial of speeding in violation of Code § 46.1-193 and fined twenty-five [\*\*341] dollars. He raises three issues on appeal: (1) whether his [\*\*\*3] conviction was invalid because he was tried under a nonexistent code subsection; (2) whether the jury was improperly instructed upon the effect of calibration evidence in determining guilt or innocence and punishment for speeding in accordance with Code § 46.1-193.1; and (3) whether the trial court erred in not allowing defense counsel, during final argument, to discuss Williams' potential liability for court costs. We answer each of these inquiries in the negative, and accordingly, we affirm.

##### *I. FACTS*

On March 27, 1986, Trooper G. E. Miller, Jr. clocked a 1985 Peterbuilt tractor trailer truck being operated by appellant, Billy Dean Williams, at a speed of fifty-nine miles per hour in a forty-five [\*516] mile per hour zone. The trooper was using a moving radar system. He issued Williams a traffic summons charging him with a violation of Code § "46.1-193" which sets the minimum/maximum speed limits. The summons described the charge as "speed 59/45."

At trial, the Commonwealth's evidence consisted of Trooper Miller's testimony and the result of the radar check. In his case-in-chief, Williams testified that he was aware of the forty-five mile per hour speed limit and [\*\*\*4] that, according to his speedometer, he was traveling within that speed limit. He then introduced a calibration certificate showing the result of a test conducted about five weeks after the offense. The test disclosed that a speedometer reading of forty-five miles per hour on his truck was obtained when the truck actually was going fifty-eight miles per hour.

The jury returned a verdict finding Williams guilty of speeding "58 miles per hour in a 45 miles per hour zone," and fined him twenty-five dollars. This appeal followed.

##### *II. CONVICTION UPON NONEXISTENT CODE SUBSECTION*

Williams first maintains that he was convicted of violating a nonexistent code subsection, and that therefore, his conviction must be reversed. At the close of the Commonwealth's evidence, Williams moved to strike the evidence,

5 Va. App. 514, \*516; 365 S.E.2d 340, \*\*341;  
1988 Va. App. LEXIS 36, \*\*\*4; 4 Va. Law Rep. 1872

contending that he was charged under the incorrect statute. The court overruled the motion, finding that Williams was charged under the appropriate section, Code § 46.1-193, but erroneously amended the warrant to show the subsection as "46.1-193h(3)," a nonexistent subsection. We hold that the error is not fatal to the conviction.

(1) [HN1] A summons must describe the offense charged. [\*\*\*5] Rule 3A:4(b). This description must comply with Rule 3A:6(a), which provides that an indictment must give an accused notice of the nature and character of the offense charged against him. *Greenwalt v. Commonwealth*, 224 Va. 498, 501, 297 S.E.2d 709, 710-11 (1982). In *Williams v. Petersburg*, 216 Va. 297, 301-02, 217 S.E.2d 893, 897 (1975), the defendant argued that his conviction for refusing to take a breath test was invalid because the warrant inaccurately recited the applicable code section. In that case, instead of referring to Code § 18.1-55.1, which required that the [\*517] breath sample be given, the warrant referred to Code § 18.1-54.1 which addressed preliminary field sobriety tests. The court found it sufficient that the warrant specifically charged the defendant with refusing to take a breath test, and held that the "misrecital [did] not invalidate the conviction." *Id.* at 302, 217 S.E.2d at 897.

In this case the traffic summons stated that Williams was charged with "speed 59/45." This description was sufficient to give him notice of the nature and character of the offense [\*\*\*6] for which he was charged. Williams does not contend that he did not know the nature of the charge against him or that he did not have an opportunity to defend against that charge. Accordingly, despite the misrecital of the applicable subsection of the statute, the description of the offense set out in the summons gave the defendant notice of the offense of which he was charged.

[\*\*342] III. INSTRUCTIONS ON CALIBRATION TEST

Next, Williams claims that the jury was incorrectly instructed upon [HN2] Code § 46.1-193.1, which provides:

In the trial of any person charged with exceeding any maximum speed limit in this Commonwealth, the court shall receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense. Such report shall be considered by the court or jury in both determining guilt or innocence and in fixing punishment.

He argues that the court erred in refusing to give three instructions he tendered because: (1) Code § 46.1-193.1 creates an absolute defense to a speeding charge where the speedometer reading on a motor vehicle [\*\*\*7] is incorrect and is relied upon by the operator to determine his speed; (2) if the statute is not an absolute bar, it fashions a narrow and specific exemption to the *malum prohibitum* statute designed to protect those drivers who, without knowledge or intent, violate the maximum speed limit and in good faith rely upon the accuracy of their speedometers and find them incorrect; and (3) Code §§ 46.1-193.1 and 46.1-193 are conflicting and, therefore, the court gave inconsistent instructions to the jury.

[\*518] A.

The trial court refused to give the following instructions requested by the defendant:

Instruction 1:

The Court instructs the Jury that the defendant, Mr. Williams, is entitled to rely on the speed shown on his truck's speedometer. If you believe that Mr. Williams' speedometer showed him traveling at a lawful speed at the time he was stopped, and that because his speedometer was incorrect, Mr. Williams exceeded the speed limit, then you shall find the defendant, Mr. Williams, not guilty.

Instruction 2:

5 Va. App. 514, \*518; 365 S.E.2d 340, \*\*342;  
1988 Va. App. LEXIS 36, \*\*\*7; 4 Va. Law Rep. 1872

The Court instructs the Jury that if you believe from the evidence that the defendant, Mr. Williams' speedometer showed Mr. Williams to be driving at a lawful [\*\*\*8] speed at the time he was stopped by the State Trooper, then regardless of Mr. Williams' actual speed as determined by radar, the defendant, Mr. Williams, shall be found not guilty.

Instruction 3:

The Court instructs the Jury that if you believe the evidence of the mechanic who performed the calibration on Mr. Williams' truck that Mr. Williams' speedometer was incorrect, and that it showed Mr. Williams to be traveling at a lawful speed when he actually was traveling at a speed greater than the posted speed, you shall find the defendant, Mr. Williams, not guilty.

(2) We find that the legislature, [HN3] in enacting Code § 46.1-193, did not intend to bar a conviction for speeding for persons with inaccurate speedometers. Such an interpretation would discourage motorists from repairing defective speedometers and encourage tampering with them so as to prevent a conviction for speeding. We do not think the legislature intended to encourage a result [\*519] that would foster unlawful activity. *See* [HN4] Code § 46.1-308(ii). (illegal to operate motor vehicle with defective speedometer).

(3) We find no language in the statute supporting the argument that the legislature intended an [\*\*\*9] incorrect speedometer reading to constitute an absolute bar to a conviction for speeding. In a speeding case the only issue is whether the defendant's vehicle was in fact exceeding the lawful maximum speed. If so, he is guilty; if not, he is innocent. The calibration report is admissible in evidence and the fact finder under the statute may give it such weight as it deems proper under the facts and circumstances of the particular case.

(4) The gravamen of the three instructions tendered by the defendant is that they removed from the fact finder the element of discretion which the statute imposes upon it. The instructions told the fact finder [\*\*343] that if the speedometer showed Williams was traveling at a lawful rate of speed in accordance with the speedometer reading, although he was in fact exceeding the maximum speed limit permitted by law, then it must find him not guilty. The weight attached to the calibration test evidence under the terms of the statute is solely for the determination of the fact finder in arriving at its conclusion as to whether there is reasonable doubt of the guilt of the accused in view of all the proven facts and circumstances. For this reason, we conclude [\*\*\*10] that the trial court was correct in refusing the tendered instructions.

B.

Williams argues that if Code § 46.1-193.1 does not provide an absolute defense when the speedometer reading is inaccurate, it creates knowledge or intent as an element for a speeding charge, and the jury should have been so instructed.

(5) The legislature may require knowledge or intent as an element of an offense, but we hold that neither Code § 46.1-193.1, nor language contained elsewhere in the Motor Vehicle Code, so provides. If the legislature intended to make knowledge or intent an element of the offense of speeding, it would have done so as it has with other offenses in the Motor Vehicle Code. *See, e.g.*, Code § 46.1-15.1 (unlawful for one to sell car if he "knows or should reasonably know" that the odometer has been changed); Code § 46.1-363 (unlawful for one to make a "willful," material false [\*520] statement on any application for a driver's license); Code § 46.1-384(b) (unlawful to "knowingly" permit another to use one's driver's license). We, therefore, find that statutory language requiring a fact finder to "consider" calibration evidence in determining guilt or innocence of speeding [\*\*\*11] was not meant to require proof of intent or knowledge as an element of a speeding conviction. Having concluded that Code § 46.1-193.1 was not intended to make knowledge or intent an element in a speeding charge when calibration evidence is introduced, we find that the trial court did not err in refusing to so instruct the jury.

C.

Williams contends that even if Code § 46.1-193.1 does not provide a defense to a speeding charge or make knowledge or intent an element of the offense, the jury was inadequately instructed because instructions D and F were incompatible and inconsistent with each other. We disagree. The instructions given were as follows:

Instruction D:

The result of the check of the speed of the defendant's automobile by radar device is sufficient to prove his guilt unless other evidence raises a reasonable doubt as to whether the defendant in fact exceeded a speed of forty-five miles per hour.

Instruction F:

You have received as evidence a sworn report and testimony of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant. You shall consider such report and testimony in both determining guilt [\*\*\*12] or innocence and in fixing punishment.

Instruction D paraphrases Code § 46.1-198(a) which provides that the result of a radar check is prima facie evidence of speed. Instruction F paraphrases Code § 46.1-193.1 which provides that the fact finder shall consider the speedometer calibration test in both determining guilt or innocence and in fixing punishment. [\*521] Considering these two instructions together, the only conclusion that the jury could reasonably draw is that the radar check is sufficient to prove the speed of the defendant's vehicle and that the calibration evidence must be considered by them to rebut it. In every case, the test will not prove the defendant's innocence; in some cases, the test may prove his guilt. Such is the case at bar. Williams did not present any evidence to refute the radar check. Rather than help prove his innocence, the calibration test evidence bolstered the prima facie case made by the radar check by confirming that Williams was in fact exceeding the speed limit. Furthermore, even if the calibration test evidence in this case tended to [\*\*\*344] rebut the prima facie case of speed, the statute confers upon the fact finder absolute discretion [\*\*\*13] concerning the weight to be attached to the test results.

Clearly, the calibration test evidence was relevant in fixing the punishment, and no doubt the jury considered it for this purpose. These two instructions stated the correct principles of law; therefore, we conclude that the court committed no error in giving them.

#### IV. REFUSAL TO PERMIT ARGUMENT ON COURT COSTS

During final argument, defense counsel commented to the jury that a finding of guilt would result in a fine, and also in payment of court costs by the defendant. The Commonwealth objected to the remark about court costs, and the court admonished the jury to disregard the statement. Williams asserts that the trial court erred in refusing to allow his counsel to mention his liability for court costs in the event he was found guilty.

(6) [HN5] The defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and, therefore, should not be addressed or alluded to in the final argument. "Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense." *Angela's Case*, 51 Va. 724 (10 Gratt.) 696, 701 (1853). [\*\*\*14] Rather, it constitutes an item of debt from the defendant to the Commonwealth for money "paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong." *Id.* Therefore, the trial court was correct in advising the [\*522] jury to disregard the statement of counsel pertaining to court costs.

For the reasons stated, the judgment of the trial court is affirmed.

*Affirmed.*

183 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**BILLY DEAN WILLIAMS v. COMMONWEALTH OF VIRGINIA****No. 0974-86****Court of Appeals of Virginia***5 Va. App. 514; 365 S.E.2d 340; 1988 Va. App. LEXIS 36; 4 Va. Law Rep. 1872***February 16, 1988, Decided****PRIOR HISTORY:** [\*\*\*1]

Circuit Court of Botetourt County, Duncan M. Byrd, Jr., Judge.

**DISPOSITION:***Affirmed.***CASE SUMMARY:****PROCEDURAL POSTURE:** Defendant appealed a judgment of the Circuit Court of Botetourt County (Virginia), which convicted him of speeding in violation of Va. Code Ann. § 46.1-193.**OVERVIEW:** Defendant was convicted of speeding, despite evidence that his speedometer was incorrectly calibrated. On appeal, the court affirmed. The court held that although the summons incorrectly identified the subsection of the statute under which defendant was charged, defendant was not prejudiced because the summons gave him notice of the speeding offense. The court further held that Va. Code Ann. § 46.1-193.1 did not require the trial court to instruct the jury that if defendant's speedometer was improperly calibrated, then the jury must find defendant not guilty, nor did it make knowledge or intent an element of the speeding charge. The trial court correctly instructed the jury that a police officer's radar check established a prima facie case of speeding, and that the jury should consider whether defendant's calibration evidence established his innocence. Finally, the court held that the trial court correctly advised the jury to disregard defendant's reference to court costs in its closing arguments, because court costs were irrelevant to the offense.**OUTCOME:** The court affirmed the trial court's conviction of defendant for speeding.**CORE TERMS:** speeding, speedometer, speed, calibration, guilt, fact finder, radar, innocence, mile, incorrect, summons, final argument, maximum speed, notice, traveling, truck, motor vehicle, speed limit, forty-five, exceeding, instruct, lawful, fixing, offense charged, nonexistent, inaccurate, accuracy, tendered, drivers, breath test**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Warning Requirements******Criminal Law & Procedure > Accusatory Instruments > Indictments***

[HN1] A summons must describe the offense charged. Va. Sup. Ct. R. 3A:4(b). This description must comply with Va. Sup. Ct. R. 3A:6(a), which provides that an indictment must give an accused notice of the nature and character of the offense charged against him.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

[HN2] Va. Code Ann. § 46.1-193.1 provides that in the trial of any person charged with exceeding any maximum speed limit in Virginia, the court shall receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense. Such report shall be considered by the court or jury in both determining guilt or innocence and in fixing punishment.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview Governments > Legislation > Interpretation***

[HN3] In enacting Va. Code Ann. § 46.1-193, the legislature did not intend to bar a conviction for speeding for persons with inaccurate speedometers.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Speeding > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Regulation Violations > Elements***

[HN4] Va. Code Ann. § 46.1-308(ii) makes it illegal to operate a motor vehicle with a defective speedometer.

***Criminal Law & Procedure > Trials > Closing Arguments > General Overview***

[HN5] A defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and, therefore, should not be addressed or alluded to in the final argument. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense.

**HEADNOTES: (1) Criminal Procedure -- Notice of the Offense -- Standard.** --A summons must describe the offense charged and must give the accused notice of the nature and character of the offense.

**(2) Motor Vehicles -- Speeding -- Calibration Evidence.** --Code § 46.1-193 was not intended to bar a conviction for speeding for persons with inaccurate speedometers.

**(3) Motor Vehicles -- Speeding -- Calibration Evidence.** --Calibration report evidence is admissible and the fact finder may give it such weight as it deems proper.

**(4) Motor Vehicles -- Speeding -- Calibration Evidence.** --The weight attached to calibration report evidence is solely for the determination of the fact finder.

**(5) Motor Vehicles -- Speeding -- Elements.** --Nothing in the Code suggests that the legislature intended knowledge or intent as an element of the offense of speeding.

**(6) Courts -- Final Argument -- Standard.** --The defendant's liability for court costs is irrelevant in the jury's determination of guilt and punishment and therefore, may not be addressed or alluded to in final argument.

**SYLLABUS:**

Defendant was convicted [\*\*\*2] of speeding. He argued that he was tried under an nonexistent code section, that the jury was improperly instructed upon the effect of calibration evidence, and that the court erred in not allowing

defense counsel to discuss defendant's potential liability for court costs.

The Court of Appeals affirmed, holding that despite the misrecital of the applicable Code section, the description of the offense in the summons gave the defendant notice of the offense of which he was charged. The Court also held that a malfunctioning speedometer does not provide an absolute defense, and that the jury was properly instructed. Finally, the Court held that the trial court properly refused to allow defense counsel to argue the defendant's potential liability for court costs.

#### **COUNSEL:**

Martin F. Clark, Jr. (Clark & Clark, P.C., on brief), for appellant.

Leah A. Darron, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

#### **JUDGES:**

Cole, J. Koontz, C.J., and Barrow, J., concurred.

#### **OPINION BY:**

COLE

#### **OPINION:**

[\*515] [\*\*\*340] Appellant, Billy Dean Williams, was convicted in a jury trial of speeding in violation of Code § 46.1-193 and fined twenty-five [\*\*341] dollars. He raises three issues on appeal: (1) whether his [\*\*\*3] conviction was invalid because he was tried under a nonexistent code subsection; (2) whether the jury was improperly instructed upon the effect of calibration evidence in determining guilt or innocence and punishment for speeding in accordance with Code § 46.1-193.1; and (3) whether the trial court erred in not allowing defense counsel, during final argument, to discuss Williams' potential liability for court costs. We answer each of these inquiries in the negative, and accordingly, we affirm.

##### *I. FACTS*

On March 27, 1986, Trooper G. E. Miller, Jr. clocked a 1985 Peterbuilt tractor trailer truck being operated by appellant, Billy Dean Williams, at a speed of fifty-nine miles per hour in a forty-five [\*516] mile per hour zone. The trooper was using a moving radar system. He issued Williams a traffic summons charging him with a violation of Code § "46.1-193" which sets the minimum/maximum speed limits. The summons described the charge as "speed 59/45."

At trial, the Commonwealth's evidence consisted of Trooper Miller's testimony and the result of the radar check. In his case-in-chief, Williams testified that he was aware of the forty-five mile per hour speed limit and [\*\*\*4] that, according to his speedometer, he was traveling within that speed limit. He then introduced a calibration certificate showing the result of a test conducted about five weeks after the offense. The test disclosed that a speedometer reading of forty-five miles per hour on his truck was obtained when the truck actually was going fifty-eight miles per hour.

The jury returned a verdict finding Williams guilty of speeding "58 miles per hour in a 45 miles per hour zone," and fined him twenty-five dollars. This appeal followed.

##### *II. CONVICTION UPON NONEXISTENT CODE SUBSECTION*

Williams first maintains that he was convicted of violating a nonexistent code subsection, and that therefore, his conviction must be reversed. At the close of the Commonwealth's evidence, Williams moved to strike the evidence,

contending that he was charged under the incorrect statute. The court overruled the motion, finding that Williams was charged under the appropriate section, Code § 46.1-193, but erroneously amended the warrant to show the subsection as "46.1-193h(3)," a nonexistent subsection. We hold that the error is not fatal to the conviction.

(1) [HN1] A summons must describe the offense charged. [\*\*\*5] Rule 3A:4(b). This description must comply with Rule 3A:6(a), which provides that an indictment must give an accused notice of the nature and character of the offense charged against him. *Greenwalt v. Commonwealth*, 224 Va. 498, 501, 297 S.E.2d 709, 710-11 (1982). In *Williams v. Petersburg*, 216 Va. 297, 301-02, 217 S.E.2d 893, 897 (1975), the defendant argued that his conviction for refusing to take a breath test was invalid because the warrant inaccurately recited the applicable code section. In that case, instead of referring to Code § 18.1-55.1, which required that the [\*517] breath sample be given, the warrant referred to Code § 18.1-54.1 which addressed preliminary field sobriety tests. The court found it sufficient that the warrant specifically charged the defendant with refusing to take a breath test, and held that the "misrecital [did] not invalidate the conviction." *Id.* at 302, 217 S.E.2d at 897.

In this case the traffic summons stated that Williams was charged with "speed 59/45." This description was sufficient to give him notice of the nature and character of the offense [\*\*\*6] for which he was charged. Williams does not contend that he did not know the nature of the charge against him or that he did not have an opportunity to defend against that charge. Accordingly, despite the misrecital of the applicable subsection of the statute, the description of the offense set out in the summons gave the defendant notice of the offense of which he was charged.

### [\*\*342] III. INSTRUCTIONS ON CALIBRATION TEST

Next, Williams claims that the jury was incorrectly instructed upon [HN2] Code § 46.1-193.1, which provides:

In the trial of any person charged with exceeding any maximum speed limit in this Commonwealth, the court shall receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense. Such report shall be considered by the court or jury in both determining guilt or innocence and in fixing punishment.

He argues that the court erred in refusing to give three instructions he tendered because: (1) Code § 46.1-193.1 creates an absolute defense to a speeding charge where the speedometer reading on a motor vehicle [\*\*\*7] is incorrect and is relied upon by the operator to determine his speed; (2) if the statute is not an absolute bar, it fashions a narrow and specific exemption to the *malum prohibitum* statute designed to protect those drivers who, without knowledge or intent, violate the maximum speed limit and in good faith rely upon the accuracy of their speedometers and find them incorrect; and (3) Code §§ 46.1-193.1 and 46.1-193 are conflicting and, therefore, the court gave inconsistent instructions to the jury.

[\*518] A.

The trial court refused to give the following instructions requested by the defendant:

Instruction 1:

The Court instructs the Jury that the defendant, Mr. Williams, is entitled to rely on the speed shown on his truck's speedometer. If you believe that Mr. Williams' speedometer showed him traveling at a lawful speed at the time he was stopped, and that because his speedometer was incorrect, Mr. Williams exceeded the speed limit, then you shall find the defendant, Mr. Williams, not guilty.

Instruction 2:

5 Va. App. 514, \*518; 365 S.E.2d 340, \*\*342;  
1988 Va. App. LEXIS 36, \*\*\*7; 4 Va. Law Rep. 1872

The Court instructs the Jury that if you believe from the evidence that the defendant, Mr. Williams' speedometer showed Mr. Williams to be driving at a lawful [\*\*\*8] speed at the time he was stopped by the State Trooper, then regardless of Mr. Williams' actual speed as determined by radar, the defendant, Mr. Williams, shall be found not guilty.

Instruction 3:

The Court instructs the Jury that if you believe the evidence of the mechanic who performed the calibration on Mr. Williams' truck that Mr. Williams' speedometer was incorrect, and that it showed Mr. Williams to be traveling at a lawful speed when he actually was traveling at a speed greater than the posted speed, you shall find the defendant, Mr. Williams, not guilty.

(2) We find that the legislature, [HN3] in enacting Code § 46.1-193, did not intend to bar a conviction for speeding for persons with inaccurate speedometers. Such an interpretation would discourage motorists from repairing defective speedometers and encourage tampering with them so as to prevent a conviction for speeding. We do not think the legislature intended to encourage a result [\*519] that would foster unlawful activity. *See* [HN4] Code § 46.1-308(ii). (illegal to operate motor vehicle with defective speedometer).

(3) We find no language in the statute supporting the argument that the legislature intended an [\*\*\*9] incorrect speedometer reading to constitute an absolute bar to a conviction for speeding. In a speeding case the only issue is whether the defendant's vehicle was in fact exceeding the lawful maximum speed. If so, he is guilty; if not, he is innocent. The calibration report is admissible in evidence and the fact finder under the statute may give it such weight as it deems proper under the facts and circumstances of the particular case.

(4) The gravamen of the three instructions tendered by the defendant is that they removed from the fact finder the element of discretion which the statute imposes upon it. The instructions told the fact finder [\*\*343] that if the speedometer showed Williams was traveling at a lawful rate of speed in accordance with the speedometer reading, although he was in fact exceeding the maximum speed limit permitted by law, then it must find him not guilty. The weight attached to the calibration test evidence under the terms of the statute is solely for the determination of the fact finder in arriving at its conclusion as to whether there is reasonable doubt of the guilt of the accused in view of all the proven facts and circumstances. For this reason, we conclude [\*\*\*10] that the trial court was correct in refusing the tendered instructions.

B.

Williams argues that if Code § 46.1-193.1 does not provide an absolute defense when the speedometer reading is inaccurate, it creates knowledge or intent as an element for a speeding charge, and the jury should have been so instructed.

(5) The legislature may require knowledge or intent as an element of an offense, but we hold that neither Code § 46.1-193.1, nor language contained elsewhere in the Motor Vehicle Code, so provides. If the legislature intended to make knowledge or intent an element of the offense of speeding, it would have done so as it has with other offenses in the Motor Vehicle Code. *See, e.g.*, Code § 46.1-15.1 (unlawful for one to sell car if he "knows or should reasonably know" that the odometer has been changed); Code § 46.1-363 (unlawful for one to make a "willful," material false [\*520] statement on any application for a driver's license); Code § 46.1-384(b) (unlawful to "knowingly" permit another to use one's driver's license). We, therefore, find that statutory language requiring a fact finder to "consider" calibration evidence in determining guilt or innocence of speeding [\*\*\*11] was not meant to require proof of intent or knowledge as an element of a speeding conviction. Having concluded that Code § 46.1-193.1 was not intended to make knowledge or intent an element in a speeding charge when calibration evidence is introduced, we find that the trial court did not err in refusing to so instruct the jury.

C.

Williams contends that even if Code § 46.1-193.1 does not provide a defense to a speeding charge or make knowledge or intent an element of the offense, the jury was inadequately instructed because instructions D and F were incompatible and inconsistent with each other. We disagree. The instructions given were as follows:

Instruction D:

The result of the check of the speed of the defendant's automobile by radar device is sufficient to prove his guilt unless other evidence raises a reasonable doubt as to whether the defendant in fact exceeded a speed of forty-five miles per hour.

Instruction F:

You have received as evidence a sworn report and testimony of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant. You shall consider such report and testimony in both determining guilt [\*\*\*12] or innocence and in fixing punishment.

Instruction D paraphrases Code § 46.1-198(a) which provides that the result of a radar check is prima facie evidence of speed. Instruction F paraphrases Code § 46.1-193.1 which provides that the fact finder shall consider the speedometer calibration test in both determining guilt or innocence and in fixing punishment. [\*521] Considering these two instructions together, the only conclusion that the jury could reasonably draw is that the radar check is sufficient to prove the speed of the defendant's vehicle and that the calibration evidence must be considered by them to rebut it. In every case, the test will not prove the defendant's innocence; in some cases, the test may prove his guilt. Such is the case at bar. Williams did not present any evidence to refute the radar check. Rather than help prove his innocence, the calibration test evidence bolstered the prima facie case made by the radar check by confirming that Williams was in fact exceeding the speed limit. Furthermore, even if the calibration test evidence in this case tended to [\*\*\*344] rebut the prima facie case of speed, the statute confers upon the fact finder absolute discretion [\*\*\*13] concerning the weight to be attached to the test results.

Clearly, the calibration test evidence was relevant in fixing the punishment, and no doubt the jury considered it for this purpose. These two instructions stated the correct principles of law; therefore, we conclude that the court committed no error in giving them.

#### IV. REFUSAL TO PERMIT ARGUMENT ON COURT COSTS

During final argument, defense counsel commented to the jury that a finding of guilt would result in a fine, and also in payment of court costs by the defendant. The Commonwealth objected to the remark about court costs, and the court admonished the jury to disregard the statement. Williams asserts that the trial court erred in refusing to allow his counsel to mention his liability for court costs in the event he was found guilty.

(6) [HN5] The defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and, therefore, should not be addressed or alluded to in the final argument. "Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense." *Angela's Case*, 51 Va. 724 (10 Gratt.) 696, 701 (1853). [\*\*\*14] Rather, it constitutes an item of debt from the defendant to the Commonwealth for money "paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong." *Id.* Therefore, the trial court was correct in advising the [\*522] jury to disregard the statement of counsel pertaining to court costs.

For the reasons stated, the judgment of the trial court is affirmed.

*Affirmed.*

184 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF MEQUON, Plaintiff-Respondent, v. MICHAEL STERR,  
Defendant-Appellant.**

**No. 95-2226**

**COURT OF APPEALS OF WISCONSIN, DISTRICT TWO**

*200 Wis. 2d 494; 546 N.W.2d 887; 1996 Wisc. App. LEXIS 255*

**February 28, 1996, Released**

**NOTICE:** [\*1] UNPUBLISHED LIMITED PRECEDENT OPINION - REFER TO LOCAL RULE 809.23(1)(B)5, STATS.

**PRIOR HISTORY:** APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Ozaukee County Circuit Court (Wisconsin), which entered a jury verdict convicting him of operating a motor vehicle with a prohibited blood alcohol concentration in violation of *Wis. Stat. § 346.63(1)(b)*.

**OVERVIEW:** On appeal from his conviction, defendant argued that the trial court erred in admitting the result of an intoxilyzer test because of a lack of foundation as to its accuracy and that the trial court should have dismissed the charge based on the inadmissibility of the test result. The court affirmed, holding that the lack of presentation of proof of certification proving that the intoxilyzer machine had been properly tested for accuracy within the time period required under *Wis. Stat. § 343.305(6)(b)* did not render the test results inadmissible. Tests by recognized methods did not need to be proved for reliability in every case; rather, whether the test was properly conducted was a matter for the defense. The mandatory aspects regarding automatic admissibility of test results under *Wis. Stat. § 343.305(6)(c)* related only to the procedures for administering the test and not to the requirement that the accuracy of the machine be tested regularly. Although a trial court could refuse to admit test results under proper circumstances, defendant did not establish that the accuracy of the test was so questionable that its results were not probative.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** accuracy, admissibility, blood alcohol, concentration, mandatory, machine, breath, jury instruction, motor vehicle, admissible, certification, automatic, requested instruction, breath sample, test result, breathalyzer,

administered, misuse, ditch, department of transportation, motion to dismiss, chemical analysis, law enforcement, inadmissible, intervals, training, approve, certify, tested

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview Governments > Legislation > Interpretation***

[HN1] Statutory interpretation is a question of law that is resolved without deference to the trial court.

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN2] See *Wis. Stat. § 343.305(6)(b)*.

#### ***Evidence > Inferences & Presumptions > Presumptions***

##### ***Evidence > Scientific Evidence > General Overview***

[HN3] Tests by recognized methods, such as speedometer, breathalyzer, and radar, do not need to be proved for reliability in every case. These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense.

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN4] The requirements of *Wis. Stat. § 343.305(6)(c)*, which outline the procedures which must be followed when a breath test is administered, must be given a mandatory reading. The test must consist of an adequate breath sample analysis, a calibration sample, and a second adequate breath sample. *Wis. Stat. § 343.305(6)(c)*. In order to be adequate, the instrument must analyze the sample and not reject it as deficient. Finally, the individual tested must provide two separate, adequate breath samples in the proper sequence. Failure to meet these requirements undermines the accuracy of the underlying test.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

##### ***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

##### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN5] The mandatory aspects regarding automatic admissibility relate only to the procedures for administering a breath test, *Wis. Stat. § 343.305(6)(c)*, not to the requirements that the Department of Transportation certify the accuracy of the machines at regular intervals. *Wis. Stat. § 343.305(6)(b)*. This does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative.

#### ***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

##### ***Criminal Law & Procedure > Jury Instructions > General Overview***

##### ***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN6] A trial court has wide discretion in instructing a jury. If the instructions adequately cover the law, the appellate court will find no misuse of discretion when the court refuses to give a requested instruction, even when the proposed instruction is correct.

**JUDGES:** SNYDER, J.

**OPINION BY: SNYDER****OPINION:**

SNYDER, J. Michael Sterr was convicted of operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b), *STATS.* n1 Sterr contends that the trial court erred in admitting the result of the Intoxilyzer test because of a lack of foundation as to its accuracy. In a related claim, he also argues that based on the inadmissibility of the test result, the trial court should have dismissed the § 346.63(1)(b) count at the close of the evidence. Finally, he claims that the trial court erred when it failed to give a requested jury instruction.

n1 STERR WAS ALSO CHARGED WITH OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, CONTRARY TO § 346.63(1)(A), *STATS.* The jury found him not guilty of that charge.

[\*2]

We conclude that the lack of presentation of proof of certification (proving the machine had been properly tested for accuracy within the required time period) did not render the test results inadmissible. Therefore, the trial court's denial of the requested dismissal of the "operating with a prohibited blood alcohol concentration" count was proper. The trial court's refusal to give Sterr's requested jury instruction was also properly within its discretion. Consequently, we affirm.

The underlying incident occurred when City of Mequon Police Officer Darren Selk, on routine patrol, observed a vehicle in a ditch. After Selk stopped to offer assistance, Sterr identified himself as the driver of the vehicle and stated that he drove into the ditch when another vehicle attempted to pass him and he overcompensated to the right. During his conversation with Sterr, Selk detected an odor of alcohol; after Sterr failed field sobriety tests, he was placed under arrest and transported to the Mequon police department. An Intoxilyzer test showed his blood alcohol concentration to be 0.17%. Sterr pled not guilty to the charged violations of § 346.63(1)(a) and (b), *STATS.*, and a jury trial was held. [\*3] After Sterr was found guilty of operating a motor vehicle with a prohibited blood alcohol concentration, this appeal followed.

Sterr's first claim of error is based upon the admission of the results of the Intoxilyzer test. At trial, Sterr claimed that the test results were not admissible because the City had not introduced "certificates of accuracy," and this omission was contrary to the requirements of § 343.305(6)(b), *STATS.*

A determination of whether the test results were admissible is governed by the language of § 343.305(6)(b), *STATS.* [HN1] Statutory interpretation is a question of law that is resolved without deference to the trial court. *Sauer v. Reliance Ins. Co.*, 152 Wis. 2d 234, 240, 448 N.W.2d 256, 259 (Ct. App. 1989).

*Section 343.305(6)(b), STATS.*, requires:

[HN2] The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

1. Approve training manuals and courses ... for the training of law enforcement officers in the chemical analysis of a person's breath;

...

3. Have trained technicians ... test and certify the accuracy of the equipment to be used by law enforcement officers [\*4] ... at intervals of not more than 120 days ...

The issue in this case is whether the requirements of this paragraph are a prerequisite to the automatic admissibility of the test result.

[HN3] Tests by recognized methods, such as speedometer, breathalyzer and radar, do not need to be proved for reliability in every case. *State v. Trailer Serv., Inc.*, 61 Wis. 2d 400, 408, 212 N.W.2d 683, 688 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. *Id.* at 408, 212 N.W.2d at 688-89. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. *Id.* at 408, 212 N.W.2d at 688.

The *Trailer Service* case was subsequently followed by *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981), which determined that compliance with administrative code procedures was not required as a foundation for the admissibility of breathalyzer results. *Id.* at 674, 314 N.W.2d at 913. In that case the court noted that "an attack [\*5] on the qualifications of the operator, the methods of operation or the accuracy of the equipment is a matter of defense and goes to the weight to be accorded to the test and not to the test's admissibility." *Id.* at 675 n.6, 314 N.W.2d at 913.

According to *State v. Grade*, 165 Wis. 2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991), [HN4] the requirements of § 343.305(6)(c), STATS., which outline the *procedures* which must be followed when the test is administered, must be given a mandatory reading. The test must consist of an adequate breath sample analysis, a calibration sample and a second adequate breath sample. See § 343.305(6)(c). In order to be adequate, the instrument must analyze the sample and not reject it as deficient. *Id.* Finally, the individual tested must provide two separate, adequate breath samples in the proper sequence. *Id.* Failure to meet these requirements undermines the accuracy of the underlying test. *Grade*, 165 Wis. 2d at 149, 477 N.W.2d at 317.

Our review of case law which addresses the requirements for the admissibility of Intoxilyzer test results leads us to conclude that [HN5] the mandatory aspects regarding [\*6] automatic admissibility relate only to the procedures for administering the test, see § 343.305(6)(c), STATS., not to the requirements that the Department of Transportation certify the accuracy of the machines at regular intervals. See § 343.305(6)(b). n2 We reiterate, as we stated in *Wertz*, that this holding does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative. *Wertz*, 105 Wis. 2d at 674-75, 314 N.W.2d at 913. That, however, did not happen here. n3

n2 Sterr argues that the statement in § 343.305(5)(d), STATS., "the results of a test administered in accordance with this section are admissible," requires that all portions of the statute are mandatory. Case law interpreting the requirements of § 343.305 has not supported this broad generalization. See generally *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981), and *State v. Grade*, 165 Wis. 2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991).

[\*7]

n3 We note that Sterr points to an unpublished decision, *State v. Hirthe*, No. 95-1058-CR, unpublished slip op. (Wis. Ct. App. Sept. 6, 1995), for the proposition that the language of the statute is mandatory, and automatic admissibility is dependent upon compliance with the statute. The significant difference is that in that case evidence was produced that the machine had been calibrated 167 days before the testing of the defendant's breath, which was an affirmative showing by the defense that the accuracy of the test results was suspect.

200 Wis. 2d 494; 546 N.W.2d 887;  
1996 Wisc. App. LEXIS 255, \*7

We conclude that the trial court did not err when it admitted the results of the Intoxilyzer test. Based upon the proper admission of the test results, the trial court's denial of Sterr's motion to dismiss the charge of operating a motor vehicle with a prohibited blood alcohol concentration was proper. The results of the Intoxilyzer test were properly before the jury, and the denial of the motion to dismiss was a proper exercise of discretion.

Sterr's final claim is that the trial court erred when it denied a requested jury instruction. The instruction [\*8] would have informed the jury of the fact that § 343.305(6)(b)3, *STATS.*, requires the Intoxilyzer to be certified every 120 days and that the City had offered no proof of such certification.

[HN6] A trial court has wide discretion in instructing a jury. *Wingad v. John Deere & Co.*, 187 Wis. 2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). If the instructions adequately cover the law, we will find no misuse of discretion when the court refuses to give a requested instruction, even when the proposed instruction is correct. *Id.* The trial court properly determined that the lack of evidence of certification of the machine did not render inadmissible Sterr's test results. The denial of Sterr's requested instruction was in line with its earlier determination. There was no misuse of discretion.

*By the Court.*--Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, *STATS.*

185 of 195 DOCUMENTS



Analysis

As of: Jan 31, 2007

**CITY OF MEQUON, Plaintiff-Respondent, v. MICHAEL STERR,  
Defendant-Appellant.**

**No. 95-2226**

**COURT OF APPEALS OF WISCONSIN, DISTRICT TWO**

*200 Wis. 2d 494; 546 N.W.2d 887; 1996 Wisc. App. LEXIS 255*

**February 28, 1996, Released**

**NOTICE:** [\*1] UNPUBLISHED LIMITED PRECEDENT OPINION - REFER TO LOCAL RULE 809.23(1)(B)5, STATS.

**PRIOR HISTORY:** APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the judgment of the Ozaukee County Circuit Court (Wisconsin), which entered a jury verdict convicting him of operating a motor vehicle with a prohibited blood alcohol concentration in violation of *Wis. Stat. § 346.63(1)(b)*.

**OVERVIEW:** On appeal from his conviction, defendant argued that the trial court erred in admitting the result of an intoxilyzer test because of a lack of foundation as to its accuracy and that the trial court should have dismissed the charge based on the inadmissibility of the test result. The court affirmed, holding that the lack of presentation of proof of certification proving that the intoxilyzer machine had been properly tested for accuracy within the time period required under *Wis. Stat. § 343.305(6)(b)* did not render the test results inadmissible. Tests by recognized methods did not need to be proved for reliability in every case; rather, whether the test was properly conducted was a matter for the defense. The mandatory aspects regarding automatic admissibility of test results under *Wis. Stat. § 343.305(6)(c)* related only to the procedures for administering the test and not to the requirement that the accuracy of the machine be tested regularly. Although a trial court could refuse to admit test results under proper circumstances, defendant did not establish that the accuracy of the test was so questionable that its results were not probative.

**OUTCOME:** The court affirmed the judgment of the trial court.

**CORE TERMS:** accuracy, admissibility, blood alcohol, concentration, mandatory, machine, breath, jury instruction, motor vehicle, admissible, certification, automatic, requested instruction, breath sample, test result, breathalyzer,

administered, misuse, ditch, department of transportation, motion to dismiss, chemical analysis, law enforcement, inadmissible, intervals, training, approve, certify, tested

### **LexisNexis(R) Headnotes**

#### ***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview Governments > Legislation > Interpretation***

[HN1] Statutory interpretation is a question of law that is resolved without deference to the trial court.

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN2] See *Wis. Stat. § 343.305(6)(b)*.

#### ***Evidence > Inferences & Presumptions > Presumptions***

##### ***Evidence > Scientific Evidence > General Overview***

[HN3] Tests by recognized methods, such as speedometer, breathalyzer, and radar, do not need to be proved for reliability in every case. These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense.

#### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN4] The requirements of *Wis. Stat. § 343.305(6)(c)*, which outline the procedures which must be followed when a breath test is administered, must be given a mandatory reading. The test must consist of an adequate breath sample analysis, a calibration sample, and a second adequate breath sample. *Wis. Stat. § 343.305(6)(c)*. In order to be adequate, the instrument must analyze the sample and not reject it as deficient. Finally, the individual tested must provide two separate, adequate breath samples in the proper sequence. Failure to meet these requirements undermines the accuracy of the underlying test.

#### ***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Admissibility***

##### ***Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor***

##### ***Evidence > Scientific Evidence > Sobriety Tests***

[HN5] The mandatory aspects regarding automatic admissibility relate only to the procedures for administering a breath test, *Wis. Stat. § 343.305(6)(c)*, not to the requirements that the Department of Transportation certify the accuracy of the machines at regular intervals. *Wis. Stat. § 343.305(6)(b)*. This does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative.

#### ***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***

##### ***Criminal Law & Procedure > Jury Instructions > General Overview***

##### ***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN6] A trial court has wide discretion in instructing a jury. If the instructions adequately cover the law, the appellate court will find no misuse of discretion when the court refuses to give a requested instruction, even when the proposed instruction is correct.

**JUDGES:** SNYDER, J.

**OPINION BY: SNYDER****OPINION:**

SNYDER, J. Michael Sterr was convicted of operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b), *STATS.* n1 Sterr contends that the trial court erred in admitting the result of the Intoxilyzer test because of a lack of foundation as to its accuracy. In a related claim, he also argues that based on the inadmissibility of the test result, the trial court should have dismissed the § 346.63(1)(b) count at the close of the evidence. Finally, he claims that the trial court erred when it failed to give a requested jury instruction.

n1 STERR WAS ALSO CHARGED WITH OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, CONTRARY TO § 346.63(1)(A), *STATS.* The jury found him not guilty of that charge.

[\*2]

We conclude that the lack of presentation of proof of certification (proving the machine had been properly tested for accuracy within the required time period) did not render the test results inadmissible. Therefore, the trial court's denial of the requested dismissal of the "operating with a prohibited blood alcohol concentration" count was proper. The trial court's refusal to give Sterr's requested jury instruction was also properly within its discretion. Consequently, we affirm.

The underlying incident occurred when City of Mequon Police Officer Darren Selk, on routine patrol, observed a vehicle in a ditch. After Selk stopped to offer assistance, Sterr identified himself as the driver of the vehicle and stated that he drove into the ditch when another vehicle attempted to pass him and he overcompensated to the right. During his conversation with Sterr, Selk detected an odor of alcohol; after Sterr failed field sobriety tests, he was placed under arrest and transported to the Mequon police department. An Intoxilyzer test showed his blood alcohol concentration to be 0.17%. Sterr pled not guilty to the charged violations of § 346.63(1)(a) and (b), *STATS.*, and a jury trial was held. [\*3] After Sterr was found guilty of operating a motor vehicle with a prohibited blood alcohol concentration, this appeal followed.

Sterr's first claim of error is based upon the admission of the results of the Intoxilyzer test. At trial, Sterr claimed that the test results were not admissible because the City had not introduced "certificates of accuracy," and this omission was contrary to the requirements of § 343.305(6)(b), *STATS.*

A determination of whether the test results were admissible is governed by the language of § 343.305(6)(b), *STATS.* [HN1] Statutory interpretation is a question of law that is resolved without deference to the trial court. *Sauer v. Reliance Ins. Co.*, 152 Wis. 2d 234, 240, 448 N.W.2d 256, 259 (Ct. App. 1989).

*Section 343.305(6)(b), STATS.*, requires:

[HN2] The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

1. Approve training manuals and courses ... for the training of law enforcement officers in the chemical analysis of a person's breath;

...

3. Have trained technicians ... test and certify the accuracy of the equipment to be used by law enforcement officers [\*4] ... at intervals of not more than 120 days ...

The issue in this case is whether the requirements of this paragraph are a prerequisite to the automatic admissibility of the test result.

[HN3] Tests by recognized methods, such as speedometer, breathalyzer and radar, do not need to be proved for reliability in every case. *State v. Trailer Serv., Inc.*, 61 Wis. 2d 400, 408, 212 N.W.2d 683, 688 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. *Id.* at 408, 212 N.W.2d at 688-89. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. *Id.* at 408, 212 N.W.2d at 688.

The *Trailer Service* case was subsequently followed by *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981), which determined that compliance with administrative code procedures was not required as a foundation for the admissibility of breathalyzer results. *Id.* at 674, 314 N.W.2d at 913. In that case the court noted that "an attack [\*5] on the qualifications of the operator, the methods of operation or the accuracy of the equipment is a matter of defense and goes to the weight to be accorded to the test and not to the test's admissibility." *Id.* at 675 n.6, 314 N.W.2d at 913.

According to *State v. Grade*, 165 Wis. 2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991), [HN4] the requirements of § 343.305(6)(c), *STATS.*, which outline the *procedures* which must be followed when the test is administered, must be given a mandatory reading. The test must consist of an adequate breath sample analysis, a calibration sample and a second adequate breath sample. *See* § 343.305(6)(c). In order to be adequate, the instrument must analyze the sample and not reject it as deficient. *Id.* Finally, the individual tested must provide two separate, adequate breath samples in the proper sequence. *Id.* Failure to meet these requirements undermines the accuracy of the underlying test. *Grade*, 165 Wis. 2d at 149, 477 N.W.2d at 317.

Our review of case law which addresses the requirements for the admissibility of Intoxilyzer test results leads us to conclude that [HN5] the mandatory aspects regarding [\*6] automatic admissibility relate only to the procedures for administering the test, *see* § 343.305(6)(c), *STATS.*, not to the requirements that the Department of Transportation certify the accuracy of the machines at regular intervals. *See* § 343.305(6)(b). n2 We reiterate, as we stated in *Wertz*, that this holding does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative. *Wertz*, 105 Wis. 2d at 674-75, 314 N.W.2d at 913. That, however, did not happen here. n3

n2 Sterr argues that the statement in § 343.305(5)(d), *STATS.*, "the results of a test administered in accordance with this section are admissible," requires that all portions of the statute are mandatory. Case law interpreting the requirements of § 343.305 has not supported this broad generalization. *See generally City of New Berlin v. Wertz*, 105 Wis. 2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981), and *State v. Grade*, 165 Wis. 2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991).

[\*7]

n3 We note that Sterr points to an unpublished decision, *State v. Hirthe*, No. 95-1058-CR, unpublished slip op. (Wis. Ct. App. Sept. 6, 1995), for the proposition that the language of the statute is mandatory, and automatic admissibility is dependent upon compliance with the statute. The significant difference is that in that case evidence was produced that the machine had been calibrated 167 days before the testing of the defendant's breath, which was an affirmative showing by the defense that the accuracy of the test results was suspect.

200 Wis. 2d 494; 546 N.W.2d 887;  
1996 Wisc. App. LEXIS 255, \*7

We conclude that the trial court did not err when it admitted the results of the Intoxilyzer test. Based upon the proper admission of the test results, the trial court's denial of Sterr's motion to dismiss the charge of operating a motor vehicle with a prohibited blood alcohol concentration was proper. The results of the Intoxilyzer test were properly before the jury, and the denial of the motion to dismiss was a proper exercise of discretion.

Sterr's final claim is that the trial court erred when it denied a requested jury instruction. The instruction [\*8] would have informed the jury of the fact that § 343.305(6)(b)3, *STATS.*, requires the Intoxilyzer to be certified every 120 days and that the City had offered no proof of such certification.

[HN6] A trial court has wide discretion in instructing a jury. *Wingad v. John Deere & Co.*, 187 Wis. 2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). If the instructions adequately cover the law, we will find no misuse of discretion when the court refuses to give a requested instruction, even when the proposed instruction is correct. *Id.* The trial court properly determined that the lack of evidence of certification of the machine did not render inadmissible Sterr's test results. The denial of Sterr's requested instruction was in line with its earlier determination. There was no misuse of discretion.

*By the Court.*--Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, *STATS.*

186 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**J. D. VROOMAN, Appellant (Appellant-Defendant), v. The STATE of Wyoming,  
Appellee (Appellee-Plaintiff)**

**No. 5610**

**Supreme Court of Wyoming**

***642 P.2d 782; 1982 Wyo. LEXIS 318***

**March 26, 1982**

**PRIOR HISTORY:** [\*\*1]

Appeal from the District Court of Teton County, The Honorable Robert B. Ranck, Judge.

**DISPOSITION:**

Affirmed.

**CORE TERMS:** driving, highway, speeding, implied consent law, patrolman, tape, probable cause, radar, conversation, chemical test, interrogation, suspension, arrest, influence of alcohol, breath test, recording, custody, motor vehicle, patrol car, convicted, admitting, clocking, proper foundation, arrested person, confession, excessive speed, breathalyzer, arrested, accuracy, alcohol

**COUNSEL:**

Timothy J. Bommer, Jackson, for Appellant.

Steven F. Freudenthal, Attorney General; Gerald A. Stack, Deputy Attorney General, Criminal Division, Cheyenne; and D. Terry Rogers, appointed Special Assistant Attorney General, Jackson, for Appellee.

**JUDGES:**

Rose, C.J., and Raper, Thomas, Rooney, and Brown, JJ.

**OPINION BY:**

BROWN

**OPINION:**

[\*783] Mr. Vrooman appeals from a conviction for driving while under the influence of intoxicating liquor

(DWUI) in violation of § 31-5-233(a), W.S.1977.

Appellant was convicted in the justice of the peace court and his conviction was affirmed by the district court.

Appellant urges four issues:

"I. Whether the Justice Court erred in finding that there was probable cause for the arrest of the Appellant and as such erred in admitting into evidence the highway patrolman's observations of Appellant, statements made by Appellant, and the results of the breath test administered to Appellant.

"II. Whether the Justice Court erred in admitting into evidence the tape recorded statement of Appellant despite Appellant's refusal to give a statement [\*\*2] and his requests that counsel be present during questioning, both of which the arresting officer ignored.

"III. Whether the Justice Court erred in admitting into evidence the results of the breath test which was conducted after an improper advisement of Appellant's rights under the implied consent law of the State.

"IV. Whether the District Court erred in finding that the Wyoming Rules of Appellate Procedure were inapplicable to Appellant's appeal from Justice Court to the District Court."

We will affirm.

On June 12, 1979, appellant was driving southbound on Highway 26 in Grand Teton National Park. He was stopped by Highway Patrolman David Schofield (Schofield), who was patrolling north. Schofield observed two vehicles approaching him in the southbound lane. The first vehicle was a blue van; the second, appellant's vehicle, was approximately one-quarter mile behind the blue van. Schofield observed his radar gun reading between 57 miles per hour and 83 miles per hour. He thought, however, that the blue van was traveling close to the speed limit, while appellant's vehicle was exceeding the speed limit. When appellant's vehicle was about a quarter of a mile away from [\*\*3] the patrol car, it slowed down drastically.

After citing appellant for speeding, n1 Schofield smelled a strong odor of alcoholic beverage and then submitted appellant to a field test unit called an "Alcosensor." Appellant failed this test; Schofield then administered field sobriety tests. He testified that because of a combination of the alcosensor test, the smell of alcohol, and appellant's failure of field sobriety tests, he determined that there was probable cause to arrest appellant for driving while under the influence of alcohol.

n1 The citation for speeding was dismissed by the State in the justice of the peace court.

Appellant was then arrested and placed in Schofield's patrol car for transportation to Jackson, Wyoming, during which time Schofield tape recorded his conversation with appellant. Before that time Schofield had advised appellant of his *Miranda* rights, and appellant had refused to give a statement. [\*784] While being transported to Jackson, Schofield asked Vrooman to take a breathalyzer [\*\*4] test.

Schofield advised appellant of the implied consent law, after which appellant consented to take the breathalyzer test. The breathalyzer test showed appellant's blood alcohol level to be 0.11% at the time he was stopped for speeding.  
n2

n2 § 31-5-233(b)(iii), W.S.1977:

"If there was at that time ten one-hundredths of one percent (0.10%) or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor, to a degree which renders him incapable of safely driving a motor vehicle;"

## I

Appellant asserts that the highway patrolman did not have probable cause to stop him for speeding. He argues that any evidence that appellant was driving while under the influence of alcohol arose from the initial, illegal stop for speeding and therefore should have been suppressed. n3 We do not agree.

n3 Appellant made a timely suppression motion which was determined adversely to him.

[\*\*5]

We must initially determine whether the highway patrolman had probable cause to stop appellant for speeding. There was considerable testimony at trial concerning the reliability of the radar. There was testimony regarding Schofield's training and experience in the use of radar, as well as testimony regarding testing and calibration of the radar unit involved. Through effective cross-examination of the State's witnesses, appellant was able to cast some doubt on the accuracy of the radar clocking. However, the testimony about the accuracy of the radar clocking obscures the initial issue. While the accuracy of a radar clocking may be determinative of appellant's guilt or innocence of speeding, it does not determine whether there was probable cause to stop appellant for speeding. In addition to the radar clocking showing excessive speed, the highway patrolman observed appellant drastically reduce his speed when the patrol car could be seen by appellant. Also, the highway patrolman observed the front of appellant's vehicle dip. A combination of these circumstances certainly constituted probable cause to stop appellant for speeding.

A court must generally determine whether there [\*\*6] was probable cause for a warrantless arrest by using a standard of reasonableness, viewed with practicality and applied with good sense. *Raigosa v. State, Wyo., 562 P.2d 1009 (1977)*. Furthermore, a court must consider the facts and circumstances known to the officer which would lead a reasonably cautious and prudent man to believe that the person to be arrested has committed a crime. *Neilson v. State, Wyo., 599 P.2d 1326 (1979)*; and *DeHerrera v. State, Wyo., 589 P.2d 845 (1979)*. Stopping appellant for speeding was not a "sham" or a pretext for a warrantless search suggested by appellant but was based on probable cause.

Having determined that the highway patrolman had probable cause to stop appellant and cite him for speeding, we have no problem with finding probable cause for appellant's arrest for driving while under the influence of alcohol. The officer initially detected excessive speed and erratic driving. After issuing the speeding citation, the officer detected a strong odor of alcohol on appellant. Appellant's balance was unsteady, his face was flushed, and his speech was slurred. Appellant failed the field sobriety test. Appellant could not put his finger [\*\*7] to his nose, could not recite the alphabet, and could not count to four with his fingers. Schofield would have been remiss in his duties had he not arrested appellant for driving while under the influence of alcohol.

## II

Schofield had a small portable cassette recorder in his patrol car, which he placed on top of the console where appellant could see it. He started the recorder shortly after he got back into the vehicle, [\*\*785] and recorded all conversation with appellant, who was aware that the conversation was being recorded. The tape was stopped during periods of silence. Schofield made the recording while he drove appellant from the scene to the courthouse. Appellant was advised of his *Miranda* rights, which he indicated that he understood. Appellant made no admissions on the tape. Schofield did not threaten or coerce him in any way.

The tape which Schofield identified as being a true and accurate recording contains no evidence of interrogation or

questioning by officer Schofield. It provides evidence of the conversation with appellant and indicates that Schofield informed appellant of the implied consent law, and illustrated appellant's quality of speech and [\*\*8] general demeanor.

The justice of the peace admitted the tape into evidence " \* \* \* for the officer advising Mr. Vrooman of his rights under the implied consent law; for the quality of Mr. Vrooman's voice, and for the Court to assess his reasoning process and/or whether he is rambling." Before finding guilt, the justice of the peace stated: "The Court will reflect that it is influenced very much by the quality of the tape and the voice on the tape."

Appellant contends that the conversation after he said he wanted an attorney should have been suppressed. Appellant cites *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), reh. denied 385 U.S. 890, 87 S. Ct. 11, 17 L. Ed. 2d 121 and *Dryden v. State, Wyo.*, 535 P.2d 483 (1975), to support his position.

*Miranda* says that while a defendant is in custody he cannot be interrogated against his will, and that any confession resulting from such interrogation is inadmissible. *Miranda* does not apply here, because appellant made no confession. There was also no interrogation under the definition provided in *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 1689, 64 L. Ed. [\*\*9] 2d 297, 308 (1980):

" \* \* \* 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

"We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. \* \* \*"

*Dryden v. State* held that after a defendant indicated that he wanted an attorney "the county authorities could not thereafter enter into other interrogation unless and until the defendant had himself reopened the subject." 535 P.2d at 493.

Neither the mandates of *Miranda* nor *Dryden* were violated here. The highway patrolman did not solicit a confession or admission, [\*\*10] nor were any made. The appellant was not interrogated after he indicated that he wanted a lawyer. The only conversation was the highway patrolman's advising appellant of the implied consent law and other normal conversation. The tape demonstrated to the justice of the peace the quality of appellant's speech and his general demeanor. It contained only matters that the highway patrolman could properly testify to at trial. The tape gave the justice of the peace direct information rather than the highway patrolman's characterization and impressions.

It is well established that sound recordings are admissible in criminal actions where the recording is relevant and material, and a proper foundation is laid. *State v. Warwick, Mont.*, 158 Mont. 531, 494 P.2d 627 (1972). A proper foundation was laid by the State, and the recording may thus be considered as direct evidence subject to the same admissibility as eyewitness testimony. *State v. Bassett, Mont.*, 189 Mont. 28, 614 P.2d 1054 (1980). Admissibility after a proper foundation has [\*\*786] been laid, rests within the sound discretion of the trial court. *Peterson v. State, Wyo.*, 586 P.2d 144 (1978). We hold that the [\*\*11] trial judge did not abuse his discretion by admitting the tape into evidence.

### III

After appellant's arrest for driving while under the influence of alcohol, Schofield asked him several times to take a breath test. The highway patrolman attempted to explain to appellant the implied consent law as follows:

"OFFICER SCHOFIELD: Okay, sir, under the Implied Consent Law of the State of Wyoming --

"MR. VROOMAN: I already know that.

"OFFICER SCHOFIELD: Okay. You are under arrest for driving under the influence --

"MR. VROOMAN: Okay.

"OFFICER SCHOFIELD: --of alcohol. Under the Implied Consent Law of the State of Wyoming, I am requesting that you take a chemical test to determine the degree of your intoxication. I request that you take a breath type test at the Sheriff's Office in Jackson. At your option and at your expense, you may have a blood test taken at the hospital. Okay?

"Your refusal to take this chemical test may result in your driving privileges being suspended for 30 days, regardless of whether you are convicted of the charge of D.W.U.I. If you are convicted, and you refuse this test, the suspension will be in addition to the driving under [\*\*12] the influence suspension.

"So what happens is, I am requesting that you take this test. If you refuse it, your driver's license may be suspended for 30 days. If convicted in Court after that, that suspension will also be added to the suspension for the conviction. Do you understand that?

"Mr. Vrooman: Oh yeh.

"OFFICER SCHOFIELD: Well, I just need an answer either yes or no if you will take the breath test. If you are not happy with the results of that test you can have a blood test taken at the hospital at your expense. Do you want to take either test?"

The implied consent law provides in part:

"(a) Any person who operates a motor vehicle upon a public street or highway is deemed to have given consent, subject to the provisions herein, to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood \* \* \* \*. The arrested person shall be told that his failure to submit to the chemical test may result in the suspension of his privilege to operate a motor vehicle. \* \* \* \*" § 31-6-102(a), W.S.1977.

"If a person under arrest refuses \* \* \* \* to submit to a chemical test \* \* \* \* none shall be given [\*\*13] \* \* \* \*." § 31-6-102(c), W.S.1977.

In *State v. Marquez*, Wyo., 638 P.2d 1292 (1982), we said the arrested person should be told that his failure to submit to the chemical test may result in the suspension of his privilege to drive a motor vehicle. In *State v. Chastain*, Wyo., 594 P.2d 458 (1979), we held that failure to advise an arrested person of the implied consent law rendered the result of a blood-alcohol test inadmissible in court. Here appellant was properly advised of the implied consent law. Additionally, there was abundant, even overwhelming, evidence before the court from which the judge could have found the appellant guilty without the result of the breath test. There was evidence of excessive speed, erratic driving, a strong odor of alcohol, appellant's flushed face and slurred speech, and failure of a field sobriety test. Also, appellant failed the finger-to-nose test, failed to recite the alphabet and could not count to four on his fingers.

IV

Finally, appellant asserts that on appeal to the district court, Wyoming Rules of Appellate Procedure should have

been followed rather than Rules of Criminal Procedure for justice of the peace courts and municipal [\*\*14] courts. We decline to address [\*787] that issue, if it can be characterized as an issue in this case. Appellant has not briefed his fourth assignment of error, nor has he favored us with any argument in support of the alleged error.

Appellant maintains that he unsuccessfully attempted to invoke Rule 4.03, W.R.A.P. n4 in his appeal from the justice of the peace court to the district court. We do not understand appellant's complaint. Both the electronic tapes of the proceedings in the justice court and a transcript were before the district court on appeal. Additionally, the district court had the original exhibits, papers and documents that were before the justice court. The parties submitted briefs to the district court. Rule 4.03, supra, would only be applicable if a transcript or electronic recording were not available in an appeal. There is no merit to appellant's assignment of error Number IV.

n4 Rule 4.03, W.R.A.P.:

"If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within ten (10) days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

[\*\*15]

Affirmed.

187 of 195 DOCUMENTS



Cited

As of: Jan 31, 2007

**J. D. VROOMAN, Appellant (Appellant-Defendant), v. The STATE of Wyoming,  
Appellee (Appellee-Plaintiff)**

**No. 5610**

**Supreme Court of Wyoming**

**642 P.2d 782; 1982 Wyo. LEXIS 318**

**March 26, 1982**

**PRIOR HISTORY:** [\*\*1]

Appeal from the District Court of Teton County, The Honorable Robert B. Ranck, Judge.

**DISPOSITION:**

Affirmed.

**CORE TERMS:** driving, highway, speeding, implied consent law, patrolman, tape, probable cause, radar, conversation, chemical test, interrogation, suspension, arrest, influence of alcohol, breath test, recording, custody, motor vehicle, patrol car, convicted, admitting, clocking, proper foundation, arrested person, confession, excessive speed, breathalyzer, arrested, accuracy, alcohol

**COUNSEL:**

Timothy J. Bommer, Jackson, for Appellant.

Steven F. Freudenthal, Attorney General; Gerald A. Stack, Deputy Attorney General, Criminal Division, Cheyenne; and D. Terry Rogers, appointed Special Assistant Attorney General, Jackson, for Appellee.

**JUDGES:**

Rose, C.J., and Raper, Thomas, Rooney, and Brown, JJ.

**OPINION BY:**

BROWN

**OPINION:**

[\*783] Mr. Vrooman appeals from a conviction for driving while under the influence of intoxicating liquor

(DWUI) in violation of § 31-5-233(a), W.S.1977.

Appellant was convicted in the justice of the peace court and his conviction was affirmed by the district court.

Appellant urges four issues:

"I. Whether the Justice Court erred in finding that there was probable cause for the arrest of the Appellant and as such erred in admitting into evidence the highway patrolman's observations of Appellant, statements made by Appellant, and the results of the breath test administered to Appellant.

"II. Whether the Justice Court erred in admitting into evidence the tape recorded statement of Appellant despite Appellant's refusal to give a statement [\*\*2] and his requests that counsel be present during questioning, both of which the arresting officer ignored.

"III. Whether the Justice Court erred in admitting into evidence the results of the breath test which was conducted after an improper advisement of Appellant's rights under the implied consent law of the State.

"IV. Whether the District Court erred in finding that the Wyoming Rules of Appellate Procedure were inapplicable to Appellant's appeal from Justice Court to the District Court."

We will affirm.

On June 12, 1979, appellant was driving southbound on Highway 26 in Grand Teton National Park. He was stopped by Highway Patrolman David Schofield (Schofield), who was patrolling north. Schofield observed two vehicles approaching him in the southbound lane. The first vehicle was a blue van; the second, appellant's vehicle, was approximately one-quarter mile behind the blue van. Schofield observed his radar gun reading between 57 miles per hour and 83 miles per hour. He thought, however, that the blue van was traveling close to the speed limit, while appellant's vehicle was exceeding the speed limit. When appellant's vehicle was about a quarter of a mile away from [\*\*3] the patrol car, it slowed down drastically.

After citing appellant for speeding, n1 Schofield smelled a strong odor of alcoholic beverage and then submitted appellant to a field test unit called an "Alcosensor." Appellant failed this test; Schofield then administered field sobriety tests. He testified that because of a combination of the alcosensor test, the smell of alcohol, and appellant's failure of field sobriety tests, he determined that there was probable cause to arrest appellant for driving while under the influence of alcohol.

n1 The citation for speeding was dismissed by the State in the justice of the peace court.

Appellant was then arrested and placed in Schofield's patrol car for transportation to Jackson, Wyoming, during which time Schofield tape recorded his conversation with appellant. Before that time Schofield had advised appellant of his *Miranda* rights, and appellant had refused to give a statement. [\*784] While being transported to Jackson, Schofield asked Vrooman to take a breathalyzer [\*\*4] test.

Schofield advised appellant of the implied consent law, after which appellant consented to take the breathalyzer test. The breathalyzer test showed appellant's blood alcohol level to be 0.11% at the time he was stopped for speeding.  
n2

n2 § 31-5-233(b)(iii), W.S.1977:

"If there was at that time ten one-hundredths of one percent (0.10%) or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor, to a degree which renders him incapable of safely driving a motor vehicle;"

## I

Appellant asserts that the highway patrolman did not have probable cause to stop him for speeding. He argues that any evidence that appellant was driving while under the influence of alcohol arose from the initial, illegal stop for speeding and therefore should have been suppressed. n3 We do not agree.

n3 Appellant made a timely suppression motion which was determined adversely to him.

[\*\*5]

We must initially determine whether the highway patrolman had probable cause to stop appellant for speeding. There was considerable testimony at trial concerning the reliability of the radar. There was testimony regarding Schofield's training and experience in the use of radar, as well as testimony regarding testing and calibration of the radar unit involved. Through effective cross-examination of the State's witnesses, appellant was able to cast some doubt on the accuracy of the radar clocking. However, the testimony about the accuracy of the radar clocking obscures the initial issue. While the accuracy of a radar clocking may be determinative of appellant's guilt or innocence of speeding, it does not determine whether there was probable cause to stop appellant for speeding. In addition to the radar clocking showing excessive speed, the highway patrolman observed appellant drastically reduce his speed when the patrol car could be seen by appellant. Also, the highway patrolman observed the front of appellant's vehicle dip. A combination of these circumstances certainly constituted probable cause to stop appellant for speeding.

A court must generally determine whether there [\*\*6] was probable cause for a warrantless arrest by using a standard of reasonableness, viewed with practicality and applied with good sense. *Raigosa v. State, Wyo., 562 P.2d 1009 (1977)*. Furthermore, a court must consider the facts and circumstances known to the officer which would lead a reasonably cautious and prudent man to believe that the person to be arrested has committed a crime. *Neilson v. State, Wyo., 599 P.2d 1326 (1979)*; and *DeHerrera v. State, Wyo., 589 P.2d 845 (1979)*. Stopping appellant for speeding was not a "sham" or a pretext for a warrantless search suggested by appellant but was based on probable cause.

Having determined that the highway patrolman had probable cause to stop appellant and cite him for speeding, we have no problem with finding probable cause for appellant's arrest for driving while under the influence of alcohol. The officer initially detected excessive speed and erratic driving. After issuing the speeding citation, the officer detected a strong odor of alcohol on appellant. Appellant's balance was unsteady, his face was flushed, and his speech was slurred. Appellant failed the field sobriety test. Appellant could not put his finger [\*\*7] to his nose, could not recite the alphabet, and could not count to four with his fingers. Schofield would have been remiss in his duties had he not arrested appellant for driving while under the influence of alcohol.

## II

Schofield had a small portable cassette recorder in his patrol car, which he placed on top of the console where appellant could see it. He started the recorder shortly after he got back into the vehicle, [\*\*785] and recorded all conversation with appellant, who was aware that the conversation was being recorded. The tape was stopped during periods of silence. Schofield made the recording while he drove appellant from the scene to the courthouse. Appellant was advised of his *Miranda* rights, which he indicated that he understood. Appellant made no admissions on the tape. Schofield did not threaten or coerce him in any way.

The tape which Schofield identified as being a true and accurate recording contains no evidence of interrogation or

questioning by officer Schofield. It provides evidence of the conversation with appellant and indicates that Schofield informed appellant of the implied consent law, and illustrated appellant's quality of speech and [\*\*8] general demeanor.

The justice of the peace admitted the tape into evidence " \* \* \* for the officer advising Mr. Vrooman of his rights under the implied consent law; for the quality of Mr. Vrooman's voice, and for the Court to assess his reasoning process and/or whether he is rambling." Before finding guilt, the justice of the peace stated: "The Court will reflect that it is influenced very much by the quality of the tape and the voice on the tape."

Appellant contends that the conversation after he said he wanted an attorney should have been suppressed. Appellant cites *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), reh. denied 385 U.S. 890, 87 S. Ct. 11, 17 L. Ed. 2d 121 and *Dryden v. State, Wyo.*, 535 P.2d 483 (1975), to support his position.

*Miranda* says that while a defendant is in custody he cannot be interrogated against his will, and that any confession resulting from such interrogation is inadmissible. *Miranda* does not apply here, because appellant made no confession. There was also no interrogation under the definition provided in *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 1689, 64 L. Ed. [\*\*9] 2d 297, 308 (1980):

" \* \* \* 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

"We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. \* \* \*"

*Dryden v. State* held that after a defendant indicated that he wanted an attorney "the county authorities could not thereafter enter into other interrogation unless and until the defendant had himself reopened the subject." 535 P.2d at 493.

Neither the mandates of *Miranda* nor *Dryden* were violated here. The highway patrolman did not solicit a confession or admission, [\*\*10] nor were any made. The appellant was not interrogated after he indicated that he wanted a lawyer. The only conversation was the highway patrolman's advising appellant of the implied consent law and other normal conversation. The tape demonstrated to the justice of the peace the quality of appellant's speech and his general demeanor. It contained only matters that the highway patrolman could properly testify to at trial. The tape gave the justice of the peace direct information rather than the highway patrolman's characterization and impressions.

It is well established that sound recordings are admissible in criminal actions where the recording is relevant and material, and a proper foundation is laid. *State v. Warwick, Mont.*, 158 Mont. 531, 494 P.2d 627 (1972). A proper foundation was laid by the State, and the recording may thus be considered as direct evidence subject to the same admissibility as eyewitness testimony. *State v. Bassett, Mont.*, 189 Mont. 28, 614 P.2d 1054 (1980). Admissibility after a proper foundation has [\*\*786] been laid, rests within the sound discretion of the trial court. *Peterson v. State, Wyo.*, 586 P.2d 144 (1978). We hold that the [\*\*11] trial judge did not abuse his discretion by admitting the tape into evidence.

### III

After appellant's arrest for driving while under the influence of alcohol, Schofield asked him several times to take a breath test. The highway patrolman attempted to explain to appellant the implied consent law as follows:

"OFFICER SCHOFIELD: Okay, sir, under the Implied Consent Law of the State of Wyoming --

"MR. VROOMAN: I already know that.

"OFFICER SCHOFIELD: Okay. You are under arrest for driving under the influence --

"MR. VROOMAN: Okay.

"OFFICER SCHOFIELD: --of alcohol. Under the Implied Consent Law of the State of Wyoming, I am requesting that you take a chemical test to determine the degree of your intoxication. I request that you take a breath type test at the Sheriff's Office in Jackson. At your option and at your expense, you may have a blood test taken at the hospital. Okay?

"Your refusal to take this chemical test may result in your driving privileges being suspended for 30 days, regardless of whether you are convicted of the charge of D.W.U.I. If you are convicted, and you refuse this test, the suspension will be in addition to the driving under [\*\*12] the influence suspension.

"So what happens is, I am requesting that you take this test. If you refuse it, your driver's license may be suspended for 30 days. If convicted in Court after that, that suspension will also be added to the suspension for the conviction. Do you understand that?

"Mr. Vrooman: Oh yeh.

"OFFICER SCHOFIELD: Well, I just need an answer either yes or no if you will take the breath test. If you are not happy with the results of that test you can have a blood test taken at the hospital at your expense. Do you want to take either test?"

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[\*\*15]

Affirmed.

188 of 195 DOCUMENTS

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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Validity, Construction, and Application of Odometer Requirement Provisions of Motor  
Vehicle Information and Cost Savings Act (49 U.S.C.A. §§ 32701 to 32711)

Ann K. Wooster, J.D.

198 A.L.R. Fed. 255

**SUMMARY:**

In 1972, Congress enacted the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991, to prohibit tampering with odometers on motor vehicles and to establish safeguards for the protection of those persons who purchase vehicles having altered or reset odometers. At the time, some 17 states had enacted legislation to curb the practice of tampering with odometers, but states without such legislation had found this practice on the increase, especially when a neighboring state had an odometer law. By prohibiting the disconnecting or turning back of odometers, Congress believed the statute would establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses. In 1994, Congress revised Title 49 of the United States Code, relating to transportation, and, as part of that revision, repealed 15 U.S.C.A. §§ 1981 to 1991 and recodified the provisions without substantive change at 49 U.S.C.A. §§ 32701 to 32711. On June 9, 1998, Congress enacted the Transportation Equity Act for the 21st Century, which added subsections to the disclosure requirements of the Act allowing an exemption for the transfer of "new motor vehicles," and allowing the Secretary of Transportation to exempt such classes or categories of vehicles as deemed appropriate from these requirements, such as vehicles with a gross weight of over 16,000 pounds, or vehicles 10 or more years old. For example, in *Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 198 A.L.R. Fed. 793 (W.D. Va. 2002), the court held that an automobile buyer could not demonstrate that the dealership intended to defraud the buyer with respect to the vehicle's mileage, precluding the buyer's civil action against the dealership for violation of 49 U.S.C.A. § 32705(a)(1), requiring the transferor of a motor vehicle to provide written, accurate disclosure of the mileage registered by the odometer on vehicle title. and other federal cases that have discussed the validity, construction, and application of the odometer requirements of the Act are collected in the following annotation.

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] PRELIMINARY MATTERS

[\*1] Introduction

[\*1a] Scope

This annotation<sup>1</sup> collects and analyzes federal cases that have discussed the validity of, or construed and applied the odometer requirement provisions of, the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. §§ 32701 to 32711*, which prohibit tampering with odometers on motor vehicles and establish safeguards for the protection of those persons who purchase vehicles with altered or reset odometers.

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.

[\*1b] Related annotations

*49 U.S.C.A. §§ 32701 to 32711*, all notes

*49 C.F.R. §§ 580.1 to 580.17*

A.L.R. Index, Automobiles and Highway Traffic

A.L.R. Index, Consumer Protection

A.L.R. Index, Motor Vehicle Information and Cost Savings Act

A.L.R. Index, Odometers

West's A.L.R. Digest, Consumer Protection 9

Products liability: application of strict liability doctrine to seller of used product, *9 A.L.R.5th 1*

Possession or operation of device for detecting or avoiding traffic radar as criminal offense, *17 A.L.R.4th 1334*

Practices forbidden by state deceptive trade practice and consumer protection acts, *89 A.L.R.3d 449*

Construction and application of statute making it unlawful to tamper with motor vehicle odometer, *76 A.L.R.3d 981*

Validity and construction of statute making it a criminal offense to "tamper" with motor vehicle or contents, or to obscure registration plates, *57 A.L.R.3d 606*

Liability for representations and express warranties in connection with sale of used motor vehicle, *36 A.L.R.3d 125*

Comment Note. -- "Out of pocket" or "benefit of bargain" as proper rule of damages for fraudulent representations inducing contract for the transfer of property, *13 A.L.R.3d 875*

Construction and application of Consumer Leasing Act (*15 U.S.C.A. §§ 1667 to 1667e*), *129 A.L.R. Fed. 587*

Standing to bring false advertising claim or unfair competition claim under sec. 43(a)(1) of Lanham Act (*15 U.S.C.A. § 1125(a)(1)*), *124 A.L.R. Fed. 189*

What constitutes violation of requirements of Truth in Lending Act (TILA) (*15 U.S.C.A. §§ 1601 et seq.*) concerning disclosure of information in credit transactions -- civil cases, *113 A.L.R. Fed. 197*

Civil penalties under sec. 20 of Consumer Product Safety Act (*15 U.S.C.A. § 2069*), *70 A.L.R. Fed. 617*

State's standing to sue on behalf of its citizens, *42 A.L.R. Fed. 23*

C.J.S., Credit Reporting Agencies; Consumer Protection § 54

C.J.S., Motor Vehicles §§ 39, 40

Devitt, Federal Jury Practice and Instructions §§ 91.04 to 91.06

Federal Procedure, L. Ed., Highways and Bridges §§ 43:157 to 43:161

13A Couch on Ins. § 48:146 (2d rev. ed.)

28 West's Legal Forms §§ 23.3, 23.13 to 23.16

5 Wright, Miller, Federal Practice and Procedure § 1298

Kelly, Blashfield, Automobile Law and Practice

Sable, Faulkner, & Ogburn, Odometer Law (1992)

Federal Procedural Forms, L. Ed. §§ 38:31, 38:36, 38:73

Abbene, Car Dealership Liable for Misrepresenting Vehicle Odometer Readings, *7 Loy. Consumer L. Rep. 153* (1995)

Burnham, Remedies Available To The Purchaser Of A Defective Used Car, *47 Mont. L. Rev. 273* (1986)

Consumer Protection, *50 Wash. & Lee L. Rev. 271* (1993)

Martin, Intracorporate Conspiracies, *50 Stan. L. Rev. 399* (1998)

[\*2] Background, summary, and comment

[\*2a] Generally

In 1972, Congress enacted the Motor Vehicle Information and Cost Savings Act (Act)<sup>n2</sup> to prohibit tampering with odometers on motor vehicles and to establish safeguards for the protection of those persons who purchase vehicles having altered or reset odometers.<sup>n3</sup> The legislative intent expressed in the statute emphasized the purchasers' reliance on odometer information,<sup>n4</sup> and although the Act does not rely exclusively on private actions by individual consumers for its enforcement, it clearly, like the Truth in Lending Act,<sup>n5</sup> contemplates actions by private attorneys general as a substantial enforcement tool.<sup>n6</sup> It has been held that the Act is remedial in nature and should be broadly construed to effectuate its purpose.<sup>n7</sup> In legislating against the practice of tampering with the odometers of motor vehicles, the Senate found such conduct to be both widespread and clearly fraudulent, stating that because consumers rely upon odometer readings as an index of the condition and value of motor vehicles, the proposed statute mandated a national policy against the disconnecting of, or the setting back of, odometers in order to defraud purchasers of motor vehicles. At the time, the Senate noted that some 17 states had enacted legislation to curb this practice. However, states without

such legislation had found this practice on the increase, especially when a neighboring state had an odometer law. Odometers were being turned back in states without odometer laws and then cars were marketed at inflated values in states with such laws. Thus, state odometer laws were easily circumvented and people in a state with such a law were suffering because of this practice.<sup>n8</sup> By prohibiting the disconnecting or turning back of odometers, the Act would establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses.<sup>n9</sup> The House of Representatives was also convinced of the fraudulent nature of such conduct.<sup>n10</sup> In 1994, Congress revised Title 49 of the United States Code, relating to transportation, and as part of that revision it repealed the original provisions of the Act<sup>n11</sup> and recodified these provisions.<sup>n12</sup> Although the recodification included some revisions, Congress stated that it intended no substantive change of the Act.<sup>n13</sup> Subsequent amendments to the Act in 1996 were similarly not meant to effect a substantive change.<sup>n14</sup> However, on June 9, 1998, Congress enacted the Transportation Equity Act for the 21st Century,<sup>n15</sup> which added a subsection to the disclosure requirements excepting from such requirements the transfers of new motor vehicles from a vehicle manufacturer jointly to a dealer and a person engaged in the business of renting or leasing vehicles for a period of 30 days or less.<sup>n16</sup> Another subsection added to the Act's disclosure requirements in 1998 provided that: "The Secretary may exempt such classes or categories of vehicles as the Secretary deems appropriate from these requirements."<sup>n17</sup>

Prior to the enactment of this subsection, a number of courts had held that the Secretary of Transportation's regulatory exemptions to the disclosure requirements of the Act were invalid because unauthorized by Congress.<sup>n18</sup> Some courts, on the other hand, had held that such regulations were valid.<sup>n19</sup> It may be possible to waive the right to an exemption by providing a disclosure statement or odometer statement to purchasers.<sup>n20</sup> It has been held constitutional to apply the disclosure requirements of the Act to the transfer of motorcycles ( § 3). As for the federal Act's relationship with state law,<sup>n21</sup> courts have held that the Act does not preempt any state law dealing with odometer fraud ( § 4) or supersede a state common-law remedy for fraud ( § 5). One court has found that under a state's doctrine of offensive collateral estoppel, an automobile seller could be estopped from litigating the issue of his liability under the Act by a prior conviction under the Act arising out of tampering ( § 6). Courts have differed on the issue of whether dual damages may be awarded under state and federal law, with one court finding that under the principles of dual sovereignty, state consumer protection damages could be awarded in addition to civil penalties under the Act ( § 7[a]), but with other courts finding that duplicative damages could not be awarded under the Act and state unfair trade practices law, consumer protection law, or common law ( § 7[b]).

A violation of the Act by itself does not automatically lead to civil liability,<sup>n22</sup> but must be accompanied by a showing of a transferor's intent to defraud for a transferee to recover damages.<sup>n23</sup> Courts disagree over the proof required to show a transferor's intent to defraud, however. The majority view is that a transferor's constructive knowledge of odometer fraud, gross negligence, or reckless disregard may support a finding of an intent to defraud ( § 8[a]). The minority view is that a transferee must show that a transferor had actual knowledge of the odometer fraud involved to show the transferor's intent to defraud ( § 8[b]). A number of courts have further clarified that proof of a transferor's negligence alone will not support a finding of an intent to defraud ( § 8[c]). Some courts have held that a transferor's intent to defraud cannot be presumed, but may be inferred by courts from the surrounding facts ( § 9). An inference of a transferor's intent to defraud may be based on the seller's actual knowledge of a violation, according to a few courts ( § 10), although such an inference may be dispelled by evidence of no intent to defraud.<sup>n24</sup> Other courts have held or recognized that an inference of a transferor's intent to defraud may be based on the transferor's dominion over a vehicle ( § 11).

It has been held that in order to be found liable under the disclosure requirements of the Act,<sup>n25</sup> one must be a transferor.<sup>n26</sup> A transferor is someone who transfers an ownership interest in a motor vehicle, according to a number of courts ( § 12[a]). However, some courts have held that someone with a nonownership interest involved in fraudulent conduct may be considered a transferor for the purposes of the disclosure requirements ( § 12[b]). Generally, it has been held that the agent of a transferor cannot be found liable for a violation of the disclosure requirements ( § 13), but an automobile auction company may be liable as a transferor if it holds title to a vehicle, even for a brief period of time, held or recognized several courts ( § 14). A transferor must exercise reasonable care concerning the reliability of an

automobile's odometer or risk liability under the disclosure requirements, held or recognized some courts ( § 15). It has been held that a transferor's experience in car sales and a vehicle's unreasonably low mileage are relevant in assessing the reasonableness of the transferor's conduct under the disclosure requirements ( § 16). Under the disclosure requirements, held or recognized many courts, a transferor has an affirmative duty to inquire regarding the accuracy of an odometer reading ( § 17), and specific circumstances giving rise to such a duty to inquire may include unreasonably low mileage in relation to the year of the car, the condition of the tires, and the condition of the interior and exterior of the car ( § 18).

Absent knowledge to the contrary, a transferor may disclose the mileage registered on a vehicle's odometer and thus fulfill any obligation under the Act.<sup>n27</sup> However, courts have held or recognized that a transferor has a duty to disclose the fact that a vehicle's mileage is unknown ( § 19), and some courts have held that less than actual knowledge is sufficient to create a duty to disclose that the mileage of a vehicle is unknown under the disclosure requirements ( § 20). When a transferor knows the true mileage of a vehicle, on the other hand, application of the Act's disclosure requirements becomes less clear. For example, where the transferor knows that a vehicle's odometer has turned over and that the vehicle has actually traveled 100,000 miles in excess of the odometer reading, the Fourth Circuit Court of Appeals has held that the transferor has a duty to disclose the total mileage ( § 21[a]), while district courts in the Third and Seventh Circuits have held that a literal reading of the disclosure requirements of the Act creates no such duty to disclose the vehicle's total mileage ( § 21[b]). For the purposes of the disclosure requirements, it has been held that the ultimate purchaser of an automobile is the "transferee" ( § 22).

Other terms or provisions of the Act have been construed by the courts. For instance, the term "motor vehicle" has been construed to mean any vehicle driven or drawn by mechanical power for use in the public streets, roads, and highways, including a motorcycle ( § 23). The word "person" as used in various provisions of the Act has been held to mean and include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, individuals, and transferors and transferees under the Act ( § 24). It has also been held that the word "person" includes agents of firms and corporations acting within the scope of their employment ( § 25). A criminal offense must include the element of knowing and willful violation of the Act,<sup>n28</sup> rather than an intent to defraud as required in civil actions.<sup>n29</sup> "Knowingly and willfully" has been held to mean an intentional violation of a known legal duty ( § 26). The provision for actual damages has been held to mean the difference between the fair market value of a vehicle with its actual miles and the amount paid for the vehicle by a purchaser, and may include other incidental expenses ( § 27). It has also been held that a consumer must show reliance on an odometer statement in order to show actual damages ( § 28), and that repairs occasioned by misrepresentation of the mileage of a vehicle may be included in actual damages ( § 29).

Private civil actions must be brought under the Act within two years of the time the fraud is discovered or should have been discovered by a purchaser, it has been held ( § 30). Courts disagree, however, over the persons against whom the statute of limitations runs upon actual or constructive discovery of the fraud. District courts in the Ninth and Tenth Circuits have held that the private civil statute of limitations in the Act runs against each purchaser who discovers or constructively discovers the fraud ( § 31[a]), while a Seventh Circuit district court has held that this statute of limitations runs against all potential purchasers at the time any person having standing to sue discovers or constructively discovers the violation, absent some act of fraudulent concealment ( § 31[b]). Based on the facts and circumstances of each case, courts have found claims brought under the Act to be time-barred by the two-year private civil statute of limitations ( § 32).

A party has been found by some courts to be a transferee under the private civil provisions of the Act, based on the facts and circumstances of each case ( § 33[a]), where the party was an auctioneer, a husband whose wife's name was used for the purposes of financing, an individual who obtained ownership of an automobile, or a customer who executed a purchase order and tendered a down payment for an automobile. Other courts have not found a party to be a transferee for the purposes of bringing a private civil action based on the facts of the case ( § 33[b]), where the party was a corporation that held a security interest in an automobile or a wife who cosigned loans and kept the ledger for an automobile business run as a sole proprietorship by her husband. In particular, courts have found, based on the facts and

circumstances of each case, that a subsequent transferor who violated the Act was barred from bringing a private civil action as a transferee ( § 34), and that an employee stated a cause of action as a transferee against an employer under the private civil provisions of the Act by alleging that the employer fired him for refusing to participate in an illegal scheme to set back odometers ( § 35). Courts have also determined when a party is a transferor for the purposes of a private civil action brought under the Act. It has been found, based on the facts and circumstances of each case, that a party was a transferor ( § 36[a]) where the party was an automobile leasing corporation, an automobile auctioneer, automobile dealership, a sole proprietor of an auto dealership, a corporate car dealer, a seller who held an ownership interest, or a seller who was the title holder but used an auction house. On the other hand, courts have found that the director and agent of a corporate seller, an employee of a used automobile dealer, the president-salesman of an automobile dealership, a bank to which a seller of a new car "assigned" a buyer's financing paper, an auction service, a seller of a used car to a dealer for resale, the manager of a car dealer, and the president, general manager, and agent of an automobile dealership were not transferors under the private civil provisions of the Act, based on the facts and circumstances of each case ( § 36[b]). Courts have recognized that under the civil provisions of the Act, a transferor's agent may be held liable for odometer fraud ( § 37). In addition, it has been found that a bank to which a seller of a new car "assigned" a buyer's financing paper and a father who held the title to an automobile that was under the sole control of his son were not owners of a vehicle for the purposes of the civil provisions of the Act, based on the facts and circumstances of each case ( § 38). Finally, courts have held or recognized that an absence of privity will not protect successive transferors from civil liability under the Act ( § 39).

A number of issues arise when multiple transferors are found liable under the civil provisions of the Act. There is conflict among the circuits as to whether such transferors should be held jointly and severally liable, or separately and individually liable, to a transferee. The circuits are fairly evenly split between these views, with the Sixth and Tenth Circuits holding that liability among multiple transferors is joint and several ( § 40), the Fourth, Fifth, and Eighth Circuits holding that such liability is separate and individual ( § 42). Seventh Circuit district courts appear to have supported both views without guidance from the Seventh Circuit Court of Appeals ( §§ 40, 42). Courts have respectively found that multiple transferors were jointly and severally liable ( § 41), or separately and individually liable ( § 43), under the private civil provisions of the Act. Seventh Circuit district courts appear similarly at odds regarding the issue of allowing cross-claims among multiple transferors, with an earlier case holding that such cross-claims may be brought ( § 44[a]) and a later case holding the opposite, along with two Tenth Circuit District Court decisions ( § 44[b]).

Regarding particular violations of the civil provisions of the Act, courts have discussed violations of the tampering provisions, based on the facts and circumstances of each case.<sup>n30</sup> Specifically, courts have found a violation of the tampering provisions due to the rolling back of a vehicle's odometer ( § 45[a]), have found no violation of the tampering provisions due to the rolling back of a vehicle's odometer ( § 45[b]), have found a rolling back of a vehicle's odometer with an intent to defraud ( § 45[c]), and have found a rolling back of a vehicle's odometer without an intent to defraud ( § 45[d]). Similarly, courts have determined that a defendant did not violate the tampering provisions by disconnecting a vehicle's odometer ( § 46[a]), and have determined that a defendant did not disconnect a vehicle's odometer with an intent to defraud ( § 46[b]). It has also been found that transferors did not violate the tampering provisions of the Act by conspiring to tamper with a vehicle's odometer ( § 47[a]), that transferors conspired to tamper with a vehicle's odometer with an intent to defraud a purchaser ( § 47[b]), and that transferors did not conspire to tamper with a vehicle's odometer with an intent to defraud a purchaser ( § 47[c]).

Particular violations of the service, repair, and replacement civil provisions of the Act have also been examined, based on the facts and circumstances of each case.<sup>n31</sup> It has been found that a transferor who failed to affix a notice of odometer repair in a vehicle as required violated the Act with an intent to defraud a purchaser ( § 48), but that automobile transferors did not conspire to repair broken odometers and thus did not violate the repair provisions ( § 49). A purchaser failed to prove that a transferor had replaced a vehicle's odometer, according to one court ( § 50). Courts have found that a transferor violated the Act with an intent to defraud a purchaser by failing to affix a notice of odometer replacement ( § 51[a]), and that a transferor violated the Act by failing to affix a notice of odometer

replacement, but did so without the requisite intent to defraud ( § 51[b]). A transferor who failed to reset a new odometer in a vehicle, while violating the Act, did not do so with an intent to defraud a purchaser as required to impose liability, determined two courts ( § 52). It has been found that a transferor did not violate the Act by failing to disclose that a vehicle's engine had been replaced ( § 53[a]), and that transferors of a vehicle did not violate the Act with an intent to defraud by failing to disclose that a vehicle's engine had been replaced ( § 53[b]). Transferors of a vehicle did not conspire to violate the Act with an intent to defraud by failing to disclose that the vehicle's engine had been replaced, it has been found ( § 54).

According to the Act, every seller of a motor vehicle must furnish to the buyer a written statement reciting the odometer reading at the time of transfer and the date of transfer and certifying the accuracy of the mileage recited.<sup>n32</sup> Although disclosure of a vehicle's cumulative mileage must be written in order to comply with the Act, evidence of an oral disclosure may be relevant in determining whether the seller had an intent to defraud the buyer of a used automobile.<sup>n33</sup> On the other hand, if a written disclosure form accurately reports the correct number of miles an automobile has traveled, it has been held that inaccurate oral misrepresentations to the contrary are not actionable when the disclosure form is presented to the transferee at the time of the transfer.<sup>n34</sup> One court has held that if the state where a motor vehicle is registered makes adequate provision for disclosure of odometer information on certificates of title, then the transferor is permitted to satisfy the disclosure requirements on the certificate of title, and a violation therefore is the failure to make accurate disclosure.<sup>n35</sup> Courts have also discussed particular civil violations of the disclosure requirements of the Act, based on the facts and circumstances of each case.<sup>n36</sup> It has been found that a transferor's failure to acquire a complete odometer statement for a vehicle meant for resale showed a violation with an intent to defraud under the disclosure requirements ( § 55). Some courts have found that a transferor was liable under the disclosure requirements of the Act for failing to provide a written odometer statement with an intent to defraud a purchaser ( § 56[a]), while other courts have found that a transferor violated the civil provisions by failing to provide a written odometer statement to a purchaser, but did not possess the requisite intent to defraud ( § 56[b]). It was found that a transferor and its agent did not violate the disclosure requirements by conspiring knowingly to give no odometer statement to a purchaser ( § 57). Courts have also found that a transferor's failure to provide a complete odometer statement to a purchaser did not violate these provisions ( § 58[a]), and that a transferor who violated the Act by failing to provide a complete odometer statement to a purchaser did not possess the requisite intent to defraud ( § 58[b]). It has been found that a transferor violated the disclosure requirements by failing to disclose a vehicle's true mileage to a purchaser ( § 59[a]), that an automobile seller did not violate the Act by failing to disclose a vehicle's true mileage to a purchaser ( § 59[b]), that a transferor who failed to disclose a vehicle's true mileage to a purchaser in violation of the Act did so with the requisite intent to defraud ( § 59[c]), and that a transferor who failed to disclose a vehicle's true mileage in violation of the Act was not liable due to the lack of an intent to defraud a purchaser ( § 59[d]). A transferor and its agent did not violate the Act by conspiring to give a false odometer statement to a purchaser, one court has determined ( § 60[a]). It has also been found, however, that transferors conspired to provide false odometer statements to a purchaser with an intent to defraud, in violation of the Act ( § 60[b]).

The auto dealer with expertise has an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, the dealer would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified.<sup>n37</sup> Making affirmative claims about the mileage of a used vehicle without knowledge is either intentionally deceitful or reckless, and thus, violates the Act.<sup>n38</sup> Continuing to discuss particular civil violations of the disclosure requirements of the Act, based on the facts and circumstances of each case, courts have found that a transferor's failure to disclose that the true mileage of a vehicle was unknown violated the Act ( § 61[a]), that the seller of an automobile did not violate the Act by failing to disclose to a purchaser that the vehicle's true mileage was unknown ( § 61[b]), that failure to disclose to a purchaser that the true mileage of a vehicle was unknown resulted in a transferor's violation of the Act with an intent to defraud ( § 61[c]), and that a transferor did not violate the Act with an intent to defraud a purchaser by failing to disclose that the true mileage of a vehicle was unknown ( § 61[d]). Courts have determined that the seller of an automobile did not violate the disclosure requirements by making a false oral statement regarding the vehicle's mileage to a purchaser ( § 62[a]), and that a transferor who violated the Act by making a false oral statement regarding a vehicle's mileage did so with an intent to defraud a purchaser ( § 62[b]).

A number of remedies are available to a prevailing purchaser under the private civil provisions of the Act, including damages. It has been held that a consumer need not show reliance on an odometer statement to prove a violation of the Act, but must show reliance to recover actual damages.<sup>n39</sup> Based on the facts and circumstances of each case, courts have awarded treble actual damages in civil actions brought by private persons under the Act<sup>n40</sup> ( § 63[a]), and in one case, a court determined that such damages should not be awarded ( § 63[b]). It has been held that an award of treble damages under the Act does not preclude an award of prejudgment interest on the amount of actual damages.<sup>n41</sup> Some courts have held that the Act does not require an automobile purchaser to be financially hurt as a prerequisite to recovery, and that in the absence of actual damages, the statute provides an alternative recovery of \$ 1,500,<sup>n42</sup> but one court has indicated that some showing of actual damage may be necessary for a court to award the statutory minimum.<sup>n43</sup> Based on the facts and circumstances of each case, courts have awarded a prevailing purchaser the statutory minimum damages of \$ 1,500 under the civil provisions of the Act ( § 64[a]), and one court determined that such an award was not justified ( § 64[b]). It has also been found that buyers were entitled to recover the expense of having a vehicle checked for odometer tampering under the Act ( § 65). Some courts have held that a transferor found liable may recoup damages or seek contribution from other transferors found liable for the same odometer fraud under the Act ( § 66[a]), but others have held that such recoupment or contribution is not allowed ( § 66[b]).

Another remedy available to a prevailing purchaser under the private civil provisions of the Act is attorney's fees.<sup>n44</sup> Based on the facts and circumstances of each case, courts have affirmed on appeal an award of attorney's fees to a plaintiff ( § 67[a]), reduced on appeal an award of attorney's fees to a plaintiff ( § 67[b]), awarded the requested amount of attorney's fees to a plaintiff at trial ( § 67[c]), reduced at trial the amount of attorney's fees requested by a plaintiff ( § 67[d]), and awarded the plaintiff attorney's fees in an amount determined at trial ( § 67[e]). Courts have awarded attorney's fees to a plaintiff in a private civil action for appeal efforts under the Act ( § 68), and have awarded attorney's fees to a plaintiff for attorney efforts made during a second trial ( § 69). Attorney's fees were not awarded, however, to a defendant ( § 70) or a third party ( § 71) in a private civil action brought under the Act, based on the facts and circumstances of each case.

Equitable remedies have also been found available to a prevailing purchaser in a private civil action brought under the Act. It has been found, based on the facts and circumstances of each case, that the equitable remedy of rescission could be ordered under the Act ( § 72), and that the equitable remedy of restitution could be ordered where a vehicle transferor was found liable ( § 73).

The Act also provides for civil actions to be brought by a state's attorney general.<sup>n45</sup> It has been found that a violation of the Act occurred in a particular state for the purposes of an attorney general civil action ( § 74), and that circumstantial evidence of the situs of a violation was sufficient for such an action ( § 75), based on the facts and circumstances of each case. Although one court has held that the two-year statute of limitations period on civil suits brought by a state attorney general under the Act runs upon the attorney general's actual or constructive discovery of the fraud ( § 76[a]), another court has held that the statute of limitations in such an action runs upon the purchaser's actual or constructive discovery of the fraud ( § 76[b]). Based on the facts and circumstances, it has been found in a civil action that purchasers represented by a state attorney general were transferees under the Act ( § 77), and that transferors were jointly and severally liable for violations of the Act in a civil action brought by a state's attorney general ( § 78). Particular violations of the Act in civil actions brought by a state's attorney general have been discussed by the courts, based on the facts and circumstances of each case. For example, it has been found that a transferor rolled back the odometer of a vehicle in violation of the tampering provisions with the requisite intent to defraud ( § 79), and that transferors conspired, with an intent to defraud, to roll back the odometers of high-mileage vehicles in violation of the tampering provisions ( § 80). Courts have also found in a civil suit brought by a state attorney general that a transferor who failed to disclose the true mileage of a vehicle violated the disclosure provisions with an intent to defraud ( § 81). It has been held in a civil action brought by a state's attorney general that the disclosure requirements prohibit a transferor from making a false statement to a transferee regarding a vehicle's mileage ( § 82). The same remedies available in a private civil action are available to a state attorney general in a civil action.<sup>n46</sup> It has been found that a

state attorney general in a civil action could recover the minimum statutory penalty of \$ 1,500 for each violation of the Act proven, based on the facts and circumstances ( § 83). The equitable remedy of restitution was not ordered in a civil action brought by a state attorney general for a violation of the Act, based on the facts and circumstances ( § 84).

Under the Act, a person that knowingly and willfully violates the statute or a regulation prescribed or order issued under the statute will be held criminally liable, and shall be fined under Title 18, imprisoned for not more than three years, or both.<sup>n47</sup> It has been found, based on the facts and circumstances, that subpoenas for the production of business records related to criminal violations of the Act should be enforced ( § 85), and that subpoenas for the production of odometer statements related to criminal violations of the Act should also be enforced ( § 86). Courts have found that the seller of an automobile was a transferor for the purposes of a criminal action brought under the Act ( § 87[a]), and that the seller of an automobile was not a transferor for the purposes of a criminal action ( § 87[b]), based on the facts and circumstances of each case. It has been held that a corporation may be responsible under the Act when two or more high-ranking or authoritative agents engage in a criminal conspiracy on its behalf ( § 88). Particular criminal violations of the Act have been examined by the courts. Regarding violations of the tampering provisions, courts have upheld convictions for rolling back vehicle odometers ( § 89), have upheld convictions for conspiring to roll back odometers ( § 90), have upheld a conviction for disconnecting a vehicle's odometer ( § 91), and have overturned a conviction for conspiring to disconnect a vehicle's odometer ( § 92), based on the facts and circumstances in each case. As for criminal violations of the disclosure requirements, based on the facts and circumstances of each case, a number of courts have upheld convictions for a transferor's failure to disclose the true mileage of a vehicle ( § 93[a]), while one court has overturned a conviction for a failure to disclose the true mileage of a vehicle because the defendant was not a transferor under the Act ( § 93[b]). There are statutory penalties available in a criminal action brought under the Act, rather than the remedies available in civil actions brought under the Act.<sup>n48</sup> Based on the facts and circumstances, one court affirmed on appeal a fine of \$ 70,000 imposed on a transferor convicted of violating the criminal provisions of the Act ( § 94), and the same court affirmed on appeal a prison sentence imposed on the transferor of three years in prison ( § 95).

[\*2b] Practice pointers

The weakness of the Motor Vehicle Information and Cost Savings Act (Act) is the difficulty of proof: it requires proof of a civil defendant's intent to defraud.<sup>n49</sup> Courts are divided as to whether a purchaser must show actual knowledge or whether constructive knowledge is sufficient. That is, if a seller does not actually tamper with the odometer but should reasonably know from the circumstances that tampering occurred, does that seller intend to deceive the purchaser when it certifies that the odometer is correct? A motor vehicle purchaser might be able to circumvent the problems of proof posed by the Act by stating an additional claim for relief for odometer tampering under a state Consumer Protection Act, which may not require proof of intent to defraud.<sup>n50</sup> It has been held that the public interest in compliance with the disclosure requirements of the Act may be protected by injunctive relief under § 32709, without regard to the defendant's intent,<sup>n51</sup> but relief in damages for private actions requires the greater showing of an intent to defraud the purchaser.

A purchaser must plead an intent to defraud under the Act with sufficient particularity, or risk having the complaint dismissed, under *Fed. R. Civ. P. 9(b)*.<sup>n52</sup> Courts have held that the burden is on the purchaser to prove fraudulent tampering by a preponderance of the evidence,<sup>n53</sup> but the mere fact that the Act requires proof of fraudulent intent is not enough to require application of the clear and convincing evidence standard.<sup>n54</sup> Counsel should be cognizant that it has been held that in an action involving multistate contracts in connection with the sale of a vehicle having an illegally altered odometer, venue may be properly laid in the federal district where the "claim arose," which district may be where resales occurred and where the ultimate purchaser allegedly sustained damages as the result of the alteration, even if the defendant neither resides nor does business in such district.<sup>n55</sup> The Act does not have a specific venue provision and therefore 28 U.S.C.A. § 1391(b) is the appropriate venue determination statute, providing that in actions brought to recover damages for violation of a federal statute, venue is proper only in the district where all defendants reside or in the district in which the claim arose.<sup>n56</sup> Although the Act provides that the court "shall award costs and a

reasonable attorney's fee to the person when a judgment is entered for that person,"<sup>n57</sup> the courts have generally recognized that the amount of attorney's fees awarded is discretionary,<sup>n58</sup> and contrary to the mandatory language of the statute, one court has suggested that whether to award attorney's fees might be discretionary.<sup>n59</sup> In particular, one court has held that court-appointed counsel fees could be awarded since the defendant assumed liability for such fees in some settlement agreements.<sup>n60</sup> It has been held that the court must provide a concise, clear explanation of its reasons for an award of attorney's fees.<sup>n61</sup> The Act provides that an award of attorney's fees shall be for a "reasonable" amount, but does not set forth any other guidance to the federal courts as to the calculation of a reasonable fees award.<sup>n62</sup> Therefore, federal courts have looked to other opinions calculating reasonable attorney's fees under other federal statutes.<sup>n63</sup> Several courts have indicated that a successful litigant must make an explicit attorney's fees request to secure the requested award amount.<sup>n64</sup> When a defendant is excluded from liability under the Act, a finding of liability on all other causes of action may support a determination that the defendant is equally liable for the attorney's fees of the buyer.<sup>n65</sup> While a few courts have held that punitive damages may be awarded under the Act even though the Act does not include a provision for such damages,<sup>n66</sup> another court has held that punitive damages may not be awarded in addition to the statutory treble damages,<sup>n67</sup> and the silence of all other courts on this issue would seem to indicate that punitive damages are generally not requested or awarded under the Act. The court must award costs to a purchaser who prevails in an odometer fraud claim under the Act.<sup>n68</sup> The issue of dischargeability of debt resulting from a violation of the Act has been considered by bankruptcy courts. One court determined that attorney's fees assessed against a bankrupt defendant for odometer fraud were dischargeable under the former Bankruptcy Act, inasmuch as attorney's fees would not be available to a plaintiff in a common-law action for fraud, but that a treble damages penalty was nondischargeable in bankruptcy.<sup>n69</sup> However, another court has held that the knowing submission by a Chapter 7 debtor of a false odometer statement constituted actual fraud under *11 U.S.C.A. § 523(a)(2)(A)*, and that the debt for \$ 2,000 incurred thereby was nondischargeable, but that the tripling of the amount owed under *15 U.S.C.A. § 1989* was a statutory penalty and was dischargeable.<sup>n70</sup> As recognized by Congress, the reading on an odometer communicates vital information concerning the value of a motor vehicle, and although in enacting the statute, Congress explicitly referred only to purchasers, both purchasers and manufacturers necessarily rely on the information conveyed by a reading of an odometer.<sup>n71</sup> It has been held that to alter or disconnect an odometer, so as to understate the number of miles actually traveled, is to make a nonverbal false statement about the value of the vehicle, and a violation of the statute against such tampering is, by its nature, a crime involving "dishonesty or false statement," for the purposes of *Fed. R. Evid. 609(a)(2)*,<sup>n72</sup> and a general release from liability obtained by an automobile dealer will be null and void with respect to the customer's claims under the Act, held one court.<sup>n73</sup>

## [\*II] VALIDITY OF ACT

### [\*3] Constitutionality of applying statute to motorcycles

It has been held that the odometer alteration disclosure requirement of the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. § 32704*, is not so vague and uncertain as to be unconstitutional as applied to motorcycles.

Rejecting the contention that the odometer alteration disclosure requirement of *15 U.S.C.A. § 1987* (now *49 U.S.C.A. § 32704*) was so vague and uncertain as to be unconstitutional as applied to motorcycles, the court held in *Grambo v. Loomis Cycle Sales, Inc.*, *404 F. Supp. 1073 (N.D. Ind. 1975)*, that although the statute required a notice to be attached to the left door frame of a vehicle when the odometer was serviced, repaired, or replaced, a reasonable person would know that to satisfy the disclosure requirements as to motorcycle odometers, they would only need to hang a tag on the motorcycle to place potential purchasers on notice of an alteration in the mileage registered on the odometer.

## [\*III] CONSTRUCTION OF ACT

## [\*A] Relationship with State Law

## [\*4] Effect on state law -- Odometer fraud

It has been held that the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32711, does not preempt any state law dealing with odometer fraud.

The court in *Glover v. General Motors Corp.*, 959 F. Supp. 332 (W.D. Va. 1997), held that the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32701 et seq., does not preempt any state law dealing with odometer fraud, under 49 U.S.C.A. § 32711.

## [\*5] Common-law fraud

It has been held that the provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, do not supersede a state common-law remedy for fraud.

The court of appeals in *Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc.*, 524 F.2d 162 (10th Cir. 1975), held that the provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), do not supersede a state common-law remedy for fraud. The court stated that the language of 15 U.S.C.A. § 1991 (now 49 U.S.C.A. § 32711), which provided that state law was not altered or affected "except to the extent that those laws are inconsistent with any provision of this subchapter and then only to the extent of the inconsistency," referred to state statutes dealing with odometer tampering, not fraud remedies, and observed that the legislative history clearly showed that the congressional concern had to do with state provisions that were less stringent than the federal law.

## [\*6] Collateral estoppel

Based on the facts and circumstances presented, it was found that under a state's doctrine of offensive collateral estoppel, an automobile seller was estopped from litigating the issue of his liability under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, by a prior conviction under the Act arising out of tampering.

Under Kentucky's doctrine of offensive collateral estoppel, found the court in *May v. Oldfield*, 698 F. Supp. 124 (E.D. Ky. 1988), a used car salesman accused by a buyer of altering an automobile's odometer was estopped from litigating the issue of his liability by virtue of his prior conviction of mail fraud arising out of tampering with the same odometer, under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710). The court noted that the issue of alteration of the odometers was identical in both cases, and the jury in the prior criminal action was required to apply a higher burden of proof than that applicable to a civil action; the fact that the car buyer had not been party to the previous criminal prosecution did not preclude application of the doctrine of offensive collateral estoppel.

## [\*7] Dual damages under state and federal laws

## [\*7a] Awarded

Under the principles of dual sovereignty, it has been found that state consumer protection damages could be awarded in addition to civil penalties under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances.

Under the principles of dual sovereignty, Maryland's attorney general could recover a civil fine of \$ 10,200, the maximum allowable under that state's Consumer Protection Act, Md. Code Ann., Commercial Law, § 13-410, for

odometer tampering and related conduct in addition to civil penalties under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), determined the court in *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989).

\*\*\*\* Comment:

n74 n75 In so finding, the court in acknowledged the policy against duplicative punishment that appears in antitrust cases that have held that an award of treble damages is partially compensatory and partially punitive and therefore duplicative of a punitive damage award. The instant case was distinguishable, noted the court, because the state of Maryland and its attorney general were requesting a state law fine, as opposed to punitive damages, for the victims under state common law. Under principles of dual sovereignty, a state in furtherance of its public policy may punish an individual for conduct that also gives rise to punitive remedies for victims under a separate federal statute. The court therefore permitted the attorney general to recover for consumers the \$ 1,500 for each violation of federal law and at the same time recover civil penalties under state statutory law.

[\*7b] Not awarded

The courts below found, based on the facts and circumstances of each case, that damages could not be awarded under both state law and the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a).

A used car buyer who was entitled to damages from a dealer for odometer disclosure violations under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), was not entitled to a duplicative award for the same violations based on state unfair trade practices and consumer protection law under La. Rev. Stat. Ann. §§ 51:1401 et seq., 51:1408, found the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987).

Automobile buyers sued the seller of the automobile, the original owner, and others in the chain of title for fraudulent rollback of the odometer mileage, and the court in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), determined that the buyers were entitled to treble damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), but that the buyers were not entitled to additional compensatory and punitive damages under their common-law fraud claims.

[\*B] Construction of Particular Terms

[\*1] Intent to Defraud Requirement

[\*8] Proof of intent to defraud

[\*8a] Constructive knowledge, gross negligence, or reckless disregard

Under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., held or recognized the courts in the cases that follow, in order to prove a seller's intent to defraud, a purchaser need only show that the seller acted with constructive knowledge, gross negligence, or reckless disregard.

Although there is no First Circuit law on the construction of the phrase "intent to defraud" under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the court in *Universal Underwriters Ins. Co. v. Bob Brest Buick, Inc.*, 1992 WL 129602 (D. Mass. 1992), under the majority view, purchasers need not prove either that the defendants acted willfully or with specific, actual intent to deceive, but proof that the

defendants acted with reckless disregard or gross negligence is sufficient to establish liability under the Act. As construed by the courts, the phrase "intent to defraud" is a term of art meaning something less than or different from common-law fraud, explained the court.

Insertion of the "intent to defraud" requirement in the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), providing a remedy of damages against persons who violate the Act, in no way compels the requirement of an "actual knowledge" standard, held the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977); recklessness is sufficient to meet the intent to defraud requirement. The common-law principle that actual knowledge is required if punitive or exemplary damages are to be awarded in a fraud action is not applicable where an action is based on remedial legislation, reasoned the court.

Constructive knowledge, recklessness, or even gross negligence in determining and disclosing the actual mileage traveled by a vehicle may be sufficient to support a finding of an intent to defraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), held the court in *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc.*, 721 F. Supp. 63 (S.D. N.Y. 1989).

The majority view is that a seller of a used car reporting that the mileage shown on the odometer is true may be held liable in the absence of actual knowledge that an odometer reading is false if the seller reasonably should have known that the odometer reading was incorrect, held the court in *Ralbovsky v. Lamphere*, 731 F. Supp. 79 (N.D. N.Y. 1990); gross negligence or acting with reckless disregard for the truth in certifying that the reading of an odometer is true may be sufficient to infer intent to defraud as a matter of law, recognized the court.

In an action brought pursuant to the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), an automobile purchaser must prove that the seller violated the statute with an intent to defraud, but the purchaser need not show actual knowledge, held the court in *Daluz v. Acme Auto Body & Sales, Inc.*, 814 F. Supp. 242 (D. Conn. 1992); rather, the purchaser may prevail by showing that the seller's statements were made recklessly or carelessly, without knowledge of their truth or falsity, or without reasonable grounds for belief in their truth.

Reckless disregard for the basic purpose of the Motor Vehicle Information and Cost Savings Act (Act) as well as the Act's specific requirement, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), may rise to the level of fraudulent intent and render an automobile seller liable under the Act, held the court in *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977).

Constructive knowledge, recklessness, or even gross negligence in determining and disclosing the actual mileage traveled by a vehicle will support a finding of "intent to defraud" under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), stated the Fourth Circuit Court of Appeals in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979).

Intent to defraud may be found under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), even without proof of actual knowledge that a mileage disclosure was false, held the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987), since the mere reliance on an odometer reading, in the face of other readily ascertainable information from the title and condition of a vehicle, constitutes reckless disregard rising to the level of an intent to defraud as a matter of law under the Act.

Actual knowledge of tampering with an odometer is not required in order for a dealer to be held liable under the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (49 U.S.C.A. § 32705), held the court in *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988), but rather, constructive knowledge, recklessness, or even gross negligence in determining and disclosing a car's actual mileage are sufficient to support a finding that a dealer acted with an intent to defraud.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), the court recognized that in a suit for violations of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), an intent to defraud may be shown by a transferor's reckless disregard.

In *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978), the court held that a vehicle transferor who lacks actual knowledge of the accuracy of an odometer reading at the time of sale may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that the actual mileage is unknown under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), if the transferor reasonably should have known that the odometer reading was incorrect. Although the transferor at the time of sale did not know to a certainty that the transferee would be defrauded, the court may infer that the transferor understood the risk of such an occurrence, stated the court. Moreover, continued the court, unless a violation of the Act can lead to civil liability, the Act is toothless. Even though the United States Attorney General can petition for injunctive relief when the transferor lacks an intent to defraud, noted the court, such relief, although theoretically available, is unlikely. Private prosecution is needed to make the Act effective, opined the court.

A vehicle transferor who lacks actual knowledge of the accuracy of an odometer reading may still be found to have intended to defraud and thus may be civilly liable for failure to disclose that actual mileage is unknown under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the Fifth Circuit Court of Appeals in *Bolton v. Tyler Lincoln-Mercury, Inc.*, 587 F.2d 796 (5th Cir. 1979). If the transferor reasonably should have known that the odometer reading was incorrect, although he or she did not know to a certainty that the transferee would be defrauded, the court may infer that the transferor understood the risk of such an occurrence, explained the court.

For the purposes of the section of the Motor Vehicle and Cost Savings Act prohibiting the knowing giving of a false statement to a transferee, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), held the district court in *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976), evidence of negligence, especially if gross, might sustain an inference of fraud.

Actual knowledge that an odometer reading is incorrect is not necessary to prove an intent to defraud, and constructive knowledge is sufficient to create liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), stated the court in *Marcel v. Zamin*, 1990 WL 170130 (E.D. La. 1990).

\*\*\*\* Comment:

To the same effect as *Marcel v. Zamin*, 1990 WL 170130 (E.D. La. 1990), see *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987); *Marcel v. Zamin*, 1990 WL 150123 (E.D. La. 1990).

\*\*\*\* Caution:

A Fifth Circuit District Court has held that there is no legislative history requiring an interpretation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), so that constructive knowledge of an intent to defraud is sufficient to show a violation of the Act where only a rule or regulation has been violated, in *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979). See § 8[b].

In *Berns v. Ginn*, 1986 WL 6150 (S.D. Ohio 1986), the court recognized that gross negligence or disregard in preparing an odometer disclosure statement may support an inference of a seller's intent to defraud under the Motor Vehicle Information and Cost Savings Act (Act).

\*\*\*\* Caution:

A later Sixth Circuit Court of Appeals case and two earlier district court cases have held that a willful violation of the Act with specific intent to deceive a purchaser is necessary to support an inference of an intent to defraud. See § 8[b].

The court in *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988), appeared to recognize in dictum that constructive knowledge, recklessness, or even gross negligence in determining and disclosing the actual mileage traveled by a vehicle may be sufficient to support a finding of intent to defraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710).

\*\*\*\* Comment:

To the same effect as *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988), see *Weatherby v. J.J. Wright Oldsmobile, Inc.*, 1986 WL 2610 (N.D. Ill. 1986); *Mid-City Enterprises, Inc. v. Huffman*, 1989 WL 8815 (N.D. Ill. 1989); *Resendiz v. Eatinger*, 1990 WL 84527 (N.D. Ill. 1990); *Joe Madden Ford, Inc v. Bickel*, 1996 WL 432408 (N.D. Ill. 1996).

Under federal odometer fraud law, the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), a vehicle purchaser does not have to prove that a seller actually knew that it was supplying false or inaccurate information, and the transferor cannot insulate itself from liability by deliberately blinding itself to facts, held the court in *Ray Kim Ford, Inc. v. Daoud*, 750 F. Supp. 327 (N.D. Ill. 1990), but rather, a purchaser can prevail when the transferor's failure to comply with the requirements of the Act is due to reckless disregard for the facts or even gross negligence.

\*\*\*\* Caution:

An earlier Seventh Circuit district court decision in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), see § 8[b], supports the opposing view that the intent to defraud required by the Act must be inferred from actual knowledge of a false odometer setting. This decision has not been overruled by the Seventh Circuit Court of Appeals, and has been cited as support by other circuits holding that actual knowledge rather than constructive knowledge is required to show an intent to defraud.

In *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983), the court reasoned that if a person lacks knowledge that an odometer disclosure statement is false only because the person displays a reckless disregard for the truth, a fact-finder can reasonably infer that the violation was committed with an intent to defraud a purchaser under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.).

If a person lacks knowledge that an odometer disclosure statement is false only because the person displays a reckless disregard for the truth, the fact-finder can reasonably infer that a violation was committed with an intent to defraud, so as to give rise to liability under the federal odometer law, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), stated the appeals court in *Huson v. General Motors Acceptance Corp.*, 108 F.3d 172 (8th Cir. 1997).

\*\*\*\* Comment:

To the same effect as *Huson v. General Motors Acceptance Corp.*, 108 F.3d 172 (8th Cir. 1997), see *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978); *Busalacchi v. Williamson*, 670 F. Supp. 272 (E.D. Mo. 1987).

The "intent to defraud" required for a violation of the federal odometer tampering statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), includes action taken with reckless disregard, as well as action taken with the specific intent to deceive or cheat potential purchasers, held the court in *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990).

A transferor need not have actual knowledge that an odometer statement is false before liability may be imposed under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, but rather, an intent to defraud may be inferred if the transferor lacks such knowledge only because he or she displays a reckless disregard for the truth or because the transferor closes his or her eyes to the truth, concluded the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998).

\*\*\*\* Comment:

To the same effect as *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998), see *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990); *Jenson v. CS & T Body & Paint of Salt Lake, Inc.*, 9 F.3d 117 (10th Cir. 1993) (not designated for publication); *Lavery v. R-K Leasing*, 19 F.3d 33 (10th Cir. 1994) (not designated for publication); *Charnetsky v. Gus Paulos Chevrolet, Inc.*, 754 F. Supp. 188 (D. Utah 1991); *Mayberry v. Said*, 911 F. Supp. 1393 (D. Kan. 1995).

[\*8b] Actual knowledge

In the following cases, the courts held or recognized that a purchaser must prove a seller's intent to defraud under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by showing that the seller had actual knowledge of the violation involved.

A Fifth Circuit district court in *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979), recognized that actual knowledge of a violation of a rule or regulation promulgated under the Motor Vehicle Information and Cost Savings Act (Act) is necessary to show an intent to defraud.

\*\*\*\* Caution:

However, other Fifth Circuit cases, including the Court of Appeals, have held that constructive knowledge of a violation of the Act itself is sufficient to prove an intent to defraud. See § 8[a].

In order to state a claim under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), there must be an intent to defraud, and Sixth Circuit case law defines intent to defraud as a "willful" act done with specific intent to deceive a purchaser of the mileage on a car, stated the court in *Paul's Auto World v. Boyd*, 881 F.2d 1077 (6th Cir. 1989) (not designated for publication).

Constructive knowledge of the inoperative condition of an odometer is insufficient to draw an inference of fraudulent intent under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705), recognized the court in *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976).

Intent to defraud within the purview of the odometer requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), means to act willfully and with specific intent to deceive any purchaser or potential purchaser of a motor vehicle who inspects the odometer of a motor vehicle as an index of the condition and value of such vehicle, stated the court in *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978), aff'd without reported opinion, 633 F.2d 218 (6th Cir. 1980). The salient showing is that the seller acted with the intent to defraud, not that anyone was actually defrauded, noted the court.

\*\*\*\* Caution:

A Sixth Circuit district court in *Berns v. Ginn*, 1986 WL 6150 (S.D. Ohio 1986), recognized that gross negligence or disregard in preparing an odometer disclosure statement may be sufficient to support an inference of an intent to defraud

under the Act. See § 8[a].

Intent to defraud required by the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988(b), 1989(a), 1990 (now 49 U.S.C.A. §§ 32705, 32709, 32710), must be inferred from actual knowledge of a false odometer setting, not constructive knowledge, held the court in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976). If it is assumed that the intent to defraud required by § 1989(a) may be presumed from a finding of actual knowledge of odometer alteration, a question would nevertheless remain as to whether an intent to defraud can be based solely upon a finding of constructive knowledge that is all that seems to be required for a violation of § 1988(b), observed the court. The better view would seem to be that actual knowledge is necessary to support an inference of intent to defraud and, correspondingly, recovery under § 1989(a), held the court. Such a ruling does not render § 1988(b)'s proscription of constructive knowledge a nullity, as it would seem that a suit by the attorney general to enjoin violations of that section would lie under § 1990 of the Act, concluded the court.

\*\*\*\* Caution:

The Seventh Circuit Court of Appeals in *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988), later appeared to hold that constructive knowledge may be sufficient to show an intent to defraud under the Act, and a string of later district court cases from the Seventh Circuit "followed" this decision. See § 8[a]. The Seventh Circuit Court of Appeals has not spoken on this issue since .

<>

To prevail on private cause of action under Federal Odometer Act, automobile owner must show that defendant intended to defraud owner with respect to a vehicle's mileage or odometer reading. 49 U.S.C.A. § 32710(a). *Lewis v. Horace Mann Ins. Co.*, 410 F. Supp. 2d 640 (N.D. Ohio 2005).

[\*8c] Negligence

The courts in the following cases held or recognized that, under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, proof of a transferor's negligence alone will not support a finding of an intent to defraud.

Mere negligence may be insufficient to sustain an award of damages in an action brought under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), held the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977).

Negligence alone does not support a finding that the Motor Vehicle and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), has been violated, held the court in *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976), and the word "knowingly" does not require a defendant to exercise every possible precaution.

While it is true that a court may infer an intent to defraud from a defendant's negligent actions, negligence alone is not enough to support a finding of liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the court in *Hill v. Bergeron Plymouth Chrysler, Inc.*, 456 F. Supp. 417 (E.D. La. 1978).

Plain and ordinary meaning of the phrase "intent to defraud" in the civil liability provision of the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), envisions misconduct more invidious than mere negligence, stated the court in *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988).

Under federal odometer fraud law, the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the court in *Ray Kim Ford, Inc. v. Daoud*, 750 F. Supp. 327 (N.D. Ill. 1990), mere negligence is not sufficient to suggest an intent to defraud such that civil liability can be imposed under the Act.

\*\*\*\* Comment:

To the same effect as *Ray Kim Ford, Inc. v. Daoud*, 750 F. Supp. 327 (N.D. Ill. 1990), see *Team Food Service, Inc. v. Francis Cadillac, Inc.*, 1988 WL 74730 (N.D. Ill. 1988); *Mid-City Enterprises, Inc. v. Huffman*, 1989 WL 8815 (N.D. Ill. 1989); *Joe Madden Ford, Inc v. Bickel*, 1996 WL 432408 (N.D. Ill. 1996).

Mere negligence in completing the required odometer statements will not lead to liability under the federal odometer law, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), stated the Eighth Circuit Court of Appeals in *Huson v. General Motors Acceptance Corp.*, 108 F.3d 172 (8th Cir. 1997).

The court in *Lavery v. R-K Leasing*, 19 F.3d 33 (10th Cir. 1994) (not designated for publication) held that it did not believe that an intent to defraud under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), could be inferred from simple negligence. The Act does not impose liability on a negligent transferor, stated the court.

Simple negligence is not sufficient to impose liability under the odometer requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, held the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998).

\*\*\*\* Comment:

In , the appeals court held that the district court's definition of the term "reckless disregard" under the Motor Vehicle Information and Cost Savings Act did not mislead the jury, and that the court did not abuse its discretion when, in response to a jury note regarding simple negligence, the court provided an example of negligence, in lieu of a definition.

[\*8.] 5 Specific intent requirement

The following authority considered whether the federal Odometer Act, 49 U.S.C.A. §§ 32701 et seq., has a specific intent requirement.

◇

Motor vehicle purchaser asserting a private right of action for violation of the federal Odometer Act regulation, requiring the transferor of the ownership of a motor vehicle to disclose the mileage on the title or document used to reassign title, was required to prove transferor's intent to defraud with respect to a failure to disclose the vehicle's mileage, rather than a general intent to defraud, or an intent to defraud by withholding the title for reasons unrelated to the mileage disclosure; purposes of Act were to prohibit tampering with odometers and to provide safeguards to protect vehicle purchasers with altered or reset odometers. 49 U.S.C.A. § 32710; 49 C.F.R. § 580.5(c). *Ioffe v. Skokie Motor Sales, Inc.*, 414 F.3d 708 (7th Cir. 2005), cert. denied, 126 S. Ct. 1432, 164 L. Ed. 2d 133 (U.S. 2006)

\*\*\*\* Comment:

Denying certiorari, the United States Supreme Court in *Ioffe v. Skokie Motor Sales, Inc.*, 126 S. Ct. 1432, 164 L. Ed. 2d 133 (U.S. 2006), let stand the determination of the Seventh Circuit that a motor vehicle buyer asserting a private right of

action under the Motor Vehicle Information and Cost Savings Act (Odometer Act) is required to prove the seller's intent to defraud with respect to the failure to disclose the vehicle's mileage. The Act requires the transferor to disclose the mileage on the title or document used to reassign title, and provides that a private party may recover damages from a person who violates the Act or its implementing regulations "with intent to defraud." The Seventh Circuit rejected the claim that it is sufficient to allege a general intent to defraud, as the Eleventh Circuit has held, or an intent to defraud by withholding the title for reasons unrelated to the mileage disclosure.

[\*9] Inference of intent to defraud -- Generally

In the cases below, the courts held that a transferor's intent to defraud cannot be presumed, but may be inferred under the Motor Vehicle and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., from the surrounding facts.

For the purposes of the section of the Motor Vehicle and Cost Savings Act prohibiting the knowing giving of a false statement to a transferee, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), held the court in *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976), fraudulent intent or an intent to deceive cannot be presumed, but such intent may be inferred.

Intent to defraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), cannot be presumed although it can be inferred from the surrounding facts, held the court in *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976).

[\*10] Based on actual knowledge of violation

An inference of a seller's intent to defraud may be based on the transferor's actual knowledge of a violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., held the courts in the cases that follow.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), the court recognized that in a suit for violations of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), an intent to defraud may be inferred from an automobile seller's involvement in a scheme to defraud, with the knowledge that many of the cars sold have incorrect odometer readings, evidencing at least reckless disregard.

In *Terry v. Whitlock*, 102 F. Supp. 2d 661 (W.D. Va. 2000), the court held that a seller who lacks actual knowledge may still "intend to defraud" in violation of 49 U.S.C.A. §§ 32701 et seq.; if a transferor reasonably should have known that a vehicle's odometer reading was incorrect, although he did not know to a certainty the transferee would be defrauded, a court may infer that he understood the risk of such an occurrence.

If a transferor has actual knowledge that the odometer reading of an automobile is incorrect and fails to disclose this to the transferee when executing a false odometer certificate, held the court in *A.B.C. Chevrolet Co. v. Kirk*, 1986 WL 10045 (N.D. Ill. 1986), a court may infer as a matter of law that the transferor did so with intent to defraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.).

\*\*\*\* Caution:

The court in *Ralbovsky v. Lamphere*, 731 F. Supp. 79 (N.D. N.Y. 1990), held that the inference of an intent to defraud under the odometer requirement provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), created by actual knowledge can be dispelled by evidence that there was no intent to defraud.

The court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983), held that if a person violates the

odometer disclosure requirement of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), with actual knowledge of committing the violation, the fact-finder can reasonably infer that the violation was committed with an intent to defraud the purchaser.

[\*11] Based on dominion over vehicle

In the following cases, the courts held or recognized that under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., an inference of a transferor's intent to defraud may be based on the transferor's dominion over a vehicle.

Where an automobile is under the owner's dominion or that of the owner's selling agent during the time that the odometer is tampered with in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991, 1988, 1989 (now 49 U.S.C.A. §§ 32701 to 32711, 32705, 32710), a purchaser may recover from the selling owner, recognized the court in *Shore v. J. C. Phillips Motor Co.*, 567 F.2d 1364 (5th Cir. 1978).

Absent explanation, an automobile dealer's sole dominion of a vehicle tends to show the dealer's responsibility for an altered odometer, held the court in *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978), and the dealer's failure to disclose that the odometer reading is incorrect is evidence of an intent to defraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710). Although the transferor may not have known to a certainty that the transferee would be defrauded, the court may infer that the transferor understood the risk of such an occurrence.

[\*2] Disclosure Requirements

[\*12] Transferor

[\*12a] Ownership

The courts in the following cases held that a "transferor" for the purposes of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., is someone who transfers an ownership interest in a motor vehicle.

A "transferor" is defined by regulation as any person who transfers his ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest, 49 C.F.R. § 580.3, held the First Circuit Court of Appeals in *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 30 Fed. R. Serv. 2d 368 (1st Cir. 1980).

In *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988), the court held that a transferor for the purposes of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), is any person who transfers an ownership in a motor vehicle, by sale, gift, or any means other than by creation of a security interest, citing regulation 49 C.F.R. § 580.3.

A party must have title or some other property interest in an automobile before it may be considered a "transferor" under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), as well as the relevant regulation, 49 C.F.R. § 580.3, opined the court in *Lile v. Louisville Auto Auction*, 1985 WL 6151 (S.D. Ind. 1985).

The rules promulgated under authority of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), define "transferor" as any person who transfers his ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest, according to 49 C.F.R. § 580.3, held the court in *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987). The prevailing view is that to be a transferor within the Act, a person must have an ownership interest in the vehicle, concluded the

court.

A person who had a certain legal or beneficial ownership interest in a vehicle may be considered to be a transferor for the purposes of a violation of the false odometer certification statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), held the court in *U.S. v. Powell*, 806 F.2d 1421 (9th Cir. 1986), even if such a person would not have been considered the owner or transferor at state law.

[\*12b] Nonownership

The courts below held that someone with a nonownership interest in a vehicle may be considered a transferor for the purposes of liability under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710, if the person is involved in fraudulent conduct.

In order to be considered a transferor within the meaning of the criminal disclosure regulations of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1990c (now 49 U.S.C.A. § 32709(b)), held the court in *U.S. v. Ellis*, 739 F.2d 1250 (7th Cir. 1984), evidence that would constitute conclusive proof of ownership is not required, since Congress intended to adopt a nationwide standard requiring those who transfer automobiles to provide odometer statements, and in accomplishing this goal, Congress and the Secretary of Transportation used broad language to describe those falling within the ambit of the Act.

A transferor liable under the federal odometer statute, held the court in *Mayberry v. Said*, 911 F. Supp. 1393 (D. Kan. 1995), typically will be the owner of the vehicle in question, but if a nonowner and the owner are involved in a scheme of fraudulent conduct, the nonowner will be considered a transferor for the purposes of liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710).

\*\*\*\* Observation:

But see *C & S Nat. Bank of Savannah, Ga. v. Gilliam*, 285 S.C. 313, 329 S.E.2d 3 (Ct. App. 1985), where the court held that the lessor of a rented automobile is not a "transferor" under the Motor Vehicle Information and Cost Savings Act where the lease does not pass the title to the vehicle and where the lease merely contains an option to purchase at the end of the leased term for the residual value of the automobile.

[\*13] Agent liability

It has been held that under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, an agent of a transferor cannot be found liable for a violation.

To be held liable under the odometer requirement provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, a defendant must be a "transferor" of the vehicle, and an agent cannot be held personally liable for the transfer of a vehicle, held the court in *Powell v. Manny*, 1997 WL 135900 (N.D. N.Y. 1997).

In *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), the court held that the language of 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705(a)(2)) could not be read to prohibit illegal conduct by sales agents of the transferor. The court observed that in 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), Congress had made it unlawful for "any person or his agent" to reset an odometer, and pointed out that if Congress intended to include an agent under 15 U.S.C.A. § 1988, similar language could have been used.

\*\*\*\* Caution:

n76 When 15 U.S.C.A. § 1984 was repealed and recodified as 49 U.S.C.A. § 32705, the language "any person or his

agent" was removed. However, the stated purpose of the repeal and recodification of this Act was only to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, and to make other technical improvements in the Code. Thus, it is unclear what the removal of this language meant to such a construction of the Act. It is important to note that the phrase "the owner of the vehicle or agent of the owner" is still contained in 49 U.S.C.A. § 32704, regarding the service, repair, and replacement of odometers.

See *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978), where the court held that the sole proprietor of an auto dealership, rather than the manager of the dealership, was the "transferor" for the purposes of liability under 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

An agent who at all times acts merely as an agent for the true owner is not a transferor under the criminal disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1988(b) (now 49 U.S.C.A. § 32705), recognized the court in *U.S. v. Powell*, 806 F.2d 1421 (9th Cir. 1986).

[\*14] Auction company liability

Under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, an automobile auction company may be liable as a transferor if it holds title to a vehicle, even for a brief period of time, held or recognized the courts in the cases below.

Automobile auction companies may be liable as transferors under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), when they have title to the automobiles they auction, even for a brief period of time, since having title, while not conclusive proof of ownership, is sufficient indicia of ownership for the purposes of the Act, held the court in *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987). Conversely, automobile auction companies are not liable under the Act when they are truly intermediaries, only peripherally involved in the sales transaction, explained the court.

\*\*\*\* Comment:

To the same effect as *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987), see *Lile v. Louisville Auto Auction*, 1985 WL 6151 (S.D. Ind. 1985).

The key ingredient in determining whether an auction company is a transferor under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988(a), (b) (now 49 U.S.C.A. § 32705), recognized the court in *Industrial Indem. v. Arena Auto Auction*, 638 F. Supp. 1030 (D. Minn. 1986), is whether the auction company held title to a vehicle, even for a brief period of time. Holding title may be a sufficient indicia of ownership for the Act, stated the court.

[\*15] Reasonable care of transferor

The courts in the following cases held or recognized that the transferor of an automobile must exercise reasonable care concerning the reliability of the automobile's odometer or risk liability under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710.

Transferors of an automobile can be held liable under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), for violation of the federal odometer disclosure requirements in the absence of actual knowledge of violations if the transferors reasonably should have known that the odometer reading was incorrect, held the court in *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc.*, 721 F. Supp. 63 (S.D. N.Y. 1989). An assessment of the reasonableness of a seller's conduct must include reference to the seller's experience in car sales, determined the court. What is reasonable for a layperson may not be so for an individual engaged in the business of

buying and selling used cars, explained the court. The legislative history incident to the relevant sections states that the test of "knowingly" was incorporated so that the auto dealer with expertise now would have an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, the dealer would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified, noted the court. Although § 1989 of the statute (now § 32710) adds an "intent to defraud" requirement, the court stated that it did not think this section abandoned the reasonableness standard apparent in the legislative history. The apparent purpose of § 1989 (now § 32710) is to give teeth to the disclosure requirements by creating substantial civil penalties for violations of the statute, explained the court, and so a construction of § 1989 (now § 32710) that would require a finding of actual knowledge of odometer inaccuracies clearly runs contrary to the goals of the statute.

Under the Federal Odometer Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), if, in the exercise of reasonable care, an automobile's transferor would have had reason to know that the mileage was more than that which the odometer indicated or a previous owner had certified, the transferor has a duty to disclose that the actual mileage is unknown, held the court in *Heffler v. Joe Bells Auto Service*, 946 F. Supp. 348 (E.D. Pa. 1996).

If, in the exercise of reasonable care, a transferor would have had reason to know that the odometer on an automobile had "turned over," the transferor must disclose this fact on the odometer mileage statement under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), held the court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979). The knowledge of the "turn over" that the transferor must have is not absolute certitude, clarified the court.

A transferor who should know in the exercise of reasonable care that an automobile's odometer has turned over is required to disclose such fact to the purchaser, recognized the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987), under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

The legislative history of § 1988 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), makes it clear that a party must use "reasonable care" to assure the accuracy of odometer disclosure statements, stated the court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983).

An automobile dealer has a duty to exercise reasonable care in ascertaining the accuracy of an odometer reading before certifying its correctness under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), held the court in *Charnetsky v. Gus Paulos Chevrolet, Inc.*, 754 F. Supp. 188 (D. Utah 1991), even if the dealer does not have actual knowledge of tampering with the odometer.

[\*16] Assessing reasonableness of transferor conduct

It has been held that a transferor's experience in car sales and a vehicle's unreasonably low mileage are relevant in assessing the reasonableness of the transferor's conduct under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710.

A dealer's experience in car sales and a vehicle's unreasonably low mileage in relation to the year and condition of the car are relevant in assessing the reasonableness of a dealer's conduct, held the court in *Daluz v. Acme Auto Body & Sales, Inc.*, 814 F. Supp. 242 (D. Conn. 1992).

[\*17] Affirmative duty to inquire

Under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710, held or recognized courts in the following cases, a transferor has an affirmative duty to inquire regarding the accuracy of an odometer reading.

One may not consciously avoid learning that the true mileage of a vehicle is not as it appears on the odometer and factual circumstances such as would alert transferors to the probable inaccuracy of an odometer reading would give rise to a duty of further investigation under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), held the court in *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc.*, 721 F. Supp. 63 (S.D. N.Y. 1989).

When a seller of used cars is a dealer of cars, it has an affirmative duty to discover defects in odometer mileage reporting if it reasonably should have known that the odometer reading was incorrect, under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), held the court in *Daluz v. Acme Auto Body & Sales, Inc.*, 814 F. Supp. 242 (D. Conn. 1992).

The legislative history of the Federal Odometer Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), clearly imposes an affirmative duty on a dealer to adopt practices reasonably designed to uncover incorrect odometer readings, held the court in *Heffler v. Joe Bells Auto Service*, 946 F. Supp. 348 (E.D. Pa. 1996).

Once an automobile dealer has notice of grounds for suspecting an odometer's inaccuracy, the law imposes on the dealer a duty of further inquiry, held the court in *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988), and the dealer must then investigate the facts in order to ascertain whether the odometer's mileage reading is reliable, before certifying it as such, under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705); or, if the dealer chooses not to do this, then the dealer is legally bound to inform the customer that he or she suspects the odometer is incorrect and that it should not be relied upon. In particular, a transferor is specifically obligated to review carefully all documents relating to the title and mileage of a car, and may even be required to check into the official motor vehicle records of those states where the car has been located, as part of such an affirmative duty, stated the court.

The remedial purposes of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), in the view of the court in *Cantrell v. Thaler Ford Sales, Inc.*, 485 F. Supp. 528 (S.D. Ohio 1980), dictate that the auto dealer, not the consumer, bear the burden of discovering prior misrepresentation.

The intent of Congress is to impose an affirmative duty upon dealers under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), to detect odometer irregularities, recognized the court in *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987).

In *Huson v. General Motors Acceptance Corp.*, 108 F.3d 172 (8th Cir. 1997), the Eighth Circuit Court of Appeals recognized that the transferor of an automobile has a duty to inspect the vehicle and title documents before providing a mileage statement under the federal odometer law, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

The federal odometer law, the Motor Vehicle Information and Cost Savings Act 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), imposes an affirmative duty on automobile dealers to discover defects, stated the court in *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990). Thus, a transferor of a vehicle may be found to have intended to defraud if the transferor had reason to know that the mileage on the vehicle was more than was reflected by the odometer or certification of the previous owner and nevertheless failed to take reasonable steps to determine the actual mileage.

An automobile dealer cannot escape liability under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, by relying solely on an odometer reading and the assertions of the previous owner, since dealers have an affirmative duty to discover odometer defects, stated the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998).

## [\*18] Specific circumstances giving rise to duty to inquire

It has been held that specific circumstances may give rise to a transferor's affirmative duty to inquire under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710.

Circumstances giving rise to a seller's duty to inquire under the odometer requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), held the court in *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc.*, 721 F. Supp. 63 (S.D. N.Y. 1989), include unreasonably low mileage in relation to the year of the car, the condition of the tires, and the condition of the interior and exterior of the car.

## [\*19] Duty to disclose mileage unknown

Under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32710, the courts in the cases that follow held or recognized that a transferor has a duty to disclose the fact that a vehicle's mileage is unknown.

The legislative history incident to the relevant sections of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), states that the test of "knowingly" was incorporated so that the auto dealer with expertise now would have an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, the dealer would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified, held the court in *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc.*, 721 F. Supp. 63 (S.D. N.Y. 1989). Although § 1989 of the statute (now § 32710) adds an "intent to defraud" requirement, the court stated that it did not think this section abandoned the reasonableness standard apparent in the legislative history. The apparent purpose of § 1989 (now § 32710) is to give teeth to the disclosure requirements by creating substantial civil penalties for violations of the statute, explained the court, and so a construction of § 1989 (now § 32710) that would require a finding of actual knowledge of odometer inaccuracies clearly runs contrary to the goals of the statute.

Under a regulation promulgated pursuant to the Motor Vehicle Information and Cost Savings Act of 1972 providing that if the transferor of an automobile knows that the odometer reading differs from the number of miles the vehicle has actually traveled and that the difference is greater than that caused by an odometer calibration error, 49 C.F.R. § 580.4(c) (now 49 C.F.R. § 580.5(e)(3)), the transferor shall include a statement that the actual mileage is unknown, held the court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976).

The Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), and the applicable regulation, 49 C.F.R. § 580.4(c) (now 49 C.F.R. § 580.5(e)(3)), provide that if a transferor of an automobile knows the odometer reading to be different from the number of miles the vehicle has actually traveled, the transferor must disclose that the actual mileage is unknown, held the court in *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977).

Making affirmative claims about the mileage of a used vehicle without knowledge is either intentionally deceitful or reckless, and thus, violates the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), declared the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987).

The Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), does not require a used automobile seller to go beyond disclosures that consist of recorded mileage and a statement that the actual mileage is unknown, recognized the court in *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980), to state its belief regarding the car's actual mileage, so long as the seller's silence does not stem from an intent to defraud.

In the event that the transferor of a used automobile knows that the odometer has turned over once and has reason to believe it has turned over more than once, the transferor should indicate that actual mileage is unknown but a minimum of 100,000 miles plus the figure shown by the odometer, in order to comply with the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(A)), held the court in *Suits v. Little Motor Co.*, 642 F.2d 883 (5th Cir. 1981).

In *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976), the court held that in order to eliminate the potential loophole of an automobile dealer's providing a false odometer statement to a purchaser when the dealer is relying completely on the representations of the previous owner, the test of "knowingly" was incorporated into the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), so that the auto dealer with expertise would have an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, the dealer would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified. This section originally allowed a person to rely completely on the representations of the previous owner, noted the court. For example, explained the court, a person could have purchased a vehicle knowing that the mileage was false but received a statement from the transferor verifying the odometer reading. Suppose an auto dealer bought a car with a 20,000 mile odometer verification, but any mechanic employed by that auto dealer could ascertain that the vehicle had at least 60,000 miles on it. The bill as introduced would have permitted the dealer to resell the vehicle with a 20,000 mile verification, stated the court.<sup>n77</sup>

The Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), envisions that when an odometer statement indicates that the true mileage is unknown, the recipient of the statement is thereby put on notice that the vehicle's odometer reading is not to be relied upon and that the recipient should make an independent investigation of the vehicle's condition and value, held the court in *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980).

[\*20] Knowledge required to create duty

Less than actual knowledge is sufficient to create a duty to disclose that the mileage of a vehicle is unknown under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, held the courts in the following cases.

Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), held the court in *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978), a transferor who lacks actual knowledge that an odometer reading is incorrect may still have a duty to state that the actual mileage is unknown.

Constructive knowledge that an automobile's odometer reading is less than the actual mileage is sufficient to make a transferor of an automobile civilly liable under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705) for failure to disclose that the vehicle's actual mileage is unknown, held the court in *Leach v. Bishop Bros. Auto Auction, Inc.*, 624 F.2d 34 (5th Cir. 1980).

Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1988(b) (now 49 U.S.C.A. §§ 32705, 32705(a)(1)(B)), held the court in *Huryta v. Diers Motor Co. of Grand Island, Neb.*, 426 F. Supp. 1176 (D. Neb. 1977), the knowledge that legally requires a seller to make a statement that the actual mileage on a vehicle is unknown may consist of something less than perfect assurance that the odometer reading is incorrect.

[\*21] Transferor knows true mileage

[\*21a] Duty to disclose total mileage

It has been held that when a transferor knows that an odometer has "turned over," the transferor must disclose that the mileage is 100,000 plus the number actually appearing on the odometer, and may certify the mileage as "unknown" only when the transferor believes the odometer reading is inaccurate for some other reason, under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705.

When a transferor knows that a motor vehicle odometer has "turned over" after registering 99,999 miles, the "cumulative mileage" that must be stated under the mileage disclosure statute, Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), is the total of 100,000 plus the number actually appearing on the odometer, and the transferor may certify the mileage as "unknown" only when the transferor believes that, for some other reason, the odometer's reading is inaccurate, held the court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979). The court explained that it could not believe that Congress intended to enact a statute requiring that consumers be given false or misleading information.

\*\*\*\* Comment:

In so holding, the Fourth Circuit Court of Appeals in noted that the absurdity of any other application of § 1988 (now 49 U.S.C.A. § 32705) to the case of an odometer that has turned over was pointed out by the district court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976), see § 21[b], upon which the court below had relied. As the court noted, although a literal reading of § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(B)) could require the transferor to state that the actual mileage is unknown when he or she knows that the true mileage exceeds the figures appearing on the odometer by 100,000 miles, forcing the transferor to state that the actual mileage was "unknown" would require the transferor to violate § 1988(b) (now 49 U.S.C.A. § 32705(a)(2)), which makes it unlawful to knowingly give a false statement to the transferee in making any disclosure. Whereas the district court concluded that the statute imposes no duty upon a transferor in this situation beyond recording the numbers appearing on the odometer, the Fourth Circuit in disagreed, holding that the statute imposed a duty upon a transferor to indicate the cumulative mileage. The court noted that its interpretation of § 1988 would not impose liability upon any transferors who, in good faith, interpreted the requirements of the statute in the same manner as did the district court, since § 1989 (now 49 U.S.C.A. § 32710) of the statute requires proof of intent to defraud before liability can be imposed.

[\*21b] No duty to disclose total mileage

The courts in the cases below held that under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, a transferor has no duty to disclose that the true mileage of an automobile exceeds the figures appearing on the odometer, if the transferor knows the true mileage.

In *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976), the court held that although a literal reading of § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(B)) of the Motor Vehicle Information and Cost Savings Act (Act) could require a transferor to state that the actual mileage is unknown when he or she knows that the true mileage exceeds the figures appearing on the odometer by 100,000 miles, forcing the transferor to state that the actual mileage is "unknown" would require the transferor to violate § 1988(b) (now 49 U.S.C.A. § 32705(a)(2)), which makes it unlawful to knowingly give a false statement to the transferee in making any disclosure, and therefore a transferor in this position has no duty beyond recording the numbers appearing on the odometer. In so holding, the court stated that it had no doubt that the statute and regulations were intended to cover this situation, but only by stretching and contorting the words of the Act and the regulations could this end be achieved. This is not a proper judicial role, explained the court, and legislators ought to be able to draft statutes with clarity and care.

The disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), do not impose upon a transferor a duty to disclose a vehicle's actual mileage when the transferor knows the odometer reading to be inaccurate and knows the actual mileage of the vehicle, held the court in *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980). Such a requirement would appear to be salutary in view of

the purposes of the Act, and perhaps the Act should be amended accordingly, noted the court, but it was apparently Congress's judgment that the disclosure goals of the Act could be satisfactorily met solely by the requirement that a transferor who knows the odometer reading to be inaccurate state that the actual mileage is unknown.

[\*22] Transferee

The courts in the following cases held that the ultimate purchasers of automobiles are "transferees" for the purposes of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705.

Ultimate purchasers of automobiles are "transferees" for the purposes of an odometer tampering prosecution under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1990c (now 49 U.S.C.A. §§ 32705, 32709), concluded the court in *U.S. v. Waldrop*, 786 F. Supp. 1194 (M.D. Pa. 1991), aff'd without reported opinion, 983 F.2d 1054 (3d Cir. 1992).

The court in *State of Utah by Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988), recognized that the ultimate purchasers of automobiles, represented by a state attorney general, are "transferees" for the purpose of stating a cause of action for violation of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

[\*3] Other Terms or Provisions

[\*23] Motor vehicle

In the cases below, the courts held that the term "motor vehicle" in the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, includes any vehicle driven or drawn by mechanical power for use in the public streets, roads, and highways, and that a motorcycle falls within this definition.

In *Grambo v. Loomis Cycle Sales, Inc.*, 404 F. Supp. 1073 (N.D. Ind. 1975), the court held that whether Congress intended the term "motor vehicle" to cover motorcycles could be found in the legislative history of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), where "motor vehicle" was described as including any vehicle driven or drawn by mechanical power for use in the public streets, roads, and highways. The court said that the description clearly covered motorcycles, and that the prohibitions and requirements of the Act applied to such vehicles.

Motorcycles fall within the protective ambit of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), held the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978).

[\*24] Person

It has been held that the word "person" as used in various provisions of the Motor Vehicle Information and Cost Savings Act (Act), 49 U.S.C.A. §§ 32701 to 32711, means and includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, individuals, and transferors and transferees under the Act.

In *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), the court held that the word "person" as used in various provisions of 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711) means and includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." The court further defined the term "person" to include transferors and transferees, as used in the statute.

[\*25] Agent

It has been held that the word "person" as used in various provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, includes agents of firms and corporations acting within the scope of their employment.

In *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), the court held that the word "person" as used in various provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), includes agents of firms and corporations acting within the scope of their employment.

\*\*\*\* Caution:

A number of courts have held or recognized that a "transferor's" agent cannot be held personally liable for the transfer of a vehicle. See, e.g., *Powell v. Manny*, 1997 WL 135900 (N.D. N.Y. 1997); *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), § 13.

[\*26] Knowingly and willfully

It has been held that the phrase "knowingly and willfully" as used in the statute providing criminal penalties for odometer tampering, the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32709(b), means an intentional violation of a known legal duty.

"Knowingly and willfully" as used in the statute providing criminal penalties for odometer tampering, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1990c (now 49 U.S.C.A. § 32709(b)), means an intentional violation of a known legal duty, held the court in *U.S. v. Studna*, 713 F.2d 416 (8th Cir. 1983). Since Congress required a showing of an intent to defraud in the civil section but did not do so in the criminal section, reasoned the court, it seemed that requiring such an intent would constitute an unwarranted addition to the statute not reflected by its language.

\*\*\*\* Comment:

The Eighth Circuit Court of Appeals in noted that other courts have interpreted similar language in tax statutes to mean an intentional violation of a known legal duty. The court stated its belief that this interpretation should also apply to 15 U.S.C.A. § 1990c (now 49 U.S.C.A. § 32709(b)).

[\*27] Actual damages

In the following cases, the courts held or recognized that a purchaser's actual damages under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, are the difference between the fair market value of the vehicle with its actual miles and the amount paid for the vehicle by the purchaser, and may include other incidental expenses.

The court in *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980), held that the actual damages for giving the purchaser of a used car a false statement concerning the mileage on the car in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), are the difference between the fair market value of the car with actual miles thereon and the amount paid for the automobile by the purchaser and any other damages the purchaser has incurred. In calculating the damages to be assessed against the car dealer, the dealer was not entitled to a deduction of the amount received by the purchaser when he subsequently sold the vehicle, or a deduction of the value of the car to the purchaser during the period in which he owned and operated the car.

Although "actual damages" is not defined in the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §

1989 (now 49 U.S.C.A. § 32710), it seems reasonable to give it the meaning commonly applied to fraud cases, which is the difference between the amount paid by the purchasers, not the value of the car if it had been as represented, and the fair market retail value of a vehicle of the type purchased with the number of miles actually traveled by the car, plus such outlays as are legitimately attributable to the acts of the transferors, held the court in *Cantrell v. Thaler Ford Sales, Inc.*, 485 F. Supp. 528 (S.D. Ohio 1980). Noting that the purpose of the statute is to punish odometer tamperers by imposing civil penalties upon them and to reward purchasers who discover such tampering and bring it to the attention of the federal courts, the court determined that in view of this policy a consumer would not be "adequately protected" by an interpretation of the Act that would limit the "actual damages" recoverable against an admitted wrongdoer to the incremental amount of damage caused by that wrongdoer, assuming such damage could even be separately determined. Particularly where Congress has made explicit reference in enacting this statute to the movement of motor vehicles in interstate commerce, 15 U.S.C.A. § 1981 (now 49 U.S.C.A. § 32701(a)(4)), the court held that private prosecution to effectuate the Act would be unduly hindered by a decision that would require a consumer to pursue a claim for damages in a piecemeal manner.

Buyers of a car that had its odometer rolled back in violation of the Motor Vehicle Information and Cost Savings Act are entitled to recover as "actual damages" the difference between the amount paid for the car and its fair market retail value at the time of the sale under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), held the court in *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986).

Purchasers are entitled to recover as damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a)(1) (now 49 U.S.C.A. § 32710(a)), the difference between the amount they paid for the car and the fair market retail value of the same car with the number of miles it has actually traveled, recognized the court in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978).

The statutory damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), have been defined as the difference between the amount paid for the automobile and the fair market value of the same type of car with the number of miles it had actually traveled, plus incidental expenses, held the court in *Goeman v. Keating*, 498 F. Supp. 700 (D.S.D. 1980).

[\*28] Reliance

It has been held that a consumer must show reliance on an odometer statement in order to show actual damages under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710.

A consumer need not show reliance on an odometer statement in order to prove a violation of the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), but such reliance is necessary to show actual damages, held the court in *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988).

[\*29] Repairs occasioned by misrepresentation

Actual damages under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, may include repairs occasioned by the misrepresentation of a vehicle's mileage, recognized the courts in the cases that follow.

Repair bills linked to the mileage of a vehicle may be included in the actual damages awarded to a purchaser under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), recognized the district court in *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980).

In *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986), the court recognized that buyers of a car that has its odometer rolled back in violation of the Motor Vehicle Information and Cost Savings Act are not entitled to recover as "actual damages" repairs that are not affirmatively shown to have been occasioned by the misrepresentation inherent

in the odometer rollback under *15 U.S.C.A. § 1989(a)* (now *49 U.S.C.A. § 32710(a)*). Thus, in order for a purchaser to recover repair bills as "actual damages" under § 1989, the purchaser must show that repairs would not have been needed if the car had in fact been a car with the lower mileage indicated on the odometer, explained the court. This could include repairs that were necessitated by the increased use (as measured in miles driven) and that would not have been needed if the car had not undergone such use, observed the court, and this could be established through testimony indicating that the repair had to be made because the particular part was worn out by use consistent with the higher mileage but would not have worn out by use at the lower mileage. What is essential is that the purchaser must prove that the repair was necessitated by the extra use, emphasized the court, since although common sense might dictate that the more a vehicle is used, the more likely its parts will be worn down or in need of replacement, this notion alone is insufficient to justify awarding damages for repairs undertaken by the purchaser. The fact that a car with higher mileage commands a lower retail price indicates that the market will take into consideration the higher probability of need for repair when determining the price for the higher mileage vehicle, noted the court, and the buyer of a higher mileage vehicle will pay less for such a vehicle because the buyer knows that the costs occasioned by greater use of the car will come sooner than for a lower mileage version of the same car; the buyer gets the benefit of a lower cost up front, but assumes the risk that other costs may soon surface. Once the market forces set a price, the buyer cannot complain when those costs begin to accrue (unless they are the result of misrepresentations on the part of the seller) because that is the risk inherent in such a purchase, and that is the risk that gave the buyer a lower price in the first place, reasoned the court. The point here is that repairs occasioned by normal wear and tear of the vehicle are costs reflected in the fair market retail price of a used car, concluded the court, and therefore when an odometer rollback purchaser is awarded damages for the difference between the price paid and the fair market retail value, he or she is already "compensated" for repairs incurred because of normal wear and tear of the higher mileage vehicle -- the market's valuation of the value-depressing effect of such costs is contained in a lower fair market retail price.

See *Duval v. Midwest Auto City, Inc.*, *425 F. Supp. 1381 (D. Neb. 1977)*, judgment aff'd on other grounds, *578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978)*, where the court held that under the Motor Vehicle Information and Cost Savings Act, *15 U.S.C.A. § 1989* (now *49 U.S.C.A. § 32710*), actual damages for tampering with an odometer or the failure to provide proper certification may include such outlays as are legitimately attributable to the acts of the sellers.

[\*IV] PRIVATE CIVIL ACTIONS

[\*A] Generally

[\*30] Statute of limitations

The two-year statute of limitations for private civil actions under the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. § 32710(b)*, does not begin to run until the fraud is discovered or should have been discovered by the purchaser, held the courts in the following cases.

The statute of limitations on a cause of action for violation of the Motor Vehicle Information and Cost Savings Act, *15 U.S.C.A. § 1989* (now *49 U.S.C.A. § 32710(b)*), a statute prohibiting tampering with motor vehicle odometers, runs from the time when the violation was discovered, not from the time when the odometer was changed, reasoned the court in *Levine v. MacNeil*, *428 F. Supp. 675 (D. Mass. 1977)*. The statute is silent on this issue, noted the court, but stated that where the gravamen of the complaint is the fraudulent concealment of a material fact, it would seem to be in accordance with general principles of law to hold that the date of discovery is the starting point for the running of the statute.

Violation of the federal odometer statute, *15 U.S.C.A. §§ 1981 to 1991* (now *49 U.S.C.A. §§ 32701 to 32711*), is considered a fraudulent act, and federal courts have similarly held that the limitations period runs from the moment the

purchaser discovered or reasonably could have discovered the fraud, held the Fourth Circuit Court of Appeals in *Ferris v. Haymore*, 967 F.2d 946 (4th Cir. 1992), as amended, (July 22, 1992).

In *Tye v. Spitzer-Dodge*, 499 F. Supp. 687 (S.D. Ohio 1980), the court held that the limitations period under the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710), is tolled from running until the time when the violation was first discovered by a purchaser; this interpretation follows the well-established federal doctrine that where fraud is involved in the cause of action, the statute of limitations does not begin to run until the fraud is discovered or should have been discovered by the plaintiff.

The two-year statute of limitation for actions under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710(b)), begins to run from the date of discovery or constructive discovery of a violation, stated the court in *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980). Since actions brought under the Act are founded upon fraudulent conduct, explained the court, federal courts are bound to employ the federal "discovery rule," which provides that statutes of limitation applicable to actions sounding in fraud begin to run either from the date a plaintiff discovers the fraud or from the date a plaintiff could have in the exercise of reasonable discretion discovered the fraud.

Because actions under the Federal Odometer Act (Act), 49 U.S.C.A. § 32710, involve allegations of fraudulent conduct, federal courts employ the federal "discovery rule," under which a cause of action accrues either on the date a purchaser discovers the fraud or on the date that the purchaser could have, in the exercise of reasonable diligence, discovered the fraud, held the court in *Carrasco v. Fiore Enterprises*, 985 F. Supp. 931 (D. Ariz. 1997). In so holding, the court noted that the 1994 revision notes of the Act explicitly state that the substitution of the phrase "after the claim accrues" for "from the date on which the liability arises" was intended only to eliminate unnecessary words, and that the statute of limitations provision was not substantively changed by the revisions.

\*\*\*\* Comment:

To the same effect as *Carrasco v. Fiore Enterprises*, 985 F. Supp. 931 (D. Ariz. 1997), see *Jones v. Roy Stanley Chevrolet*, 666 F. Supp. 194 (D. Mont. 1987).

In interpreting the federal discovery rule in the context of odometer rollback cases, held the court in *Davis v. Adoption Auto, Inc.*, 731 F. Supp. 1475 (D. Kan. 1990), it has been held that actual knowledge that a rollback has occurred is unnecessary to start (or alternatively, to end the tolling of) the statutory limitations period under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710(b)), but rather, the test is when a prudent person under the circumstances would be led to further inquiry regarding the possibility of odometer tampering.

[\*31] Persons against whom statute runs

[\*31a] Each purchaser who discovers fraud

The courts in the cases below held that the two-year private civil statute of limitations under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), runs against each purchaser who discovers or constructively discovers the fraud.

The statute of limitations begins to run on an action against any prior owner who violated the Federal Odometer Act (Act) under 49 U.S.C.A. § 32710(b) when the purchaser discovers or constructively discovers the violation by each prior owner, held the court in *Carrasco v. Fiore Enterprises*, 985 F. Supp. 931 (D. Ariz. 1997), and under this theory, the cause of action belongs to each purchaser, who may bring a cause of action against all prior owners who violated the Act.

The court in *John Watson Chevrolet, Inc. v. Willis*, 890 F. Supp. 1004 (D. Utah 1995), held that the two-year statute of limitations contained in the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710(b)), begins to run as against a potential plaintiff only when that plaintiff, and not any other purchaser of the automobile, knows or reasonably should know that a violation of the Act has occurred. Thus, a buyer's knowledge as to the previous owner's possible violation of the statute is not imputed to subsequent buyers, explained the court.

\*\*\*\* Comment:

In so holding, the court in chose to follow the reasoning of *Attorney General of State of Md. v. Dickson*, 914 F.2d 247, 17 Fed. R. Serv. 3d 1075 (4th Cir. 1990), an enforcement action brought by the attorney general under 15 U.S.C.A. § 1990a (now 49 U.S.C.A. § 32709), see §§ 74 to 76, 78 to 83, rather than the reasoning of *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980), see § 31[b], which like was brought under the private civil enforcement provision of 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(b)). The court stated that this was a distinction without a difference, however, because the statute of limitations for those two sections of the federal Act are substantively the same, and therefore, the reasoning in was applicable in . was based on faulty notions of public policy, stated the court in , since the focus should be on the specific policy considerations behind Congress's enactment of the Act, and not on the general policy considerations inherent in all statutes of limitations. Congress enacted the Act to punish odometer tamperers by imposing civil penalties upon them and to reward purchasers who discover such tampering and bring it to the attention of the federal courts, noted the court, and this policy would not be furthered by an interpretation of § 1989(b) (now 49 U.S.C.A. § 32710(b)) that imputes the knowledge of one prior purchaser to all later purchasers to bar a later purchaser's recovery. The court therefore refused to read such a limitation into the statute.

[\*31b] All potential purchasers

It has been held that the two-year private civil statute of limitations under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), runs against all potential purchasers at the time any person having standing to sue discovers or constructively discovers the violation, absent some act of fraudulent concealment.

Violation of the Motor Vehicle Information and Cost Savings Act (Act) creates a single cause of action, not as many causes of action as there might be subsequent owners of the vehicle involved, held the court in *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980), and thus since a violation becomes actionable when any potential transferee has a right of action, the Act's statute of limitation begins to run as to the violation of the Act as against all potential purchasers at the time any person having standing to sue discovers or constructively discovers the violation, absent some act of fraudulent concealment, under 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710(b)). To interpret the Act's statute of limitation so that it begins to run only upon the transferee's discovery or constructive discovery of a violation, without regard to any knowledge of that violation possessed by prior owners and potential transferees, would effectively undermine the policy considerations inherent in Congress's enactment of a statute of limitation, reasoned the court. Such an interpretation could subject a violator of the Act to potential liability throughout the life of a vehicle, observed the court, and this would be true even though the alleged violator's transferee was aware of the alleged violation of the Act and had slept on his or her rights. The court refused to find that Congress intended such an inequitable result. Further, the court did not believe that its interpretation would significantly remove any of the teeth from the Act's bite, pointing out that once a violation has been discovered by a vehicle owner, before a subsequent owner will be misinformed as to the vehicle's mileage, another violation of the Act will have had to occur somewhere along the portion of the chain of title extending from the owner who discovered the violation to the subsequent complaining owner.

[\*32] Action time-barred

The courts below found that an action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., was time-barred by the two-year civil statute of limitations, based on the facts and circumstances of

each case.

An action was brought by a purchaser against a prior transferor of a vehicle alleging that the transferor had turned back the odometer on the vehicle in 1973 in violation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), and on the transferor's motion for summary judgment, the court in *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980), determined that since the prior purchasers discovered or should have discovered the alleged violation of the Act more than two years before the commencement of the action, the alleged violation of the Act by the transferor was time-barred. An automobile purchaser who discovered, or in the exercise of reasonable diligence could have discovered, that the odometer had been disconnected on the day he purchased an automobile was barred from bringing an action under the Federal Odometer Tampering Act, Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), more than two years after the date of this discovery, found the court in *Jones v. Roy Stanley Chevrolet*, 666 F. Supp. 194 (D. Mont. 1987). In so finding, the court noted that the purchaser did not have to wait for the car to show signs of excessive wear, indicating the odometer must have been reset or altered, before a cause of action accrued. Merely disconnecting the odometer with the intent to change the number of miles registered gives rise to an actionable claim, held the court, and assuming that the dealer did state that the odometer had been disconnected as alleged, a prudent person so informed would be led to further inquiry.

[\*B] Parties

[\*1] Transferee Status

[\*33] Transferee

[\*33a] Found

Based on the facts and circumstances of each of the following cases, the courts found that a party was a transferee for the purposes of bringing a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

Where a husband negotiated the purchase of a used automobile and remained responsible for the debt incurred, but subsequently determined that the automobile would be placed in his wife's name for the purposes of financing, the court in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), found that the husband was the "transferee" of the automobile for the purposes of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1982, 1989 (now 49 U.S.C.A. §§ 32702, 32710), and was therefore a real party in interest for the purpose of proceeding under that Act to recover damages for a false odometer setting. The statutory and administrative language of the Act evince an intent to expansively prescribe the class of persons to be protected and, correspondingly, the class of persons who may bring suit thereunder, noted the court.

The intention of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), of having each transferor give odometer information to a buyer, together with extremely strong documentary evidence of ownership that an automobile auctioneer created, led the court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983), to conclude that the auctioneer's brief retention of the title of a car made it a "transferee" under the Act.

An automobile dealer was found liable in the district court of giving a false odometer statement with an intent to defraud under the Federal Odometer Statute, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), and upon appeal, the court in *Van Praag v. Columbia Classics Corp.*, 849 F.2d 1106, 11 Fed. R. Serv. 3d 845 (8th Cir. 1988), found that the

individual who obtained ownership of the automobile was a real party in interest, or transferee, who could maintain an action for odometer tampering.

A customer who executed a purchase order and tendered a down payment for an automobile was a "transferee" entitled to seek relief under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), for the transferors' alleged concealment of the true mileage of the automobile, found the court in *Evans v. Paradise Motors, Inc.*, 721 F. Supp. 250 (N.D. Cal. 1989), even though the customer did not take title to or possession of the automobile upon discovering that the original odometer on the automobile had been replaced and that the automobile had greater mileage than was represented. The aggressive statutory scheme of the Act suggests a generous reading of the standing requirement, stated the court. A seller should not have a pretransfer escape hatch if the tampering is discovered before the deal is closed, reasoned the court, since the harm is already done. The buyer wants to recoup the time, money, and energy invested in the transaction, and may feel pressured to take the car when the dealer says, "[y]ou're getting a good deal even if the mileage is more," added the court. The court concluded that the most effective private attorneys general are the most vigilant and those who will detect the fraud at the earliest opportunity; certainly Congress did not intend to prevent this class from representing the public in the courts.

[\*33b] Not found

In the following cases, the courts found that a party was not a transferee for the purposes of bringing a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances of each case.

In *Kennedy v. BMW Financial Services, N.A.*, 2003 WL 22305163 (D. Conn. 2003), the court held that the Odometer Act, 49 U.S.C.A. § 32705(c)(1), requires a transfer of the legal ownership from a lessor before its disclosure requirements are triggered and therefore, when the lessor returned the vehicle back to the dealership, the transfer was not triggered because the dealership had maintained ownership throughout the length of the lease.

An automobile dealer was found liable in the district court of giving a false odometer statement with an intent to defraud under the Federal Odometer Statute, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), and upon appeal, the Eighth Circuit Court of Appeals in *Van Praag v. Columbia Classics Corp.*, 849 F.2d 1106, 11 Fed. R. Serv. 3d 845 (8th Cir. 1988), found that the corporation that held a security interest in the automobile was not a transferee under the pertinent regulations and thus could not maintain a cause of action under the statute.

A wife who cosigned loans and kept the ledger for an automobile business run as a sole proprietorship by her husband was not a transferee who could maintain an action for violations of the federal odometer statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1984, 1986, 1988, 1989 (now 49 U.S.C.A. §§ 32703, 32705, 32710), arising out of the sale to the business of automobiles with altered odometers, found the court in *Bishop v. Mid-America Auto Auction, Inc.*, 772 F. Supp. 565 (D. Kan. 1991). While the wife's position as that of a cosigner conferred an interest in the outcome of the litigation, it did not entitle her to maintain the action in her own name, held the court, since only one who is a transferee under the regulations governing a federal odometer statute may maintain a cause of action under the statute, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710). The vehicle's title was never in the wife's name, she did not have any knowledge of the purchase, and she did not see an odometer statement in conjunction with the purchase, observed the court.

[\*34] Subsequent transferor

The courts in the following cases found, based on the facts and circumstances presented, that a subsequent transferor who violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., was barred from bringing a private civil action as a transferee.

In *Galano v. McDonald Chevrolet-Oldsmobile, Inc.*, 644 F. Supp. 940 (W.D. Pa. 1986), the court found that where a used car dealer who purchased a car from another dealer brought an action under the Motor Vehicle and Information and Cost Savings Act, 15 U.S.C.A. §§ 1901 et seq. (now 49 U.S.C.A. §§ 32701 to 32711), to recover damages for an alleged odometer rollback, the dealer-purchaser was barred from recovery because of his own illegal action in rolling back the same car's odometer. The purchaser alleged that the used car dealer rolled back the odometer on a 1979 Cadillac Fleetwood from over 68,000 miles to 37,300 miles, a fact that the purchaser alleged that he discovered after the car was in an accident three days after he purchased it, noted the court. At the time of the accident the purchaser, who was also a used-car dealer, was transporting the car for resale, and the purchaser admitted that at the time of the accident the odometer read 17,704 miles, observed the court.

\*\*\*\* Comment:

In so finding, the court relied on the Fourth Circuit district court's decision in *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), see § 34. Although was factually distinguishable from in that involved a single wrong ratified by subsequent wrongdoers and involved a separate wrong committed by a subsequent wrongdoer, the court found that the court's reluctance to let a guilty party profit would suggest that the court would find the subsequent wrongdoer's action barred.

Where a vehicle's odometer was rolled back, apparently by the original owner, then the car passed through two used car dealers who knew of the rollback, and was finally sold to a purchaser, the court in *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), found that the dealers who ratified and approved the initial wrong could not recover from the prior wrongdoer, the original owner.

See *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990), where the court held that subsequent transferors with knowledge of a false odometer statement who fail to report the actual mileage are barred from recovering damages due to their own violations of the federal odometer law, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)).

An automobile dealership could not be considered an innocent party in a chain of bad odometer statements, and therefore could not be considered a transferee for the purposes of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), determined the court in *Charnetsky v. Gus Paulos Chevrolet, Inc.*, 754 F. Supp. 188 (D. Utah 1991), where the odometer mileage statement delivered to the dealership did not contain a certification that the mileage represented was the actual mileage traveled by the vehicle, and was left unsigned, thus imposing a legal duty on the dealer to either investigate the reliability of the odometer statement before certifying it to be correct or disclose to the subsequent buyer that the actual mileage was unknown, which duty was disregarded by the dealer.

\*\*\*\* Caution:

In *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990), the court held that private person transferors who are unaware of the requirement that they provide a federal odometer statement do not have an "intent to defraud" and their failure to make the required statement will not preclude them from seeking damages from previous transferors under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)).

[\*35] Employee of transferor

It has been held that, based on the facts and circumstances, an employee stated a cause of action as a transferee against an employer under the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, by alleging that the employer fired him for refusing to participate in an illegal scheme to set back odometers.

A former employee brought suit against his employer, alleging that he was fired because he refused to participate in an illegal scheme to set back odometers, and on the employer's motion to dismiss, the court in *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257, 2 I.E.R. Cas. (BNA) 922 (N.D. Ind. 1987), found that the employee had stated a cause of action under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710). In so finding, the court was impressed with the salient argument made by the employee that an employer should not be able to fire an employee for refusing to violate the Act. Such could seriously undermine the basic legislative values that were the subject matter and concern of the Congress as reflected in the legislative history of this enactment, noted the court, since the principal purpose of this statute was to impose a certain variety of forced honesty in the sale of motor vehicles that was triggered by congressional concern of the widespread practice of the clandestine turning back of odometers.

[\*2] Transferor Status

[\*36] Transferor

[\*36a] Found

The courts in the following cases found, based on the facts and circumstances of each case, that a party was a transferor for the purposes of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

In *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), the court held that a used automobile dealer was a "transferor" as required by the Motor Vehicle Information and Cost Savings Act. The count of the complaint charging that the automobile leasing corporation, which had sold an automobile to the purchaser, had violated provisions of 15 U.S.C.A. § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(B)), requiring the "transferor" of a motor vehicle either to disclose the cumulative mileage registered on the odometer or to disclose that the actual mileage is unknown, was sufficient to state a cause of action against the corporation, found the court.<sup>n78</sup>

The court in *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977), found that an automobile auctioneer was a transferor within the meaning of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), when it transferred ownership of a 1971 Plymouth station wagon to a purchaser. Although the auctioneer argued that its practice was not to purchase cars but simply to auction the cars while acting as an agent for the lease company, in view of the strong documentary evidence that indicated that ownership of this particular motor vehicle was in fact transferred to the auctioneer, the court rejected this argument.

In *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988), where a consumer brought an action against an automobile dealership alleging claims of odometer fraud, the court found that the dealership was a "transferor" within the meaning of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a) (now 49 U.S.C.A. § 32705).

The court in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), determined that a corporate car dealer, rather than the president of the corporation, was the owner and therefore transferor of a vehicle for the purposes of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).<sup>n79</sup> The intention of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), of having each transferor give odometer information to a buyer, together with the extremely strong documentary evidence of ownership that an automobile auctioneer created, led the court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983), to conclude that the auctioneer's brief retention of the title of a car made it a "transferor" under the Act.

The sole proprietor of an auto dealership was a "transferor" within the definition contained in the regulation promulgated pursuant to the Motor Vehicle Information Cost and Savings Act, 49 C.F.R. § 580.3, and therefore the sole proprietor was accountable for a violation of 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), determined the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978).n80

An automobile buyer brought an action to recover for odometer rollback, and after the jury returned a verdict for the buyer, the sellers moved for judgment as a matter of law and for a new trial, and the district court in *Bishop v. Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992), determined that the evidence was sufficient to allow the jury to find that the sellers were "transferors" within the meaning of the Motor Vehicle Information Cost and Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), where one seller held an ownership interest in the vehicle and would either suffer a loss or realize a profit on the sale, and another seller was the title holder, but conducted the sale through his auction house.

[\*36b] Not found

A party was not a transferor for the purposes of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., found the courts in the cases below, based on the facts and circumstances of each case.

The director and agent of the corporate seller of an automobile was not a "transferor" for the purposes of a section of the Motor Vehicle Information and Cost Savings Act governing odometer tampering, 15 U.S.C.A. § 1983 (now 49 U.S.C.A. § 32703), found the court in *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 30 Fed. R. Serv. 2d 368 (1st Cir. 1980), where the director never had any ownership interest in the automobile, and thus could not be liable for any misrepresentation as to the automobile's mileage. Although the purchaser contended that the director could nevertheless be held liable under 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), which imposes liability on any "person" who violates the statute, the court held that liability under this section is derivative of 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705) and dependent on a showing that the director was a "transferor." In line with the weight of authority, the court concluded that the defendant, as director and agent of the transferor, was not liable under 15 U.S.C.A. § 1989.

In *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), the court held that an employee of a used automobile dealer was not a "transferor" as required by the Motor Vehicle Information and Cost Savings Act. Although a count of the complaint charged that both the automobile leasing corporation, which had sold an automobile to the purchaser, as well as the employee of the corporation had violated provisions of 15 U.S.C.A. § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(B)), requiring the "transferor" of a motor vehicle either to disclose the cumulative mileage registered on the odometer or to disclose that the actual mileage is unknown, that count had to be dismissed with respect to the individual employee, a corporate sales agent, determined the court, since the sales agent had no interest in the title to the automobile, and therefore did not constitute a "transferor" within the meaning of § 1988.n81

Since, as an individual, the president-salesman of an automobile dealership never had any personal ownership interest in an automobile, found the court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979), he could not be held liable for a violation of the statute governing mileage disclosure when the ownership of a motor vehicle is transferred, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), and where the sole owner of the vehicle was the corporate dealership, the salesman-president was not a "transferor," notwithstanding that he made the entries found to have violated the statute.

The bank to which the seller, a dealer, of a new car "assigned" a buyer's financing paper was not a transferor under the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), found the court in *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982).

Neither the auction service, which merely provided the means by which a prior transferor sold a used car to a dealer, nor the seller of the used car to the dealer for resale were transferors to the party who ultimately purchased the vehicle from the dealer under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), determined the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987).

In *Paul's Auto World v. Boyd*, 881 F.2d 1077 (6th Cir. 1989) (not designated for publication), an odometer tampering case where the purchaser of an automobile appealed the district court's grant of summary judgment for the previous sellers of the automobile under the Federal Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), the appeals court affirmed the district court's grant of summary judgment for one seller, since the evidence supported a finding that the seller was not a transferor as required by the Act. The court noted that the seller filed an affidavit and various documents to support his contention that he was not a transferor of the vehicle in question, and the purchaser again failed to file a response or any type of countervailing documentation.

The manager of a car dealer against which a buyer brought suit under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), for the alleged failure to disclose the true mileage of a purchased vehicle, was not a "transferor" of the vehicle under the Act, found the court in *Romans v. Swets Motors, Inc.*, 428 F. Supp. 106 (E.D. Wis. 1977), and was therefore not liable for the alleged false and fraudulent representations and failures to disclose.

An action was brought by the purchaser of an automobile to recover damages arising out of an allegedly false odometer disclosure statement, and on the defendants' summary judgment motions, the district court in *Cwiakala v. Economy Autos, Ltd.*, 587 F. Supp. 1462 (N.D. Ind. 1984), found that an individual who was the president, general manager, and agent of an automobile dealership was not a "transferor" within the meaning of the section of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), relating to odometer disclosures and, hence, could not be held personally liable for the alleged misrepresentations in the disclosure statement for the vehicle in question.

The court in *American Hardward Mutual v. Rood*, 1985 WL 3327 (N.D. Ill. 1985), found that an auction company was not the transferor of a vehicle under the definition contained in the pertinent regulation, 49 C.F.R. § 580.3, promulgated pursuant to the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1981 (now 49 U.S.C.A. § 32701), where the auction company had never acquired title to the vehicle. The auction form expressly listed the party representing the mileage and from whom title was transferred, observed the court, and the rules for the auction explicitly stated that the auction company did not warrant the veracity of the odometer reading. While an auctioneer should not be able to circumvent the clear call of the statute merely by disclaiming warranty, noted the court, here there was no indication that the auction company was acting more as an agent for the seller than for the purchaser. In other words, there was no justifiable reliance on the auctioneer here, where the auction company had made available to the purchaser the name and address of the seller, determined the court. The lack of agency, in conjunction with the express disclaimer, held the court, reduced the involvement of the auction company to that of a mere conduit as opposed to a transferor within the intent of 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

Where an auction company alleged that it had never acquired a legal or equitable title to the automobile that was the subject of the lawsuit in *Lile v. Louisville Auto Auction*, 1985 WL 6151 (S.D. Ind. 1985), and where it also did not appear that the auction company was an owner of record, or that there was any other evidence that the auction company had an ownership interest in the automobile, the court found that the auction company was not a transferor within the meaning of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

In *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987), a case concerning an inaccurate odometer reading on a vehicle sold at a used automobile auction, the court found that there

was no evidence that the auction company was a transferor within the meaning of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), where the auction company had no ownership interest in the automobile. The physical tendering of a title document is insufficient to transfer ownership to the possessor, held the court.

The president of a corporate car dealer was not the transferor of a vehicle for the purposes of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), determined the court in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), since the owner of the vehicle, and thus its transferor, was the corporate car dealer.<sup>n82</sup> The manager of an auto dealership was not a "transferor" within the definition contained in 49 C.F.R. § 580.3, and therefore was not accountable for a violation of 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), determined the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978).<sup>n83</sup>

An automobile auction company that did not own or hold title to the cars it sold was not a "transferor" under the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a), (b) (now 49 U.S.C.A. § 32705), determined the court in *Industrial Indem. v. Arena Auto Auction*, 638 F. Supp. 1030 (D. Minn. 1986), notwithstanding the fact that the auction company received a fee from both the seller and the buyer and that the buyer's check was made out to the auction company. In so finding, the court noted that the auction company had put forth affidavit testimony indicating that it never owned the Toyota in question, that the title certificate for the Toyota did not list the auction company as an owner, and that the auction company did not make out a disclosure statement, but simply passed on the seller's disclosure statement.

See *C & S Nat. Bank of Savannah, Ga. v. Gilliam*, 285 S.C. 313, 329 S.E.2d 3 (Ct. App. 1985), where the court held that liability for failure to disclose that the actual mileage of an automobile is different from the odometer reading is limited to the "transferor" of the vehicle, and the lessor of a rented automobile is not the "transferor" where the lease does not pass title to the vehicle and where the lease merely contains an option to purchase at the end of the leased term for the residual value of the automobile.

[\*37] Agent

The courts in the following cases recognized that under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., a transferor's agent may be held liable for odometer fraud.

In *Heffler v. Joe Bells Auto Service*, 946 F. Supp. 348 (E.D. Pa. 1996), the court recognized that a sales agent of an automobile owner could be held liable for a violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710).

The court in *Delay v. Hearn Ford*, 373 F. Supp. 791, 28 A.L.R. Fed. 576 (D.S.C. 1974), recognized that an agent may be liable for rolling back an odometer in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703).

Liability under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), may properly lie against a corporate agent who violates the Act's provisions, recognized the court in *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975).

[\*38] Owner

In the cases that follow, the courts found that a party was not an owner of a vehicle for the purposes of the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances of each case.

The bank to which the seller, a dealer, of a new car "assigned" a buyer's financing paper was not an owner under the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), found the court in *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982).

A father who held the title to an automobile that was under the sole control of his son did not fall within the meaning of an "owner" in the provision of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1987 (now 49 U.S.C.A. § 32704), requiring an owner or his agent to give notice of an inaccurate odometer reading to a purchaser of the car, found the court in *Goeman v. Keating*, 498 F. Supp. 700 (D.S.D. 1980), where the father never had possession of the car, had no control over the car, and received no money upon the sale of the car.

[\*39] Absence of privity

Under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., the courts in the cases below held or recognized that an absence of privity will not protect successive transferors from liability.

Transferors of an automobile cannot be protected from liability under the odometer requirement provisions of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), by the absence of privity between themselves and an actual purchaser, because the consumer is entitled to recover damages under the Act from each transferor in the chain of title who has made a false mileage statement with an intent to defraud, held the court in *Ralbovsky v. Lamphere*, 731 F. Supp. 79 (N.D. N.Y. 1990).

The concept of privity cannot be used to bar a buyer's recovery under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), held the court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979), since the dispositive finding is the transferor's intent to defraud, and the consumer may recover statutory damages from each transferor in the chain of title who has made false mileage statements with such intent.

Legal liability to an automobile purchaser is not limited to the immediate seller under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), and each successive seller may be held liable for the statutory recoveries provided, held the court in *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975).

\*\*\*\* Comment:

n84 In so holding, the court in relied on the previous language of the Act that provided that "any person" could be liable under § 1989(a) to show that Congress indicated an intent to extend liability to and impose liability upon any person violating the law. The language of the remedy provision of the Act was subsequently changed to read: "A person." It does not appear that Congress intended to make any substantive change to this section by amending the language in this way.

Civil liability for fraudulent misrepresentations regarding the actual mileage of a used vehicle is imposed upon each person in the chain of title who has violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987).

By providing in the civil damage provision of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), that any person shall be liable, the statute allows an automobile buyer to sue not only the immediate seller, but also any other persons in the chain of title who may have been involved in the fraud, held the court in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989).

\*\*\*\* Comment:

n85 In so holding, the court quoted the previous language of the civil damages provision of the Act that "any person" shall be liable. However, when the Act was recodified, this language was changed, and the current version of this section, 49 U.S.C.A. § 32710(a), provides that: "A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or \$ 1,500, whichever is greater." It appears that Congress did not mean to effect a substantive change to this provision by amending its language.

In *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), the court recognized that transferors of a used automobile are not insulated from liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1984, 1988 (now 49 U.S.C.A. §§ 32703, 32705), for a false odometer reading by virtue of any lack of privity with the ultimate purchaser of the automobile.

Actions for damages under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), are in no way limited by notions of privity, and liability extends to each and every malefactor in the chain of title, stated the court in *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987).

Privity is unnecessary between a defrauded party and a party that violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), with an intent to defraud, held the court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983).

The purchaser of a vehicle on which the odometer has been altered has standing to bring an action under the Federal Odometer Act (Act), 49 U.S.C.A. §§ 32701 et seq., against all prior owners in the chain of title, even where there is no allegation that the prior owners made a false statement directly to the purchaser, held the court in *Carrasco v. Fiore Enterprises*, 985 F. Supp. 931 (D. Ariz. 1997). If a defrauded ultimate purchaser could only sue the violator of the Act who directly transferred the vehicle to the ultimate purchaser, noted the court, then each owner in the chain who discovered the violation and then perpetuated the fraud without disclosing liability would be insulated from liability merely because the vehicle was sold many times.

The concept of privity cannot be used to bar a plaintiff's recovery under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), recognized the court in *State of Utah by Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988).

[\*3] Multiple Transferors

[\*40] Joint and several liability -- Generally

The courts in the following cases held or recognized that defendants are jointly and severally liable under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

The court in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), recognized that liability under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, is to be joint and several, rather than separate and individual.

The general rule of tort law imposes liability on multiple tortfeasors through joint and several liability, and there is no provision of the Federal Odometer Act (Act) that changes this general rule, held the court in *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995). While it is true that the purpose of the Act is to prevent odometer tampering, this may be done just as effectively using a form of joint and several liability,

concluded the court.

\*\*\*\* Caution:

An earlier Seventh Circuit district court case, *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), held that liability is separate and individual under the Act, see § 42.

In an odometer case, each codefendant found guilty under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), is jointly and severally liable for the whole judgment to the purchaser, recognized the court in *Yowell v. Boyd Chevrolet, Inc.*, 504 F. Supp. 77 (W.D. Okla. 1980).

See *Slaymaker v. Westgate State Bank*, 241 Kan. 525, 739 P.2d 444 (1987), where the state court held that liability under the Federal Odometer Act is joint and several and not separate and individual.

[\*41] Found

Based on the facts and circumstances of each of the following cases, the courts found that multiple transferors were jointly and severally liable under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

The court in *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405 (W.D. La. 1998), found that an automobile dealership and its owner were jointly and severally liable to the extent of each purchaser's injury for violating the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710).

In *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411 (W.D. La. 1998), where the district found that an automobile dealer and its owner were liable to buyers for violating the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), which prohibits the making of false statements as to the actual mileage on an automobile with the intent to defraud, the court determined that the dealer, its owner, and the lenders were jointly and severally liable to the buyers to the extent of each buyer's injury under the federal odometer law.

Automobile buyers sued the seller of an automobile, the original owner, and others in the chain of title for fraudulent rollback of the odometer mileage, and the court in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), determined that under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), the liability of the seller, owner, and others was joint and several, and therefore, the buyers were not entitled to full treble damages from each defendant individually. Although the buyers contended that joint and several liability was ineffective, and that separate and individual liability was the most effective and cost efficient means to eradicate odometer tampering, the court held that this was a decision for Congress to make, not the courts. Liability for tortious conduct is normally joint and several, held the court, and Congress did not change the normal rule when it passed the Act.

[\*42] Separate and individual liability -- Generally

Under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., held the courts below, separate and individual liability is imposed on each automobile seller who violates the Act.

The Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1989, 1989(a)(1) (now 49 U.S.C.A. §§ 32710, 32710(a)), imposes separate and individual liability for trebled damages on each automobile seller who violates the Act, held the court in *Ferris v. Haymore*, 967 F.2d 946 (4th Cir. 1992), as amended, (July 22, 1992). Joint and

several liability applies only where multiple defendants are responsible for a single tort, not where multiple defendants have each committed a separate tort, reasoned the court, and in any event, when Congress has intended to impose joint and several liability rather than separate and individual liability, it has so provided explicitly. Section 1989 (now 49 U.S.C.A. § 32710) is unmistakably punitive in character, explained the court, and spreading among several fraudulent parties what are in truth relatively small damages awards would substantially dilute the deterrent force of the statute.

\*\*\*\* Comment:

n86 n87 In so holding, the Fourth Circuit Court of Appeals in stated that it was not persuaded by the Sixth Circuit's contrary decision in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), see § 40. The court did not even purport to rest its decision that a purchaser may not recover treble damages from each seller found guilty of violating the federal odometer statute on the terms of the statute, noted the court, but simply stated that "[t]he fact that each such person shall be liable . . . does not necessarily preclude the conclusion that liability is to be joint and several, rather than separate and individual." Then, without analysis, the court invoked the common-law rule that "[l]iability for tortious conduct is normally joint and several" in holding that the federal odometer statute does not permit a purchaser to recover the full measure of damages against each defendant, pointed out the court in , adding that it did not believe that this holding could be reconciled with the plain terms of the odometer statute. The court also stated that it could not agree with that the common-law principle of joint and several liability can be imported into a provision such as 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), at least not where each fraudulent transfer was by a separate entity, because each fraudulent transfer of an automobile is a separate violation of the federal odometer statute (15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705); 49 C.F.R. § 580.5). Not only is there no evidence "that Congress was concerned with softening the blow on joint wrongdoers," which would justify a rule so at odds with the statute's punitive intent, but there is affirmative evidence that Congress intended the full punitive force of the statute to be felt by every person who defrauds the public through deceptive odometer manipulation -- joint wrongdoers no less so than others, reasoned the court. The Fourth Circuit had held in an earlier case that "judicial notions of fairness and equity must yield to the prophylactic policies of the treble-damage remedy," noted the court.

Each violation of the federal odometer law, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1983, 1988 (now 49 U.S.C.A. §§ 32703, 32705), is a separate transaction and each issuer of a false odometer statement is subject to separate and individual liability, held the court in *Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 2 Fed. R. Serv. 3d 914 (5th Cir. 1985).

\*\*\*\* Caution:

In two subsequent opinions from the Western District of Louisiana joint and several liability was found with respect to an automobile dealership and its owner. See § 41.

In *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), the court held that each person violating the provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988(b), 1989(a), 1990 (now 49 U.S.C.A. §§ 32705, 32709, 32710), concerning the alteration of odometer readings is separately subject to liability to the purchaser of the automobile.

\*\*\*\* Caution:

A later Seventh Circuit district court case, *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995), held that liability among defendants is joint and several, see § 40.

Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), each defendant joined in a conspiracy is liable for the whole judgment of each plaintiff, held the court in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d

1090 (8th Cir. 1978).

[\*43] Found

The courts in the following cases found, based on the facts and circumstances, that multiple transferors were separately and individually liable under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

Where separate odometer statements were issued for the same vehicle, one by a credit corporation on transfer to a dealer following repossession and a second by the dealer on the sale to another, each issuer was subject to separate and individual liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1983, 1988 (now 49 U.S.C.A. §§ 32703, 32705), determined the court in *Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 2 Fed. R. Serv. 3d 914 (5th Cir. 1985), and hence, the buyer's settlement and release of the dealer did not release the credit company from its liability.

In a civil odometer fraud action brought under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), the court in *Saber v. Dileo*, 723 F. Supp. 1167 (E.D. La. 1989), found that a nonsettling defendant was separately and individually liable to the purchasers of automobiles for the full amount of the treble damages awarded, \$ 10,500, and therefore was not entitled to a reduction of the damages by the amounts the purchasers had received from the settling defendants prior to the trial.

A violator who was the last link in a chain of wrongdoers and who admitted tampering with an odometer but denied knowledge of any prior violations would be liable for the full amount of actual damage, determined the court in *Cantrell v. Thaler Ford Sales, Inc.*, 485 F. Supp. 528 (S.D. Ohio 1980), where the violator had sold the car to the claimant and where the incremental damages limited to the mileage the violator had added to the car would deny the claimant her actual damages, the difference between the price she paid for the car and the fair market value of the vehicle with the number of miles actually traveled by the car.

\*\*\*\* Comment:

The court in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), recognized that liability under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710, is to be joint and several, rather than separate and individual.

[\*44] Cross-claims among transferors

[\*44a] Allowed

It has been held that defendants under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., should be allowed to recover on cross-claims.

In *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995), the court concluded that since the general rule of tort law imposes liability on multiple tortfeasors through joint and several liability, and since there is no provision of the Federal Odometer Act (Act) that changes this general rule, defendants under the Act should be allowed to recover on an indemnity claim. While it is true that the purpose of the Act is to prevent odometer tampering, noted the court, this may be done just as effectively using a form of indemnification.

\*\*\*\* Caution:

An earlier Seventh Circuit district court decision, *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), stated that such cross-claims are precluded. See § 44[b].

[\*44b] Not allowed

Cross-claims among defendants are not allowed under the civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., held or recognized courts in the following cases.

Recovery of indemnification from other persons subject to liability for violating the provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988(b), 1989(a), 1990 (now 49 U.S.C.A. §§ 32705, 32709, 32710), concerning the alteration of odometer readings, is precluded, held the court in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976).

\*\*\*\* Caution:

A later Seventh Circuit district court decision in *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995), held that such cross-claims should be allowed. See § 44[a].

Codefendants who are found liable with each other to a purchaser under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), are precluded from recovering on cross-claims against each other for indemnity, recognized the court in *Yowell v. Boyd Chevrolet, Inc.*, 504 F. Supp. 77 (W.D. Okla. 1980).

The court in *Charnetsky v. Gus Paulos Chevrolet, Inc.*, 754 F. Supp. 188 (D. Utah 1991), held that a cross-claim does not exist between wrongdoers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710). A contrary holding would permit wrongdoers in the chain of bad odometer statements to benefit from prior wrongdoers, when all have contributed to violating the statute, stated the court, and to permit wrongdoers to bring an action against others in the chain would lead a subsequent wrongdoer to ignore prior violations of others and to perpetrate the wrongdoing.

[\*C] Particular Violations of Statute

[\*1] Tampering

[\*45] Odometer rolled back

[\*45a] Violation -- Found

Based on the facts and circumstances presented, it was found in the following cases that a transferor violated the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by rolling back a vehicle's odometer.

See *Klein v. Pincus*, 397 F. Supp. 847 (E.D. N.Y. 1975), where the court noted that an automobile buyer sued under 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711) "on the ground that defendant reset or altered the odometer of a motor vehicle purchased by the plaintiff from the defendant and/or failed to disclose the cumulative mileage listed on the odometer or that the actual mileage was unknown," and where the court, while expressly holding that 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705) was violated, and while not expressly referring to the tampering provision, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), concluded that "the defendant violated the statute in this case in the respects claimed by the plaintiff." The court referred to evidence indicating that the buyer had purchased from the defendant an automobile with approximately 40,000 miles on the odometer, that two previous owners of the automobile

had had it inspected with over 75,000 miles on the odometer, and that the defendant had purchased the automobile at an auction at a time when the odometer was in the 80,000-mile range.

In *Weatherby v. J.J. Wright Oldsmobile, Inc.*, 1986 WL 2610 (N.D. Ill. 1986), the court denied a seller's motion for summary judgment based on the purchaser's allegations that the seller altered the odometer in a car that was sold through the seller to the purchaser in violation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703). Although the seller argued that the odometer on the car it sold to the purchaser had been altered prior to its own purchase of the car, and therefore that it lacked the intent to defraud necessary for finding a violation of the Act, the court found that while this argument might ultimately prevail, the case law provided that sellers who reasonably should know that a vehicle's odometer reading has been changed but who close their eyes to that fact can be held liable under the Act. In this case, where discovery had not been closed, the seller's conclusory and self-serving affidavits that its salesmen had no reason to suspect odometer tampering did not suffice to meet its burden under *Fed. R. Civ. P. 56* of showing undisputed facts that would exempt it from liability under the Act, concluded the court.

[\*45b] Not found

The courts in the cases that follow found that a transferor did not violate the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by rolling back a vehicle's odometer, based on the facts and circumstances of each case.

In view of the fact that an odometer registered only two miles less at the time of resale than it did at the time of purchase by a dealer, and evidence that, after the buyer had driven the automobile for about three months, the automobile registered 16 miles less than when the buyer purchased the automobile, the court in *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976), found that the inaccuracy of the odometer was due to a defect in the odometer and that the dealer had not illegally tampered with the odometer under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703).

The court in *Berns v. Ginn*, 1986 WL 6150 (S.D. Ohio 1986), determined that a purchaser failed to allege or provide any evidence to support the contention that a vehicle owner or the owner's employee tampered with a 1979 Toronado's odometer in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), where another seller allegedly tampered with the odometer several sales previous to the last seller's ownership. The court observed that the purchaser bought the vehicle with an odometer reading of approximately 52,150 miles from the owner and seller of the automobile, and that the owner, acting through its employee, provided an odometer statement showing the actual mileage to be approximately 52,150 miles. The owner had purchased the car the day before and received a sworn odometer statement from the previous owner that was the basis for, and virtually identical to, that which the owner disclosed to the purchaser, and the owner and seller was the last in a long line of owners of the vehicle, added the court.

[\*45c] Intent to defraud -- Found

The courts in the following cases found, based on the facts and circumstances of each case, that a transferor rolled back a vehicle's odometer in violation of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., with an intent to defraud the purchaser.

Where a purchaser traded his automobile, with approximately 72,000 miles on the odometer, to an automobile dealer, and subsequently repurchased from the same dealer the same automobile, which had 49,000 miles on the odometer on the date of repurchase, the court in *Delay v. Hearn Ford*, 373 F. Supp. 791, 28 A.L.R. Fed. 576 (D.S.C. 1974), an action to recover damages for illegal odometer tampering, denied the dealer's motion for summary judgment, holding that the affidavits presented were sufficient to support a reasonable inference that the dealer through its agents had rolled back

the odometer in violation of § 404 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), and that an intent to defraud arose in the absence of an explanation of the odometer change. The court observed that since the automobile was under the dominion of the automobile dealer during the entire time in which the alleged odometer alteration took place, the conclusion of illegal tampering was compelled in the absence of a showing by the dealer as to when the rollback occurred and by whom it was done.

Suit was brought for odometer tampering under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), and the appeals court in *Shore v. J. C. Phillips Motor Co.*, 567 F.2d 1364 (5th Cir. 1978), found that evidence that the automobile purchaser was not supplied with an odometer statement on the vehicle, that the odometer reading was 20,125, and that a repair order had showed the mileage of the car to be 50,365 was sufficient to establish a violation of the Act and a showing of an intent to defraud. Where there has been a reduction in the odometer reading while a vehicle is in the possession of a transferor, fraud is implied in the absence of an explanation, held the court.

An automobile purchaser sued a seller for violation of the motor vehicular odometer requirements under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), upon the transfer of ownership of three automobiles, and the court in *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978), aff'd without reported opinion, 633 F.2d 218 (6th Cir. 1980), found that as the seller offered no satisfactory explanation for setting back the odometers of these vehicles, his intent to defraud in reducing those odometer readings while the vehicles were in his possession was implied. The seller's contention that he had rolled back the odometers on the vehicles at the request of the buyer, and as a condition precedent to the buyer's purchase of the vehicles, was not a viable defense, determined the court.

Under Kentucky's doctrine of offensive collateral estoppel, found the court in *May v. Oldfield*, 698 F. Supp. 124 (E.D. Ky. 1988), a used car salesman accused by a private buyer of altering an automobile's odometer was estopped from litigating the issue of his civil liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), by virtue of his prior conviction of mail fraud arising out of tampering with the same odometer. The court noted that the issue of alteration of the odometers was identical in both cases, and the jury in the prior criminal action was required to apply a higher burden of proof than that applicable to a civil action; the fact that the car buyer had not been party to the previous criminal prosecution did not preclude application of the doctrine of offensive collateral estoppel.

An automobile buyer brought an action to recover for odometer rollback, and after the jury returned a verdict for the buyer, the sellers moved for judgment as a matter of law and for a new trial, and the district court in *Bishop v. Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992), determined that the evidence was sufficient to allow the jury to find that the sellers were "transferors" within the meaning of the Motor Vehicle Information Cost and Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), and to hold them liable for odometer tampering.

[\*45d] Not found

Based on the facts and circumstances of each of the cases below, the courts found that a purchaser failed to show a transferor's intent to defraud as required to impose liability under the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, relating to odometer rollback.

In an action brought by the buyer of a used automobile against a dealer under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), alleging that the dealer altered the odometer of the vehicle with an intent to deceive the buyer, the court in *LePiere v. Phoenix Emprise, Inc.*, 500 F. Supp. 251 (E.D. Pa. 1980), found that the buyer failed to meet her burden of proving the requisite intent to defraud on the part of the dealer. There was no showing by the buyer that the dealer tampered with the odometer, observed the court, and

this case differed from the classic cases falling under the Act where at the time the vehicle was sold, the actual mileage was in excess of that indicated on the odometer. In the case sub judice, the vehicle odometer at the time the dealer sold it to the buyer registered a higher number of miles (63,000) than was on it (58,662) at the time the dealer purchased the vehicle, noted the court, and there was no testimony that the actual mileage was in excess of that indicated on the odometer. Although the buyer received a Certificate of Title indicating 86,000 miles on the vehicle when she purchased it, there was no testimony presented by the buyer to account for that mileage, found the court. Further, there was no testimony presented by the buyer concerning the written "mileage 86 743" that appeared at the top of the reassignment of title form, stated the court.

In *Paul's Auto World v. Boyd*, 881 F.2d 1077 (6th Cir. 1989) (not designated for publication), an odometer tampering case where the purchaser of an automobile appealed the district court's grant of summary judgment for the previous sellers of the automobile under the Federal Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), the appeals court affirmed the district court's grant of summary judgment for two of the three sellers, since the purchaser failed to provide any evidence of an intent to defraud on the part of these sellers. The sellers complied with all of the specific duties that they owed to the purchaser when they provided a sworn statement that the odometer readings reflected the car's actual mileage, determined the court, and the sellers provided sworn affidavits in their motions for summary judgment.

Mere showing of a discrepancy between the mileage actually showing on the odometers of a used truck-tractor and the mileage recorded on the title certificate by the previous owner was insufficient to support an inference of an intent to defraud through rolling back the odometers in the absence of evidence that the odometers, rather than the title certificates, did not show the correct reading, found the court in *Witkowski v. Mack Trucks, Inc.*, 712 F.2d 1352, 36 U.C.C. Rep. Serv. 1598 (11th Cir. 1983).

[\*46] Odometer disconnected

[\*46a] Violation of statute

It has been found that a transferor did not violate the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on an automobile odometer's disconnection, based on the facts and circumstances.

An automobile manufacturer could not be held liable to an automobile buyer under the Odometer Requirement Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), even if the automobile's odometer was disconnected, or never connected, by the manufacturer, found the court in *Reiff v. Don Rosen Cadillac-BMW, Inc.*, 501 F. Supp. 77 (E.D. Pa. 1980), since any such occurrence happened at some substantial distance up the chain of distribution from the buyer's purchase of the automobile. There was no assertion that the manufacturer had any direct contact with the purchaser, or, more importantly, that manufacturer made representations to the purchaser about the mileage of the automobile, observed the court.

[\*46b] Intent to defraud

It has been found, based on the facts and circumstances, that a transferor did not disconnect an automobile's odometer with an intent to defraud as required to impose liability for violation of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

The court in *Marcel v. Zamin*, 1990 WL 170130 (E.D. La. 1990), did not find that an automobile dealer intentionally or fraudulently disconnected the odometer of an automobile prior to its sale in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1984, 1985 (now 49 U.S.C.A. § 32703), where there would have been no point in disconnecting the odometer at the time of the sale because it already registered in excess of 84,000 miles. Further, added

the court, even if the odometer was not functional while on the dealer's car lot, it was more likely than not that the odometer reading would not have been significantly greater, since the dealer purchased the auto on March 30, 1989, only 2 months prior to the sale to buyer, and the odometer registered 84,099 at the time of the transfer to the dealer by another dealer. Once the vehicle was purchased, explained the court, the dealer had no interest in the number of miles registered on the odometer and had nothing whatsoever to gain by disconnecting the odometer.

[\*47] Conspiracy to tamper with odometer

[\*47a] Violation of statute

The courts in the following cases determined that transferors did not violate the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by conspiring to tamper with a vehicle's odometer, based on the facts and circumstances of each case.

It was alleged that both an automobile-leasing corporation and the corporation's sales agent had together conspired to sell an automobile to the purchasers with an odometer inaccurately reflecting the actual mileage, in violation of 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), and the court in *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), determined that such allegations failed to state a cause of action against either of the defendants. Observing that 15 U.S.C.A. § 1986 provided that no person shall conspire to violate: (1) 15 U.S.C.A. § 1983 (now 49 U.S.C.A. § 32703), which precluded the sale or use of a device designed for causing odometer setbacks; (2) 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), which prohibited the actual setting back of odometers; or (3) 15 U.S.C.A. § 1985 (now 49 U.S.C.A. § 32703), which made it unlawful to drive an automobile with a nonfunctioning odometer with intent to defraud, the court found that nothing in the purchaser's complaint could possibly be related to any of the enumerated statutory sections.

The buyer of an automobile sued the seller and manufacturer for violations of the Odometer Requirement Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), and the court in *Reiff v. Don Rosen Cadillac-BMW, Inc.*, 501 F. Supp. 77 (E.D. Pa. 1980), determined that there was certainly no allegation in the complaint, nor any facts stated from which to infer, that the manufacturer joined in a conspiracy to defraud the purchaser.

Insufficient evidence existed to find that the sole proprietor of an auto dealership and the dealership's manager conspired to violate the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), found the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978), and thus the court could not hold the sole proprietor and manager liable for conspiracy to tamper with an odometer under the Act.

[\*47b] Intent to defraud -- Found

It has been found that transferors conspired to tamper with a vehicle's odometer with an intent to defraud a purchaser in violation of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances.

Two automobile buyers brought suit against, among others, a dealer, its president, and a wholesale automobile dealer, alleging that they had violated the Motor Vehicle Information and Cost Savings Act (Act) by tampering with the odometers on the automobiles, and the court in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), found that the dealer, its president, and the automobile wholesaler had engaged in a conspiracy to tamper with odometers in violation of the Act, 15 U.S.C.A. §§ 1984, 1989 (now 49 U.S.C.A. §§ 32703, 32710), with an intent to defraud. Under the Act, where there is a reduction in an odometer reading while a vehicle is in the possession of a transferor, fraud is implied in the absence of an explanation, held the court.

[\*47c] Not found

It has been found that transferors did not conspire to tamper with a vehicle's odometer with an intent to defraud a purchaser in violation of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances.

The court in *Berns v. Ginn*, 1986 WL 6150 (S.D. Ohio 1986), determined that a purchaser of a 1979 Toronado had not alleged or provided any evidence to support the contention that the previous owner of the vehicle or its employee was involved in a conspiracy to deprive the purchaser of his rights with an intent to defraud in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.). In so finding, the court observed that the purchaser bought the Toronado with an odometer reading of approximately 52,150 miles from the owner and seller of the automobile, and the owner, acting through its employee, provided an odometer statement showing the actual mileage to be approximately 52,150 miles. The owner had purchased the car the day before and received a sworn odometer statement from the previous owner that was the basis for, and virtually identical to, that which the owner disclosed to the purchaser, the owner was the last in a long line of owners of the vehicle, and another seller allegedly tampered with the odometer several sales previous to the last seller's ownership, noted the court. These facts did not establish that the owner or its employee intended to defraud the purchaser, or that the owner or its employee exhibited such a gross negligence or disregard in preparing the odometer disclosure statements that an intent to defraud could be inferred by their conduct, concluded the court.

[\*2] Service, Repair, and Replacement

[\*48] Failure to affix notice of odometer repair

It has been found that a transferor who failed to affix a notice of odometer repair in a vehicle as required by the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., violated this provision with an intent to defraud a purchaser, based on the facts and circumstances.

Evidence that an automobile seller who did not hold title but who had sole control over the car had repaired the car's odometer on two occasions and knew that it was inaccurate and failed to place any notice of repair in the car as required by the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1987, 1989 (now 49 U.S.C.A. §§ 32704, 32710), was sufficient to establish that the seller possessed the requisite intent to defraud the purchaser of the car such that he could be held liable for statutory damages under the Act, determined the court in *Goeman v. Keating*, 498 F. Supp. 700 (D.S.D. 1980). All that is required of a purchaser before recovery will be allowed is that a change in the odometer reading has occurred and that the seller has failed to disclose the change, held the court, and an intent to defraud arises from such proof in the absence of an explanation of the odometer change.

[\*49] Conspiracy

It has been found that automobile transferors did not conspire to repair broken odometers and thus did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32703(4), 32704(a), based on the facts and circumstances.

Where it was alleged that both an automobile-leasing corporation and the corporation's sales agent had together conspired to sell an automobile to the purchasers with an odometer inaccurately reflecting the actual mileage, the court in *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), determined that such allegations failed to state a cause of action against either of the defendants under the provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1986, 1987 (now 49 U.S.C.A. §§ 32703(4), 32704(a)), which concerned conspiring to

repair broken odometers. Nothing in the purchaser's complaint could possibly be related to these statutory sections, observed the court.

[\*50] Odometer replaced

It has been found that, based on the facts and circumstances, a purchaser failed to prove that a transferor had replaced a vehicle's odometer in violation of the private civil provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703.

Where purchasers sought damages for alleged odometer tampering, and by the introduction of a photograph of the odometer taken during May 1975, showing that the instrument had a red tenths digit, an indication that the original odometer had been replaced, attempted to prove that the dealer from whom they purchased the vehicle on March 16, 1974, had altered or replaced the mileage indicator, the court in *Birdwell v. Hartsville Motors, Inc.*, 404 F. Supp. 625 (M.D. Tenn. 1975), held that the purchasers failed to prove by a fair preponderance of the evidence that the odometer had been altered or replaced at any time when the automobile was in the possession of the dealer or under the custody or control of the dealer's agents; accordingly, it was held that 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703) was not violated.

[\*51] Failure to affix notice of odometer replacement

[\*51a] Intent to defraud -- Found

Based on the facts and circumstances, it has been found that a transferor violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by failing to affix a notice of odometer replacement, with an intent to defraud a purchaser.

Where the seller of an automobile had received an odometer mileage statement indicating an odometer reading on the automobile of 51,233 miles, and the seller substituted an instrument panel that contained an odometer with a reading of 21,280 miles, but no written notice of such replacement was affixed to the left door frame of the automobile as required by statute, and the buyer had no knowledge of such a replacement, the court in *Kirkland v. Cooper*, 438 F. Supp. 808 (D.S.C. 1977), found that the seller had violated the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), and that such violation was both knowing and willful so as to entitle the buyer to treble damages under the Act.

[\*51b] Not found

The courts in the following cases found that by failing to affix in a vehicle a notice of odometer replacement, a transferor did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., with an intent to defraud a purchaser, based on the facts and circumstances of each case.

Where an automobile buyer brought suit pursuant to the Motor Vehicle Information and Cost Savings Act of 1972, 15 U.S.C.A. §§ 1987, 1989(a), (b) (now 49 U.S.C.A. §§ 32705, 32710), alleging that he purchased a used automobile in which the odometer had been replaced, the court in *Levine v. Ark-Les Switch Corp.*, 451 F. Supp. 55 (W.D. Pa. 1978), determined that a previous corporate owner that was not an automobile dealer was not liable to the buyer, since it was uncontroverted that this previous owner, when it traded in the automobile, apprised the dealer that the odometer had been replaced and that the automobile's true mileage was over 29,000 miles, and since it was thus apparent that the previous owner had no "intent to defraud" in connection with the sale of the automobile, even though the previous owner had failed to give the dealer an odometer mileage statement. Although it did not appear that the previous owner's mechanic had attached a notice of the new odometer to "the left door frame," the fact that a "sticker" containing the required data was attached to a "door jamb" with a warning against its removal, clearly showed that there was no

genuine issue as to any material fact that would establish that the previous owner violated the § 1987 (now 49 U.S.C.A. § 32704) requirement with the intent to defraud anyone pursuant to 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), concluded the court.

The owner of an automobile sued a dealer that had replaced a malfunctioning odometer in the automobile over a year before the car was sold, and on the dealer's motion for summary judgment, the district court in *Hill v. Bergeron Plymouth Chrysler, Inc.*, 456 F. Supp. 417 (E.D. La. 1978), determined that the dealer could not be held liable for violating the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), by failing to attach the required notice to the door frame absent evidence of an intent to defraud. There was no evidence in the record as to any motive on the part of the dealer for misrepresenting the mileage figure, noted the court, nor was there even an allegation that the dealer was in collusion with a transferor who may have profited from the reduced mileage figure on the odometer. If anything, the fact that the car was not sold until over a year after the dealer had replaced the odometer certainly created a strong inference that the replacement was not done by the dealer in anticipation of, or in preparation for, a sale, found the court.

Although a motor coach manufacturer that had replaced an odometer on a coach failed to affix a notice of replacement, determined the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998), the manufacturer was not liable for violating the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, absent evidence that it acted with intent to defraud or stood to gain financially from its failure to affix such a notice.

[\*52] Failure to reset new odometer

Based on the facts and circumstances of each of the cases below, the courts found that a transferor who failed to reset a new odometer in a vehicle, while violating the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., did not do so with an intent to defraud a purchaser as required to impose liability.

The owner of an automobile sued a dealer that had replaced a malfunctioning odometer in the automobile over a year before the car was sold, and on the dealer's motion for summary judgment, the district court in *Hill v. Bergeron Plymouth Chrysler, Inc.*, 456 F. Supp. 417 (E.D. La. 1978), determined that the dealer could not be held liable for violating the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), by failing to reset the new odometer, absent evidence of an intent to defraud. There was no evidence in the record as to any motive on the part of the dealer for misrepresenting the mileage figure, noted the court, nor was there even an allegation that the dealer was in collusion with a transferor who may have profited from the reduced mileage figure on the odometer. If anything, the fact that the car was not sold until over a year after the dealer had replaced the odometer certainly created a strong inference that the replacement was not done by the dealer in anticipation of, or in preparation for, a sale, found the court.

Although a motor coach manufacturer that had replaced an odometer on a coach failed to reset the new odometer, determined the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998), the manufacturer was not liable for violating the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 to 32711, absent evidence that it acted with intent to defraud.

[\*53] Failure to disclose engine replacement

[\*53a] Violation of statute

It has been found, based on the facts and circumstances, that a transferor did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose that a vehicle's engine had been replaced.

The buyers of an automobile brought an action against a transferor alleging a violation of the mileage disclosure

requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and the court in *Michael v. Ferris Auto Sales*, 650 F. Supp. 975 (D. Del. 1987), determined that the mileage disclosure requirements were not violated when the motor vehicle, whose original engine had been replaced with an older engine, was transferred without disclosure by the transferor that the odometer reading was different from the number of miles the vehicle had actually traveled. Although the purchasers asserted that because the engine was the most important component of a vehicle, the number of miles on the engine was the number of miles the vehicle had actually traveled within the meaning of § 1988 of the statute, and that the statute and the rules promulgated thereunder required the transferor to disclose any discrepancy between the odometer reading and the number of miles on the engine, the court found that this argument failed in two respects. First, noted the court, there was no indication in the legislative history of the odometer statute that Congress intended to address any problems other than actual odometer tampering or nondisclosure to purchasers of vehicles whose odometers had been altered or reset. Nondisclosure of the replacement of vehicle components other than the odometer simply did not appear as a federal concern, regardless of the impact of such replacements on the reliability of the odometer reading as an index of a vehicle's condition and value, stated the court. Second, the purchasers' interpretation of the statute invited purchasers to take advantage of a federal treble damage remedy whenever a transferor failed to disclose that any one of the many vehicle components that tend to depreciate with mileage has been replaced with an older part, reasoned the court. Even though the engine was an important part of a motor vehicle, the purchasers' logic extended as well to the brakes, the tires, and the transmission. Congress surely did not intend, by enacting the odometer statute, to federalize such a large segment of common-law fraud, concluded the court.

[\*53b] Intent to defraud

It has been found that transferors of a vehicle did not violate with an intent to defraud the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose that the vehicle's engine had been replaced, based on the facts and circumstances.

The buyer of an automobile in a civil odometer fraud action against the sellers, a husband and wife, failed to establish an intent to defraud on the part of the sellers who allegedly violated the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), determined the court in *Busalacchi v. Williamson*, 670 F. Supp. 272 (E.D. Mo. 1987), where prior to the sale, the sellers revealed the fact that although the odometer had a low reading because a new engine had been installed, the actual chassis mileage was higher. There was absolutely nothing that remotely smacked of any intent to defraud, found the court, since the sellers revealed everything regarding the auto's history, nothing was hidden, there were no false statements, and there was no reckless disregard for the truth.

[\*54] Conspiracy

The transferors of a vehicle did not conspire to violate with an intent to defraud the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose that the vehicle's engine had been replaced, it has been found, based on the facts and circumstances.

The buyer of an automobile in a civil odometer fraud action against the sellers, a husband and wife, failed to establish an intent to defraud on the part of the sellers who allegedly violated the conspiracy provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), determined the court in *Busalacchi v. Williamson*, 670 F. Supp. 272 (E.D. Mo. 1987), where prior to the sale, the sellers revealed the fact that although the odometer had a low reading because a new engine had been installed, the actual chassis mileage was higher. There was absolutely nothing that remotely smacked of any intent to defraud, found the court, since the sellers revealed everything regarding the auto's history, nothing was hidden, there were no false statements, and there was no reckless disregard for the truth.

[\*3] Disclosure

[\*55] Failure to acquire complete odometer statement for resale

It has been found that a transferor's failure to acquire a complete odometer statement for a vehicle meant for resale showed a violation with an intent to defraud of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, based on the facts and circumstances of the following cases.

The buyer of two used automobiles brought an action against a dealer, an auction service, and the prior transferor for violation of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988(c) (now 49 U.S.C.A. § 32705), and the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987), determined that the dealer had violated the Act with an intent to defraud the purchaser by accepting a written disclosure statement that was incomplete when acquiring one of the vehicles for resale.

In *Salmeron v. Highlands Ford Sales, Inc.*, 248 F. Supp. 2d 1035 (D.N.M. 2003), the court held that even if the car dealership did not have actual possession of title of a vehicle bought from a rental car company at the time it sold a vehicle to the purchaser, the purchaser's allegations that the dealership disclosed the vehicle's accurate mileage on an application for the vehicle title and registration and on an odometer disclosure statement, rather than on the vehicle's title, were sufficient to state a claim for violation of the disclosure obligations under 49 U.S.C.A. § 32705, where the vehicle title had been reassigned before sale to the purchaser, and the title contained a space for mileage information.

[\*56] Failure to provide written odometer statement

[\*56a] Intent to defraud -- Found

The courts in the following cases have found that, based on the facts and circumstances of each case, a transferor was liable under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, for failing to provide a written odometer statement, with an intent to defraud a purchaser.

Because an automobile dealership failed to explain its failure to supply an odometer statement to a purchaser, the purchaser was entitled to recover on his claim for costs under the federal odometer disclosure law, 49 U.S.C.A. § 32705, found the district court in *Forrest v. Simonds*, 1997 WL 610761 (N.D. N.Y. 1997).

The buyer of two used automobiles brought an action against a dealer, an auction service, and the prior transferor for violation of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705), and the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987), determined that the dealer violated the Act with an intent to defraud by failing to provide the purchaser with an odometer statement for either vehicle, though its agents were clearly aware that such statements were required.

[\*56b] Not found

A transferor violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to provide a written odometer statement to a purchaser, but the transferor did not possess the requisite intent to defraud, held the courts below, based on the facts and circumstances of each case.

Where an automobile buyer brought suit pursuant to the Motor Vehicle Information and Cost Savings Act of 1972, 15 U.S.C.A. §§ 1988, 1989(a), (b) (now 49 U.S.C.A. §§ 32705, 32710), alleging that he was misinformed of the car's true mileage, the court in *Levine v. Ark-Les Switch Corp.*, 451 F. Supp. 55 (W.D. Pa. 1978), determined that a previous corporate owner that was not an automobile dealer was not liable to the buyer, since it was uncontroverted that this

previous owner, when it traded in the automobile, apprised the dealer that the odometer had been replaced and that the automobile's true mileage was over 29,000 miles, and since it was thus apparent that the previous owner had no "intent to defraud" in connection with the sale of the automobile, even though the previous owner had failed to give the dealer an odometer mileage statement. The previous owner could not be held liable to the subsequent buyer of the automobile, because a subsequent owner-dealer falsely represented a lower mileage with intent to defraud the subsequent purchaser, added the court.

In an action brought by the buyer of a used automobile against a dealer under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), alleging that the dealer failed to give the buyer the written mileage statement required by § 1988 (now 49 U.S.C.A. § 32705) of the Act, the court in *LePiere v. Phoenix Emprise, Inc.*, 500 F. Supp. 251 (E.D. Pa. 1980), found that the buyer failed to meet her burden of proving the requisite intent to defraud on the part of the dealer. The parties, at trial, stipulated that the dealer failed to give the buyer, the transferee, the written mileage statement required by § 1988 of the Act, noted the court, but although that constituted a violation of the Act by the dealer, it did not of itself entitle the buyer to recover. To recover under the Act, held the court, the buyer must show not only a violation of the Act, but also that the commission of the violation was coupled with an intent to defraud, which the buyer in this case failed to do.

In *Birdwell v. Hartsville Motors, Inc.*, 404 F. Supp. 625 (M.D. Tenn. 1975), where the seller of an automobile that had been used as a demonstration model admitted that it had failed to furnish the buyers with an odometer disclosure form at the time of the sale, the court determined that although the failure to provide the mileage affidavit constituted a violation of 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), there could be no recovery of damages under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710) in the absence of proof of an "intent to defraud" on the part of the seller. Specifically finding that there was no proof that the seller intended to conceal a material fact from the buyers nor that the seller had attempted to mislead or deceive the buyers as to the true mileage or condition of the automobile, the court held that the buyers were not entitled to damages, costs, or attorney's fees.

Where an automobile dealer brought suit against a customer alleging that the customer made odometer misrepresentations when he traded in his 1990 Plymouth Voyager and the dealer moved for summary judgment, the court in *Joe Madden Ford, Inc v. Bickel*, 1996 WL 432408 (N.D. Ill. 1996), denied summary judgment, finding that although it may have been negligence for the customer to have failed to examine documents more carefully when mailed to him, it was not necessarily gross negligence or reckless disregard for the customer to fail to inform the dealer of the correct mileage after receiving the forms in the mail that would support an inference of intent to defraud under the federal odometer law, which requires that a person selling a motor vehicle make a written disclosure of the cumulative mileage registered by the odometer under 49 U.S.C.A. § 32705(a)(3). In addition, noted the court, the fact that the customer had previously disclosed the true mileage, which was more than 100,000 miles, to the dealer's maintenance department on a number of occasions supported a finding that the customer did not intend to defraud the dealer.

[\*57] Conspiracy

It was found that a transferor and its agent did not violate the Motor Vehicle Information and Cost Savings Act by conspiring to knowingly give no odometer statement to a purchaser, based on the facts and circumstances.

Where it was alleged that both an automobile-leasing corporation and the corporation's sales agent had together conspired knowingly to give no statement of the mileage traveled by an automobile to a purchaser in violation of the Motor Vehicle Information and Cost Savings Act, the court in *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), determined that these allegations were insufficient to state a cause of action, since, as a matter of law, the agent could not conspire with the corporation that was his principal, where the agent was not actuated by a personal motive beyond the expectation of a commission.

[\*58] Failure to provide complete odometer statement

[\*58a] Violation of statute

Based on the facts and circumstances of each of the following cases, the courts found that a transferor's failure to provide a complete odometer statement to a purchaser did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705.

Where an odometer mileage statement made at the time a dealership's customer traded in a used automobile contained the correct odometer reading at the time of the transaction, the date of transfer, the transferor's name and address, and the identity of the vehicle, the customer did not violate the regulation promulgated pursuant to the Motor Vehicle Information and Cost Savings Act of 1972, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), requiring a document containing such information, even though the odometer reading was 35,690 while the vehicle had actually traveled 135,690 miles, determined the court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976).

The purchaser of a used automobile brought an action to recover under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), and the court in *Jackson v. Columbus Dodge, Inc.*, 676 F.2d 120 (5th Cir. 1982), found that the absence of some of the information on the odometer mileage certificate was not a violation of the Act, since the sales contract provided all the information that was not included on the odometer certificate and was delivered to the automobile purchaser simultaneously with the odometer mileage certificate. In considering the seller's mileage disclosure claim, the court noted that the then applicable version of 49 C.F.R. § 580.4 (now 49 C.F.R. § 580.5) required the seller to furnish various particulars, but allowed the required information to be presented "elsewhere on a transfer document integral with the odometer disclosure." The uncontradicted affidavit of the seller asserted that the sales contract (which provided all the missing information) and the odometer mileage certificate were simultaneously delivered to the purchaser, observed the court, and the purchaser made no allegations that the odometer had been tampered with or that the seller had made any misrepresentations.

\*\*\*\* Observation:

The updated version of the regulation at issue, 49 C.F.R. § 580.5, provides as follows: "(c) In connection with the transfer of ownership of a motor vehicle, each transferor shall disclose the mileage to the transferee in writing on the title or, except as noted below, on the document being used to reassign the title. In the case of a transferor in whose name the vehicle is titled, the transferor shall disclose the mileage on the title, and not on a reassignment document. This written disclosure must be signed by the transferor, including the printed name. In connection with the transfer of ownership of a motor vehicle in which more than one person is a transferor, only one transferor need sign the written disclosure. . . ."

An automobile purchaser brought an action against a car dealer complaining of violations of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), due to the dealer's failure to complete the odometer disclosure statement in connection with the sale of an automobile, and the court in *Team Food Service, Inc. v. Francis Cadillac, Inc.*, 1988 WL 74730 (N.D. Ill. 1988), found that no violation of the Act had been shown where there was no allegation that the mileage represented on the bill of sale supplied by the dealer was inaccurate or that the odometer had been tampered with or was malfunctioning. In so finding, the court observed that the odometer statement delivered by the dealer was only incomplete in that the dealer failed to check one of the three boxes contained on that statement certifying the actual mileage on the vehicle.

[\*58b] Intent to defraud

The courts in the cases that follow determined that a transferor who violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to provide a complete odometer statement to a purchaser, did not possess the requisite intent to defraud a purchaser, based on the facts and circumstances of each case.

Where a buyer alleged that a used automobile he purchased had been constructed from two other vehicles, one of which had been in a major collision, but the buyer did not allege that the seller either knew of these facts or was responsible for the vehicle's reconstruction, in the court *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980), determined that the seller's failure to provide the buyer with the vehicle's last license plate number in the odometer disclosure, which information was in any event publicly available, was not based upon an intent to defraud as required to render the seller liable under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710).

The failure of an automobile seller to place on an odometer disclosure statement the last license plate number of a vehicle, the address of the transferor, or the date of the statement was contrary to the regulations of the Secretary of Transportation, found the court in *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979), but was not a basis for establishing liability for treble damages under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988, 1989, (now 49 U.S.C.A. §§ 32705, 32710), in the absence of an intent to defraud. Here, not only was the correct mileage disclosed and the purpose of the Act thereby fulfilled, observed the court, but the disclosures omitted from the odometer disclosure statement were disclosed in the bill of sale, thereby fulfilling the purpose of even the regulations. Thus, the defect complained of was merely a technical one, and a higher burden of actual knowledge of the missing information was required of the seller. Even if the standard were constructive knowledge of the absence of missing information from the odometer disclosure statement, damages would not have been available because no evidence was proffered by the buyer that the seller was constructively aware of the absence of such information, concluded the court.

Although an automobile dealer violated the disclosure requirement of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), by signing an odometer report form in blank when selling an automobile to an intermediate purchaser, the dealer was not liable under 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710) to the consumer who ultimately purchased the automobile, determined the court in *Mayer v. Warren Hollon Motors*, 410 F. Supp. 768 (S.D. Ohio 1975), since an intent to defraud was not established.

Although an automobile dealer violated the disclosure provisions of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), by failing to record the last license plate number of an automobile and by failing to refer to the Act in the used car odometer mileage statement, the court in *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976), determined that the purchaser wholly failed to present substantial evidence from which it could reasonably conclude that the dealer harbored fraudulent intent, and thus the court found that the seller was not liable under the Act.

An action was brought under the Motor Vehicle Information and Cost Savings Act (Act), and on the dealer's and creditor's motion for summary judgment, the court in *Augusta v. Marshall Motor Co.*, 453 F. Supp. 912 (N.D. Ohio 1977), judgment aff'd on other grounds, 614 F.2d 1085 (6th Cir. 1979), granted the motion, finding that the failure of an odometer mileage statement to disclose the last license plate number of the vehicle was not a violation of the Act, absent any intent of the dealer to defraud the buyer with respect to the mileage reading disclosed at the time of the purchase. In so finding, the court noted that it was not alleged that the mileage disclosed on the Odometer Mileage Statement was incorrect, or that the odometer on the purchaser's vehicle had been altered or replaced. In fact, the purchaser stated in his deposition that the mileage reading provided on this statement corresponded to that registered on the vehicle at the time it was delivered to him, observed the court.

\*\*\*\* Comment:

The court in cited to a previous regulation promulgated pursuant to the Act, 49 C.F.R. § 580.4(4), which required a transferor of a motor vehicle to furnish to the transferee a written disclosure statement signed by the transferor and containing, among other things, the last license plate number of the vehicle. The license plate number requirement is no

longer contained in the Secretary of Transportation's regulations, 49 C.F.R. §§ 580.1 to 580.17.

[\*59] Failure to disclose true mileage

[\*59a] Violation -- Found

It has been found, based on the facts and circumstances, that a transferor violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose a vehicle's true mileage to a purchaser.

Where the buyer of a used automobile sued the immediate seller, a used car dealer, the automobile dealership from which the dealer had acquired the vehicle, and the latter's president to recover for violations of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), the appeals court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979), found that the used car dealer's entering odometer figures of 13,175 as the odometer reading and checking the box on the disclosure statement indicating that the true mileage was unknown did not satisfy the requirement of the statute governing mileage disclosure when the ownership of a motor vehicle is transferred, on the ground that even if the dealer believed that the odometer of a four-year-old vehicle had "turned over," the dealer could not be absolutely certain. Even when a transferor who knows that an odometer has "turned over" merely records the numbers on the odometer and certifies that the true mileage is unknown, the consumer is not simply deprived of accurate mileage information but is actually misled by the form itself, concluded the court.

[\*59b] Not found

The courts in the following cases found that an automobile seller did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose a vehicle's true mileage to a purchaser, based on the facts and circumstances of each case.

Even though the seller of an automobile, knowing the actual mileage on the vehicle to be 135,690, traded the automobile in to an automobile dealership and, with the intent to defraud the dealership, reported the mileage to be 35,690, as shown on the automobile odometer, and failed to disclose the actual mileage, and even though the Motor Vehicle Information and Cost Savings Act of 1972 (Act) and regulations promulgated pursuant thereto were intended to impose liability in such a case, the court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976), found that where the seller's conduct was not covered by the plain meaning of the language of the Act or regulations, the seller was not liable to the dealership under the terms of the Act, 15 U.S.C.A. §§ 1981 et seq., 1988 (now 49 U.S.C.A. §§ 32701 et seq., 32705).

An automobile dealer's misrepresentations on an odometer mileage statement to a buyer concerning the model and body type of the vehicle sold did not violate the odometer disclosure requirements of the Motor Vehicle Information and Cost Savings Act of 1972 (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), because that Act was concerned only with misrepresentations in mileage, found the court in *Purser v. Bill Campbell Porsche Audi, Inc.*, 431 F. Supp. 1235 (N.D. Fla. 1977), where the dealer had represented to the buyer that the vehicle was a 1969 model Porsche with a 911S body type when in fact, the vehicle was a 1967 model Porsche, body type 912, into which a 1969 Porsche 911S engine had been placed.

Even assuming that constructive knowledge was the applicable standard for obtaining treble damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), determined the court in *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979), if the standard was constructive knowledge of a false mileage disclosure, damages were not available because there was no false mileage disclosure.

An auction service that merely provided the means by which a prior transferor sold a used car to a dealer was not itself a transferor, and was therefore not liable to the ultimate buyer for the dealer's failure to disclose that two vehicles'

odometers were unreliable under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), determined the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987).

A car buyer who alleged that the seller of a used 1981 Mercedes Benz SE violated the Motor Vehicle Information and Cost Savings Act and sought to hold the seller liable pursuant to 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710) failed to offer any evidence that the odometer statement was false, found the court in *Moss v. Farr Motor Co.*, 82 F.3d 418 (6th Cir. 1996) (not designated for publication), where all agreed that the disclosure statement provided by the seller to the buyer accurately reflected the odometer reading of the "grey market" automobile that had originally been manufactured for use outside the United States and was subsequently "Americanized" for sale within the United States. In so finding, the court dismissed the buyer's argument that because of the necessary conversion of grey market automobiles, the odometers of these vehicles are inherently unreliable. A simple mathematical formula converts kilometers to miles with reasonable accuracy (a kilometer equals approximately 0.62 miles), observed the court. Furthermore, noted the court, the buyer offered minimal evidence that the odometer reading was in fact false.

A truck purchaser brought an action against a motor credit corporation and dealership alleging violations of the federal odometer disclosure requirements under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), due to a failure to disclose the actual mileage of the truck, and the court in *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986), found that the truck was exempt from the disclosure requirements as a large commercial vehicle according to 49 C.F.R. § 580.5(a)(1) (now 49 C.F.R. § 580.17(a)(1)). Although the method of weighing the vehicle by weighing only the cab did not conform with the regulatory definition, the court determined that the transferors of the vehicle, the gross vehicle weight rating of which was 45,000 pounds, were within the class of transferors contemplated by the regulatory exception to the odometer disclosure requirements.

\*\*\*\* Comment:

n88 n89 Although many courts have held such exemptions an invalid exercise of regulatory authority, Congress amended the Act in June of 1998 to state that: "The Secretary may exempt such classes or categories of vehicles as the Secretary deems appropriate from these requirements."

In *Riverside Lincoln Mercury Sales, Inc. v. Auto Dealers Exchange Co.*, 1987 WL 7280 (N.D. Ill. 1987), a case concerning an inaccurate odometer reading on a vehicle sold at a used automobile auction, the court found that there was no genuine issue of material fact that the auction company was subject to the disclosure requirements of the Motor Vehicle Information and Cost Savings Act 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), since there was no evidence that the auction company was a transferor of the Oldsmobile at issue.

An automobile auction company that did not own or hold title to the cars it sold was not a "transferor" under the Odometer Act of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a), (b) (now 49 U.S.C.A. § 32705), determined the court in *Industrial Indem. v. Arena Auto Auction*, 638 F. Supp. 1030 (D. Minn. 1986), and thus the auction company was not liable to a buyer when an automobile's odometer proved inaccurate, notwithstanding the fact that the auction company received a fee from both the seller and the buyer, and that the buyer's check was made out to the auction company.

[\*59c] Intent to defraud -- Found

Based on the facts and circumstances of each of the following cases, the courts determined that a transferor who failed to disclose a vehicle's true mileage to a purchaser in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, did so with the requisite intent to defraud.

Where a seller called a purchaser's attention to a vehicle's odometer reading of approximately 40,000 miles at the time

the purchaser bought the used automobile that was represented to have been the seller's personal vehicle, the court in *Klein v. Pincus*, 397 F. Supp. 847 (E.D. N.Y. 1975), held that the evidence was sufficient to show that the seller had, with an intent to defraud, failed to disclose that the odometer reading was incorrect in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). Two previous owners were shown to have had the vehicle inspected when the odometer reading was over 75,000 miles, and the seller had purchased the vehicle at an automobile auction with approximately 80,000 miles on the odometer, noted the court.

In *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), the court held that an odometer mileage statement supplied to the purchaser of a used car by a dealership that recited the current odometer reading, but that failed to alert the buyer to existing odometer irregularities that had been noted in the odometer mileage statement supplied to the dealership by the previous owner, was a representation made either with actual knowledge of its falsity, or with such reckless disregard of the truth as to satisfy the "intent to defraud" requirement and permit the imposition of liability for a violation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711). It was no defense to assert that defects in the design or supervision of the dealership's record-keeping system were responsible for the misrepresentation in this case, rather than employee recklessness per se, noted the court. In the first place, stated the court, recklessness on the part of individual dealership employees was amply proven. What was more important, however, was that the maintenance of a thorough, well-supervised record-keeping system with respect to Odometer Mileage (OM) Statements was a clear, implicit requirement of the Act. At the very least, it should be required that sales personnel read and accurately represent to prospective purchasers the content of an automobile's file, and that OM Statements be certified only upon the basis of back-up information actually available in the file, concluded the court.

Where the buyer of an automobile brought suit against the dealer from which she purchased the car for violations of the federal odometer disclosure requirements under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), the court in *Ralbovsky v. Lamphere*, 731 F. Supp. 79 (N.D. N.Y. 1990), found that the dealer, which had been informed by the transferor of the vehicle that the odometer had not been functioning, at the very least was grossly negligent or acted with reckless disregard for the truth in certifying that the reading of the odometer was true when the dealer transferred the car to the buyer, so that an intent to defraud by the dealer could be inferred as a matter of law, and the buyer could recover from the dealer under the Act.

The buyer of a used automobile, alleging violations of 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), sued the corporate seller of the vehicle, the corporation's salesman, another corporate agent who certified the automobile's odometer reading, and two previous owners in the vehicle's chain of title, and the court in *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), determined that each of the named defendants was liable under 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), where it was stipulated that during all transactions between the previous owners and between the present buyer and seller, the odometer mileage was represented to be approximately 18,000 miles, while an inspection sticker on the windshield indicated that the vehicle had traveled nearly 55,000 miles. The court observed that each of the defendants had engaged in an activity forbidden by Congress, and that the language of the section indicated an intention to impose liability on any person who violated its provisions.

In *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987), where the buyer of a used truck moved for summary judgment in an action against the original seller and successive transferors, alleging odometer fraud under the Motor Vehicle Information and Cost Savings Act (Act), seeking treble damages and attorney's fees, the court found that the transferors' mere reliance on the truck's odometer reading, in the face of other readily ascertainable information from the title and condition of the truck, was reckless disregard that rose to the level of an intent to defraud, as a matter of law, under 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). While noting that it would be reluctant to hold, as a matter of law, that the transferors should have known that a nine-year-old truck with 47,778 miles indicated a suspiciously low mileage, the court nevertheless stated that with the exercise of minimal care, the transferors could have discovered that the odometer reading they were certifying was false, had they inspected the original seller's title, which showed a mileage of 62,000 miles in 1979. If the transferor has a reason to know by the exercise of reasonable care that the odometer has turned

over and the transferor does not inform the purchaser, the majority of cases hold that an intent to defraud may be inferred from that violation of the Act and regulations, stated the court.<sup>n90</sup>

Evidence revealed that an automobile dealer acted with fraudulent intent when it certified to a consumer that a car's odometer reading was accurate, and thus the dealer violated the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), found the court in *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988), where having received title documents, the dealer had reason to suspect fraudulent tampering of the odometer, and therefore the dealership was deemed to have known all that a minimal inspection would have revealed. The law does not and cannot tolerate such willful ignorance in the face of obvious warning signs -- signs that would have moved reasonable people to undertake further inquiry, stated the court.

In *Suits v. Little Motor Co.*, 642 F.2d 883 (5th Cir. 1981), the court found that where an automobile dealer had actual knowledge that the odometer on an automobile had "turned over" after registering 99,999 miles and knew that the actual mileage was 100,073 miles but did not so indicate to the buyer, as a matter of law the dealer evidenced an intent to defraud under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a) (now 49 U.S.C.A. § 32705(a)(1)(A)). At trial the dealer had testified that one of his reasons for failing to indicate that the actual mileage equaled 100,073 miles was the possibility that the vehicle's odometer had turned over more than once and, therefore, that the actual mileage was 200,073 or 300,073 miles, observed the court. In the event that a transferor knows that an odometer has turned over once and has reason to believe it has turned over more than once, the transferor should indicate that the actual mileage is unknown but a minimum of 100,000 miles plus the figure shown by the odometer, stated the court. Since the dealer had no reason to believe that the odometer had turned over more than once, however, this requirement would not apply in the instant case, determined the court. While the facts of the case sufficiently evidenced fraudulent intent under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), held the court, the dealer's business practices buttressed the conclusion that the dealer intended to defraud where the car dealer's common practice, as he testified, was to sell the car prior to receiving the papers and thus indicate that the vehicle's true mileage was unknown. Obvious steps would have assured his possession of the previous transferor's mileage disclosure form at the time he sold a car: he could have physically taken the disclosure form with him along with the car at the time of purchase, instead of arranging to have the statement mailed, or he could have waited to place the car for sale until the papers arrived by mail. Either course would have precluded an excuse for failing to provide potential customers with accurate information, concluded the court, adding that in its judgment, Congress did not intend the Act to allow car dealers to operate in such a manner, and that such behavior manifested a clear intent to defraud.

\*\*\*\* Comment:

The court observed that the dealer's stated reason for failing to disclose the fact that the odometer on an automobile had turned over after registering 99,999 miles was that the buyer of a 10-year-old car with an odometer reading of 73 miles knows the odometer has turned over. This did not necessarily follow, found the court, even though the dealer checked the statement indicating that odometer calibration error was not responsible for the disparity between the actual mileage and the odometer reading. A buyer provided such disclosure might conclude that the seller was unsure as to whether the odometer had turned over or had been turned back, explained the court. Since, in the latter case, it could have been turned back, for example, from 10,073 to 73 miles, this would still leave a wide range in the beliefs the buyer could form as to the vehicle's actual mileage, noted the court. In the more typical case, continued the court, where the odometer reading showed a larger figure, the buyer might conclude that the seller was uncertain as to whether the odometer had been turned back, had turned over, or showed actual (though unusually low) mileage.

A used car dealer's receipt of a disclosure statement from the previous owner of a vehicle indicating that the odometer reading could not be relied upon, and the dealer's performance of extensive repairs on another vehicle over the course of six months, which should have brought to light the fact that that vehicle's odometer was nonfunctional, conferred on the dealer constructive knowledge that the odometer readings on both vehicles were incorrect, and raised a duty to disclose that information to the individual who subsequently purchased the two cars under the Motor Vehicle Information and

Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32705), found the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987).

The court in *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405 (W.D. La. 1998), found that an automobile dealership and its owner were liable to purchasers for violating the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), which prohibits the making of false statements as to the actual mileage on an automobile with the intent to defraud, by defrauding the purchasers with regard to the actual mileage on their vehicles. Each of the purchasers bought an automobile from the dealership that possessed an odometer that had been altered while in the dealership's possession, found the court, and in connection with the auto sales, the purchasers executed and signed various documents, including sales invoices, retail installment contracts, security contracts, consumer credit contracts, and financing applications.

The victims of an odometer rollback scheme brought suit against an automobile dealer and its owner, and the lenders to whom their installment contracts were assigned, and upon the victims' motions for summary judgment and the lender's motion for partial summary judgment, the district court in *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411 (W.D. La. 1998), found that the automobile dealer and its owner were liable to the buyers for violating the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), by making false statements as to the actual mileage on the automobiles with an intent to defraud. Therefore, the court held the dealer, its owner, and the lenders jointly and severally liable to the buyers to the extent of each buyer's injury under the federal odometer law.

An automobile purchaser sued a seller for violation of the motor vehicular odometer requirements under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710), upon the transfer of ownership of three automobiles, and the court in *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978), aff'd without reported opinion, 633 F.2d 218 (6th Cir. 1980), found that the seller had violated the Act with an intent to defraud the purchaser by issuing false odometer certificates. The seller's contention that he had issued false odometer certificates on these vehicles at the request of the buyer, and as a condition precedent to the buyer's purchase of the vehicles, was not a viable defense, held the court.

Where the original seller of an automobile admitted that he knew the odometer reading of 36,738 miles to be inaccurate at the time of sale, and that despite such knowledge he sold the car to an auction company without disclosing the true mileage or that the odometer did not accurately reflect the vehicle's true mileage, in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), the court in *A.B.C. Chevrolet Co. v. Kirk*, 1986 WL 10045 (N.D. Ill. 1986), found the seller liable to the car dealer that ultimately purchased the automobile from the auction company.

Since the seller of an automobile admitted that his failure to disclose the car's actual mileage upon transferring the vehicle violated the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and since the seller admitted that he had actual notice that the odometer did not reflect the correct mileage the car had traveled, and that he did not disclose this fact to the purchasers of the car, the court in *Resendiz v. Eatinger*, 1990 WL 84527 (N.D. Ill. 1990), determined that the seller was liable for violating the Act with an intent to defraud. Although the seller argued that the purchasers failed to show he acted with an intent to defraud, the court rejected this argument, stating that even if the seller were able to claim that the odometer disclosure provided to him by the chauffeur service that sold him the car was insufficient to alert him to the inaccuracy of the odometer reading, the seller still acted with an intent to defraud within the meaning of the Act because an intent to defraud on the part of the transferor may be inferred by a finding of gross negligence, constructive knowledge, or reckless disregard of facts that would indicate the actual mileage.

The court in *Woodfield Ford Sales v. Broniek*, 1992 WL 38401 (N.D. Ill. 1992), found that a car dealer had proven by a preponderance of the evidence each element of its allegation that a car purchaser failed to disclose the true mileage on

his trade-in, a 1986 Volvo, in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and that the Volvo was worth less than the dealer's \$ 10,000 appraisal, which was based upon the lower mileage figure. In particular, noted the court, the dealer proved by a preponderance of the evidence that the purchaser intentionally did not disclose the existence of the additional 51,388 miles that were on the Volvo. When the purchaser was asked why he didn't detect the significantly lower number on the odometer statement when he received it two days later in the mail, observed the court, the purchaser answered that he put all the papers away without looking at them and that it was not until he was called by the dealer's lawyer several months later that he learned of the Volvo mileage problem. The purchaser's negligence in this regard was exacerbated by his own experience the previous year when he had purchased the Volvo, found the court, since the significance of the real mileage and the existence of odometer certifications were emphasized by the seller of the Volvo that had provided the purchaser with a similar odometer statement reflecting the actual miles that were on the Volvo in spite of the new odometer and with correspondence to confirm the purchaser's knowledge of that fact.

When an auctioneer's procedure for preparing odometer disclosure statements -- filling in the mileage simply by looking at a vehicle's odometer -- was combined with its ignoring an altered title on which erasure was clear and apparent, the district court could reasonably have found that the auctioneer showed a reckless disregard for the truth, showing an intent to defraud, determined the appeals court in *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983); since the auctioneer was a transferor and transferee under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), the auctioneer could be held liable for the false odometer disclosure statement.

A finding of misrepresentation of the mileage on a vehicle with an intent to defraud under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988(a), (b) (now 49 U.S.C.A. § 32705), was supported by a finding that the original information provided by the sellers as to the vehicle's mileage was incorrect, and that they did not specifically point out the mistake as soon as possible but rather, merely forwarded the correct odometer statement without acknowledging that the mileage on the correct statement was materially different from what it was initially represented to be and sent along an accompanying title that incorrectly stated the mileage, determined the appeals court in *Hughes v. Box*, 814 F.2d 498 (8th Cir. 1987). The contradictory nature of the documents, along with the initial misrepresentation of the vehicle's actual mileage, could hardly be characterized as the type of disclosure contemplated by the Act, noted the court, concluding that there was sufficient evidence presented at trial for the jury to conclude that the sellers had violated the Act. Given the broad purpose of the Act to protect motor vehicle purchasers from inaccurate mileage representations by sellers, held the court, the transferor of an automobile has some duty to specifically and unambiguously alert the transferee to the fact that the transferor's initial representation of a vehicle's mileage was incorrect and to make clear the vehicle's actual mileage.

The manager of an auto dealership who completed an odometer certificate for a motorcycle based only on the odometer reading at the time the motorcycle was purchased, without checking the files to see if there was a different reading on the certificate of title obtained when the dealership acquired the motorcycle, violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), found the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978), and the manager's actions constituted a recklessness that rose to the level of fraudulent intent and could be attributed to the dealer for whom the manager was acting as agent. See § 59[d].

The Tenth Circuit Court of Appeals in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998), found that the fact that a motor coach dealer acted with reckless disregard concerning the accuracy of a motor coach's odometer statement, as required to impose liability under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, was supported by evidence that the dealer relied solely on the assertions of the consignor of the coach to ascertain whether its odometer reading was correct and did nothing to independently verify the accuracy of the odometer reading.

[\*59d] Not found

Courts found, based on the facts and circumstances of each of the following cases, that a transferor who failed to disclose a vehicle's true mileage in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, was not liable due to the lack of an intent to defraud a purchaser.

In *Locascio v. Imports Unlimited, Inc.*, 309 F. Supp. 2d 267 (D. Conn. 2004), subsequent determination, 2004 WL 964186 (D. Conn. 2004), the court held that an automobile dealer did not violate the Odometer Act (Act), even though the dealer did not provide the customer with a title certificate and consequently did not comply with the Act's requirement that correct mileage be set forth on the certificate because the customer failed to make the necessary showing that the seller intended to commit fraud regarding the mileage.

In *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977), an action by an automobile buyer against a seller and auctioneer, alleging a violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), the court found that the evidence established that the seller did not know that the automobile's actual mileage was in excess of that indicated on the odometer when he sold the vehicle and that the seller did not intend to defraud the buyer.

In *Gavin v. Koons Buick Pontiac GMC, Inc.*, 28 Fed. Appx. 220 (4th Cir. 2002), the court held that a deviation between a used truck's odometer reading and the odometer disclosure prepared by the vehicle dealership lacked materiality, and thus the dealership was not liable to the buyer under the Federal Odometer Act 49 U.S.C.A. § 32710(a), where a misstatement of only approximately three miles was insufficient to show intent to defraud.

In *Robinette v. Griffith*, 483 F. Supp. 28 (W.D. Va. 1979), a used automobile purchaser's action against a seller for the alleged failure to disclose the true mileage as required by the Federal Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1901 et seq., 1988 (now 49 U.S.C.A. §§ 32701 et seq., 32705), the court found that the purchaser's pleading failed to state a claim where the complaint alleged none of the elements of fraud or the circumstances surrounding the seller's alleged violation. Although the purchaser's allegations, if true, stated a claim under the Act, to recover damages for this alleged violation, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710) requires that a seller's violation must be with an intent to defraud, held the court. The purchaser's pleading, found the court, was deficient in that it failed to aver the circumstances constituting fraud with the particularity required by *Fed. R. Civ. P. 9(b)*. A bare allegation of fraud does not satisfy the pleading requirements of *Fed. R. Civ. P. 9(b)*, stated the court.

In *Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 198 A.L.R. Fed. 793 (W.D. Va. 2002), the court held that an automobile buyer could not demonstrate that the dealership intended to defraud the buyer with respect to the vehicle's mileage, precluding the buyer's civil action against the dealership for violation of 49 U.S.C.A. § 32705(a)(1), requiring the transferor of a motor vehicle to provide written accurate disclosure of mileage registered by the odometer on the vehicle title; even though odometer mileage was not disclosed on the title, but on a separate odometer disclosure statement, the automobile buyer acknowledged that she received an accurate statement of mileage on the dealership's odometer disclosure statement, and that she had no evidence that the odometer was tampered with or manipulated.

Although a used automobile seller could have provided a fuller disclosure by adding "actual mileage of approximately 41,000" as the last transferor had indicated, found the court in *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980), the mileage disclosures made by the seller, which stated that the actual mileage was unknown and that the cumulative mileage registered on the odometer was 39,266, did not demonstrate any fraudulent intent and thus did not violate the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710). The difference between 41,000 and 39,266 miles was negligible, noted the court, and a buyer given the information the buyer was provided would be likely to conclude that the actual mileage was greater than the 39,266 miles shown. The court stated that it did not have before it a case in which a dealer states that the actual mileage is unknown and gives the odometer reading without saying more, knowing that the actual mileage is 100,000 miles greater than that shown. Although the seller would have provided fuller disclosure by adding "actual mileage approximately

41,000," such a statement was neither required by the Act nor misleading in its absence, concluded the court.

An automobile seller's negligence in failing to investigate and determine whether the odometer was working did not constitute a violation of the section of the Motor Vehicle and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), prohibiting the knowing giving of a false statement to a transferee, with an intent to defraud, found the court in *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976), since evidence showed that the seller checked out the automobile according to industry practices and did not notice any odometer problem, that the speedometer operating off the same cable as the odometer was working, and that the mileage shown on the odometer approximately matched the mileage given by the previous owner. In addition, the seller's employees had attested that they had no actual knowledge that the odometer was malfunctioning, no evidence had been offered that there was a willful violation, and not a scintilla of evidence had ever been hinted at that would suggest, or that would justify an inference that the seller had any intent to defraud, concluded the court.

The bank to which the seller, a dealer, of a new car "assigned" a buyer's financing paper was not subject to liability under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), found the court in *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982), where uncontroverted evidence showed that no employee or agent of the bank had any knowledge with respect to the odometer disclosures required by the Act, that no employee or agent of the bank had an intent to defraud the buyer in regard to the alleged violations of the odometer disclosure requirements, and that the bank had never been a transferor or owner of the car the buyer purchased. Furthermore, found the court, since civil liability under the Act was predicated on an "intent to defraud," but since, in the instant case, the new car buyer did not allege any intent by the dealer to defraud, nor allege facts from which the court might infer an intent to defraud, the buyer also failed to state a cause of action under the Act against the dealer.

Although the purchaser of an automobile proved that various dealers and an auction company had failed to provide the proper disclosure statements regarding the automobile's mileage, as required by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), the court in *Marcel v. Zamin*, 1990 WL 150123 (E.D. La. 1990), found that the purchaser failed to produce a scintilla of evidence of an intent to defraud on the parts of the dealers and auction company. Each of these transferors indicated the mileage on the vehicle to be in excess of 84,000 miles, observed the court, and no evidence whatsoever was introduced by the purchaser to suggest that these defendants had any knowledge, either actual or constructive, that the odometer was not functioning or that it had been rolled back. Further, one could infer from the evidence that the odometer was in fact connected and functioning because the mileage increased by a mile or a few miles in these transfers, which occurred only days apart, noted the court.

The court in *Marcel v. Zamin*, 1990 WL 170130 (E.D. La. 1990), did not find that an automobile dealer intentionally or fraudulently furnished to the purchaser of an automobile a false statement that the mileage of the vehicle was 84,079 when in fact, at the very least, it was 84,099. Although the court did not find credible the testimony of the dealer that he obtained that mileage figure from the purchaser, whom he had asked to look at the odometer and give him the mileage, the court determined that the purchaser failed to prove that the dealer's violation of the Odometer Disclosure Regulations, 49 CFR § 580.4(a) to (c) (now 49 C.F.R. § 580.5) was done with an intent to defraud as required by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710). At most, found the court, the dealer was guilty of a technical violation of the rules.

Where an automobile dealer filled out an odometer statement both when he purchased an automobile and when he resold it, and those statements showed a loss of two miles between the time of purchase and the time of resale, the dealer had constructive knowledge of the vehicle's defective odometer and the inaccurate odometer reading, violating the disclosure provisions of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), but the court in *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976), determined that the dealer was nevertheless not liable under the Act, since there was no evidence of an intent to defraud.

A purchaser bought a 1979 Toronado with an odometer reading of approximately 52,150 miles from the owner and seller of the automobile, and the owner, acting through its employee, provided an odometer statement showing the actual mileage to be approximately 52,150 miles, having purchased the car the day before and received a sworn odometer statement from the previous owner that was the basis for, and virtually identical to, that which the owner disclosed to the purchaser, and the court in *Berns v. Ginn*, 1986 WL 6150 (S.D. Ohio 1986), determined that the purchaser had not alleged or provided any evidence to support the contention that the owner or its employee knew or should have known that the odometer had previously been altered in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). The facts did not establish that the owner or its employee intended to defraud the purchaser, or that the owner or its employee exhibited such a gross negligence or disregard in preparing the odometer disclosure statements that an intent to defraud could be inferred by their conduct, determined the court, but rather the facts established that the owner was the last in a long line of owners of the vehicle and that another seller had allegedly tampered with the odometer several sales previous to the last seller's ownership.

An automobile dealer could not be held civilly liable under the disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act) to the purchaser of a car with an altered odometer on the basis of the dealer's failure to notice a missing turn signal lens suggesting that the automobile's dashboard had been removed, determined the court in *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988), since under the Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), the dealer's mere negligence was insufficient to support a finding of an intent to defraud.

The purchaser of a used automobile brought an action against a dealership from which he had bought the automobile, alleging a violation of the odometer disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act), 49 U.S.C.A. § 32705, and the Seventh Circuit Court of Appeals in *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 37 Fed. R. Serv. 3d 400 (7th Cir. 1997), determined that although the National Highway Traffic Safety Administration lacked the authority to promulgate a regulation exempting vehicles 10 or more years old from the Act's odometer disclosure requirements, the purchaser failed to establish an intent to defraud on the part of the seller in any event.

\*\*\*\* Caution:

n91 n92 Although many courts have held such exemptions an invalid exercise of regulatory authority, Congress amended the Act in June of 1998 to state that: "The Secretary may exempt such classes or categories of vehicles as the Secretary deems appropriate from these requirements."

The seller of a used automobile was not liable to the husband of a purchaser under the disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988(b), 1989(a), 1990 (now 49 U.S.C.A. §§ 32705, 32709, 32710), for damages for an allegedly false odometer setting, found the court in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976), where the seller made an un rebutted prima facie showing by affidavit that it did not have actual knowledge of the odometer alteration.

Where an automobile dealer brought suit against a customer alleging that the customer made odometer misrepresentations when he traded in his 1990 Plymouth Voyager, and the dealer moved for summary judgment, the court in *Joe Madden Ford, Inc v. Bickel*, 1996 WL 432408 (N.D. Ill. 1996), denied summary judgment, finding that although it may have been negligence for the customer to have failed to examine the sale documents more carefully when mailed to him, it was not necessarily gross negligence or reckless disregard to fail to inform the dealer of the correct mileage after receiving the forms in the mail that would support an inference of intent to defraud under the federal odometer law, which prohibits making any false statements in this disclosure under 49 U.S.C.A. § 32705(a)(1)(A). In addition, noted the court, the fact that the customer had previously disclosed the true mileage, which was more than 100,000 miles, to the dealer's maintenance department on a number of occasions supported a finding that the customer did not intend to defraud the dealer.

In *Hamilton v. O'Connor Chevrolet, Inc.*, 2004 WL 1403711 (N.D. Ill. 2004), the court upheld a summary judgment in favor of the defendant where the plaintiffs failed to present any evidence that the defendant intended to defraud them with respect to the car's mileage or its odometer reading.

The seller of a pickup truck brought an action against a buyer to recover for violation of the federal odometer rollback statute in connection with a trade-in, and following the district court's dismissal of the claim, the appeals court in *Walt Bennett Ford, Inc. v. Goynes*, 969 F.2d 603 (8th Cir. 1992), opinion corrected, (Aug. 7, 1992), found that the buyer lacked the intent to defraud necessary to run afoul of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), where the buyer disclosed to the seller's employee that the stated mileage on the odometer and disclosure form for the trade-in was incorrect, and where the buyer signed the disclosure statement based on the employee's assurances that only the actual mileage shown on the odometer needed to be reported.

The buyers of a used car sued the manufacturer's credit company, which had repossessed the car before selling it at auction to a dealer who made the sale to the buyers, for alleged violations of the federal odometer law, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and the Eighth Circuit Court of Appeals in *Huson v. General Motors Acceptance Corp.*, 108 F.3d 172 (8th Cir. 1997), determined that the failure of the credit company to inspect the vehicle or title documents before providing the mileage statements did not show an intent to defraud, as necessary for liability under the odometer law, in the absence of evidence that the investigation would have revealed a potential problem with the odometer.

The manager of an auto dealership who completed an odometer certificate for a motorcycle based only on the odometer reading at the time the motorcycle was purchased, without checking the files to see if there was a different reading on the certificate of title obtained when the dealership acquired the motorcycle, could not be charged with violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), with an intent to defraud, given the lack of positive evidence that the manager had anything to do with the odometer adjustment, found the court in *Bryant v. Thomas*, 461 F. Supp. 613 (D. Neb. 1978). See § 59[c].

Even if a father who held title to a car that was under the sole control of his son was considered an owner within the meaning of the provision of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1987 (now 49 U.S.C.A. § 32704), requiring that the owner or his agent give notice of an inaccurate odometer reading to a purchaser of the car, determined the court in *Goeman v. Keating*, 498 F. Supp. 700 (D.S.D. 1980), there was no evidence that the father possessed the requisite intent to defraud the purchaser such that he could be held liable for violating the Act.

An automobile credit corporation's disclosure of an automobile's odometer readings did not violate the federal disclosure statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), found the court in *Bedsworth v. G & J Automotive, Inc.*, 650 F. Supp. 763 (E.D. Mo. 1986), where the corporation listed the mileage in the application for a repossession title as an estimated figure in light of the prior title indication that the odometer was broken, and the inaccuracy was attributable to clerical error on the state's part and could not support the requisite finding of an intent to defraud. The court stated that the credit corporation had met its obligation of providing accurate information to the state of Missouri, and that the corporation's liability could not be grounded on a subsequent clerical error by the state.

In *Watkins v. Lowe*, 895 F.2d 1419 (9th Cir. 1990) (not designated for publication), where a used car salesman with over 20 years' experience purchased a 1982 Cadillac Eldorado from the lessee intending to resell it, the court found that although the lessee knew that the mileage disclosed by the odometer was 100,000 miles less than what the car had actually traveled, the lessee was not liable for a violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(c) (now 49 U.S.C.A. § 32705), for a failure to disclose the true mileage, since there was no intent to defraud the purchaser. In so finding, the court observed that the service records for the car were left in the glove compartment when it was delivered to the purchaser and revealed that the odometer had turned over.

In light of uncontroverted evidence establishing that the face of a certificate of title for an automobile clearly indicated that the odometer had turned over, and that a car shop's president orally informed the purchaser of that fact at the time of transfer, the appeals court in *Jenson v. CS & T Body & Paint of Salt Lake, Inc.*, 9 F.3d 117 (10th Cir. 1993) (not designated for publication), found that the district court had properly determined that as a matter of law, the car shop did not violate the federal odometer statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), with the requisite intent to defraud.

A truck purchaser alleged that a leasing company, through its agent, violated the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), by intentionally or recklessly failing to disclose that the truck's actual mileage exceeded what the odometer showed when the truck was sold, and the court in *Lavery v. R-K Leasing*, 19 F.3d 33 (10th Cir. 1994) (not designated for publication), found that the purchaser failed to show an intent to defraud as required by the Act where one record-keeping error, surrounded by undisputedly correct practices in similar transactions, did not amount to record-keeping sloppy enough to evidence reckless disregard. There was no evidence that the leasing company closed its eyes to the truth or was anything but a negligent transferor, determined the court, based on the undisputed facts that the leasing company sold 11 identical trucks at the same auction and the disclosure statements were accurate for all of the trucks except the one the purchaser subsequently acquired. In addition, noted the court, the leasing company received no special benefit from the sale of the purchaser's truck.

The purchasers of a 1988 GMC pickup truck from a car dealer appealed the district court's dismissal of their action for odometer fraud based on an allegation that the dealer falsely represented the mileage on the pickup for the purpose of fraudulently inducing the purchasers to buy the vehicle, in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705(a), and the appeals court in *Pickens v. Mike Haughton Ford, Inc.*, 166 F.3d 1221 (10th Cir. 1999) (not designated for publication), affirmed, since the purchasers had articulated no explanation for their failure to respond to the dealer's motion to dismiss or their failure to seek reconsideration of the district court's order. Further, there was no indication that a manifest injustice would result from affirmance of the district court's order, concluded the court.

The purchasers failed to establish an intent to defraud in connection with the sale of a used truck-tractor, even though the sellers of the truck-tractor had failed to disclose to the purchasers in writing a discrepancy between the mileage actually showing on the vehicle's two odometers and the higher mileage recorded on the title certificate by the previous owner, determined the court in *Witkowski v. Mack Trucks, Inc.*, 712 F.2d 1352, 36 U.C.C. Rep. Serv. 1598 (11th Cir. 1983), where there was no evidence that anyone had tampered with the cab odometer or that it was malfunctioning, the purchasers stipulated that the hub odometer was tamper-proof, and tractors with higher mileages were selling for about the same price the purchasers had paid.

Where an automobile buyer did not allege that the mileage represented on the odometer of the automobile purchased was inaccurate, or that the odometer had been tampered with or was malfunctioning, and where the difference in the mileage at issue was less than 100 miles, no intention of fraud was fairly chargeable to the automobile seller, found the court in *Lawrence v. Franklin Inv. Co., Inc.*, 468 F. Supp. 499 (D.D.C. 1978), and the buyer could not prevail in an action brought against the seller under the section of the Odometer Act governing a civil action to enforce liability for violations of the odometer requirements, the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)). The purchaser's allegations went entirely to establishing that the seller was aware of his failure to comply with the disclosure requirements of the Act, observed the court, and whatever the efficacy of such allegations in an action grounded upon § 1988 (now 49 U.S.C.A. § 32705), they did not allege the "intent to defraud" necessary under § 1989 (now 49 U.S.C.A. § 32710).

See *Hubbard v. Bob McDorman Chevrolet*, 104 Ohio App. 3d 621, 662 N.E.2d 1102 (10th Dist. Franklin County 1995), where the state court determined that a purchaser could not recover under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), from the seller of a motor vehicle with

318 fewer miles on the odometer than were actually on the vehicle, as the purchaser failed to demonstrate that the seller knew of the discrepancy.

[\*60] Conspiracy

[\*60a] Violation of statute

It has been found that a transferor and its agent did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by conspiring to give a false odometer statement to a purchaser, based on the facts and circumstances.

Where it was alleged that both an automobile-leasing corporation and the corporation's sales agent had together conspired knowingly to give a false statement of the mileage traveled by an automobile to the purchaser in violation of the Motor Vehicle Information and Cost Savings Act, the court in *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975), determined that these allegations were insufficient to state a cause of action, since, as a matter of law, the agent could not conspire with the corporation that was his principal, where the agent was not actuated by a personal motive beyond the expectation of a commission.

[\*60b] Intent to defraud

Based on the facts and circumstances, it has been found that transferors conspired to provide false odometer statements to a purchaser with an intent to defraud, in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705.

Two automobile buyers brought suit against, among others, a dealer, its president, and a wholesale automobile dealer, alleging that they had violated the Motor Vehicle Information and Cost Savings Act (Act) by giving false odometer certifications, and the court in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), found that the dealer, its president, and the automobile wholesaler engaged in a conspiracy to give false odometer certifications in violation of the Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), with an intent to defraud the purchasers.

[\*61] Failure to disclose true mileage unknown

[\*61a] Violation -- Found

It has been found that a transferor's failure to disclose that the true mileage of a vehicle was unknown violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, based on the facts and circumstances.

Where the seller of an automobile had reason to know that the mileage could be that registered on the automobile's odometer plus 100,000 miles, found the court in *Leach v. Bishop Bros. Auto Auction, Inc.*, 624 F.2d 34 (5th Cir. 1980), the seller was obligated to disclose that the mileage was unknown rather than provide a statement showing the mileage as shown on the odometer under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). Although the district court had granted summary judgment for the seller, holding that "(t)he mileage was unknown to the defendant and, under the semantic double speak of 15 U.S.C.A. § 1988, [the seller] could not disclose the mileage as 'unknown,'" the court reversed, believing that Congress did not intend for an automobile seller to misrepresent the mileage to a buyer if the seller knew, or had reason to know, that the mileage could be that registered on the odometer plus the 100,000 at the time of his disclosure.

[\*61b] Not found

The courts in the cases that found that, based on the facts and circumstances of each case, the seller of an automobile did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by failing to disclose to a purchaser that the vehicle's true mileage was unknown.

Where the seller of a used automobile knew that the actual mileage of a used car was 135,690, but was prohibited from making false statements on the required documents under a section of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705(a)(2)), found the court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976), the seller could not be held liable under such Act for violating a regulation promulgated pursuant thereto requiring the seller of a used automobile who is aware of a disparity between the odometer reading and the actual mileage to include a statement that the actual mileage is unknown, even though the mileage appearing on the odometer and reported pursuant to the other regulation was 35,690. Forcing the seller to state that the actual mileage was "unknown," as appeared to be the thrust of 49 C.F.R. § 580.4(c) (now 49 C.F.R. § 580.5(e)(3)), would have required the seller to violate § 1988(b) (now 49 U.S.C.A. § 32705(a)(2)), which made it unlawful knowingly to give a false statement to the transferee in making any disclosure required by such rules, held the court. Consequently, the court determined that it could not adhere to the strictly literal and fundamentally nonsensical interpretation of 49 C.F.R. § 580.4(c), which would hold the seller liable for failing to make a statement that the actual mileage was "unknown" to him when, in fact, he did know the actual mileage.

The failure of a corporate car dealer's president to furnish car buyers with the required statement disclosing that the true mileage of the vehicles was unknown did not violate the statute that imposes liability upon a "transferor" who fails to make such required disclosure to a transferee, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), found the court in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), where the owner of the vehicles and thus the "transferor" was the corporate car dealer, not its president.

[\*61c] Intent to defraud -- Found

Failure to disclose to a purchaser that the true mileage of a vehicle was unknown resulted in a transferor's violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, with an intent to defraud, found the courts in the cases that follow, based on the facts and circumstances of each case.

Where an automobile auctioneer, found to be the transferor of a vehicle, prepared an odometer statement for a vehicle simply on the basis of the odometer reading, but failed to disclose that the actual mileage was not known, the auctioneer's reckless disregard for the basic purpose of the Motor Vehicle Information and Cost Savings Act (Act) as well as the Act's specific requirement, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), rose to a level of fraudulent intent and rendered it liable under the Act, determined the court in *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977). This was true, held the court, notwithstanding the fact that the buyer subsequently transferred the automobile, intentionally or unintentionally, in violation of the Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710).

Preparing odometer statements simply on the basis of a used truck's odometer reading, and then failing to disclose to the buyer that the actual mileage of the truck was unknown, demonstrated a reckless disregard for the basic purposes of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), as well as specific requirements of the Act, rendering successive transferors of the truck civilly liable under the Act to the buyer, determined the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987). The statute and applicable regulation, 49 C.F.R. § 580.4(c) (now 49 C.F.R. § 580.5(e)(3)), provide that if the transferor knows the odometer reading to be different from the number of miles the vehicle has actually traveled, the transferor must disclose that the actual mileage is unknown, concluded the court.

Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), found the Fifth Circuit Court of Appeals in *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978), a transferor who

lacked actual knowledge that a vehicle's odometer reading was incorrect was still found to have intended to defraud and thus was civilly liable for a failure to disclose that a vehicle's actual mileage was unknown where, in the exercise of reasonable care, the seller would have had reason to know that the vehicle's mileage was more than that which the odometer had recorded or the previous owner had certified.

An original automobile seller's failure to check the box on an odometer statement certifying that to the best of his knowledge the odometer reading as stated was not the actual mileage and should not be relied on, when the seller admittedly knew the odometer reading was inaccurate, only supported the conclusion that the seller intended to defraud a transferee under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), determined the court in *A.B.C. Chevrolet Co. v. Kirk*, 1986 WL 10045 (N.D. Ill. 1986). Thus, the court granted summary judgment in favor of the transferee and against the seller as to liability.

Where an automobile dealer either knew directly of the falseness of odometer readings or was reckless in his disregard of the obvious indications that the odometer readings were false in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), the court found that the dealer knowingly failed to provide certification that the actual mileage on the vehicles was unknown, and that the dealer could not escape liability by telling a vehicle buyer that he only knew that the prior transferor had certified the mileage on the odometer to the dealer, under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). Under the Act, explained the court, liability is placed on each transferor who makes no discertification of mileage or a false certification knowingly.

[\*61d] Not found

Based on the facts and circumstances of each of the following cases, the courts found that a transferor did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, with an intent to defraud a purchaser by failing to disclose that the true mileage of a vehicle was unknown.

In *Robinette v. Griffith*, 483 F. Supp. 28 (W.D. Va. 1979), a used automobile purchaser's action against a seller for the seller's alleged failure to disclose a lack of knowledge of the true mileage of the vehicle as required by the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1901 et seq., 1988 (now 49 U.S.C.A. §§ 32701 et seq., 32705), the court found that the purchaser's pleading failed to state a claim where the complaint alleged none of the elements of fraud or the circumstances surrounding the seller's alleged violation. Although the purchaser's allegations, if true, stated a claim under the Act, to recover damages for this alleged violation, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), required that the seller's violation include an intent to defraud, held the court. The purchaser's pleading, found the court, was deficient in that it failed to aver the circumstances constituting fraud with the particularity required by *Fed. R. Civ. P. 9(b)*. A bare allegation of fraud does not satisfy the pleading requirements of *Fed. R. Civ. P. 9(b)*, stated the court.

A district court's finding that an automobile dealer, sued by buyers to recover for alleged violations of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), based on the dealer's failure to disclose that the actual mileage of a vehicle was unknown, knew that the actual mileage was unknown, was clearly erroneous, determined the appeals court in *Yates v. Tindall and Son Pontiac*, 531 F.2d 293 (5th Cir. 1976), in view of uncontradicted evidence that when a financing corporation sold the vehicle to the dealer it furnished an odometer disclosure statement representing the mileage to be 4,180, and there was no evidence to prove that the odometer then read differently, i.e., allegedly in excess of 14,000 miles, or that the dealer knew or had reason to know that its seller's statement was false.

Motor vehicle buyers brought suit against a dealer and a salesman under the Motor Vehicle Information and Cost Savings Act (Act), alleging that the dealer provided an odometer certificate that recorded the odometer reading, but did not show that the actual mileage was unknown, and the court in *Huryta v. Diers Motor Co. of Grand Island, Neb.*, 426

*F. Supp. 1176 (D. Neb. 1977)*, found that although the prior owner had certified the true mileage as "unknown" on the certification received by the dealer, and the dealer had violated the Act, 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705(a)(1)(B)), by failing to include a statement that the actual mileage was unknown, the dealer's failure to certify the mileage as "unknown" for that one vehicle was insufficient to establish an intent to defraud, absent evidence that the dealer turned back the odometer, participated in any way, or had a history of dealing in vehicles with altered odometers.

In *Watkins v. Lowe*, 895 F.2d 1419 (9th Cir. 1990) (not designated for publication), where a used car salesman with over 20 years' experience purchased a 1982 Cadillac Eldorado from the lessee intending to resell it, the court found that although the lessee knew that the mileage disclosed by the odometer was 100,000 miles less than what the car had actually traveled, the lessee was not liable for a violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), for a failure to indicate that the mileage was unknown, since there was no intent to defraud the purchaser. In so finding, the court observed that the service records for the car were left in the glove compartment when it was delivered to the purchaser and revealed that the odometer had turned over.

[\*62] False oral statement regarding mileage

[\*62a] Violation of statute

In the following cases, the courts determined that the seller of an automobile did not violate the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., by making a false oral statement regarding the vehicle's mileage to a purchaser, based on the facts and circumstances of each case.

Where an automobile lessee brought an action against an automobile dealership alleging a violation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), the Third Circuit Court of Appeals in *Francesconi v. Kardon Chevrolet, Inc.*, 888 F.2d 18 (3d Cir. 1989), held that assuming the Act applied to the leased automobile at issue, the car salesman's inaccurate oral representations as to the amount of miles the car had traveled were not actionable under the Act, since a written disclosure form accurately reported the correct number of miles and the disclosure form was presented to the lessee at the time of transfer.

An automobile dealer's oral misrepresentations to a buyer concerning the model and body type of the vehicle sold did not violate the odometer disclosure requirements of the Motor Vehicle Information and Cost Savings Act of 1972 (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), because the Act was concerned only with misrepresentations in mileage, found the court in *Purser v. Bill Campbell Porsche Audi, Inc.*, 431 F. Supp. 1235 (N.D. Fla. 1977). In this case, noted the court, the dealer had represented to the buyer that the vehicle was a 1969 model Porsche with a 911S body type when in fact, the vehicle was a 1967 model Porsche, body type 912, into which a 1969 Porsche 911S engine had been placed.

In *Watkins v. Lowe*, 895 F.2d 1419 (9th Cir. 1990) (not designated for publication), where a used car salesman with over 20 years' experience purchased a 1982 Cadillac Eldorado from the lessee intending to resell it, the court determined that no affirmative misrepresentations regarding the car's mileage were made to the purchaser under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988(b) (now 49 U.S.C.A. § 32705), where there was conflicting testimony as to whether the lessee or the person using the car ever affirmatively represented the car's mileage to the purchaser, either by reference to a specific mileage or by describing the car as a "low mileage" vehicle.

[\*62b] Intent to defraud

Based on the facts and circumstances of each of the following cases, the courts found that a transferor who violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, by making a false oral statement regarding a vehicle's mileage, did so with an intent to defraud a purchaser.

Where a seller called a purchaser's attention to a vehicle's odometer reading of approximately 40,000 miles at the time the purchaser bought the used automobile that was represented to have been the seller's personal vehicle, the court in *Klein v. Pincus*, 397 F. Supp. 847 (E.D. N.Y. 1975), held that the evidence was sufficient to show that the seller had, with an intent to defraud, made a false oral statement regarding the odometer reading in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705). Two previous owners were shown to have had the vehicle inspected when the odometer reading was over 75,000 miles, and the seller had purchased the vehicle at an automobile auction with approximately 80,000 miles on the odometer, noted the court.

In *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), the court held that a false representation made to the purchaser of a used car by a sales agent that the odometer reading on a car was accurate "to the best of [his] knowledge" was a representation made either with actual knowledge of its falsity, or with such reckless disregard of the truth, as to satisfy the "intent to defraud" requirement and permit the imposition of liability for a violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711).

A used car dealer's newspaper advertisement describing a four-year-old automobile, on which the odometer had "turned over" and registered 13,175 miles, as a "low mileage" vehicle as well as any false oral statement, i.e., that the 110,020 mileage figure on the title certificate was an error, constituted a violation of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988(b), 1989 (now 49 U.S.C.A. §§ 32705, 32710), which provided that no transferor shall give a false statement to a transferee in making any disclosure required by the Act, found the Fourth Circuit Court of Appeals in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979). Ample evidence was produced at trial to support the jury's conclusion that the dealer knowingly provided false mileage information to the purchaser either on the odometer mileage statement itself or in other representations he made, and that he did so with an intent to defraud, concluded the court, and thus the court held that the jury's verdict on this issue should be reinstated. A transferor cannot insulate himself from liability under the statute by completing the odometer mileage statement correctly, and then contradicting that statement with false oral claims, held the court.

[\*D] Remedies

[\*1] Damages

[\*63] Treble damages

[\*63a] Awarded

The courts in the following cases have awarded treble damages in civil actions brought by private persons under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), based on the facts and circumstances of each case.

Where the buyer of a used automobile presented proof that the seller had tampered with the vehicle's odometer and had failed to make the required disclosure that the instrument reading did not accurately reflect the miles the vehicle had traveled, the court in *Klein v. Pincus*, 397 F. Supp. 847 (E.D. N.Y. 1975), observing that the buyer had paid \$ 1,500 for the vehicle and had sold it a year later for \$ 80 and that the seller admitted the automobile should not have depreciated more than \$ 300 or \$ 400 in that time, calculated the statutory damage by subtracting \$ 480 from the purchase price, finding the damage to be \$ 1,020, which when trebled pursuant to the provisions of 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), resulted in total damages of \$ 3,060.

Since the seller of an automobile had received an odometer mileage statement indicating an odometer reading on the automobile of 51,233 miles, and the seller substituted an instrument panel that contained an odometer with a reading of

21,280 miles, but no written notice of such replacement was affixed to the left door frame of the automobile as required by statute and the buyer had no knowledge of such replacement, the court in *Kirkland v. Cooper*, 438 F. Supp. 808 (D.S.C. 1977), found that the seller had violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), and that the buyer of the automobile was entitled to recover from the seller treble damages in the amount of \$ 2,123.70 under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)).

The prevailing consumer in federal Motor Vehicle Information and Cost Savings Act (Act) litigation was entitled to recover an amount of \$ 1,756.40 in actual damages, and since the consumer had a statutory right to treble damages under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), she was awarded \$ 5,269.20 by the court in *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988). An automobile purchaser's actual damages to be trebled under the Act are to be measured by the purchase price paid for the car, less the fair market value of the car with its higher actual mileage, plus any expenses shown to be attributable to the wrongful acts of the seller, held the court.

A used car dealer's liability for the failure to disclose the unreliability of an odometer reading was three times the difference between the fair-market value of the car with the actual mileage thereon, and the amount paid for the vehicle by the buyer, in the absence of any additional damages caused by the odometer rollback, or \$ 4,500, under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), found the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987). Expert testimony at trial established that the price differential between a 1980 Toyota Tercel with 66,124 miles and one with 34,367 miles was \$ 1,500, observed the court. The odometer rollback caused no additional damages to the purchaser, and thus, the damages for the dealer's infraction in failing to disclose the unreliability of the Tercel's odometer reading was three times \$ 1,500, or \$ 4,500, explained the court.

Automobile purchasers sued a seller for odometer rollbacks in violation of the Motor Vehicle Information and Cost Savings Act, upon the transfer of ownership of three automobiles, and the court in *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978), aff'd without reported opinion, 633 F.2d 218 (6th Cir. 1980), awarded damages under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)) to one purchaser in an amount equal to the sum of three times the actual damages of \$ 2,006, or an aggregate of \$ 6,018, and to another purchaser in an amount equal to three times the actual damages of \$ 1,400, or an aggregate of \$ 4,200.

A used automobile purchaser brought an action against a seller for odometer fraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), and after the district court reduced the jury's damage award, the appeals court in *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254, 17 Fed. R. Serv. 3d 159 (7th Cir. 1990), determined that the jury's award of \$ 7,500, statutorily tripled to \$ 22,500, to the purchaser of the used car, the odometer of which had been fraudulently set back some 80,000 miles, was, even if slightly excessive, not so "monstrously excessive" or a "product of passion and prejudice" as to justify being set aside by the court. Thus, the court remanded with instructions to reinstate the jury's verdict and award treble damages in the amount of \$ 22,500.

The buyers of a car that had its odometer rolled back in violation of the Motor Vehicle Information and Cost Savings Act (Act) were entitled to recover as "actual damages" the difference between the amount paid for the car and its fair market retail value at the time of sale, or \$ 2,975, which when trebled under the Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), amounted to \$ 8,925, and after subtracting settlements with other defendants in the amount of \$ 1,750, came to \$ 7,175, determined the court in *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986). The buyers were not entitled to recover repair costs, added the court, since they made no attempt to show that any of the repairs undertaken would not have been necessary at the lower mileage.

See *Woodfield Ford Sales v. Broniek*, 1992 WL 38401 (N.D. Ill. 1992), where the court found that since a car dealer had proven by a preponderance of the evidence each element of its allegation that a car purchaser had failed to disclose the true mileage on his trade-in, a 1986 Volvo, in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and that the Volvo was worth less than the dealer's \$ 10,000 appraisal,

which was based upon the lower mileage figure, the car dealer suffered actual damages of \$ 5,000, and pursuant to its discretion to triple the actual damages under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), the court doubled the award for a total award of \$ 10,000.

Two automobile buyers brought suit against, among others, a dealer, its president, and a wholesale automobile dealer, alleging that they had violated the Motor Vehicle Information and Cost Savings Act (Act) by tampering with odometers on the automobiles, and the court in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), found that one buyer was entitled to actual damages in the amount of \$ 820, which tripled according to the Act amounted to \$ 2,460. Although substantial repairs were reasonably done on the car, added the court, no attempt was made to establish what amount represented repairs that would not have been necessary had the car been the lower-mileage vehicle the odometer indicated it was.

[\*63b] Not awarded

Under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), treble damages have not been awarded in a civil action brought by a private person, based on the facts and circumstances.

Treble compensatory damages could not be awarded to the buyer of a used truck alleging that the successive transferors of the truck violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), absent proof of actual damages, found the court in *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987). However, the court granted partial summary judgment in favor of the buyer against the transferors, in an amount to be set after further submissions to the court regarding evidence of actual damages and after a hearing on damages if requested by any party.

[\*64] Statutory minimum of \$ 1,500

[\*64a] Awarded

The statutory minimum amount of \$ 1,500 damages available to private persons bringing civil actions under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), was awarded by courts in the cases below, based on the facts and circumstances of each case.

Where the purchaser of a used car brought an action against a dealer seeking statutory damages and equitable relief based on a claim that the dealer violated the disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), by failing to disclose to the purchaser that the vehicle's odometer mileage reading was inaccurate, the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), determined that the dealer was liable and ordered the dealer to pay the statutory minimum penalty of \$ 1500, where the true value of the automobile was very difficult to determine since its true mileage was unknown. The court granted rescission of the sale and based damages upon such a rescission.

In *Forrest v. Simonds*, 1997 WL 610761 (N.D. N.Y. 1997), the district court found that an automobile purchaser was entitled to recover on his claim for damages under the federal odometer disclosure law, awarding \$ 1,500 under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), since the purchaser did not claim actual damages.

An automobile auctioneer, found to be the transferor of a vehicle, prepared an odometer statement for the vehicle simply on the basis of the odometer reading, but failed to disclose that the actual mileage was not known, and the court in *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977), determined that the auctioneer's reckless disregard for the basic purpose of the Motor Vehicle Information and Cost Savings Act (Act) as well as the Act's specific requirement, 15 U.S.C.A. § 1988(a)(2) (now 49 U.S.C.A. § 32705(a)(1)(B)), rose to a level of fraudulent

intent and rendered it liable to a subsequent purchaser of the vehicle for \$ 1,500 in statutory damages under the Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710).

Where the buyer of a used automobile sued the immediate seller, a used car dealer, the automobile dealership from which the dealer had acquired the vehicle, and the latter's president to recover for violations of the statute governing mileage disclosure when the ownership of a motor vehicle is transferred, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988, 1989 (now 49 U.S.C.A. §§ 32705, 32710), the appeals court in *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979), ordered the district court to enter judgment on the jury's verdict, awarding the minimum statutory damages as provided in § 1989 (now 49 U.S.C.A. § 32710(a)).

In *Gimarc v. Neal*, 417 F. Supp. 129 (D.S.C. 1976), an action for a violation of the odometer requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq., (now 49 U.S.C.A. §§ 32701 et seq.), wherein the jury returned a verdict in the sum of \$ 450 as actual damages, the court found that the purchaser was entitled to a judgment for \$ 1,500 under the statute, since it was an amount greater than three times the actual damages.

A used car dealer's failure to disclose the inaccuracy of a car's odometer reading created liability for the statutory minimum of \$ 1,500 under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), found the court in *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987), since the car had a nonfunctioning odometer and it was impossible to determine its actual mileage.

In *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), upon a finding that the automobile sellers had violated the Motor Vehicle Information and Cost Savings Act (Act) in connection with the sale of an automobile, the court determined that the amount of the purchasers' actual damages under 15 U.S.C.A. § 1989(a)(1) (now 49 U.S.C.A. § 32710(a)) was \$ 247 that, if tripled, was less than the \$ 1,500 minimum provided in the Act, and thus the purchasers would have been entitled to recover \$ 1,500.

The statutory damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), have been defined as the difference between the amount paid for the automobile and the fair market value of the same type of car with the number of miles it had actually traveled, plus incidental expenses, and applying this test to the facts of the case, the court in *Goeman v. Keating*, 498 F. Supp. 700 (D.S.D. 1980), found that a purchaser who paid \$ 3,000 for a car and received \$ 2,800 when selling it with an unknown odometer reading, and who expended \$ 274.99 in interest for financing his purchase of the car, was entitled to actual damages in the amount of \$ 474.9

since treble damages were less than the statutory \$ 1,500, the purchaser was entitled to \$ 1,500 -- the greater of the actual damages trebled and the sum of \$ 1,500.

[\*64b] Not awarded

Based on the facts and circumstances, it has been found that a transferee who prevailed in a private civil action was not entitled to the statutory minimum damages of \$ 1,500 under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a).

An automobile dealership that had received an automobile as a trade-in whose odometer mileage reading was 100,000 less than the number of miles the automobile had actually been driven and that subsequently brought an action against the transferor under the Motor Vehicle Information and Cost Savings Act of 1972 (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), was not entitled to an award of damages under the Act, found the court in *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976), since the dealership had sustained a loss of \$ 900 from the transaction, the difference between the fair market value of the car with its actual mileage and the fair market value of the car with a mileage of 100,000 less than its actual mileage, according to an accepted document within the

automobile industry for the valuation of used cars.

[\*65] Odometer check

It has been found that buyers were entitled to recover the expense of having a vehicle checked for odometer tampering under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), based on the facts and circumstances.

Buyers were entitled under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), to a \$ 25 expense for having a vehicle checked for odometer tampering, found the court in *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986).

[\*66] Recoupment or contribution

[\*66a] Allowed

In the cases that follow, the courts held that a transferor found liable may recoup damages or seek contribution from other transferors found liable for the same odometer fraud under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a).

The recoupment rule under the odometer statute, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), should be identical to the rule under the antitrust laws that a plaintiff's treble damages award must be diminished by any amounts received in settlement, held the Sixth Circuit Court of Appeals in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989).

Settlements made with other defendants by the buyer of a car that has had its odometer rolled back in violation of federal law should be subtracted from the total damages awarded to the buyers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), recognized the court in *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986).

In *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995), the court concluded that since the general rule of tort law imposes liability on multiple tortfeasors through joint and several liability, and since there is no provision of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), that changes this general rule, defendants under the Act should be allowed to recover on a contribution claim. While it is true that the purpose of the Act is to prevent odometer tampering, noted the court, this may be done just as effectively using a form of contribution.

\*\*\*\* Caution:

An earlier Seventh Circuit district court decision has held that such recoupment or contribution is not allowed. See § 66[b].

Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), held the court in *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), judgment aff'd on other grounds, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), payment by one tortfeasor diminishes the amount of the claim against the other tortfeasors on account of the harm for which each is liable. The array of techniques for controlling violators or potential violators militates against a holding that each violator should be required to pay the full judgment and not receive a diminution of its liability by reason of payment by another, reasoned the court. If the statute depended entirely or primarily upon the civil liability provision to deter incipient violators, or if the civil liability provision were not itself punitive, the argument for requiring each violator to pay without benefit of credit for payment by another would be stronger, noted the court.

[\*66b] Not allowed

A transferor found liable under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(a), may not recoup damages or seek contribution from other transferors found liable for the same odometer fraud, held the courts in the cases that follow.

The Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710), does not provide a right of recoupment to the seller, held the Fourth Circuit Court of Appeals in *Ferris v. Haymore*, 967 F.2d 946 (4th Cir. 1992), as amended, (July 22, 1992). Therefore, recognized the court, where the purchaser of an automobile with an altered odometer brings suit against a seller, settlements that the purchaser has reached with the other odometer tampering defendants under the Act cannot be set off or recouped.

\*\*\*\* Comment:

In so holding, the Fourth Circuit Court of Appeals in stated that it was not persuaded by the Sixth Circuit's contrary decision in *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989), see § 66[a]. Specifically, the court in rejected the argument advanced by the court that the recoupment rule under the odometer statute should be identical to the rule under the antitrust laws that a plaintiff's treble damages award must be diminished by any amounts received in settlement. This argument failed to recognize the marked differences between the damages provisions of the antitrust laws and of the federal odometer statute, stated the court, since whereas § 4 of the Clayton Act by terms limits an antitrust plaintiff to "recover threefold the damages by him sustained," 15 U.S.C.A. § 15, the federal odometer statute does not limit a purchaser's recovery by some factor of the purchaser's actual damages. Indeed, the terms of the federal odometer statute expressly entitle a purchaser to recover treble damages from each seller found to have violated the statute, held the court, and the rule that an antitrust plaintiff's award must be reduced by amounts received in settlement from coconspirators simply has no bearing on the recoupment rule under the differently worded odometer statute. The separate opinion written in also suggested that odometer fraud is adequately deterred and sufficient compensation provided through other enforcement provisions of the federal odometer statute, but whether there is or is not adequate deterrence and compensation without permitting a purchaser to recover multiple treble damages awards is irrelevant, concluded the court in , since Congress determined that treble damages awards are necessary to achieve the degree of deterrence and compensation that it wished to exist, and courts are without authority to adjust those levels of deterrence and compensation through application of common law or equitable principles. The court noted that even if Congress' intent were less clear from the face of the statute than the court believed it was, the court would be reluctant to announce a different rule. Section 1989 (now 49 U.S.C.A. § 32710) is unmistakably punitive in character, explained the court, and granting recoupment under this section to a guilty defendant would substantially dilute not only the section's punitive, but also its deterrent, force.

In *Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 2 Fed. R. Serv. 3d 914 (5th Cir. 1985), the court held that a buyer's settlement and release of one defendant does not release another defendant from its liability under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)).

A nonsettling defendant is not entitled to a reduction of damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)), by the amounts the purchasers have received from the settling defendants prior to the trial, held the court in *Saber v. Dileo*, 723 F. Supp. 1167 (E.D. La. 1989).

Recovery of contribution from other persons subject to liability for violating the provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988(b), 1989(a), 1990 (now 49 U.S.C.A. §§ 32705, 32709, 32710), concerning the alteration of odometer readings is precluded, held the court in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wis. 1976).

## \*\*\*\* Caution:

Two later Seventh Circuit district court decisions have held that such recoupment or contribution is allowed. See § 66[a].

[\*2] Attorney's Fees

[\*67] Plaintiff

[\*67a] Award affirmed on appeal

Based on the facts and circumstances of each of the following cases, the courts affirmed on appeal an award of attorney's fees to a plaintiff in a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b).

The appeals court in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978), determined that the district court had properly awarded the purchasers of a used vehicle attorney's fees in the amount of \$ 14,205.65 under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(b)), even though the combined statutory damages recoverable by all the purchasers was only \$ 3,960. Where a remedial statute such as the Act requires that attorney's fees be awarded as an element of recovery, held the court, the fact that the trial court's award of attorney's fees exceeds the amount of damages recovered is not in itself sufficient to establish an abuse of discretion. In making this award, the district court had applied the guidelines recommended in the American Bar Association's Code of Professional Responsibility, Disciplinary Rule 2-106, noted the court, and those guidelines had frequently been approved by the appeals court as a standard for determining reasonable attorney's fees. Under all the circumstances, continued the court, the fact that two of the four purchasers had entered into a settlement with another defendant that precluded them from recovering from the corporate car dealer and its president did not require a reduction in the total amount of attorney's fees awarded, since after the settlement, the case proceeded to trial on the claims of all four purchasers and the liability of the dealer and its president to each purchaser was established, since the case required the same amount of preparation whether there were one or more purchasers, and since there was no showing that any significant portion of the total work product would not have been performed had the case preceded only on the claims of the purchasers who did not effect a settlement.

In *Evans v. Paradise Motors, Inc.*, 788 F. Supp. 1079 (N.D. Cal. 1991), an odometer tampering case in which the jury awarded \$ 1,500 in statutory damages for an Odometer Act violation, the court determined that the automobile buyer's attorneys were entitled to fees of \$ 47,116.80 and costs of \$ 610.55 under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a)(2) (now 49 U.S.C.A. § 32710(b)), where the attorneys staffed the case economically and billed for reasonable amounts of time for each segment of the case, showed extraordinary skill in the case with novel legal issues and unusual defense tactics, and achieved an outstanding result. In awarding attorney's fees in an odometer tampering case, the court explained that it considered the time and labor required, the novelty and difficulty of the questions involved, the requisite skill, the preclusion of other employment, the customary fee, whether the fee was fixed or contingent, time limitations, the amount involved and results obtained, the experience, reputation, and ability of the attorneys, the undesirability of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Considering the inherent complexity of a lawsuit instituted for the alleged violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), creating liability for tampering with an automobile odometer, and the number of issues that a purchaser's attorneys had to address, the \$ 5,000 attorney's fees awarded by the district court following a jury verdict for the purchaser was well within the standard of reasonableness, found the appeals court in *Fleet Inv. Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980). The

appeals court determined that the award of attorney's fees was not limited to the amount set by a fee arrangement between the parties that was contingent on the return of a verdict larger than what was awarded by the jury, but was to be measured not only by the amount of recovery to the purchaser, but also by nonmonetary benefits accruing to others, that is, the public at large from successful vindication of a national policy to protect consumers from fraud in the used car business.

[\*67b] Award reduced on appeal

The courts in the cases that follow determined that the amount of attorney's fees awarded to a plaintiff in a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), had to be reduced on appeal, based on the facts and circumstances of each case.

In *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983), an action for a violation of the odometer disclosure provisions of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), the appeals court found that an award of \$ 12,000 in attorney's fees upon a request for \$ 27,000, with a damages award of \$ 1,500, was out of line when compared to other awards under the Act, even when inflation was taken into account for the other earlier cases, and thus, the award would be reduced to \$ 8,000. There must be some relationship between the amount of damages involved and the amount of attorney's fees awarded, held the court. Undoubtedly the Act allows for fees to exceed damages, noted the court, but \$ 12,000 in fees was too far out of proportion to the \$ 1,500 award to be considered reasonable.

While a motor coach buyer's claims against husband and wife consignors were "virtually inseparable" at the beginning of the buyer's suit under the Motor Vehicle Information and Cost Savings Act, found the court in *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998), once the husband's and wife's interests diverged, issues with respect to each of them became distinct and separable, and, when the buyer prevailed against only the estate of the husband, the district court should have allocated attorney's fees under 49 U.S.C.A. § 32710(b), but should not have awarded the buyer those fees attributable to the pursuit of the claim against the wife after she distanced herself from her husband.

[\*67c] Requested amount awarded at trial

It has been found that in a private civil action, the requested amount of attorney's fees would be awarded to a plaintiff at trial under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), based on the facts and circumstances.

Buyers of a car that had its odometer rolled back in violation of the Motor Vehicle Information and Cost Savings Act were awarded attorney's fees at the requested rate of \$ 60 an hour for total of 126.2 hours of attorneys' work, or \$ 7,572, detailed in an affidavit under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(b)), determined the court in *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986).

[\*67d] Requested amount reduced at trial

Based on the facts and circumstances of each case, the courts below awarded a reduced amount of requested attorney's fees at trial to a plaintiff in a private civil action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b).

In *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977), an action brought by an automobile buyer against a seller and an auctioneer from whom the seller had obtained the automobile, the court reduced the amount of attorney's fees requested under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(b)), by the time spent on the unsuccessful claim against the seller of the

automobile. In light of the evidence presented at trial, the court was not convinced that it was necessary to proceed to trial against both defendants in order to discover the source of the fraud, explained the court. The court found therefore that the evidence established that, upon prevailing against the auctioneer, the buyer was entitled to attorney's fees in the amount of \$ 1,185. Although the buyer's role as a private attorney general was somewhat tainted by his actions subsequent to bringing this lawsuit, he was nonetheless entitled to recover reasonable attorney's fees and costs, concluded the court.

An automobile purchaser who prevailed in an odometer alteration suit brought pursuant to the Motor Vehicle Information and Cost Savings Act (Act) petitioned for attorney's fees under *15 U.S.C.A. § 1989* (now *49 U.S.C.A. § 32710(b)*), and the court in *Bayless v. Irv Leopold Imports, Inc.*, *659 F. Supp. 942 (D. Or. 1987)*, determined that considering the results obtained and the unnecessary time incurred, the attorney's fees request of \$ 20,249.83 would be reduced to \$ 8,500. In formulating an award under the attorney's fees provision of the Act, the court sought guidance from opinions calculating attorney's fees under other federal statutes authorizing payment of such awards.

Prosecution of a claim that resulted in an award of actual damages of \$ 5,000 under the Motor Vehicle Information Cost and Savings Act, *15 U.S.C.A. § 1989* (now *49 U.S.C.A. § 32710(b)*), could not support the requested attorney's fees of more than \$ 160,000, determined the court in *Bishop v. Mid-America Auto Auction, Inc.*, *807 F. Supp. 683 (D. Kan. 1992)*, since the case was not unusual or complex and involved a single rollback rather than a conspiracy, even though the buyer was awarded substantial punitive damages. Thus, the court held that the purchaser's requested attorney's fees were wholly unreasonable and would not be granted. If the purchaser wished to pursue his request for attorney's fees, noted the court, he would have to resubmit a reasonable request without charges for services unrelated to the federal odometer statute claim. While there could have been some overlap for services devoted both to a common-law fraud claim and the federal odometer statute claim, the court was not convinced that the purchaser was entitled to an award that did not differentiate between the two. Therefore, the court directed the purchaser to submit his request with this reservation in mind.

An attorney who represented purchasers in an action brought under the Motor Vehicle Information and Cost Savings Act, *15 U.S.C.A. §§ 1981 et seq.* (now *49 U.S.C.A. §§ 32701 et seq.*), in which the purchasers received statutory damages of \$ 1,500 applied for attorney's fees, and the district court in *Lindsey v. Anderson & Sons Auto Sales, Inc.*, *690 F. Supp. 1028 (N.D. Ga. 1988)*, determined that the attorney was entitled to a fee award of \$ 9,728, representing 102.4 hours of work at a rate of \$ 95 per hour, although the attorney claimed that she should be compensated at \$ 125 per hour based in part on the contention that commercial litigation was most comparable to the work performed in this action. An Odometer Act case is a very routine, unsophisticated lawsuit most closely akin to collection matters, to suits on account, and to small actions for breach of contract, held the court, and the prevailing rate for attorneys of the same skill and experience in collection law matters where counterclaims are filed or in minor breach of contracts was \$ 75 to \$ 100 per hour. Because the court judged the attorney's skill as above average, it believed that the reasonable fee would be \$ 95 per hour.

[\*67e] Award amount determined at trial

In a private civil action brought under the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. § 32710(b)*, the courts in the following cases determined the amount of attorney's fees to award to a plaintiff at trial, based on the facts and circumstances of each case.

In *Cirrincone v. Pratt Chevrolet, Oldsmobile & Pontiac*, *275 F. Supp. 2d 26 (D. Me. 2003)*, the court held that although the buyer failed to establish the amount of damages in the form of excess vehicle damage or loss in the value of the vehicle due to odometer fraud, the buyer was more likely than not to succeed under *49 U.S.C.A. § 32705(a)*, which authorized the award of costs and attorney's fees for a successful plaintiff, and that buyer's counsel submitted an affidavit asserting that he anticipated spending 50 hours on the case at a rate of \$ 150 per hour, and that costs would amount to at least \$ 1,500.

In *Klein v. Pincus*, 397 F. Supp. 847 (E.D. N.Y. 1975), where the buyer of a used automobile recovered treble damages in the amount of \$ 3,060 from the seller of the vehicle who had illegally tampered with the odometer, the court held that the buyer was in addition entitled to reasonable attorney's fees of \$ 1,000 under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(b)).

Where the purchaser of a used car brought an action against a dealer seeking statutory damages and equitable relief based on a claim that the dealer violated the disclosure provisions of the Motor Vehicle Information and Cost Savings Act by failing to disclose that the vehicle's odometer mileage reading was inaccurate, the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), determined that the dealer was liable and ordered the dealer to pay \$ 1,200 in attorney's fees.

The purchaser of a used car from a dealer brought an action under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1901 et seq. (now 49 U.S.C.A. §§ 32701 to 32711), charging the dealer with knowingly having given the purchaser a false statement concerning the mileage on a car with intent to defraud the purchaser, and on a motion for a new trial or remittitur, the court in *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980), found that the attorney for the purchaser who prevailed in this action was entitled to recover an award of fees of \$ 9,000, plus costs. This amount was slightly less than 50% in excess of the lodestar figure, noted the court. A purchaser's attorneys are entitled to compensation for time spent preparing fee petitions and successfully appealing a fee award when the fee award is statutorily authorized, held the court.

In an action for a violation of the odometer requirements of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), consideration of the time spent, the skill employed, the reputation and skill of the successful purchaser's counsel, the diligence of counsel and the objective of Congress in having attorneys adequately compensated required an award in the sum of \$ 1,000 for attorney's fees, found the court in *Gimarc v. Neal*, 417 F. Supp. 129 (D.S.C. 1976). Considerations that may control the fixing of attorney's fees in a case involving an alleged violation of the odometer requirements of the Act necessarily are flexible and not absolute, and, if submitted without proof of the specific time involved, resolve themselves into a question of reasonableness, explained the court.

\*\*\*\* Observation:

The court in stated that if an attorney is to be awarded a fee commensurate with the assistance given to the purchaser, the fee could easily overshadow the amount that is recovered for the purchaser. If one is to take the matter of recovery as a measure, then first-class attorneys will be discouraged from engaging in this sort of litigation, and the purpose and intent of Congress would be entirely aborted, noted the court. Perhaps it would be easy for courts to "pass the buck" back to the United States Congress, observed the court, but justice demands that the courts give a decision and that the attorney be awarded a reasonable fee. If the court set a precedent awarding attorney's fees in such a niggardly fashion as to discourage from handling this type of litigation the kind of lawyers wanted in federal court, then it would have aborted the purpose of Congress in passing the legislation, reasoned the court. In an effort to solve this problem, which takes on immense proportions when one considers the number of cases that could evolve from violations of this statute, the court stated that it faces an obvious dilemma, since experience showed that niggardly fee schedules discourage good lawyers, but on the other hand, overly generous attorney's fees might be productive of otherwise unworthy litigation.

Where the seller of an automobile had received an odometer mileage statement indicating an odometer reading on the automobile of 51,233 miles, and the seller substituted an instrument panel that contained an odometer with a reading of 21,280 miles, but no written notice of such replacement was affixed to the left door frame of the automobile as required by statute and the buyer had no knowledge of such replacement, the court in *Kirkland v. Cooper*, 438 F. Supp. 808 (D.S.C. 1977), found that the seller had violated the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 to 1991 (now 49 U.S.C.A. §§ 32701 to 32711), and that the buyer of the automobile was entitled to attorney's fees

in the amount of \$ 2,000.

Automobile purchasers' attorneys in a civil odometer fraud action were entitled to a fee award under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a)(2) (now 49 U.S.C.A. § 32710(b)), reflecting 135.55 hours of legal work at \$ 100 per hour, in view of the time and labor required, the amount involved and the results obtained, and awards in similar cases, and the award was to be apportioned among the defendants in a court-specified manner, determined the court in *Saber v. Dileo*, 723 F. Supp. 1167 (E.D. La. 1989). The most important factor in assessing attorney's fees is the results obtained, continued the court, and where a purchaser has obtained excellent results, his or her attorney should recover a full compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified, held the court.

[\*68] Appeal fees

Based on the facts and circumstances of each of the following cases, the courts awarded attorney's fees to a plaintiff in a private civil action for appeal efforts under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b).

A used automobile purchaser who prevailed on retrial of an odometer fraud claim was entitled to a reasonable award for the time involved in the preparation and argument of the appeal, under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a)(2) (now 49 U.S.C.A. § 32710(b)), found the Seventh Circuit Court of Appeals in *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254, 17 Fed. R. Serv. 3d 159 (7th Cir. 1990).

A successful purchaser filed a motion seeking an award of additional attorney's fees for legal services rendered on appeal from a judgment entered in an action under the Motor Vehicle Information and Cost Savings Act, and the court in *Fleet Inv. Co., Inc. v. Rogers*, 505 F. Supp. 522 (W.D. Okla. 1980), determined that the purchaser was entitled to an award of \$ 3,600 for legal services rendered on appeal under 15 U.S.C.A. § 1989(a)(2) (now 49 U.S.C.A. § 32710(b)). This fee, held the court, was based on the nature of the litigation, the presence of some complex features in the case, the amount involved, the time required of counsel, the skill required and possessed by counsel, the result obtained for the purchaser, and a reasonable hourly rate considered customary in the community in a case of this kind. It would be inconsistent with the intent of Congress, in providing for attorney's fees, to dilute a fee award by refusing to compensate an attorney for the time reasonably spent establishing a rightful claim to a fee or on appellate work defending a judgment, reasoned the court. The district court had the power and was the proper forum in which to determine reasonable attorney's fees for services performed on appeal, added the court.

[\*69] Second trial fees

Attorney's fees have been awarded to a plaintiff in a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), for attorney efforts made during a second trial, based on the facts and circumstances.

A used automobile purchaser who prevailed on retrial of an odometer fraud claim was entitled to \$ 12,560 in attorney's fees under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(a)(2) (now 49 U.S.C.A. § 32710(b)), found the Seventh Circuit Court of Appeals in *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254, 17 Fed. R. Serv. 3d 159 (7th Cir. 1990). Although the seller argued that the purchaser should not receive attorney's fees incurred in the second trial, the court allowed such fees, because the costs of additional relitigation were created in large part by the sellers, the second trial was a worthwhile option for the purchaser and his counsel, and because denying attorney's fees for retrials would burden the purchaser's rights under 15 U.S.C.A. § 1989(a) (now 49 U.S.C.A. § 32710(a)) in a manner not intended by Congress. Removing the right to reasonable attorney's fees for a second trial would effectively foreclose that option for many litigants, thus removing their right to a jury determination of their case, and the court would not countenance such a result.

[\*70] Defendant

Attorney's fees were not awarded to a defendant in a private civil action under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), based on the facts and circumstances of each case.

In *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977), an action by an automobile buyer against a seller and an auctioneer from whom the seller had obtained the automobile, the court found that the seller was not entitled to the requested attorney's fees under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(b)), in the amount of \$ 3,406.66 (85.16 hours at \$ 40 per hour) as against the buyer, even though the court had held that the seller was not liable to the buyer under the Act.

In *Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin*, 177 F.3d 232 (4th Cir. 1999), where the defendant moved for costs and attorney's fees against an automobile dealer who had unsuccessfully brought an action against a customer under the Motor Vehicle Information and Cost Savings Act of 1972, alleging odometer fraud in connection with trade-in, the court held that the 49 U.S.C.A. § 32710(b) authorizes an award of costs and attorney's fees only to a prevailing plaintiff, and not to any prevailing party, and thus the defendant customer could not recover costs and attorney's fees under the Act.

[\*71] Third party

A third party defendant was not awarded attorney's fees under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32710(b), based on the facts and circumstances in a private civil action.

In *Hathcock v. G & M Builders, Inc.*, 601 F.2d 846 (5th Cir. 1979), a suit brought under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1987 to 1989 (now 49 U.S.C.A. §§ 32704, 32705, 32710), to redress an alleged violation consisting of a failure to disclose the accurate mileage of a used car, the appeals court determined that the district court had properly refused to assess attorney's fees against the seller in favor of a successful third-party defendant. Although the seller argued that the literal language of the statute was broad enough to allow the award of its attorney's fees because the language did not limit the award of fees to successful plaintiffs, the court found this argument wholly without merit for three separate and independently sufficient reasons. First, and most compelling, the court did not think that the statute was intended to authorize an award of attorney's fees to a party in the position of the third-party defendants. The seller was a plaintiff with respect to the third-party defendants, and it would subvert the purpose of the Act to award attorney's fees against an unsuccessful plaintiff, explained the court. A different result should not obtain merely because of the posture of this lawsuit, stated the court. Second, and equally important, the underlying judgment on which the third-party defendants sought to predicate fee liability against the seller had been reversed in the court's opinion. Finally, concluded the court, even had it decided that attorney's fees were authorized by the statute in this situation, the award of fees was discretionary with the trial judge, and the appeals court could not say that the trial judge abused his discretion in refusing to exercise it in favor of the third-party defendants.

[\*3] Equitable Remedies

[\*72] Rescission

It has been found that the equitable remedy of rescission may be ordered in an action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances of each case.

Rescission being an equitable remedy based on the law of contracts, its place in a statutory action for legal damages that sounds in tort must be considered, but even the common law recognized concurrent legal and equitable jurisdiction in

fraud cases, as a correlate of equity's broad prerogative to remedy fraudulent wrongs, held the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), concluding that there could thus be little question that the court could properly exercise pendent equitable jurisdiction and order rescission in a case brought under the Motor Vehicle Information and Cost Savings Act.

In *Irby-Greene v. M.O.R., Inc.*, 79 F. Supp. 2d 630 (E.D. Va. 2000), the court held that under "FTC Holder Rule," purchaser of a used automobile could seek rescission of an installment contract against the assignee based on the assignor's alleged violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705.

[\*73] Restitution

The equitable remedy of restitution has been ordered, based on the facts and circumstances, where a vehicle transferor was found liable under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

Where the purchaser of a used car brought an action against the dealer seeking statutory damages and equitable relief based on a claim that the dealer violated the disclosure provisions of the Motor Vehicle Information and Cost Savings Act by failing to disclose that the vehicle's odometer mileage reading was inaccurate, the court in *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977), determined that the dealer was liable and ordered the dealer to make restitution for the full value of the automobile purchased from it, including the value of the installment note (\$ 1,750), the down payment (\$ 221.70), and the trade-in allowance for the purchaser's 1967 Ford Falcon (\$ 50). In return, the dealer would retain ownership and possession of automobile, held the court.

In *U.S. v. Suva*, 44 Fed. Appx. 87 (9th Cir. 2002), where the defendant was convicted of the alteration of used motor vehicle odometers under 49 U.S.C.A. § 32709(b), the court held that the defendant's plea agreement, which expressly provided that the district court was not bound by it, could not limit the district court's discretion in imposing restitution, in prosecution for conspiracy, alteration of used motor vehicle odometers, interstate transportation of forged securities, and engaging in money laundering of funds derived from the interstate transportation of stolen vehicles.

[\*V] ATTORNEY GENERAL CIVIL ACTIONS

[\*A] Generally

[\*74] Situs of violation

It has been found that a violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., occurred in a particular state for the purposes of an attorney general civil action, based on the facts and circumstances.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), where the state of Maryland and its attorney general sued for violations of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), in connection with the "rolling-back" of odometers of high-mileage vehicles, the court found that the inaccurate disclosure of or failure to disclose odometer information under 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705) could be inferred to have occurred in Maryland, where odometers on the subject vehicles were rolled back in that state, the bases of operations of conspiracy were in that state, and the purchasers titled the vehicles there.

\*\*\*\*\* Observation:

The Act, 49 U.S.C.A. § 32709(c), provides that an attorney general may bring a civil action to enjoin a violation in the

United States district court for the judicial district in which the violation occurred or the defendant is found, resides, or does business.

[\*75] Circumstantial evidence

It has been found that circumstantial evidence of the situs of a violation was sufficient for the purposes of an attorney general civil action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances.

Circumstantial evidence that Maryland was the situs of odometer alterations was sufficient in a suit by the state of Maryland and its attorney general for violations of the Federal Motor Vehicle Information and Cost Savings Act (Act), under 15 U.S.C.A. § 1990a(a) (now 49 U.S.C.A. § 32709(c)), determined the court in *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), particularly where direct evidence implicated the defendants in numerous violations of the Act, leaving open only a formal question of which state's attorney general would act as custodian for the claims and recoveries on behalf of the victims. The Act empowers the attorney general of a state to sue only with respect to violations that "occurred" in that state, held the court.

[\*76] Statute of limitations

[\*76a] Runs upon attorney general's discovery

It has been held that the two-year statute of limitations period on suits by a state attorney general under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., runs upon the attorney general's actual or constructive discovery of the fraud.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), the court held that the two-year limitations period on suits by a state attorney general under the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1990a(b) (now 49 U.S.C.A. § 32709(d)(2)), is tolled until the attorney general's discovery of the alleged violations. Such an action is subject to the discovery rule governing federal causes of action, stated the court, which provides that the statute of limitations applicable to actions sounding in fraud begins to run from the date the fraud is discovered or the date that it could have been discovered in the exercise of reasonable diligence.

[\*76b] Runs upon purchaser's discovery

In civil suits brought by a state attorney general under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., it has been held that the two-year statute of limitations period runs upon the vehicle purchaser's actual or constructive discovery of the fraud.

The two-year statute of limitations on odometer fraud suits brought by the attorney general on behalf of damaged automobile purchasers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1989(b) (now 49 U.S.C.A. § 32710(b)), begins to run, as to each purchaser's claim, at the time the purchaser discovered or should have discovered the seller's alleged fraud, held the court in *State of Utah by Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988). The date the state discovers the alleged violation of the fraud statute is irrelevant, stated the court, since the state has no greater rights than those upon whose behalf it brings the action.

[\*B] Parties

[\*77] Transferee

Based on the facts and circumstances presented, it has been found in a civil action that purchasers represented by a state attorney general were transferees under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

The court in *State of Utah by Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988), determined that the ultimate purchasers of automobiles, represented by a state attorney general, were "transferees" for the purpose of stating a cause of action for violation of the disclosure requirements of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705).

[\*78] Joint and several liability

It has been found that transferors were jointly and severally liable for violations of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances in a civil action brought by a state attorney general.

Participants in a conspiracy to violate the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), were jointly and severally liable for violations committed by the other conspirators during the course and in furtherance thereof, held the court in *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989).

[\*C] Particular Violations of Statute

[\*1] Tampering

[\*79] Odometer rolled back

Based on the facts and circumstances presented, it has been found in a civil suit brought by a state attorney general that a transferor rolled back the odometer of a vehicle in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., with the requisite intent to defraud.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), where the state of Maryland and its attorney general sued for violations of the Federal Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), in connection with the "rolling-back" of odometers of high-mileage vehicles, the court found that an intent to defraud could be inferred from the automobile seller's knowledge that many of the cars sold had incorrect odometer readings, evidencing at least reckless disregard. The court held that each time an automobile seller alters an odometer, a separate violation of the Act occurs.

[\*80] Conspiracy

It has been found in a civil suit brought by a state attorney general that transferors conspired, with an intent to defraud, to roll back the odometers of high-mileage vehicles in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances.

Coconspirators were liable for violations of the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), in connection with the "rolling-back" of the odometers of high-mileage vehicles committed by members of their conspiracy during the course of and in furtherance of the conspiracy, determined the court in *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989). The sellers were sufficiently linked to the conspiracy to roll back the odometers of 355 high-mileage vehicles and were

thereby liable for statutory violations associated with each vehicle, held the court, where the names of both sellers appeared in chain of title for 186 of those vehicles, the names of one seller or the other appeared in chain of title of 111 others, and the sellers were otherwise implicated in the sale of remaining 58 vehicles. Furthermore, added the court, contrary to the coconspirators' contention, the record contained ample evidence establishing an intent to defraud. In addition to confessing guilt before the judge during his arraignment, the record showed that one coconspirator testified fully to the entire conspiracy at another coconspirator's trial, describing the arrangement pursuant to which 400 to 500 used vehicles were redocumented and thereafter transferred from one coconspirator to the next, observed the court. The coconspirator also admitted that he rolled back somewhat more than 100 vehicles and that he knew the other seller had rolled back 30% to 40% of the remainder of the 400 to 500 vehicles, and described the involvement of his son as well as other coconspirators, and this same coconspirator had not come forward to dispute any of these admissions, noted the court.

[\*2] Disclosure

[\*81] Failure to disclose true mileage

It has been found in a civil suit brought by a state attorney general that a transferor who failed to disclose the true mileage of a vehicle violated the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., with an intent to defraud, based on the facts and circumstances.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), the court recognized that in a suit for violations of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), an intent to defraud could be inferred from an automobile seller's involvement in a scheme to defraud and the knowledge that many of the cars sold had incorrect odometer readings, evidencing at least reckless disregard.

[\*82] False oral statement regarding mileage

It has been held that in a civil suit brought by a state attorney general, the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., prohibits a transferor from making a false statement to a transferee.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), the court held that the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), prohibits a transferor of a motor vehicle from making a false oral statement to a transferee in violation of rules adopted under the section, which are set forth at 49 C.F.R. §§ 580.1 et seq.

[\*D] Remedies

[\*83] Statutory minimum of \$ 1,500

A state attorney general in a civil action could recover the minimum statutory penalty of \$ 1,500 for each violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., based on the facts and circumstances, it has been found.

In *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), where the state of Maryland and its attorney general sued for violations of the Federal Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1981 et seq. (now 49 U.S.C.A. §§ 32701 et seq.), in connection with the "rolling-back" of odometers of high-mileage vehicles, the court found that Maryland's attorney general could recover \$ 1,500, representing the minimum statutory

penalty when a victim proved no damage, for each of the 355 violations of the Act involving tampering with odometers under *15 U.S.C.A. § 1989(a)* (now *49 U.S.C.A. § 32710(a)*). To deter odometer tampering, noted the court, the Act provides remedies that assure not only that victims are compensated fully for any damage caused but also that violators are penalized by the trebling of the damage or, in the absence of damage, by awarding a minimum amount of \$ 1,500. When the victim proves no damage, continued the court, the victim receives the minimum statutory amount of \$ 1,500 as a penalty. Should the victim, however, prove damage in the action, whether under the Act or on a common-law theory, the victim ought not to receive automatically the \$ 1,500 penalty, but rather should receive a sum that is the damage trebled or \$ 1,500, whichever is greater, stated the court. In that circumstance, to avoid receiving compensatory damages twice, the victim could not recover under other theories of compensatory damage, concluded the court.

[\*84] Restitution

The equitable remedy of restitution was not ordered in a civil action brought by a state attorney general for a violation of the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. §§ 32701 et seq.*, based on the facts and circumstances.

In *Attorney General of Maryland v. Dickson*, *717 F. Supp. 1090 (D. Md. 1989)*, where the state of Maryland and its attorney general sued for violations of the Federal Motor Vehicle Information and Cost Savings Act (Act), *15 U.S.C.A. §§ 1981 et seq.* (now *49 U.S.C.A. §§ 32701 et seq.*), in connection with the "rolling-back" of odometers of high-mileage vehicles, the court found that the attorney general of Maryland was not entitled to recover a restitutionary award.

[\*VI] CRIMINAL ACTIONS

[\*A] Generally

[\*85] Subpoena power -- Production of business records

It has been found, based on the facts and circumstances, that subpoenas for the production of business records related to criminal violations of the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. §§ 32701 et seq.*, should be enforced.

Grand jury subpoenas for the production of business records related to an investigation into putative criminal violations of odometer regulations by automobile dealers under the Motor Vehicle Information and Cost Savings Act, *15 U.S.C.A. § 1990* (now *49 U.S.C.A. § 32706(e)(C)*), did not make overly broad or burdensome requests, found the court in *In re Grand Jury Subpoena Duces Tecum Served on Allied Auto Sales, Inc.*, *606 F. Supp. 7 (D.R.I. 1983)*.

[\*86] Production of odometer statements

Based on the facts and circumstances presented, it has been found that subpoenas for the production of odometer statements related to criminal violations of the Motor Vehicle Information and Cost Savings Act, *49 U.S.C.A. §§ 32701 et seq.*, should be enforced.

Sole proprietors operating automobile dealerships moved to quash subpoenas duces tecum requiring them to produce odometer statements for their motor vehicles under the Motor Vehicle Information and Cost Savings Act, *15 U.S.C.A. § 1990(d)* (now *49 U.S.C.A. § 32709*), and after the district court quashed the subpoenas, the appeals court in *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, *781 F.2d 64 (6th Cir. 1986)*, found that the odometer statements were not protected by the Fifth Amendment, and that the act of producing such statements came within the required-records exception to the Fifth Amendment where the requirement to maintain the statements was regulatory in

nature, the statements were records that automobile dealers would ordinarily keep, and the statements assumed public aspects because the transferors were required to provide signed copies to buyers.

[\*B] Parties

[\*87] Transferor

[\*87a] Found

The courts in the following cases found, based on the facts and circumstances of each case, that the seller of an automobile was a transferor for the purposes of a criminal action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

An automobile seller convicted under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1988(b), 1990(c) (now 49 U.S.C.A. §§ 32705, 32709), for giving a false mileage statement to a transferee was found to be a transferor within the meaning of § 1988(b) (now 49 U.S.C.A. § 32705) by the court in *U.S. v. Henson*, 848 F.2d 1374 (6th Cir. 1988), where the seller gave, or caused a transferor to give, a false odometer statement to a transferee as alleged in the indictment. A defendant may be found to be a transferor under the Act, held the court, where the seller gives, or causes a transferor to give, a false odometer statement to a transferee. In so holding, the court stated that it believed Congress used language in § 1988(b) (now 49 U.S.C.A. § 32705) similar to that used in 18 U.S.C.A. § 2(b), under which defendants can be convicted as causers, even though they are not legally capable of personally committing the act forbidden by the federal statute, and even though the agent caused to do the criminal act was guiltless of the crime. Thus, even assuming a defendant was not a transferor within the meaning of § 1988(b), the jury could find that the defendant adopted a transferor's acts and capacity by causing a transferor to commit a criminal act, concluded the court.

\*\*\*\* Comment:

n93 The Sixth Circuit Court of Appeals in noted that it had examined the legislative history of the Act and did not find any pronouncements inconsistent with the conclusion it reached in this case. If the court were to accept the seller's interpretation that only transferors who give or cause to be given a false odometer statement can be convicted, stated the court, it would create a gaping loophole in the law that would hinder, rather than promote, accurate reporting of mileage information to the consumer. For example, proposed the court, an automobile dealer's corrupt employee could alter the odometer statements of his employer's vehicles without the latter's knowledge, and under the seller's interpretation, this employee could not be convicted under § 1990(c) (now 49 U.S.C.A. § 32709) because the employee would not be a transferor. The court did not believe that the Act countenances such an outcome. Furthermore, the court noted the Ninth Circuit Court of Appeals' decision in *U.S. v. Powell*, 806 F.2d 1421 (9th Cir. 1986), see § 87[b], which found that an employee was not a "transferor" but also stated that the government's argument that the employee should be held liable under § 1990(c) because he caused his employer, the transferor, to violate § 1988(b) by furnishing mileage certificates that he knew to be false. The court stated that this was certainly a viable theory, although it refused to consider this theory because the argument was raised for the first time on appeal.

Automobile dealers and their accomplices in a scheme to "launder" automobile titles through states other than Illinois so as to avoid the Illinois requirement of including a "salvaged vehicle" notation on the titles were "transferors" within the meaning of the federal odometer disclosure regulations of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1990c (now 49 U.S.C.A. § 32709(b)), determined the court in *U.S. v. Ellis*, 739 F.2d 1250 (7th Cir. 1984), inasmuch as each dealer claimed to own the vehicles in question when applying for new titles. Evidence that would constitute conclusive proof of ownership was not required under the Act, added the court. Congress intended to adopt a nationwide standard requiring those who transfer automobiles to provide odometer statements, explained the court, and

in accomplishing this goal, Congress and the Secretary of Transportation used broad language to describe those falling within the ambit of the Act. To make the application of this standard vary depending upon the person's state of residence and state of mind would severely undercut the effectiveness of the Act, determined the court. By all objective evidence, found the court, the dealers in this case transferred ownership of the automobiles, nothing more was required to subject them to the requirements of the Act, and the dealers could not claim that the transfers were sham and thereby avoid the consequences of their actions.

[\*87b] Not found

Based on the facts and circumstances presented, it has been found that the seller of an automobile was not a transferor for the purposes of a criminal action brought under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq.

An agent of a sole proprietorship that was engaged in the business of purchasing used cars from auto auctions and reselling them to used car retailers was not a transferor under the criminal disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), determined the court in *U.S. v. Powell*, 806 F.2d 1421 (9th Cir. 1986), since even though the agent had held himself out as the owner of the vehicles at issue, arranged the sales, and signed the sales certificates as the transferor, he was at all times merely an agent for the true owner, found the court.

\*\*\*\* Caution:

Circuit Judge Ferguson dissented in , arguing that while a transferor may be the only one liable in civil proceedings, this limitation was specifically and intentionally eliminated by Congress for the imposition of criminal liability. To conclude otherwise thwarts the general purpose of the statute and makes fine-line distinctions contrary to congressional intent and statutory language, argued the judge.

[\*88] Corporation

It has been held that a corporation may be responsible when two or more high-ranking or authoritative agents engage in a criminal conspiracy on its behalf, under the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703.

In *U.S. v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737 (8th Cir. 1986), the court held that under the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703, a corporation may be responsible when two or more high-ranking or authoritative agents engage in a criminal conspiracy on its behalf.

[\*C] Particular Violations of Statute

[\*1] Tampering

[\*89] Odometer rolled back

In the following cases, the courts upheld convictions for rolling back vehicle odometers in violation of the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32703, 32709, based on the facts and circumstances in each case.

In *U.S. v. Brandon*, 599 F.2d 112 (6th Cir. 1979), the court determined that evidence that automobiles had been

purchased by dealers and kept on their used car lot under their possession and control until the date on which the altered odometers were observed was sufficient to sustain their convictions for altering the odometers on two automobiles under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. §§ 1984, 1990(c) (now 49 U.S.C.A. §§ 32703, 32709), despite the dealers' contentions that the automobiles involved had been sold to a cousin of one of the dealers.

Evidence that seven automobiles had a higher mileage when purchased by a used car dealer than was shown when they were sold by the dealer and testimony that the dealer had been personally involved in causing the alteration of the odometers to a lower mileage sustained the dealer's conviction for altering the odometers under the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. §§ 32703, 32709), determined the court in *U.S. v. Townsend*, 796 F.2d 158, 21 Fed. R. Evid. Serv. 71 (6th Cir. 1986). Although the government produced no direct evidence that the dealer actually altered the odometers, noted the court, the government produced sufficient circumstantial evidence from which the jury could have reasonably concluded that the dealer altered or directed someone else to alter the odometer of each of the seven cars.

A vehicle transferor was convicted before the district court of violating the Motor Vehicle Information and Cost Savings Act provisions concerning odometer tampering, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), and upon appeal, the court in *U.S. v. Studna*, 713 F.2d 416 (8th Cir. 1983), upheld the conviction, finding that the transferor had knowingly and willfully violated a known legal duty.

Sufficient evidence existed to support a used automobile seller's conviction based on 28 counts of odometer tampering, determined the appeals court in *U.S. v. Berndt*, 86 F.3d 803 (8th Cir. 1996), under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703(2).

[\*90] Conspiracy

Based on the facts and circumstances of each of the following cases, the courts upheld convictions for conspiring to roll back odometers in violation of the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32703, 32709.

Although a convicted defendant in *U.S. v. Carroll*, 166 F.3d 334 (4th Cir. 1998) (not designated for publication), claimed that the evidence was insufficient to support the verdict of conviction for conspiring to alter the odometers of hundreds of motor vehicles, in violation of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32703(2), 32709(b), the appeals court found that even the abbreviated recitation of facts in its opinion showed that the defendant's claim was entirely without merit.

The evidence was sufficient to support an auto broker employee's conviction of conspiracy to alter motor vehicle odometers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), found the court in *U.S. v. Fallon*, 776 F.2d 727, 19 Fed. R. Evid. Serv. 632 (7th Cir. 1985), where the prosecution introduced documents showing that the employee purchased cars with high mileage readings and resold them with lower mileage readings, and introduced testimony that the employee was the auto broker's manager at a time when 95% of the cars sold were altered, that the employee used the state auto titling process to conceal the odometer rollbacks, and that the employee discussed the odometer rollbacks with others.

Sufficient evidence existed to support a conviction based on a conspiracy between two defendants to purchase high-mileage vehicles, tamper with the odometers, and sell the same vehicles with significantly fewer miles listed on the odometer, determined the appeals court in *U.S. v. Berndt*, 86 F.3d 803 (8th Cir. 1996), under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703(4).

[\*91] Odometer disconnected

It has been found that a conviction for disconnecting a vehicle's odometer in violation of the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703, was supported by the evidence, based on the facts and circumstances.

A finding that an automobile dealership had disconnected a vehicle's odometer in violation of a criminal statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. § 32703), was sufficiently supported by evidence that the vehicle had been in the custody and control of dealership, and that it was sold with an inoperative odometer and with uncharacteristic tire-tread wear, found the court in *U.S. v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737 (8th Cir. 1986).

[\*92] Conspiracy

Based on the facts and circumstances presented, it has been found that a conviction for conspiring to disconnect a vehicle's odometer in violation of the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32703, was supported by the evidence.

The finding that an automobile dealership had conspired to disconnect a vehicle's odometer in violation of a criminal statute, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1986 (now 49 U.S.C.A. § 32703), was sufficiently supported by evidence that the general manager of automobile dealership had ordered an employee to disconnect the car's odometer, the vehicle had been in the custody and control of the dealership, and that it was sold with an inoperative odometer and with uncharacteristic tire-tread wear, held the court in *U.S. v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737 (8th Cir. 1986). Although the dealership claimed that as a corporate entity it could not be subject to criminal prosecution for conspiracy solely among its own agents, the court disagreed, holding that a corporation may be responsible when two or more high-ranking or authoritative agents engage in a criminal conspiracy on its behalf.

[\*2] Disclosure

[\*93] Failure to disclose true mileage

[\*93a] Conviction upheld

The courts in the cases that follow determined that the conviction of a vehicle transferor for failure to disclose the vehicle's true mileage under the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32705, 32709, was supported by the evidence, based on the facts and circumstances of each case.

After carefully reviewing the record, and making all reasonable inferences favorable to the government, the court in *U.S. v. Henson*, 848 F.2d 1374 (6th Cir. 1988), could find no merit to an automobile seller's contention that there was insufficient evidence to support the jury's verdict that he gave, or caused a transferor to give, false odometer statements to transferees under the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. §§ 1988(b), 1990(c) (now 49 U.S.C.A. §§ 32705, 32709), and the court therefore affirmed the seller's conviction.

Where a car transferor appealed from his conviction on five counts of furnishing a false odometer statement in connection with the sale of five automobiles, in violation of 15 U.S.C.A. §§ 1988(b) and 1990(c) (now 49 U.S.C.A. §§ 32705, 32709), the appeals court in *U.S. v. Barker*, 932 F.2d 975 (10th Cir. 1991) (not designated for publication), agreed with the district court that the documentary evidence in combination with the testimony of a Department of Motor Vehicles representative and of the transferor himself provided sufficient evidence to support the government's case, and the conviction, beyond a reasonable doubt.

[\*93b] Conviction overturned

It has been determined, based on the facts and circumstances presented, that the conviction of a vehicle transferor for failure to disclose the vehicle's true mileage under the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. § 32705, was not supported by the evidence.

An agent of a sole proprietorship that was engaged in the business of purchasing used cars from auto auctions and reselling them to used car retailers was not a transferor under the disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and thus could not be found guilty under the statute prohibiting the false certification of an odometer mileage reading by transferors as he had no legal or beneficial ownership interest in the transferred cars, determined the court in *U.S. v. Powell*, 806 F.2d 1421 (9th Cir. 1986), reversing the agent's conviction.

\*\*\*\* Caution:

Circuit Judge Ferguson dissented in , arguing that while a transferor may be the only one liable in civil proceedings, this limitation was specifically and intentionally eliminated by Congress for the imposition of criminal liability. To conclude otherwise thwarts the general purpose of the statute and makes fine-line distinctions contrary to congressional intent and statutory language, argued the judge. The agent in this case committed prohibited, criminal acts by filing false certificates, stated the judge, dissenting from the majority's reversal of the agent's conviction on the false certification counts.

[\*D] Statutory Penalty

[\*94] Fine

Based on the facts and circumstances, a fine imposed on a transferor convicted of violating the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., was affirmed on appeal.

A fine of \$ 70,000 imposed upon a dealer convicted on seven counts of altering odometers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. §§ 32703, 32709), was well within the range permitted by the statute and the dealer failed to demonstrate any abuse of discretion, found the court in *U.S. v. Townsend*, 796 F.2d 158, 21 Fed. R. Evid. Serv. 71 (6th Cir. 1986). The maximum punishment for altering odometers was a \$ 50,000 fine, noted the court.

[\*95] Prison sentence

A prison sentence imposed on a transferor convicted of violating the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C.A. §§ 32701 et seq., was affirmed on appeal, based on the facts and circumstances.

A sentence of three years in prison imposed upon a dealer convicted on seven counts of altering odometers under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C.A. § 1984 (now 49 U.S.C.A. §§ 32703, 32709), was well within the range permitted by the statute and the dealer failed to demonstrate any abuse of discretion, found the court in *U.S. v. Townsend*, 796 F.2d 158, 21 Fed. R. Evid. Serv. 71 (6th Cir. 1986).

## FOOTNOTES

n1 This annotation supersedes 28 A.L.R. Fed. 584 (1976), which was based on the earlier version of the statute, previously codified at 15 U.S.C.A. §§ 1981 to 1991.

n2 Pub. L. 92-513, Title IV, S 401, Oct. 20, 1972, 86 Stat. 961. Originally codified at 15 U.S.C.A. §§ 1981 to 1991, the Act was subsequently repealed by Act July 5, 1994, P.L. 103-272, § 7(b), 108 Stat. 1379, except for rights and duties that matured, penalties that were incurred, and proceedings that were begun before enactment (see note preceding 49 U.S.C.A. § 101). The subject matter formerly covered by the Odometer Requirement Provisions is now covered in Title 49, Subtitle VI -- Motor Vehicle and Driver Programs, Part C -- Information, Standards, and Requirements, Chapter 327 Odometers (49 U.S.C.A. §§ 32701 to 32711).

n3 See, e.g., *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977) (Congress intended to impose affirmative duty upon dealers to detect odometer irregularities); *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977) (Congress did not draft statute with intention that used car dealer could buy vehicle at auction, drive vehicle as personal car, sell car for profit, and then follow his customer into court claiming fraud); *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980) (to insure good-faith dealing in automobile industry, to establish safeguards for protection of public, and to punish odometer tamperers); *Michael v. Ferris Auto Sales*, 650 F. Supp. 975 (D. Del. 1987); *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979) (purpose of statute is to enable purchaser of motor vehicle to know how many miles vehicle has traveled, as guide to its safety, reliability, and value); *Delay v. Hearn Ford*, 373 F. Supp. 791, 28 A.L.R. Fed. 576 (D.S.C. 1974); *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975) (purpose is to punish odometer tamperers by imposing civil liability upon them, and to reward purchasers who discover such tampering and bring it to the attention of the federal courts); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64 (6th Cir. 1986) (provisions serve overall purpose of enforcement of an essentially regulatory program, such that automobile dealer's records sought by grand jury fall within required records exception to Fifth Amendment); *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976); *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978), aff'd without reported opinion, 633 F.2d 218 (6th Cir. 1980) (to prohibit tampering with odometers on motor vehicles and to establish safeguards for protection of purchasers who rely heavily on odometer reading as index of condition and value of vehicle); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986); *Arnold v. Smith Motor Co., Brookfield, Missouri*, 389 F. Supp. 1020 (N.D. Iowa 1974) (to curb the practice of importing vehicles with tampered odometers from a neighboring state with no regulation into a state that did prohibit such conduct).

n4 See Note, Consumer Protection, 50 Wash. & Lee L. Rev. 271, 314 (1993). 49 U.S.C.A. § 32701 provides: Findings and purposes; (a) Findings. -- Congress finds that -- (1) buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle; (2) buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle; (3) an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle; and (4) motor vehicles move in, or affect, interstate and foreign commerce. (b) Purposes. -- The purposes of this chapter are -- (1) to prohibit tampering with motor vehicle odometers; and (2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers. Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1048.

n5 15 U.S.C.A. §§ 1601 et seq.

n6 *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982).

n7 *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979).

n8 S. Rep. No. 92-413, 92d Cong., 2d Sess., reprinted in (1972) U.S. Code Cong. & Ad. News 3960, 3962.

n9 See *U.S. v. Harris*, 512 F. Supp. 1174, 8 Fed. R. Evid. Serv. 519 (D. Conn. 1981).

n10 "Because consumers commonly rely on the odometer reading as a measure of the vehicle's condition and fair value, it has become a widespread practice for unscrupulous dealers to disconnect or reset odometers in order to deceive prospective purchasers. This practice not only results in a considerable dollar loss, but also interferes with the consumer's ability to evaluate the condition of a vehicle's safety systems based upon their apparent use. As a consequence, the consumer may not properly examine a vehicle for degradation of key safety components such as the vehicle's suspension, steering, and brakes." H.R. Rep. No. 92-1033, 92d Cong., 2d Sess. at 19 (1972). See *U.S. v. Harris*, 512 F. Supp. 1174, 8 Fed. R. Evid. Serv. 519 (D. Conn. 1981).

n11 15 U.S.C.A. §§ 1981 to 1991.

n12 49 U.S.C.A. §§ 32701 to 32711.

n13 See Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180, at 5 (1994), reprinted in 1994 U.S.C.A. Appx. §§ 818, 822C.A.N..

n14 See Pub. L. No. 104-287, § 9(a), 110 Stat. 3388, 3400 (1996).

n15 Pub. L. 105-178, S. 7105(b), 112 Stat. 467.

n16 49 U.S.C.A. § 32705(a)(4)(A). Section 32705(4)(B) added that: "For purposes of subparagraph (A), the term 'new motor vehicle' means any motor vehicle driven with no more than the limited use necessary in moving, transporting, or road testing such vehicle prior to delivery from the vehicle manufacturer to a dealer, but in no event shall the odometer reading of such vehicle exceed 300 miles."

n17 49 U.S.C.A. § 32705(a)(5).

n18 See *Davis v. Dils Motor Co.*, 566 F. Supp. 1360, 36 U.C.C. Rep. Serv. 792 (S.D. W. Va. 1983) (regulation exempting any vehicles having a gross vehicle weight rating of more than 16,000 pounds was held at variance with the Act and void); *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 37 Fed. R. Serv. 3d 400 (7th Cir. 1997) (National Highway Traffic Safety Administration lacked authority to promulgate regulation exempting vehicles 10 or more years old); *Lair v. Lewis Service Center, Inc.*, 428 F. Supp. 778 (D. Neb. 1977) (rejected by, *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986)) (regulation exempting vehicles with gross weight of over 16,000 pounds unauthorized and void); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994) (regulation exempting large trucks from odometer disclosure rules invalid); *Lee v. Gallup Auto Sales, Inc.*, 135 F.3d 1359 (10th Cir. 1998) (regulation exempting transfers of vehicles 10 or more years old from Act's odometer disclosure requirements invalid); *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998) (regulatory exemption from odometer disclosure requirements for transferors of vehicles with gross vehicle weight rating of more than 16,000 pounds invalid as unauthorized exercise of authority).

n19 See, e.g., *Baker v. Cawthon Motor Co.*, 629 F.2d 410 (5th Cir. 1980) (49 C.F.R. § 580.5(b) (now 49 C.F.R. § 580.17(b)), purporting to provide an exemption from the odometer disclosure requirements of the Motor Vehicle Information and Cost Savings Act (Act), 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), for "a transfer of a new vehicle prior to its first transfer for purposes other than resale" was intended to exempt transfers of a vehicle that occur before its first transfer to a consumer and thus was not applicable to the sale of a new demonstrator car to a consumer); *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979) (regulation that required disclosure on an odometer disclosure form of the date of transfer, the name and address of the transferor, and the last license plate number of the transferred vehicle was valid); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986) (exemption for transfers of large commercial vehicles valid because neither arbitrary nor capricious).

n20 See *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993).

n21 See 49 U.S.C.A. § 32711.

n22 See, e.g., *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978); *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988); *Huycke v. Greenway*, 876 F.2d 94, 13 Fed. R. Serv. 3d 94 (11th Cir. 1989).

n23 See, e.g., *LePiere v. Phoenix Emprise, Inc.*, 500 F. Supp. 251 (E.D. Pa. 1980) (commission of violation must be coupled with intent to defraud); *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979) (proof of intent to defraud required before liability can be imposed); *Robinette v. Griffith*, 483 F. Supp. 28 (W.D. Va. 1979); *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989) (same requirement in civil action brought by state Attorney General); *Shore v. J. C. Phillips Motor Co.*, 567 F.2d 1364 (5th Cir. 1978) (requirement of intent to defraud while committing violation); *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978); *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976); *Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979) (there are two levels of violations -- those that give rise to a penalty because accompanied by an intent to defraud, and those not giving rise to a penalty because not accompanied by an intent to defraud); *Tye v. Spitzer-Dodge*, 499 F. Supp. 687 (S.D. Ohio 1980); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986); *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803 (7th Cir. 1988); *Byrne v. Autohaus On Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980); *Huycke v. Greenway*, 876 F.2d 94, 13 Fed. R. Serv. 3d 94 (11th Cir. 1989).

n24 *Ralbovsky v. Lamphere*, 731 F. Supp. 79 (N.D. N.Y. 1990).

n25 See 49 U.S.C.A. § 32705.

n26 *Paul's Auto World v. Boyd*, 881 F.2d 1077 (6th Cir. 1989) (not designated for publication) (threshold requirement for liability under the disclosure requirements).

n27 See *Moss v. Farr Motor Co.*, 82 F.3d 418 (6th Cir. 1996) (not designated for publication) (transferor need not know of odometer's accuracy, and used car seller is rarely in position to be 100% certain of accuracy of odometers in cars he or she sells).

n28 See *Schmuck v. U.S.*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989) (knowingly and willfully tampering with an odometer is not identical to devising or intending to devise a fraudulent scheme; comparing 18 U.S.C.A. § 1341 with 15 U.S.C.A. §§ 1984, 1990c(a) (now 49 U.S.C.A. §§ 32703, 32709(b))); *U.S. v. Studna*, 713 F.2d 416 (8th Cir. 1983); *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982).

n29 *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982); *U.S. v. Ellis*, 739 F.2d 1250 (7th Cir. 1984) (phrase "knowingly and willfully" used in the Act, 15 U.S.C.A. § 1990c (now 49 U.S.C.A. § 32709(b)), does not necessarily include fraudulent intent); *Lawrence v. Franklin Inv. Co., Inc.*, 468 F. Supp. 499 (D.D.C. 1978) (public interest in compliance with the disclosure requirements of the Act may be protected by injunctive relief under 15 U.S.C.A. § 1990 (now 49 U.S.C.A. § 32709), without regard to a defendant's intent).

n30 See 49 U.S.C.A. § 32703.

n31 See 49 U.S.C.A. § 32704.

n32 See *Daluz v. Acme Auto Body & Sales, Inc.*, 814 F. Supp. 242 (D. Conn. 1992); *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979).

n33 See *Hathcock v. G & M Builders, Inc.*, 601 F.2d 846 (5th Cir. 1979).

n34 *Francesconi v. Kardon Chevrolet, Inc.*, 888 F.2d 18 (3d Cir. 1989).

n35 See *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989) (situs of violation is where inaccurate disclosure was made or where sale was made without disclosure).

n36 See 49 U.S.C.A. § 32705.

n37 Senate Report No. 92-413, U.S. Code Cong. & Ad. News (1972), 3971-72.

n38 *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987).

n39 See *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488 (E.D. Va. 1988).

n40 See 49 U.S.C.A. § 32710(a).

n41 See *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998).

n42 See, e.g., *Delay v. Hearn Ford*, 373 F. Supp. 791, 28 A.L.R. Fed. 576 (D.S.C. 1974) (to construe the statute to require actual damage to the purchaser would effectively gut the Act of its alternative remedy); *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989).

n43 See *Rider Oldsmobile, Inc. v. Wright*, 415 F. Supp. 258 (M.D. Pa. 1976) (automobile dealership not entitled to award of damages under the Act since it had sustained a loss of \$ 900 from the transaction, the difference between the fair market value of the car with its actual mileage and the fair market value of the car with a mileage of 100,000 less than its actual mileage).

n44 See 49 U.S.C.A. § 32710(b); see also § 2[b] for further discussion of attorney's fees awards.

n45 See 49 U.S.C.A. § 32709(c).

n46 See 49 U.S.C.A. § 32709(d)(B).

n47 See 49 U.S.C.A. § 32709(b).

n48 See 49 U.S.C.A. § 32709(b).

n49 See Consumer Protection, 50 Wash. & Lee L. Rev. 271 (1993); 49 U.S.C.A. §§ 32703(3), 32704(b), 32710(a), 32711(1).

n50 See, for example, Mont. Admin. R. § 8.78.204(3), (12). See also Construction and Application of State Statute Making It Unlawful To Tamper with Motor Vehicle Odometer, 76 A.L.R.3d 981 (1977).

n51 See *Parker v. DeKalb Chrysler Plymouth*, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd on other grounds, 673 F.2d 1178 (11th Cir. 1982); *U.S. v. Ellis*, 739 F.2d 1250 (7th Cir. 1984); *U.S. v. Studna*, 713 F.2d 416 (8th Cir. 1983); *Lawrence v. Franklin Inv. Co., Inc.*, 468 F. Supp. 499 (D.D.C. 1978). See § 2[a].

n52 See, e.g., *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 30 Fed. R. Serv. 2d 368 (1st Cir. 1980) (*Fed. R. Civ. P. 9(b)* requires specification of the time, place, and content of an alleged false representation, but does not require the pleading of circumstances or evidence from which fraudulent intent could be inferred; thus, it was sufficient for an automobile purchaser to have pled that a seller's intent was fraudulent where the complaint as a whole alleged that, in selling the car to the purchaser, the seller represented the car's mileage as 26,514 even though the odometer had "turned over" and the mileage was over 100,000 miles); *Levine v. MacNeil*, 428 F. Supp. 675 (D. Mass. 1977) (complaint was not defective in the particularity with which the

allegations of fraud were pleaded, since the allegations sufficiently complied with *Fed. R. Civ. P. 9(b)*); *Reiff v. Don Rosen Cadillac-BMW, Inc.*, 501 F. Supp. 77 (E.D. Pa. 1980) (although complaint did not, in terms, state that dealer possessed intent to defraud, whether factual allegations encompassed assertion that dealer had actual knowledge that odometer reading was incorrect at the time car was sold to purchaser, or merely assertion that dealer proceeded with sale in reckless disregard of odometer's accuracy, requisite intent to defraud would permissibly be inferred from facts alleged); *Robinette v. Griffith*, 483 F. Supp. 28 (W.D. Va. 1979) (used car purchaser failed to plead a fraud claim with sufficient particularity to support a finding of an intent to defraud; rule governing particularity with which circumstances constituting fraud must be pleaded, *Fed. Rules Civ. Proc. Rule 9(b)*, applicable to all claims of fraud); *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 29 U.C.C. Rep. Serv. 2d 1208 (N.D. Ill. 1995) (vehicle buyer's allegations that automobile's odometer had been replaced twice without her knowledge and with intent that she believed that odometer reading at time of purchase was accurate stated cause of action); See also Construction and Application of Provision of *Rule 9(B)*, *Federal Rules of Civil Procedure*, That Circumstances Constituting Fraud or Mistake Be Stated with Particularity, 27 A.L.R. Fed. 407 (1976).

n53 See *Landrum v. Goddard*, 921 F.2d 61 (5th Cir. 1991) (statute is silent as to the requisite burden of proof, and where Congress has not prescribed a particular standard of proof and the Constitution is similarly silent, courts must dictate which standard is to be applied); *Birdwell v. Hartsville Motors, Inc.*, 404 F. Supp. 625 (M.D. Tenn. 1975) (fair preponderance of the evidence standard should be applied); *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990) (causes of action based on fraud for violations of the federal odometer statutes are governed by the preponderance of the evidence standard of proof, not the state's standard for common-law fraud).

n54 See *Landrum v. Goddard*, 921 F.2d 61 (5th Cir. 1991).

n55 See *Arnold v. Smith Motor Co., Brookfield, Missouri*, 389 F. Supp. 1020 (N.D. Iowa 1974) (venue must be determined under 28 U.S.C.A. § 1391(b), balancing the contacts involved is a reasonable method of determining where the "claim arose," and convenience of the litigants should be considered in determining the place of trial).

n56 See *Schenefeld v. Colorado Auction Services Corp.*, 1986 WL 3673 (D.S.D. 1986) (cause of action arises in the district where the complaining party purchased the vehicle in question).

n57 49 U.S.C.A. § 32710(b).

n58 See, e.g., *Saber v. Dileo*, 723 F. Supp. 1167 (E.D. La. 1989); *Woodfield Ford Sales v. Broniek*, 1992 WL 38401 (N.D. Ill. 1992).

n59 *Hathcock v. G & M Builders, Inc.*, 601 F.2d 846 (5th Cir. 1979), § 71, a case involving a claim for attorney's fees by a third-party defendant.

n60 See *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992).

n61 See, e.g., *Krieger v. Gold Bond Bldg. Products, a Div. of National Gypsum Co.*, 863 F.2d 1091, 48 Fair Empl. Prac. Cas. (BNA) 1050, 48 Empl. Prac. Dec. (CCH) P 38550, 27 Fed. R. Evid. Serv. 506 (2d Cir. 1988); *Saber v. Dileo*, 723 F. Supp. 1167 (E.D. La. 1989); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975); *Strebel v. Milton Wagstaff Motor Co., Inc.*, 46 F.3d 1152 (10th Cir. 1995).

n62 See 49 U.S.C.A. § 32710; *Bayless v. Irv Leopold Imports, Inc.*, 659 F. Supp. 942 (D. Or. 1987); *Evans v. Paradise Motors, Inc.*, 788 F. Supp. 1079 (N.D. Cal. 1991).

n63 See, e.g., *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 25 Fed. R. Serv. 2d 1090 (8th Cir. 1978)

(American Bar Association's Code of Professional Responsibility, Disciplinary Rule 2-106 and Johnson factors); *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248 (8th Cir. 1983) (lodestar amount and Johnson factors); *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992) (lodestar amount, rather than percentage of each purchaser's recovery); *Bayless v. Irv Leopold Imports, Inc.*, 659 F. Supp. 942 (D. Or. 1987) (Kerr factors); *Evans v. Paradise Motors, Inc.*, 788 F. Supp. 1079 (N.D. Cal. 1991) (Kerr factors); *Fleet Inv. Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) (measured by amount of recovery to plaintiff as well as nonmonetary benefit accruing to others, such as public at large); *Bishop v. Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992) (whether case unusual or complex, number of violations involved); *Lindsey v. Anderson & Sons Auto Sales, Inc.*, 690 F. Supp. 1028 (N.D. Ga. 1988) (beginning point is "reasonable hourly rate," or prevailing market rate in relevant legal community for similar services or similar clients by lawyers of reasonably comparable skills, experience, and reputation).

n64 See, e.g., *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987) (attorney's fees could not be awarded absent evidence regarding the application for attorney's fees); *Bishop v. Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992) (while there could have been some overlap for services devoted both to common-law fraud claim and the federal odometer statute claim, the court was not convinced that the purchaser was entitled to an award that did not differentiate between the two); *Lindsey v. Anderson & Sons Auto Sales, Inc.*, 690 F. Supp. 1028 (N.D. Ga. 1988) (information contained in record created by plaintiffs' counsel was inadequate for court to make a determination of reasonable hourly rate for attorney's fees).

n65 *Evans v. Paradise Motors, Inc.*, 788 F. Supp. 1079 (N.D. Cal. 1991).

n66 *Aldridge v. Billips*, 656 F. Supp. 975 (W.D. Va. 1987) (recognized that punitive damages may be awarded for fraudulent misrepresentations in the sale of a used vehicle; however, punitive damages could not be awarded to the buyer of a used truck alleging that the successive transferors of the truck violated the Act, 15 U.S.C.A. § 1989 (now 49 U.S.C.A. § 32710(a)), absent proof of actual damages; court granted partial summary judgment in favor of the buyer against the transferors, in an amount to be set after further submissions to the court regarding evidence of actual damages and after a hearing on damages if requested by any party); *Bishop v. Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992) (evidence was sufficient to allow a jury to find that transferors had engaged in a fraudulent course of conduct to sell vehicles with rolled-back odometers in violation of the Act, 15 U.S.C.A. § 1988 (now 49 U.S.C.A. § 32705), and, thus, to support awards of \$ 250,000 and of \$ 100,000 in punitive damages, despite the small award of actual damages to the buyer, found the court, where there was evidence of a course of conduct, evidence that the rollbacks could be very lucrative, evidence of federal statutory and regulatory requirements, including criminal penalties for violations, and evidence that it was unlikely for an individual consumer to discover the rollback; court held that the nature, extent, and enormity of the wrong, the intent of the party committing it, and circumstances attending the transaction involved should be considered when awarding punitive damages, and that any mitigating circumstances that may bear upon any of these factors may be considered to reduce such damages).

n67 *Glover v. General Motors Corp.*, 959 F. Supp. 332 (W.D. Va. 1997) (held that a purchaser who brings a successful action under the Act, 49 U.S.C.A. §§ 32701 et seq., based on odometer fraud may not recover punitive damages, since the Act contains a provision allowing recovery of treble damages, 49 U.S.C.A. § 32710(a), which serves the same function as common-law punitive damages of punishing the wrongdoer and deterring similar conduct in the future; to allow both treble damages and common-law punitive damages would grant a duplicative remedy, which Congress did not intend, and might raise serious due process questions).

n68 See, e.g., *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254, 17 Fed. R. Serv. 3d 159 (7th Cir. 1990) (prevailing purchaser awarded costs of retrial and costs associated with appeal); *Fleet Inv. Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) (travel mileage costs of four witnesses beyond the 100-mile limit specified in Fed. R. Civ. P. 45(e) awarded).

n69 See *In re Beard*, 5 *Bankr. Ct. Dec. (CRR)* 680 (*Bankr. M.D. Tenn.* 1979); see also Debts Arising From Penalties As Exceptions To Bankruptcy Discharge Under §§ 523(A)(7), (13) and 1328(A) of *Bankruptcy Code of 1978* (11 *U.S.C.A.* §§ 523(A)(7), (13), and 1328(A)), 150 *A.L.R. Fed.* 159 (1998).

n70 See *In re Castonguay*, 77 *B.R.* 602 (*Bankr. E.D. Mich.* 1987).

n71 *U.S. v. Harris*, 512 *F. Supp.* 1174, 8 *Fed. R. Evid. Serv.* 519 (*D. Conn.* 1981).

n72 *U.S. v. Harris*, 512 *F. Supp.* 1174, 8 *Fed. R. Evid. Serv.* 519 (*D. Conn.* 1981).

n73 *Parker v. DeKalb Chrysler Plymouth*, 459 *F. Supp.* 184 (*N.D. Ga.* 1978), judgment aff'd on other grounds, 673 *F.2d* 1178 (11th *Cir.* 1982).

n74 See, e.g., *SuperTurf, Inc. v. Monsanto Co.*, 660 *F.2d* 1275, 32 *Fed. R. Serv.* 2d 1300 (8th *Cir.* 1981); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 674 *F. Supp.* 183 (*D. Md.* 1987), order rev'd on other grounds, 878 *F.2d* 791, 28 *Fed. R. Evid. Serv.* 323, 9 *U.C.C. Rep. Serv.* 2d 61 (4th *Cir.* 1989); *Natural Design, Inc. v. Rouse Co.*, 302 *Md.* 47, 485 *A.2d* 663 (1984); *McDonald v. Johnson & Johnson*, 722 *F.2d* 1370 (8th *Cir.* 1983).

n75 Compare, e.g., *Abbate v. U.S.*, 359 *U.S.* 187, 79 *S. Ct.* 666, 3 *L. Ed.* 2d 729 (1959).

n76 *Pub. L.* 103-272, § 1(e), July 5, 1994, 108 *Stat.* 1049.

n77 Citing S. Rep. No. 92-413, 92d Cong., 2d Sess. (1972) reprinted in (1972) *U.S. Code Cong. & Admin. News*, pp. 3960, 3971, 3972.

n78 See § 36[b] for a discussion of the status of an employee of the dealership.

n79 As to the president of the corporation, see § 36[b].

n80 As to a manager of the dealership, see § 36[b].

n81 As to the status of the dealer, see § 36[a].

n82 As to the car dealer, see § 36[a].

n83 As to the sole proprietor of the dealership, see § 36[a].

n84 49 *U.S.C.A.* § 32710(a). *Pub. L.* 103-272, § 1(e), July 5, 1994, 108 *Stat.* 1055.

n85 *Pub. L.* 103-272, § 1(e), July 5, 1994, 108 *Stat.* 1055.

n86 *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 *U.S.* 630, 101 *S. Ct.* 2061, 68 *L. Ed.* 2d 500 (1981).

n87 *Burlington Industries v. Milliken & Co.*, 690 *F.2d* 380, 217 *U.S.P.Q. (BNA)* 662, 35 *Fed. R. Serv.* 2d 780 (4th *Cir.* 1982).

n88 See, e.g., *Davis v. Dils Motor Co.*, 566 *F. Supp.* 1360, 36 *U.C.C. Rep. Serv.* 792 (*S.D. W. Va.* 1983); *Diersen v. Chicago Car Exchange*, 110 *F.3d* 481, 37 *Fed. R. Serv.* 3d 400 (7th *Cir.* 1997); *Lair v. Lewis Service Center, Inc.*, 428 *F. Supp.* 778 (*D. Neb.* 1977); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 *F.3d* 433 (9th *Cir.* 1994); *Lee v. Gallup Auto Sales, Inc.*, 135 *F.3d* 1359 (10th *Cir.* 1998); *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 *F.3d* 1275 (10th *Cir.* 1998).

n89 See 49 *U.S.C.A.* § 32705(a)(5).

n90 The *Aldridge* court found that a material issue of disputed fact existed as to whether the original seller of the used truck signed the odometer mileage statements in blank when transferring the truck to the dealer, precluding summary judgment on the buyer's claim against the original seller alleging odometer fraud under the Act.

n91 See, e.g., *Davis v. Dils Motor Co.*, 566 F. Supp. 1360, 36 U.C.C. Rep. Serv. 792 (S.D. W. Va. 1983); *Lair v. Lewis Service Center, Inc.*, 428 F. Supp. 778 (D. Neb. 1977) (rejected by, *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986)); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994); *Lee v. Gallup Auto Sales, Inc.*, 135 F.3d 1359 (10th Cir. 1998); *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275 (10th Cir. 1998).

n92 See 49 U.S.C.A. § 32705(a)(5).

n93 See S. Rep. No. 155, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 1718; H.R. Rep. No. 764, 94th Cong., 1st Sess. (1975).

## JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

### JURISDICTIONAL TABLE OF STATUTES AND CASES

#### UNITED STATES CODE

*1328(A) of Bankruptcy Code of 1978*  
*Fed. R. Civ. P. 45(e)*  
*Fed. R. Civ. P. 9(b)*  
*Fed. R. Evid. 609(a)(2)*  
*Fed. Rules Civ. Proc. Rule 9(b)*  
*Rule 9(B), Federal Rules of Civil Procedure*

#### CODE OF FEDERAL REGULATIONS

*49 C.F.R. § 580.17(a)(1)*  
*49 C.F.R. § 580.17(b)*  
*49 C.F.R. § 580.3*  
*49 C.F.R. § 580.4*  
*49 C.F.R. § 580.4(4)*  
*49 C.F.R. § 580.4(c)*  
*49 C.F.R. § 580.5*  
*49 C.F.R. § 580.5(a)(1)*  
*49 C.F.R. § 580.5(b)*  
*49 C.F.R. § 580.5(c)*  
*49 C.F.R. § 580.5(e)(3)*  
*49 C.F.R. §§ 580.1 to 580.17*  
*49 C.F.R. §§ 580.1*  
*49 C.F.R. §§ 580.1 to 580.17*  
*49 CFR § 580.4(a)*

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*Am. Jur. 2d, Automobiles and Highway Traffic § 220*

*Am. Jur. 2d, Consumer and Borrower Protection § 299*

*Am. Jur. 2d, Fraud and Deceit §§ 84, 151, 185*

## INDEX OF TERMS (Go to beginning)

Absence of privity, private civil actions, § 39  
Acquire complete odometer statement for vehicle meant for resale, failure to, § 55  
Actual damages, construction of, §§ 27- 29  
Actual knowledge of violation, inference of intent to defraud, § 10  
Actual knowledge of violation, proof of intent to defraud, § 8[b]  
Affix notice of odometer repair, failure to, §§ 48, 49  
Affix notice of odometer replacement, failure to, § 51  
Agent, liability of, §§ 13, 37  
Agent as person, § 25  
Agents of corporation, criminal conspiracy by, § 88  
All potential purchasers, persons against whom statute of limitations runs, § 31[b]  
Appeal, affirming or reduction of award of attorneys' fees on, §§ 67[a, b]  
Appeal, award of attorney fees for work on, § 68  
Assessing reasonableness of transferor conduct, § 16  
Attorney fees, §§ 67- 71  
Attorney General civil actions, §§ 74- 84  
Auction company, liability as transferor, § 14  
Automobile auction company, liability as transferor, § 14  
Background, summary, and comment, § 2  
Business records, production of, § 85  
Check of vehicle for odometer tampering, recovery of expense of, § 65  
Circumstantial evidence, situs of violation, § 75  
Collateral estoppel, § 6  
Comment, background, and summary, § 2  
Common law fraud, § 5  
Complete odometer statement, failure to acquire for vehicle meant for resale, § 55  
Complete odometer statement, failure to provide to purchaser, § 58  
Conspiracy, disconnection of odometer, § 92  
Conspiracy, failure to disclose engine replacement, § 54  
Conspiracy, failure to disclose true mileage, § 60  
Conspiracy, failure to provide written odometer statement, § 57  
Conspiracy, rolling back of odometer, §§ 80, 90  
Conspiracy to repair broken odometers, § 49  
Conspiracy to tamper with odometer, § 47  
Constitutionality of applying statute to motorcycles, § 3  
Construction of Act, §§ 4- 29  
Construction of particular terms, §§ 8- 29  
Constructive knowledge, proof of intent to defraud, § 8[a]  
Contribution or recoupment, § 66  
Corporation, agent of as person, § 25  
Corporation, criminal responsibility of, § 88  
Corporation as person, § 24  
Criminal actions, §§ 85- 95

Cross-claims among transferors, § 44  
Damages, actual, construction of, §§ 27- 29  
Damages, private civil actions, §§ 63- 66  
Damages under both state and federal laws, § 7  
Defendant, award of attorney fees to, § 70  
Defendant, third party, award of attorney fees to, § 71  
Discharge from employment for refusing to participate in scheme to set back odometers, § 35  
Disclosure, Attorney General civil actions, §§ 81, 82  
Disclosure, criminal actions, § 93  
Disclosure, private civil actions, §§ 55- 62  
Disclosure requirements, construction of particular terms, §§ 12- 22  
Disconnection of odometer, §§ 46, 91, 92  
Discovery of fraud, statute of limitations, §§ 30, 31[a], 76  
Dominion over vehicle, inference of intent to defraud, § 11  
Dual damages under state and federal laws, § 7  
Duty to disclose fact that mileage is unknown, §§ 19, 20, 61  
Duty to disclose that odometer has turned over, §§ 21, 59  
Duty to disclose total mileage, § 21  
Duty to inquire regarding accuracy of odometer reading, §§ 17, 18  
Each purchaser who discovers fraud, persons against whom statute of limitations runs, § 31[a]  
Effect on state law, §§ 4, 5  
Employee as transferee, § 35  
Engine replacement, failure to disclose, §§ 53, 54  
Equitable remedies, §§ 72, 73  
Experience of transferor in car sales, § 16  
Fair market value of vehicle with actual miles and amount paid for vehicle, difference between as actual damages, § 27  
False odometer statement, conspiring to give, § 60  
False oral statement regarding mileage, §§ 62, 82  
Fine, § 94  
Fraud, common law, § 5  
Gross negligence, proof of intent to defraud, § 8[a]  
Incarceration, § 95  
Inference of intent to defraud, §§ 9- 11  
Inquire regarding accuracy of odometer reading, affirmative duty to, §§ 17, 18  
Intent to defraud requirement, generally, §§ 8- 11  
Introduction to annotation, § 1  
Joint and several liability, §§ 40, 41, 78  
Knowingly and willfully, construction of, § 26  
Knowledge, actual, §§ 8[b], 10  
Knowledge of true mileage, transferor's, § 21  
Knowledge required to create duty to disclose fact that mileage is unknown, § 20  
Limitation of actions, §§ 30- 32, 76  
Mileage, true, as unknown, failure to disclose, § 61  
Mileage is unknown, duty to disclose fact that, §§ 19, 20  
Mileage unknown, certifying when odometer has turned over, § 21[a]  
Minimum damages, statutory, §§ 64, 83  
Motorcycle as included within term motor vehicle, § 23  
Motorcycles, constitutionality of applying statute to, § 3  
Motor vehicle, construction of term, § 23  
Multiple transferors, §§ 40- 44, 66

Negligence, proof of intent to defraud, § 8[c]  
New odometer, failure to reset, § 52  
Nonownership interest, construction of transferor, § 12[b]  
Notice of odometer repair, failure to affix, §§ 48, 49  
Notice of odometer replacement, failure to affix, § 51  
Odometer check, recovery of expense of, § 65  
Odometer fraud, effect on state law regarding, § 4  
Odometer statement, complete, failure to acquire for vehicle meant for resale, § 55  
Odometer statement, complete, failure to provide to purchaser, § 58  
Odometer statement, false, conspiring to give, § 60  
Odometer statement, written, failure to provide, §§ 56, 57  
Odometer statements, production of, § 86  
Oral statement regarding mileage, false, §§ 62, 82  
Owner, for purposes of private civil action, § 38  
Ownership interest, construction of transferor, § 12[a]  
Particular terms, construction of, §§ 8- 29  
Particular violations of statute, §§ 45- 62, 79- 82, 89- 93  
Parties, §§ 33- 44, 77, 78, 87, 88  
Partnership as person, § 24  
Person, construction of term, §§ 24, 25  
Persons against whom statute of limitations runs, § 31  
Plaintiff, attorney fees, §§ 67- 69  
Practice pointers, § 2[b]  
Preemption of state law dealing with odometer fraud, § 4  
Preliminary matters, §§ 1, 2  
Prison sentence, § 95  
Private civil actions, §§ 30- 73  
Privity, absence of, private civil actions, § 39  
Production of business records, § 85  
Production of odometer statements, § 86  
Proof of intent to defraud, § 8  
Provide complete odometer statement to purchaser, failure to, § 58  
Provide written odometer statement, failure to, §§ 56, 57  
Purchaser's discovery of fraud, beginning of running of statute of limitations, §§ 30, 76[b]  
Purchaser who discovers fraud, person against whom statute of limitations runs, § 31[a]  
Reasonable care of transferor, §§ 15, 16  
Reckless disregard, proof of intent to defraud, § 8[a]  
Recoupment or contribution, § 66  
Related annotations, § 1[b]  
Relationship with state law, §§ 4- 7  
Reliance on odometer statement as required to show actual damages, § 28  
Remedies, §§ 63- 73, 83, 84  
Repair, failure to affix notice of, §§ 48, 49  
Repair, service, and replacement, §§ 48- 54  
Repairs occasioned by misrepresentation as actual damages, § 29  
Replacement, failure to affix notice of, § 51  
Replacement of engine, failure to disclose, §§ 53, 54  
Replacement of odometer, §§ 50, 51  
Rescission, § 72  
Reset new odometer, failure to, § 52

Restitution, §§ 73, 84  
Rolling back of odometer, generally, §§ 45, 79, 80,, 89, 90  
Scope of annotation, § 1[a]  
Second trial, award of attorney fees for work on, § 69  
Seller of automobile as transferor, § 87  
Separate and individual liability, multiple transferors, §§ 42, 43  
Service, repair, and replacement, §§ 48- 54  
Situs of violation, §§ 74, 75  
State Attorney General civil actions, §§ 74- 84  
State law, relationship with, §§ 4- 7  
Statement, odometer, complete, failure to provide to purchaser, § 58  
Statement, odometer, complete, for vehicle meant for resale, failure to acquire, § 55  
Statement, odometer, false, conspiring to give, § 60  
Statement, odometer, written, failure to provide, §§ 56, 57  
Statement regarding mileage, oral, false, §§ 62, 82  
Statements, odometer, production of, § 86  
State where violation occurred, §§ 74, 75  
Statute of limitations, §§ 30- 32, 76  
Statutory minimum damages, §§ 64, 83  
Statutory penalty, criminal actions, §§ 94, 95  
Subpoena power, §§ 85, 86  
Subsequent transferor, bringing of private civil action as transferee by, § 34  
Successive transferors, absence of privity, § 39  
Summary, background, and comment, § 2  
Superseding of state common-law remedy for fraud, § 5  
Tampering, generally, §§ 45- 47, 79, 80, 89- 92  
Termination of employment for refusing to participate in scheme to set back odometers, § 35  
Third party defendant, award of attorney fees to, § 71  
Transferee, status as, §§ 22, 33- 35, 77  
Transferee as person, § 24  
Transferor, reasonable care of, §§ 15, 16  
Transferor, status as, §§ 12- 14, 36- 39, 87, 88  
Transferor as person, § 24  
Transferor knowing true mileage, duty to disclose, § 21  
Treble damages, § 63  
Trial, attorney fees award affirmed, reduced, or determined at, §§ 67[c-e]  
True mileage, failure to disclose, generally, §§ 59, 60, 81, 93  
True mileage, transferor knowing, § 21  
True mileage was unknown, failure to disclose that, §§ 19, 20, 61  
Turned over, duty to disclose that odometer has, §§ 21, 59  
Ultimate purchasers as transferees, § 22  
Unknown, duty to disclose that mileage is, §§ 19, 20, 61  
Vagueness, § 3  
Validity of Act, § 3  
Written odometer statement, failure to provide, §§ 56, 57

TABLE OF REFERENCES(Go to beginning)

## Annotations

See the related annotations listed in § 1[b]

## REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

*Am. Jur. 2d, Automobiles and Highway Traffic § 220*

*Am. Jur. 2d, Consumer and Borrower Protection § 299*

*Am. Jur. 2d, Fraud and Deceit §§ 84, 151, 185*

Fraudulent Alteration of Odometer, 1 *Am. Jur. Proof of Facts 2d* 677

Misrepresentation in sale of defective automobile, *Supp.*, 13 *Am. Jur. Trials* 253 § 14.5

*Am. Jur. Legal Forms 2d, Automobiles and Highway Traffic § 33:36*

*Am. Jur. Pleading and Practice Forms, Products Liability, Form 115.1, Form 115.1*

## ARTICLE OUTLINE (Go to beginning)

### I. PRELIMINARY MATTERS

#### § 1 Introduction

##### § 1[a] Scope

##### § 1[b] Related annotations

#### § 2 Background, summary, and comment

##### § 2[a] Generally

##### § 2[b] Practice pointers

### II. VALIDITY OF ACT

#### § 3 Constitutionality of applying statute to motorcycles

### III. CONSTRUCTION OF ACT

#### A. Relationship with State Law

##### § 4 Effect on state law -- Odometer fraud

##### § 5 Common-law fraud

##### § 6 Collateral estoppel

##### § 7 Dual damages under state and federal laws

###### § 7[a] Awarded

###### § 7[b] Not awarded

#### B. Construction of Particular Terms

## 1. Intent to Defraud Requirement

### § 8 Proof of intent to defraud

§ 8[a] Constructive knowledge, gross negligence, or reckless disregard

§ 8[b] Actual knowledge

§ 8[c] Negligence

### § 8.5 Specific intent requirement

### § 9 Inference of intent to defraud -- Generally

### § 10 Based on actual knowledge of violation

### § 11 Based on dominion over vehicle

## 2. Disclosure Requirements

### § 12 Transferor

§ 12[a] Ownership

§ 12[b] Nonownership

### § 13 Agent liability

### § 14 Auction company liability

### § 15 Reasonable care of transferor

### § 16 Assessing reasonableness of transferor conduct

### § 17 Affirmative duty to inquire

### § 18 Specific circumstances giving rise to duty to inquire

### § 19 Duty to disclose mileage unknown

### § 20 Knowledge required to create duty

### § 21 Transferor knows true mileage

§ 21[a] Duty to disclose total mileage

§ 21[b] No duty to disclose total mileage

### § 22 Transferee

## 3. Other Terms or Provisions

### § 23 Motor vehicle

### § 24 Person

### § 25 Agent

§ 26 Knowingly and willfully

§ 27 Actual damages

§ 28 Reliance

§ 29 Repairs occasioned by misrepresentation

#### IV. PRIVATE CIVIL ACTIONS

##### A. Generally

§ 30 Statute of limitations

§ 31 Persons against whom statute runs

§ 31[a] Each purchaser who discovers fraud

§ 31[b] All potential purchasers

§ 32 Action time-barred

##### B. Parties

###### 1. Transferee Status

§ 33 Transferee

§ 33[a] Found

§ 33[b] Not found

§ 34 Subsequent transferor

§ 35 Employee of transferor

###### 2. Transferor Status

§ 36 Transferor

§ 36[a] Found

§ 36[b] Not found

§ 37 Agent

§ 38 Owner

§ 39 Absence of privity

###### 3. Multiple Transferors

§ 40 Joint and several liability -- Generally

§ 41 Found

§ 42 Separate and individual liability -- Generally

§ 43 Found

§ 44 Cross-claims among transferors

§ 44[a] Allowed

§ 44[b] Not allowed

C. Particular Violations of Statute

1. Tampering

§ 45 Odometer rolled back

§ 45[a] Violation -- Found

§ 45[b] Not found

§ 45[c] Intent to defraud -- Found

§ 45[d] Not found

§ 46 Odometer disconnected

§ 46[a] Violation of statute

§ 46[b] Intent to defraud

§ 47 Conspiracy to tamper with odometer

§ 47[a] Violation of statute

§ 47[b] Intent to defraud -- Found

§ 47[c] Not found

2. Service, Repair, and Replacement

§ 48 Failure to affix notice of odometer repair

§ 49 Conspiracy

§ 50 Odometer replaced

§ 51 Failure to affix notice of odometer replacement

§ 51[a] Intent to defraud -- Found

§ 51[b] Not found

§ 52 Failure to reset new odometer

§ 53 Failure to disclose engine replacement

§ 53[a] Violation of statute

§ 53[b] Intent to defraud

§ 54 Conspiracy

3. Disclosure

§ 55 Failure to acquire complete odometer statement for resale

§ 56 Failure to provide written odometer statement

§ 56[a] Intent to defraud -- Found

§ 56[b] Not found

§ 57 Conspiracy

§ 58 Failure to provide complete odometer statement

§ 58[a] Violation of statute

§ 58[b] Intent to defraud

§ 59 Failure to disclose true mileage

§ 59[a] Violation -- Found

§ 59[b] Not found

§ 59[c] Intent to defraud -- Found

§ 59[d] Not found

§ 60 Conspiracy

§ 60[a] Violation of statute

§ 60[b] Intent to defraud

§ 61 Failure to disclose true mileage unknown

§ 61[a] Violation -- Found

§ 61[b] Not found

§ 61[c] Intent to defraud -- Found

§ 61[d] Not found

§ 62 False oral statement regarding mileage

§ 62[a] Violation of statute

§ 62[b] Intent to defraud

D. Remedies

1. Damages

§ 63 Treble damages

§ 63[a] Awarded

§ 63[b] Not awarded

§ 64 Statutory minimum of \$ 1,500

§ 64[a] Awarded

§ 64[b] Not awarded

§ 65 Odometer check

§ 66 Recoupment or contribution

§ 66[a] Allowed

§ 66[b] Not allowed

2. Attorney's Fees

§ 67 Plaintiff

§ 67[a] Award affirmed on appeal

- § 67[b] Award reduced on appeal
- § 67[c] Requested amount awarded at trial
- § 67[d] Requested amount reduced at trial
- § 67[e] Award amount determined at trial

§ 68 Appeal fees

§ 69 Second trial fees

§ 70 Defendant

§ 71 Third party

### 3. Equitable Remedies

§ 72 Rescission

§ 73 Restitution

## V. ATTORNEY GENERAL CIVIL ACTIONS

### A. Generally

§ 74 Situs of violation

§ 75 Circumstantial evidence

§ 76 Statute of limitations

§ 76[a] Runs upon attorney general's discovery

§ 76[b] Runs upon purchaser's discovery

### B. Parties

§ 77 Transferee

§ 78 Joint and several liability

### C. Particular Violations of Statute

#### 1. Tampering

§ 79 Odometer rolled back

§ 80 Conspiracy

#### 2. Disclosure

§ 81 Failure to disclose true mileage

§ 82 False oral statement regarding mileage

### D. Remedies

§ 83 Statutory minimum of \$ 1,500

§ 84 Restitution

## VI. CRIMINAL ACTIONS

### A. Generally

§ 85 Subpoena power -- Production of business records

§ 86 Production of odometer statements

### B. Parties

§ 87 Transferor

§ 87[a] Found

§ 87[b] Not found

§ 88 Corporation

### C. Particular Violations of Statute

#### 1. Tampering

§ 89 Odometer rolled back

§ 90 Conspiracy

§ 91 Odometer disconnected

§ 92 Conspiracy

#### 2. Disclosure

§ 93 Failure to disclose true mileage

§ 93[a] Conviction upheld

§ 93[b] Conviction overturned

### D. Statutory Penalty

§ 94 Fine

§ 95 Prison sentence

189 of 195 DOCUMENTS

American Law Reports 5th  
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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Admissibility in State Court Proceedings of Police Reports as Business Records

George L. Blum, J.D.

*111 A.L.R.5th 1*

**NOTICE:** The present annotation supersedes the annotation at *77 A.L.R.3d 115*.

**SUMMARY:**

The common law has developed a rule that entries in books of account made in the regular course of business by a person other than the party who offers them in evidence are admissible, provided that they are proved by the person who made them, and a number of jurisdictions have enacted statutes that, while not abrogating the common-law rule, have enlarged upon it so as to permit a writing or record of any act or transaction to be admissible in evidence if it appears that the records were made in the regular course of any business. The issue arises as to the admissibility in state court proceedings of police reports as business records. In *Sikora v. Gibbs*, *132 Ohio App. 3d 770, 726 N.E.2d 540, 111 A.L.R. 5th 685 (10th Dist. Franklin County 1999)*, for example, the court held that a memorandum written by a police officer, whose issuance of a citation to the plaintiff gave rise to a malicious prosecution action, would not be admissible in support of a summary judgment motion under the "business records" exception to the hearsay rule. The court held that a memorandum written by the police officer regarding the incident did not fall within the "business records" exception, particularly since the source of information and the circumstances of preparation indicated a lack of trustworthiness, the court stressing that given that the source of the information was the accused in the present case, it could not be said that the memorandum was prepared by a person who was independent of the parties. This annotation collects those state cases in which the courts have determined the admissibility as evidence of police reports as business records in state court proceedings.

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] PRELIMINARY MATTERS

[\*1] Introduction

[\*1a] Scope

This annotation<sup>1</sup> collects those state cases that have determined the admissibility as evidence of police reports<sup>2</sup> as business records in state court proceedings. The annotation considers the question of whether such reports are within the ambit of the business records exception to the hearsay rule, and if so, what factors affect the admissibility of the report under the exception. The annotation is concerned only with admissibility of police reports under the business records exception to the hearsay rule, and does not consider in depth whether an individual police report may be admissible on grounds other than the business record exception, except insofar as such question may be made an integral part of the discussion of the business records issue by an individual court.

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing on this subject; since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulatory compilations.

[\*1b] Related annotations

A.L.R. Index, Accident Reports

A.L.R. Index, Business Records

A.L.R. Index, Hearsay

A.L.R. Index, Police and Law Enforcement Officers

A.L.R. Index, Records and Recording

A.L.R. Index, Reports

A.L.R. Index, Witnesses

Admissibility in State Court Proceedings of Police Reports Under Official Record Exception to Hearsay Rule, *112 A.L.R.5th 621*

What corporate communications are entitled to attorney-client privilege -- modern cases, *27 A.L.R.5th 76*

Admissibility of police officer's testimony at state trial relating to motorist's admissions made in or for automobile accident report required by law, *46 A.L.R.4th 291*

Construction and application of "amnesty" provision whereby automobile driver leaving scene of accident may report to police within stated time without risk of use of his report against him, *36 A.L.R.4th 907*

Admissibility of computerized private business records, *7 A.L.R.4th 8*

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, *95 A.L.R.3d 832*

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, *86 A.L.R.3d 1170*

Physician-patient privilege as applied to physician's testimony concerning wound required to be reported to public

authority, *85 A.L.R.3d 1196*

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, *80 A.L.R.3d 456*

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, *80 A.L.R.3d 414*

Requirement of notice as condition for admission in evidence of summary of voluminous records, *80 A.L.R.3d 405*

Admissibility under Uniform Business Records as Evidence Act or similar statute of medical report made by consulting physician to treating physician, *69 A.L.R.3d 104*

Admissibility under business entry statutes of hospital records in criminal case, *69 A.L.R.3d 22*

Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence, *68 A.L.R.3d 1069*

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, *47 A.L.R.3d 822*

Admissibility of report of police or other public officer or employee, or portions of report, as to cause of or responsibility for accident, injury to person, or damage to property, *69 A.L.R.2d 1148*

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury, *44 A.L.R.2d 553*

Privilege of custodian, apart from statute or rule, from disclosure, in civil action, of official police records and reports, *36 A.L.R.2d 1318*

Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, *23 A.L.R.2d 1360*

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts", *21 A.L.R.2d 773*

Admissibility of Summaries or Charts of Writings, Recordings, or Photographs Under *Rule 1006 of Federal Rules of Evidence*, *198 A.L.R. Fed. 427*

Admissibility of records other than police reports, under *Rule 803(6), Federal Rules of Evidence*, providing for business records exception to hearsay rule, *61 A.L.R. Fed. 359*

Admissibility, over hearsay objection, of police observations and investigative findings offered by government in criminal prosecution, excluded from public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence, *56 A.L.R. Fed. 168*

Admissibility of credit reports under Federal Business Records Act (*28 U.S.C.A. § 1732(a)*), *19 A.L.R. Fed. 988*

Accident reports by employees of litigant as admissible under Federal Business Records Act (*28 U.S.C.A. § 1732*), *10 A.L.R. Fed. 858*

Admissibility of hospital records under Federal Business Records Act (*28 U.S.C.A. § 1732(a)*), *9 A.L.R. Fed. 457*

Personal checkbook or account as business record under Federal Business Records Act (28 U.S.C.A. § 1732), 8 A.L.R. Fed. 919

C.J.S., Evidence § 924

[\*2] Summary and comment

[\*2a] Generally

The so-called "shop-book rule," under which a party to a lawsuit may, independently of any statute expressly authorizing him or her to do so, give in evidence, in support of a claim, books of account even though the entries have been made by the party, is said to be a creature of American common law that acts in derogation of the English common-law principle that a party shall not be permitted to make his or her own evidence.<sup>n3</sup> In addition to the "shop-book rule," the common law has also developed a rule that entries in books of account made in the regular course of business by a person other than the party who offers them in evidence are admissible, provided that they are proved by the person who made them.<sup>n4</sup> A number of jurisdictions have now enacted statutes that, while not abrogating the common-law rule, have enlarged upon it so as to permit a writing or record of any act or transaction to be admissible in evidence, notwithstanding the availability or nonavailability of the maker or makers of the records to testify, if it appears that the records were made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of the act or occurrence in question.<sup>n5</sup>

While the basic content of these statutes is generally similar, the phraseology of an individual statute may differ according to which of several drafts, drawn up by scholars, was used as the model. For example, American Law Institute, Model Code of Evidence, Rule 514(1) provides that a writing offered as a memorandum or record of an act, event, or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event, or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event, or condition or within a reasonable time thereafter. Paragraph (3) of the Rule states that the word "business" as used in paragraph (1) includes every kind of occupation and regular organized activity, whether conducted for profit or not.

The Uniform Business Records as Evidence Act, promulgated by the National Conference of Commissioners on Uniform State Laws, provides at Uniform Business Records as Evidence, § 2, that a record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, and method and time of preparation, were such as to justify its admission. Uniform Business Records as Evidence, § 1 states that the term "business" shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

The Rules of Evidence promulgated by the National Conference of Commissioners on Uniform State Laws provides in Uniform State Laws, Rules of Evidence, Rule 63(13) that writings offered as memoranda or records of acts, conditions, or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition, or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, constitute an exception to the general rule that evidence of a statement that is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible. Uniform State Laws, Rules of Evidence, Rule 62(6) provides that "a business" as used in Uniform State Laws, Rules of Evidence, Rule 63(13) shall include

every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. The commissioners' note to Uniform State Laws, Rules of Evidence, Rule 62 states that the definition of "a business" is from the Uniform Business Records as Evidence Act.

The Uniform Rules of Evidence promulgated in 1974 by the National Conference of Commissioners on Uniform State Laws supersede the Uniform Rules of Evidence previously approved in 1953. Uniform State Laws, Rules of Evidence, Rule 803(6) provides that a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness, is not excluded by the hearsay rule, even though the declarant is available as a witness. The Rule further provides that the term "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The issue arises as to the admissibility in state court proceedings of police reports as business records. A number of jurisdictions have taken the view that, depending upon its content, all or part of a police report will be admissible as a business record at the reporter level, without the testimony of the reporting officer, provided that certain qualifications of trustworthiness are met ( § 3). In this regard, it has been held that unless a police report is made in the regular course of police business, and unless it is the regular course of police business to keep such a report, the report cannot be admitted as a business record exception to the hearsay rule ( § 5). A number of cases have held that a police report will not be admissible under the business records exception where it is apparent that the reporting officer did not have firsthand knowledge of the facts that he or she was recording ( § 6). In addition, it has been held in several cases that police reports are admissible as evidence under the business records exception only when made at or near the time of the event or occurrence being recorded ( § 7). Under these rules of qualification, it is generally held that the content of a police report that was not the result of the reporting officer's own observations, but was the product of statements made to the officer by third persons, cannot be admitted into evidence under the business records exception to the hearsay rule, unless the third party making the statement was under a business duty to do so ( § 8). Similarly, it has been held that the opinions or conclusions of the reporting officer, or the opinions and conclusions of witnesses making statements to the reporting officer, which opinions and conclusions are contained in a police report, will not be admissible as evidence under the business records exception where the reporting officer or witness would not be qualified to state such opinions or conclusions if testifying in person ( § 9).

It has been held in a number of jurisdictions that, in any event, police reports generally are not admissible in evidence, either because there is in existence a statute that proscribes the admissibility in evidence of certain types of police reports ( § 4[a]), or because the courts did not expressly recognize that police reports constituted "business records" within the meaning of that exception to the hearsay rule ( § 4[b]).

With regard to the availability of the reporting officer to testify in court, it has been held that the officer's presence in court does not mean that his or her report should be admitted as evidence without qualification under the business records exception to the hearsay rule ( § 10). The question has also been raised as to whether a police report may be admitted in evidence as a business record when it appears that it was made with the primary purpose in mind of its use as evidence in court proceedings ( § 11).

In some jurisdictions that generally recognize the admissibility of police reports as evidence, it has been held that an objection to the admissibility of material contained in such a report must be specific in nature, a general objection to the report as a whole being insufficient ( § 12).

Generally speaking, it may be said that in those jurisdictions that generally recognize the admissibility of police reports under the business records exception to the hearsay rule, whether a particular report is admissible in part or in whole

depends upon the facts and circumstances surrounding the making of the report, and the content of the report.

In civil cases, a number of courts have held that all or part of varied police reports would be admissible at the time of trial as evidence under the business records exception to the hearsay rule, including: automobile accident reports ( § 13[a]), slip-and-fall accident reports ( § 14[a]), assault and battery reports ( § 15[a]), "incident" or arrest reports ( § 17[a]), telephone reports ( § 18[a]), offense reports ( § 20[a]), and investigative reports ( § 22[a]). Other courts, however, given the particular circumstances presented, have ruled to the contrary ( §§ 13[b], 14[b], 15[b], 17[b], 18[b], 20[b], 22[b]).

In other civil cases, courts have held that all or part of police custody reports would be admissible at the time of trial as evidence under the business records exception to the hearsay rule ( § 21). Other courts, however, have held in civil cases that all or part of varied police reports would not be admissible at the time of trial as evidence under the business records exception to the hearsay rule, including: police memoranda ( § 16), complaint reports ( § 19), presentence reports ( § 23), summary reports ( § 24), and laboratory reports ( § 25).

In criminal cases, a number of courts have held that all or part of varied police reports would be admissible at the time of trial as evidence under the business records exception to the hearsay rule, including: "incident" or arrest reports ( § 26[a]), speedometer, Breathalyzer, and other test reports ( § 27[a]), complaint reports ( § 28[a]), teletype or telephone reports ( § 29[a]), receipts for property ( § 33[a]), and investigative reports ( § 38[a]). Other courts, however, given the particular circumstances presented, have ruled to the contrary ( §§ 26[b], 27[b], 28[b], 29[b], 33[b], 38[b]).

In other criminal cases, a number of courts have held that all or part of varied police reports would be admissible at the time of trial as evidence under the business records exception to the hearsay rule, including: victim reports ( § 30), radio logs ( § 31), vehicle use forms ( § 34), memoranda ( § 37), and offense reports ( § 39). Other courts, however, have held in criminal cases that all or part of varied police reports would not be admissible at the time of trial as evidence under the business records exception to the hearsay rule, including: letters of police personnel ( § 32), booking sheets ( § 35), and officer's disciplinary reports ( § 36).

[\*2b] Practice pointers

It is generally held by the courts that for evidence such as police reports to be admissible as a business record, a proper foundation must be laid to establish the necessary indicia of reliability. That foundation should generally include the following: (1) the record must be made in the regular course of the business or entity that keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition, or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness. It is typically held that the requisite foundation can be made by the custodian of the records.<sup>n6</sup>

The purpose for which police records are sought to be introduced frequently determines whether a court will find in those records the requisite trustworthiness for admissibility as business records. For instance, in prosecutions for narcotics violations, notations made by government agents on envelopes in which narcotics purchased from defendants have been placed, which describe the circumstances of the transaction, have been admitted as business records for the limited purpose of proving the chain of custody of the evidence. Police reports have also been admitted, for example, to: prove or disprove a defendant's alibi; show the fact that a crime was reported have been held admissible as business records; show the defendant's knowledge that violent acts regularly occurred on its premises; establish a flaw in the story of defense witness who testified she saw the defendant at the site of police investigation of purse-snatching far from the location of the robbery with which the defendant was charged, at the time of the robbery; and impeach a witness.<sup>n7</sup>

A party failing in its attempt to prevent the admission into evidence at the time of trial a police report may wish to request of the court a limiting instruction explaining to the jury the precise purpose for which the subject police report was admitted.<sup>n8</sup>

It should be noted that where a defendant in a criminal action is attempting to introduce a police report pursuant to a business records exception to a hearsay rule, the state may not be entitled to object to its admission on the ground that the individual preparing the report is unavailable. That is, some courts hold that the prosecution, unlike a criminal defendant, enjoys no right of confrontation under the federal or pertinent state constitution.<sup>n9</sup>

Similarly, it has been held that since police reports of the factual events and details of a criminal case are generally made for the purpose of successfully prosecuting a crime, the reasons that might otherwise provide a basis to assume reliability of such reports as business records do not exist where police reports are offered by the prosecution in a criminal proceeding. It does not necessarily follow, however, some courts have held, that such records may not be admissible when proffered by a defendant in a criminal trial.<sup>n10</sup>

It has been noted that while typically the "business records" and the official records exception apply to written hearsay, the business records exception has been relied upon, in certain circumstances, to allow testimony based upon records or documents.<sup>n11</sup>

When a police report contains out-of-court assertions by others, an additional level of hearsay is contained in the report and an exception for that hearsay must also be found, such that reports cannot establish more than their maker could if he or she was testifying in court on their subject matter, it has been noted.<sup>n12</sup>

Typically, the type of "business" envisioned in a state's business records exception to the hearsay rule, by which certain documents, including police reports, may be admissible at trial, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.<sup>n13</sup>

It has been noted that trustworthiness no longer serves as a mere philosophical justification for the admission of evidence otherwise excluded as hearsay, but rather, trustworthiness is itself an express threshold condition of admissibility. That is, the courts have commented, the business records exception to the hearsay rule, on its face, provides that evidence such as police reports, otherwise meeting the literal requirements of the rule, shall not be admissible where the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.<sup>n14</sup>

The fact that a particular police report may be deemed inadmissible under the business records exception does not mean, of course, that it might not be admissible, at least in part, under some other exception to the operation of the hearsay rule, or that it might not be admissible for some limited purpose other than supporting the truth of the matter asserted therein. An attorney attempting to have a police report admitted under the business records exception to the hearsay rule should take care to show not only that the report was made in the regular course of police business, but also that it was the regular course of police business to make such a report under the circumstances presented. This can be shown by the testimony of the reporting officer, by the custodian of the police report files, or by any other person "qualified" to relate police procedures under a given set of circumstances. It should also be borne in mind that the business records exception normally only removes the objection to the admissibility of the report itself, so that the personal observations of the reporter can be admitted into evidence without the reporter's direct testimony. However, where the report relates the content of statements made to the reporter by third persons, the so-called "double hearsay" situation is present, and the business records exception will not operate to render admissible the reporter's account of statements made to him by others, since the reporter would not be qualified to relate these statements even if testifying in person. If the third party is acting under a business duty in making the statements to the reporting officer, it can be strongly argued that the third-party statements, as recorded in the police reports, would be admissible under the business records exception. Similarly, if the statement of the third party falls under some other exception to the hearsay rule, then it can be argued

that the third-party statement, as recorded by the officer in the course of his duty, will be admissible.

Some courts do recognize that if the police report was based entirely upon the officer's own observations, then it will be admissible as a business record exception to the hearsay rule, particularly if the officer is available to testify. However, unless the report itself clearly, beyond any reasonable doubt, reveals that it is in fact based upon the reporting officer's own observations, the court in question cannot be sure that such is in fact the case, and probably will exclude the evidence. The inadmissibility of a police report cannot be circumscribed by the simple expedient of an affidavit by the person who prepared the report that everything contained in it is true and correct. In such an instance it would be incumbent upon the affiant to couch such evidentiary fact in testimonial language indicating that what he was testifying to were matters within his own knowledge and not such as were contained in a police report.<sup>n15</sup> Even if it is found that a police report was based on the officers' personal observations, and yet was excluded by the trial court, such exclusion, even if erroneous, will not be prejudicial where the officers who prepared the report are available as witnesses. This is particularly the case where the officers did in fact testify at the trial and the report in question was used to refresh their recollections.<sup>n16</sup> If any portion of a police report being admitted into evidence as a business record was not admissible, it is incumbent upon the objecting party to point out the inadmissible parts with specificity and to give reasons why the specified parts were not admissible. It is not the court's duty to separate the inadmissible parts of the report from the admissible parts.<sup>n17</sup> The fact that there is authority for the admissibility of police reports as business records has been advanced as reasoning for permitting the investigating officer to testify as to his findings and conclusions, where a state statute absolutely prohibits the admissibility of the record itself.<sup>n18</sup> While it is generally true that when a party fails to object to a police accident report's being put in evidence at trial, it is too late to raise the question on appeal, yet where the appellant was not represented by counsel at trial, the appellate court may reserve the right to notice a prejudicial error even in the absence of objection.<sup>n19</sup>

[\*II] ADMISSIBILITY OF POLICE REPORTS UNDER BUSINESS EXCEPTION, GENERALLY

[\*3] View that police reports, properly qualified, are admissible

The courts in the following cases have taken the view that a police report will be admissible as a business record at the reporter level, without the testimony of the recording officer, provided that certain qualifications of trustworthiness are met.

ALABAMA

*Reeves v. King*, 534 So. 2d 1107 (Ala. 1988)

*McLaughlin v. City of Homewood*, 548 So. 2d 580 (Ala. Crim. App. 1988)

*Bates v. State*, 574 So. 2d 868 (Ala. Crim. App. 1990)

*Stevens v. Stanford*, 766 So. 2d 849 (Ala. Civ. App. 1999), reh'g denied, (Dec. 17, 1999)

ALASKA

*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975), § 4[a] (recognizing rule)

ARKANSAS

*Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976)

*Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985)

## CALIFORNIA

*Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966) (police "incident" report)  
*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967) (drunkenness and disorderly conduct report)  
*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982) For California cases holding police accident reports inadmissible, see § 4[a]

## COLORADO

*People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980)  
*Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985)

## CONNECTICUT

*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)  
*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)  
*Bonner v. Winter*, 175 Conn. 41, 392 A.2d 436 (1978)  
*State v. Sharpe*, 195 Conn. 651, 491 A.2d 345 (1985)  
*Swenson v. Sawoska*, 215 Conn. 148, 575 A.2d 206 (1990)  
*O'Sullivan v. DelPonte*, 27 Conn. App. 377, 606 A.2d 43 (1992)  
*Paquette v. Hadley*, 45 Conn. App. 577, 697 A.2d 691 (1997)  
*State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962)  
*Zadroga v. Commissioner of Motor Vehicles*, 42 Conn. Supp. 1, 597 A.2d 848, 4 Conn. L. Rptr. 461 (Super. Ct. 1991)

## DELAWARE

*Johnson v. State*, 253 A.2d 206 (Del. 1969)

## DISTRICT OF COLUMBIA COURT

*Leiken v. Wilson*, 445 A.2d 993 (D.C. 1982)  
*Montgomery v. U.S.*, 517 A.2d 313 (D.C. 1986)

## GEORGIA

*Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by, *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001))

## HAWAII

*State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972)

## ILLINOIS

*People v. Tsombanidis*, 235 Ill. App. 3d 823, 176 Ill. Dec. 426, 601 N.E.2d 1124 (1st Dist. 1992)

## INDIANA

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)

*Perry v. State*, 541 N.E.2d 913 (Ind. 1989)

## MAINE

*State v. Therriault*, 485 A.2d 986 (Me. 1984)

## MARYLAND

*Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983)

*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)

*Ali v. State*, 314 Md. 295, 550 A.2d 925 (1988)

*Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971)

## MASSACHUSETTS

*Com. v. Trapp*, 396 Mass. 202, 485 N.E.2d 162 (1985), appeal after remand on other grounds, 423 Mass. 356, 668 N.E.2d 327 (1996)

*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973) (by implication)

## MICHIGAN

*Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976)

*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)

*People v. Miller*, 88 Mich. App. 210, 276 N.W.2d 558 (1979), judgment rev'd on other grounds, 411 Mich. 321, 307 N.W.2d 335 (1981)

## MINNESOTA

*City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968) (apparently recognizing rule)

## MISSISSIPPI

*Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989)

*Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000)

*Mississippi State Dept. of Human Services v. Fargo*, 771 So. 2d 935 (Miss. Ct. App. 2000), reh'g denied, (Aug. 29, 2000)

#### MISSOURI

*Ryan v. Campbell "66" Exp., Inc.*, 304 S.W.2d 825 (Mo. 1957) (recognizing rule)  
*Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962)  
*State v. Taylor*, 486 S.W.2d 239 (Mo. 1972)  
*Penn v. Hartman*, 525 S.W.2d 773 (Mo. Ct. App. 1975)  
*Nelson v. Holley*, 623 S.W.2d 604 (Mo. Ct. App. W.D. 1981)  
*State ex rel. Pini v. Moreland*, 686 S.W.2d 499 (Mo. Ct. App. E.D. 1984)  
*State v. Cuno*, 869 S.W.2d 285 (Mo. Ct. App. E.D. 1994)

#### NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)  
*Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999)

#### NEW JERSEY

*State v. Matulewicz*, 101 N.J. 27, 499 A.2d 1363 (1985)  
*Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968)  
*Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (App. Div. 1969), certification denied, 55 N.J. 163, 259 A.2d 915 (1969)  
*State v. McGearry*, 129 N.J. Super. 219, 322 A.2d 830, 77 A.L.R.3d 106 (App. Div. 1974)  
*State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979)  
*State v. Weller*, 225 N.J. Super. 274, 542 A.2d 55 (Law Div. 1986)

#### NEW YORK

*People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970) (recognizing rule)  
*Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 A.D.2d 556, 251 N.Y.S.2d 240 (3d Dep't 1964)  
*Yeargans v. Yeargans*, 24 A.D.2d 280, 265 N.Y.S.2d 562 (1st Dep't 1965)  
*Mahon v. Giordano*, 30 A.D.2d 792, 291 N.Y.S.2d 854 (1st Dep't 1968) (recognizing rule)  
*Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969)  
*People v. Jackson*, 40 A.D.2d 1006, 338 N.Y.S.2d 760 (2d Dep't 1972)  
*Schlobohm v. Command Trucking Corp.*, 52 A.D.2d 844, 382 N.Y.S.2d 816 (2d Dep't 1976) (apparently recognizing rule)  
*Matter of Ronald B.*, 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dep't 1978)  
*Murray v. Donlan*, 77 A.D.2d 337, 433 N.Y.S.2d 184 (2d Dep't 1980)  
*Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982)  
*Flynn v. Manhattan and Bronx Surface Transit Operating Authority*, 94 A.D.2d 617, 462 N.Y.S.2d 17 (1st Dep't 1983)  
*Shea v. Johnson*, 101 A.D.2d 1018, 476 N.Y.S.2d 706 (4th Dep't 1984)  
*State Farm Mut. Auto. Ins. Co. v. Bermudez*, 111 A.D.2d 858, 490 N.Y.S.2d 595 (2d Dep't 1985)  
*Leonick v. City of New York*, 120 A.D.2d 573, 502 N.Y.S.2d 60 (2d Dep't 1986)  
*People v. Maisonave*, 140 A.D.2d 545, 528 N.Y.S.2d 626 (2d Dep't 1988)

*Taft v. New York City Transit Authority*, 193 A.D.2d 503, 597 N.Y.S.2d 374 (1st Dep't 1993)  
*Lindsay v. Academy Broadway Corp.*, 198 A.D.2d 641, 603 N.Y.S.2d 622 (3d Dep't 1993)  
*People v. Giesa*, 71 Misc. 2d 506, 337 N.Y.S.2d 233 (City Crim. Ct. 1972)  
*People v. Meyers*, 72 Misc. 2d 1003, 340 N.Y.S.2d 505 (City Crim. Ct. 1973)  
*People v. Fields*, 74 Misc. 2d 109, 344 N.Y.S.2d 413 (Dist. Ct. 1973)  
*Petition of Schaeffner*, 96 Misc. 2d 846, 410 N.Y.S.2d 44 (Sur. Ct. 1978)  
*New York County Dist. Attorney's Office v. Rodriguez*, 141 Misc. 2d 1050, 536 N.Y.S.2d 933 (City Civ. Ct. 1988)  
*Jones v. Gelineau*, 154 Misc. 2d 930, 587 N.Y.S.2d 99 (Sup 1992)

#### NORTH CAROLINA

*Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E.2d 507 (1981)  
*Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198 (1988)  
*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993)  
*Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999)

#### PENNSYLVANIA

*Com. v. Russell*, 459 Pa. 1, 326 A.2d 303 (1974)  
*Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061 (1979)  
*Wilkerson v. Allied Van Lines, Inc.*, 360 Pa. Super. 523, 521 A.2d 25 (1987), appeal granted, 517 Pa. 591, 535 A.2d 81 (1987) and appeal granted, 517 Pa. 594, 535 A.2d 84 (1987) and on remand on other grounds to, 1 Pa. D. & C.4th 459, 16 Phila. Co. Rptr. 379, 1987 WL 65063 (C.P. 1987)  
*Ariondo v. Munsey*, 122 Pa. Commw. 475, 553 A.2d 94 (1989), appeal granted, 523 Pa. 650, 567 A.2d 653 (1989) and appeal granted, 523 Pa. 650, 567 A.2d 653 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and order rev'd on other grounds, 533 Pa. 143, 620 A.2d 1103 (1993)

#### RHODE ISLAND

*Mercurio v. Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976) (by implication)

#### TENNESSEE

*Gamble v. State*, 215 Tenn. 26, 383 S.W.2d 48 (1964)  
*Wheeler v. Cain*, 62 Tenn. App. 126, 459 S.W.2d 618 (1970)  
*West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101 (Tenn. Ct. App. 1989)

#### TEXAS

*Porter v. State*, 623 S.W.2d 374 (Tex. Crim. App. 1981)  
*Blakney v. Panhandle & S. F. Ry. Co.*, 381 S.W.2d 143 (Tex. Civ. App. El Paso 1964), writ refused n.r.e., (Oct. 28, 1964)

*Logan v. Grady*, 482 S.W.2d 313 (Tex. Civ. App. Fort Worth 1972) (apparently recognizing rule)  
*U. S. Fire Ins. Co. v. Skatell*, 596 S.W.2d 166 (Tex. Civ. App. Texarkana 1980), writ refused n.r.e., (June 25, 1980)  
*Waldo v. State*, 705 S.W.2d 381 (Tex. App. San Antonio 1986), petition for discretionary review granted, (Apr. 29, 1987) and judgment aff'd on other grounds, 746 S.W.2d 750 (Tex. Crim. App. 1988)

## VIRGINIA

*Hooker v. Com.*, 14 Va. App. 454, 418 S.E.2d 343 (1992)

## WASHINGTON

*State v. Bradley*, 17 Wash. App. 916, 567 P.2d 650 (Div. 2 1977)

According to the court in *Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969), generally speaking, a police report may be admitted as a business entry, the court adding, however, that the fact that such a report is generally admissible does not require that everything contained in the report be admitted into evidence. The court stated that for an item contained in a report to be admissible, it must be based on the entrant's own observation or on information of others whose business it was to convey information to the entrant.

The court in *Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976), held that a police report is a writing that may be admitted into evidence at trial as an exhibit if the proponent can demonstrate that it meets the requirements of the business records exception. However, the court noted, because of the "nature" of police business and the circumstances under which such reports are usually made, the possibility of police reports so qualifying is typically unlikely. Nevertheless, the court stressed, the report could be received into evidence if the proponent is able to demonstrate that the report constitutes its author's past recollection recorded.

In *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972), the court, of the opinion that the purpose of the Uniform Business Records as Evidence Law, as enacted in Missouri (*Mo. Ann. Stat. § 490.690*), was to enlarge the operation of the common-law rule providing for the admission of business records as an exception to the hearsay rule, took the position that a police laboratory report, or any part thereof, would be admissible as an exception to the hearsay rule where there is a preliminary showing of the identity of the record, the mode and time of its preparation, and that it was made in the regular course of police business.

In determining that a certificate of inspection indicating that a Breathalyzer machine was in good operating condition would be admissible as a business record in a prosecution for driving while under the influence of intoxicating liquor, the court in *State v. McGeary*, 129 N.J. Super. 219, 322 A.2d 830, 77 A.L.R.3d 106 (App. Div. 1974), observed that under the New Jersey court rule that makes business records admissible to prove the facts stated therein under certain circumstances, the term "business" includes "every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not," and that it was clear that police reports, with certain qualifications, are admissible thereunder as an exception to the hearsay rule.

See *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970), in which the court, apparently in dictum, stated that it was not improper for the trial court to allow the prosecution to place in evidence, in a speeding prosecution, a speedometer deviation record to prove the reliability of the speedometer used to clock the speed of the defendant's car, the court further stating that although such a record is considered hearsay, it is admissible under the business entry exception to the hearsay rule if the court finds that it was made in the regular course of any business and that it was the regular course of such business to make it.

According to the court in *Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993), highway accident reports may be admissible as a business records exception to the hearsay rule pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6) if they are properly qualified and authenticated. To qualify for admissibility, the court instructed, the following requirements must be met: such reports must be authenticated by their writer, prepared at or near the time of the acts reported, by or from information transmitted by a person with knowledge of the acts, kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity unless the circumstances surrounding the report indicate a lack of trustworthiness.

The court in *Com. v. Russell*, 459 Pa. 1, 326 A.2d 303 (1974), held that it was not error to admit into evidence certain reports prepared by a murdered undercover police officer in a prosecution arising out of that murder, the court adding that the admission of such a report in evidence is within the purpose of the business records exception where there is sufficient evidence that the report has a degree of trustworthiness.

Where a qualifying witness testified that certain records, which were proffered for admission in the defendant's criminal prosecution ( § 33), were prepared in the regular course of police business, at or near the time of the reported incident, and, that although he didn't remember the particular incident with which the reports were concerned, his signature as reviewing officer was on the report, the records were properly qualified as business records (28 P.S. § 91b), the court held in *Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061 (1979).

<>

Police reports are normally admissible under the business records exception to the hearsay rule; statements of witnesses repeated in those reports, however, are not generally admissible, unless another hearsay exception applies. C.G.S.A. § 52-180(a). *DeMarkey v. Fratturo*, 80 Conn. App. 650, 836 A.2d 1257 (2003).

Police report generally is admissible as a "business record" under business records exception to hearsay rule. C.G.S.A. § 52-180. *Housing Authority of the City of Hartford v. Deleon*, 79 Conn. App. 300, 830 A.2d 298 (2003).

[\*4] View that police reports are not admissible

[\*4a] Under state statute

The courts in the following cases held that due to the existence of a statute proscribing the admissibility in evidence of certain types of police reports, a police report would not be admissible in evidence as a business record.

See *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975), in which the court, while holding that the testimony of the investigating officer would be admissible in a civil action arising out of an automobile accident, nevertheless held that the officer's police report filled out at the time of his investigation would not be admissible in evidence as a business record exception to the hearsay rule, in view of an Alaska statute (*Alaska Stat. § 28.35.080(e)*) providing that no accident report can be used in evidence in a criminal or civil action arising out of the accident that is the subject of the report. The court clearly indicated, however, that were it not for the statute, police reports might be admissible under the business records exception to the hearsay rule.

According to the court in *Wallin v. Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980), the lower tribunal erred in admitting into evidence an "investigative report" ( § 22[b]) in a civil action as that type of police report is proscribed from admission by Uniform Rules of Evidence, Rule 803(8), which specifically provides that such reports by the police or other law enforcement personnel are not within the business records exception to the hearsay rule. It was a fact question for the jury to determine whether the insured died as a result of suicide, the court related, and

the burden of proof was on the plaintiffs to prove that death was not a result of suicide. The ruling of the lower tribunal in receiving in evidence the report of an officer over the objections of the beneficiaries of the subject life insurance policy required reversal, the court determined, for the challenged excerpts of the report were clearly hearsay and the report was not admissible pursuant to the prevailing statute.

In *Summers v. Burdick*, 191 Cal. App. 2d 464, 13 Cal. Rptr. 68 (1st Dist. 1961), an action by a pedestrian struck by an automobile, the court held that the trial court had acted correctly in precluding certain police reports, which had been used to refresh the memory of the investigating officer, from being admitted into evidence pursuant to, inter alia, Cal. Veh. Code § 20012. Affirming a judgment for the defendant, the court rejected the argument of the plaintiff that since the investigating officer was examined and cross-examined as to the contents of the report, it should have been admitted into evidence on offer of the plaintiff. The court noted that the plaintiff had cited no authority to support his argument, the reason being that it is well established in California that police reports are not admissible under the Uniform Business Records as Evidence Act, nor under the provisions of the California Vehicle Code.

See *Kramer v. Barnes*, 212 Cal. App. 2d 440, 27 Cal. Rptr. 895 (1st Dist. 1963), a civil action arising out of a chain-reaction automobile collision, in which the court held that the police report of the accident could not be admitted into evidence under the Uniform Business Records as Evidence Act (Cal. Civ. Proc. Code § 1953e), in view of a provision of the California Vehicle Code (Cal. Veh. Code § 20012) that precluded the use of such reports as evidence.

The court in *Smith v. Frisch's Big Boy, Inc.*, 208 So. 2d 310 (Fla. Dist. Ct. App. 2d Dist. 1968), in holding that a police accident report would not be admissible as evidence, commented that even if the hearsay evidence in question was deemed admissible under the Uniform Business Records as Evidence Act, or as a "shop book" as contemplated by the Florida Shop Book Rule, nevertheless there was in existence an independent Florida statute (Fla. Stat. Ann. § 92.36) regarding accident reports, which provided that no such report could be used as evidence in any trial, civil or criminal, arising out of an accident.

Determining that a letter written by a California police officer regarding an automobile accident would not be admissible in an Illinois prosecution for contributing to the delinquency of a minor, the court in *People v. Marselle*, 20 Ill. App. 3d 1012, 314 N.E.2d 21 (3d Dist. 1974), stated that, apart from constitutional issues, the letter would not be admissible in this cause under an Illinois statute (S.H.A. ch. 110A, § 236) that permitted certain business and professional writings or records to be admitted as an exception to the hearsay rule, since such statute specifically provided that the rule should not apply to the introduction into evidence of police accident reports.

The court in *Wilkinson v. Mullen*, 27 Ill. App. 3d 804, 327 N.E.2d 433 (1st Dist. 1975), stated that police reports are generally not admissible in Illinois, and pointed out that it was provided in an Illinois Supreme Court Rule (Ill. Supreme Court Rules, rule 236(b)) that they are specifically excluded from the general rule allowing the admission of business records. The court went on to say, however, that their use has been allowed to refresh the memory of a witness, and where a proper foundation has been laid, certain portions of a police report have been admitted into evidence as past recollection recorded.

While recognizing that in some jurisdictions police reports have been held admissible under a "business records" exception to the hearsay rule, the court in *Webster v. Central Paving Co.*, 51 Mich. App. 62, 214 N.W.2d 707 (1974), expressed the view that this could not be the case in Michigan, which had a statute (Mich. Comp. Laws Ann. § 257.624) strictly barring statutorily mandated reports from admission into evidence.

[\*4b] Police report not "business record"

The courts in the following cases refused to admit as evidence, under a business records exception to the hearsay rule, certain police reports sought to be admitted in their entirety, on the basis that these reports did not constitute a "business record" within the meaning of that exception.

In *Oliver v. State*, 475 So. 2d 655 (Ala. Crim. App. 1985), the facts of which are more fully discussed at § 33, receipts that an investigator gave to the police for money removed from a criminal defendant and his companions did not constitute a business record and, therefore, was not admissible under the business records exception to the hearsay rule.

The court in *Welch v. Medlock*, 79 Ariz. 247, 286 P.2d 756 (1955), held that a "fatality sheet" filled out by an Arizona highway patrol officer who had investigated, but did not observe, a fatal automobile accident was not admissible in evidence under the business records exception to the hearsay rule, the court expressing the opinion that the report did not come within the purview of a "business record" as defined in the recently adopted Uniform Business Records as Evidence Act.

See *Layne v. Hartung*, 87 Ariz. 88, 348 P.2d 291 (1960) (overruled in part on other grounds by, *Odekirk v. Austin*, 90 Ariz. 97, 366 P.2d 80 (1961), in which the defendant sought to have admitted as evidence an accident report prepared by a police officer pertaining to the accident in question, where the court stated that it was apparent from the record that the defendant offered the exhibit in evidence under the Uniform Business Records as Evidence Act, as adopted in Arizona, and further stated that it had been held in *Welch v. Medlock*, 79 Ariz. 247, 286 P.2d 756 (1955), this section, that such an accident report was not a "business record" within the meaning of the Act, and was therefore inadmissible, the court concluding that this rule applied to the exhibit in the instant case.

According to the court in *Polster v. Griff's of America, Inc.*, 34 Colo. App. 161, 525 P.2d 1179 (1974), a slip-and-fall action, the lower tribunal had properly sustained an objection to the admission of the police report of the accident on the grounds that it contained hearsay upon hearsay, because it contained the statements of a third party recorded by a police officer, and because the witness offered by the defendant to identify the report had no personal knowledge of the contents of the report, the court expressing the view that police reports "of this nature" do not fall within the business records exception to the hearsay rule, and furthermore, where such reports do contain hearsay they would be inadmissible in any event.

The court in *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 177 N.W.2d 109 (1970), rejected the view that police reports of an automobile accident should be admitted under Wisconsin's business record statute (*Wis. Stat. Ann. § 889.18*), as an exception to the hearsay rule, in a personal injury action by a pedestrian. The court expressed the opinion that the business entry statute was not intended to serve as a vehicle for the admission of an investigational report by the police, and added that although investigational reports are prepared in the ordinary course of a police officer's duty, they are not an integral part of a larger transaction or business. While admitting that the statute made any writing or record of an occurrence or event admissible as evidence of such occurrence or event, the court felt that the "regular course of any business" did not refer to law enforcement. The court distinguished police reports from such things as hospital reports, where the persons making the entries have personal knowledge in most cases or rely on statements of employees or persons in the business or hospital who have a duty to make the statements relied upon. The court concluded that the basis for allowing the business entry rule as an exception to the hearsay rule does not exist in the case of police reports, but did specifically state that police records of arrests stand on a different footing and may be admissible as a business record.

\*\*\*\* Observation:

The court overruled an earlier decision, *Voigt v. Voigt*, 22 Wis. 2d 573, 126 N.W.2d 543 (1964) (overruled in part on other grounds by, *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 177 N.W.2d 109 (1970)), insofar as that decision left any implication that a police accident report might be considered as a business entry under the relevant Wisconsin statute. The court noted that in that case it had inferred that a police accident report was an official record, but the report in that case was inadmissible because the officer who made it was dead at the time of trial, and thus could not be cross-examined concerning a statement that he took from one of the parties at a hospital to the effect that his car had slid into the path of the other car. In retrospect, the court felt that it would have been better to have based the exclusion in on

the ground that the statement was hearsay because the full application of the official records doctrine admits hearsay, that being the purpose of the exception. The court felt that it had been a bit misleading to state in that case that a police traffic accident report is a public document, and then to limit its admissibility to only those facts of which the report maker has personal knowledge. As to such facts, stated the court, a traffic accident report is admissible without the testimony of the officer making the report, and the death of the officer would not make such part of the report inadmissible.

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Narrative portions of police report are not admissible under business records exception to the hearsay rule. *Armour v. State*, 594 S.E.2d 765 (Ga. Ct. App. 2004).

### [\*III] FACTORS AFFECTING ADMISSIBILITY UNDER BUSINESS RECORDS EXCEPTION

#### [\*A] Generally

#### [\*5] Report made in regular course of police business

The courts in the following cases held that unless a police report is made in the regular course of police business, and unless it is the regular course of police business to keep such a report, the report will not be admissible as a business record exception to the hearsay rule.

### ALABAMA

*Dunaway v. King*, 510 So. 2d 543 (Ala. 1987)

*Reeves v. King*, 534 So. 2d 1107 (Ala. 1988)

*McLaughlin v. City of Homewood*, 548 So. 2d 580 (Ala. Crim. App. 1988)

*Bates v. State*, 574 So. 2d 868 (Ala. Crim. App. 1990)

*Stevens v. Stanford*, 766 So. 2d 849 (Ala. Civ. App. 1999), reh'g denied, (Dec. 17, 1999)

### ARKANSAS

*Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976)

### CALIFORNIA

*Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966)

*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967)

*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982)

*Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999)

### COLORADO

*People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980)  
*Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985)

## CONNECTICUT

*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)  
*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)  
*State v. Milner*, 206 Conn. 512, 539 A.2d 80 (1988), habeas corpus denied, 1998 WL 851441 (Conn. Super. Ct. 1998), judgment aff'd on other grounds, 63 Conn. App. 726, 779 A.2d 156 (2001)  
*State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962)

## DELAWARE

*Johnson v. State*, 253 A.2d 206 (Del. 1969)

## DISTRICT OF COLUMBIA COURT

*Leiken v. Wilson*, 445 A.2d 993 (D.C. 1982)  
*Montgomery v. U.S.*, 517 A.2d 313 (D.C. 1986)

## GEORGIA

*Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), on remand to, 251 Ga. App. 80, 553 S.E.2d 386 (2001)  
*Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by, *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001))

## HAWAII

*State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972)

## ILLINOIS

*People v. Tsombanidis*, 235 Ill. App. 3d 823, 176 Ill. Dec. 426, 601 N.E.2d 1124 (1st Dist. 1992)

## INDIANA

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)  
*Perry v. State*, 541 N.E.2d 913 (Ind. 1989)  
*State v. Edgman*, 447 N.E.2d 1091 (Ind. Ct. App. 4th Dist. 1983)

## LOUISIANA

*State v. Gremillion*, 542 So. 2d 1074 (La. 1989), reh'g denied, (June 2, 1989)  
*Ziamba v. City of New Orleans*, 411 So. 2d 697 (La. Ct. App. 4th Cir. 1982)

#### MARYLAND

*Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983)  
*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)  
*Schear v. Motel Management Corp. of America*, 61 Md. App. 670, 487 A.2d 1240 (1985)

#### MASSACHUSETTS

*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973)

#### MICHIGAN

*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)  
*Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983)

#### MISSISSIPPI

*Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989)  
*Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000)

#### MISSOURI

*Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962)  
*State v. Taylor*, 486 S.W.2d 239 (Mo. 1972)  
*Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967) (recognizing rule)  
*Ellis v. Smith*, 640 S.W.2d 163 (Mo. Ct. App. E.D. 1982)  
*State v. Cuno*, 869 S.W.2d 285 (Mo. Ct. App. E.D. 1994)

#### NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)

#### NEW JERSEY

*State v. Matulewicz*, 101 N.J. 27, 499 A.2d 1363 (1985)  
*Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968)  
*Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (App. Div. 1969), certification denied, 55 N.J. 163, 259 A.2d 915 (1969)  
*State v. McGearry*, 129 N.J. Super. 219, 322 A.2d 830, 77 A.L.R.3d 106 (App. Div. 1974)

*State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979)  
*State v. Weller*, 225 N.J. Super. 274, 542 A.2d 55 (Law Div. 1986)

#### NEW YORK

*People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970)  
*Zaulich v. Thompkins Square Holding Co.*, 10 A.D.2d 492, 200 N.Y.S.2d 550 (1st Dep't 1960)  
*Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 A.D.2d 556, 251 N.Y.S.2d 240 (3d Dep't 1964)  
*Yeargans v. Yeargans*, 24 A.D.2d 280, 265 N.Y.S.2d 562 (1st Dep't 1965)  
*Mahon v. Giordano*, 30 A.D.2d 792, 291 N.Y.S.2d 854 (1st Dep't 1968) (recognizing rule)  
*People v. Jackson*, 40 A.D.2d 1006, 338 N.Y.S.2d 760 (2d Dep't 1972)  
*Schlobohm v. Command Trucking Corp.*, 52 A.D.2d 844, 382 N.Y.S.2d 816 (2d Dep't 1976)  
*Matter of Ronald B.*, 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dep't 1978)  
*Flynn v. Manhattan and Bronx Surface Transit Operating Authority*, 94 A.D.2d 617, 462 N.Y.S.2d 17 (1st Dep't 1983),  
order aff'd on other grounds, 61 N.Y.2d 769, 473 N.Y.S.2d 154, 461 N.E.2d 291 (1984)  
*Bracco v. Mabstoa*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986)  
*People v. Meyers*, 72 Misc. 2d 1003, 340 N.Y.S.2d 505 (City Crim. Ct. 1973)  
*People v. Fields*, 74 Misc. 2d 109, 344 N.Y.S.2d 413 (Dist. Ct. 1973)  
*New York County Dist. Attorney's Office v. Rodriguez*, 141 Misc. 2d 1050, 536 N.Y.S.2d 933 (City Civ. Ct. 1988)

#### NORTH CAROLINA

*Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E.2d 507 (1981)  
*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993)

#### OREGON

*Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980)

#### PENNSYLVANIA

*Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061 (1979)  
*Ariondo v. Munsey*, 122 Pa. Commw. 475, 553 A.2d 94 (1989), appeal granted, 523 Pa. 650, 567 A.2d 653 (1989) and  
appeal granted, 523 Pa. 650, 567 A.2d 653 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal  
granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and appeal granted,  
523 Pa. 651, 567 A.2d 654 (1989) and appeal granted, 523 Pa. 651, 567 A.2d 654 (1989) and order rev'd on other  
grounds, 533 Pa. 143, 620 A.2d 1103 (1993)

#### RHODE ISLAND

*Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975)

#### TENNESSEE

*West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101 (Tenn. Ct. App. 1989)

#### TEXAS

*Porter v. State*, 623 S.W.2d 374 (Tex. Crim. App. 1981)

#### UTAH

*State v. Bertul*, 664 P.2d 1181 (Utah 1983)

*Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990)

#### WASHINGTON

*State v. Bradley*, 17 Wash. App. 916, 567 P.2d 650 (Div. 2 1977)

#### WISCONSIN

*Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978)

In *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967), the court held that certain police reports would be admissible in evidence, the court observing that the reports in question reflected direct observations of the reporting officers and hence were admissible under the Uniform Business Records as Evidence Act, which makes admissible the observations of an informant having the business duty to observe and report, which observations are made in the regular course of business.

According to the court in *Leiken v. Wilson*, 445 A.2d 993 (D.C. 1982), a properly qualified police report is admissible at the time of trial, the court commenting that factual observations in such a report may be admissible under the business records exception to the hearsay rule (D.C. Civil Rule 43-1(a)) if, for example, the report was made and reported in the regular course of business.

See *Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001)), where the court, allowing into evidence certificates of inspection of a breath-testing machine ( § 27[a]), commented that the documents were valid business records, particularly given the testimony of the arresting officer that such certificates were made in the ordinary course of business of the police department, and that it was the ordinary course of business of the department to maintain such records.

The court in *State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972), pointed out that the question of offering into evidence a speed-test card, which vouched for the accuracy of the speedometer of a police vehicle, could readily be resolved by the reasoning that since regular tests are made and the records of those tests are kept by the police department, the cards can be introduced as an ordinary business entry of evidence of such records indicating the routine testing of speedometers.

In *Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989), the court held that a police report prepared by law enforcement officials in the regular course of their activities would be admissible at the time of trial. Here, the court remarked, a police chief testified at length that the report was written by its author in the regular course of his duties. While the report in question was allowed into evidence for identification purposes, it was never admitted into evidence

for the jury to view, the court remarking that it was error for the lower tribunal to not allow this report into evidence, though it was harmless error in view of the additur granted by the court and thus did not require a new trial. In holding the police report admissible, the court stressed, it should not be understood that it was holding all the contents of the report necessarily admissible. That is, the court explained, there may be notations in such a report that are recitations of statements of others, and would be inadmissible even though the officer were present in court testifying, the court concluding that the report was simply a substitute for the officer appearing in person and testifying.

The court in *State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979), in holding that a police investigative report, which contained a statement of a declarant, would not be admissible in the defendant's criminal prosecution pursuant to the business records exception to the hearsay rule, commented that one of the critical circumstances importing reliability under the business records exception doctrine is the fact that the informant whose declaration is so recorded is under a duty, in the context of the activity in which the record is made, to make an honest and truthful report, a fact not present in the instant matter. The court held that the business records exception is predicated not only on the circumstance that the record itself is kept in the usual course of the business but also on the circumstance that the recorded information is obtained by the recorder from a declarant having a "business" duty to communicate it truthfully.

According to the court in *Bracco v. Mabstoa*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986), a police officer's report concerning a motor vehicle accident ( § 13[a]) would be admissible, for it was clearly made in the regular course of business, as a result of which they were admissible as a business record under *N.Y. C.P.L.R. 4518(a)*.

The court in *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E.2d 507 (1981), held that the contents of a police automobile accident report prepared shortly after a motor vehicle accident qualified for admission in evidence in the plaintiff's personal injury action under the business records hearsay exception, particularly given the testimony of a police officer that the report was prepared in the regular course of his business. The court noted at the outset that a police officer testified that he prepared the subject report in the normal course of his employment and that it was standard procedure to do so shortly after investigating an accident. He authenticated the report by identifying the handwriting thereon as his own, the court remarked, such that it appeared that the contents of the report qualified for admission under the hearsay exception for entries made in the regular course of business.

According to the court in *Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980), the statutory phrase "regular course of business," with respect to the business records exception to the hearsay rule, is a term of art, and the words have come to be a shorthand expression or symbol for a doctrine, the essence of which is the reliance on records where the circumstances in which they were made furnish sufficient checks against inducements to misstate to make them trustworthy, give them some "badge of truthfulness." The court, holding that a particular police "custody report" ( § 21) was not admissible in a civil action, pointed out that the mere fact that records are routinely prepared does not satisfy the requirement of the state's business records exception to the hearsay rule (*Or. Rev. Stat. § 41.690*) that the report, to be admissible, be "made in the regular course of business." Instead, the court indicated, it is the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation, that is the test of whether records are prepared in the "regular course of business." The basis of the rule allowing business records into evidence as an exception to the hearsay rule is the probability of trustworthiness of records because they were routine reflections of the day-to-day operations of a business, the court stressed. All the exceptions to the hearsay rule are based on the belief that something about the out-of-court statement insures or tends to insure its truthfulness, and therefore the jury need not evaluate the maker's demeanor for signs of credibility, the court continued, and the business records exception to the hearsay rule is in keeping with this theory of inherent believability. Giant businesses, the court explained, involve many departments that must interact as well as deal with outsiders over long periods of time, and precise communication and accurate records are extremely important if these interactions are to succeed. That is, the court concluded, a company cannot lie to itself on a day-to-day basis and survive because business records serve as the corporation's memory.

In *Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975), the court, after expressing the opinion that a police report does come within the ambit of the Rhode Island Business Record statute (*R.I. Gen. Laws 1956, § 9-19-13*), stated that under that statute, if the trial judge is satisfied that the writing of a record was made in the regular course of business and that it was the regular business to make the entry at the time of the event, then the writing may be admitted into evidence under the exception to the hearsay rule.

According to the court in *Porter v. State*, 623 S.W.2d 374 (*Tex. Crim. App. 1981*), a transcript of police radio transmissions ( § 31) would be admissible pursuant to the business records exception to the hearsay rule (*Tex. Rev. Civ. Stat. Ann. art. 3737e, § 2*) in the defendant's criminal prosecution where, inter alia, a police officer testified that the recording was made in the regular course of business, that it was the regular course of the police department for an employee of the police with personal knowledge of the event to make the recording, and that the recording was made at the same time as the events recorded.

The court in *State v. Bertul*, 664 P.2d 1181 (*Utah 1983*), the facts of which are more fully discussed at § 35, held that witness statements recorded by officers were not made in the regular course of the witness' business and therefore did not have the indicia of reliability associated with routine and regularly recorded entries upon which reliance is placed by the organization, such that they were not admissible under the business records exception to the hearsay rule (*Utah Rules of Evid., Rule 63(13)*). However, the court remarked, such a document may be admissible if the witness' statement to the police officer meets the requirements of some other exception to the hearsay rule.

◇

Defendant's arrest report was admissible under business records exception to hearsay rule; arrest report merely included biographical information and the type of charge to be brought against defendant, arrest records were kept in the regular course of business at police department, and arrest report was made near the time of the arrest event, prepared by an officer with personal knowledge, and was kept in the regular and routine course of business at department. *Rules of Evid., Rule 803(6)*. *Tate v. State*, 835 N.E.2d 499 (*Ind. Ct. App. 2005*).

Truck driver's written statement to police investigator regarding cause of accident was not admissible in personal injury suit as business record, inasmuch as driver was under no business duty to report incident to police. *Carr v. Burnwell Gas of Newark, Inc.*, 803 N.Y.S.2d 834 (*App. Div. 4th Dep't 2005*).

[\*6] Necessity of reporter's personal knowledge

In the following cases, the courts held that a police report will not be admissible under the business records exception to the hearsay rule where it is apparent that the reporting officer did not have firsthand knowledge of the facts that he or she was recording.

#### ALABAMA

*Dunaway v. King*, 510 So. 2d 543 (*Ala. 1987*)

*Reeves v. King*, 534 So. 2d 1107 (*Ala. 1988*)

*McLaughlin v. City of Homewood*, 548 So. 2d 580 (*Ala. Crim. App. 1988*)

#### CALIFORNIA

*Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966)

*Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 288 P.2d 989 (2d Dist. 1955)  
*MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957)  
*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967)

#### COLORADO

*Polster v. Griff's of America, Inc.*, 34 Colo. App. 161, 525 P.2d 1179 (1974)

#### CONNECTICUT

*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)  
*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)  
*Bonner v. Winter*, 175 Conn. 41, 392 A.2d 436 (1978)  
*Baughman v. Collins*, 56 Conn. App. 34, 740 A.2d 491 (1999), certification denied, 252 Conn. 923, 747 A.2d 517 (2000)

#### GEORGIA

*Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), on remand to, 251 Ga. App. 80, 553 S.E.2d 386 (2001)  
*Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by, *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001))

#### INDIANA

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)  
*Perry v. State*, 541 N.E.2d 913 (Ind. 1989)  
*State v. Edgman*, 447 N.E.2d 1091 (Ind. Ct. App. 4th Dist. 1983)

#### KANSAS

*Smith v. Hall's Estate*, 215 Kan. 262, 524 P.2d 684 (1974)

#### LOUISIANA

*Ziamba v. City of New Orleans*, 411 So. 2d 697 (La. Ct. App. 4th Cir. 1982)  
*Dobson v. Louisiana Power and Light Co.*, 550 So. 2d 1334 (La. Ct. App. 1st Cir. 1989), writ granted, 559 So. 2d 129 (La. 1990) and writ granted, 559 So. 2d 129 (La. 1990) and judgment aff'd in part and amended on other grounds, 567 So. 2d 569 (La. 1990), reh'g denied, (Oct. 18, 1990)

#### MARYLAND

*Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983)  
*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)  
*Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971)

## MASSACHUSETTS

*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973)

## MICHIGAN

*Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976)

*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)

*Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983)

## MISSISSIPPI

*Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000)

## MISSOURI

*Nash v. Sauerberger*, 629 S.W.2d 491 (Mo. Ct. App. E.D. 1981)

## NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)

## NEW JERSEY

*Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968)

## NEW YORK

*Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930)

*Needle v. New York Rys. Corp.*, 227 A.D. 276, 237 N.Y.S. 547 (1st Dep't 1929)

*Mahon v. Giordano*, 30 A.D.2d 792, 291 N.Y.S.2d 854 (1st Dep't 1968)

*Matter of Ronald B.*, 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dep't 1978)

*Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982)

*Canty v. New York City Health and Hospitals Corp.*, 158 A.D.2d 271, 550 N.Y.S.2d 673 (1st Dep't 1990)

*Jones v. Gelineau*, 154 Misc. 2d 930, 587 N.Y.S.2d 99 (Sup 1992)

## NORTH CAROLINA

*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993)

## OREGON

*Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980)

## PENNSYLVANIA

*Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952)

*Haas v. Kasnot*, 377 Pa. 440, 105 A.2d 74 (1954)

*Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061 (1979)

## RHODE ISLAND

*Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975)

## TEXAS

*Porter v. State*, 623 S.W.2d 374 (Tex. Crim. App. 1981)

*Logan v. Grady*, 482 S.W.2d 313 (Tex. Civ. App. Fort Worth 1972)

*U. S. Fire Ins. Co. v. Skatell*, 596 S.W.2d 166 (Tex. Civ. App. Texarkana 1980), writ refused n.r.e., (June 25, 1980)

*Waldo v. State*, 705 S.W.2d 381 (Tex. App. San Antonio 1986), petition for discretionary review granted, (Apr. 29, 1987) and judgment aff'd on other grounds, 746 S.W.2d 750 (Tex. Crim. App. 1988)

## UTAH

*Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990)

## WISCONSIN

*Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978)

In finding admissible in evidence a police accident report which contained the investigating officer's own personal observations concerning such factors as the condition of the weather and the road surface, the time of day and the location of the vehicles when the officer arrived at the scene, the court in *Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969), stated that in order for such a report to be admissible, it must be based on the entrant's own observation or the information of others whose business it was to convey information to the entrant.

The court in *Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971), held that items contained in police accident reports that are within the personal observation of the investigating officer are admissible under the business record statute (Md. Code 1957, art. 35, § 59), but that items based on hearsay and conclusions of the officer are inadmissible.

In *Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000), the facts of which are more fully discussed at § 39, the court, without detailed discussion, held that a campus police supervisor would be qualified under the business records exception to the hearsay rule (Miss. Rules of Evid., Rule 803(6)) to testify about the contents of a police offense report since, inter alia, he had personal knowledge regarding the contents of the document.

The court in *Porter v. State*, 623 S.W.2d 374 (Tex. Crim. App. 1981), held that a police report consisting of transcriptions of police radio broadcasts ( § 31) would be admissible at the defendant's criminal prosecution where, inter alia, a police officer testified that it was the ordinary course of business for an employee or officer to have personal knowledge of the transmissions and broadcasts recorded on the tape. The court rejected the defendant's argument that the officer did not have personal knowledge of the acts and events preserved in the transcription, the court commenting that *Tex. Rev. Civ. Stat. Ann. art. 3737e*, § 2 provides, in pertinent part, that the identity and mode of preparation of the memorandum or record in accordance with the provisions of the statute may be proved by the testimony of the entrant, custodian, or other qualified witness even though the witness may not have personal knowledge as to the various items or contents of such memorandum or record. Here, the court stated, the subject officer testified he was the custodian of the sound recording, such that the defendant's contention was without merit, the court concluding that a proper predicate for the admission of the tape recording as a business record was established.

Determining that the mere fact that the written statement of a witness to a traffic accident was made part of the highway department's file on the wreck did not make it admissible as a business record exception to the hearsay rule, the court in *Logan v. Grady*, 482 S.W.2d 313 (Tex. Civ. App. Fort Worth 1972), noted that the Texas Business Record statute (*Tex. Rev. Civ. Stat. Ann. art. 3737e*, § 1(b)) requires that some employee or representative who either made the record or transmitted the information therein contained to another to record must have had personal knowledge of the act or event reflected by such record, in order for such record to be admissible under the business records exception to the hearsay rule.

According to the court in *Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990), a police incident report would not be admissible in the defendant's probation violation hearing pursuant to the business records exception to the hearsay rule (Utah Rules of Evid., Rule 803(6)), where the officer testifying about the events related in the report stated that he had no personal knowledge of the incident upon which his affidavit was based. The officer testified that a file is normally maintained on each person incarcerated at the jail, although he did not know if a file was maintained for the subject defendant, the court remarked, and the officer further testified that he supervised the persons who are the custodians of the prisoner files, yet he was not the custodian of any of the files.

Reasoning that a police report contained details of which a police officer had no personal knowledge, but instead, merely repeated the declaration of another made to the officer over the phone, the business records exception (Wash. Rev. Code Ann. § 908.03(6)) did not allow admission of such report, the court held in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), the facts of which are more fully discussed at § 29.

◇

To qualify as business record under business records exception to hearsay rule, police report must be based entirely upon police officer's own observations or upon information provided by observer with business duty to transmit such information. C.G.S.A. § 52-180. *Housing Authority of the City of Hartford v. Deleon*, 79 Conn. App. 300, 830 A.2d 298 (2003).

[\*7] Timeliness of report

The courts in the following cases held that police reports are not admissible as evidence under the business records exception if they do not satisfy the requirement of timeliness.

ALABAMA

*Reeves v. King*, 534 So. 2d 1107 (Ala. 1988)  
*Bates v. State*, 574 So. 2d 868 (Ala. Crim. App. 1990)

#### ALASKA

*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975) (apparently recognizing rule)

#### CALIFORNIA

*People v. Bazaure*, 235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (3d Dist. 1965)  
*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967)  
*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982)  
*Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999)

#### COLORADO

*Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985)

#### CONNECTICUT

*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)  
*State v. Milner*, 206 Conn. 512, 539 A.2d 80 (1988), habeas corpus denied, 1998 WL 851441 (Conn. Super. Ct. 1998), judgment aff'd on other grounds, 63 Conn. App. 726, 779 A.2d 156 (2001)  
*State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962)

#### DELAWARE

*Johnson v. State*, 253 A.2d 206 (Del. 1969)

#### GEORGIA

*Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), on remand to, 251 Ga. App. 80, 553 S.E.2d 386 (2001)

#### ILLINOIS

*People v. Tsombanidis*, 235 Ill. App. 3d 823, 176 Ill. Dec. 426, 601 N.E.2d 1124 (1st Dist. 1992)

#### INDIANA

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)  
*Riddle v. State*, 273 Ind. 112, 402 N.E.2d 958 (1980), related reference, 491 N.E.2d 527 (Ind. 1986)

*State v. Edgman*, 447 N.E.2d 1091 (Ind. Ct. App. 4th Dist. 1983)

#### LOUISIANA

*Ziamba v. City of New Orleans*, 411 So. 2d 697 (La. Ct. App. 4th Cir. 1982)

#### MAINE

*State v. Therriault*, 485 A.2d 986 (Me. 1984)

#### MARYLAND

*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)

#### MICHIGAN

*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)

*Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983)

#### MISSISSIPPI

*Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989)

#### MISSOURI

*Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962)

*Hamilton v. Missouri Petroleum Products Co.*, 438 S.W.2d 197 (Mo. 1969)

*State v. Taylor*, 486 S.W.2d 239 (Mo. 1972)

*Ellis v. Smith*, 640 S.W.2d 163 (Mo. Ct. App. E.D. 1982)

*State v. Cuno*, 869 S.W.2d 285 (Mo. Ct. App. E.D. 1994)

#### NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)

#### NEW JERSEY

*Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968)

*State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979)

*State v. Weller*, 225 N.J. Super. 274, 542 A.2d 55 (Law Div. 1986)

## NEW YORK

*Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969)  
*People v. Giesa*, 71 Misc. 2d 506, 337 N.Y.S.2d 233 (City Crim. Ct. 1972)  
*People v. Meyers*, 72 Misc. 2d 1003, 340 N.Y.S.2d 505 (City Crim. Ct. 1973)

## NORTH CAROLINA

*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993)

## OREGON

*Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980)

## PENNSYLVANIA

*Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952)  
*Com. v. Russell*, 459 Pa. 1, 326 A.2d 303 (1974)

## PUERTO RICO

*Medina v White Star Bus Line* (1934) 47 Puerto Rico 532

## RHODE ISLAND

*Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975)

## TENNESSEE

*West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101 (Tenn. Ct. App. 1989)

While holding that a police officer's report filled out at the time of his investigation would be inadmissible because of an Alaska statute (*Alaska Stat. § 28.35.080(e)*), the court in *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975), surmised that, absent such a statute, police reports may be admissible under the business records exception to the hearsay rule, since the investigator is usually an expert, at least to the extent of being experienced in investigation, and since the report is generally prepared from investigations made at the time of the incident and thus tends to represent a more competent evaluation of the occurrence than subsequent investigation.

In determining that the lower tribunal did not commit error by refusing to admit into evidence in a prosecution for murder of a prison guard an "incident" report prepared by a police officer, such report sought to be admitted under the Uniform Business Records as Evidence Act (*Cal. Civ. Proc. Code § 1953e*), the court in *People v. Bazaure*, 235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (3d Dist. 1965), noted, inter alia, that it appeared elsewhere in the record of the trial that the police report in question was not written up until approximately 30 days after the stabbing death of the prison guard.

See *Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999), where the court, in denying a defendant's request to admit summary police reports under the business records exception to the hearsay rule ( § 24), held that such evidence is admissible pursuant to *Cal. Evid. Code* § 1280 if the writing was made by and within the scope of duty of a public employee, the writing was made at or near the time of the event, and the sources of information and the method and time of its preparation were such as to indicate its trustworthiness, the court adding that even assuming other criteria were met here, the in-lieu summary reports were not made at or near the time of the event.

Commenting that under a New Jersey statute (*N.J. Stat. Ann. 2A:82-35*), evidence of the identity and the method and time of preparation of a police accident record must satisfy the trial court that its admission is justified, the court in *Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968), an action arising out of a collision between two automobiles in a department store parking lot, held that the trial court had made an implicit finding that the statutory standard had been complied with, the police report in question having been admitted as a business record under the Uniform Business Records as Evidence Act.

[\*B] Content of Report

[\*8] Statements made to reporting officer

In the following cases the courts held that the content of a police report that was not the result of the reporting officer's own observations, but was the product of statements made to the officer by third persons, could not be admitted into evidence under the business records exception to the hearsay rule, unless the third party making the statement was under a business duty to do so.

#### ALABAMA

*Dunaway v. King*, 510 So. 2d 543 (Ala. 1987)

*Reeves v. King*, 534 So. 2d 1107 (Ala. 1988)

*Stevens v. Stanford*, 766 So. 2d 849 (Ala. Civ. App. 1999), reh'g denied, (Dec. 17, 1999)

#### ARKANSAS

*Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976)

*Wallin v. Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980)

*Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985)

#### CALIFORNIA

*Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 288 P.2d 989 (2d Dist. 1955)

*MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957)

*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982)

*Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999)

#### COLORADO

*Polster v. Griff's of America, Inc.*, 34 Colo. App. 161, 525 P.2d 1179 (1974)

## CONNECTICUT

*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)

*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)

*Bonner v. Winter*, 175 Conn. 41, 392 A.2d 436 (1978)

*State v. Sharpe*, 195 Conn. 651, 491 A.2d 345 (1985)

*State v. Milner*, 206 Conn. 512, 539 A.2d 80 (1988), habeas corpus denied, 1998 WL 851441 (Conn. Super. Ct. 1998), judgment aff'd on other grounds, 63 Conn. App. 726, 779 A.2d 156 (2001)

*Swenson v. Sawoska*, 215 Conn. 148, 575 A.2d 206 (1990)

*O'Sullivan v. DelPonte*, 27 Conn. App. 377, 606 A.2d 43 (1992)

*O'Shea v. Mignone*, 35 Conn. App. 828, 647 A.2d 37 (1994), certification denied, 231 Conn. 938, 651 A.2d 263 (1994) and related reference, 1997 WL 331033 (Conn. Super. Ct. 1997), judgment aff'd on other grounds, 50 Conn. App. 577, 719 A.2d 1176 (1998), certification denied, 247 Conn. 941, 723 A.2d 319 (1998)

*Baughman v. Collins*, 56 Conn. App. 34, 740 A.2d 491 (1999), certification denied, 252 Conn. 923, 747 A.2d 517 (2000)

*State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962)

*Zadroga v. Commissioner of Motor Vehicles*, 42 Conn. Supp. 1, 597 A.2d 848, 4 Conn. L. Rptr. 461 (Super. Ct. 1991)

## HAWAII

*Territory of Hawaii v. Makaena*, 39 Haw. 270, 1952 WL 7346 (1952)

## INDIANA

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)

*Olson v. State*, 262 Ind. 329, 315 N.E.2d 697 (1974)

*Canaan v. State*, 541 N.E.2d 894 (Ind. 1989)

## KENTUCKY

*Manning v. Com.*, 23 S.W.3d 610 (Ky. 2000), reh'g denied, (Aug. 24, 2000)

## LOUISIANA

*State v. Gremillion*, 542 So. 2d 1074 (La. 1989), reh'g denied, (June 2, 1989)

*Southern County Mut. Ins. Co. v. Bryant*, 385 So. 2d 1286 (La. Ct. App. 3d Cir. 1980)

*Dobson v. Louisiana Power and Light Co.*, 550 So. 2d 1334 (La. Ct. App. 1st Cir. 1989), writ granted, 559 So. 2d 129 (La. 1990) and writ granted, 559 So. 2d 129 (La. 1990) and judgment aff'd in part and amended on other grounds, 567 So. 2d 569 (La. 1990), reh'g denied, (Oct. 18, 1990)

## MARYLAND

*Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983)  
*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)  
*Ali v. State*, 314 Md. 295, 550 A.2d 925 (1988) (abrogation recognized on other grounds by, *Wiggins v. State*, 352 Md. 580, 724 A.2d 1 (1999))  
*Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971)

#### MASSACHUSETTS

*Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980)  
*Com. v. Meech*, 380 Mass. 490, 403 N.E.2d 1174 (1980)  
*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973)  
*Com. v. Alves*, 6 Mass. App. Ct. 572, 380 N.E.2d 701 (1978)

#### MICHIGAN

*Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976)  
*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)  
*Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983)

#### MINNESOTA

*City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968)

#### MISSISSIPPI

*Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989)  
*Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000)

#### MISSOURI

*Hamilton v. Missouri Petroleum Products Co.*, 438 S.W.2d 197 (Mo. 1969)  
*Penn v. Hartman*, 525 S.W.2d 773 (Mo. Ct. App. 1975)  
*Nelson v. Holley*, 623 S.W.2d 604 (Mo. Ct. App. W.D. 1981).  
*Nash v. Sauerberger*, 629 S.W.2d 491 (Mo. Ct. App. E.D. 1981)  
*State v. Vance*, 633 S.W.2d 442 (Mo. Ct. App. W.D. 1982)  
*State v. Dorsey*, 706 S.W.2d 478 (Mo. Ct. App. E.D. 1986)

#### NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)

#### NEVADA

*Miranda v. State*, 101 Nev. 562, 707 P.2d 1121 (1985)

#### NEW JERSEY

*Rogalsky v. Plymouth Homes, Inc.*, 100 N.J. Super. 501, 242 A.2d 655 (App. Div. 1968), certification denied, 52 N.J. 167, 244 A.2d 298 (1968) and (overruled on other grounds by, *State v. LaBrutto*, 114 N.J. 187, 553 A.2d 335, 81 A.L.R.4th 853 (1989)) (apparently recognizing rule)

*Sas v. Strelecki*, 110 N.J. Super. 14, 264 A.2d 247 (App. Div. 1970)

*State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979)

#### NEW YORK

*Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930)

*Needle v. New York Rys. Corp.*, 227 A.D. 276, 237 N.Y.S. 547 (1st Dep't 1929)

*Yeargans v. Yeargans*, 24 A.D.2d 280, 265 N.Y.S.2d 562 (1st Dep't 1965)

*Sinkevich v. Cenkus*, 24 A.D.2d 903, 264 N.Y.S.2d 979 (2d Dep't 1965)

*Mahon v. Giordano*, 30 A.D.2d 792, 291 N.Y.S.2d 854 (1st Dep't 1968)

*Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969)

*People v. Jackson*, 40 A.D.2d 1006, 338 N.Y.S.2d 760 (2d Dep't 1972)

*Murray v. Donlan*, 77 A.D.2d 337, 433 N.Y.S.2d 184 (2d Dep't 1980)

*Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982)

*Flynn v. Manhattan and Bronx Surface Transit Operating Authority*, 94 A.D.2d 617, 462 N.Y.S.2d 17 (1st Dep't 1983), order aff'd on other grounds, 61 N.Y.2d 769, 473 N.Y.S.2d 154, 461 N.E.2d 291 (1984)

*People v. Vallejos*, 125 A.D.2d 352, 508 N.Y.S.2d 615 (2d Dep't 1986)

*Connors v. Duck's Cesspool Service, Ltd.*, 144 A.D.2d 329, 533 N.Y.S.2d 942 (2d Dep't 1988)

*Sansevere v. United Parcel Service, Inc.*, 181 A.D.2d 521, 581 N.Y.S.2d 315 (1st Dep't 1992)

*People v. Giesa*, 71 Misc. 2d 506, 337 N.Y.S.2d 233 (City Crim. Ct. 1972)

*People v. Meyers*, 72 Misc. 2d 1003, 340 N.Y.S.2d 505 (City Crim. Ct. 1973)

*Jones v. Gelineau*, 154 Misc. 2d 930, 587 N.Y.S.2d 99 (Sup 1992)

#### NORTH CAROLINA

*Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E.2d 507 (1981)

*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993)

*Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999)

#### OREGON

*Snyder v. Portland Traction Co.*, 182 Or. 344, 185 P.2d 563 (1947) (apparently recognizing rule)

*Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980)

#### PENNSYLVANIA

*Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952)

*Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061

(1979)

#### RHODE ISLAND

*Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975)

*Mercurio v. Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976)

#### TENNESSEE

*State v. Allen*, 692 S.W.2d 651 (Tenn. Crim. App. 1985), related reference, 1988 WL 119326 (Tenn. Crim. App. 1988)

#### TEXAS

*Logan v. Grady*, 482 S.W.2d 313 (Tex. Civ. App. Fort Worth 1972)

#### UTAH

*Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990)

#### WASHINGTON

*State v. Bradley*, 17 Wash. App. 916, 567 P.2d 650 (Div. 2 1977)

The court in *People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982), held that a police report would not be admissible in the defendant's grand theft prosecution pursuant to the business records exception to the hearsay rule (*Cal. Evid. Code* § 1271), where it contained inadmissible hearsay in that it was evidence of an out-of-court statement made by the defendant.

In *State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962), the court, in commenting upon the admissibility of police reports under the business records exception to the hearsay rule (*Conn. Gen. Stat. Ann.* § 52-180), said that statements contained in police reports that were made by volunteers or others outside of the police department, who are under no duty to make observations or record them as members of the police organization, are treated as hearsay and do not come under the exception provided by the statute. The court added that this is particularly true of reports containing statements of witnesses as to their own observations, opinions, or speculations.

The court in *Canaan v. State*, 541 N.E.2d 894 (Ind. 1989), without detailed explanation, held that hearsay statements made to the police by a non-testifying defendant were not rendered admissible at the defendant's prosecution for murder, burglary, and attempted criminal deviate conduct under the business records exception by the fact that the officer's notes from the conversation were filed in the record of the cause, the court adding that the police officer's notes did not change their character with regard to admissibility merely because they were filed in the police records.

The statement of a party did not come within the business records exception to the hearsay rule Md. Code Ann., Cts. & Jud. Proc. § 10-101(b), as it was not a memorandum of the accident such as the statute contemplated, but was merely the party's explanation of his part in the event, the court held in *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983). The statement, the court elaborated, is not accorded the reliability necessary to come within the business

records exception because the party had no duty to make a truthful statement, and in fact, as was the case with the accused, the witness had every motive to lie. The police officer taking the statement had no firsthand knowledge as to whether the events happened as the party had indicated, the court related, the officer, instead, merely having a written record of what the witness told him, such that the statement was hearsay not falling within the business records exception.

According to the court in *Com. v. Meech*, 380 Mass. 490, 403 N.E.2d 1174 (1980), a statement given to the police by a person who died prior to trial was not admissible pursuant to the business records exception to the hearsay rule (*Mass. Gen. Laws Ann. ch. 233, § 78*) where the declarant was under no business duty to make the statement. The defendant was convicted of first-degree murder and assault and battery with a dangerous weapon, and the court, on review of the defendant's appeal, affirmed. The court, without detailed discussion, held that the lower tribunal did not err in refusing to admit the police report containing the statement under the business records exception.

Commenting that two levels of hearsay are involved in many police reports, the first level being the extrajudicial statements of the officer as to what he himself saw or otherwise observed, the second being the statements made to the officer by other persons during the course of his investigations, the court in *Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973), expressed the view that the better rule is that the second level of hearsay appearing in a police officer's report is not admissible in evidence under business entry statutes (*Mass. Gen. Laws Ann. ch. 233, § 78; Mass. Gen. Laws Ann. ch. 90, §§ 26, 29*).

According to the court in *Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983), a statement from a bystander contained in a police report regarding the actions of a decedent just before his death would not be admissible pursuant to the business records exception to the hearsay rule Mi. R. Rev. M.R.E. 803(6) in the wrongful death action brought by the decedent's representative. The court reasoned that the primary foundational requirement that the declarant be acting in the regular course of his or her business when making the statement was lacking, such that the statement to the effect that the decedent had jumped in front of the train was not admissible under the business records exception to the hearsay rule.

The court in *State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979), holding that statements contained in a police investigative report would not be admissible ( § 38[b]) pursuant to the business records exception to the hearsay rule (N.J. Rules of Evidence, Rule 63(13)) in the defendant's prosecution for knowing possession of a motor vehicle with an altered serial number, reasoned that if a declarant is not available to testify and if the statement is not admissible under some other exception to hearsay rule, such as excited utterance or dying declaration, then the admissibility cannot be predicated exclusively upon the circumstance that the statement was made to a police officer who paraphrased its content in his or her report.

In *Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975), the court held that that part of a police accident report that contained statements of the principals involved in the accident was properly held inadmissible as evidence, the court commenting that while the police department's personnel are in the business of recording statements, the witnesses were not, and those statements would not come within the reach of the business exception statute (*R.I. Gen. Laws 1956, § 9-19-13*) even though the police report itself would, the problem being essentially one of "double hearsay." The court clarified its statement by pointing out that while the business records exception may serve to justify admitting out-of-court declarations of the entrant, it does not follow that this justifies admitting the statement of someone else merely because the maker of the record relates it. Thus, the court added, in order for the third party's statement to be admissible as part of the police report, that party must have had a business duty of transmitting the information to the reporter.

[\*9] Opinions or conclusions of reporting officer

The courts in the following cases held that opinions or conclusions of the reporting officer contained in a police report,

or the opinions and conclusions of witnesses making statements to the reporting officer, would not be admissible as evidence under the business records exception to the hearsay rule where the reporting officer or the witness making the statements would not be qualified to state such opinions or conclusions if testifying in person.

#### ALASKA

*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975)

#### CONNECTICUT

*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)

#### KANSAS

*Smith v. Hall's Estate*, 215 Kan. 262, 524 P.2d 684 (1974)

#### KENTUCKY

*Fields v. Com.*, 12 S.W.3d 275 (Ky. 2000)

#### MARYLAND

*Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971)

#### MASSACHUSETTS

*Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980)  
*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973)

#### MINNESOTA

*City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968)

#### MISSOURI

*Ryan v. Campbell "66" Exp., Inc.*, 304 S.W.2d 825 (Mo. 1957)  
*Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967)  
*Penn v. Hartman*, 525 S.W.2d 773 (Mo. Ct. App. 1975)

#### NEW JERSEY

*Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968)

*State v. McGeary*, 129 N.J. Super. 219, 322 A.2d 830, 77 A.L.R.3d 106 (App. Div. 1974) (recognizing rule)

## NEW YORK

*Needle v. New York Rys. Corp.*, 227 A.D. 276, 237 N.Y.S. 547 (1st Dep't 1929)

*Sinkevich v. Cenkus*, 24 A.D.2d 903, 264 N.Y.S.2d 979 (2d Dep't 1965)

*Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969)

*Skoller v. Short*, 35 N.Y.S.2d 68 (City Ct. 1942)

## OREGON

*Lewis v. Merrill*, 228 Or. 541, 365 P.2d 1052 (1961)

## UTAH

*State v. Bertul*, 664 P.2d 1181 (Utah 1983)

See *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975), in which the court, although stating that police reports are not admissible as evidence in Alaska because of a statute (*Alaska Stat.* § 28.35.080(e)), appeared to suggest that, at least insofar as accident investigation is concerned, the investigating officer may be an expert, and that his opinions and conclusions with regard to his investigation may be admissible as evidence. The court noted that two safeguards are generally present to protect against an investigator's conclusions being given undue weight by the jury: the discretionary power of the trial court to exclude opinions that would be highly prejudicial, and the fact that such conclusions are open to dispute by contrary evidence.

The court in *Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980), held that expressions of opinion of a police officer contained within a police report would not be admissible in a civil action ( § 22[b]) pursuant to the business records exception to the hearsay rule. A police lieutenant testified that he was assigned to make the usual investigation made when a police officer discharges his weapon; the officer stated in his report that the defendant police officer was "justified in using his firearm." The plaintiff objected to the admission of the report on the ground that it contained the opinion of the officer based upon hearsay statements. The report contained a narrative account of the incident, and, in general, the account agreed with the defendant officer's account, while differing from those of other witnesses. The court stated that it was apparent that most of the narrative was supplied by police officers, and the lieutenant testified that in preparing the report, he spoke with the defendants, read their reports, interviewed the plaintiff and at least one of the other bystander witnesses, and had the assistance of other officers. A record of a primary fact, the court instructed, made by a public officer in the performance of official duty is or may be competent prima facie evidence as to the existence of that fact, but records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as either public records or business records. Reasoning thusly, the court determined that the conclusion of the subject report, comprising the investigating officer's opinion and recommendation, was not admissible.

In noting upon its holding that the lower tribunal had erred in sustaining a general objection to the admissibility of a police accident report under the Uniform Business Records as Evidence Law even though the objection was based, *inter alia*, on the fact that it contained conclusions of the investigating officer, the court in *Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967), emphasized that its holding should not be interpreted as meaning that a police officer's report that

undertakes to diagnose the nature and extent of injuries of a victim of a collision would be admissible if a specific objection has been made thereto.

See *Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982), an action seeking damages for injuries sustained in a fight involving patrons of a tavern in its parking lot, where the court held that error by the lower tribunal in admitting a state liquor authority report as a business record was prejudicial, particularly in view of an award of punitive damages, since inadmissible conclusions and opinions contained in the report were highly inflammatory and since the report could appear to the jury as an official determination that the subject tavern owner acted negligently in failing to control her patrons and to take precautions for patrons' safety.

See *Lewis v. Merrill*, 228 Or. 541, 365 P.2d 1052 (1961), in which the court refused to admit into evidence in an action for assault and battery a police report of an earlier burglary of the plaintiff's premises in which report it had been stated by the officer that the plaintiff "believed" that certain persons were responsible for the act. The court observed that had the officer who made the report been on the witness stand, he would not have been permitted to testify to the plaintiff's belief, for that would have been only the conclusion of the witness.

The court in *State v. Bertul*, 664 P.2d 1181 (Utah 1983), the facts of which are more fully discussed at § 35, held that, as with business records, investigative reports of governmental officials containing opinions not based on firsthand knowledge are not admissible at the time of trial, pursuant to Utah Rules of Evid., Rule 63(15). Police reports of crimes, however, should ordinarily be admitted when offered by the defendant in a criminal case to support his or her defense, the court indicated, but, when offered by the prosecution, they should ordinarily be excluded, except when offered to prove simple, routine matters that are based on firsthand knowledge of the maker of the report and do not involve conclusions, and when the circumstances of their preparation indicate their trustworthiness. In the instant case, though, the court stressed, since the booking sheet in question was offered by the defendant, the trial court erred in excluding the booking sheet even though it contained what might be considered a conclusion regarding the state of the criminal defendant's intoxication.

[\*C] Other Factors

[\*10] Availability of reporter to testify

The courts in the following cases held that the presence of the reporting police officer in court, and his or her availability to testify, did not mean that the officer's report should be admitted as evidence without qualification under the business records exception to the hearsay rule.

See *MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957), where the court commented that even if a police report had been improperly excluded when offered in evidence as a business record, the error could not have been prejudicial where the officers who prepared it were available as witnesses and, in fact, did testify at the trial, and where, in fact, the report in question was used to refresh their recollections.

See *Summers v. Burdick*, 191 Cal. App. 2d 464, 13 Cal. Rptr. 68 (1st Dist. 1961), an automobile accident case in which the court rejected the argument of the plaintiff pedestrian that since the investigating officer was examined and cross-examined as to the contents of his police accident report, it should have been admitted into evidence on offer of the plaintiff. Noting that the plaintiff had cited no authority to support his argument, the court stated that in any event police reports are not generally admissible under the Uniform Business Records as Evidence Act (*Cal. Civ. Proc. Code § 1953e*), nor under the provisions of the California Vehicle Code (*Cal. Veh. Code § 20012*).

Where the police officer making a police report containing certain statements was unavailable to testify at the time of trial, his report would not be admitted as a "business record," the court held in *Ziamba v. City of New Orleans*, 411 So.

2d 697 (*La. Ct. App. 4th Cir. 1982*), the facts of which are more fully discussed at § 26[b].

Even assuming, arguendo, that the police accident report in question did meet the qualifications set forth in the Uniform Business Records as Evidence Law, the court in *Hamilton v. Missouri Petroleum Products Co.*, 438 S.W.2d 197 (*Mo. 1969*), took the position that qualification of the report as a business record would mean that there was not available the objection that the person who prepared the report was not present to be cross-examined, and observed that in the instant case the person preparing the report was available for cross-examination, and that the report was being used to refresh his recollection. The court expressed the view that the "business entry" exception would not mean that the contents of the report were admissible in evidence even though they would not have been admissible if the person who prepared the report was testifying as to those matters placed in the report.

According to the court in *Rogalsky v. Plymouth Homes, Inc.*, 100 N.J. Super. 501, 242 A.2d 655 (*App. Div. 1968*), certification denied, 52 N.J. 167, 244 A.2d 298 (*1968*) and (overruled on other grounds by, *State v. LaBrutto*, 114 N.J. 187, 553 A.2d 335, 81 A.L.R.4th 853 (*1989*)), an objection to the admission into evidence of a police report of an automobile accident should have been sustained, the court commenting that the report contained much of what the investigating officer himself had orally testified to.

The court in *Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (*App. Div. 1969*), certification denied, 55 N.J. 163, 259 A.2d 915 (*1969*), rejected the contention that a police officer's hit-and-run accident report, otherwise inadmissible under the business records exception, was not made admissible in view of the fact that the officer who had prepared it had testified substantially to the information it contained, the court noting that it was only after the officer's oral testimony was excluded that counsel qualified the report and offered it in evidence. However, the court did appear to agree that to permit a police officer to testify as to the facts contained in an accident report made by him and thereafter to allow his report into evidence would be to give the party seeking admission "two bites of the apple." The court felt that the better rule would be to exclude the report when its contents had been fully developed by oral testimony.

See *Snyder v. Portland Traction Co.*, 182 Or. 344, 185 P.2d 563 (*1947*), where the court, holding that no error was committed in sustaining an objection to an offer in evidence of a traffic accident report in a personal injury action, stated that in any event the defendant was not prejudiced by the exclusion of the report, since the investigating officer did testify about what he observed immediately following the accident in question.

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Police report was not admissible in suppression hearing to establish probable cause to stop defendant's vehicle under business records exception to hearsay rule, where author of report was deceased and unavailable to testify. Rules of Evid., Rule 803(6), 42 Pa.C.S.A. *Com. v. Raab*, 2004 PA Super 63, 845 A.2d 874 (*2004*).

[\*11] Report made primarily for use in court

The courts in the following cases held that where it appears that a police report sought to be admitted as a business record was made with the purpose in mind of its use as evidence in court proceedings, it should not be permitted in evidence as a business record.

Reports prepared by police officers who had knowledge of the possibility of wrongful death litigation stemming from an officer-involved shooting incident lacked the required trustworthiness within the meaning of the business records exception to the hearsay rule (Mi. R. Rev. M.R.E. 803(6)), as a result of which exhibits were improperly admitted into evidence in the wrongful death action brought by a widow against the officers who shot and killed her husband, the court held in *Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (*1990*). The lower tribunal improperly concluded that

the sources of information and the circumstances under which the four police reports were prepared did not lack trustworthiness as that term is narrowly defined in the code provision under inquiry, the court noted at the outset. As to the officer's motivation to misrepresent, the court commented that, in this case, the motivation to misrepresent was obvious and indicated a lack of trustworthiness. The statements of two officers, the court continued, were taken during the course of the department's homicide investigation, which they knew could result in a criminal prosecution, and they, along with a police sergeant, would also be subject to the department's internal affairs investigation, which could result in interdepartmental discipline. Finally, it was highly probable that the officers and the city faced civil litigation and potential liability, for although the trial court rejected this potential motivation to misrepresent as too speculative, it did recognize that even an officer who did not fire a single shot at the decedent, possibly was "anything but totally frank with the homicide investigators," the court concluded.

See *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970), in which the court, apparently in dictum, rejected a defendant's contention that a speedometer deviation record made by a police department inspector should not be allowed in evidence because the record had been made with the primary purpose of being used as proof in court. The court stated that while it was true that such records may later be used in litigation, such was not the sole purpose when the report was made, and therefore it should not be excluded merely because this was a possible future use.

\*\*\*\* Caution:

See, however, *People v. Crant*, 42 Misc. 2d 350, 248 N.Y.S.2d 310 (City Ct. 1964), in which the court held that a speedometer test card filled out and signed by a police officer, indicating the results of a calibration test performed on the speedometer against which the defendant's speed had been measured, would not be admissible in evidence as a "shop-book" record, since it was apparent that the record was compiled for primary use as an exhibit in court proceedings. The court felt that the statutory "shop-book" rule was designed to permit incidental testimonial use of records that are made and kept primarily for nontestimonial purposes, rather than the other way around.

The court in *Sikora v. Gibbs*, 132 Ohio App. 3d 770, 726 N.E.2d 540, 111 A.L.R. 5th 685 (10th Dist. Franklin County 1999), the facts of which are more fully discussed at § 16, held that a police memorandum that was prepared primarily for use in a court case would not be admissible as a "business record." The subject report was written by a defendant police officer, whose issuance of a citation to the plaintiff gave rise to a malicious prosecution action. The court, holding that the report was not admissible in support of a summary judgment motion under the business records exception to the hearsay rule (Ohio Evid. R. 803(6)), pointed out the memorandum was clearly prepared in anticipation of trial. That is, the court remarked, the memorandum was prepared by the subject officer exclusively for the Legal Section of the Columbus Police Department approximately three weeks after the plaintiff filed her causes of action against the defendant. Documents prepared in anticipation of litigation substantially undermine the presumed guarantee of circumstantial trustworthiness in qualified business records, the court instructed. The court stressed that it was not making a determination that the subject officer was untrustworthy, but rather was finding that under the pertinent legal analysis, the circumstances of preparation indicated a lack of trustworthiness, as a result of which the memorandum did not meet the requirements of the business-record exception found in Ohio Evid. R. 803(6).

In *Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980), the facts of which are more fully discussed at § 21, the court held that a police custody report was properly excluded from the plaintiff's civil action where the report was, in substantial part, made primarily for use in court. That is, the court elaborated, the report undoubtedly functioned in part as a memorandum of the day-to-day activities of the department, but it was the report's utility as an aid in litigation that was the more significant basis for its preparation. Consequently, the court concluded, the necessary earmarks of reliability and trustworthiness were absent.

The court in *Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990), held that a police report containing an alcohol breath test would not be admissible in the defendant's probation revocation proceeding pursuant to the business records exception to the hearsay rule (Utah Rules of Evid., Rule 803(6)), where it appeared that the document was

prepared, at least in part, for use in court. The court commented that police reports made for the purpose of prosecuting an offense and offered by the prosecution lack sufficient reliability so as to be admissible under the business records exception. Here, the court stressed, the subject police report was made with the intent to submit it to the court for "prosecution" of a probation violation, the court adding that the report was accompanied by a police lieutenant's sworn affidavit, which in form and substance was virtually identical to a criminal complaint.

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Police laboratory report, which identified substance found on defendant as heroin, was not admissible under business records exception to hearsay rule, where report was prepared in anticipation of litigation. MRE 803(6). *People v. McDaniel*, 670 N.W.2d 659 (Mich. 2003).

[\*12] Nature of objection to admission

The courts in the following cases held that any objection to the admissibility of material contained in a police report must be specific in nature, a general objection to the report as a whole being insufficient.

A general objection made to the admission in evidence under the business records exception of a whole police report, and not directed to specific portions thereof that might have been inadmissible, was held properly overruled by the court in *Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969). In holding that it would not order a new trial on the basis of the plaintiff's claim that the court committed error by failing to exclude from the report the officer's conclusions, the court stated that the plaintiff did not make the specific claim of inadmissibility before the trial court, and that therefore the trial court was not alerted to the claim that the plaintiff was raising for the first time on appeal. The court expressed the view that if the plaintiff had made, at trial, the specific objection now being urged before the appeals court, the portion of the report objected to should and probably would have been deleted, or the jury charged concerning the matter.

In *Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962), an action arising out of an automobile accident, the appellate court was faced, inter alia, with considering the effect on the admissibility of a police accident report of the plaintiff's "waiver" of any objection to the authenticity report, although the plaintiff did state that certain portions thereof might or might not be objectionable. The court stated that the plaintiff's subsequent general objection to the police record as the "rankest form of hearsay," after the defendant attempted to introduce part of it in evidence, was not a valid objection, in that although it might be admitted that part of the record containing the statement that was read to the jury from the report was hearsay, yet objections to such records as hearsay are not effective if the records have been properly qualified either by proof or admission under the Uniform Business Records Act, and it is only when specific and legally proper objections are made to parts of the record, on grounds other than hearsay generally, that such parts may be properly excluded.

According to the court in *Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967), an action arising out of injuries sustained by the plaintiff in a vehicular collision, a general objection to the introduction in evidence of a police accident report, where such introduction was made under the Uniform Business Records as Evidence Law, could not be sustained on the basis that the report was hearsay, nor on the basis, as stated by the objection, that there was "no chance for cross-examination of the party who made [the report]." The court noted that the very purpose of the Uniform Law was to create a statutory exception to the hearsay rule, and to permit into evidence those business records without benefit of testimony by the person or persons who made the records. The court did express the opinion, however, that if proper specific objections had been made to certain parts of the report, as containing conclusions of the investigating officer, or as containing self-serving statements by the parties, then there might have been grounds for sustaining such objections.

## [\*IV] ADMISSIBILITY UNDER PARTICULAR CIRCUMSTANCES

## [\*A] In Civil Actions

## [\*13] Automobile accident reports

## [\*13a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police automobile accident report would be admissible as evidence under the business records exception to the hearsay rule.

An automobile accident report that contained the investigating police officer's own personal observations, such as the condition of the weather and the road surface, the time of day, and the location of the vehicles when the officer arrived at the scene, and in which the officer concluded that the driver of the vehicle in which the plaintiff was riding had failed to yield the right of way and that the defendant's vehicle had entered the intersection first, was held by the court properly admitted into evidence in *Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969), where the plaintiff objected generally to the admission of the whole report, and not to specific portions thereof that might have been inadmissible. Noting that, generally speaking, a police report may be admitted as a business entry, the court stated that the fact that a report is generally admissible does not require that everything contained in the report be admitted into evidence, and that for an item contained in a report to be admissible, it must be based on the entrant's own observation or information of others whose business it was to convey information to the entrant. Moreover, the court added, a police officer's conclusion about the cause of or responsibility for an injury is merely an opinion that the officer would not be permitted to give if he were on the witness stand, and there is all the more reason for excluding such an opinion when the officer, as in the instant case, was not under oath and subject to cross-examination. In holding that it would not order a new trial on the basis of the plaintiff's claim that the court committed error by failing to exclude from the report the officer's conclusions concerning the cause of the accident, the court stated that the plaintiff did not make this specific claim of inadmissibility before the trial court, and that therefore the trial court was not alerted to the claim that the plaintiff was raising for the first time on appeal. The court stated that had the plaintiff made, at the trial, the objection that was now being urged before the appeals court, the portion objected to should and probably would have been deleted, or the jury charged concerning the matter. The court commented that the police report was generally admissible if it was made in the regular course of business, if it was the regular course of business to make such a record, and if the record was made when the act, transaction, or event occurred, or within a reasonable time thereafter, and that if any portions of the report were not admissible, it was incumbent upon the objecting party to point out the inadmissible parts with specificity and to give reasons why the specified parts were not admissible. The court added that the trial record did not disclose whether the trial court examined the report or whether the court was requested to do so before making its ruling, but that in any event, it was not the court's duty to separate the inadmissible parts of the report from the admissible parts.

The court in *Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989), an action for personal injuries arising from a collision between an automobile and a city garbage truck, held that the lower tribunal erred by refusing to admit into evidence a police report prepared at the time of the accident in accordance with rules established by the city police department. A motorist injured in a collision with a city-owned garbage truck brought action against the city and its driver for alleged negligence, the lower tribunal entered judgment on verdict for the motorist, the city appealed, the state supreme court remanded, and, on retrial, the jury awarded the plaintiff \$ 40,000 in damages and found him to be 30% contributorily negligent, the trial judge granted additur to \$ 350,000 for the plaintiff but reduced the award by 30% to \$ 245,000, and the state supreme court, on review of the appeal by the motorist and city, held, inter alia, that the police reports prepared during the investigation of the accident were admissible under the business records exception to the hearsay rule. The court commented that according to Miss. Rules of Evid., Rule 803(6), which governs the admissibility of police reports, the source of the material at issue must be an informant with knowledge who is acting in

the course of the regularly conducted activity. Here, the court explained, the subject police report was prepared at the time of the accident in accordance with the rules established by the police department of the city, the court commenting that, as a general principle, reports prepared by law enforcement officials in the regular course of their activities should be admissible into evidence.

In *Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (App. Div. 1969), certification denied, 55 N.J. 163, 259 A.2d 915 (1969), an action under the New Jersey Unsatisfied Claim and Judgment Fund Act by a pedestrian who was struck by a hit-and-run driver, the court expressed the view that a routine report of an automobile accident prepared by the investigating policeman in pursuance of his duty and duly filed in the regular course of business, where relevant and not otherwise inadmissible, may be received as evidence as a business record under the New Jersey rules of evidence. The police report in question contained the statement of the victim, obtained shortly after the occurrence, that the signal light at the intersection had changed while she was in the middle of the intersection and when she went to run to the next corner she was struck by the truck. The court took the position that in view of the nature of the case and the claim being made by the plaintiff, the police report would have been relevant evidence on her behalf, since she was the only eyewitness who testified, and since she was vigorously cross-examined in an effort to affect her credibility and raise an inference that the accident did not occur as she had testified. The court further explained that in the absence of corroborating testimony the jury could very well have been dubious as to her veracity, and the fact that the occurrence was officially reported by the police as having involved an unknown driver and owner tended to substantially support this phase of her testimony. The court rejected the defendant's urging that the report was rendered inadmissible because it contained the victim's hearsay account of the happening of the accident, the court commenting that it was at a loss to understand how this prejudiced the defendant, in view of a somewhat different version to which the victim testified at the trial. In any event, continued the court, it could not be determined from the record whether the victim's statement as recorded in the report qualified as a spontaneous declaration made at the scene immediately upon the arrival of the officer, or whether it was no more than a later, self-serving narration of past events. Reversing a judgment for the defendant, the court commented that, undoubtedly, these issues would be determined at the new trial when and if an objection was made to the offer of the report in evidence. The court also rejected the defendant's contention that the report was not admissible in view of the fact that the officer who had prepared it had testified substantially to the information it contained, the court noting that it was only after the officer's oral testimony was excluded that counsel qualified the report and offered it in evidence. However, the court did appear to be in agreement with the defendant that to permit a police officer to testify as to the facts contained in an accident report made by him and thereafter to allow his report into evidence would be to give a plaintiff "two bites of the apple." The court felt that the better rule would be to exclude the latter when its contents have been fully developed by oral testimony. The court noted that the report in the instant case was admissible not only as establishing that the driver of the truck had left the scene of the accident before the arrival of the officer, but also as pointing to the possibility that a witness whose name and address were contained therein had seen the occurrence.

See *Schlobohm v. Command Trucking Corp.*, 52 A.D.2d 844, 382 N.Y.S.2d 816 (2d Dep't 1976), a brief memorandum decision affirming an interlocutory judgment by a lower appellate court in a negligence action for personal injury damages, the court said that the trial court could have admitted a police memorandum into evidence upon the issue of the existence of a stop sign, as it was a report made in the regular course of business, though this theory was not urged as a ground of admission.

See the following additional cases in which the courts held, under the particular circumstances presented, that all or part of a police automobile accident report would be admissible as evidence under the business records exception to the hearsay rule, where --

-- in an automobile negligence case, the lower tribunal entered judgment for the defendants, and the court, on review of the plaintiff's appeal, ordered a new trial, the court commenting that a police report of an accident generally is admissible as a business entry if it was made in the regular course of business, if it was the regular course of business to make such a report, and if the report was made when the accident occurred or within a reasonable time thereafter, the

court stressing that these requirements were satisfied in the instant case; that the trooper had no independent recollection of the accident or the parties, so long as there was sufficient evidence for the court to find that the report met the statutory criteria of *Conn. Gen. Stat. Ann. § 52-180*, the court pointed out. *Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978).

-- in a case in which a wife brought an action against her husband to recover damages for personal injuries suffered as a result of a collision between an automobile being operated by him, in which the wife was a passenger, and a motor vehicle operated by a co-defendant, the lower tribunal entered judgment on a jury's verdict for the plaintiff against her husband, and both the husband and wife appealed, and the court, on review, held that the lower tribunal erred in refusing to allow into evidence a portion of a police report referring to the co-defendant's description of how the accident occurred; the court pointed out that *Conn. Gen. Stat. Ann. § 52-180* provides for the admission into evidence of a business record if it is found that the entry was made in the regular course of any business, and that it was the regular course of such business to make such writing or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter, the court adding that in the instant case, a member of the New Haven police department testified that police reports are made in the normal course of business of the department and that it is the duty of the investigating officer to submit a report of any accident investigated, and the evidence established that the report of the accident was made approximately two hours after the accident by the investigating officer, who, it was stipulated, did not actually witness the accident, evidence that established that the requirements of the code provision under inquiry were satisfied. *Bonner v. Winter*, 175 Conn. 41, 392 A.2d 436 (1978).

-- in a case in which the driver of a vehicle brought a negligence action against the driver of the second vehicle for injuries sustained in a motor vehicle accident, the lower tribunal entered judgment for the driver of the second vehicle, and the court, on review of the appeal of the driver of the first vehicle, affirmed, the court commenting that any error in admitting into evidence an alleged hearsay statement in the police officer's accident report was harmless; as a general rule, a police accident report is admissible as a business record under *Conn. Gen. Stat. Ann. § 52-180*, the court pointed out, though the rule does not automatically allow everything in a police report into evidence, the court adding that the plaintiff correctly asserted that the officer declined to testify that he distinctly remembered which operator was the source of the statement at issue, and, even if it were to be assumed that the statement was hearsay, it could not be concluded that its admission required reversal, for there was sufficient other evidence to support the jury's verdict, including the location of the damage on the plaintiff's car. *Swenson v. Sawoska*, 215 Conn. 148, 575 A.2d 206 (1990).

-- in a case in which the owner of a parked automobile, which had been struck by a vehicle driven by the offending motorist and owned by his fiancé, appealed from a judgment entered by the small claims branch of the superior court in favor of the driver and owner of the offending vehicle in a damages action, and the court, on review, held that factual observations in a police report may be admissible under the business records exception to the hearsay rule (D.C. Civil Rule 43-1(a)) if made and reported in the regular course of business, the court adding that statements of third parties recorded in police reports may be admissible if they fall within another exception to the hearsay rule, such as the exception for admissions; in the instant case, however, the court continued, there was no reversible error committed by the lower tribunal in excluding the police report, for, with the lower tribunal's help, the owner of the parked motor vehicle was able to elicit on the examination of the driver of the motor vehicle that collided with the parked vehicle's owner the substance of that individual's statement to the police, as well as the fact that the driver was charged with having faulty brakes. *Leiken v. Wilson*, 445 A.2d 993 (D.C. 1982).

-- the court stated that it would consider that the police report was a record of an act or event that was made in the regular course of business by the police department at or near the time of the act or event, and that the source of information, and method and time of preparation, were such to justify its admission in evidence, thus eliminating any hearsay objection to the police report but not making admissible any evidence that would be incompetent if offered in person; the court stated that the plaintiff's objection that the police record was the "rankest form of hearsay" was not a valid objection, in that although it might be admitted that the part of the record containing the statement that was read to the jury was hearsay, yet objections to such records as hearsay are not effective if the records have been properly

qualified either by proof or admission under the Uniform Business Records Act, and it is only when specific and legally proper objections are made to parts of the record, on grounds other than hearsay generally, that such parts may be properly excluded. *Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962).

-- in an action for injuries sustained in a collision between a motor scooter and an automobile, the court held that the lower tribunal had erred in sustaining a general objection to the admissibility of a police accident report under the Uniform Business Records as Evidence Law even though the objection was based, inter alia, on the fact that it contained conclusions of the investigating officer, the court observing that the objecting counsel did not contend that the records were not within the contemplation of the Uniform Law, nor was there objection to admission of the record on the grounds that it was irrelevant, or that the custodian did not testify to its identity and mode of preparation, or that it was not made in the regular course of business; the court emphasized that by holding in the instant case that the police report was improperly excluded, insofar as it might have contained conclusions of the officer, such holding was not intended to mean that a police officer's report that undertakes to diagnose the nature and extent of injuries of a victim of a collision is admissible if a specific objection is made thereto, the court adding that there was no specific objection made in the instant case. *Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967).

-- the court held that a diagram that indicated the positions of automobiles that had just been involved in an accident, and that indicated the location and length of skidmarks, such diagram being included in the police report of the accident, was properly admitted as evidence under the Uniform Business Records as Evidence Act (*N.J. Stat. Ann.* 2A:82-35), the court rejecting the claim that the diagram contained in the report was based on the opinion of the officer; as to the position of the cars shown on the diagram, the court felt that it was obvious that they were not placed there by the officer and would not be likely to be understood by the jury to purport to show the exact position of the cars either before or after the collision, but merely to indicate the direction in which they had been proceeding, the court adding that neither of the parties had denied that they were driving in the directions so indicated. *Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968).

-- the court held that although an automobile accident report filled out by a deputy sheriff who did not testify at the trial contained the deputy's summary of what the defendant told him at the time of the accident, the police record was properly received in evidence as a business record, the proof satisfying each of the specific conditions imposed upon its admissibility by a statute (*N.Y. C.P.L.R.* 4518(a)) rendering competent a memorandum or record of any occurrence or event if made in the regular course of any business, provided it was the regular course of such business to make it; the court commented that it had been claimed by the defendant that the admission of the report was objectionable on hearsay grounds, but noted that the statement would have been admissible, in any event, as admissions of a party. *Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 A.D.2d 556, 251 N.Y.S.2d 240 (3d Dep't 1964).

-- in a proceeding to stay arbitration of an uninsured motorist claim, the insurer appealed from the lower tribunal's judgment denying its application and directing the parties to proceed to arbitration at the earliest date, and the court, on review, reversed and remanded, the court commenting that the police report, in which the officer had recorded the number assigned to the insurer in the blank for insurance code information, was sufficient to raise a triable issue of fact as to whether the company insured the owner of the offending vehicle; police reports are admissible pursuant to the business records exception to the hearsay rule, and while, ordinarily, any statements by the driver made to the officer and incorporated in the accident report fall within no recognized exception to the hearsay rule and would not be admissible as regards the insurer, under New York law, insurance identification cards are required to be produced upon the request of a police officer, the court adding that since the driver of the offending vehicle was under legal compulsion to produce the insurance identification card and since the card itself was admissible as an exception to the hearsay rule, proof of the card's presentation would render the insurance code entry admissible and would shift the burden on the insurer to come forward with some proof that it either did not insure the presenter or that it had followed the requisite procedure for cancellation. *Eagle Ins. Co. v. Olephant*, 81 A.D.2d 886, 439 N.Y.S.2d 159 (2d Dep't 1981).

-- the court, in an action involving a collision between a bus and bicycle, the statement of a bus driver, who was a

participant in the accident, and his explanation of the incident as reported to a police officer was admissible as a record made in the regular course of business, the court commenting that the bus driver acknowledged that he halted the bus precisely because of a passenger's statement, and, as the driver was a participant in the accident, his explanation of the incident as reported to the police officer was admissible as a business record. *Flynn v. Manhattan and Bronx Surface Transit Operating Authority*, 94 A.D.2d 617, 462 N.Y.S.2d 17 (1st Dep't 1983), order aff'd on other grounds, 61 N.Y.2d 769, 473 N.Y.S.2d 154, 461 N.E.2d 291 (1984).

-- in a case in which a plaintiff was seriously injured in a head-on collision with a stolen car, the court held that the defendant's admission, recorded in a police report, that his motor vehicle was parked in front of his house, unlocked, with his keys in the ignition when it was stolen would be admissible as a police business record to establish negligence, such that the lower tribunal's entry of summary judgment in favor of the defendant was improper; the lower tribunal erroneously concluded that the admission contained in the police report was insufficient to raise the existence of a triable issue of fact concerning where the vehicle was located, for issue finding, and not issue determination, is the function of summary judgment, the court indicated, adding that the defendant's admission, recorded in police business records, was available for the plaintiff's use as evidence-in-chief in establishing negligence, and the relative weight to be accorded the admission in light of his subsequent explanation was properly determined by a jury. *Shea v. Johnson*, 101 A.D.2d 1018, 476 N.Y.S.2d 706 (4th Dep't 1984).

-- in a case in which a bus passenger brought an action against a municipally owned bus company for injuries that resulted from falling on a bus step, the lower tribunal entered judgment on a jury verdict in favor of the bus company, and the court, on review of the passenger's appeal, reversed and remanded, the court holding that statements in the reports of a police officer and bus company dispatcher and the statement contained in a police officer's memo book were within the business records exception to the hearsay rule (*N.Y. C.P.L.R. 4518(a)*); some of the pages of the officer's memo book were marked for identification and read to the jury, and, in addition, the accident report prepared by the officer was admitted into evidence, along with the report of the defendant's dispatcher, reports that were clearly made in the regular course of business and were admissible as a business record. *Bracco v. Mabstoa*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986).

-- in a case in which a plaintiff brought an action for personal injuries sustained as a result of a motor vehicle accident, the plaintiff moved for a declaration that the license plate number as reported by a witness to the accident and contained in the police report would be admissible at trial, and the court, on review, held that the police report containing a statement of an eyewitness to the accident could not be admitted into evidence for its truth under the business records exception, the court commenting, however, that a police report is clearly a business record, as the police officer preparing such report is under a business duty to investigate the subject of the report and memorialize the details thereof; here, the court elaborated, the witness was not under a business duty to impart the information, but the entrant, a police officer, was under a business duty to obtain and record the statement, such that the court, pursuant to *N.Y. C.P.L.R. 4518(a)*, has the discretion to admit the police report to establish that the witness's statement as to the license plate number of the fleeing vehicle was made, the court adding that although another hearsay exception would be required for the police report to be admitted for its truth, here, the citizen's identification of the license plate number as memorialized in the police report qualified as a past recollection recorded, and the license plate number was properly admissible, though the citizen was unwilling or unable to testify at the time of trial, where the citizen observed the accident, the police officer recorded the citizen's statement regarding the license plate within minutes of the accident, and the citizen testified in deposition that the police report was accurate and that he intended the information report to be accurate. *Jones v. Gelineau*, 154 Misc. 2d 930, 587 N.Y.S.2d 99 (Sup 1992).

-- in a pedestrian's action seeking recovery for injuries sustained when struck by an automobile, the court held that a police report of the accident would be admissible in evidence except for that part of the report in which the officer expressed his conclusion that the "operator failed to give pedestrian right of way"; the court felt that insofar as the New York Civil Practice Act (N.Y. Civil Practice Act, § 374-a) permits admissibility of records made in the regular course of business, the law was never intended to expand the ancient shop-book rule, from which it was derived, to such an extent

as to allow in evidence the conclusion or opinion of a police officer, simply because it was included in a report, no matter upon what information it was based, the court thus concluding that the police report, including the officer's report as to what third persons at the scene of the accident had told him, would be admissible in evidence, but that the officer's conclusion as to fault would be deleted. *Skoller v. Short*, 35 N.Y.S.2d 68 (City Ct. 1942).

-- in a case in which a plaintiff, whose car was struck by the defendant's car in an intersection, brought a negligence claim for injuries she sustained in a collision, the lower tribunal entered judgment on a jury verdict finding that, though the defendant was negligent, the plaintiff was contributorily negligent and was not, therefore, entitled to recover any damages, the plaintiff appealed, and the court, on review, affirmed; the court, in so ruling, referenced the testimony of a police officer that he prepared the motor vehicle accident report in the normal course of his employment and that it was standard procedure to do so shortly after investigating an accident. *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

-- in a case in which personal and property damages arising out of a highway collision were sought, the court held that a highway patrol officer's accident reports were admissible as "business records" where, inter alia, the officer stated that he had observed the scene of the accident, had spoken with both drivers, and later prepared his first report as part of the standard protocol of officers, the court adding that pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6), highway accident reports may be admissible, as a business records exception to the hearsay rule, and, to be admissible, such reports must be authenticated by their writer, prepared at or near the time of the act reported, by or from information transmitted by a person with knowledge of the acts, kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity unless the circumstances surrounding the report indicate a lack of trustworthiness; here, the court indicated, the reports were fully authenticated and a proper foundation laid by the trooper's testimony, the substance of which complied with the business records exception. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198 (1988).

-- in a case in which one driver brought a negligence suit against the estate of a second driver for injuries arising out of an automobile accident, the lower tribunal entered judgment on a jury verdict stating that the first driver was not injured by the negligence of the second driver, and the court, on review of the appeal of the first driver, ordered a new trial, the court holding that the police report of the automobile accident containing statements made at the scene of the accident by the second driver was sufficiently trustworthy to be admissible under the exception to the hearsay rule for business records of a regularly conducted activity (N.C. Gen. Stat. § 8C-1, Rule 803(6)); here, the court related, an officer testified that on the date of the accident, he completed a form based on information received from the two drivers and his own investigation of the accident, he prepared the report during the course and scope of his employment as a police officer and further as a regularly conducted business activity, he reviewed the accident report with the parties at the accident and neither objected to his conclusions, and, subsequent to the accident, the officer filed the report with his immediate supervisor, who in turn filed the report with the records division of the police department, the court adding that the officer's testimony provided proper authentication and tended to show that the report was sufficiently trustworthy and was therefore admissible under the business records exception to the hearsay rule. *Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993).

-- in a case in which a rear-ended motorist sued the rear-ending motorist to recover for personal injuries sustained in a four-car chain collision, the lower tribunal entered judgment on a jury verdict for the rear-ended motorist, and the court, on review of the rear-ending motorist's appeal, held a state trooper's accident report admissible under the business records exception to the hearsay rule (N.C. Gen. Stat. § 8C-1, Rule 803(6)); even though the report referred to an unidentified motorist who fled the scene, and whom the trooper thus never interviewed, the trooper prepared the report from statements given by drivers at the scene, each of whom possessed firsthand knowledge of the collision and involvement therein of the unidentified motorist, and no driver, including the defendant driver, objected to the narrative contained in the report. *Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

-- in a case in which it was proven at trial that police officers are under an obligation by reason of their employment to

enter in the police blotter the happenings or accidents within their knowledge, and where it was shown that a police blotter did contain a written entry made by a since-deceased policeman regarding a particular automobile accident, and where that entry was dated the same day that the accident to which this suit referred had happened, the court held that said writings were properly admitted into evidence by the trial court; in so holding, the court recognized that it has long been a settled rule of law that a memorandum in writing, made by a person since deceased, which writing was made when the fact it records took place, and was made in the ordinary course of the writer's business, and corroborated by other circumstances, is admissible in evidence. *Medina v White Star Bus Line* (1934) 47 Puerto Rico 532.

-- in a wrongful death action resulting from an automobile-train collision, the court held that the lower tribunal did not commit error by admitting into evidence, on the defendant's motion, a police officer's report of the incident, the report being offered in evidence after the plaintiffs had introduced in evidence a copy of a sketch of the scene prepared by the same officer, which showed the location of a brakeman with a light, and various objects on the ground, and the approximate speed and approximate length of skidmarks of the approaching automobile before it struck the train; in overruling the plaintiffs' points of appeal regarding the admission of this evidence, the court pointed out that it had been qualified in strict accordance with the provisions of the Texas business entry statute (*Tex. Rev. Civ. Stat. Ann. art. 3737e*), the court adding that the plaintiffs were given ample opportunity to object, that they did so, and that the trial court passed on these objections as they arose, no error appearing. *Blakney v. Panhandle & S. F. Ry. Co.*, 381 S.W.2d 143 (*Tex. Civ. App. El Paso 1964*), writ refused n.r.e., (Oct. 28, 1964).

[\*13b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police automobile accident report would not be admissible as evidence under the business records exception to the hearsay rule.

An automobile accident report of an investigating officer did not come under the business records exception to the hearsay rule, and was thus not admissible at the time of trial, the court held in *Plenkers v. Chappelle*, 420 So. 2d 41 (*Ala. 1982*). An action was instituted to recover for injuries sustained by the plaintiff when his automobile was struck by the defendant's vehicle while the plaintiff was attempting to secure the hood of his motor vehicle. The lower tribunal entered judgment on verdict for the defendant, and, after the denial of a motion for new trial, the plaintiff appealed; the court, on review, affirmed. At the time of the accident, the plaintiff's automobile was stopped in the wrong lane of a road and the plaintiff was attempting to refasten his hood that had blown off; in his effort to secure the hood, the plaintiff, apparently standing in front of the only working headlight on his vehicle, was injured by the defendant, who claimed that he noticed the plaintiff's peril too late to avoid hitting the plaintiff's car. The plaintiff argued, on appeal, that the lower tribunal's order permitting the cross-examination of a state trooper concerning matters contained in his accident investigation report constituted reversible error. The court held that the automobile accident report of an investigating officer is not admissible into evidence because it does not come under the business records exception to the hearsay rule. The record in the instant case disclosed that the plaintiff's attorney asked the witness several questions regarding a diagram drawn by him and included in his accident report, the same diagram being admitted into evidence at the trial as a plaintiff exhibit. Since the plaintiff initially introduced this portion of the trooper's report, defense counsel was entitled and justified, by virtue of the doctrine of curative admissibility, to cross-examine the trooper about matters relevant to the diagram portion of his accident report. The rule of curative admissibility is applicable even though the defendant failed to object to the plaintiff's initial questioning of the trooper and the introduction of the accident diagram, the court reasoned as it affirmed the judgment of the lower tribunal.

A police accident report would not be admissible as a business record in a personal injury action brought by a bicyclist against a driver arising out of a motor vehicle-bicycle accident, the court held in *Stevens v. Stanford*, 766 So. 2d 849 (*Ala. Civ. App. 1999*), reh'g denied, (Dec. 17, 1999). A minor bicyclist, acting through his mother and next friend, sued a motor vehicle driver, alleging that the driver negligently operated the car that struck the bicyclist; the lower tribunal entered summary judgment for the driver, and the court, on review of the bicyclist's appeal, affirmed. In so ruling, the

court commented that the accident report was inadmissible because neither of the investigating officers was a witness to the accident and their report recounted the statements and conclusions of others. Accident reports are inadmissible only if they violate the hearsay rule, and while such a report may be admitted pursuant to a valid exception, here, the report of the automobile accident did not fall within any exception to the hearsay rule, and was therefore inadmissible.

According to the court in *Baughman v. Collins*, 56 Conn. App. 34, 740 A.2d 491 (1999), certification denied, 252 Conn. 923, 747 A.2d 517 (2000), a motor vehicle accident report containing unredacted hearsay statements made by three individual bystanders would not be admissible as a business record (Conn. Gen. Stat. Ann. § 52-180) in a motorist's personal injury action against a police officer and city arising from an accident with the police vehicle. The court commented that an out-of-court statement that is offered to establish the truth of the matters contained therein is hearsay, and that the business records exception to the hearsay rule provides that not every statement contained in a document qualifying as a business record is necessarily admissible. The court added that to be admissible under the code provision, the contents of a business record must be based on the entrant's own observations or on information transmitted to the entrant by an observer whose business duty it was to transmit it to the entrant. A police report generally is admissible as a business record under the statute, the court instructed, but, to qualify for admission, the report must be based entirely upon the police officer's own observations or upon information provided by an observer with a business duty to transmit such information, such that a report prepared by an officer in charge of an accident investigation is admissible in its entirety, despite the fact that it contains information received from other officers assisting in the investigation, though such a report is not admissible if it contains information furnished by a mere bystander. The court concluded that because the subject police report contained unredacted hearsay statements made by three bystanders, it was not admissible as a business record.

According to the court in *State v. Edgman*, 447 N.E.2d 1091 (Ind. Ct. App. 4th Dist. 1983), the lower tribunal properly refused, in a personal injury action, to make a police report of an automobile accident a full exhibit pursuant to the business records exception to the hearsay rule where the officer who initially prepared the report had died, and where the officer who attempted to introduce the report did not witness the accident and thus had no firsthand knowledge concerning the accident. A plaintiff who was seriously injured in a two-car collision, and whose wife was killed, brought suit against the state for negligent design, construction, and maintenance of a roadway; the lower tribunal entered judgment in favor of the plaintiff, and the court, on review of the state's appeal, affirmed. In so ruling, the court held that the lower tribunal correctly refused to admit a police accident report prepared by an officer who died prior to trial, a report that the state offered during direct examination of an officer who conducted a follow-up investigation at the hospital but was not present at the accident scene. The state requested the entire report be admitted as evidence or, in the alternative, that the officer be permitted to read notations by the author regarding the speed limit at the accident site and other facts, the court pointed out, the state arguing that the report came within the business record exception to the hearsay rule. The court commented that, pursuant to the business records exception to the hearsay rule, documentary evidence is admissible if identified by its entrant or one under whose supervision it is kept and shown to be an original or first permanent entry, made in the routine course of business, at or near the time of the recorded transaction, by one having both a duty to so record and personal knowledge of the transaction represented by the entry. Here, the court related, it was clear that while the author of the report was under a business duty to make such report, he did not personally view the accident, and that any persons who might have had personal knowledge thereof were not reporting within the regular course of business, such that the report was not admissible in its entirety because significant information contained therein was not based on the personal observation of the preparer of the report. That is, the court stressed, the report was not within the business records exception to the hearsay rule. Moreover, the court indicated, the lower tribunal did not err in excluding evidence in the report relating details as to the location of the accident, for this information, unlike notations in the report such as lane markings, was not based on his personal observation, the court adding that the officer's narrative description of the accident represented either statements given to him by witnesses and bystanders or conclusions and opinions he formed from his observation of the position of automobiles on the roadway.

The court in *Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973), reversing a judgment for the plaintiff in an

automobile accident case, held that the trial court's admission into evidence of the police accident report constituted error where such report contained a listing of several distinct violations of the motor vehicle code, accompanied by boxes permitting or requiring the officer to check the violations he might attribute to particular operators, and where such violations so listed called for conclusions by the officer, and where the report also contained a verbal description of the accident in which the officer had included statements to the effect that the plaintiff and witnesses had stated that the defendant had put his headlights on after the collision. Noting that two levels of hearsay were involved in this report, the first level being the extra-judicial statements of the officer as to what he himself saw or otherwise observed, the second being the statements made to the officer by other persons during the course of his investigation, the court felt that better-reasoned cases from other jurisdictions hold that the second level of hearsay appearing in a police officer's report is not admissible in evidence under entry statutes (*Mass. Gen. Laws Ann. ch. 233, § 78*; *Mass. Gen. Laws Ann. ch. 90, §§ 26, 2*

*Mass. Gen. Laws Ann. ch. 90, § 29*). With regard to the admissibility of the plaintiff's signed carbon copy of the accident report that the plaintiff herself had filed with the police department pursuant to statutory requirement, the court felt that much of what had been said as to the police report itself would apply with equal force to the plaintiff's report. More immediately, however, stated the court, for any document to be admissible as a business entry, the court must first find, among other things, that the entry was made in the regular course of business and that it was the regular course of such business to make such memorandum or record at the time the act or occurrence occurred, or within a reasonable time thereafter. The court was of the opinion that in no sense could it be found or said that the plaintiff had prepared her accident report in the regular course of any business in which she was engaged, or that it was her regular course to prepare such reports, the fact that the police department maintained such reports on file in the regular course of its business being immaterial.

According to the court in *Webster v. Central Paving Co., 51 Mich. App. 62, 214 N.W.2d 707 (1974)*, an action for damages arising out of an automobile accident, the police accident report, which had been prepared by an officer at the time of the accident who died prior to trial, would not be admitted into evidence under the so-called "business records" exception to the hearsay rule. It appeared from the facts that the accident report in question contained a statement allegedly made by the plaintiff to the deceased officer in which she said that "the last she remembers was that she was passing a blue car." The defendants sought to introduce this statement in the report to impeach plaintiff's testimony at trial where she explicitly recalled all facts up to the time of the accident. Even assuming that the defendants could have shown that the statement made by the plaintiff constituted a party admission or a *res gestae* statement, the court felt that the report would still not be admissible since it was prepared by a now-unavailable witness, and the defendant therefore must show a hearsay exception for the report itself to be admitted into evidence. Although recognizing that in some jurisdictions police records have been held admissible under the "business records" exception to the hearsay rule, the court felt that such could not be the case in Michigan, which has a statute (*Mich. Comp. Laws Ann. § 257.624*) strictly barring statutorily mandated reports from admission into evidence.

The court in *Hamilton v. Missouri Petroleum Products Co., 438 S.W.2d 197 (Mo. 1969)*, an action arising out of injuries sustained in an automobile-truck collision, held that the investigating officer, while on the witness stand, could not read from his police accident report regarding statements made by the defendant immediately following the accident, because, *inter alia*, the police report would not constitute a business record admissible in evidence under the Uniform Business Records as Evidence Law, as enacted in Missouri. Assuming that the police report did meet the qualifications set forth in the statute, to wit, that it was a record of an act, condition, or event made in the regular course of business, at or near the time of the act, condition, or event, the court felt that qualification of the report as a business record would mean that there was not available the objection that the person who prepared the report was not present to be cross-examined. Observing that in the instant case the person preparing the report was available for cross-examination, and that the report was being used to refresh his recollection, the court expressed the view that the "business entry" exception to the hearsay rule would not mean that the contents of the report were admissible in evidence even though they would not have been admissible if the person who prepared the report was testifying as to those matters placed in the report. The court expressed the view that whether the testifying officer placed the defendant's statement in his report

was of no consequence except as a basis of refreshing his recollection. For the purposes of proving the truth of the facts stated, said the court, the officer could not, over the objection of the plaintiff, testify as to what the defendant told him following the accident, and in this regard it was immaterial whether the officer was testifying solely from his recollection or after he had refreshed his recollection by referring to what he had written in the report.

In *Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969), an action for personal injuries arising out of an automobile collision involving a state-owned vehicle, the court, adopting as a workable guide regarding the admission of police officer reports in accident cases the fact that such a report may be admitted as proof of the facts recorded therein if the entrant of those facts was the witness or the person giving the entrant the information was under a business duty to relate the facts to the entrant, stated that if neither of these two requisites is satisfied, but the report recites a statement of an outsider, the record may nevertheless be admitted to prove that the statement recorded therein was made by the outsider, even though the main facts set forth in the business record would be hearsay. The court stated that the facts recited in the statement by the outsider may be proved by the business record if the outsider's statement qualifies as a hearsay exception. In the instant case, the collision not having been witnessed by the officer who filed the accident report, and there being no proof that whoever gave him the facts had a business duty to do so, the report was not admissible to prove the main facts, said the court, and since no other hearsay exception applied to the information from outsiders to the trooper, the trial court's admission of the report was error. The court also stated that since the police report contained the conclusion of the officer as to the factors contributing to the impact and it being impressionable for the officer to testify to his conclusions, his written conclusions should have been excluded if the report had otherwise been acceptable. In this regard, the court explained that the business entry statute lifts the barrier of the hearsay objection, but it does not overcome any other exclusionary rule that might properly be invoked.

The court in *Quint v. Pawtuxet Val. Bus Lines*, 114 R.I. 473, 335 A.2d 328 (1975), held that the trial justice did not err when he refused to make a police accident report a full exhibit under the Rhode Island business record legislation. The defendant's statement, which was taken at the scene, was read in full during plaintiff counsel's direct examination of one of the investigating officers, but the plaintiff's statement, which tended to indicate that defendant's schoolbus shot into the street in front of her, was not admitted because of its hearsay aspects and also because the report contained conclusions of the officer. The court noted that under the Rhode Island business record statute, if the trial judge is satisfied that the writing of a record was made in the regular course of business and that it was the regular business to make the entry at the time of the event, the writing may be admitted into evidence under the exceptions to the hearsay rule, the entrant's or maker's lack of personal knowledge as to events listed in the document going to the weight rather than the admissibility of the record. Of the opinion that a police report can come within the ambit of the statute (*R.I. Gen. Laws 1956, § 9-19-13*), the court stated that while the police department's personnel were in the business of recording statements, the plaintiff was not, and her statement would not come within the reach of the statute even though the report itself did, the problem being essentially one of "double hearsay." The court explained that while the business records exception may serve to justify admitting out-of-court declarations of the entrant, it does not follow that this justifies admitting the statement of someone else because the maker of the record relates it. Thus, the court continued, the majority of courts who have considered the admissibility of the contents of a police report pursuant to a business records statute require that the record be based upon the maker's own observation or upon information transmitted to him by an observer who has the business duty of transmitting such information, and that this record be of such a nature that the person making the report, if called as a witness, could properly testify as to the material it contains. The court concluded under the circumstances of the case that the trial judge could not be faulted in culling the police report, since the business records exception was never intended to make an entire record admissible where oral testimony as to its disputed portions would be inadmissible.

In *Vladyka v. Page*, 135 Vt. 252, 373 A.2d 539 (1977), the court held that admission into evidence of a police officer's report of an automobile accident report in a civil action resulting from the accident was prejudicial error. The administratrix of an estate of an automobile driver brought a civil action as a result of an automobile accident; the lower tribunal denied relief, and the court, on review of the appeal of the administratrix, reversed and remanded. At trial, the court pointed out, a police officer was called to testify during the course of the defendant's case, and, upon direct

examination, his report was offered into evidence as a business record kept in the ordinary course of business, pursuant to *Vt. Stat. Ann. 12 § 1700*, and, on this basis, the trial court admitted the document over the timely objection of counsel for the plaintiff. The court observed that *Vt. Stat. Ann. 12 § 1700*, entitled the "Uniform Business Records as Evidence Act," provides for the admissibility of certain records made in the regular course of business. The court commented that the police accident report did not fall within the ambit of the code provision under inquiry. That is, the court indicated, the business-entry statute was intended to serve as a vehicle for the admission of an investigational report by the police, the court adding that although investigational reports are prepared in the ordinary course of a police officer's duty, they are not an integral part of a larger transaction or business. While the statute makes any writing or record of occurrence or event admissible as evidence of such occurrence or event, the "regular course of business" does not refer to law enforcement. The court pointed out that even in those jurisdictions that allow the admission of police accident reports into evidence as "business records," an exception has been grafted making such records inadmissible where the report contains objectionable hearsay, conclusions, or unsupported opinions. The police report admitted into evidence in the present case was replete with such conclusions and opinion, for included was an indication by the officer that the vehicle driven by the plaintiff "failed to yield the right of way."

See the following additional cases, in which the courts held, under the particular circumstances presented, that all or part of a police automobile accident report would not be admissible as evidence under the business records exception to the hearsay rule, where --

-- in a case in which suit was brought seeking recovery for personal injuries allegedly sustained in an automobile collision, the lower tribunal entered judgment for the defendant, and the court, on review of the plaintiffs' appeal, reversed and remanded, the court commenting that an accident report written by an investigating police officer relating to the collision was not admissible within the "business records" exception to the exclusionary rule, the court explaining that, to be admissible, that portion of the report sought to be introduced must come within the ambit of some other exception to the hearsay rule, and here, the report would be admissible as a "past recollection recorded" exception to the exclusionary rule, where the officer testified that he was not present when the collision occurred and that he did not remember anything of the interview with the defendant, but he did recognize his signature and handwriting on the report, and that he made the recording at the time of his investigation, and at that time he must have known the recording's veracity. *Dennis v. Scarborough*, 360 So. 2d 278 (Ala. 1978).

-- the court held that a "fatality sheet" filled out by an Arizona highway patrolman who had investigated, but did not observe, the fatal automobile accident upon which the action was based, would not be admissible as a "business record" under the provisions of the Uniform Business Records as Evidence Act, as adopted in Arizona (A.C.A. Supp. 1952, § 23-314(a), (b)), where, over the plaintiff's objection, the entire report, which contained statements damaging to the plaintiff's case, was admitted in evidence and read to the jury; reversing a judgment for the defendant, the court held that while the document could be admitted solely for the purpose of impeaching the witness who authored it, there was no basis for admitting the entire document, the court apparently taking the position, however, that the Uniform Business Records as Evidence Act was primarily intended to liberalize and broaden the "shop-book rule" and to enlarge the operation of the business records exception to the hearsay evidence rule. *Welch v. Medlock*, 79 Ariz. 247, 286 P.2d 756 (1955).

-- in an action arising out of an automobile collision, the defendant sought to have admitted as evidence an accident report prepared by a police officer pertaining to the accident in question, but objection was made to the entire report on the grounds that it constituted hearsay evidence, after which the defendant sought to offer the exhibit for the limited purpose of disclosing the alleged legal speed at the place where the accident occurred, which fact had been inserted in the report by the police officer making the investigation, the court concluded that the lower tribunal's admittance of the report constituted prejudicial error, and remanded the case for a new trial, the court stating that it was apparent from the record that the defendant offered the exhibit in evidence under the Uniform Business Records Act, as adopted in Arizona (Ariz. Rev. Stat. § 12-2262); observing that uncontradicted evidence at trial showed that at the time of the accident the defendant was traveling in an area of a municipality in which the legal speed limit was 30 miles per hour,

and noting that in the police report in question the legal speed limit was stated at 35 miles per hour, the court concluded that the statement as to the speed limit contained in the accident report was purely hearsay, and an incorrect conclusion of the officer who prepared the report. *Layne v. Hartung*, 87 Ariz. 88, 348 P.2d 291 (1960) (overruled in part on other grounds by, *Odekirk v. Austin*, 90 Ariz. 97, 366 P.2d 80 (1961)).

-- in a wrongful death action arising out of an automobile accident allegedly caused by malfunctioning traffic-control devices, the plaintiff sought to have admitted as evidence of the fact that the municipality had been made aware of the condition prior to the accident a police report of the accident that contained the statement that the police radio center had received notification of the condition from a certain officer prior to the accident, and that such information had been relayed to the maintenance unit, the court held that the admission of that evidence was error, and affirmed an order granting a new trial, the court reasoning that the source of the information contained in the police report did not appear, and that it could not have been within the personal knowledge of the investigating officer, and that it was therefore hearsay, and not admissible as a business record; the court implied that the report under consideration contained numerous opinions and statements of purported facts that would not have been admissible as oral testimony, there being no business duty on the part of persons who made statements to the reporting officer, and that the extract from the report that was received at bar was therefore essentially hearsay, not admissible under the suggested exceptions to the hearsay rule, or under the *Uniform Act*. *Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 288 P.2d 989 (2d Dist. 1955).

-- in a civil action arising out of a chain-reaction automobile collision involving several cars, in which the defendant, the driver of the second car in the chain, sought to have admitted into evidence the investigating officer's affidavit that purported to give evidentiary value to a police report, the court held that the police report itself would not be admissible in evidence under the Uniform Business Records as Evidence Act (*Cal. Civ. Proc. Code § 1953e*), and that in any event the admissibility of police reports is precluded by the terms of the California Vehicle Code (*Cal. Veh. Code § 20012*), the court adding that the proscription cannot be obviated by the simple expedient of an affidavit by the person who prepared the report that everything contained in it is true and correct, and that if he is called as a witness he can testify competently to the facts in said police report; the court noted that the apparent purpose of the affidavit was to show that the plaintiff, the driver of the lead vehicle, made an admission that the defendant's vehicle had come to a complete stop, and that it was only when the defendant's vehicle was hit from behind that it was pushed into the back of the plaintiff's car, the court commenting that such an admission, although not conclusive of the facts stated therein, would constitute affirmative and substantive evidence of such facts, but added that it was incumbent upon the affiant to couch such evidentiary facts in testimonial language indicating that what he was testifying to were matters within his own knowledge and not such as were contained in a police report. *Kramer v. Barnes*, 212 Cal. App. 2d 440, 27 Cal. Rptr. 895 (1st Dist. 1963).

-- in a case in which an action was brought for injuries sustained in a hit-and-run accident, the lower tribunal entered judgment on a jury verdict for the defendants, and the court, on review of the plaintiff's appeal, held that while there was an error committed by the lower tribunal in admitting the statements contained in a police report under the business records exception to the hearsay rule, the error was harmless; it was clear, the court indicated, that statements in the police report by a witness to the motor vehicle accident did not satisfy the requirements of the business records exception, because in order for that to be the case there must be a finding that the person who made the statement had a duty to report it, the court adding that there was no evidence in the instant case tending to show that the unidentified witness belonged to a particular class of persons, much less a class having a duty to report observations of an accident, such that the lower tribunal improperly allowed the statement into evidence under the business record exception to the hearsay rule, though the error in the admission was harmless. *O'Shea v. Mignone*, 35 Conn. App. 828, 647 A.2d 37 (1994), certification denied, 231 Conn. 938, 651 A.2d 263 (1994) and related reference, 1997 WL 331033 (*Conn. Super. Ct.* 1997), judgment aff'd on other grounds, 50 Conn. App. 577, 719 A.2d 1176 (1998), certification denied, 247 Conn. 941, 723 A.2d 319 (1998).

-- a police report containing only isolated notes as to an experimental accident test run would not, the court held, come within the category of either a business record, under the Florida version of the Uniform Business Records as Evidence

Act, or of a "shop book" as contemplated by the Florida Shop Book Rule statute (Fla. Stat. Ann. § 92.37), the court adding that the two police officers who handled the accident in question apparently conducted an independent test of the plaintiff's claim that he was traveling at or under the allowable speed limit, by measuring the skid marks of a car traveling at the speed at which the plaintiff indicated that he was going at the time of the accident; in rejecting the defendant's contention that the evidence was admissible as a business record, the court stated that, even assuming that the police report was admissible under the Florida statute, there was an independent Florida statute, Fla. Stat. Ann. § 92.37, regarding accident reports, which provided that no such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, the court thus concluding that it was reversible error to admit, over objection, the testimony in question as to the speed of the test car. *Smith v. Frisch's Big Boy, Inc.*, 208 So. 2d 310 (Fla. Dist. Ct. App. 2d Dist. 1968).

-- a police record of a call for an ambulance following an automobile collision in which the plaintiff was allegedly injured was held by the court inadmissible as a business record exception to the hearsay rule, the court commenting that the plaintiff had conceded that the police report was hearsay evidence, and expressing the view, without further discussion of the matter, that the plaintiff's specific reference to the business records exception was clearly misplaced; the court felt that even if the report were admissible, nonetheless the failure of the lower tribunal to admit it would not constitute reversible error, in view of the above-stated purpose of the evidence, since the plaintiff successfully introduced considerable testimony regarding the extent of her injuries, the police report simply being cumulative. *Douglas v. Chicago Transit Authority*, 3 Ill. App. 3d 318, 279 N.E.2d 44 (1st Dist. 1972).

-- in an action for personal injuries sustained by a motorcyclist in a collision with an automobile, it was held by the court that the investigating officer should not have been permitted to testify at trial that he had marked on his police report that the plaintiff's speed was too fast, and that the defendant had failed to yield the right of way, since the "business entry" exception to the hearsay rule does not permit the admission of documents that are not "records of acts, conditions or events" that are sought to be proved; in the instant case, the court stated, what was sought were the officer's recorded conclusions, not his recorded observations as to physical conditions, the court further stating that it had been specifically held by Kansas courts that police reports were not admissible to show conclusions of an investigating officer. *Smith v. Hall's Estate*, 215 Kan. 262, 524 P.2d 684 (1974).

-- in a personal injury action arising out of a rear-end automobile collision, the court held that items contained in police accident reports that are within the personal observation of the investigating officer are admissible under the business record statute (Md. Code 1957, art. 35, § 59), but that items based on hearsay and conclusions of the investigating officer are inadmissible; although reversing a judgment for the plaintiff on other grounds, the court noted that in the instant case the plaintiff's counsel on direct examination of the officer confined himself to matters in the accident report that the officer personally observed, there being, therefore, no basis for admitting the entire police report on cross-examination, the court commenting that the admission as evidence of that part of the police accident report based upon the personal observation of the investigating officer would be proper, this including such things as the damage to the automobiles involved, which was observed by the officer. *Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971).

-- in a case in which a passenger on a bus brought a personal injury suit for damages allegedly resulting from a bus accident, the intermediate appellate tribunal held that the facts presented did not support a finding of negligence, and the state supreme court, on review, affirmed, the court holding that there was no attempt by the plaintiff's counsel to show that the document was made by the witness from personal observation or was prepared contemporaneously with the event and based on his personal knowledge rather than, for example, statements of bystanders or witnesses. *Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976).

-- that portion of a police accident report that contained a diagram purporting to show the scene and the positions of objects and persons at the scene of the accident was held by the court to have been erroneously admitted as evidence, where it was not made clear as to whether the diagram depicted the scene of the accident as the investigating officer found it, or whether the diagram was made with the assistance of witnesses to the accident; while stating that a police

report, properly qualified, can be admitted into evidence under the business record exception to the hearsay rule, the court took the view that it was not the intention of the Uniform Business Records Act to make admissible any evidence that would be incompetent if offered in person. *Penn v. Hartman*, 525 S.W.2d 773 (Mo. Ct. App. 1975).

-- in an action for wrongful death arising from an automobile collision in which the plaintiffs' daughter was killed when the vehicle in which she was riding was struck from behind, the lower tribunal entered judgment on a jury verdict for the defendant and the court, on review of the plaintiffs' appeal, affirmed, the court holding that a written signed statement of the driver contained in the highway patrol officer's official report was not rendered admissible simply because it was contained in a business record; the court, in so ruling, rejected the plaintiffs' argument that the witness' written signed statement contained in the report of the accident was admissible under the Uniform Business Records as Evidence Law (Mo. Ann. Stat. § 490.660), and that the witness' written signed statement was on a separate sheet of paper attached to the officer's official report and made a part of the report, the court pointing out that the officer's report of the accident met the requirements for admission as a business record, but that did not make all the contents of such report admissible, for the witness statement contained therein, inadmissible as hearsay, did not become admissible because contained in a business record. *Nelson v. Holley*, 623 S.W.2d 604 (Mo. Ct. App. W.D. 1981).

-- the court held in a case brought by a minor pedestrian against the driver of an automobile to recover for personal injuries sustained in a pedestrian-motor vehicle accident, that as it was not demonstrated that purported prior inconsistent statements of the plaintiffs' witnesses were made by them to the person who wrote the police report, or reported to that person by others who had a duty to do so, it was prejudicial error to admit the police report containing those statements into evidence, since the statute (Mo. Ann. Stat. § 490.660) permitting police reports to be admitted into evidence as business records merely eliminated a hearsay objection to the report itself. *Nash v. Sauerberger*, 629 S.W.2d 491 (Mo. Ct. App. E.D. 1981).

-- in a case in which the lower tribunal entered judgment in an action for injuries sustained in an automobile accident, the court, on review, held that a copy of an accident report prepared by officers would not be allowed on the basis of the business record rule, the court commenting that the officer who apparently investigated the accident and reported it on a state uniform accident report form did not testify and that the original accident report was not produced; it was error for any evidence to come in through the plaintiff's exhibit, for nothing in the exhibit itself was admissible under the Uniform Business Records as Evidence Law because, being an errant photocopy of an antecedent record, the exhibit was not made in the regular course of police department "business" nor was it a contemporary of what it purported to record, the court pointed out as it cited *Mo. Ann. Stat. § 490.680. Ellis v. Smith*, 640 S.W.2d 163 (Mo. Ct. App. E.D. 1982).

-- in a case in which a motorist brought a personal injury action against another motorist involved in a motor vehicle accident, the lower tribunal entered judgment in favor of the plaintiff, the defendant appealed, and the court, on review, affirmed, the court rejecting the defendant's argument that the lower tribunal erred in not admitting the Missouri Highway Patrol Report of the accident, the court commenting that it is generally recognized that the business records exception does not make admissible anything contained in the record or report that would not be admissible if testified to by the maker of the record or report, as a result of which the content of a police report that was not the result of the reporting officer's own observations, but was the product of statements made to the officer by third persons, could not be admitted into evidence under the business records exception to the hearsay rule, unless the third party making the statement was under a business duty to do so; pointing out that this rule is applicable in Missouri, the court further rejected the defendant's argument that because the plaintiff introduced the "collision diagram" portion of the report, the lower tribunal should have admitted the report in toto, the court remarking that upon the plaintiff's objection, the lower tribunal properly rejected the defendant's offer that included inadmissible hearsay. *Edgell v. Leighty*, 825 S.W.2d 325 (Mo. Ct. App. S.D. 1992), reh'g and/or transfer denied, (Feb. 27, 1992).

-- in an action arising out of an automobile accident, in which each of the parties claimed that the other had crossed the center line of the highway and was therefore responsible for the accident, the court held that the plaintiff's objection to

the admission into evidence of a police report of the automobile accident should have been sustained, the court commenting that the report contained much of what the investigating officer had orally testified to, including matters that were inadmissible, the defendant's statement to the officer, and a diagram depicting the officer's opinion as to the point of impact; after holding that the report was not admissible as "past recollection recorded," since the officer had sufficient recollection to testify and did testify fully as to everything in the report, the court further stated that in view of what the report contained and the fact that the officer had testified as to what was set forth therein, there would be no substance in the defendant's argument that the report was admissible as a business record. *Rogalsky v. Plymouth Homes, Inc.*, 100 N.J. Super. 501, 242 A.2d 655 (App. Div. 1968), certification denied, 52 N.J. 167, 244 A.2d 298 (1968) and (overruled on other grounds by, *State v. LaBrutto*, 114 N.J. 187, 553 A.2d 335, 81 A.L.R.4th 853 (1989).

-- assuming arguendo that since an investigating officer had practically read his entire accident report into evidence at the trial, his testimony should be evaluated for admissibility as though it were the report that had itself been directly received in evidence, the court held that the accident report would be inadmissible under the business record exception to the hearsay rule, because the witnesses were not under any "business duty" to render a truthful account of the accident to the investigating officer; the court noted that the Supreme Court of New Jersey had been firm in following the general requirement of the business entry exception to the hearsay evidence rule, that where the business entry consists of information supplied the entrant by another, the informant must be shown to have been under a "business duty" to supply honest information to the entrant, that being the heart of the rationale of the exception. *Sas v. Strelecki*, 110 N.J. Super. 14, 264 A.2d 247 (App. Div. 1970).

-- in an action for damages for the wrongful death of a motorcyclist who collided with the defendants' truck, the court held that the investigating officer's police report would not be admissible as evidence since it was not made in the regular course of any business, profession, occupation, or calling, the court adding, in holding the police report inadmissible under the statute (N.Y. Civil Practice Act, § 374-a), that the police officer who made it was not present at the time of the accident, that the memorandum was made from hearsay statements of third persons who happened to be present at the scene of the accident when he arrived, and that it did not appear whether or not these witnesses actually saw the accident and stated to him what they knew, or stated what some other persons had told them; the court felt that the purpose of the legislature in enacting that statute was to permit a writing or record made in the regular course of business to be received in evidence, without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were also under a duty to impart such information. *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930).

-- in an action for personal injuries sustained by a pedestrian wherein the pedestrian claimed that as she was crossing the track in front of a stopped streetcar, the streetcar operator started the car with his head turned away, the defendant claiming that the plaintiff had crossed the tracks in front of the already-moving car and then suddenly jumped back in order to avoid being hit by another vehicle, the court held that it was reversible error to admit in evidence a police blotter containing a report of the investigating police officer who did not see the accident but based his conclusion, "responsibility pedestrian," upon statements made to him by others, including the streetcar operator; the court felt that since the statements to the police officer were not made by any persons in the regular course of any business, to admit the report would be contrary to the intent of the business records provision of the New York Civil Practice Act, the court noting that the statute (N.Y. Civil Practice Act, § 374-a) provided that the trial court must determine whether any particular entry was made in the regular course of any business, the court adding that in the instant case in order to show that this record was inadmissible, it was only necessary to point out that the statements made to the policeman were not made by any persons in the regular course of any business. *Needle v. New York Rys. Corp.*, 227 A.D. 276, 237 N.Y.S. 547 (1st Dep't 1929).

-- in a personal injury action arising out of an automobile accident, the court held that a so-called police blotter, apparently containing information regarding the accident, would not be admitted into evidence where no proper foundation had been laid for its admission, and that for the same reason the police blotter would not be deemed admissible under that section of the New York Civil Practice Act (N.Y. Civil Practice Act, § 374-a) that provided for

the admission of records made in the regular course of business. *Amsden v. Washington Bridge Exp. Lines*, 248 A.D. 645, 287 N.Y.S. 855 (3d Dep't 1936).

-- the court held that it was prejudicial error under the circumstances of the case for the trial court to receive in evidence the accident report filed by the investigating officer regarding an automobile accident that occurred in Vermont, the court commenting that the police officer, a member of a Vermont police force, was never called to testify at the trial, and there was no indication in the report itself save by possible inference as to his source or sources for the information recorded; while recognizing that reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence, the court emphasized that police reports have consistently been held inadmissible to establish the main fact where the information contained in the police blotter came from witnesses not engaged in the police business in the course of which the memorandum was made, or where the person giving the information had every reason to give a biased and false report. *Yeargans v. Yeargans*, 24 A.D.2d 280, 265 N.Y.S.2d 562 (1st Dep't 1965).

-- statements contained in a police accident report to the effect that the plaintiffs in the resulting civil action had failed to stop on a signal and that the defendant driver was not guilty of any contributing violation, constituted conclusions of the investigating officer as to the cause of the accident, which conclusions were prejudicial and which were not admissible as entries made in the regular course of business, the court held; the court noted that the police officer who prepared the report did not actually witness the accident, nor did he recall the accident at the time of trial, the court further noting that there was also a notation on the report as to how the violation was determined, that it was "based on statements of parties and witnesses," but that the report did not state that there were any eyewitnesses to the accident nor that the plaintiff had admitted to the investigating officer that he had failed to stop on a signal or light. *Sinkevich v. Cenkus*, 24 A.D.2d 903, 264 N.Y.S.2d 979 (2d Dep't 1965).

-- in an action for personal injuries arising out of an automobile accident, the court held that a police accident report, which contained statements of one of the parties made to the investigating officer, had been improperly admitted as evidence to establish the main fact, presumably who was at fault; reversing the trial court's ruling that the report was admissible because it was made in connection with police business and such fact was conclusive as to its admissibility, the court stated that police reports are not admissible to establish the main fact where the information contained in the police records are hearsay, the court adding that the defendant's statement contained in the report was exculpatory, it not being an admission against interest, and that the officers who made the report had recorded facts conveyed by the defendant of which they had no personal knowledge, the court observing that one of the vices of police reports is that they appear to the jury as official determinations after an investigation. *Mahon v. Giordano*, 30 A.D.2d 792, 291 N.Y.S.2d 854 (1st Dep't 1968).

-- in a case in which passengers in an automobile involved in a collision with a train brought an action against the owner of the automobile, the driver of the automobile, and the railroad for injuries allegedly sustained, the court held that the lower tribunal's admission into evidence of a police accident report under the business record exception to the hearsay rule (*N.Y. C.P.L.R. 4518(a)*) constituted prejudicial and reversible error, where the report had been prepared by an officer who had not witnessed the accident, the officer testified to having interviewed several witnesses whose names or identities he could not remember except for the engineer and the motorman of the train involved in the accident, the officer was initially certain that he had not interviewed the plaintiffs or defendant but he later testified to having had conversation with the defendant, and the source of the information contained in the report that concluded the cause of the accident to have been the excessive speed of the defendant's car was unclear. *Murray v. Donlan*, 77 A.D.2d 337, 433 N.Y.S.2d 184 (2d Dep't 1980).

-- in a proceeding to stay arbitration, an insured appealed from the judgment of the lower tribunal, which granted a permanent stay of arbitration on the ground that the insured did not establish, as required by his insurance policy, that there had been physical contact between the insured's vehicle and a hit-and-run vehicle, and the court, on review, reversed, the court holding that a police accident report with ambiguous entries was inadmissible to show there had

been physical contact between the insured's vehicle and the hit-and-run vehicle where no proper foundation was laid for the admission of such a report and, in any event, it was inadmissible under the business record rule; since the court, on review, has the power to grant the judgment that upon the evidence should have been granted by the trial court sitting without a jury, the judgment below would be reversed and the proceeding dismissed, the court concluded. *Matter of Utica Mut. Ins. Co.*, 97 A.D.2d 422, 467 N.Y.S.2d 259 (2d Dep't 1983).

-- in an action to recover damages for personal injuries arising from a two-vehicle accident, the court held that reversible error occurred when the lower tribunal admitted into evidence a police report concerning the accident, the report containing statements of the defendant driver concerning, inter alia, her opinion that the plaintiff had caused the accident, the court reasoning that under the particular circumstances presented, no hearsay exception justified the admission into evidence of the defendant's statements through the medium of the police report as a business record; the error in admitting the report, the court opined, that set forth a party's opinion that the cause of the accident was "the motorcycle [driven by the plaintiff] was going too fast," was compounded when the trial court charged the jury that if they found the plaintiff had exceeded the posted speed limit of 40 miles per hour, they could "consider the violation some evidence of negligence on the part of the plaintiff . . . along with the other evidence in the case." *Auer v. Bienstock*, 104 A.D.2d 350, 478 N.Y.S.2d 681 (2d Dep't 1984).

-- the court held that a motor vehicle accident report prepared by a member of the sheriff's department who came upon the scene of the accident approximately 30 minutes after its occurrence was not admissible as a business record where the reporting officer was not a witness to the accident and the person who had relayed the information to the officer was under no business duty to do so; the court rejected the argument that while the document was hearsay, it was admissible as an exception to the hearsay rule under the business records exception (C.P.L.R. 4518), the court stressing that police reports are admissible as business records if the reporting officer witnesses the accident or if the person who relayed the information to the officer was under a business duty to do so; otherwise, the court elaborated, the facts stated in the report may be proved by a business record only if the statement qualifies as a hearsay exception, such as an admission. *Turner v. Spaide*, 108 A.D.2d 1025, 485 N.Y.S.2d 593 (3d Dep't 1985).

-- in a case in which a personal injury action was filed arising out of a motor vehicle hit-and-run accident, the lower tribunal entered judgment on a jury verdict in favor of the plaintiff, and the court, on review of the defendant's appeal, reversed and remanded, the court noting that error occurred when the lower tribunal, over defense counsel's objection, received into evidence a police report, prepared by a civilian employee of the police department who was not at the scene, containing the statement that a witness stated that the "truck was from UPS," the court instructing that not only was the statement hearsay, but it pertained to the ultimate factual issue in the case; the report did not qualify as a business record, for the witness was under no business duty to report the accident to the police, nor did his statement qualify as a declaration against interest or fall under any other exception of the hearsay rule and, the court declared, since the report contained a hearsay statement relevant to the ultimate issue of fact, the admission of the statement contained in the report constituted prejudicial and reversible error, the court adding that generally, the testimony of a witness may not be corroborated or bolstered by evidence of prior consistent statements made before trial since an untrustworthy statement is not made more trustworthy by repetition. *Sansevere v. United Parcel Service, Inc.*, 181 A.D.2d 521, 581 N.Y.S.2d 315 (1st Dep't 1992).

-- holding that no error was committed in sustaining an objection to an offer in evidence of a "Traffic Accident Report" in a personal injury action arising out of a collision between a bus and an automobile, the court took the position that the statute known as the Uniform Business Records as Evidence Act had no application, the court noting that the defendant had urged that the report made by the investigating officer, and filed with police records, was admissible because it was a record of an "act, condition or event," as provided in that statute; the court observed from the record that the police officer did not see the collision occur, and noted that his report, in the main, was based upon what various individuals, including interested parties, told him about the accident, such evidence being pure hearsay, the court stating that, in any event, the defendant was not prejudiced by the exclusion of the report, since the investigating officer did testify about what he observed immediately following the accident. *Snyder v. Portland Traction Co.*, 182 Or. 344, 185 P.2d 563

(1947).

-- a police accident report that had been written up at police headquarters subsequent to the accident by several officers, only one of whom was identified, all of whom arrived on the scene after the accident had occurred, was held by the court not admissible in evidence under the Uniform Business Records as Evidence Act; the court felt that the Uniform Act was not intended to make relevant that which is not relevant, nor to make all business and professional records competent evidence regardless of by whom, in what manner, and for what purpose they are compiled, or offered, the court pointing out that the statute (28 P.S. § 91a) itself conditions the admissibility of such a record upon the court's being of the opinion that the sources of information, and method and time of preparation, were such as to justify its admission, the court concluding that in the present instance, it was clearly erroneous to permit the introduction of this police report into evidence, and remanded the cause for a new trial. *Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952).n20

-- in a case in which a moped operator who was injured in a fall brought an action against the owners of the dog that allegedly caused the fall, the court held that a police accident report was not admissible as a business record to prove the manner in which the accident occurred absent showing that the sources of information appearing in the police record were trustworthy; the court commented that the plaintiff failed to demonstrate that the police accident report and the hospital records were admissible as business records to prove the manner in which the accident occurred, for here, the plaintiff did not demonstrate that the source of the information appearing in the police and hospital records were trustworthy. *Liles v. Balmer*, 389 Pa. Super. 451, 567 A.2d 691 (1989), on remand to, 1992 WL 1369476 (Pa. C.P. 1992), order aff'd on other grounds, 439 Pa. Super. 238, 653 A.2d 1237 (1994), reargument denied, (Mar. 1, 1995).

-- in an action arising out of an automobile accident, the defendant sought to have the written report of the police officer who investigated the accident admitted into evidence; upholding the trial court's refusal to admit this report as a business record, the court simply said that in this case the report did not qualify for admission, because it included not only what the officer observed at the scene, but also what the parties told him about how the accident happened. *Mercurio v. Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976).

-- the court stated that the mere fact that the written statement of a witness to a traffic accident was made part of the highway department's file on the wreck did not make it admissible as a business record exception to the hearsay rule, the court commenting that in order for an exhibit to become admissible as a business record under the appropriate Texas statute (*Tex. Rev. Civ. Stat. Ann. art. 3737e*, § 1(b)), it is necessary that the one offering it lay a proper predicate for its admission by proving the existence of each of the essential elements set out in the statute; reversing a "take nothing" judgment based on a verdict that found both motorists guilty of negligence, the court concluded that the report, which contained statements tending to show that the plaintiff had just passed another car in an unsafe manner, and that such act was a cause of the accident, did not satisfy the requirements of the statute, and should not have been admitted. *Logan v. Grady*, 482 S.W.2d 313 (*Tex. Civ. App. Fort Worth* 1972).

◇

Statements that were part of police investigation of automobile accident were inadmissible under the business records exception to the hearsay rule since they were inadmissible under public records exception. LSA-C.E. art. 803(6), (8)(b)(i). *Sims v. Liberty Mut. Ins. Co.*, 897 So. 2d 834 (*La. Ct. App. 3d Cir.* 2005).

[\*14] Slip-and-fall accident reports

[\*14a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a slip-and-fall

accident police report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *Zaulich v. Thompkins Square Holding Co.*, 10 A.D.2d 492, 200 N.Y.S.2d 550 (1st Dep't 1960), a personal injury action arising out of plaintiff's fall from the second-floor landing of a fire escape, a police report of the accident, signed by the investigating officer, was admissible as a record made in the regular course of business. The court felt it unnecessary to decide whether the police officer's own memorandum book was likewise admissible as a business record, since, in any event, both the report and the memorandum book were at least competent evidence to rebut the inference attempted to be created by plaintiff's counsel that the testimony of the patrolman was a recent fabrication. The court noted that while the plaintiff denied attempting such an inference, the record of examination of the officer supported the inference that his testimony was being assailed as a possible recent fabrication, and that under those circumstances, the exclusion from evidence of the police officer's report and memorandum book to bolster the officer's testimony constituted prejudicial error.

Police department reports containing a bystander's report regarding a slip-and-fall victim's actions at the time of her accident would be admissible under the business records exception to the hearsay rule, the court held in *Taft v. New York City Transit Authority*, 193 A.D.2d 503, 597 N.Y.S.2d 374 (1st Dep't 1993). An administratrix of a decedent's estate brought an action for wrongful death of the decedent, who allegedly fell between subway cars and was hanging on as the train left the station. The lower tribunal entered summary judgment in favor of the transit authority, and the court, on review of the appeal of the administratrix, reversed. The court pointed out that a statement of a platform conductor was contained in the police report to the effect that he was approached by an "extremely agitated," unidentified man who told him that approximately one minute earlier, he saw a woman trying to board a train through pantograph gates between cars, and that she slipped and was hanging on as the train left the station. The spontaneous declaration exception applies to statements made by bystanders as well as participants, and the bystander need not be identified as long as the statements are sufficiently corroborated by other evidence, the court remarked. The spontaneous description of events by an unidentified bystander, made substantially contemporaneously with the observation, is admissible under the present sense impression exception to the hearsay rule, if the description is sufficiently corroborated by other evidence, the court continued, and corroboration is necessary to admit the statement under this exception, because it lacks the reliability that a statement made under shock or excitement affords. Here, the court observed, the statement of the declarant, whom the platform conductor described as agitated, gesturing wildly, and as if in a state of shock, provided the reliability lacking in a present sense impression statement. Since the declarant's statement was independently admissible as an exception to the hearsay rule, the reports of the transit authority and the New York City Police Department containing the statement would be admissible as "business records" pursuant to *N.Y. C.P.L.R. 4518(a)*.

[\*14b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a slip-and-fall accident police report would not be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957), a bus passenger who was injured when she allegedly stepped in some wet mortar while walking from the bus to the curb was not entitled to have admitted as evidence, under the business records exception, a police report that indicated that the woman had slipped on wet mortar and that in fact the fire department had to be called by the police to wash down the street in order "to prevent another reoccurrence of this mishap." While stating that it was the general rule before the adoption of the so-called Model Act, adopted in some states, or the Uniform Act, adopted in California (*Cal. Civ. Proc. Code § 1953e*), that such reports were not admissible, the court expressed the view that it was well settled that the adoption of either of these two statutes did not change the existing rule. The court explained that the reason why such police records are not ordinarily admissible is that they are ordinarily based upon the description of witnesses and

others at the scene of the accident, who are not giving information under a business duty to render reports to the police. In the instant case, stated the court, the excluded report did not disclose on its face whether it was based on the officers' own observations or upon the observations of third parties. The court added that if it was based upon the observations of third parties, the report would have to be excluded, but that even if it was based on the officers' personal observations, its exclusion, even if erroneous, could not have been prejudicial because the officers who prepared it were available as witnesses and, in fact, did testify at the trial, and the report in question was in fact used to refresh their recollections. The court felt that it was evident from the record that the officers' testimony adequately covered the contents of the report.

The court in *Polster v. Griff's of America, Inc.*, 34 Colo. App. 161, 525 P.2d 1179 (1974), an action for personal injuries sustained when the plaintiff slipped and fell on a snow- and ice-covered incline leading to defendant's place of business, where the defendant appealed from an adverse judgment on the basis that the trial court erred in excluding an official police record of an incident involving the plaintiff subsequent to the accident involved in the instant suit, and that such police report was admissible as an official business record for the purpose of impeaching the witness, affirming the judgment for the plaintiff, noted that the plaintiff had objected to the admission of the report on the grounds that it contained hearsay upon hearsay because it contained statements of a third party recorded by a police officer, and because the witness offered by the defendant to identify the report had no personal knowledge of the contents of the report. The court expressed the view that police reports of this nature do not fall within the "business records exception" to the hearsay rule, and furthermore, where such reports contain hearsay, they would be inadmissible in any event.

See *Wolf v. Kaufmann*, 227 A.D. 281, 237 N.Y.S. 550 (1st Dep't 1929), motion granted, 254 N.Y. 598, 173 N.E. 882 (1930), a wrongful death action arising out of the decedent's fall down a flight of stairs on the defendant's premises, in which the court held that the receipt in evidence of a hospital record containing the report of a police officer that was based upon hearsay information obtained by him after the accident was erroneous, for the same reasons set forth in the decision of *Needle v. New York Rys. Corp.*, 227 A.D. 276, 237 N.Y.S. 547 (1st Dep't 1929), § 13[b].

[\*15] Assault and battery reports

[\*15a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of an assault and battery police report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In *Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966), an action against a proprietor arising out of an assault sustained by plaintiff on the premises, the court held that an officer's testimony, which was based in large part upon police reports of prior incidents on the premises, would be admissible as evidence if the contents were based on the testifying officer's own observations, or the observations of other police officers or public officials whose job it was to know the facts recorded. Reversing a judgment for the defendant on the basis that it was unclear as to whether the testimony was properly excluded, the court pointed out that the hearsay objection to it was not valid if the police reports were admissible under the Uniform Business Records as Evidence Act. The court stated that the problem arose in the instant case because business records are not admissible under an exception to the hearsay rule when they are not based upon the report of an informant having the business duty to observe and report.

A police report indicating that an accident occurred in a case in which an insurer brought a declaratory judgment action seeking a determination of whether coverage existed under two policies for injuries sustained by two men in an assault and battery would come within the business records exception to the hearsay rule statute (Md. Code Ann., Cts. & Jud. Proc. § 10-101(b)), though statements made by witnesses or parties to the accident to the officer would not come within the code provision ( § 15[b]), the court held in *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983). The rationale behind the business records exception is that the writer is under a duty to make a truthful report, the court

remarked, the court instructing that obviously, the making of investigations and the receiving of information concerning crime is usual police business, such that a police record is admissible to prove, for example, that a report of crime was made by a member of the public and when the report was made and received.

[\*15b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of an assault and battery police report would not be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983), while a police report involving an assault and battery would be admissible to establish that an accident occurred, and the parties involved ( § 15[a]), it would not be admissible to prove the truth of the contents of that report since members of the public, whether targets of investigation, witnesses, or victims, are not under a duty in the nature of a business duty to make an honest and truthful report, the court adding that such "citizen" declarations are virtually universally held to constitute excluded hearsay in respect of otherwise admissible police reports. Here, the court remarked, a party's statement would not come within the statute because it was not a memorandum of the accident such as the statute (Md. Code Ann., Cts. & Jud. Proc. § 10-101(b)) contemplates, but was merely one individual's explanation of his part in the event.

The court in *Lewis v. Merrill*, 228 Or. 541, 365 P.2d 1052 (1961), an action for assault and battery, held that a police report of an earlier burglary upon the plaintiff's premises, in which report it had been written by the investigating officer that the complainant, the plaintiff in the instant action, believed that his ex-wife and her cousin, the defendant in the instant action, were responsible, would not be admissible in evidence under the Oregon version of the Uniform Business Records as Evidence Act (*Or. Rev. Stat. § 41.690*), on the theory that the statement was relevant on the subject of malice and would be admissible for purposes of impeachment. The court expressed the opinion that it was unnecessary to decide whether the Act was applicable to a record of this character, since the exhibit would be inadmissible in any event, because it did not purport to state what the plaintiff said concerning the identity of the burglars, but what the plaintiff "believes." The court observed that had the officer who made the report been on the witness stand, he would not have been permitted to testify to the plaintiff's belief, for that would have been only the conclusion of the witness, and added that if the officer could not so testify himself, the testimony would not acquire admissibility simply because it was included in the officer's report, even were the report as a whole admissible under the "uniform act."

[\*16] Memorandum

The following authority considered, under the particular circumstances presented, whether all or part of a police memorandum report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *Sikora v. Gibbs*, 132 Ohio App. 3d 770, 726 N.E.2d 540, 111 A.L.R. 5th 685 (10th Dist. Franklin County 1999), a memorandum written by a police officer, whose issuance of a citation to the plaintiff gave rise to a malicious prosecution action, would not be admissible in support of a summary judgment motion under the "business records" exception to the hearsay rule. The plaintiff was a member of the community organization "Copwatch," which was formed to monitor police activities; one evening, the plaintiff was observing police procedures when two members of Copwatch were arrested. The two members were placed into a police transport vehicle and transported from the scene; the plaintiff claimed that she began following the police wagon in her vehicle, intending to discover where the volunteers were being taken and then to make arrangements for their release, but, before the police vehicle arrived at its destination, the plaintiff's vehicle was stopped, and the defendant police officer issued a citation to the plaintiff for following near an emergency or safety vehicle traveling in response to an alarm, a citation that was subsequently dismissed at the request of the prosecutor for insufficient evidence. The plaintiff thereafter filed a complaint against the defendant, alleging that the actions of the subject police officer constituted malicious prosecution.

The court held that a memorandum written by the police officer regarding the incident did not fall within the "business records" exception of Ohio Evid. R. 803(6), which provides, inter alia, that a memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, is admissible. Here, the court indicated, the source of information and the circumstances of preparation indicated a lack of trustworthiness. Given that the source of the information was the accused in the present case, it could not be said that the memorandum was prepared by a person who was independent of the parties and unaware of the importance of the data contained in the memorandum. Reasoning thusly, the court concluded that the memorandum constituted inadmissible hearsay to which no exception applies, such that the lower tribunal improperly relied upon it in determining the motions for summary judgment, as a result of which the plaintiff's third assignment of error would be sustained.

[\*17] "Incident" or "arrest" reports

[\*17a] Held admissible

The following authority held, under the particular circumstances presented, that all or part of a police "incident" or "arrest" report would be admissible as evidence in a civil action under the business records exception to the hearsay rule in a civil action.

In *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967), a personal injury action arising out of an automobile accident, the court affirmed the trial judge's decision to allow into evidence, at the urging of the defendant, certain police reports made at the time of the plaintiff's prior arrests for drunkenness both before and after the accident in question. Noting that the records were relevant and admissible on two issues: first, to refute the plaintiff's claim that certain physical difficulties were of recent origin and had been caused by an accident that had brought about a change in personality and mode of life; and second, to rebut plaintiff's claim that his motor difficulties subsequent to the accident resulted from traumatic epilepsy, and to prove, instead, that they resulted from excessive use of alcohol, the court observed that the reports in question reflected the direct observations of the arresting officers and hence were admissible as business records under the Uniform Business Records as Evidence Act, which makes admissible the observations of an informant having the business duty to observe and report, which are made in the regular course of business at or near the time of the event, from sources of information that are considered trustworthy.

[\*17b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police "incident" or "arrest" report would not be admissible as evidence in a civil action under the business records exception to the hearsay rule in a civil action.

In *Dunaway v. King*, 510 So. 2d 543 (Ala. 1987), the court, in a case in which a shooting victim brought an action against his assailant's father for negligently entrusting a handgun and motor vehicle to the assailant, held that a police incident report containing hearsay statements was properly excluded by the lower tribunal. The court, without detailed discussion, commented that a police incident report has, in the past, been held inadmissible as evidence. Here, the court remarked, the incident report contained the hearsay statements of one individual regarding the circumstances surrounding the victim's death, and did not contain the personal observations of the investigating officer, as a result of which the lower tribunal properly excluded this report.

According to the court in *Ziamba v. City of New Orleans*, 411 So. 2d 697 (La. Ct. App. 4th Cir. 1982), an incident report

would not be admissible in the plaintiff's suit for false arrest where there was no logical basis to believe that in all probability the report was trustworthy. The plaintiff was arrested for the crimes of simple burglary, possession of stolen property, assault of an officer, and resisting arrest; he remained in police custody for 36 hours and, after review of the police report, the district attorney declined to prosecute the plaintiff for any of these offenses. During the trial of the plaintiff's claim of damages for false arrest, the plaintiff testified that he was innocent of these crimes, that he was at another place working offshore in the Gulf of Mexico when the burglary occurred, and that he was never in possession of stolen property; the plaintiff possessed payroll receipts and crewboat logs corroborating his alibi, and the city conceded the arrests for assault of an officer and resisting arrest were without any basis. In an attempt to prove probable cause for the arrest of the plaintiff for burglary and possession of stolen property, the city offered as evidence the police report of the investigating officer. The custodian of the records of the police reports was present and prepared to testify during trial to establish a foundation for the introduction of the report of the burglary and possession of the stolen property, but the police officer subpoenaed for the purpose of showing that the investigating officer was no longer employed by the police department and could not be located did not appear to testify. The trial judge refused to receive the offer of the police report because the investigating officer who prepared the report was not present in court to testify, and the city did not produce witnesses to testify that he could not be found and that he was not otherwise subject to the processes of court. The court held that permanent business records, regularly kept during the operation of a business, have been recognized by Louisiana courts as an exception to the hearsay rule, for they are offered to prove the truth of the matter asserted therein, and it is usually sufficient to show as a basis for their receipt as evidence that certain conditions have been met, the court remarked: they are permanent, regularly kept records; the record was made within a reasonable time after the occurrence of the event; and the information was furnished by one having a business duty to report or record the event in the regular course of business. Here, the court commented, the city failed to meet at least one condition precedent to the admission of the police report by failing to show the officer who prepared the report was genuinely unavailable, the court adding that since the plaintiff's arrest for assault and resisting arrest was conceded to be erroneous, there was no logical basis to believe that in all probability the report was trustworthy, and it was within the trial judge's discretion to refuse to receive it as evidence for that reason alone.

The court in *Willie v. American Cas. Co.*, 547 So. 2d 1075 (La. Ct. App. 1st Cir. 1989), held that police incident reports regarding past crimes at a shopping center were not admissible under the business records exception to the hearsay rule where most, if not all, of the reports were not mental impressions of the authors themselves but rather that of victims or witnesses to the alleged crimes, though, given the particular circumstances presented, the introduction of the reports was harmless error. In the plaintiff's tort action for damages resulting from a gunshot injury following the plaintiff's abduction from a shopping center, the court held that the lower tribunal erred in admitting police incident reports of crimes occurring on the shopping center premises under the business records exception to the hearsay rule, the court pointing out that La. Code of Evidence, art. 802 provides that hearsay is not admissible except as specifically provided within the Code by other legislation, and here, the lower tribunal accepted police incident reports of crimes occurring on the shopping center's premises based on the business records exception. Under the jurisprudence prior to the Code of Evidence, four factors were required of such records to be admissible under this exception, the court instructed: whether the person who made the record is unavailable for testimony, or production of said person would be a needless burden; the writing is the first writing reflecting the transaction; the records are identified at trial by one familiar with the bookkeeping procedure used by the business keeping the records; and the evidence is reliable. While testimony was received, the court indicated, that an officer testified that she collected reports from the department's files reflecting incidents at the shopping center for the two-year period prior to the date of the subject incident, and that such reports were maintained as a normal business practice, and while testimony of the various authors of the reports unquestionably would have been an undue burden, most, if not all, of these reports were not the mental impressions of the authors themselves but rather that of victims or witnesses to the alleged crimes. That is, the court elaborated, the reports contained hearsay within hearsay, the court concluding that the inadmissible hearsay statements in the police reports were no more than a description of the alleged crimes.

An incident report made by the police detailing the circumstances of a police officer's fatal shooting of the decedent would not be admissible in the widow's wrongful death action since the report lacked trustworthiness within the

meaning of the business records exception, the court held in *Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990). The decedent's widow brought a wrongful death action after her husband was shot by police officers; the lower tribunal entered judgment on a jury verdict for the widow, but found the victim contributorily negligent, the widow appealed, the intermediate appellate tribunal affirmed, and the state supreme court, on review, reversed and remanded. The court noted at the outset that the traditional business records hearsay exception (Mi. R. Rev. M.R.E. 803(6)) is justified on grounds of trustworthiness. Where, however, the court remarked, the source of information or the person preparing the report has a motivation to misrepresent, trustworthiness can no longer be presumed, and the justification for the business records exception no longer holds true. The evolution of the business records hearsay exception clearly indicated that Mi. R. Rev. M.R.E. 803(6) eliminated burdensome common-law restrictions and broadened the scope of the exception, the court related. In order to ensure the same high degree of accuracy and reliability upon which the traditional, but narrowly construed business records exception was founded, the current rules also recognize that trustworthiness is the principal justification giving rise to the exception, the court stated. As such, the court continued, Mi. R. Rev. M.R.E. 803(6) provides that trustworthiness is presumed, subject to rebuttal, when the party offering the evidence establishes the requisite foundation, the court adding that even though proffered evidence may meet the literal requirements of the rule, the presumption of trustworthiness is rebutted where the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Thus, the court pointed out, in cases like the instant matter, upon a party's timely objection, the court must determine as a question of admissibility whether the proffered evidence lacks trustworthiness. Upon the basis of a review of the record, the court concluded that the lower tribunal improperly held that the proffered exhibits did not lack trustworthiness.

The court in *Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983), a wrongful death action, held that a police incident report containing a statement of a bystander that the decedent had jumped in front of the train was inadmissible under the business records exception (Mi. R. Rev. M.R.E. 803(6)). A wrongful death action was brought against a railroad; the lower tribunal entered judgment on a verdict in favor of the railroad, the decedent's administratrix appealed, and the court, on review, reversed and remanded. The business records exception to the hearsay rule is justified, the court instructed, on grounds analogous to those underlying other exceptions to the hearsay rule. Unusual reliability is regarded as furnished by the fact that in practice regular entries have a comparatively high degree of accuracy, as compared to other memoranda, because such books and records are customarily checked as to correctness by systematic balance-striking, because the very regularity and continuity of the records is calculated to train the record-keeper in habits of precision, and because in actual experience the entire business of the nation and many other activities constantly function in reliance upon entries of this kind, the court elaborated. The business records exception has validity, the court pointed out, if all participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or, in short, in the regular course of business, the court stated, but if the supplier of the information does not act in the regular course, an essential link is broken, and the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. Here, the court stressed, the report was not admissible as a business record because the primary foundational requirement that the declarants or informants must be acting in the regular course of their business when making the statements was lacking, the court adding that this foundational element is critical as the business records exception is premised on the assumption that the statements of a declarant acting in the regular course of his or her business are inherently trustworthy.

According to the court in *Canty v. New York City Health and Hospitals Corp.*, 158 A.D.2d 271, 550 N.Y.S.2d 673 (1st Dep't 1990), an incident report containing a statement by a plaintiff in his action against a corporation for negligent failure to respond to "911" telephone calls was not admissible under the business records exception to the hearsay rule. The plaintiff brought an action for severe emotional fright and shock alleging that negligence by a city health and hospitals corporation in responding to a "911" call resulted in a premature birth taking place at home rather than at a hospital. The lower tribunal entered judgment on a jury verdict awarding damages; an appeal was taken and the court, on review, affirmed. The verdict in the plaintiff's favor was based on the negligence of the health and hospital corporation in responding to a "911" call concerning the plaintiff, a 21-year-old married woman, who was, at the time, approximately seven months pregnant with her first child, the court pointed out. After the third call, at which time there

had still been no response from the emergency medical service, the plaintiff gave birth, the court continued. The baby was alive, still encased in the amniotic sac, the court pointed out, and an ambulance finally arrived at the plaintiff's apartment approximately 90 minutes after the first "911" call. The jury found the defendant corporation negligent in its emergency treatment of the infant, who, after surviving for 24 hours, died, according to the autopsy report, from respiratory distress syndrome, as well as pulmonary hemorrhage and bleeding in the brain, the court observed. The court rejected the defendant's argument that the lower tribunal committed reversible error in excluding a statement, contained in a police report, allegedly attributed to the plaintiff's husband that his first two phone calls were, not to "911," but to a hospital. The document did not qualify for admission as a business record exception to the hearsay rule, the court instructed, for not only must the entrant be under a business duty to record the event, but the informant, as well, must be under a similar duty to report the occurrence to the entrant. Here, the court related, while the defendant demonstrated that a former police officer, the recorder of the underlying facts, was under a duty to report the incident, the officer conceded at trial that he could not identify the person who furnished the information for the report, such that the source of the information was unknown, and the incident report thus properly excluded as a business record exception to the hearsay rule.

[\*18] Telephone report

[\*18a] Held admissible

The following authority held, under the particular circumstances presented, that all or part of a police telephone report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999), a computer printout of data showing that the police department received approximately 1,700 telephone calls during a five-year period prior to the sexual assault of a bar patron, requesting that police be dispatched to an eight-block area including and surrounding the building where the subject assault occurred, was admissible under the business records exception to the hearsay rule (Neb. Evid. R. 803(5)) in the patron's negligence action against the building owner. The court held that the lower tribunal erred in barring the admission of the telephone printout, the court noting that the code provision under inquiry provides, in pertinent part, that the following are not excluded by the hearsay rule: a memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, the court instructed. The subject document met the criteria of the code provision and, as such, fell within the exception to the hearsay rule, the court stated. In so ruling, the court commented that the custodian of the records testified that all of the calls the police department receives are recorded by the operators and that records of the time, content, and place of dispatch are kept in the regular course of business. That is, the court elaborated, the plaintiff laid the proper foundation to have the exhibit admitted as a business record, and the trial court should have admitted the exhibit.

[\*18b] Held inadmissible

The following authority held, under the particular circumstances presented, that all or part of a police telephone report would not be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In *West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101 (Tenn. Ct. App. 1989), the court held that a police record of a telephone call in which an anonymous caller stated that "another bomb" was about to explode on the premises was not admissible as a "business record," though the erroneous admission of the record by the lower tribunal was not

prejudicial. Bowling alley owners brought a suit against a natural gas utility and heater manufacturer, seeking to recover for an explosion and fire at the bowling alley. The lower tribunal entered a jury verdict for the utility and the manufacturer, and the court, on review, affirmed. In so ruling, the court rejected the plaintiff's argument that the testimony by the unidentified declarant took the report out of the business records exception to the hearsay rule, and its admission into evidence was prejudicial error sufficient to warrant a mistrial. The Uniform Business Records as Evidence Act was enacted to provide a broad exception to the hearsay rule to enable litigants to introduce and use business records without calling the numerous witnesses who were involved in preparing or keeping them. The Act does not render all business records admissible, but instead gives the trial judge the discretion to determine whether the particular record sought to be introduced is sufficiently trustworthy to be admitted, the court instructed. The trustworthiness of a record is determined by considering the source of the information contained in the record as well as the time and the manner in which the record was prepared, the court remarked. In order for the police record to be admissible to prove the truth of the statements contained therein, each statement, standing on its own, must be admissible, the court elaborated. Here, the court indicated, the primary statement in the case, the police record, qualified as a business record under Tenn. Code Ann. § 24-7-111(c) because it was regularly prepared in the course of business at or near the time of the act by a qualified witness. However, the court related, the anonymous caller's statement contained in the police report could be used to prove the truth of what he asserted only if he was acting in the routine of business when he made it or if it qualified under another exception to the hearsay rule, circumstances that did not exist in the instant case. However, the court concluded, since the trial lasted 12 days and other substantial evidence existed to support the jury verdict that was approved by the trial judge, the error in allowing the statement by the lower tribunal did not affect the verdict so as to require the judgment to be set aside.

[\*19] Complaint reports

The following authority considered, under the particular circumstances presented, whether all or part of a police complaint report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In an action brought by a police officer against a city director for intentional infliction of emotional distress, police reports concerning complaints lodged by the director against the officer were admissible under the business records exception to the hearsay rule, where each report was submitted through its author, who was subject to cross-examination on its contents, and where many of the statements in one report were admissions by the director and thus not hearsay, the court held in *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985). A lawsuit was instituted by a police officer to recover against a city director, the lower tribunal entered judgment awarding the officer compensatory and punitive damages, and the court, on review of the city director's appeal, affirmed. The court rejected the city director's argument that the lower tribunal erred in admitting certain police reports into evidence under the "business records" exception to the hearsay rule (Ark. Unif. R. Evid. 803(6)), including memoranda made by police personnel regarding the case. More specifically, the city director argued that the reports were inadmissible under Ark. Unif. R. Evid. 803(8), which prohibits the introduction of investigative reports by police and other law enforcement personnel, factual findings resulting from special investigation of a particular complaint, case, or incident, or any matter as to which the source of information or other circumstances indicate lack of trustworthiness, the court indicated. Although these reports may not technically have come within the business records exception, the court continued, the lower tribunal has substantial latitude under Ark. Unif. R. Evid. 803(24) to admit evidence that it feels meets the spirit of the rule. Here, the court stressed, in each instance the report was submitted through its author, who was subject to cross examination on its contents, and, in addition, many of the statements in one of the memoranda to which the city director objected were admissions, and were thus not hearsay under Ark. Unif. R. Evid. 801(d)(2), such that it could not be determined that the lower tribunal erred in admitting this evidence.

[\*20] Offense report

[\*20a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police offense report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In a negligence action brought against a restaurant by a customer who sustained injuries during a robbery on the restaurant premises, the lower tribunal properly admitted into evidence police offense reports concerning earlier robberies at the restaurant under the business records exception to the hearsay rule, the court held in *Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985). The plaintiff sued a restaurant, seeking recovery of damages he sustained when, after perceiving a robbery in progress, he turned and ran, thereby startling the robber, who fired at him, striking him in the hand. The lower tribunal entered judgment on a jury verdict in favor of the plaintiff, and the restaurant appealed; the court, on review, held that police offense reports concerning other robberies at the restaurant were admissible pursuant to the business records exception. In so ruling, the court disagreed with the restaurant's contention that the lower tribunal erred in admitting into evidence police offense reports concerning other robberies at the restaurant, and that the police reports were not covered by the business records exception to the hearsay rule set forth in Colo. R. Evid. 803(6). While the question of whether police offense reports fall under the business records hearsay exception had not been specifically addressed in the state, the court remarked, the drafters of *Fed. R. Evid. 803(6)*, which is identical to Colo. Rev. Stat. Ann. § 803(6), contemplated including police reports within the business records exception when the other requirements of the rule are met, as a result of which such offense reports would be admissible in civil cases. The circumstances presented adequately satisfied the requirements of Colo. Rev. Stat. Ann. § 803(6), the court indicated, for the reports were kept in the regular course of police department business, and were made shortly after the robberies from information transmitted by restaurant employees who were present at the robberies. Moreover, the court declared, the subject offense reports did not indicate a lack of trustworthiness, and the reports represented "factual findings" pursuant to an authorized police investigation, such that their admission was proper.

Police offense reports regarding other disturbances at a bar owner's place of business, would, upon proper foundation, be admissible as business records in an injured bar patron's action against a bar owner, the court held in *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999). A bar patron who was injured in a fight with a fellow patron, which occurred outside the bar after the bartender instructed patrons that if they did not take it outside, she would call police, brought an action against the bar owner; the lower tribunal entered judgment on a jury verdict for the owner, the court, on the patron's appeal, reversed and remanded. On remand, the lower tribunal entered jury verdict in favor of the bar owner, and the court, on review of the patron's appeal, reversed and remanded for a new trial. The contested police reports, the court noted at the outset, consisted of 30 police reports describing police calls to the area surrounding the subject premises over an approximate three-year period, the court pointing out that more than half of these incidents pertained to fights or disturbances, and the disturbances described on the forms included separating patrons who were "shoving and pushing," removing "drunken" persons from the bar, and breaking up fights in or near the tavern. The court held that the calls to which the police responded were relevant as evidence regarding fights and disturbances in and near the defendant's premises and thus, the foreseeability of fights and disturbances in or outside the tavern related to foreseeability as it pertained to the defendant's duty. The police reports, upon proper foundation, were admissible as business records pursuant to Neb. Evid. R.803(5), and were relevant to the issue of the bar owner's duty to protect the plaintiff from injury from third persons, the court instructed. The police reports were also relevant, the court continued, as they pertained to the breadth of the duty the owner owed patrons, the court adding that because the owner owed the plaintiff a duty of reasonable care in light of the circumstances, the information in the police reports would be useful in defining the scope of the duty owed by the owner by more fully developing the record as to the context in which the duty was to be performed, and would also be relevant as they may have pertained to proximate cause. Given the particular circumstances presented, the court concluded, the police reports were relevant and otherwise admissible, and their exclusion was error since a substantial right of the plaintiff was prejudiced by its exclusion.

[\*20b] Held inadmissible

The following authority held, under the particular circumstances presented, that all or part of a police offense report

would not be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In a negligence action by hotel customers against a hotel owner and others resulting from a theft of jewelry, furs, and other property from their room, the court in *Schear v. Motel Management Corp. of America*, 61 Md. App. 670, 487 A.2d 1240 (1985), held that computer printout offense reports compiled by the police concerning other crimes that had been reported to the police in the vicinity of the hotel would not be admissible under the business records exception to the hearsay rule (Md. Code Ann., Cts. & Jud. Proc. § 10-101(b)). The lower tribunal granted a motion for directed verdict by the hotel manager and entered judgment in favor of the management corporation and hotel owner, and the court, on review of the plaintiff's appeal, affirmed. The court, in so ruling, rejected the argument that the lower tribunal erred in refusing to admit into evidence computer printouts, which were compiled by a county police department, listing crimes that had been reported to and investigated by the police as having occurred at or in the vicinity of the subject hotel, and the assertion that the printouts were relevant to establish that the hotel and its management had knowledge of a high incidence of reported crime at the hotel but failed to take reasonable steps in prevention thereof. The business record exception is contained in Md. Code Ann., Cts. & Jud. Proc. § 10-101(b), the court instructed, which provides that a writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event. It is true, the court remarked, that police accident reports are admissible under the business records exception, and summaries or compilations of business records may similarly be admissible. However, the court elaborated, the printouts proposed for admission into evidence were not accident reports, but were merely lists of unverified complaints of crimes made by unidentified individuals. The attempt to characterize the printouts as admissible police reports was based upon the fact that the only crime reports included in the compilation were those in which a police officer investigated the complaint, the court stressed, but since the reported crimes contained in these printouts were not based upon the personal observations of the investigating officer, they constituted hearsay that was inadmissible under the business records exception.

[\*21] Custody report

The following authority considered, under the particular circumstances presented, whether all or part of a police custody report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980), a police custody report would not be admissible in a proceeding to suspend a driver's license under the business records exception to the hearsay rule (*Or. Rev. Stat. § 41.690*). An appeal was taken from the suspension of the petitioner's driver's license, the lower tribunal entered a directed verdict in favor of the petitioner, and the court, on review, reversed and remanded. Police reports are admissible as "business records" when they satisfy the requirements of *Or. Rev. Stat. § 41.690*, the court commented. Here, an officer of the subject police department, the custodian of documents and reports, testified as to the identity of the report and the mode of its preparation, the officer stating that any time a person is taken to jail, the arresting officer is required by the police department to complete a custody report before the end of his shift and hand it in to be corrected by either the chief or lieutenant, such that the report is prepared as a matter of routine. The custody report offered into evidence in the instant case was not made in the "regular course of business" within the meaning of *Or. Rev. Stat. § 41.690*, the court stressed, for it was not the type of systematic entry subject to regular examination, relied upon because of its customary accuracy, that justifies the business records exception to the hearsay rule. That is, the court elaborated, the custody report undoubtedly functioned in part as a memorandum of the day-to-day activities of the department, but it was the report's utility as an aid in litigation that was the more significant basis for its preparation. Reasoning thusly, the court concluded that the sources of information and the method and time of preparation were not such as to justify the report's admission pursuant to the business records exception to the hearsay rule, as a result of which the custody report was properly excluded by the lower tribunal.

[\*22] Investigative report

[\*22a] Held admissible

The following authority held, under the particular circumstances presented, that all or part of a police investigative report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

According to the court in *U. S. Fire Ins. Co. v. Skatell*, 596 S.W.2d 166 (Tex. Civ. App. Texarkana 1980), writ refused n.r.e., (June 25, 1980), an action to recover under insurance policies for the loss of stolen jewelry, a police report of theft investigation was properly admitted pursuant to the business records exception to the hearsay rule (*Tex. Rev. Civ. Stat. Ann. art. 3737e*). An insured sued to collect benefits under two policies issued by insurers covering jewelry that was stolen from the insured's home; the lower tribunal rendered judgment for the insured, and the court, on review of the insurers' appeals, affirmed. In so ruling, the court rejected the argument that reversible error was committed when the lower tribunal admitted into evidence a police report of the theft investigation, the court noting that, after lengthy objections and arguments, the lower tribunal excluded everything in the police report except the fact that the insured had reported a theft, and those matters that the investigating police officers had personally found and reported in their investigation, the trial judge thereafter carefully instructing the jury and allowing only the admitted portions of the report to be read to the jury. The fact that the insured reported the theft of his jewelry was admissible, not for the truth of the statement, but to show that the insured had made such a report, an operative fact in itself because the credibility of the testimony that a theft had occurred had been attacked, the court remarked, and the other portion of the exhibit, being the report by the investigating officers of what they actually found, as distinguished from what others had said or done, was shown to meet the requirements of the business records act, and was therefore admissible.

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Police report concerning search of tenant's apartment, which revealed presence of marijuana, was admissible under business records exception to hearsay rule in city housing authority's summary process action against tenant, which sought possession of rental premises, since report had been prepared by investigating officer and was based on his personal knowledge of events and on information that had been provided to him by officers with business duty to report the information. C.G.S.A. § 52-180. *Housing Authority of the City of Hartford v. Deleon*, 79 Conn. App. 300, 830 A.2d 298 (2003).

[\*22b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police investigative report would not be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In *Wallin v. Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980), an action by beneficiaries of a life insurance policy and accidental death policy, both of which contained a suicide exclusion clause, and wherein both insurance companies asserted suicide as a defense, the court held that the lower tribunal erred in admitting excerpts of a sheriff's investigative report containing statements of persons as to the mental state of the insured since said excerpts were clearly hearsay and since the report itself was not admissible as a business record under Uniform Rules of Evidence, Rule 803(8). The ruling of the lower tribunal in receiving in evidence the report of the sheriff over the objections of the beneficiaries of the policies required reversal, the court determined, the court rejecting the argument of the insurers that even if the evidence was erroneously admitted, it was merely cumulative and harmless error not requiring reversal. That is, the court explained, the hearsay statement in the report attributed to the decedent's uncle was substantially stronger against the plaintiff's case than other evidence in the record concerning prior hospitalizations for mental disorders and past history of driving-while-intoxicated-type accidents and reckless driving, the court adding that the error in admitting this incompetent evidence was compounded by permitting the hearsay statement by the uncle to be singled out and separately reread to the jury.

In a civil action brought against police officers for assault, assault and battery, false imprisonment, and "negligent denial of medical care," the lower tribunal erred in admitting into evidence a police investigation report that concluded that the defendant officer was justified in using his firearm, the court held in *Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980), the facts of which are more fully discussed at § 9. The court commented that while police reports may be admissible as business records pursuant to *Mass. Gen. Laws Ann. ch. 233, § 78*, statements in such a report made by bystanders may be inadmissible as "second level" or "totem-pole" hearsay. Moreover, the court continued, there is authority that police reports should ordinarily be excluded when offered by the party at whose instance they were made. While the defendants argued that any error in this respect did not affect the substantial rights of the plaintiff, in view of the discrepancies in the eyewitness testimony, the aura of officialdom inherent in the report, and the fact that it was taken to the jury room during the jury's deliberations, it could not be held that the error was harmless.

[\*23] Presentence report

The following authority considered, under the particular circumstances presented, whether all or part of a police presentence report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In *Dunaway v. King*, 510 So. 2d 543 (Ala. 1987), the court held that a presentence report was not admissible pursuant to the business records exception to the hearsay rule in a shooting victim's negligent entrustment action. A shooting victim brought an action against the assailant's father for negligently entrusting a handgun and truck to the assailant; the lower tribunal granted summary judgment in favor of the assailant's father, the shooting victim appealed, and the court, on review, affirmed. The court, with respect to a presentence report, which had been prepared by the Alabama Board of Pardons and Paroles, and which was attached by the plaintiff as an exhibit to his brief in opposition to the defendant's motion for summary judgment, held that the report was not admissible under the business records exception to the hearsay rule, because no predicate was laid for its admission as a business record. For a report such as this to be admissible, the proponent of the report must show that it was made in the regular course of business and that it was the regular course of business to make such a report at the time of the event noted or within a reasonable time thereafter (Ala. Rule Civ. Proc. Rule 44(h)). Here, the court stressed, the exhibit was not sufficiently authenticated as a business record.

[\*24] Summary report

The following authority considered, under the particular circumstances presented, whether all or part of a police "summary" report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

Hearsay contained in summary reports submitted by the police department in lieu of actual police reports about a shooting would not come within the business records exception to the hearsay rule (*Cal. Evid. Code § 1280*), the court held in *Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999). A claimant filed a petition for writ of mandate and complaint for declaratory relief after the Board of Control denied a request for compensation under the Victims of Crime Restitution Program without obtaining a full crime report from a law enforcement agency; the lower tribunal declared that the Board had a duty to obtain the report and ordered it to approve the claim, and the court, on review, held, inter alia, that summary reports would not be admissible pursuant to the business records exception to the hearsay rule. A claimant under the Victims Program has the burden of establishing by a preponderance of the evidence that, as a direct result of a crime, the victim or derivative victim incurred an injury that resulted in a pecuniary loss, the court indicated and once a derivative victim establishes a prima facie right to benefits, the burden shifts to the Board to prove the victim's contribution to his or her injuries or death justifies nonpayment. It was undisputed that the burden shifted to the Board to prove the victim's conduct contributed to his death, the court pointed out, and the Board relied primarily upon the two in-lieu reports provided by the Department, forms that were prepared 11 and 20 months, respectively, after the victim's death, and

neither of which was completed by the officer preparing the initial police report, and neither form suggesting that the officer completing it was involved in the investigation of the subject victim's killing. Hearsay, the court remarked, is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated, and here, the Department's in-lieu reports contained multiple hearsay, and did not come within the business records exception to the hearsay rule. Even assuming other criteria were met for the admissibility of the summary reports in the instant case, the court concluded, they were not made at or near the time of the event ( § 7).

[\*25] Laboratory report

The following authority considered, under the particular circumstances presented, whether all or part of a police laboratory report would be admissible as evidence under the business records exception to the hearsay rule in a civil action.

In *New York County Dist. Attorney's Office v. Rodriguez*, 141 Misc. 2d 1050, 536 N.Y.S.2d 933 (City Civ. Ct. 1988), a summary holdover proceeding to evict a drug dealer from property used for illegal drug trade, business, or manufacture, the court held that police laboratory reports concluding that a white substance found outside the apartment was heroin would be admitted pursuant to the business records exception to the hearsay rule. The county district attorney initiated a proceeding based on an allegation that a tenant used his apartment as the headquarters of a large narcotics operation; the court held that evidence established that a particular apartment located in a public housing authority building was the nerve center and headquarters of a large drug operation where drugs were stored and sold, and thus established illegal trade, business, or manufacture warranting eviction of the tenant and her family. The police laboratory analysis reports under inquiry clearly set forth that the entries were made within a reasonable time of the acts recorded, the court remarked, for one report was made on the same day of the test and the other two reports revealed that the reports were made within one to two days of the test. Additionally, the court remarked, the petitioner established a proper foundation for the admission of the police laboratory reports pursuant to the business records exception (*N.Y. C.P.L.R. 4518(a)*), the court stated, through the testimony of a police officer and a police chemist. The rules governing the admission of business records were promulgated to assure the accuracy and trustworthiness of the information contained in the records, the court indicated, and the petitioner met its burden in establishing the accuracy and trustworthiness of the police laboratory reports as required under the code provisions at issue.

[\*B] In Criminal Actions

[\*26] "Incident" or "arrest" reports

[\*26a] Held admissible

In the following cases, police "incident" or "arrest" reports were held admissible by the courts as evidence in criminal actions under the business records exception to the hearsay rule under the particular circumstances presented.

An incident report prepared by a police officer would be admissible pursuant to the business records exception at the time of the defendant's prosecution for receiving stolen property in the second degree, the court held in *Bates v. State*, 574 So. 2d 868 (Ala. Crim. App. 1990). The criminal defendant argued on appeal that the lower tribunal erred in allowing into evidence the Alabama Uniform Incident Report and testimony concerning the identification of the subject stolen property, and the record indicated that a deputy who investigated this case testified extensively concerning the missing items, without objection from the defendant. Thereafter, on redirect examination, the state sought to introduce the incident report into evidence, and the defendant objected to its admission, stating that it could be used to refresh the witness's recollection but should not be admitted because the state had not laid the proper predicate for the business record exception to the hearsay rule. Incident reports made by investigating officers, although generally hearsay, may be introduced if they meet one of the hearsay exceptions, the court commented. In order to lay a proper predicate for the

admission into evidence under the business records exception to the hearsay rule, the following must be established, the court instructed: testimony by any witness, frequently the custodian of the record, that the document now exhibited to the witness is a record of the business; that the witness knows the method, that is, the standard operating procedure, used in the business of making records of the kind now exhibited to the witness; and that it was the regular practice of the business to make records of such kind and to make them at the time of the event recorded or within such specified period thereafter as could be found by the trier of fact to be reasonable. Here, the court stated, a deputy testified that the incident report was a record of police business that is always made in the investigation of an incident, such that a proper predicate was laid. In so ruling, the court rejected the defendant's argument that, even if the report met the business records exception, it should not have been admitted into evidence because it was not the best evidence of the identification of the stolen property, the court explaining that while the defendant submitted that an original handwritten list, which contained the serial numbers of the guns in the victim's family's possession, would have been the best evidence of the missing guns, the record indicated that the list contained the serial numbers of every gun in the family's possession, and did not specify those that were stolen during the burglary, such that the incident report, which did specify and identify the stolen guns, was the best evidence.

The court in *Johnson v. State*, 253 A.2d 206 (Del. 1969), an appeal from a conviction for vehicle larceny, held that the testimony of a police officer to the effect that the defendant was a passenger in the stolen vehicle at the time it was stopped by police could properly be buttressed by the acceptance in evidence of the officer's notebook in which the events that transpired had been recorded. In holding that the trial court did not commit error in permitting the notebook into evidence, the court noted that the admission of the notebook, as a business record, was on safe ground, since the witness had stated that it was kept in connection with the performance of his duty as a police officer, and that the entries were made therein shortly after the vehicle check took place. The court further noted that although the police department is not a "business" in the ordinary sense of the word, it is in the "business" of law enforcement, and the reports and records kept in connection with such enforcement are "business records" within the meaning of the Delaware statute (Del. Code Ann. 10 § 4310) allowing the admission of such records as competent evidence.

According to the court in *Scott v. Nassau County*, 43 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup 1964), an action for false arrest and for personal injuries sustained through the use of excessive force in the making of the arrest, a motion for discovery of any statement made by the arresting officer, including an official report made by the officer to his commanding officer with regard to the arrest, would be granted. While admitting that discovery may be had only of documents admissible in evidence, the court was of the opinion that the report in question would nonetheless be discoverable in litigation not involving a unit of government as a report made in the regular course of business, and because it might reasonably contain admissions by the arresting officer. The court then noted that the only question before it was whether the official nature of the communication was sufficient reason for denying plaintiff the disclosure to which he would otherwise be entitled.

[\*26b] Held inadmissible

The courts in the following cases held that police "incident" or "arrest" reports were inadmissible under the business records exception to the hearsay rule under the circumstances presented.

In *People v. Bazzaure*, 235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (3d Dist. 1965), an appeal from the defendant's conviction of the murder of a prison guard, the court upheld the lower tribunal's order sustaining of the prosecution's objection to the admission, pursuant to the Uniform Business Records as Evidence Act (*Cal. Civ. Proc. Code § 1953e*), into evidence of an "incident" report prepared by an officer. In so ruling, the court stated that the purpose of the offer of this evidence was to impeach certain witnesses of the prosecution, and that it was not stated to the court who the witnesses were nor what statements the report would have impeached. The court added that the relevancy of the report was not pointed out, except as it might have been guessed by the subsequent questioning of the officer who made it. The court also noted that it appeared elsewhere in the record that the report in question was not written until 30 days after the stabbing death of the prison guard.

An incident report should not have been admitted pursuant to the business records exception in a defendant's murder prosecution, the court held in *State v. Milner*, 206 Conn. 512, 539 A.2d 80 (1988), habeas corpus denied, 1998 WL 851441 (Conn. Super. Ct. 1998), judgment aff'd on other grounds, 63 Conn. App. 726, 779 A.2d 156 (2001), but the admission of the report, given the particular circumstances presented, was non-prejudicial. The defendant was convicted in the lower tribunal of murder, the defendant appealed, and the court, on review, affirmed. The defendant argued that the lower tribunal erred in admitting a portion of a detective's incident report indicating that a caller had heard a woman yelling "Help me, Robert, help me," because the state failed to demonstrate that the caller had a business duty to report the information to the police, the court remarked. The court agreed with the argument of the state, which conceded that the lower tribunal erred in admitting that portion of the detective's report, that the defendant failed to demonstrate that the lower tribunal's error resulted in any prejudice, as a result of which he failed to provide any ground for reversing his conviction. To be admissible under the business record exception of *Conn. Gen. Stat. Ann. § 52-180*, the court commented, the business record must be one based upon the entrant's own observations or upon information transmitted to the entrant by an observer whose business duty it was to transmit it to him. Statements obtained from volunteers are not admissible though included in a business record because it is the duty to report in a business context that provides the reliability to justify this hearsay exception, and information in a business record obtained from a person with no duty to report is admissible only if it falls within another hearsay exception, the court related. Given the particular circumstances presented in the instant case, the court pointed out, the lower tribunal erred in admitting the hearsay statements contained in the subject report because the identity of the caller was unknown, thus preventing a determination as to whether it was the caller's business duty to report such information. Where, however, an evidentiary ruling has been found to be erroneous but the error does not implicate a constitutional right of the defendant, the burden rests upon the defendant to establish the harmfulness of the error, the court indicated. Here, the court noted, the inferences that could be drawn from the report were numerous, particularly in light of the various accounts of what the victim allegedly screamed at five o'clock that morning. The detective's report, which the defendant had admitted as an exhibit, indicated that an anonymous male caller heard a woman scream "Robert, no, no, Robert, no no," the detective also testified that other phone calls were received from people who stated they heard the victim scream "no, robber, no, robber," and numerous other witnesses testified they heard screams only and no specific words. Thus, the court reasoned, the erroneous admission of the detective's one-page incident report was harmless error.

According to the court in *State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962), a physician's report as to the sobriety of the defendant in a drunkenness prosecution, which report was made part of a police report regarding the defendant's arrest, was inadmissible under the "business entry" statute (*Conn. Gen. Stat. Ann. § 52-180*) to show the guilt of the accused. The evidence indicated that the examining physician had filled out the report and signed it, and it was then returned to the police department by the attending officer. While noting that police reports may be introduced in evidence if they are made in the regular course of police business, if it is the regular course of business to make them, and if the report is made at or near the time of the act, transaction, or event, the court nevertheless noted that statements of volunteers and of those outside the police department, who are under no duty to make observations or record them as members of the police organization, even though such statements are made part of the police records or reports, are treated as hearsay, and do not come under the exception provided by the statute. The court noted that there was no evidence that the physician in question was a member of the police department or under any duty to the department to make the report that was admitted in evidence, and that the fact that his observations and opinions were expressed on a mimeographed form of the police department did not make it a record or report of that department. Holding that the trial court erred in admitting the report into evidence, the court concluded that the record was no more and no less than a statement of the physician's own observations and opinions, made in the course of his own medical practice, and added that even if the report had been offered as a medical record made by the physician, there was no evidence under which it would have qualified as such under the statute or any other pertinent exceptions to the hearsay rule.

In *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), on remand to, 251 Ga. App. 80, 553 S.E.2d 386 (2001), the court held that the narrative portion of a police incident report would not be admissible under the business records hearsay

exception (*Ga. Code Ann. § 24-3-14*) in the defendant's criminal prosecution. The defendant was convicted in the lower tribunal of possession of cocaine with intent to distribute, the intermediate appellate tribunal affirmed, and the state supreme court, on review of the defendant's appeal, reversed. While the narrative portion of a police report may meet the technical requirements of the statute, it does not have the reliability inherent in other documents that courts have traditionally considered to be business records, such that the narratives contained in police reports generated in connection with police investigations are not the appropriate subject of an exception to the hearsay rule, the court instructed. The court determined that the evidence contained in the subject police report narrative were not facts that should properly be admitted under the business records exception to the hearsay rule, the court adding that the lower tribunal erred when it allowed a police officer to read into evidence the narrative portion of a police report of which he had no personal knowledge and did not prepare, and the Court of Appeals erred in affirming that ruling. The court reasoned that were it to conclude that the police report narrative in the subject case were admissible, serious public policy implications would result. That is, the court related, an alteration in the administration of the system of criminal prosecutions might result. Since almost all prosecutions are based on incidents in which witness statements are taken and those, along with police officers' statements, are made part of some police agency's reporting system, it is reasonable to expect that in the future it might be the rare case in which the witnesses actually come to court and testify, the court continued. Such a practice would run afoul of the accused's rights to confrontation mandated under the federal constitution, the court elaborated, the court pointing out that out-of-court statements that fall within a firmly rooted hearsay exception are deemed to satisfy the constitutional requirement of reliability usually provided by a witness's oath-taking and subjection to cross-examination because such an exception is the result of judicial and legislative experience assessing the trustworthiness of that type of out-of-court statement. Reasoning thusly, the court concluded that the intermediate appellate tribunal erred in upholding the lower tribunal's ruling permitting the officer's reading of the police report narrative into evidence for purposes of demonstrating a similar transaction and in considering the similar transaction in determining the sufficiency of the evidence supporting the appellant's conviction.

The court in *Cranwill v. Donahue*, 132 Ill. App. 3d 873, 87 Ill. Dec. 883, 478 N.E.2d 22 (3d Dist. 1985), held that a deputy sheriff's arrest report was not admissible as a business record, such that admitting the report at the time of trial was reversible error. The plaintiff was arrested by two police officers and charged with driving under the influence of alcohol; the plaintiff was taken to the sheriff's office and given two Breathalyzer tests, which he passed, though the sheriff's department nonetheless issued an arrest citation and the plaintiff had to post bond. After remand, the lower tribunal entered judgment on a jury verdict in favor of the sheriff and deputy in the plaintiff arrestee's action alleging false arrest, false imprisonment, and other claims, and the plaintiff appealed; the court, on review, held that the deputy sheriff's arrest report was inadmissible on hearsay grounds, and the error in admitting the report, which found its way into jury room, was prejudicial. Illinois courts have generally held that a police report is not admissible in corroboration of a witness' testimony, and that the mere attempt to introduce such an exhibit may be considered reversible error, the theory behind this line of cases being that police reports are in the nature of hearsay or state conclusions, the court noted at the outset. Not all errors committed at trial, however, constitute grounds for reversal, the court continued, for only those errors that are prejudicial to the rights of the complaining party are reversible. In the present case, the defendants' first brought up the existence of the arrest report in their opening statement, and they next brought the police report to light during the examination of a sheriff, who the plaintiff had called as an adverse witness, the court observed. Subsequently, during their case-in-chief, the defendants were successful in placing the police report in evidence as a business record, but the lower tribunal reversed itself and disallowed admittance of the report, the court elaborated. The plaintiff raised objections throughout the trial concerning the defendants' use of the report and many of the arguments made by the adverse parties concerning the report were made in the presence of the jury, and these circumstances, coupled with the undisputed fact that the police report found its way into the jury room, were enough to show prejudice to the plaintiff's case-in-chief, the court stressed.

A police incident report, which indicated that an unidentified individual approached a police officer with details regarding the victim's death as possibly related to another murder committed by someone else, was inadmissible under the business records exception to the hearsay rule, Ky. Rules of Evidence, Rule 803(6), particularly since statements reflected in the report did not qualify for admission under any other recognized exception to the hearsay rule, the court

held in *Manning v. Com.*, 23 S.W.3d 610 (Ky. 2000), reh'g denied, (Aug. 24, 2000). The defendant was convicted in the lower tribunal of first-degree manslaughter, and the court, on review of the defendant's appeal, affirmed. In so ruling, the court rejected the defendant's argument that the lower tribunal erred by denying admission of an officer's police report that contained information regarding a female who approached the officer regarding the victim's death, the court pointing out that the defendant's defense was that the death of the victim was related to the death of a third party, who was murdered the next day, such that the defendant sought access to the police report, as well as the investigative file on an individual who had entered a guilty plea to the murder of the third party. This report, the court related, was not admissible under the business records exception to the hearsay rule, the court observing that the code provision allows for the possibility that police reports might be admissible under the business records exception. However, the court continued, if a report is admissible pursuant to Ky. Rules of Evidence, Rule 803(6), then all parts of the report must be admissible under some hearsay exception. If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business record, the court indicated, and hearsay within hearsay is inadmissible unless each part of the combined statements conforms with a recognized exception to the hearsay rule, the court declared. Consequently, anything in the police report regarding what an unidentified female may have told the officer, or what anyone else may have said, would be inadmissible, as these statements did not qualify for admission under any other hearsay exception, the court stated, and the defendant was not prejudiced by the lower tribunal's ruling since the bulk of the report was inadmissible.

The court in *State v. Gremillion*, 542 So. 2d 1074 (La. 1989), reh'g denied, (June 2, 1989), held, without detailed discussion, in a case in which the defendant was convicted of manslaughter, that a victim's statement to the police that three men had attacked him was not admissible under the business records exception to the hearsay rule at the time of trial, despite the fact that the statement had been recorded by the deputy in the course of his employment as a police officer.

A police incident report prepared by one police officer that included statements made to him by another police officer regarding fingerprints that had been lifted at the scene of a robbery was inadmissible in evidence under the business records exception to the hearsay rule (Mass. Gen. Laws Ann. ch. 278, §§ 33A to 33G), the court held in *Com. v. Alves*, 6 Mass. App. Ct. 572, 380 N.E.2d 701 (1978). The court, affirming the defendant's conviction of armed robbery, rejected the defendant's assignment as error the trial judge's exclusion at the time of trial a police report on the robbery in which were recorded certain statements that could be viewed as indicating that fingerprints, which were not identifiable as belonging to the defendant, had been lifted by another officer at the scene of the robbery. The defendant more specifically contended that the trial judge's exclusion of the report and the judge's limitation of counsel's questioning of the testifying officer with regard to the report prevented him from fully developing a potential defense based on mistaken identification, the court pointed out. However, the court explained, the portion of the report that the defendant sought to introduce appeared to have consisted of the testifying officer's extra-judicial recording of that which had been stated to him by the officer at the scene of the robbery, the court adding that the defendant's contention that this second-level hearsay was admissible under either the business records or the official written statements exception to the hearsay rule was erroneous.

The lower tribunal properly refused to allow a theft defendant to introduce as a business record a police report allegedly containing exculpatory statements made by the defendant to the witness, where the witness' statements to the reporting officer were inadmissible hearsay, the court held in *State v. Vance*, 633 S.W.2d 442 (Mo. Ct. App. W.D. 1982). The defendant was convicted of attempting to steal a parked refrigerator trailer unit by trying to hitch the unit to a tractor unit, and the court, on review of the defendant's appeal, affirmed. While qualification as a business record under *Mo. Ann. Stat. § 490.680* offsets the objection that the person who prepared the report is not present for cross-examination, the code provision does not make all records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered, the court noted at the outset. Qualification under the act does not make admissible any evidence that would be incompetent if offered in person, the court declared. If the content of the record could not have been testified to by the reporter had he or she been offered as a witness present in court, then that content will not be admitted into evidence as a part of a business record, the court indicated. Here, the court elaborated, the

report contained statements made by a witness to an officer based upon the witness's observations and, as such, was hearsay and not admissible under any exception to the hearsay rule. As the trial judge noted, the court stressed, if the officer had been present to testify, he could not have testified as to what the witness had told him. The court pointed out that the witness's statement failed to corroborate the defendant's assertion that he had an honest belief that he had a right to hook up the trailer, the court adding that evidence is relevant if it logically tends to prove or disprove a fact in issue or to corroborate evidence that itself is relevant and bears on the principal issue. Here, the court noted, the witness's statement would corroborate the defendant's testimony that a certain vehicle was present at the scene on the night of the offense, but did not support the defendant's claim that he was deceived by the vehicle's owner into believing that the vehicle owner owned the trailer.

The trial court properly refused to admit two highway patrol incident reports as business records in a prosecution for assault, where the documents were apparently prepared by state highway patrol personnel and sent to a sheriff's office, although a deputy sheriff was not able to testify as to, inter alia, the mode of preparation of documents, the court held in *State v. Luleff*, 781 S.W.2d 199 (Mo. Ct. App. E.D. 1989). The defendant was convicted of second-degree assault and armed criminal action by the lower tribunal, and the court, on review of the defendant's appeal, affirmed. The defendant contended that the lower tribunal erred in refusing to admit the contested exhibits as business records of the county sheriff's office pursuant to *Mo. Ann. Stat. § 490.680*. In order to qualify under the contested code provision, the court instructed, a custodian or other qualified witness must testify to the record's identity, the mode of its preparation, and the fact that it was made in the regular course of business, at or near the time of the act, condition, or event. Here, the court continued, the defendant attempted to qualify the exhibits through the testimony of a deputy sheriff, rather than a custodian or other qualified witness from the patrol, but the deputy was not able to testify as to the mode of preparation of the exhibits, or that they were made in the regular course of business, at or near the time shown on the exhibits. Absent such a showing, the lower tribunal did not err or abuse its discretion in refusing to admit the exhibits, the court concluded.

The court in *Miranda v. State*, 101 Nev. 562, 707 P.2d 1121 (1985), held that an incident report containing a witness's statement would not be admissible at the time of the defendant's criminal trial. The defendant was convicted of first-degree murder with use of a deadly weapon, robbery with use of a deadly weapon, and grand larceny, and the court, on review of the defendant's appeal, affirmed. At trial and again on appeal, the defendant asserted that the lower tribunal should have admitted the transcribed statements under the "business records" exception to the hearsay rule contained in *Nev. Rev. Stat. § 51.135(1)*, the court pointed out. The business records exception to the hearsay rule generally permits a party to introduce into evidence reports made during the regularly conducted course of business, such that the police report itself, which was made when the witness gave his statement to police, would have been admissible as substantive evidence to demonstrate such things as the date on which the report was made or the fact that the statement was actually taken, the court declared. However, the court continued, the business records exception does not itself permit a party to introduce into evidence the actual contents of an out-of-court statement given to police by a witness to a crime concerning the events of the crime itself. Any statement given by a witness to a police officer is itself hearsay and must itself be independently admissible under a separate and distinct exception to the hearsay rule, the court indicated.

\*\*\*\* Comment:

The court stressed that although the defendant failed to make this argument either at trial or in his briefs on appeal, to the extent that the defendant's out-of-court statements to the police were inconsistent with his trial testimony, they were independently admissible as substantive evidence under *Nev. Rev. Stat. § 51.135(1)*, the statutory exception to the hearsay rule that permits the introduction of prior inconsistent statements made by a testifying witness. Accordingly, the lower tribunal should have admitted any transcribed statements made by the witness that were inconsistent with his trial testimony, the court pointed out, but the defendant was not prejudiced by this error. That is, the court explained, the prior inconsistent statements given by the witness would not have served to exculpate the defendant, but instead, the inconsistencies in question pertained primarily to the sequence of events surrounding the commission of the offense,

such that, at best, the defendant might have used the inconsistent statements to impeach the witness's overall credibility as a witness. The defendant, however, the court explained, was given a full opportunity to accomplish this at his trial, when the lower tribunal permitted him to extensively cross-examine the witness concerning his prior inconsistent statements.

In *State v. Morrell*, 803 P.2d 292 (Utah Ct. App. 1990), the court, without detailed discussion, held that a police incident report referred to by a police officer in a criminal defendant's robbery prosecution was not admissible pursuant to the business records exception (Utah Rules. Of Evid. 803(6)), the court adding that police reports are not eligible for admission under the rule except in certain limited circumstances not applicable in the instant case.

According to the court in *Hooker v. Com.*, 14 Va. App. 454, 418 S.E.2d 343 (1992), an incident report would not be admissible as a business record in the defendant's prosecution for petit larceny. Appealing from a conviction for a third offense of petit larceny, the defendant asserted that certain testimony should not have been admitted because it was hearsay, while the commonwealth asserted that the testimony was admissible under the business records exception to the hearsay rule, but that if it was not admissible, its admission was harmless. The court, concluding that a proper foundation for the admission of the testimony was not laid and that although part of the testimony was harmless, the remainder of it was not harmless, reversed. The subject offense arose from the theft of merchandise, and three employees of a store testified that they saw the defendant take merchandise from the store without paying for it, the court pointed out, and, in addition, copies of two judgments of conviction, establishing that a person named James Lee Hooker had previously been convicted of petit larceny, were introduced into evidence. The commonwealth attempted, through a detective's testimony, to link the instant defendant with the James Lee Hooker previously convicted of petit larceny, the court observed, the court commenting that the detective, who had investigated the incident, testified that the name of the person who had stolen the merchandise had been given to him by the store's security guard and that the name on the police report was given as a "James Lee Hooker." The detective also testified that he used this name to search the police department's computer database and retrieve information indicating that a person named James Lee Hooker previously had been convicted of two prior offenses of petit larceny. The business records exception allows introduction into evidence of regular business entries of persons, other than the parties, where the entrant is unavailable to testify at trial and where the trustworthiness of the entries are established by showing the regularity of preparation of the records and the fact that they are relied upon in the transaction of business by those for whom they are kept, the court instructed. In the instant case, the court continued, no foundation was laid for admitting either the incident report or the computer information under the business records exception to the hearsay rule, for no evidence of the regularity of the preparation of the report or the computer data was presented. No evidence showed the extent to which either was relied upon in the transaction of business by those for whom these records were kept. Without a proper foundation for their admissibility, neither the report nor the computer information was admissible into evidence as an exception to the hearsay rule, the court determined.

[\*27] Speedometer, Breathalyzer, and other test reports

[\*27a] Held admissible

The courts in the following cases held that police test reports of the accuracy of police car speedometers, and police-operated Breathalyzer machines, and other tests, would be admissible as evidence under the business records exception to the hearsay rule.

According to the court in *McLaughlin v. City of Homewood*, 548 So. 2d 580 (Ala. Crim. App. 1988), a driving under the influence prosecution, a police report containing results of a driver's blood alcohol test would be admissible pursuant to the business records exception to the hearsay rule. The defendant appealed his municipal court conviction for driving under the influence of alcohol, the lower tribunal affirmed, and the court, on review of the defendant's appeal, affirmed. In so ruling, the court rejected the defendant's argument that the prosecutor failed to prove the proper predicate for the results of his blood alcohol test, the defendant specifically asserting that a log, which contained information concerning

the inspection of the machine by a sergeant of the State Troopers office and also contained the defendant's test results, was improperly admitted into evidence under the business records exception to the hearsay rule. The court pointed out that during the testimony of an officer of the police department, the officer responded that the log was kept in the ordinary course of business of the police department, and that he was one of the custodians of the log. The defendant argued that because the officer was not the sole custodian of this log, the police report containing the laboratory results was not properly admitted under the business records exception to the hearsay rule, the court elaborated. There is no requirement that every custodian of the log must testify before it can be admitted into evidence, the court concluded.

The record of a police car speedometer calibration test was admissible in the defendant's speeding prosecution as a "business record," the court held in *People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980). The defendant was charged with speeding, and a police officer testified that the posted speed limit was 30 miles per hour and that the speedometer on his patrol car read 48 miles per hour as he followed the defendant at a uniform distance and speed. A comparison of the speedometer reading with the calibration card for the patrol car showed that the speed of the patrol car actually was 46 miles per hour. At the time of trial, a parking control officer testified that he saw a mechanic take calibration readings for the patrol car and note them on a calibration card, he signed the card and gave it to the officer, who countersigned, and that the officer kept the original card in a locked filing cabinet and put a copy in the patrol car. Based upon the control officer's testimony, the city offered in evidence the record of the calibration test to prove the accuracy of the police officer's determination of the defendant's speed. The defendant objected, arguing that the admission of the record was hearsay, and as such, it should be excluded from evidence because of the lack of opportunity for the defendant to test, by cross-examination, the accuracy of the calibration test. The objection was overruled by the municipal court, but the district court held that the test was not admissible under either the business records exception or the official governmental records exception to the hearsay rule. The city argued that the record was admissible under the business records exceptions to the hearsay rule. The business records exception, Colo. Crim. P. 26.2, the court pointed out, provides that any writing or record, if made in the regular course of any business, may be admissible, even if it would ordinarily be excluded as hearsay in a criminal case. While it is true, the court indicated, that police records are held inadmissible for failure to comply with the business records exception because the records are "accident reports," calibration tests are performed routinely by police departments. There is no dispute here that the tests were performed in the ordinary course of business, for their primary use is in speeding prosecutions to validate the police officer's speedometer and support his or her testimony, but the records of the speedometer calibrations are not prepared and kept for the purpose of proving in court that any particular defendant was speeding, the court remarked.

See *Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by, *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001)), where the court held that the state laid the proper foundation for certificates of inspection of a breath-testing machine, such that the certificates were admissible as business records. The defendant was convicted in the lower tribunal of driving under the influence of alcohol to the extent that it is less safe to drive and driving with an alcohol concentration of 0.10 grams or more, and the court, on review of the defendant's appeal, affirmed. The court rejected the defendant's argument that the admission of the certificates violated his rights under the confrontation clause. The court pointed out that not only had the certificates been prepared in the regular course of business ( § 5), but a testifying witness was familiar with the methods by which such records are kept. Moreover, the court remarked, the certificates of inspection were prepared on the dates the inspections were conducted, such that the defendant's argument that the state did not lay a proper foundation for admission of the certificates as business records pursuant to *Ga. Code Ann. § 24-3-14* was unpersuasive.

The court in *State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972), a prosecution for speeding in which the question was raised as to the admissibility in evidence under the hearsay rule of a speed-test card certifying the accuracy of the speedometer of the police vehicle that was used to clock the defendant's speed, after noting that the defendant at trial failed to adduce evidence bringing into issue the accuracy of the speedometer of the arresting officer's vehicle, and that the defendant further failed to question the date of the speed-test card or the frequency of the speed tests of the speedometer in question, pointed out that the problem of offering into evidence the speed-test card could be readily resolved by the reasoning that since regular tests are made and the records of those tests kept by the city and county, or

the police department, the card could be introduced as an ordinary business entry of evidence of such record indicating the routine testing of speedometers.

A police report of a chemical analysis performed by a state chemist was admissible in a prosecution for delivery of cocaine under the business records exception to the rule against hearsay (S.H.A. ch. 38, § 115-5(a)), the court held in *People v. Tsombanidis*, 235 Ill. App. 3d 823, 176 Ill. Dec. 426, 601 N.E.2d 1124 (1st Dist. 1992). The defendant was convicted of delivering more than 30 grams of a controlled substance, and the court, on review of the defendant's appeal, affirmed. In so ruling, the court rejected the defendant's assertion that the lower tribunal should have excluded a Drug Enforcement Agency (DEA) form that contained the chemical analysis of the drug evidence and another form that authorized the destruction of the drug evidence, since the forms constituted hearsay evidence. The business records exception to the rule against hearsay is premised on the recognition that records of an act, occurrence, or event that are routinely made at the time of the occurrence, or within a reasonable time thereafter, are normally sufficiently reliable to be admissible in evidence despite their hearsay character, and the credibility of a business record depends on the regular, prompt, and systematic nature of the entry and the fact that it is relied on in the operation of the business, the court remarked. Since the rationale of the business records exception is the probability of trustworthiness, records prepared for litigation, or during an investigation of an alleged offense, are not normally admissible, even if it is part of the regular course of business to make such records, the court stated, and this includes police reports. However, the court indicated the two DEA forms were admissible under the business records exception to the rule against hearsay, for one form contained the report of the chemical analysis performed by a DEA chemist, the court reasoning that DEA chemical analysis reports are sufficiently trustworthy and have sufficient indicia of reliability to fall within the exception. The other form, the court related, authorized the destruction of the drug evidence, and an agent testified that he completed the form pursuant to regular office practice. The nature of that form was clearly administrative, and was not prepared during an investigation of an alleged offense or during an investigation relating to pending or anticipated litigation, as a result of which it was admissible under the business records exception to the rule against hearsay, the court concluded.

In *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972), an appeal from a conviction for second-degree burglary, the court held that the lower tribunal did not abuse its discretion by admitting into evidence, as a business record, a police laboratory report prepared by the chief criminologist, which report dealt with a microscopic examination of the defendant's clothing. The court noted that the specific objection to the evidence was that the report was not sufficiently identified as a business record, and further noted that the trial court refused to admit the whole report in evidence, permitting only portions of it to be read in evidence. The court felt that the purpose of the Uniform Business Records as Evidence Law, as enacted in Missouri (*Mo. Ann. Stat. § 490.690*), was to enlarge the operation of the common-law rule providing for the admission of business records as an exception to the hearsay rule, and that in order for a record to qualify there must be a preliminary showing of the identity of the record, and the mode and time of its preparation, and that it was made in the regular course of business. In upholding the admissibility of certain portions of the report, the court expressed the view that a trial court must of necessity have a reasonable discretion in its determination of whether the statutory requirements for the admissibility of evidence as a business entry have been met.

The court in *State v. McGeary*, 129 N.J. Super. 219, 322 A.2d 830, 77 A.L.R.3d 106 (App. Div. 1974), held that a certificate of inspection indicating that a Breathalyzer machine was in good operating condition would be admissible as a business record in a prosecution for driving while under the influence of intoxicating liquor, where it appeared that the inspection and testing of the Breathalyzer instrument, and the filling out of the certificate, were performed by a member of the New Jersey state police pursuant to his official duties. The court observed that under the New Jersey court rule that makes business records admissible to prove the facts stated therein under certain circumstances, the term "business" includes "every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not," and that it is clear that police reports with certain qualifications are admissible thereunder as an exception to the hearsay rule. The court reasoned that the inspecting police officer would appear to have little reason to violate his duty and certify that an instrument had been inspected and found to be in good operating order when in truth and in fact it had not been so found, there being little likelihood of and absolutely no reason for the

fabrication of the inspection certificate, no purpose being served thereby. The court observed that it is not only important to and in the interests of the police department that a Breathalyzer is functioning properly, but is also in the interests of a defendant and all the citizens of the state. The court thus felt that there were compelling reasons for the inspecting officer to properly and honestly perform his duty in inspecting the instrument and recording the results of the inspection on the certificate. The court emphasized that the fact certified to by the inspecting officer here was within his personal knowledge, and distinguished the present situation from one in which, for example, an opinion was stated by a police officer in a police report as to the cause of an automobile accident. The court felt that in the latter instance the opinion would not be admissible as part of a business record. Accordingly, the court concluded that strong and convincing indicia of trustworthiness existed for the admission of the inspection certificate as business record exception to the hearsay rule.<sup>n21</sup>

According to the court in *State v. Weller*, 225 N.J. Super. 274, 542 A.2d 55 (Law Div. 1986), a blood-alcohol test would be admissible in a drunk driving accident case pursuant to the business records exception to the hearsay rule (N.J. Evid. R. 63(13)). The defendant was convicted of driving under the influence of alcohol, the intermediate appellate tribunal reversed, the state supreme court remanded the matter, and the court held that a contested laboratory police report would be admissible at the time of trial. The conditions under which the laboratory report might be admitted into evidence pursuant to N.J. Evid. R. 63(13), as a hearsay exception, are threefold, the court indicated: the report must be made in the regular course of business; it must be prepared within a short time of the test performed; and the source of information from which it was made and the method and circumstances of its preparation must be such as to justify its admission. The court observed that while it was clear that the first two requirements had been satisfied, the third factor, related to the method and circumstances of the document's preparation, needed further analysis. Here, the court indicated, the subject test, the headspace gas chromatography test, is a "classic objective test" that requires virtually no subjective analysis by the examiner. Moreover, the court stated, the evidence indicated that approximately 1,200 tests were performed in a six-month period, and the same routine is followed in each analysis, factors indicating that the analysis is performed with great regularity, under procedure guidelines that the examiner is required to follow. Additionally, the court indicated, the defendant did not suggest any persuasive reason why the one performing the analysis would have a motive to single out a specific analysis for the purpose of rendering an untrustworthy report, the court adding that each forensic chemist is subject to having his or her work periodically checked by a unit supervisor, such that there is an incentive to make an accurate and reliable analysis. Given the particular circumstances presented, the court held, the state clearly demonstrated the reliability of the blood test results when they are obtained as a result of the procedure present here, the court declared. Reasoning thusly, the court concluded that the laboratory test was admissible as a business record pursuant to N.J. Evid. R. 63(13).

In *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970), the court, apparently in dictum, held that the trial court did not err, in a prosecution for speeding, in allowing the prosecution to place in evidence a speedometer deviation record to prove the reliability of the speedometer that was used to clock the speed of the defendant's car. The court stated that although such a record is considered hearsay, it is admissible under the business entry exception to the hearsay rule that provides that any writing or record, as a memorandum or record of any occurrence or event, shall be admissible in evidence as proof of that occurrence or event, if the court finds that it was made in the regular course of any business and that it was the regular course of such business to make it. The court thus concluded that if the officer who made the deviation record could testify that it was made in the ordinary course of police business of maintaining highway safety, and that it was the regular course of police business to make such a record, then the record would be admissible. The court rejected the defendant's contention that a speedometer deviation record made by a police department inspector should not be allowed in evidence because the record had been made with the primary purpose of being used as proof in court, the court stating that while it is true that such records may later be used in litigation, such was not the sole purpose when they were made, and therefore they should not be excluded merely because this was a possible future use. The court added that had a proper foundation been laid for admission of the speedometer deviation record as a business entry, it should have been received in evidence even if proper objection had been taken at trial.

The court in *Matter of Ronald B.*, 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dep't 1978), held that a police ballistics report

could be admitted in the defendant's delinquency matter under the business records exception to the hearsay rule *N.Y. C.P.L.R. 4518(a)*. A 14-year-old student was determined to be a juvenile delinquent by the family court, and the court, on review of the defendant juvenile's appeal, affirmed. The evidence presented indicated that the defendant, while at school, was confronted by a school official regarding his purported possession of a pistol. Another official arrived at the scene and the weapon was ultimately taken from the juvenile; a ballistics test revealed that the gun was operable. On appeal, the defendant argued that a ballistics report could not be admitted under the business records exception to the hearsay rule and that, therefore, the person who prepared the report would be required to testify. The court held that the exception to the hearsay rule, set forth in *N.Y. C.P.L.R. 4518(a)*, provides that any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible in evidence in proof of that act, transaction, occurrence, or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter. The defendant did not question the reliability of the ballistics report, but asserted that the test was specifically made for the purpose of litigation and thus did not fall within the business records exception, the court pointed out. However, the court stressed, a ballistics report does further the business of the police department, and it is not prepared solely for litigation, but is a routine test conducted on almost all of the guns confiscated by the police and may, in fact, defeat litigation if the gun is found to be inoperable, the court observing that it is a simple test that can be performed by any police officer and consists mainly of pulling the trigger. The court noted that various reports, involving tests more complicated than a ballistics test, have been held admissible as an exception under the business records rule, including autopsy reports prepared by a medical examiner to determine cause of death. Ballistic evidence, among a variety of kindred scientific methods, is freely accepted in the courts for their general reliability, without the necessity of offering expert testimony as to the scientific principles underlying them, the court concluded.

See *State v. Walker*, 53 Ohio St. 2d 192, 7 Ohio Op. 3d 368, 374 N.E.2d 132 (1978), where the court held that a log book maintained by the police related to the maintenance of a Breathalyzer machine, if not admissible as a business record in the defendant's criminal prosecution, would be admissible as an "official record." The defendant was convicted of operating a motor vehicle while under the influence of alcohol and he appealed; the court, on review, affirmed. The court rejected the defendant's assertion that two pages from a permanent police log book maintained by the police department in accordance with regulations promulgated by the Director of Health relating to calibration tests performed by police officers on breath analysis machines was inadmissible in evidence as an exception to the hearsay rule. The court acknowledged that the Business Records as Evidence Act (Ohio Rev. Code. Ann. 2317.40), which allows the admission into evidence of records without substantiation by the person who actually performed the acts that resulted in such record, is not applicable to criminal proceedings so as to allow the admission into evidence under such act of, for example, hospital records showing the results of a physical examination of an alleged rape victim. The court, however, rejected the defendant's argument that the right of confrontation includes the right of cross-examination of the person who is the actual witness against him, and, if applicable in a criminal case, the business records as evidence act denies the criminal defendant such right. That is, the court declared, there is no general rule proscribing the introduction in evidence of all documents that may qualify as a business record. The court held though, that the documentary evidence under inquiry would be admissible under the Official Reports as Evidence Act pursuant to Ohio Rev. Code. Ann. 2317.42, for the document was sufficiently reliable to warrant its admissibility in evidence despite the fact that the declarant is not present at trial.

In *Waldo v. State*, 705 S.W.2d 381 (Tex. App. San Antonio 1986), petition for discretionary review granted, (Apr. 29, 1987) and judgment aff'd on other grounds, 746 S.W.2d 750 (Tex. Crim. App. 1988), a murder prosecution, the court held that the lower tribunal properly admitted two laboratory reports containing blood analysis and comparison tests between the blood of the victim and the blood found on the accused after the arrest, pursuant to the business records exception to the hearsay rule (Tex. Rev. Civ. Stat. Ann. art. 3737e). The defendant was convicted of murder, and the court, on review of the defendant's appeal, affirmed. In so ruling, the court rejected the defendant's argument that the admission into evidence of the two laboratory reports containing blood analysis and comparison tests was in error. The serologist who prepared the reports was not available, the court continued, but the predicate was testified to by the

supervisor of the crime laboratory of the City of San Antonio. This individual, the court remarked, testified that the laboratory reports were made in the normal course of business for the laboratory, that they were made by an individual who worked under his supervision and who had personal knowledge of the event, that the record was made at or near the time of the event, and that he was the custodian of records. Rejecting the defendant's additional argument that he was deprived of the right of confrontation and cross-examination of the witness who prepared the exhibits, the court stressed that there was no testimony that the exhibits were prepared solely for the defendant's criminal prosecution rather than in the course of business of the crime laboratory. That is, the court concluded, the exhibits bore sufficient indicia of reliability and trustworthiness as to accord the same protection provided by the constitutional rights of confrontation.

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Police officer's testimony that radio shop issues certificate of testing and accuracy of laser-based speed-measuring device "for purposes like today," i.e., court proceedings, and that people who prepared certificate knew they were regularly brought into court, did not indicate that certificate was prepared "solely for litigation purposes," so as to exceed scope of business records exception to rule against hearsay, in trial for speeding; certification document was prepared in regular course of police department's business to ensure that laser was accurately measuring speed and meeting manufacturer's specifications for the output and detection circuits. M.S.A. § 169.14, subd 10(b); 50 M.S.A., Rules of Evid., Rule 803(6). *State v. Ali*, 679 N.W.2d 359 (Minn. Ct. App. 2004).

[\*27b] Held inadmissible

The courts in the following cases held that police reports containing test results of the accuracy of a police vehicle speedometer, or a police-operated Breathalyzer machine, or other tests, would not be admissible in evidence under the business records exception to the hearsay rule.

A testing certificate related to an alcohol breath test given a motorist would not be admissible under the business records exception to the hearsay rule, the court held in *Mullinax v. State*, 231 Ga. App. 534, 499 S.E.2d 903 (1998). The defendant was convicted of driving under the influence, and the court, on review of the defendant's appeal, reversed. The defendant, on appeal, enumerated as error the lower tribunal's admission the testing certificates for the Intoxilyzer 5000 without requiring the proper foundation pursuant to the business records exception to the hearsay rule (*Ga. Code Ann. § 24-3-14*). Breath-testing device certificates, the court remarked, are records made within the regular course of the business within the meaning of the code provision and may, upon the proper foundation being laid, be introduced into evidence under the business record exception to the hearsay rule. The court pointed out that (*Ga. Code Ann. § 24-3-14*) provides that any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence in proof of the act, if the trial judge shall find that it was made in the regular course of any business and that it was the regular course of such business to make the memorandum or record at the time of the act, or within a reasonable time thereafter. Here, the court stated, a police officer testified that he was familiar with the actual book in which the records were maintained, where the book was maintained, and that it contained documents prepared by the trooper whose job it was to maintain and calibrate the Intoxilyzer 5000 machines, the court adding that the officer also testified that he did not know if the documents were made contemporaneously with the testing, and that he further agreed that the extent of his knowledge regarding the certificates was that he knew where they were kept and that he had seen them at different points in time. Here, the court noted, the police officer was unable to provide additional information satisfying the foundational requirements of (*Ga. Code Ann. § 24-3-14*), as a result of which the lower tribunal erroneously admitted the results of the criminal defendant's breath test, such that his "per se" driving under the influence conviction would necessarily be reversed.

According to the court in *State v. Matulewicz*, 101 N.J. 27, 499 A.2d 1363 (1985), a state police chemist's laboratory regarding the identification of a controlled dangerous substance would not be admissible as a business record. In the

defendant's prosecution for marijuana possession, the lower tribunal determined that a state police chemist's laboratory report identifying a controlled dangerous substance as marijuana was admissible in evidence, and the defendant appealed; the intermediate appellate tribunal, on review, reversed and remanded, and the state supreme court, on review of the state's petition for certiorari, held that the admissibility of the state police chemist's report must be informed by an evidential record addressing all relevant factors. The issue raised by the defendant, the court indicated, focused upon whether the laboratory report could be admitted as a business record pursuant to the hearsay exception in N.J. Evid. R. 63(13). Although it is apparent that the "business entry" hearsay exception delineated in the code provision carries the potential of broad application, parameters do exist to restrict its scope, the court noted at the outset. That is, the court instructed, the statute posits three preliminary conditions to the admissibility of evidence pursuant to this hearsay exception: the writing must be made in the regular course of business; it must be prepared within a short time of the act, condition, or event being described; and the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. The court stressed that in the instant case, it was the latter prerequisite that caused some concern, the court adding that the Uniform Business Records as Evidence Act, (*N.J. Stat. Ann. 2A:82-34*), which incorporated language similar to that found in N.J. Evid. R. 63(13), was founded upon the theory that records that are properly shown to have been kept as required normally possess a circumstantial probability of trustworthiness, and therefore ought to be received in evidence. The factual record here, the court continued, was devoid of evidence that would elucidate the "method and circumstances" involved in the preparation of the forensic chemist's laboratory report. The court stressed that the admissibility of the state police chemist's report must be informed by an evidential record that addresses all relevant factors, as a result of which the case would be remanded for retrial, the court concluding that in the event the case proceeded to trial and the state sought to introduce the chemist's report into evidence as a business record, it would then become necessary for the state to develop a factual record to establish the availability of the hearsay exception.

The court in *State v. Conners*, 129 N.J. Super. 476, 324 A.2d 85 (*App. Div. 1974*), an appeal from a conviction for driving while under the influence of intoxicating liquor, affirmed the trial court's ruling that the inspection certificates for the Breathalyzer machine were inadmissible in evidence, on the ground that the record revealed that the state failed to authenticate the inspection certificates in any manner, and failed to lay any foundation qualifying the inspection certificates as business records under N.J. Evid. R. 63(13). The court noted, furthermore, that such inspection certificates are inadmissible as reports of a public official by virtue of N.J. Evid. R. 63(13), and added that it could not find that the trial judge abused his discretion in the instant case in excluding the inspection certificates, since it appeared that the intention of the state to offer them in evidence was not made known to the defendant in sufficient time to provide him with a fair opportunity to prepare to meet them.

In *People v. Crant*, 42 Misc. 2d 350, 248 N.Y.S.2d 310 (*City Ct. 1964*), a prosecution for violating a local speeding ordinance, the court held that a test card filled out and signed by a police officer, which card indicated the results of a calibration test performed on the speedometer against which defendant's speed had been measured, would not be admissible in evidence as a "shop-book" record, since it was apparent that the record was compiled for primary use as an exhibit in court proceedings. Stating the general rule that incompetent evidence does not become competent through its inclusion in a "shop-book" record, the court noted that the statutory "shop-book" rule was designed to permit incidental testimonial use of records that are made and kept primarily for non-testimonial purposes, rather than the other way around.

An examination sheet and report of an unavailable police chemist that stated that substance on a pipe seized from a criminal defendant was cocaine resin were matters observed by law enforcement personnel and, therefore, were not within the business records exceptions to the hearsay rule, the court held in *Davenport v. State*, 856 S.W.2d 578 (*Tex. App. Houston 1st Dist. 1993*). The defendant was convicted of possession of a controlled substance, and she appealed; the court, on review, reversed and remanded. The record indicated that a police officer arrived at a motel in response to numerous complaints of narcotics activity taking place at that location, and that the officer saw that the defendant standing outside one of the motel rooms, the court remarked. As the defendant stepped out of his car, the officer saw the defendant throw down a crack cocaine pipe and a push wire, the court continued, and, after the officer retrieved the

pipe, he arrested the defendant. At the defendant's bench trial, a supervisor in the police lab testified from a police chemist's report and examination sheet that the resin removed from the crack pipe tested positive for cocaine, and that the amount was determined to be approximately 40 milligrams of pure cocaine, the court indicated. This testimony and the examination sheet were admitted over repeated hearsay and confrontation objections by the defendant, and the examination sheet was admitted as a "business record" under Tex. R. Crim. Evid. 803(6). The chemist was on vacation out of the country at the time of the defendant's trial, the court elaborated, and the testifying officer did not participate in the preparation of the report or examination sheet. The court agreed with the defense argument that the lower tribunal erred in admitting the testimony of the officer as to the actions of the chemist, which the officer did not observe personally and about which she could only testify based on documents prepared by the chemist. The subject chemist's examination and the officer's testimony based on the chemist's reports were admitted as business records, the court pointed out, but, pursuant to *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990), reh'g on petition for discretionary review granted, (July 3, 1991) and decision clarified on reh'g, (Oct. 21, 1992), this section, the examination sheet and reports were not admissible as a business record, and because the chemist's reports were not admissible as business records, the officer's testimony from those reports was likewise inadmissible as a business record.

See *Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct. App. 1990), where the court held that an alcohol breath test was inadmissible under the business record exception (Utah Rules of Evid., Rule 803(6)) where the incident report containing the breath test was not routine, but instead completed due to one jailor's suspicion, the record lacked evidence that accepted testing procedures were used or that a qualified technician performed the test, the report was made with the intent to prosecute the defendant's probation violation, the custodian of records was not present in court, and the police lieutenant who tried to introduce the report lacked qualifications to lay its foundation.

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Department of law enforcement lab report introduced through records custodian, who supervised chemist who tested alleged contraband, who wrote report summarizing his findings, and who performed test to ascertain weight and character of alleged contraband, was inadmissible under business records exception to hearsay rule; report lacked indicia of reliability characteristic of hospital record cases as hospital tested patient's blood alcohol for benefit of patient's treatment, but State tested alleged drug samples to incriminate and convict accused. West's F.S.A. § 90.803(6). *Rivera v. State*, 917 So. 2d 210 (Fla. Dist. Ct. App. 5th Dist. 2005).

[\*28] Complaint reports

[\*28a] Held admissible

The courts in the following cases held that police reports of complaints made by citizens were admissible as evidence under the business records exception to the hearsay rule.

In *People v. Jackson*, 40 A.D.2d 1006, 338 N.Y.S.2d 760 (2d Dep't 1972), an appeal from the defendant's conviction of assault and possession of a dangerous weapon, the court reversed the conviction, stating that a police report sought to be introduced into evidence as a business record by the defendant should be admitted into evidence if it indicated that the source of the information contained in it was the complaining witness. The court stated that the fact that the officer who recorded the entry was not the officer who obtained the information did not impair the admissibility of the report under the business record rule. The court added that if the complaining witness was the source of the information it should have been admitted in evidence as a statement inconsistent with his testimony at trial that he had immediately identified the defendant as the perpetrator.

The court in *People v. Giesa*, 71 Misc. 2d 506, 337 N.Y.S.2d 233 (City Crim. Ct. 1972), held that a police department complaint report, which the arresting officer, before coming into court, had personally obtained from the officer in

charge of the clerical files, which report related the ownership and the larceny of the vehicle in question, described the vehicle and stated its value, and gave the registration and vehicle identification number as well as other particulars, all of these facts being supplied by the owner-complainant at the time he reported the loss of his car, was admissible as evidence under the business entry exception to the rule against hearsay. Noting that there was ample precedent for the admission of police records into evidence under this exception, the court noted that the report recited essential information given to the police by one who not only had intimate knowledge of the facts, but also had the right and obligation to report the crime. The court further stated that the information was reported within minutes after the loss of the car was discovered.

In *People v. Meyers*, 72 Misc. 2d 1003, 340 N.Y.S.2d 505 (City Crim. Ct. 1973), the court recognized that there was authority to the effect that a police department complaint report reciting facts relating to the ownership of and larceny of a motor vehicle, and containing other basic information supplied by the owner-complainant, at the time he reported the loss of his car, was a business entry exception to the rule against admissibility of hearsay evidence. The court said that the business entry exception permits admission into evidence of a memorandum or record of any transaction, occurrence, or event made in the regular course of business, as proof of such happening, provided it was made in accordance with regular practice and simultaneously with or within a reasonable time after the event. To the argument that the information supplied the investigating officer by the owner of the automobile was not furnished in the course of the proponent's business, and therefore did not come within the exception, the court felt that there may indeed be a "business duty" basis for accepting a police report to demonstrate ownership of the car, and prima facie evidence of its theft, in view of the fact that each insured automobile owner is under contract to notify his insurer in writing of accident or theft of an automobile and also to notify the police. The court felt that the rationale for such a policy requirement is quite obvious, since not only may a report to the police result in recovery of the vehicle, but it may serve to apprehend the thief and protect others from thieves. In any event, stated the court, the ownership of a motor vehicle may be readily established as a business record, since the automobile owner is required to apply for its registration with proof of ownership, and the same law makes registration a prerequisite for operating the vehicle on the public highways of the state. The court concluded that since the Commissioner of Motor Vehicles is directed to receive applications for registration and maintain a record of such registrations, the record of registration may be admitted as prima facie evidence of ownership.

Permitting an officer to testify concerning the call received by the police department dispatcher's office regarding a vehicle involved in a hit-and-run accident with the plaintiff was held by the court not erroneous in *Wheeler v. Cain*, 62 Tenn. App. 126, 459 S.W.2d 618 (1970), the court expressing the opinion that such evidence was competent under the Tennessee version of the Uniform Business Records as Evidence Act. The court noted that the officer who testified was the radio dispatcher who was on duty when the report in question came in, and that said officer testified that a record is made of all calls received at the police department from people reporting accidents and the movement of squad cars. The court noted that the officer also testified that these records are made on a tape and also on computer cards in the regular course of business of the police force. The court further related that the officer testified that he received a report of the hit-and-run accident in question and that the person calling him described the car that had left the scene of the accident, and that a subsequent call from officers at the scene divulged a license number. Holding this testimony admissible, the court overruled the defendant's assignment of error based thereon.

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Under New York law, police complaint report containing robbery victim's hearsay description of her assailant would have been admissible in robbery trial as business record through officer who signed the report. *Harris v. Senkowski*, 298 F. Supp. 2d 320 (E.D. N.Y. 2004) (applying New York law).

[\*28b] Held inadmissible

The courts in the following cases held that police reports of complaints made by citizens would not be admissible under the business records exception to the hearsay rule to show the truth of the matters asserted, since the complaining witness was deemed to be under no business duty to make the complaint in question.

In *Territory of Hawaii v. Makaena*, 39 Haw. 270, 1952 WL 7346 (1952), a burglary prosecution in which the prosecutor sought to have admitted, under a statute (Haw. Rev. Stat. § 9902) providing for the admissibility of business records, a so-called "offense report," in which was contained, among other things, statements made by the burglary victims to the police officers, stating that it was error to permit the prosecution to put the offense report in evidence, and reversing the defendant's conviction, the court held that if such a police record is admissible, the act recorded is merely that a complaint was made, and could be admissible only for the purpose of proving that a complaint was made to the police, and not as to the correctness of the report to the officer, or that, in the instant case, the premises were entered and money and jewelry stolen. The court went on to state that to permit in evidence, as a business record, the statements of the victims contained in the police report, would be to admit hearsay evidence, which derived its value not from the credibility of the witness, or reporter, himself, but depended upon the veracity and credibility of other persons whom the jury never sees or whose credibility it has no chance to weigh.

Material contained in a police complaint report filled out by an officer who took the information over the telephone was held by the court inadmissible as evidence under the business records exception in *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970). The court observed that under the common-law rule, without benefit of modification by statute, a business entry, in order to qualify as an exception to the hearsay rule, must consist of the original entries, must have been made in the regular course of business at or near the time of the event recorded, and must have been within the firsthand knowledge of someone whose business duty it was to observe and report the facts, and, in addition, the witness who had knowledge of the facts must be unavailable. The heart of the rule, continued the court, is the requirement that the observation, reporting, and the recording of the facts all be made by someone in the regular course of the business, the court adding that without this there is no assurance of the accuracy and reliability of the fact that justifies the admission of the record as evidence of the facts asserted therein. Turning its attention to the facts involved in this particular instance, the court observed that the complaint report in question was filled out by the officer in the regular course of his duties as an employee of the police department, but that of all the information placed on the report by the officer, he actually had firsthand knowledge only of the date, time, log number, case number, his own name, and the use of a phone to report the complaint. The court stated that the reporter did not have firsthand knowledge that the caller was the complainant in the instant action, nor that there actually had been a breaking and entering of the complainant's premises. The caller, the court related, who as far as the officer knew at the time of recording may or may not have had firsthand knowledge of the burglary, was not an employee of the police department and was not acting in the regular course of business of the police department in observing and reporting the facts to the reporting officer. While concluding that the trial court did commit error in permitting the report into evidence, the court felt that such error was not reversible in the instant case because the defendant was in no way prejudiced thereby, since the erroneously admitted evidence merely purported to show that the complainant reported a burglary at a particular time, and the defendant did not at the trial, nor on appeal, challenge the fact that the complainant's premises were broken into on the date alleged, and that the complainant discovered this fact the following day, and reported it to the police.

The court in *Olson v. State*, 262 Ind. 329, 315 N.E.2d 697 (1974), held that a complaint report filled out by a police officer while talking to the complainant on the phone, which report indicated that a certain numbered license plate was lost or stolen from the complainant's residence at a particular time, did not fall within the requisites for the business records exception to the hearsay rule, and was therefore inadmissible in evidence. Noting that the complaint report was being used to show that the license plate had been lost or stolen at a certain time, the court noted that, as such, it was an out-of-court statement by the complainant offered to show the truth of the matters asserted therein and resting upon the credibility of an out-of-court asserter. The court further stated that in order for a document to fall within the business records exception to the hearsay rule, the facts asserted therein must have been within the firsthand knowledge of someone whose business duty it was to observe and report the facts. Concluding that the facts of the time and the place of the theft and the number of the license plate involved were not within the firsthand knowledge of the officer who

received the telephone complaint and who filled out the report, the court further concluded that the report was hearsay in nature and that the trial court's admission of the exhibit over the defendant's objections was reversible error.

In *City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968), the court held that a police log report that contained statements made by the complainant to the effect that he had been run off the road by the defendant's car was improperly admitted as evidence in the defendant's prosecution for driving while intoxicated. After noting that the complainant's statements would be hearsay unless made in court by the complainant himself, the court noted that the Uniform Business Records as Evidence Act, as enacted in Minnesota, was not intended to make proof out of that which is not proof, and that it does not make a record admissible when oral testimony of the same facts, based on hearsay, would be inadmissible. The court went on to state that business records, to be admissible, must be based on the entrant's own observation or some information transmitted to him by an observer who has the business duty of transmitting such information to him. The court felt that if the informant of the person who makes the record entry is under no duty to anyone to make a truthful account of the facts thus recorded, the record should not be admissible as proof of such facts. The court concluded that the statute (*Minn. Stat. Ann. § 600.01*) was not intended to permit the receipt in evidence of entries based on voluntary hearsay statements made by third parties not engaged in the business or under any duty with respect thereto. Returning to the facts of the case, the court indicated that since the entry in the police log constituted hearsay, and was the only evidence that the defendant's car was being operated within the vicinity of the incident, the record therefore contained no valid proof that the defendant was driving, and his conviction of violating an ordinance proscribing driving while under the influence of liquor should not stand.

A complaint report containing a complainant's statement would not qualify under the business records exception to the hearsay rule, the court held in *People v. Vallejos*, 125 A.D.2d 352, 508 N.Y.S.2d 615 (2d Dep't 1986). The defendant was convicted of rape in the first degree and robbery in the first degree, and the court, on review of the defendant's appeal, affirmed. The court, without detailed explanation or discussion, held that the lower tribunal properly found that the police report that contained the complainant's statement did not qualify under the business records exception to the hearsay rule for admission in evidence, pursuant to *N.Y. C.P.L.R. 4518(a)*.

[\*29] Teletype or telephone report

[\*29a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police teletype or telephone report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

In *People v. Fields*, 74 Misc. 2d 109, 344 N.Y.S.2d 413 (*Dist. Ct. 1973*), a prosecution for unauthorized use of a motor vehicle, the court held that a certified copy of the police teletype message identifying the car in which the defendants were observed to be riding as one reported stolen would be admissible as a business entry under a New York statute (*N.Y. C.P.L. 100.40*) permitting such entries if properly qualified. Of the opinion that New York case law on the subject supports the proposition that there is no rule that admits police reports in all cases, and there is no rule that excludes police reports in all cases, the court noted that in the instant case the police department was under a duty to receive and check the report of the owner of the vehicle and was under a duty to transmit that information to the police of other jurisdictions, and those police of other jurisdictions were under a duty to receive, record, and act on the information. The court felt that the teletype message was the regular course of such communication, and also noted that the copy of the teletype record had been certified, and concluded from that fact that the police report in question was non-hearsay evidence sufficient to establish, if true, that defendants did not have the consent of the owner when they took the automobile.

According to the court in *State v. Bradley*, 17 Wash. App. 916, 567 P.2d 650 (*Div. 2 1977*), a robbery prosecution in which the accused's alibi raised the question of the exact time of an unrelated purse snatching that occurred some

distance away, a computer printout of phone calls to the police indicating the time the purse snatching was reported and the officers were dispatched was admissible as a business record (*Wash. Rev. Code Ann. § 5.45.010*). The court, in so ruling, rejected the defendant's argument that the trial court erred in admitting the computer printout since the police report contained double hearsay. That is, the court indicated, the report contained the statements of the person who received the call, dispatched the officers, and recorded the time of their arrival, and the printout contained the declarations of the person who placed the phone call and described the nature and location of the incident. The printout, the court elaborated, was a record of an event made in the regular course of business that satisfied the requirements for admission under the Uniform Business Records as Evidence Act, *Wash. Rev. Code Ann. § 5.45.010*, the court adding that a document that qualifies as a business record cannot be denied admission on the ground that the person who entered the information in the record does not testify in court. Thus, the court emphasized, the statements of the person who received the phone call came within an exception to the hearsay rule for business records. The court further rejected the defendant's assertion that the admission of the computer printout as a business record denied him a constitutional right to confront witnesses, the court stressing that this objection to evidence properly admitted as a business record under the subject code provision is without merit.

[\*29b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police teletype or telephone report would not be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

A police telephone report would not be admissible pursuant to the business records exception to the hearsay rule (*Cal. Evid. Code § 1271*) in the defendant's prosecution of grand theft, the court held in *People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982). The record at issue consisted of a police record that served to support the defendant's claim that he had called the police to report a vehicle repossession when he took a motor vehicle back from a third party; when the third party attempted to move the document into evidence, an objection was made and sustained on the basis of hearsay. The record, the court noted at the outset, was inadmissible hearsay in that it was evidence of an out-of-court statement made by the defendant, offered to prove the truth of the matter asserted, that is, that he had repossessed a vehicle. Police records may, in some circumstances, be admissible under the business records exemption to the hearsay rule, but in order to be considered under the exception, a proper foundation must be established, the court elaborated: the report must be shown to have been made in the regular course of business; at or near the time of the act, condition, or event; the custodian or other qualified witness must testify to its identity and the mode of its preparation; and finally, the sources of information and method and time of preparation must be such as to indicate its trustworthiness. Here, the court stressed, no such foundation was laid, such that the evidence was properly excluded.

A police teletype report prepared by an officer regarding his initial investigation of alleged crimes would not be admissible at the time of trial under the business records exception to the hearsay rule, the court held in *Riddle v. State*, 273 Ind. 112, 402 N.E.2d 958 (1980). The defendant was convicted of burglary, rape, and criminal deviate conduct, and the court, on review of the defendant's appeal, affirmed. In so ruling, the court rejected the defendant's assertion that the lower tribunal erred in refusing to admit into evidence a case report prepared by an officer concerning the officer's initial investigation of the crimes. While the officer himself did not testify and was not subpoenaed by the defendant, the court remarked, the defendant claimed that two items on the report could have been used to impeach the testimony of the victim and were admissible under several theories. The court elaborated that the first statement which the defendant wished to have admitted was a line that had "Victim's Cond:" typed on the far left-hand side of the page and then the words "heavy drinker" on the same line but far over on the right-hand side of the page, and the second statement was a handwritten notation at the bottom of the page near a description of the suspect's clothes, "Possible Narc Dealer." Both statements were ambiguous because from their locations on the page they could refer to either the victim or the defendant, the court indicated, and, furthermore, the typewritten part of the page was a teletype report that the officer had called in when he first investigated the crime and the handwritten portions of the report were apparently notations made by a different officer at a later time. This report was clearly hearsay and did not fall within the business

records exception to the hearsay rule since the defendant made no effort to establish a foundation by having it identified by its entrant or the official in charge of keeping the records, the court declared. The statements could not be regarded as admissions against interest since there was no evidence that the victim said anything about drinking or drugs, the court stated. Finally, the statements were certainly made at a time too far removed from the crime to be considered part of the *res gestae*, such that there was no error in refusing to admit the police report, the court concluded.

A police telephone report containing statements of an individual with knowledge of a crime was erroneously admitted by the lower tribunal pursuant to the business records exception to the hearsay rule (*Wis. Stat. Ann. § 908.03(6)*), the court held in *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), though, given the particular circumstances presented, the error was harmless. The defendant was convicted of driving a motor vehicle without the owner's consent and he appealed; the court, on review, affirmed. The only direct evidence adduced at the preliminary examination regarding the vehicle owner's ownership of the motor vehicle was the testimony of the arresting officer concerning the recovery of the car and his phone conversation with the owner thereafter, the court pointed out, and the judge presiding over the preliminary examination admitted into evidence two reports prepared by the arresting officer, including a long-distance telephone report, describing the conversation with the vehicle owner. The court held that the rules of evidence apply to preliminary examinations, and here the lower tribunal relied on the business records exception in admitting the record, the court adding that this exception allows the introduction of documents made in the course of a regularly conducted activity, which includes police reports. The state, the court pointed out, conceded that the owner's statements contained in the police telephone report were not admissible as a record of a regularly conducted activity, but instead, that the contents of the reports were admissible under the residual exception for hearsay testimony not included among the enumerated exceptions to the hearsay rule but having comparable circumstantial guarantees of trustworthiness. The defendant, conversely, pointed out that the police reports admitted in the instant case were of the type covered by the business records exception but did not fit under that exception, the defendant arguing that to admit the report under the residual exception would be to circumvent the requirements of the business records exception. The court concluded that the statements made to the police over the telephone by the victim concerning the theft of an automobile had some guarantees of trustworthiness, but they did not have sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception in *Wis. Stat. Ann. § 908.03(24)*, and since the statements did not fall within any of the enumerated exceptions to the rule in that code provision, their admission was error.

[\*30] Victim report

The following authority considered, under the particular circumstances presented, whether all or part of a victim report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

In *Com. v. Russell*, 459 Pa. 1, 326 A.2d 303 (1974), an appeal from a defendant's conviction for murder of a police undercover agent, the court held that the trial court did not commit error by admitting into evidence certain reports prepared by the victim that mentioned previous drug contacts and conversations with the defendant. In holding that the admission of the report did not violate the Business Records Act, the court stated that the victim transcribed the report from notes made by him at or near the time of the transaction and that mere typographical and stylistic errors delayed its filing. The court noted that the unsubmitted report remained in the control of either the victim or the qualifying witness, and concluded that since the evidence had a degree of trustworthiness and was within the purpose of the Act, the trial judge properly admitted the report. In so holding, the court rejected the urging of the defendant that the report improperly introduced evidence of his prior criminal activity that was normally inadmissible, the court stating that where the evidence is offered to prove matters other than criminal activity, the trial judge, in his discretion, may admit it. The court further stated that, even assuming that the mention of drug involvement did imply prior criminal activity, the prosecution introduced the report to show the close relationship between the defendant and the victim, and that, as such, it was admissible.

[\*31] Radio log

The courts in the following cases considered, under the particular circumstances presented, whether all or part of a police radio log report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

Portions of police radio logs reporting two calls made by a victim to the police shortly before he was murdered met the requirements for admissibility of the business records statute (Ark. Stats. § 28-928), the court held in *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976). The defendant was convicted before the lower tribunal of capital felony-murder, and he appealed; the court, on review, affirmed. The subject logs were admitted into evidence under the exception to the hearsay rule for records made in the regular course of business, during the testimony of the dispatcher, the court remarked. The code provision under inquiry permits the introduction into evidence of records made in the regular course of business, the entries having been made to record an act, transaction, occurrence, or event, if made in the regular course of business, the court observed. Here, the court indicated, there was sufficient evidence in the record to meet the requirements of the statute to show that the records were regularly kept and made within a reasonable time after the event recorded, such that there was no error in the lower tribunal's admission of the logs as they reflected that the two calls were received on the evening in question from the victim, the nature of the report given by the victim, and the fact that the police investigated and found the report to be false, the court adding that these were the sort of "transactions" the statute contemplated.

The court in *Gamble v. State*, 215 Tenn. 26, 383 S.W.2d 48 (1964), involving a prosecution of two police officers for larceny, held that police radio logs that contained notations as to which police unit was assigned to a particular call were original records, made in the regular course of police business, and would be admissible in evidence under the Uniform Business Records as Evidence Act.

In *Porter v. State*, 623 S.W.2d 374 (Tex. Crim. App. 1981), a prosecution for capital murder arising from the slaying of a police officer, the court held that the lower tribunal properly admitted a tape recording and transcript of a tape of radio transmissions of police on the day the police officer was shot pursuant to the business record exception to the hearsay rule. The court rejected the defendant's argument that the tape recording and a transcript of the tape were improperly admitted in evidence, the court pointing out that a police sergeant testified that radio communications of the police department were continuously recorded 24 hours a day, that he had the care, custody, and control of the tape, and that the tape was prepared in the ordinary course of business of the police department. The officer added that the entries on the tape were made contemporaneously with the events they described and that while he was not present when the recordings were made, no changes in the tape had been made. Moreover, the court observed, a civilian dispatcher for the police who was working on the day of the shooting stated that the recording was accurate and that no alterations had been made to it and that he could identify all the voices on the tape, either by recognizing the sound of their voices or by their call number. The court instructed that *Tex. Rev. Civ. Stat. Ann. art. 3737e, § 2*, the state business records act, provides that a business record is admissible as evidence of an event if it was made in the regular course of business, it was the regular course of that business for an employee of that business with personal knowledge of the event to make a record, and it was made at or near the time of the event. The court rejected the defendant's argument that the subject record was not fundamentally trustworthy and should therefore not be admitted, the court stating that the document's trustworthiness could not be questioned. That is, the court remarked, here the document was not made with a specific view toward prosecution in mind and, as a matter of fact, it is a rare situation in which such a recording would provide any probative value to a case. The court explained that the sound recording in the instant case allowed the police department to review the procedures used by their officers and to insure that information transmitted was accurately recorded, the court concluding that the sound recording was of such trustworthiness as to guarantee the same protection provided by the rights of confrontation and cross-examination.

[\*32] Letter of officer

The following authority considered, under the particular circumstances presented, whether all or part of the letter of a police officer would be admissible as evidence under the business records exception to the hearsay rule in a criminal

action.

According to the court in *People v. Marselle*, 20 Ill. App. 3d 1012, 314 N.E.2d 21 (3d Dist. 1974), an appeal from a criminal defendant's conviction for contributing to the delinquency of a minor, the lower tribunal committed error by admitting into evidence a letter written by a California policeman regarding an automobile accident, in which letter it was stated by the writer that he had been told that the defendant and the minor in question had been seen together. Noting that, except for the direct testimony of the complaining minor, the letter in question was the only evidence of any substance that tended to place the complaining minor with the defendant, the court stated that, apart from constitutional issues, the letter would not have been admissible in this cause under an Illinois statute (S.H.A. ch. 110A, § 236) that permitted certain business and professional writings or records to be admitted as exceptions to the hearsay rule, since such statute specifically provided that the rule should not apply to the introduction into evidence of police accident reports. Concluding that the "business entry" statute would be unavailable as a statutory basis for admissibility of the letter, and that it likewise did not come under any of the express exclusions from the hearsay rule, the court reversed the defendant's conviction, stating that it could not determine whether the defendant, in the absence of such evidence, would have been found guilty beyond a reasonable doubt.

[\*33] Receipts for property

[\*33a] Held admissible

The courts in the following cases held, under the particular circumstances presented, that all or part of police receipts for property would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

According to the court in *Perry v. State*, 541 N.E.2d 913 (Ind. 1989), evidence consisting of police evidence vault logs, listing the dates on which drugs were received from an informant, would be admissible as evidence under the business records exception to the hearsay rule. The defendant was convicted of three counts of dealing in controlled substances and judgment was entered in the lower tribunal; the court, on review, affirmed. In so ruling, the court rejected the defendant's arguments that state police evidence vault logs that listed the dates on which the drugs were received by certified mail and the times at which they were removed and replaced, and by whom, were improperly admitted at the time of trial. An officer who analyzed the controlled substances testified that he made some of the entries on the logs, and other markings on the logs were made by persons other than that officer, the court pointed out. The defendant made hearsay objections to the exhibits on the basis that the persons other than the testifying officer who made entries on the logs were not present and subject to cross-examination, and he asserted that the business records exception to the hearsay rule was inapplicable because the state failed to establish the proper foundation, the court pointed out. However, the court stressed, an exhibit qualifies under the business records exception to the hearsay rule when the sponsor of the exhibit shows that it is part of the records kept in the routine course of business and placed in the record by one authorized to do so who had personal knowledge of the transaction represented at the time of entry, the court adding that the exception does not mandate that the sponsor of the exhibit personally made it, filed it, or had firsthand knowledge of the transaction represented by it. Here, the court pointed out, the subject officer testified that the log sheets were filled out and maintained in the normal course of business with the Indiana State Police, and he stated that the evidence custodian was the only person who had access to the vault, and he further explained that a log was kept that records when evidence is removed and returned to the vault and that some of the entries on the log were made by himself and some were made by persons other than himself. All of the records on the log indicated that they were entered by an evidence custodian, such that the evidence adduced at trial established that the logs were made by persons authorized to do so and who had personal knowledge of the transactions represented at the time of entry. Reasoning thusly, the court found that the foundation was properly established to admit the evidence under the business records exception of the hearsay rule.

The court in *Com. v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), judgment aff'd on other grounds, 484 Pa. 527, 399 A.2d 1061 (1979), held that a police property receipt was admissible at the time of the defendant's criminal

prosecution. The defendant was convicted of one count of obstructing the administration of the law, three counts of perjury, and one count of bribery; the court, on review, affirmed. In so ruling, the court rejected the defendant's assignment of error in the admission of a police property receipt. While the defendant asserted that these records were not properly qualified as business records pursuant to 28 P.S. § 91b, the court disagreed, commenting that contrary to the argument of the defendant, a witness called for the purpose of qualifying a business record need not have any personal knowledge of the facts that are reported in the particular records. The code provision under inquiry provides that a record of an act, condition, or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition, or event, and if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission, the court instructed. Here, the court pointed out, the qualifying witness, a police lieutenant, testified that the complained-of records were prepared in the regular course of police business, at or near the time of the reported incident. Although the witness did not remember the particular incident with which the reports were concerned, his signature as reviewing officer was on the report. As such, the court noted, the police property receipts were properly qualified as business records.

[\*33b] Held inadmissible

The court in the following case held, under the particular circumstances presented, that all or part of police receipts for property would not be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

According to the court in *Oliver v. State*, 475 So. 2d 655 (Ala. Crim. App. 1985), receipts for property relative to money removed from the defendant, even if considered "business records," would not be admissible under an exception to the hearsay rule. The defendant was convicted of first-degree theft of property, and the court, on review of the defendant's appeal, held that the admission of an investigator's inadmissible hearsay testimony as to denominations of money removed from the defendant and his companions when they were placed in jail was reversible error. More specifically, a sheriff's department investigator was permitted to testify to the amount of money and the denominations of the money removed from the defendant and his two companions when they were placed in the city jail even though she did not personally observe the removal of the money; the trial judge ruled that while circumstantial evidence is hearsay, it was "permissible." The court commented that this testimony, and the receipts the investigator gave to the police for the money, constituted inadmissible hearsay evidence. Even if the receipts were considered a police report, they were not admissible as an exception to the hearsay rule under the business records exception and, even if police reports were admissible as business records in Alabama, in this case the prosecutor did not lay a proper predicate for the admission of business records, the court stressed. This hearsay testimony was incriminating and tended to connect the defendant to the crime charged, such that it could not be considered harmless error, the court pointed out. Although the defendant admitted having approximately \$ 50 on his person, he did not testify about the particular denominations possessed and it was the evidence of the denominations of the money that was so incriminating, the court declared as it reversed the judgment of the lower tribunal and remanded the matter.

[\*34] Vehicle use form

The following authority considered, under the particular circumstances presented, whether all or part of a police vehicle use form would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

Mandatory vehicle use forms completed by police personnel were admissible under the business records exception to the hearsay rule in the criminal defendant's narcotics prosecution, the court held in *Montgomery v. U.S.*, 517 A.2d 313 (D.C. 1986). The defendant was convicted of possession of heroin, and the court, on review of the defendant's appeal, affirmed. The court rejected the defendant's argument that the lower tribunal erred in admitting into evidence a police form under the business records exception to the hearsay rule on the ground that it was made with a view toward litigation. A well-known exception to the hearsay rule, the admission of records generally kept in the course of business,

has long been recognized in the District of Columbia, and is applicable to both civil and criminal cases, the court pointed out. The factual observations in a police report may be admissible under the business records exception to the hearsay rule if made and reported in the regular course of business, the court elaborated. Although it is true that the business records exception does not apply to records that have been prepared with an eye toward litigation, here, the form under inquiry qualified as a business record, the court pointed out. That is, the court explained, police officers are required to complete the form under inquiry each day that they use a police vehicle, and the report enables the officers to document the condition of the vehicle and also to account, in skeletal form, for their activities for the day. It is part of routine police procedure designed to serve several internal, administrative purposes, not to aid a prosecution, and the information contained in the report in the subject case did not summarize the prosecution's case, the court noted, but instead, was only a brief outline of the officers' activities of the day. Lastly, the lower tribunal explicitly found that the vehicle use form admitted into evidence in this case was not made in anticipation of litigation, a ruling that had ample support in the record, the court concluded.

[\*35] Booking sheet

The courts in the following cases considered, under the particular circumstances presented, whether all or part of a police booking sheet would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

A police department booking sheet would not be admissible in the defendant's criminal prosecution, the court held in *State v. Harry*, 741 S.W.2d 743 (Mo. Ct. App. E.D. 1987), post-conviction relief denied, 800 S.W.2d 111 (Mo. Ct. App. E.D. 1990), reh'g and/or transfer denied, (Dec. 12, 1990). The defendant was convicted of first-degree robbery and armed criminal action, and was adjudicated a prior and persistent offender before the lower tribunal. The court, on review of the defendant's appeal, affirmed. The court rejected the defendant's assertion that the lower tribunal erred in sustaining the state's objection to the admission of the police department booking sheet into evidence. The lower tribunal has a wide latitude in determining whether a sufficient foundation has been established to allow the admission of records under the Uniform Business Records as Evidence Act (*Mo. Ann. Stat. § 490.660*), the court remarked. A police report may generally be admitted into evidence when qualified under the act, but in order to be admissible under the act, the proponent of the report must show that the report was based either upon the entrant's observations or on the information of others with a duty to transmit it to the entrant. The court observed that a detective entered the defendant's age, height, and weight in the report apparently based upon the defendant's statements, and the defendant attempted to use the report to prove the truth of the matter stated therein, that being the defendant's true height, weight, and age. The detective could not testify as to the defendant's hearsay statement regarding his age, the court indicated, the court adding that the act would not serve to transform this inadmissible hearsay into admissible evidence simply because the information was recorded. Reasoning thusly, the court concluded that the lower tribunal correctly excluded the police booking sheet from evidence.

The court in *State v. Bertul*, 664 P.2d 1181 (Utah 1983), held that the lower tribunal's exclusion of a police "booking sheet" from evidence, proffered by the defendant to support his defense of intoxication, was not prejudicial error where intoxication would not have served as a defense to the charge of burglary. The defendant was convicted of burglarizing a pharmacy, and he was seen leaving the premises by a witness who identified him at the time of trial. At trial the defendant, who did not dispute his participation in the crime, relied on a defense of voluntary intoxication, the defendant contending that he had consumed an inordinate amount of alcoholic beverages the night of the crime, was subject to blackouts when drinking, and had blacked out the night of the burglary and remembered nothing of it. The testimony of the officer who made the arrest was that the defendant had obviously been drinking but did not appear intoxicated; during cross examination of the officer, the defendant proffered what appeared to be a copy of the "booking sheet," which apparently was filled out at the county jail when the defendant was booked at 6:30 a.m. the day of the burglary, the burglary being committed approximately three hours prior to the arrest. The defendant's apparent purpose in offering the booking sheet was to substantiate his claim of intoxication; in making out a booking sheet, the booking officer writes in a number indicating the arrestee's degree of intoxication, and the number is based on the conclusion of

the "searching officer" who verbally communicates his conclusion to the booking officer. A "1" indicates that the searching officer concluded that he or she believed that the arrestee, at the time of booking, was so intoxicated that he could not be booked, a "2" indicates obvious intoxication, and a "3" indicates that the arrested person had been drinking. The booking sheet offered by the defendant was marked with the number "2"; the lower tribunal ruled that the document was inadmissible hearsay. The booking sheet and the code number on it were clearly hearsay, the court remarked, for they were out-of-court statements offered to prove the truth of the information contained on the sheet, and were thus inadmissible unless they fell within one of the exceptions to the hearsay rule. The court, on review of the defendant's appeal, reversed, the court holding that the booking sheet should have been admitted as a "business record," the court adding that the rules governing the business record exception are construed broadly. In holding that the document was admissible, the court pointed out that the searching officer who supplied the information acted in the regular course of his duties in reporting to the booking officer.

[\*36] Officer's disciplinary reports

The following authority considered, under the particular circumstances presented, whether all or part of a police officer's disciplinary report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

An officer's disciplinary report would not be admissible in a defendant's criminal prosecution, the court held in *Com. v. Trapp*, 396 Mass. 202, 485 N.E.2d 162 (1985), appeal after remand on other grounds, 423 Mass. 356, 668 N.E.2d 327 (1996). The defendant was found guilty of murder in the first degree, armed robbery, and larceny; the defendant appealed his convictions and the denial of his motion for new trial, and the court, on review, held that certain records would not be admissible under the business records exception to the hearsay rule. At the time of trial, the judge admitted as business records three Officer's Disciplinary Reports describing incidents involving the defendant while he was detained at a house of correction awaiting trial. According to one of the reports, three weeks before the trial the defendant and another inmate engaged in a verbal altercation, each threatening to kill the other, another report indicated that eight months before trial, the defendant was found to be in possession of a small amount of marijuana, and the third report showed that approximately 15 months before trial, three weeks after his arrest, the defendant was involved in a fight with two other inmates. These records were admitted as business records under *Mass. Gen. Laws Ann. ch. 233, § 78*, which provides that before business records can be admitted, the judge must make four preliminary findings: that the entry was made in good faith, in the regular course of business, before the beginning of the proceeding, and that it was the usual course of business to make the entry at the time of the event or within a reasonable time thereafter. The records offered were made while the defendant was in custody awaiting trial. When the commonwealth has custody and control of the accused, it cannot be said that the dispute or controversy between the accused and the commonwealth has not already begun, for the purposes of admitting hearsay declarations, the court indicated. Thus, pursuant to the code provision under inquiry, the Officer's Disciplinary Reports made after the defendant was in pretrial detainment at the house of correction would not be admissible as business records. There could be no question, the court declared, that the use of the subject records was prejudicial to the defendant and, considered cumulatively, the evidence of threats in 1977 and of misconduct between arrest and trial were so prejudicial that the admission of such evidence would require reversal of the judgments and a new trial.

[\*37] Memorandum

The following authority considered, under the particular circumstances presented, whether all or part of a police memorandum would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

In *Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986), a prosecution for murder, the court held that a police incident report containing a detective's account of the defendant's unacknowledged confession was properly admitted into evidence as a business record, where the defendant's statement, although second-level hearsay, was excepted from the

hearsay rule as an admission of a party-opponent. In a prosecution for murder, the lower tribunal admitted as a business record a contemporaneous memorandum, prepared by a police officer, but not signed by the defendant, that contained an accused's oral confession. The court, granting certiorari, affirmed, the court holding that a business record made by a detective following the criminal defendant's polygraph examination, which included his recollection of a question and answer session in which the defendant confessed to the murder, was admissible to prove the truth of the facts related in the defendant's statement. The Maryland business records statute defines "business" to include "business, profession, and occupation of every kind" (Md. Code Ann., Cts. & Jud. Proc. § 10-101(a)), the court noted at the outset. In general, those portions of the report of a police investigation that record the facts obtained by the direct sense impressions of the investigating officer are admissible as a business record while those portions that report objectionable hearsay and opinions of the investigator are inadmissible as a business record, the court elaborated. With respect to the use of the business records exception at the second level of hearsay, the court instructed that if the declarant is not available to testify and if the statement is not admissible under some other exception to the hearsay rule, such as excited utterance or dying declaration, then admissibility cannot be predicated exclusively upon the circumstance that the statement was made to a police officer who paraphrased its content in his report. That is, the court elaborated, the business record exception is predicated not only on the circumstance that the record itself is kept in the usual course of the business but also on the circumstance that the recorded information is obtained by the recorder from a declarant having a "business" duty to communicate it truthfully. Here, the court stressed, the criminal defendant, the declarant, made an admission to the detective, who recorded it in the course of "business." As such, the court reasoned, the lower tribunal correctly held that the business record was admissible to prove the truth of the facts related in the defendant's statement because the second level hearsay fell within the exception for admissions by a party-opponent.

[\*38] Investigative report

[\*38a] Held admissible

The following authority held, under the particular circumstances presented, that all or part of a police investigative report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

A police investigative report would be admissible pursuant to the business records exception in the defendant's rape prosecution, the court held in *State v. Therriault*, 485 A.2d 986 (Me. 1984). At his second trial, the defendant was convicted of rape, and he appealed; the court, on review, vacated the judgment and remanded the matter. The test for admissibility under Me. Rules of Evid., Rule 803(6), the court noted at the outset, focuses on the knowledge of the person making the report, the contemporaneity of the making of the report with the observance of the facts being reported, the "regularity" of the recording and keeping of the report, and the report's trustworthiness. The presiding justice labeled the report in the present case "investigative" and, as such, ruled that it could not qualify for admission under the statutory business records exception, the court pointed out, but the test for admissibility under the provision does not concern the "investigative" or "non-investigative" nature of the report being offered. The fact that the report was "investigative" in the sense that it was completed at the request of a local police department and concerned the investigation of possible criminal activity in a particular case did not, per se, remove the report from the business records exception, the court stated, such that the justice erred when he concluded that an "investigative" report could not qualify for admission under Me. Rules of Evid., Rule 803(6). The justice also erred in concluding that the report was untrustworthy, the court observed. Lack of trustworthiness is a proper ground for excluding from evidence an otherwise qualified business record, but here, the record on appeal revealed no basis for such a conclusion, the court remarked. Commonly, a "lack of trustworthiness" finding is predicated on a finding that the record was altered after it left the control of the preparer or custodian of the report, or that the preparer had some motivation to misrepresent or misstate results contained in the report, or that the report was prepared in anticipation of litigation. Here, the court stressed, there was no indication that the subject laboratory report was altered after the preparer completed it, and its authenticity was not disputed at trial.

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Reports of State Bureau of Investigation (SBI) agent that contained information on chain of custody of DNA material and agent's DNA analysis were business records for purposes of exception to hearsay rule for business records, where agent's supervisor was responsible for creating and implementing laboratory policies regarding record keeping, and supervisor testified that agent created reports contemporaneously with his work as part of regular practice of agency and within the ordinary course of agency business. Rules of Evid., Rule 803(6), West's N.C.G.S.A. § 8C-1. *State v. Forte*, 629 S.E.2d 137 (N.C. 2006).

[\*38b] Held inadmissible

The courts in the following cases held, under the particular circumstances presented, that all or part of a police investigative report would not be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

A purportedly exculpatory investigative report discovered in the records of the police department and provided to defense counsel prior to trial was appropriately excluded from evidence in the defendant's murder prosecution, the court held in *Fields v. Com.*, 12 S.W.3d 275 (Ky. 2000). The court pointed out that the subject report was unsigned and consisted primarily of hearsay information obtained by its unidentified author from witnesses who implicated other individuals in the murder of the victim, the report concluding with the statement: "I myself, believe after talking with these people and listening to their stories, that the burglary and murder took place earlier that evening and that the other people had ran off and left [the defendant] because he had gotten" too wild for them, after which the defendant returned to the victim's apartment and "broke in there looking for her." A police officer speculated that the report had been authored by the defendant's father, a former employee of the subject police department who was employed by another police department on the date of the victim's murder, the court pointed out. The defendant's father, the court continued, admitted that he had conducted his own investigation and prepared a report that he furnished to the subject police department, though he was never called upon to identify the particular report. The report consisted almost exclusively of the kind of "investigative hearsay" that has been consistently condemned, the court stressed, the court commenting that this kind of evidence is no more admissible when offered by the defendant than when offered by the commonwealth. Moreover, the court remarked, the subject report did not fall within the business records exception to the hearsay rule, since there was no proof that the person who prepared the report was under a business duty to do so (Ky. Rules of Evidence, Rule 803(6)). If the report was, indeed, prepared by the defendant's father, the court emphasized, he did so at a time when he was not an employee of the subject police department.

The court in *State v. Dorsey*, 706 S.W.2d 478 (Mo. Ct. App. E.D. 1986), held that a police investigative report would not be admissible in the defendant's criminal prosecution pursuant to the business records exception to the hearsay rule. In so ruling, the court rejected the defendant's assertion that the lower tribunal erred in refusing to admit parts of police reports that contained statements of the officer who inspected the crime scene under the business records exception of the hearsay rule, the court commenting that the defendant did not argue in his brief but made the argument at trial that the records would show the defendant was released by the police initially but that a co-defendant was not released. That is, the court stated, the defendant attempted to prove his innocence through the release. The lower tribunal ruled, however, the court continued, that even if the police reports were business records, they would be inadmissible under the circumstances presented. The lower tribunal is necessarily vested with broad discretion in ruling evidentiary matters, the court noted, and here, the lower tribunal correctly ruled in denying the statements contained in the records on grounds other than non-qualification under the Business Records Act, the court concluding that the Act does not make evidence admissible that would be incompetent if offered in person.

In a prosecution for the knowing possession of a motor vehicle with an altered serial number for which no verified statement had been filed with the Division of Motor Vehicles within 10 days of possession and receiving a motor vehicle known to have been stolen and belonging to another, the hearsay of the alleged car owner contained in a police

investigative report was inadmissible under the business records exception to the hearsay rule (N.J.S.A. Rules of Evidence, Rules 8, 63(30)), the court held in *State v. Lungsford*, 167 N.J. Super. 296, 400 A.2d 843 (App. Div. 1979). The court held that the trial judge erred in holding that the hearsay statement of the vehicle owner was admissible under the business records exception, the court adding that while police records may qualify as business records for certain purposes and in certain respects, they are nevertheless not vehicles by which substantive evidential status may be conferred upon the otherwise hearsay declarations of a victim of or witness to a crime, accident, or other occurrence. The business records exception, the court explained, was founded upon the twin principles of reliability and necessity, and originally conceived as an aid to commercial litigation, the theory of the exception is that records made in the usual course of business normally possess a circumstantial probability of trustworthiness. The court pointed out that two criteria, the recording of the information in the usual course of the business activity and the providing of that information by a declarant whose duty it is to supply it truthfully, must be met before the trial judge is free to exercise his discretion in admitting or excluding the business entry based upon his ultimate evaluation of its reliability. Here, the court indicated, the second of these criteria was not met. Obviously, the court related, the making of investigations and the receiving of information concerning crime is usual police business, such that a police record is admissible to prove, for example, that a report of crime was made by a member of the public and when the report was made and received. It is not, however, the court stressed, admissible to prove the truth of the contents of that report since members of the public, whether targets of investigation, witnesses, or victims, are not under a duty, in the nature of a business duty, to make an honest and truthful report. Thus, such "citizen" declarations are virtually universally held to constitute excluded hearsay in respect of otherwise admissible police reports, the court concluded.

<>

Reports admitted by trial court, which were prepared by police department crime laboratory with respect to DNA evidence, did not qualify as business record under exception to hearsay rule and, as technicians who prepared reports did not testify, reports should not have been admitted in prosecution for rape, involuntary deviant sexual intercourse (IDSI), unlawful contact with minor, aggravated indecent assault, endangering the welfare of a child, and corrupting the morals of a minor. Rules of Evid., Rule 803(6), 42 Pa.C.S.A.; 18 Pa.C.S.A. §§ 3123, 3125, 3131, 4304, 6301, 6318. *Com. v. Twitty*, 2005 PA Super 193, 876 A.2d 433 (2005).

[\*39] Offense report

The following authority considered, under the particular circumstances presented, whether all or part of a police offense report would be admissible as evidence under the business records exception to the hearsay rule in a criminal action.

A campus police supervisor would be a qualified witness under the state business records exception to the hearsay rule (Miss. Rules of Evid., Rule 803(6)) for the purposes of testifying about the contents of a police offense report, the court held in *Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000). The defendant was convicted by the lower tribunal of taking possession of or taking away a motor vehicle, and the court, on review of the defendant's appeal, affirmed. The defendant contended that the testimony of the police supervisor regarding the contents of the police offense report prepared by a campus police officer was "blatant hearsay" and a violation of his constitutional rights, the defendant further arguing that in allowing the supervisor to testify regarding the contents of the report when he did not prepare it was a violation of Miss. Rules of Evid., Rule 803(6). The defendant, the court pointed out, conceded that the code provision under inquiry provides that either the custodian of records or any other qualified witness may testify about business records and records of regularly conducted activity, such as the police offense report, but he asserted that the state failed to produce the testimony of the custodian or any other qualified witness. The court disagreed, instructing that the supervisor was a qualified witness under the provisions of Miss. Rules of Evid., Rule 803(6). That is, the court remarked, it was clear that the supervisor was present at the time that the victim came in to report the theft of his motor vehicle, and the record was further clear that the supervisor, who was the shift supervisor, and took the victim's oral complaint. Moreover, the court stated, the record clearly indicated that just prior to the time the victim appeared to

report the theft of his automobile, the supervisor had spoken with a deputy about the possible theft of the very same vehicle and had performed a check of the campus parking decal to determine ownership. The defendant perhaps would have a point if the source of the information in the report regarding the time had been the victim, an informant not acting within the course and scope of the activities of the campus police department, the court emphasized. However, the court stressed, the fact that the report was made pursuant to the victim's complaint did not make the victim the source of the information about the time indicated in the report, the court stressing that since the supervisor had personal knowledge about the time that was shown on the offense report, this testimony fell squarely within the meaning of Miss. Rules of Evid., Rule 803(6) and did not constitute inadmissible hearsay.

[\*39.] 5 Autopsy report

The following authority considered whether an autopsy report was admissible in a murder trial under the business or public record exceptions to the hearsay rule.

◇

Findings in autopsy report prepared by Office of the Chief Medical Examiner of New York qualified as business records, and thus findings in report were not testimonial and were not subject to Confrontation Clause requirements; autopsy reports were reports kept in course of regularly conducted business activity, Office conducted thousands of routine autopsies every year, and reports did not constitute observations of a police officer. U.S.C.A. Const.Amend. 6; *Fed.Rules Evid.Rule 803(6)*, 28 U.S.C.A. *U.S. v. Feliz*, 467 F.3d 227 (2d Cir. 2006), for additional opinion, see, 2006 WL 3044420 (2d Cir. 2006).

Redacted autopsy report was admissible in murder trial under the business or public record exceptions to hearsay rule; deputy medical examiner testified that autopsy reports were records kept during the regularly conducted business activity of the Office of the Chief Medical Examiner and that the rough body drawings and notations taken during the autopsy, which were referenced by examiner, were regularly relied upon in the field in order to come to a conclusion or opinion. *Fed.Rules Evid.Rule 803(8)*, 28 U.S.C.A.; West's Ann.Md.Code, Courts and Judicial Proceedings, §§ 10-101(b), 10-204; West's Ann.Md.Code, Health-General, § 5-311(d); West's Ann.Md.Code, State Government, § 10-611(g); Md.Rule 5-803(b)(6). *Rollins v. State*, 392 Md. 455, 897 A.2d 821 (2006).

[\*40] Latent print report

The following authority considered the admissibility in state court proceedings of a police officer's latent print report under the business records exception to the hearsay rule.

◇

Police officer's latent print report, which described activities and results in connection with his lifting fingerprints from apartment that had allegedly been burglarized and forwarding them to police department, was testimonial in nature and could not be admitted under business records exception to hearsay rule; fingerprints were not taken simply for administrative use, rather, they were taken with ultimate goal of apprehending and successfully prosecuting a defendant, regardless of fact that report was not prepared at prosecution's request, and was made before defendant's identity became known. *People v. Hernandez*, 7 Misc. 3d 568, 794 N.Y.S.2d 788 (Sup 2005).

## FOOTNOTES

n1 The present annotation supersedes the annotation at 77 A.L.R.3d 115.

n2 A precise definition of the term "police report" is rendered difficult by the many different types of information that are kept on file by a police agency. Essentially, it is the intent of this annotation to deal with those types of police documents that contain a written account of a specific occurrence or event that has required police investigation. Such items as accident reports and crime reports filled out by the investigating officers are considered police reports for the purposes of this annotation, as are the police logs of phoned-in complaints and transcriptions of police radio communications. Not considered police reports for the purposes of this annotation are those police documents that are kept primarily as records for reference purposes, such as arrest records, fingerprint files, and the like. Similarly, the various types of referential and statistical data that are compiled by other agencies but that are available for police use, are not considered herein.

n3 See *Am. Jur. 2d, Evidence* § 1290.

n4 See *Am. Jur. 2d, Evidence* § 1291.

n5 See, *Am. Jur. 2d, Evidence* §§ 1294 to 1299.

n6 See, for example, *State v. Bertul*, 664 P.2d 1181 (Utah 1983), where the court, reasoning thusly, held that whether police records are admissible depends on the nature of the records and the purpose for which they are offered, the court adding that police records of routine matters are admissible under Utah Rules of Evid., Rule 63(13), such as the day a crime was reported.

n7 See, for example, *Lepire v. Motor Vehicles Division*, 47 Or. App. 67, 613 P.2d 1084 (1980).

n8 See, for example, *Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985), where the court, citing CJI-Civ.2d 11:9 and C.R.C.P. 61, held that the lower tribunal's failure to give such an instruction was not reversible error where the party objecting to the admission of a police report failed to demonstrate how the absence of such an instruction was prejudicial to its defense against a suit brought by a plaintiff seeking recovery of damages he sustained when, after perceiving a robbery in progress, he turned and ran, thereby startling the robber, who fired at him, striking him in the hand.

n9 See, for example, *State v. Therriault*, 485 A.2d 986 (Me. 1984), where the court, holding that a police report was admissible pursuant to the governing business records statutory provision (Me. Rules of Evid., Rule 803(6)) despite the fact that the preparer of the pertinent report was dead, rejected the assertion that if the report were admissible at all, it would be so only if it were subject to cross-examination. That is, the court explained, the code provision, by its terms, does not predicate the admission of a business record on the ability of the opposing party to cross-examine the preparer of the record, and the rule applies to all cases where the admissibility of a business record is at issue, regardless of whether the declarant is available. Moreover, the court stressed, the state's inability to cross-examine the preparer of the report offered in the present case was of no consequence to the report's admissibility under the business records exception, such that the trial judge erred in concluding that the subject report was inadmissible because of the state's inability to cross-examine.

n10 See, for example, *State v. Bertul*, 664 P.2d 1181 (Utah 1983).

n11 See, for example, *Hooker v. Com.*, 14 Va. App. 454, 418 S.E.2d 343 (1992).

n12 See, for example, *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), where the court commented, in a case in which a criminal defendant objected to the introduction of a police telephone report in his prosecution for driving a motor vehicle without the vehicle owner's consent, that the defendant's hearsay objection was not to the details of which the officer had personal knowledge but to the repetition of declarations made by the vehicle owner to the officer over the phone. The business records exception, the court declared, did

not allow admission of this second level of hearsay.

n13 See, for example, *Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000), citing Miss. Rules of Evid., Rule 803(6).

n14 See, for example, *Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990), where the court, citing Mi. R. Rev. M.R.E. 803(6), pointed out that the evolution of the business records hearsay exception from its common-law origins to the current Rules of Evidence further supports this interpretation, the court explaining that, beginning in the 1920s, various model and uniform acts were formulated to ease the burdensome restrictions that had developed under the common-law business records exception. Many of the limitations, such as the narrow definition of "business," the requirements of "originality," and the unavailability of all participants involved in the preparation of a record, no longer served to ensure the practical trustworthiness of the proffered evidence, the court indicated.

n15 See *Kramer v. Barnes*, 212 Cal. App. 2d 440, 27 Cal. Rptr. 895 (1st Dist. 1963).

n16 See *MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957).

n17 *Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969).

n18 *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975).

n19 *Levin v. Green*, 106 A.2d 136 (Mun. Ct. App. D.C. 1954).

n20 In a subsequent appeal, *Haas v. Kasnot*, 377 Pa. 440, 105 A.2d 74 (1954), the court noted that while the error of the first trial had been avoided in the second trial, it was nevertheless true that one of the police officers, who had not made the record in question, was allowed to read from it that there were three cars involved in the accident, but that this statement was promptly stricken from the record. Moreover, the court added, this officer was able to testify and did testify of his own knowledge that when he came to the scene he saw three cars there "that were wrecked." The court further noted that another policeman who joined in making the report was allowed to use it at the second trial to refresh his recollection, the court being of the opinion that this was obviously permissible as long as the trial court properly refused to allow the record itself to be introduced into evidence.

n21 The court disagreed with that portion of the opinion in an earlier New Jersey case, *State v. Conners*, 125 N.J. Super. 500, 311 A.2d 764 (County Ct. 1973), judgment aff'd on other grounds, 129 N.J. Super. 476, 324 A.2d 85 (App. Div. 1974), in which the court had held that the inspection certificate was admissible "without testimony and cross-examination of the coordinator who tested the machine," as proof that the Breathalyzer was in proper working order.

JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

JURISDICTIONAL TABLE OF STATUTES AND CASES

DISTRICT OF COLUMBIA COURT

*Leiken v. Wilson*, 445 A.2d 993 (D.C. 1982)

*Montgomery v. U.S.*, 517 A.2d 313 (D.C. 1986)

UNITED STATES CODE

*Fed. R. Evid.* 803(6)  
*Fed.Rules Evid.Rule* 803(6)  
*Fed.Rules Evid.Rule* 803(8)  
*Rule 1006 of Federal Rules of Evidence*  
*Rule 803(6), Federal Rules of Evidence*

## ALABAMA

*Bates v. State*, 574 So. 2d 868 (Ala. Crim. App. 1990)  
*Dunaway v. King*, 510 So. 2d 543 (Ala. 1987)  
*McLaughlin v. City of Homewood*, 548 So. 2d 580 (Ala. Crim. App. 1988)  
*Reeves v. King*, 534 So. 2d 1107 (Ala. 1988)  
*Stevens v. Stanford*, 766 So. 2d 849 (Ala. Civ. App. 1999), reh'g denied, (Dec. 17, 1999)

## ALASKA

*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975)  
*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975) (apparently recognizing rule)  
*Adkins v. Lester*, 530 P.2d 11 (Alaska 1974), reh'g denied, 532 P.2d 1027 (Alaska 1975), § 4[a] (recognizing rule)  
*Alaska Stat.* § 28.35.080(e)

## ARKANSAS

*Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976)  
*Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985)  
*Wallin v. Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980)

## CALIFORNIA

*Cal. Civ. Proc. Code* § 1953e  
*Cal. Evid. Code* § 1271  
*Cal. Evid. Code* § 1280  
*Cal. Veh. Code* § 20012  
*Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 86 Cal. Rptr. 2d 575 (4th Dist. 1999), as modified on denial of reh'g, (July 27, 1999)  
*Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 288 P.2d 989 (2d Dist. 1955)  
*MacLean v. City and County of San Francisco*, 151 Cal. App. 2d 133, 311 P.2d 158 (1st Dist. 1957)  
*People v. Bazaure*, 235 Cal. App. 2d 21, 44 Cal. Rptr. 831 (3d Dist. 1965)  
*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982)  
*People v. Ferguson*, 129 Cal. App. 3d 1014, 181 Cal. Rptr. 593 (1st Dist. 1982) For California cases holding police accident reports inadmissible, see § 4[a]  
*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967)  
*Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (2d Dist. 1967) (drunkenness and disorderly conduct report)  
*Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966)  
*Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (1966) (police "incident" report)

## COLORADO

*Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Colo. Ct. App. 1985)  
*People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980)  
*Polster v. Griff's of America, Inc.*, 34 Colo. App. 161, 525 P.2d 1179 (1974)

#### CONNECTICUT

*Baughman v. Collins*, 56 Conn. App. 34, 740 A.2d 491 (1999), certification denied, 252 Conn. 923, 747 A.2d 517 (2000)  
*Bonner v. Winter*, 175 Conn. 41, 392 A.2d 436 (1978)  
*Conn. Gen. Stat. Ann. § 52-180*  
*Hutchinson v. Plante*, 175 Conn. 1, 392 A.2d 488 (1978)  
*Mucci v. LeMonte*, 157 Conn. 566, 254 A.2d 879 (1969)  
*O'Shea v. Mignone*, 35 Conn. App. 828, 647 A.2d 37 (1994), certification denied, 231 Conn. 938, 651 A.2d 263 (1994) and related reference, 1997 WL 331033 (Conn. Super. Ct. 1997), judgment aff'd on other grounds, 50 Conn. App. 577, 719 A.2d 1176 (1998), certification denied, 247 Conn. 941, 723 A.2d 319 (1998)  
*O'Sullivan v. DelPonte*, 27 Conn. App. 377, 606 A.2d 43 (1992)  
*Paquette v. Hadley*, 45 Conn. App. 577, 697 A.2d 691 (1997)  
*State v. Masse*, 1 Conn. Cir. Ct. 381, 24 Conn. Supp. 45, 186 A.2d 553 (App. Div. 1962)  
*State v. Milner*, 206 Conn. 512, 539 A.2d 80 (1988), habeas corpus denied, 1998 WL 851441 (Conn. Super. Ct. 1998), judgment aff'd on other grounds, 63 Conn. App. 726, 779 A.2d 156 (2001)  
*State v. Sharpe*, 195 Conn. 651, 491 A.2d 345 (1985)  
*Swenson v. Sawoska*, 215 Conn. 148, 575 A.2d 206 (1990)  
*Zadroga v. Commissioner of Motor Vehicles*, 42 Conn. Supp. 1, 597 A.2d 848, 4 Conn. L. Rptr. 461 (Super. Ct. 1991)

#### DELAWARE

*Johnson v. State*, 253 A.2d 206 (Del. 1969)

#### GEORGIA

*Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), on remand to, 251 Ga. App. 80, 553 S.E.2d 386 (2001)  
*Ga. Code Ann. § 24-3-14*  
*Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (overruled on other grounds by, *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001))

#### HAWAII

*State v. Ing*, 53 Haw. 466, 497 P.2d 575 (1972)  
*Territory of Hawaii v. Makaena*, 39 Haw. 270, 1952 WL 7346 (1952)

#### ILLINOIS

*People v. Tsombanidis*, 235 Ill. App. 3d 823, 176 Ill. Dec. 426, 601 N.E.2d 1124 (1st Dist. 1992)

#### INDIANA

*Canaan v. State*, 541 N.E.2d 894 (Ind. 1989)  
*Olson v. State*, 262 Ind. 329, 315 N.E.2d 697 (1974)  
*Perry v. State*, 541 N.E.2d 913 (Ind. 1989)  
*Riddle v. State*, 273 Ind. 112, 402 N.E.2d 958 (1980), related reference, 491 N.E.2d 527 (Ind. 1986)  
*State v. Edgman*, 447 N.E.2d 1091 (Ind. Ct. App. 4th Dist. 1983)

*Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)

#### KANSAS

*Smith v. Hall's Estate*, 215 Kan. 262, 524 P.2d 684 (1974)

#### KENTUCKY

*Fields v. Com.*, 12 S.W.3d 275 (Ky. 2000)

*Manning v. Com.*, 23 S.W.3d 610 (Ky. 2000), reh'g denied, (Aug. 24, 2000)

#### LOUISIANA

*Dobson v. Louisiana Power and Light Co.*, 550 So. 2d 1334 (La. Ct. App. 1st Cir. 1989), writ granted, 559 So. 2d 129 (La. 1990) and writ granted, 559 So. 2d 129 (La. 1990) and judgment aff'd in part and amended on other grounds, 567 So. 2d 569 (La. 1990), reh'g denied, (Oct. 18, 1990)

*Southern County Mut. Ins. Co. v. Bryant*, 385 So. 2d 1286 (La. Ct. App. 3d Cir. 1980)

*State v. Gremillion*, 542 So. 2d 1074 (La. 1989), reh'g denied, (June 2, 1989)

*Ziamba v. City of New Orleans*, 411 So. 2d 697 (La. Ct. App. 4th Cir. 1982)

#### MAINE

*State v. Therriault*, 485 A.2d 986 (Me. 1984)

#### MARYLAND

*Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983)

*Ali v. State*, 314 Md. 295, 550 A.2d 925 (1988)

*Ali v. State*, 314 Md. 295, 550 A.2d 925 (1988) (abrogation recognized on other grounds by, *Wiggins v. State*, 352 Md. 580, 724 A.2d 1 (1999))

*Holcomb v. State*, 307 Md. 457, 515 A.2d 213 (1986)

*Honick v. Walden*, 10 Md. App. 714, 272 A.2d 406 (1971)

*Schear v. Motel Management Corp. of America*, 61 Md. App. 670, 487 A.2d 1240 (1985)

#### MASSACHUSETTS

*Com. v. Alves*, 6 Mass. App. Ct. 572, 380 N.E.2d 701 (1978)

*Com. v. Meech*, 380 Mass. 490, 403 N.E.2d 1174 (1980)

*Com. v. Trapp*, 396 Mass. 202, 485 N.E.2d 162 (1985), appeal after remand on other grounds, 423 Mass. 356, 668 N.E.2d 327 (1996)

*Julian v. Randazzo*, 380 Mass. 391, 403 N.E.2d 931 (1980)

*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973)

*Kelly v. O'Neil*, 1 Mass. App. Ct. 313, 296 N.E.2d 223 (1973) (by implication)

*Mass. Gen. Laws Ann. ch. 233, § 78*

#### MICHIGAN

*Hewitt v. Grand Trunk Western R. Co.*, 123 Mich. App. 309, 333 N.W.2d 264 (1983)

*Mich. Comp. Laws Ann. § 257.624*

*Moncrief v. City of Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976)

*People v. Miller*, 88 Mich. App. 210, 276 N.W.2d 558 (1979), judgment rev'd on other grounds, 411 Mich. 321, 307 N.W.2d 335 (1981)  
*Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990)

#### MINNESOTA

*City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968)  
*City of Fairmont v. Sjostrom*, 280 Minn. 87, 157 N.W.2d 849 (1968) (apparently recognizing rule)  
*Minn. Stat. Ann. § 600.01*

#### MISSISSIPPI

*Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989)  
*Hurt v. State*, 757 So. 2d 1102 (Miss. Ct. App. 2000)  
*Mississippi State Dept. of Human Services v. Fargo*, 771 So. 2d 935 (Miss. Ct. App. 2000), reh'g denied, (Aug. 29, 2000)

#### MISSOURI

*Ellis v. Smith*, 640 S.W.2d 163 (Mo. Ct. App. E.D. 1982)  
*Hamilton v. Missouri Petroleum Products Co.*, 438 S.W.2d 197 (Mo. 1969)  
*Mo. Ann. Stat. § 490.660*  
*Mo. Ann. Stat. § 490.680*  
*Mo. Ann. Stat. § 490.690*  
*Nash v. Sauerberger*, 629 S.W.2d 491 (Mo. Ct. App. E.D. 1981)  
*Nelson v. Holley*, 623 S.W.2d 604 (Mo. Ct. App. W.D. 1981)  
*Nelson v. Holley*, 623 S.W.2d 604 (Mo. Ct. App. W.D. 1981).  
*Penn v. Hartman*, 525 S.W.2d 773 (Mo. Ct. App. 1975)  
*Ryan v. Campbell "66" Exp., Inc.*, 304 S.W.2d 825 (Mo. 1957)  
*Ryan v. Campbell "66" Exp., Inc.*, 304 S.W.2d 825 (Mo. 1957) (recognizing rule)  
*State ex rel. Pini v. Moreland*, 686 S.W.2d 499 (Mo. Ct. App. E.D. 1984)  
*State v. Cuno*, 869 S.W.2d 285 (Mo. Ct. App. E.D. 1994)  
*State v. Dorsey*, 706 S.W.2d 478 (Mo. Ct. App. E.D. 1986)  
*State v. Taylor*, 486 S.W.2d 239 (Mo. 1972)  
*State v. Vance*, 633 S.W.2d 442 (Mo. Ct. App. W.D. 1982)  
*Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967)  
*Stegall v. Wilson*, 416 S.W.2d 658 (Mo. Ct. App. 1967) (recognizing rule)  
*Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1962)

#### NEBRASKA

*Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999)  
*Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999)

#### NEVADA

*Miranda v. State*, 101 Nev. 562, 707 P.2d 1121 (1985)  
*Nev. Rev. Stat. § 51.135(1)*

#### NEW JERSEY

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 N.J. Stat. Ann. 2A:82-34  
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## NEW YORK

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#### OREGON

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#### PENNSYLVANIA

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*Mercurio v. Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976) (by implication)  
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#### TENNESSEE

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## UTAH

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## VERMONT

*Vt. Stat. Ann. 12 § 1700*

## VIRGINIA

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## WASHINGTON

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## WISCONSIN

*Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978)  
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*Wis. Stat. Ann. § 908.03(24)*  
*Wis. Stat. Ann. § 908.03(6)*

## PUERTO RICO

*Medina v White Star Bus Line* (1934) 47 Puerto Rico 532

## OTHER REFERENCES

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*Am. Jur. 2d, Evidence § 1291*  
*Am. Jur. 2d, Evidence §§ 1294 to 1299*

## INDEX OF TERMS (Go to beginning)

Accident reports, §§ 3- 10, 12, 13  
Admissibility, generally, §§ 3, 4  
Alcohol breath tests and testing, §§ 3, 5, 11, 27  
Anticipation of litigation, documents prepared in, § 11  
Arrest or incident reports, §§ 4[b], 6, 7, 17, 26  
Assault and battery reports, § 15  
Automobile accident reports, §§ 3- 7, 9, 10, 12, 13  
Automobile use form, § 34  
Availability of reporter to testify, §§ 4[b], 10  
Ballistics report, § 27[a]  
Battery and assault reports, § 15  
Blood analysis, § 27[a]  
Booking sheet, §§ 9, 35  
Breath tests and testing, §§ 3, 5, 11, 27  
Business record, police report as, § 4[b]  
Civil actions, generally, §§ 13- 25  
Comment and summary, § 2  
Complaint reports, §§ 19, 28  
Conclusions or opinions of reporting officer, generally, §§ 9, 12  
Content of report, generally, §§ 8, 9  
Court use, report made primarily for, § 11  
Criminal actions, §§ 26- 39  
Custody reports, §§ 5, 11, 21  
Death of officer making report, § 4[b]  
Death of person giving statement to police, § 8  
Disciplinary reports, officer's, § 36  
Expert, investigating officer as, § 9  
Factors affecting admissibility under business records exception, §§ 5- 12  
Falls, accident reports, § 14  
Fatality sheet, § 4[b]  
First-hand knowledge of reporter, necessity of, generally, § 6  
Incident or arrest reports, §§ 4[b], 6, 7, 17, 26  
Introduction to annotation, § 1  
Investigative reports, §§ 8, 9, 22, 38  
Laboratory reports, §§ 25, 27  
Letter of officer, § 32  
Liquor authority report, § 9  
Memoranda, §§ 16, 37  
Motor vehicle accident reports, §§ 3- 7, 9, 10, 12, 13  
Motor vehicle use form, § 34  
Nature of objection to admission, § 12  
Objection to admission, nature of, § 12  
Offense reports, §§ 6, 20, 39  
Officers' disciplinary reports, § 36  
Opinions or conclusions of reporting officer, generally, §§ 9, 12  
Other crimes, reports of, § 20

Particular circumstances, admissibility under, §§ 13- 39  
 Personal knowledge of reporter, necessity of, generally, § 6  
 Police vehicle use form, § 34  
 Practice pointers, § 2[b]  
 Preliminary matters, §§ 1, 2  
 Presentence report, § 23  
 Prior crimes, reports of, § 20  
 Property receipts, §§ 4[b], 33  
 Radio log, §§ 5, 6, 31  
 Receipts for property, §§ 4[b], 33  
 Refreshing memory of witness, §§ 4[a], 10  
 Regular course of any business, § 4[b]  
 Regular course of police business, report made in, generally, § 5  
 Related annotations, § 1[b]  
 Reporter's personal knowledge, necessity of, generally, § 6  
 Scope of annotation, § 1[a]  
 Slip and fall accident reports, §§ 4[b], 14  
 Speedometer test reports, §§ 3, 5, 11, 27  
 Statements made to reporting officer, generally, § 8  
 Statute proscribing admissibility in evidence of certain types of police reports, § 4[a]  
 Summary and comment, § 2  
 Summary reports, §§ 7, 24  
 Telephone or teletype reports, §§ 18, 29  
 Testify, availability of reporter to, §§ 4[b], 10  
 Third persons, statements made to officer by, generally, § 8  
 Timeliness of report, generally, § 7  
 Use form, police vehicle, § 34  
 Use in court, report made primarily for, § 11  
 Vehicle accident reports, §§ 3- 7, 9, 10, 12, 13  
 Vehicle use form, § 34  
 Victim reports, § 30  
 Witness statements, § 5

#### TABLE OF REFERENCES(Go to beginning)

#### Annotations

See the related annotations listed in § 1[b]

#### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

*Am. Jur. 2d, Evidence §§ 1082 to 1084, 1358 to 1362*

Foundation for audio recording as evidence, 23 *Am. Jur. Proof of Facts 3d* 315

Foundation for offering business records in evidence, 34 *Am. Jur. Proof of Facts 2d* 509

Admissibility of computerized business records, 14 *Am. Jur. Proof of Facts 2d* 173

Tape records as evidence, 17 *Am. Jur. Proof of Facts 1*

Audio recordings: evidence, experts and technology, 48 Am. Jur. Trials 1  
Computer technology in civil litigation, 41 Am. Jur. Trials 445  
Police misconduct litigation -- plaintiff's remedies, 15 Am. Jur. Trials 555

ARTICLE OUTLINE (Go to beginning)

I. PRELIMINARY MATTERS

§ 1 Introduction

§ 1[a] Scope

§ 1[b] Related annotations

§ 2 Summary and comment

§ 2[a] Generally

§ 2[b] Practice pointers

II. ADMISSIBILITY OF POLICE REPORTS UNDER BUSINESS EXCEPTION, GENERALLY

§ 3 View that police reports, properly qualified, are admissible

§ 4 View that police reports are not admissible

§ 4[a] Under state statute

§ 4[b] Police report not "business record"

III. FACTORS AFFECTING ADMISSIBILITY UNDER BUSINESS RECORDS EXCEPTION

A. Generally

§ 5 Report made in regular course of police business

§ 6 Necessity of reporter's personal knowledge

§ 7 Timeliness of report

B. Content of Report

§ 8 Statements made to reporting officer

§ 9 Opinions or conclusions of reporting officer

C. Other Factors

§ 10 Availability of reporter to testify

§ 11 Report made primarily for use in court

§ 12 Nature of objection to admission

## IV. ADMISSIBILITY UNDER PARTICULAR CIRCUMSTANCES

## A. In Civil Actions

§ 13 Automobile accident reports

§ 13[a] Held admissible

§ 13[b] Held inadmissible

§ 14 Slip-and-fall accident reports

§ 14[a] Held admissible

§ 14[b] Held inadmissible

§ 15 Assault and battery reports

§ 15[a] Held admissible

§ 15[b] Held inadmissible

§ 16 Memorandum

§ 17 "Incident" or "arrest" reports

§ 17[a] Held admissible

§ 17[b] Held inadmissible

§ 18 Telephone report

§ 18[a] Held admissible

§ 18[b] Held inadmissible

§ 19 Complaint reports

§ 20 Offense report

§ 20[a] Held admissible

§ 20[b] Held inadmissible

§ 21 Custody report

§ 22 Investigative report

§ 22[a] Held admissible

§ 22[b] Held inadmissible

§ 23 Presentence report

§ 24 Summary report

§ 25 Laboratory report

## B. In Criminal Actions

§ 26 "Incident" or "arrest" reports

§ 26[a] Held admissible

§ 26[b] Held inadmissible

§ 27 Speedometer, Breathalyzer, and other test reports

§ 27[a] Held admissible

§ 27[b] Held inadmissible

§ 28 Complaint reports

§ 28[a] Held admissible

§ 28[b] Held inadmissible

§ 29 Teletype or telephone report

§ 29[a] Held admissible

§ 29[b] Held inadmissible

§ 30 Victim report

§ 31 Radio log

§ 32 Letter of officer

§ 33 Receipts for property

§ 33[a] Held admissible

§ 33[b] Held inadmissible

§ 34 Vehicle use form

§ 35 Booking sheet

§ 36 Officer's disciplinary reports

§ 37 Memorandum

§ 38 Investigative report

§ 38[a] Held admissible

§ 38[b] Held inadmissible

§ 39 Offense report

§ 39.5 Autopsy report

§ 40 Latent print report

190 of 195 DOCUMENTS

American Law Reports 3d  
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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations

Thomas J. Goger, J.D.

*47 A.L.R.3d 822*

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] Introduction

[\*1] Preliminary matters

[\*1a] Scope

This annotation<sup>1</sup> collects the reported cases which have expressly considered issues relating to the admissibility and sufficiency, in a prosecution<sup>2</sup> for violation of speed regulations,<sup>3</sup> of evidence obtained by the use of a radar speedmeter or other mechanical or electronic device which automatically registers the speed of passing vehicles.

Although some of the issues considered herein are governed in some jurisdictions by statutes or ordinances, these laws are discussed only to the extent that they are reflected in the reported cases pertinent to this annotation; and no attempt has otherwise been made to state the relevant statutory law in any jurisdiction.

[\*1b] Related matters

Admissibility in State Court Proceedings of Police Reports as Business Records, *111 A.L.R.5th 1*

Possession or operation of device for detecting or avoiding traffic radar as criminal offense, *17 A.L.R.4th 1334*

Admissibility in state court proceedings of police reports as business records, *77 A.L.R.3d 115*

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, *33 A.L.R.3d 1405*

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, *29 A.L.R.3d 248*

Automobiles: speeding prosecution based on observation from aircraft, *27 A.L.R.3d 1446*

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v Arizona*, *25 A.L.R.3d 1076*

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party, *19 A.L.R.3d 1008*

Indefiniteness of automobile speed regulations as affecting validity., *6 A.L.R.3d 1326*

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, *93 A.L.R.2d 287*

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, *73 A.L.R.2d 1025*

Proof, by means of radar or photographic devices, of violation of speed regulations, *49 A.L.R.2d 469*

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, *21 A.L.R.2d 1200*

Expert or opinion testimony as to speed of vehicle by one who had no view, or only momentary view, of vehicle at time of accident, *156 A.L.R. 382*

Admissibility of police reports under Federal Business Records Act (*Federal Rules of Evidence, Rule 803*, and predecessor amendments), *31 A.L.R. Fed. 457*

Comment: Scientific evidence in traffic cases. *59 Journal of Criminal Law, Criminology and Police Science 57*

Radar evidence in the courts. *32 Dicta 323*

Radar speed detection in Illinois. *56 Ill Bar J 296*

Radar speedmeter in court. *6 Law Notes 69*

Comment: Radar and the Law. *10 South Tex LJ 269*

Legal aspects of police radar. *16 Cleveland Marshall L Rev 455*

Symposium: Radar Speedmeters. *33 NC L Rev 343*

[\*2] Summary and comment

[\*2a] Generally

The cases which have considered issues relating to the admissibility and sufficiency of radar evidence have indicated that there are three basic prerequisites to a conviction of speeding based upon radar readings: (1) the scientific reliability of the radar speedmeter as a recorder of speed; (2) the accuracy of the particular speedmeter used in a given case; and

(3) the proper operation of the radar equipment.

Although the early cases involving radar evidence required expert testimony as to the nature and function of a radar speedmeter and the scientific principles upon which it was based,<sup>n4</sup> it is now generally agreed that the reliability of radar is a proper subject for judicial notice.<sup>n5</sup> There has also been some legislative acceptance of the radar speedmeter;<sup>n6</sup> and statutory provisions permitting the use of radar in speed regulation enforcement have been held to eliminate the necessity, in speeding prosecutions, of presenting expert evidence as to radar's ability to measure speed.<sup>n7</sup>

While the general reliability of radar may be judicially noticed, it is still necessary in each speeding prosecution based on radar evidence to prove the accuracy of the particular speedmeter involved,<sup>n8</sup> although there is some disagreement as to whether the accuracy issue is one affecting the admissibility of radar evidence,<sup>n9</sup> or only its sufficiency.<sup>n10</sup>

Among the various methods of testing the accuracy of a radar speedmeter,<sup>n11</sup> the most commonly employed tests are those performed by holding calibrated tuning forks in front of the speedmeter's receiver, and by driving through the radar beam a police patrol car equipped with a calibrated speedometer. The cases themselves do not establish any definite guidelines regarding the proper time and place of conducting tests upon the accuracy of a radar device;<sup>n12</sup> and the sufficiency of the proof offered to establish the accuracy of a radar speedmeter is a matter determined largely in the light of the facts of each particular case.<sup>n13</sup> There is widespread agreement, however, that the adequacy of any test for accuracy is dependent upon the accuracy of the testing apparatus itself, although there is some authority to the contrary.<sup>n14</sup>

Under statutory provisions pertaining to radar evidence in speeding prosecutions, it has been held that in requiring proof of the machine's accuracy, the legislature did not intend to demand absolute exactness.<sup>n15</sup> And with regard to accuracy certificates executed in accordance with statutory provisions, and offered as proof of radar speedmeter accuracy, one case has held that the certificate need not contain the explicit statement that the speedmeter tested had, in fact, been found to be accurate,<sup>n16</sup> while in another case the certificate was ruled inadmissible for failing to state explicitly that the testing apparatus was itself accurate.<sup>n17</sup>

The cases agree that to sustain a speeding conviction on radar evidence, it must be shown that the radar device was properly operated; in this connection, it is also generally conceded that the police officer operating the speedmeter need not be an expert in the science of radar or of electronics in order to be considered properly qualified to work the device and to testify as to its readings.<sup>n18</sup>

Where the statute permitting the use of radar in speed regulation enforcement requires that the particular device used be of an approved type, it has been held that affirmative proof that the radar equipment used to time a motorist's speed was actually approved by the proper authority is necessary to a conviction based upon evidence obtained by the equipment.<sup>n19</sup> And where radar warning signs are required by statute, it has been held that proof of the erection of these signs is a prerequisite to a speeding conviction based on radar evidence.<sup>n20</sup> But it has also been held that the warning signs need not be so placed<sup>n21</sup> or so worded<sup>n22</sup> as to indicate that radar is, at the time, being used in the immediate area of the signs, since the purpose of the signs is only to give motorists adequate notice that radar may be in use at some point along the road on which they are traveling.<sup>n23</sup> An objection based upon a structural deficiency in a radar warning sign was upheld in one case, however, where the sign was inadequately illuminated or reflectorized to comply with statutory requirements.<sup>n24</sup>

The argument that the use of a radar speedmeter constituted a "speed trap," and hence was entrapment, has been rejected.<sup>n25</sup> And courts have also denied that a statutory provision permitting state police "officers" to use radar equipment in speed regulation enforcement required that a speedmeter be operated by more than one officer.<sup>n26</sup>

The contention that the officers operating radar equipment had mistakenly identified the defendant's vehicle as the vehicle detected speeding by the radar device was held not supported by the evidence in those cases where it was

raised.n27

Because of the possibility of error existing even in a tested radar speedmeter, there is some authority to the effect that a speeding conviction will not be sustained where the radar evidence indicates that the defendant motorist was traveling only slightly in excess of the legal speed limit.n28

In addition to the radar speedmeter, law enforcement officers have made use of several other electronic or mechanical devices in an effort to detect speeding violations. Where there was sufficient evidence to establish the scientific reliability, the accuracy, and the proper operation of the device in question, speeding convictions were sustained on evidence obtained by the use a "speed watch,"n29 a "Photo-Speed-Recorder,"n30 a "Foto-Patrol,"n31 and a "visual average speed computer recorder" (VASCAR).n32 But in the absence of adequate evidence establishing the accuracy of "speed watch" equipment and the qualifications of the officer operating it, speeding charges based on evidence produced by the device were dismissed.n33

[\*2b] Practice pointers

One of the most dramatic innovations in traffic law enforcement is the introduction of the radar speedmeter to record the rates of speed of vehicles suspected of going faster than the speed limit prescribed for the area of road on which they are traveling. The radar speedmeter was originally developed for use by traffic engineers in studying vehicle speeds in relation to zoning, curves, grades, intersection approaches, etc. Soon after it was developed, however, police and highway departments began using it to obtain information recording speed habits of drivers in different localities, to establish speed zones, and later, to enforce speed laws. The radar speedmeter has obtained its most widespread publicity in this latter field. And it is this latter type of radar speed reading that most often finds its way into court as evidence.n34

Radar devices are of two general types. The "pulse" type radar used by the military operates by sending forth at regular intervals a beam of radio microwaves which, coming into contact with the object to be detected, is reflected or bounced back to the receiver. The waves move in both directions at the speed of light, so that by computing the time lapse between sending and reception, the distance of the detected object may be determined, and by computing distance changes over a time interval, the speed of movement of the object can be learned. The radar speed-testing devices used in traffic control operate by a similar but distinct method, in which a continuous beam of microwaves is sent out at a fixed frequency, the operation depending upon the physical law that when such waves are intercepted by a moving object, the frequency changes in such a ratio to the speed of the intercepted object that by measuring the change of frequency, the speed may be determined.n35

In operation the radar device is set up along the side of the road, usually in or upon a parked police car, with the beam played along the highway. When the attached graph or dial shows that a passing car is speeding, the police officer in the car radios ahead a description of the car to another officer stationed some distance farther on, and the car is intercepted by this officer.n36

Generally speaking, there are three methods of checking the accuracy of a radar speedmeter.n37 Internal tests may be performed using test equipment and procedures to check such things in the instrument itself as the crystal detector, the cavity output, the frequency calibration, and the indicator calibration. An alternate method of calibrating the indicator circuit to within an accuracy of better than one percent is by utilizing a universally accepted means of producing constant frequency waves -- a tuning fork. Tuning forks are often manufactured and calibrated by the same company which manufactures the radar device and are shipped with the device as part and parcel of the total radar apparatus. These forks are cut in such a manner as to emit frequencies which will register certain readings upon a radar set which is properly operating, and the reading to be registered is usually marked upon the fork itself. A third method of testing is performed by two police officers, one of whom operates the radar machine itself while the other drives through the radar "zone of influence" a police patrol car equipped with a calibrated speedometer. By radio messages, the officers are

able to compare the readings upon the patrol car's speedometer with those readings registered upon the radar speedmeter. This type of test raised hearsay problems in early speeding prosecutions based on radar evidence,<sup>n38</sup> where the comparative readings of the speedometer and speedometer were presented in the testimony of a single police officer. In more recent cases, each police officer is asked to testify as to the reading which he observed on the instrument in his presence. The similarity between the readings becomes obvious, and the hearsay problem is overcome.<sup>n39</sup> A fourth type of test involved the use of what was called, in *People v Lynch (1969) 61 Misc 2d 117, 304 NYS2d 985*, infra § 7[b], an "internal switch," which activated a calibrated electronic tone within the machine itself, which was calibrated to register a certain speed on the radar unit's meter.

Cases concerned with the legal sufficiency, in various aspects, of methods of checking the accuracy of a radar speedmeter are collected in §§ 6-8, infra.

[\*II] Admissibility and sufficiency of evidence obtained by use of radar speedmeter

[\*A] Reliability of radar generally

[\*3] General rule in absence of statute that judicial notice may be taken of radar's ability to measure speed

When data secured by radar speedmeters are proffered in evidence, the first question presented to the courts is the general one of whether it can be assumed or judicially noted that the principle involved, and the means of applying that principle to the problem in question, are so clearly apt to the end in view as to show without expert testimony that it is in fact feasible to detect speed with this device.<sup>n40</sup> In most of those jurisdictions in which this question has been presented, apparently in the absence of relevant statute, it has been held, as the following cases indicate, that judicial notice might be taken of the general reliability of a radar speedmeter to measure the speed of motor vehicles.

## ARKANSAS

*Everight v Little Rock (1959) 230 Ark 695, 326 SW2d 796*

## CALIFORNIA

*People v MacLaird (1968) 264 Cal App 2d 972, 71 Cal Rptr 191*  
*People v Flaxman (1977) 74 Cal App 3d Supp 16, 141 Cal Rptr 799*

## COLORADO

*People v Walker (1980, Colo) 610 P2d 496*

## CONNECTICUT

*State v Tomanelli (1966) 153 Conn 365, 216 A2d 625*  
*State v Lenzen (1962) 24 Conn Supp 208, 189 A2d 405 (apparently recognizing rule)*  
*State v Carta (1963) 2 Conn Cir 68, 194 A2d 544, certif den (Conn) 197 A2d 932*  
*State v Naumec (1966) 3 Conn Cir 575, 222 A2d 239*

*State v McCoy* (1966) 4 Conn Cir 109, 226 A2d 116  
*State v Gilmore* (1967) 5 Conn Cir 65, 241 A2d 545

#### DELAWARE

*State v Harper* (1978, Del) 382 A2d 263

#### ILLINOIS

*People v Abdallah* (1967) 82 Ill App 2d 312, 226 NE2d 408  
*People v Cash* (1968) 103 Ill App 2d 20, 242 NE 2d 765 (apparently recognizing rule)  
*People v Barbic* (1969) 105 Ill App 2d 360, 244 NE2d 626 (dictum)  
*People v Stankovich* (1970) 119 Ill App 2d 187, 255 NE2d 461  
*People v Beil* (1979) 76 Ill App 3d 924, 32 Ill Dec 290, 395 NE2d 400

#### KANSAS

*State v Primm* (1980) 4 Kan App 2d 314, 606 P2d 112 (citing annotation)

#### KENTUCKY

*Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421

#### MASSACHUSETTS

*Commonwealth v Whynaught* (1979) 377 Mass 14, 384 NE2d 1212

#### MINNESOTA

*State v Gerdes* (1971) 291 Minn 353, 191 NW2d 428

#### MISSOURI

*State v Calvert* (1984, Mo) 682 SW2d 474, (citing annotation)  
*State v Graham* (1959, Mo App) 322 SW2d 188  
*St. Louis v Boecker* (1963, Mo App) 370 SW2d 731 (recognizing rule)  
*Kansas City v Hill* (1969, Mo App) 442 SW2d 89

#### NEW JERSEY

*State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR2d 460  
*State v Readding* (1978) 160 NJ Super 238, 389 A2d 512 (citing annotation)

## NEW YORK

*People v Magri* (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728

*People v Dusing* (1959) 5 NY2d 126, 181 NYS2d 493, 155 NE2d 393

*People v Sachs* (1955) 1 Misc 2d 148, 147 NYS2d 801 (dictum)

*People ex rel. Igoe v Nasella* (1956) 3 Misc 2d 418, 155 NYS2d 463 (dictum)

*People v Wylie* (1958) 13 Misc 2d 310, 179 NYS 2d 901

*People v Johnson* (1960) 23 Misc 2d 11, 196 NYS2d 227 (apparently recognizing rule)

For earlier New York cases requiring expert testimony, see *infra*

## OHIO

*East Cleveland v Ferrell* (1958) 168 Ohio St 298, 7 Ohio Ops 2d 6, 154 NE2d 630

## TENNESSEE

*Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351 (dictum)

## TEXAS

*Wilson v State* (1959, *Tex Crim*) 328 SW2d 311 (apparently recognizing rule)

## VERMONT

*State v Doria* (1977, *Vt*) 376 A2d 751 (citing annotation)

## WISCONSIN

*Re Bardwell* (1978) 83 Wis 2d 891, 266 NW2d 618 (citing annotation)

In *Everight v Little Rock* (1959) 230 Ark 695, 326 SW2d 796, the court said that the usefulness of radar equipment for testing the speed of vehicles had become so well established that the testimony of an expert to prove the reliability of radar in this respect was not necessary, and that judicial knowledge of such fact could be taken by the courts.

In reversing a dismissal of a speeding prosecution based upon evidence obtained by the use of a radar device, the court in *People v MacLaird* (1968) 264 Cal App 2d 972, 71 Cal Rptr 191, held that the trial judge had erred in refusing to take judicial notice of the use, validity, and accuracy of a radar device as a scientific method of measuring speed, and that the prosecution should not have been required to call an expert witness to establish this commonly known and accepted proposition. The court was careful to point out, however, that taking judicial notice of the principle of radar as an electronic device which scientifically and accurately measured the speed of moving objects was altogether different from judicially noticing the accuracy and operating efficiency of the particular radar device used to measure the speed of the defendant's vehicle in a particular case.

It was held in *State v Tomanelli* (1966) 153 Conn 365, 216 A2d 625, that the scientific accuracy of the Doppler-shift principle for the measurement of speed, if the principle was correctly applied, was, in the discretion of the trial court, a proper subject of judicial notice, so that especially where, as in this case, no evidence attacking it was proffered, expert testimony in explanation of the principle was not a necessary prelude to the introduction of radar evidence.

Noting that eminently qualified expert testimony had been offered to establish the principle of Radio Detection and Ranging as being the use of exact laws of science and nature in the measurement of distance and speed, the court in *State v Graham* (1959, Mo App) 322 SW2d 188, pointed out that this principle was supported by the evidence in a great many cases and by the declarations of numerous authorities, and held that it was now time for the courts, which must of necessity maintain a conservative attitude, to recognize by judicial knowledge that a radar speedometer was a device which, within a reasonable engineering tolerance, and when properly functioning and properly operated, could accurately measure speed in terms of miles per hour.

Noting that since World War II, members of the public had become generally aware of the widespread use of radar methods, and did not question the general accuracy and effectiveness of such methods, the court in *State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR2d 460, said that it would seem that radar speedometer readings should be received in evidence upon a showing that the meter was properly set up and tested by the police officers, without any need for independent expert testimony by electrical engineers as to its general nature and trustworthiness. The court added that the possibility of error would not wholly vitiate the admissibility of the evidence but would simply affect its weight, the state conceding that the readings were not conclusive but merely constituted admissible evidence to be weighed by the trier of facts.

In New York, expert testimony was required in all speeding prosecutions based upon radar evidence,<sup>n41</sup> until the Court of Appeals in *People v Magri* (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728, first recognized the general reliability of the radar speedometer as a device for measuring the speed of motor vehicles, and declared that it would no longer be necessary in each speeding prosecution to produce an expert to testify regarding the nature and function of a speedometer and the scientific principles underlying its operation.

Prior to the decision in *Magri* (NY) supra, the propriety of taking judicial notice of the general effectiveness of a tested radar speedometer was recognized in *People ex rel. Igoe v Nasella* (1956) 3 Misc 2d 418, 155 NYS2d 463, although in finding a motorist guilty of speeding upon evidence obtained by the use of a radar device, the court based its ruling as to the admissibility of the radar evidence upon expert testimony regarding the reliability of radar in measuring speed, and upon evidence offered to prove the proper testing and operation of the particular device used in this case. As to the contention that taking judicial notice would, in effect, raise the radar readings to such final and conclusive proof of guilt as to foreclose all chance of exculpation, the court agreed that, to a marked degree, a speeding trial would become a contest between man and machine, but asserted that in view of the conceded engineering tolerance, approximating 2 miles per hour, in the radar device, the weight to be accorded the machine's readings in the face of the entire proof in each case would still be a substantial question for the trier of fact.

Pointing out that it was proper to take judicial notice of the general reliability of radar to measure speed, the court in *People v Wylie* (1958) 13 Misc 2d 310, 179 NYS2d 901, affirmed a speeding conviction, and held that the defendant motorist's rights on appeal were not prejudiced as a result of the failure of the court stenographer's stenograph machine to record the expert testimony offered by the prosecution to explain the nature and function of the speedometer which was used to clock the motorist's speed. The court stated that the expert's testimony was superfluous and not at all necessary to the prosecution's case, and pointed out, without discussion, that the well-presented-and-prepared prosecution case showed convincingly that the radar device was properly tested and operated.

Radar evidence was held properly admitted in a prosecution for violation of speed regulations in *Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351, the court reviewing extensive expert testimony regarding the construction, theory, operation, and accuracy of radar equipment. In affirming a speeding conviction, however, the court emphasized that

radar evidence was not to be considered conclusive, but was simply admissible and subject to cross-examination, leaving to the triers of fact the determination of the weight to be given the radar evidence in view of all the other evidence. The court pointed out that the propriety of taking judicial notice of the accuracy of a radar speedometer was not presented in this case, since a noted electronics expert had testified as to the accuracy of the instrument used here; but the court expressed approval of recent cases in which such judicial notice was taken, and suggested that the question might be settled by a legislative enactment.

&lt;&gt;

In charging the jury, the court in *State v Moffitt* (1953) 48 Del 210, 100 A2d 778, explained that its ruling that radar evidence of speeding was admissible was based upon expert testimony regarding the construction, the operation, and the purpose of a radar speedometer, its margin of error when properly functioning, and the ways and means of testing its accuracy. The court then submitted to the jury the question whether, under all the circumstances of the present case, the radar device was in fact accurate in its measurement of the speed of the defendant's vehicle.

There is, in addition to the earlier New York cases discussed supra, some authority to the effect that expert testimony explaining the nature and functions of a radar speedometer is essential in a speeding prosecution based upon radar evidence.<sup>n42</sup>

&lt;&gt;

Traffic court properly convicted driver of speeding based on radar indication of speed, where driver challenged only general reliability of radar speed-measuring devices and no evidence suggested that particular unit used by officer was improperly calibrated or operated. *State v Kane* (1992, Idaho App) 836 P2d 569 (citing annotation).

Laser evidence to measure the speed of vehicles constituted new or novel evidence, and thus a Frye hearing had to be held before the evidence could be admitted in trial against motorist charged with speeding violation; the issue of scientific acceptance of laser technology to measure the speed of vehicles had not been adequately litigated. *People v. Canulli*, 275 Ill. Dec. 207, 792 N.E.2d 438 (App. Ct. 4th Dist. 2003).

Evidence as to reliability of radar as means of detecting speed was not precluded solely by fact that judicial notice had been taken of radar's reliability, thus trial court erred in excluding testimony of defendant, who was expert witness, as to reliability of radar devices in general. *People v Beil* (1979) 76 Ill App 3d 924, 32 Ill Dec 290, 395 NE2d 400.

Evidence obtained through the use of a radar gun is analyzed as scientific evidence, and is admissible provided there is proof that the test device was operating accurately and that the test was performed by qualified individuals. *State v. Cochrane*, 897 A.2d 952 (N.H. 2006).

In prosecution for speeding trial court erroneously admitted into evidence speed reading obtained by speed measuring device where state failed to prove scientific reliability of device either by expert testimony or through judicial notice. *State v Musgrave* (1979) 171 NJ Super 477, 410 A2d 64.

See *State v Finkle*, 128 NJ Super 199, 319 A2d 733 affd 66 NJ 139, 329 A2d 65, § 19.

In prosecution for speeding, testimony by police officer that he clocked defendant at 62 mph with moving radar device and that device was calibrated and in good working order was insufficient to sustain conviction for speeding where there was no expert testimony concerning technical theory of operation of device nor any testimony as to its scientific accuracy and reliability; although expert testimony is not necessary in cases involving stationary radar units, judicial

notice of moving radar has not been established and, although one type of moving radar device has been given judicial notice by at least one appellate court, this notice does not automatically extend to all models of moving radar and did not extend to particular model used by police officer. *Kirtland Hills v Logan* (1984, Lake Co) 21 Ohio App 3d 67, 21 Ohio BR 71, 486 NE2d 231.

Judicial notice of radar set's accuracy was not proper where defendant presented expert testimony calling accuracy into question and state failed to present rebuttal expert testimony attesting to set's accuracy. *State v Freeman* (1985) 24 Ohio Misc 2d 7, 24 Ohio BR 131, 493 NE2d 571.

In prosecutions for speeding prosecution is not required to call expert witnesses to establish accuracy of radar. *Masquelette v State* (1979, Tex Crim) 579 SW2d 478.

For purposes of demonstrating the reliability of radar evidence, the underlying scientific theory of radar is valid as a matter of law. *Maysonet v. State*, 91 S.W.3d 365 (Tex. App. Texarkana 2002).

Even though trial court may take judicial notice of reliability of underlying principles of speed radar detection based on Doppler effect, court erred in taking judicial notice as to reliability and accuracy of moving radar device; prosecution failed to carry its burden of proof as to accuracy of device where trooper failed to establish use of verify button to ascertain squad car's speed as entered into radar's speed equation. *State v Hanson* (1978) 85 Wis 2d 233, 270 NW2d 212 (citing annotation).

[\*4] Effect of statutory provisions permitting use of radar in speed regulation enforcement

As the following cases indicate, the effect of statutes permitting the use of radar speedmeters to enforce speed regulation is to foreclose the question whether expert testimony is necessary to establish the reliability of a speedmeter as a speed detection device.

In *United States v Dreos* (1957, DC Md) 156 F Supp 200, where a motorist was charged with speeding on the Baltimore-Washington Parkway, a road under the concurrent jurisdiction of the State of Maryland and the United States, it was said that the use of a radar speedmeter, like the use of cameras and X-rays, had reached such general acceptance by state legislatures, executive departments of state and Federal Governments, courts, and the public, that it was no longer necessary for the prosecution to offer expert testimony, as it did in this case, to explain the theory and operation of the radar equipment, at least where there was a statute or regulation similar to applicable sections of the Maryland Code and National Capital Parks Regulations permitting radar speed detection. The court said that it was sufficient to show that the equipment had been properly tested and checked, that it was manned by a competent operator, that proper operative procedures were followed, and that proper records were kept. Adding that the evidence in the instant case showed that all these requirements were complied with, the court concluded that it was shown beyond a reasonable doubt that the defendant was driving at least 65 miles per hour where the maximum speed permitted was 55 miles per hour.

Citing numerous cases holding that, without statutory aid, the data obtained by the use of scientific instruments for measuring speed was admissible in a speeding prosecution only after expert witnesses had testified as to the theory, operation, and accuracy of the instruments, the court in *Royals v Commonwealth* (1957) 198 Va 876, 96 SE2d 812, pointed out that the Virginia radar statute made the rate of speed indicated by radio microwaves or other electrical devices admissible evidence in any proceeding where the speed of a motor vehicle was at issue, without the necessity of proving by expert testimony the theory and operation of the method of measuring speed; but the court emphasized that the statute did not eliminate the necessity for the prosecution to prove that the machine used for measuring speed had been properly set up and recently tested for accuracy. And a speeding conviction was reversed in this case, because the prosecution had failed to introduce "any legal evidence" tending to show that the radar machine to measure the speed of the defendant motorist had been properly set up and recently tested for accuracy.

In *Thomas v Norfolk* (1966) 207 Va 12, 147 SE2d 727, a speeding prosecution based upon radar evidence, the action of a trial judge in declining to allow the defendant motorist to question the accuracy of radar as a reliable method of determining the speed of his car was held proper and in accord with the terms of the Virginia statute permitting the use of radio microwaves or other electrical devices to check the speed of motor vehicles, and further providing that "[t]he results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue." Rejecting the motorist's argument that the trial judge was, in effect, creating a conclusive presumption that the radar set was accurate at the time of the alleged offense, the court pointed out that the ruling was directed at the motorist's intention to introduce expert testimony to contest the basic reliability of the radar set in question as opposed to the proper testing of that set, and noted that the trial judge's ruling specifically protected the motorist's right to elicit or present testimony as to the proper or improper testing of the unit.

On a related note the validity of these statutes has been upheld in several cases.

Thus, a motorist's argument that he was denied due process of law in violation of the Federal Constitution by a statutory provision which permitted the use of radar in speed regulation enforcement was rejected in *Commonwealth v Gideon* (1962) 28 Pa D & C2d 157, 4 Adams Co Leg J 11, the court affirming the motorist's conviction of speeding at 60 miles per hour in a zone where speed was restricted to 50 miles per hour. The motorist contended that the statute placed an unconscionable burden on motorists, since the use of radar allowed an instantaneous timing of speed for fractions of a second, making it impossible for the motorists to disprove charges of speed violations. The motorist also argued that electronic devices such as the radar speedmeter were subject to error and might be affected by various factors such as weather conditions, X-ray machines, welding apparatus, the presence of iron ore, or any large moving objects, and that a motorist apprehended for speeding by the use of radar could not be expected to know of the presence of the myriad factors that might affect the radar reading. Noting that the motorist's speed was not timed only for an instant but over the course of 300 feet which, at a speed of 60 miles per hour, would have been traversed in 3 1/3 seconds, the court pointed out that the motorist had offered no evidence to show that radar generally, or the equipment used in this case, was not accurate; and that there was no indication in the record of the presence of any accuracy-affecting factors in the vicinity of the radar unit used to time the defendant motorist's speed. On the contrary, the court said, the officer operating the equipment testified specifically that there were no X-ray machines or power stations in the vicinity, and that there was no other traffic moving at the time. The court also observed that many other jurisdictions had accepted the use of radar in measuring the speed of motor vehicles, and pointed to the complete lack of any cases in which the use of radar as a means of measuring speed had been held to be unconstitutional. The court concluded that the use of radar to measure speed could properly be added to the list of scientific discoveries which have been judicially accepted.<sup>n43</sup>

In affirming a speeding conviction based upon radar evidence which indicated that the defendant motorist was operating his motor vehicle at a speed of 62 miles per hour in a 55-mile-per-hour zone, the court in *Dooley v Commonwealth* (1956) 198 Va 32, 92 SE2d 348, app dismd 354 US 915, 1 L Ed 2d 1432, 77 S Ct 1377, held that the due process clause of the Fourteenth Amendment to the Constitution of the United States was not contravened by a statutory provision permitting "the use of radio microwaves or other electrical device" to check the speed of motor vehicles, and further providing that "[t]he results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue." The court said that the test generally applied to determine the constitutionality of statutes making proof of a certain fact prima facie or presumptive evidence of another fact was whether there was a natural and rational evidentiary relation between the fact proven and the fact presumed. That there was a natural and rational evidentiary relation existing between the results of a speed checked by radio microwaves and the speed of the motor vehicle checked by them, could hardly be denied, said that court, adding that in recent years the public had become generally aware of the widespread use of radio microwaves or other electrical devices in detecting the speed of motor vehicles or other moving objects; and that while the intricacies of such devices might not be fully understood, their general accuracy and effectiveness were not seriously questioned. Emphasizing that the proper testing of the machine was a matter stipulated by the parties, and that no attempt had been made to show that the radar equipment did not properly record the defendant's speed, the court pointed out that if any of those conditions

and happenings which the defendant argued could affect the correct reading of radar under given circumstances had actually occurred, the defendant could have introduced evidence to rebut the prima facie presumption created by the statute. And the court stated that the statute did not shift the burden of proof, as contended by the defendant, but merely created a rule of evidence under which the burden of going forward with evidence shifted to the defendant after the prosecution had offered the radar check of the speed of the defendant's motor vehicle as proof of excessive speed. The statute did not determine the guilt of the defendant, the court said, nor did it shift the burden of ultimate proof, nor deprive the defendant of the presumption of innocence. The court concluded that the statute was a valid enactment.n44

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Statutory conditions for admissibility of radar results were met where officer operating device was sufficiently trained in classroom and in field, officer testified as to setting up and operating device, device was operated with minimal distortion or interference, and device was tested by accurate external methods when it was set up, by means of tuning fork and speedometer of squad car, both of which had been recently calibrated. *State v Dow (1984, Minn App) 352 NW2d 125.*

Trial court in speeding prosecution properly admitted evidence of radar speed measurement under statute recognizing accuracy of radar devices and authorizing use of results in evidence, where officer testified that he was qualified to use device and that it was operating properly at time of speed measurement. *Billings v Skurdal (1986, Mont) 730 P2d 371, cert den (US) 95 L Ed 2d 508, 107 S Ct 1902, reh den (US) 96 L Ed 2d 384, 107 S Ct 2492.*

[\*B] Accuracy of particular radar set

[\*5] Necessity of proving accuracy

[\*5a] View that evidence of accuracy is a prerequisite to admissibility of radar evidence

A basic element of proof in a speeding prosecution based upon radar evidence involves the accuracy of the particular radar unit used to clock the defendant motorist's speed; and the cases generally agree that no conviction may be had upon radar evidence alone, absent proof of the machine's accuracy. Whether this accuracy issue is one affecting the admissibility of radar evidence or merely its sufficiency is not so clear-cut. The following cases have taken the view that evidence tending to show the accuracy of the particular speedometer involved in a given case is a necessary prerequisite to the admissibility of evidence of speed obtained by the use of the speedometer.

#### ARKANSAS

*Everight v Little Rock (1959) 230 Ark 695, 326 SW2d 796*

#### CALIFORNIA

*People v Flaxman (1977) 74 Cal App 3d Supp 16, 141 Cal Rptr 799*

#### COLORADO

*People v Walker (1980, Colo) 610 P2d 496*

## CONNECTICUT

*State v Tomanelli* (1966) 153 Conn 365, 216 A2d 625  
*State v Lenzen* (1962) 24 Conn Supp 208, 189 A2d 405 (by implication)  
*State v Carta* (1963) 2 Conn Cir 68, 194 A2d 544, certif den (Conn) 197 A2d 932  
*State v Naumec* (1966) 3 Conn Cir 575, 222 A2d 239  
*State v McCoy* (1966) 4 Conn Cir 109, 226 A2d 116  
*State v Greenman* (1969) 6 Conn Cir 160, 268 A2d 808 (recognizing rule)

## KANSAS

*State v Primm* (1980) 4 Kan App 2d 314, 606 P2d 112 (citing annotation)

## KENTUCKY

*Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421

## MINNESOTA

*State v Pulos* (1987, Minn App) 406 NW2d 75

## MISSOURI

*State v Calvert* (1984, Mo) 682 SW2d 474, (citing annotation)  
*State v Graham* (1959, Mo App) 322 SW2d 188  
*St. Louis v Boecker* (1963, Mo App) 370 SW2d 731  
*Kansas City v Hill* (1969, Mo App) 442 SW2d 89  
*Ballwin v Collins* (Mo App) 534 SW2d 280

## NEBRASKA

*Dietze v State* (1956) 162 Neb 80, 75 NW2d 95 (by implication)  
*Peterson v State* (1957) 163 Neb 669, 80 NW 2d 688  
*State v Green* (1984) 217 Neb 70, 348 NW2d 429

## NEW JERSEY

*State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR2d 460  
*State v Readding* (1978) 160 NJ Super 238, 389 A2d 512 (citing annotation)  
*State Musgrave* (1979) 171 NJ Super 477, 410 A2d 64  
*State v Overton*, 135 NJ Super 443, 343 A2d 516  
*State v Cardone*, 146 NJ Super 23, 368 A2d 952

## NEW YORK

For New York cases, see § 5[b], *infra*

## OKLAHOMA

*Jackson v Oklahoma* (1984, *Okla Crim*) 678 P2d 725

## TENNESSEE

*Hardaway v State* (1957) 202 *Tenn* 94, 302 SW2d 351 (by implication)

## VERMONT

*State v Doria* (1977, *Vt*) 376 A2d 751 (citing annotation)

## WASHINGTON

*Seattle v Peterson* (1985) 39 *Wash App* 524, 693 P2d 757 (citing annotation)

Pointing out that judicial notice could extend only to the scientific accuracy of the Doppler-shift principle as a means of measuring speed if the principle was correctly applied, the court in *State v Tomanelli* (1966) 153 *Conn* 365, 216 A2d 625, stated that judicial notice did not extend to the accuracy or efficiency of any given instrument designed to employ the principle, and that whether the instrument itself was accurate and was accurately operated must necessarily be demonstrated to the satisfaction of the trier in order to render the evidence produced by it admissible.

In outlining the various prerequisites to the admissibility of radar evidence in a prosecution for violation of speed regulations, the court in *State v Graham* (1959, *Mo App*) 322 SW2d 188, noted, as a general rule, that the character of the radar device was such that to be acceptable as correctly indicating speed, it must have been carefully tested and found to be correct at or near the time of its use in traffic regulation.

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See *Aurora v McIntyre* (1986, *Colo*) 719 P2d 727, § 7[d].

Once State introduced a certified copy of the Department of Public Safety's (DPS) list of approved laser speed detection devices in trial for speeding, evidence of speed measured by an approved laser speed detection device was admissible. *O.C.G.A. § 40-14-17. Odum v. State*, 564 S.E.2d 490 (*Ga. Ct. App.* 2002).

See *People v Burch*, 19 *Ill App 3d* 360, 311 NE2d 410, § 8[a].

Although in defendant's case judge, over defendant's objection, permitted police officer to testify as to radar readings without requiring foundation regarding radar unit's accuracy and although defendant's conviction for speeding was

upheld, court noted that in any speeding case tried after date of present opinion, where radar readings from untested equipment are admitted over objection and without independent corroborative evidence, any judgment of guilt would be reversed. *Commonwealth v Whyngaught (1979) 377 Mass 14, 384 NE2d 1212*.

Officer complied with relevant servicing requirements under *Ferency*, which imposed certain requirements on admission of radar speedometer readings into evidence, in speeding case; although motorist elicited testimony from officer at hearing indicating that radar speedometer had not been serviced for approximately 13 months, officer testified that, on basis of his training and instruction, the Michigan Speed Measurement Task Force did not recommend any servicing for speedometer unit, and thus, requirement at issue only mandated service as recommended, and did not mandate any specific actions. *City of Adrian v. Strawcutter, 259 Mich. App. 142, 673 N.W.2d 469 (2003)*.

See *State v Dow (1984, Minn App) 352 NW2d 125, § 4*.

Testimony by officer that he calibrated radar gun with two tuning forks, was certified radar training instructor, observed speeding defendant's vehicle approaching at higher rate of speed than other freeway traffic, and that radar gun locked onto defendant's car and displayed speed of 76 mph supported speeding conviction. *Berkeley v Stringfellow (1990, Mo App) 783 SW2d 501*.

Evidence that radar unit operated by officer and properly tested for accuracy recorded defendant's speed as 52 miles per hour was sufficient to sustain charge of speeding, and additional opinion testimony of arresting officer would not be required. *Kansas City v Corley (1977, Mo App) 552 SW2d 30*.

Admissibility of speed readings produced by laser speed detector requires a showing that the law enforcement officer operating the device received appropriate training and that relevant pre-operational checking procedures were satisfied. *Matter of Admissibility of Motor Vehicle Speed Readings Produced by LTI Marksman 20-20 Laser Speed Detection System, 314 N.J. Super. 233, 714 A.2d 381 (Law Div. 1998)*.

In prosecution for speeding wherein police officer testified that he had "clocked" defendant's vehicle with moving radar unit, trial court erred in exercising judicial notice as to evidential competence of moving, as oppose to stationary, radar unit, but error was harmless where same police officer gave eyewitness opinion testimony that defendant's vehicle was speeding. *Kirtland Hills v Logan (1984, Lake Co) 21 Ohio App 3d 67, 21 Ohio BR 71, 486 NE2d 231*.

In order to introduce evidence of a defendant's speed derived from the use of radar detection device, the Commonwealth must offer a certificate by the Secretary of Transportation certifying the agency which performed the tests on the device as an official testing station, and must introduce a certificate of accuracy of such device, signed by the person who performed the tests and the engineer in charge of the testing station, and which certification must show that device was accurate when tested, and that device was tested within 60 days of date it was used to calibrate the defendant's speed. 75 Pa. C.S.A. §§ 3362(a), 3368(d). *Com. v. Kaufman, 2004 PA Super 152, 849 A.2d 1258 (2004)*.

See *State v Hanson (1978) 85 Wis 2d 233, 270 NW2d 212, (citing annotation), § 3*.

[\*5b] View that evidence of accuracy is not a prerequisite to admissibility but affects only sufficiency of radar evidence

It was expressly held in the following cases that the accuracy of the particular radar device used to clock a motorist's speed was an issue affecting the sufficiency of the radar evidence, and not its admissibility.

Acknowledging that where there was reasonable and sufficient proof of the accuracy of a radar instrument, the reading taken therefrom might of itself be sufficient for a conviction of speeding, the court in *People v Abdallah (1967) 82 Ill App 2d 312, 226 NE2d 408*, pointed out also that where the accuracy of a particular radar device was unproved, the

readings taken therefrom were unproved, the readings taken therefrom were admissible in evidence, although they would be insufficient in themselves to convict for a traffic violation.

Expressing the opinion that there was sufficient proof of the accuracy of the particular radar unit in question for the trier of fact to find the defendant motorist guilty of speeding, based solely upon the reading taken from the radar unit, the court in *People v Barbic* (1969) 105 Ill App 2d 360, 244 NE2d 626, recognized that where the accuracy of a particular radar device was unproved, the results thereof would be insufficient to convict for a traffic violation, although such results were admissible as evidence; and that where, on the other hand, there was reasonable and sufficient proof of the accuracy of the radar instrument, the reading taken therefrom might of itself be sufficient for a conviction.

And pointing out that evidence obtained by the use of an "untested" radar unit would be insufficient of itself to sustain a conviction for speeding, the court in *People v Magri* (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728, held that although the radar speedometer used in this case must be regarded as "untested" because of the failure to establish in the record evidence of four accuracy tests, the radar evidence of the defendant's speed was admissible and was sufficient, when taken together with the corroborative opinion testimony given by two police officers, to sustain a speeding conviction.

Although an early New York case expressed the view that the admissibility of radar evidence was dependent upon proof of the machine's accuracy,<sup>n45</sup> the court declared in *People v Dusing* (1959) 5 NY2d 126, 181 NYS2d 493, 155 NE2d 393, that a reading from an untested speedometer or radar device was admissible, although it would not be sufficient in itself to sustain a speeding conviction. Holding that the trial judge should not have ruled out radar evidence of speed merely because the radar unit had been tested against an automobile speedometer which had not been shown to be accurate, the court pointed out that the deficiency in this proof could be overcome by the opinion testimony offered by two admittedly experienced and qualified police officers who from separate positions had observed the defendant's oncoming automobile.

In holding that radar evidence was sufficient, without corroborative opinion testimony as to speed, to sustain a speeding conviction, the court in *People v Blattman* (1966) 50 Misc 2d 606, 270 NYS2d 903, stated that the Dusing Case (NY) supra, had established the rule that a reading from an untested radar device was admissible, but was not, without more, sufficient for a speeding conviction, and that the resulting deficiency in proof could be supplied by the testimony of qualified observers.

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Evidence was sufficient to support conviction for driving in excess of maximum lawful speed; even if police officer was using speed detection device without city permit, officer made visual estimate that defendant was driving at 73 or 74 miles per hour in 55 miles per hour zone. *O.C.G.A. § 40-6-181. Stone v. State*, 571 S.E.2d 488 (Ga. Ct. App. 2002).

Evidence of accuracy of radar equipment went only to weight to be assigned to reading and was not foundational requirement for admission of radar reading into evidence. *State v Caron* (1987, Me) 525 A2d 1049.

See *State v Wilcox*, 40 Ohio App 2d 380, 69 Ohio Ops 2d 333, 319 NE2d 615, § 8[b].

Evidence was insufficient where prosecution failed to prove that radar type speedometer was accurate and functioning properly at time speed was checked and where sole evidence was reading secured by use of radar type speed meter. *State v Bonar*, 40 Ohio App 2d 360, 69 Ohio Ops 2d 320, 319 NE2d 388.

Arresting officer's testimony setting forth his training and experience in use of radar unit, in addition to his testimony describing tuning-fork test on day defendant was stopped, was reasonable and sufficient proof of accuracy of radar unit,

and reading taken therefrom was admissible even though tuning fork used to test accuracy of radar device was itself not tested for accuracy. *State v Sprague (RI) 322 A2d 36.*

[\*6] Statutory provisions affecting sufficiency of test for accuracy

[\*6a] Definition of term "accurate"

A Pennsylvania statute providing, in part, "No conviction shall be had upon evidence obtained through the use of radar apparatus unless. . . it has been calibrated and *tested for accuracy and found accurate* or adjusted for accuracy within a period of thirty days prior to the alleged violation," was held in the following cases not to require absolute accuracy in radar speedmeters.

In *Commonwealth v Perdok (1963) 411 Pa 301, 192 A2d 221*, it was held that the word "accurate" in the statutory provision quoted above was not meant to require absolute exactness, since no machine was capable of such precise measurement. The court pointed out, however, that the legislature also did not intend that the variance between true speed and the speed indicated on a radar unit should be of such a magnitude as to prejudice the motorist whose speed was measured by the device. In the present case, where the "Certificate of Radar Speedmeter Accuracy" showed a variance of less than one mile per hour between true speed and the indicated speed at all speeds up to 90 miles per hour, the differential between true and indicated speed was said not to prejudice the defendant motorist, whose speed was measured at 59 miles per hour, the court explaining that after making adjustments for the variance indicated by the certificate, the true speed of the motorist at the time of his arrest was 58.7 miles per hour, considerably in excess of the 50-mile-per-hour legal limit which he was charged with violating. A speeding conviction was reversed, however, on other grounds.

And it was held in *Commonwealth v McConnell (1965) 35 Pa D & C2d 541*, that the above statutory provision did not demand absolute exactness, since no machine was capable of such precise measurement, but required only that the variance between true speed and indicated speed should not be of such a magnitude as to prejudice the motorist whose speed was clocked. In affirming the speeding convictions of three motorists, the court noted that the radar speedmeter readings in question of 65, 61, and 65 miles per hour indicated, according to the respective certificates of speedmeter accuracy, that the motorists were traveling respectively at 65.5, 60.4, and 65.2 miles per hour. Without stating the speed limits which the motorists were supposed to have violated, the court concluded that the motorists were not harmed by the minute degree of inaccuracy in the radar units which had measured their speed.

Thus, in ruling admissible radar evidence which indicated that a motorist was driving at a speed of 63 miles per hour in a 50-mile-per-hour speed zone, the court in *Commonwealth v O'Malley (1962, Pa) 53 Luzerne Leg Reg 87*, rejected the motorist's contention that the certificate of accuracy offered by the prosecution showed in fact that the speedmeter was inaccurate, rather than accurate, and failed to comply with the requirements of the above-quoted statutory provision. The certificate indicated that the radar speedmeter had been tested within the 30-day period required by the Code, but also indicated some slight variance between indicated speed and true speed at all speeds other than 60 miles per hour. Noting that earlier decision regarded 99 percent accuracy sufficient compliance with the code requirements as to speedometers in state police vehicles used to enforce speed regulations, the court pointed out that in clocking the motorist's speed at 63 miles per hour, the radar speedmeter used here was between 100 percent and 98.8 percent accurate, since the certificate indicated that the speedmeter registered 60 miles per hour at a true speed of 60 miles per hour, and 65 miles per hour at a true speed of 64.9 miles per hour. The court concluded that the radar apparatus had been shown to be accurate within acceptable tolerances, and sustained an order suspending the motorist's motor vehicle operating privileges for 2 months.

See *Commonwealth v Gernsheimer* (1980, Pa Super) 419 A2d 528, § 6[b].

[\*6b] Sufficiency of test certificate

A few cases have considered problems relating to statutory provisions authorizing the admission of test certificates as evidence of the accuracy of a radar speedometer. In one case it was held that the certificate need not state expressly that the speedometer had been found to be accurate, since this conclusion was implicit in the mere issuance of the certificate.

Under statutory provisions requiring, in part, proof of the accuracy of radar apparatus as a prerequisite to a speeding conviction based upon evidence obtained by the use of the apparatus, and further providing for the establishment of official radar testing stations authorized to test radar apparatus and to issue certificates indicating that the tests were made, it was held in *Commonwealth v Perdok* (1963) 411 Pa 301, 192 A2d 221, that it was not necessary for the official testing station to make the precise statement that "this machine has been found accurate," in order to comply with the statutory requirement that the apparatus be found accurate. The court said that the conclusion that the machine had been found to be accurate was manifested by the title of the document, "Certificate of Radar Speedometer Accuracy." Having adjusted the machine for accuracy, the court added, the testing station issued the certificate in question, and it was the court's opinion that if the testing station had been unable to adjust and calibrate the machine within acceptable limits, the certificate would not have been issued.

On the other hand, another case has held that the certificate must clearly indicate that the testing apparatus was itself accurate.

Thus, in a speeding prosecution based upon radar evidence, a certificate indicating that the radar device in question had been tested for accuracy on six occasions within a 2-hour period on the night of the defendant motorist's arrest, by driving a police patrol car with a "calibrated" speedometer past the device, was held in *Sweeny v Commonwealth* (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817, not admissible as evidence of the speedometer's accuracy, since it did not sufficiently comply with that section of the Virginia radar statute which provided for the admissibility of "a certificate, executed and signed by the officers calibrating or testing such [radar] device as to its accuracy as well as to the accuracy of the speedometer of any motor vehicle used in such test, and stating the time of such test, type of test and results of testing." The court pointed out that while the certificate in question indicated that the speeds reflected on the radar meter during the test were identical with the speeds reflected on the speedometer of the police vehicle driven past the radar beam, this fact would indicate that the radar meter was reflecting the correct speed only if the reading of the automobile speedometer was accurate. As the court noted, however, the certificate signed by the police officers indicated only that the speedometer had been "calibrated," or in other words, had been "tested for accuracy." The court said that the statutory provision in question must be strictly construed and fully complied with, if a certificate was to be used in evidence; and the court emphasized that the use of the word "calibrate" did not necessarily indicate that the speedometer had been found to be accurate. The court concluded that the certificate was improperly admitted in evidence, and in reversing the motorist's conviction, pointed out that there was no other evidence in the record showing the accuracy of the speedometer which was used as a test upon the accuracy of the radar apparatus.

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See *Commonwealth v Nardei* (1980, Pa Super) 420 A2d 612, § 12.

Document approving specified radar system as speed timing device and certifying specified laboratory as approved testing laboratory into evidence was not error, notwithstanding those documents predated effective date of vehicle code, where there was nothing to suggest that code was intended to revoke prior approval of radar apparatus and appointment of stations for calibrating and testing approved apparatus, and where both electronic device and testing and calibration station were approved after effective date of code. *Commonwealth v Kerns* (1980, Pa Super) 420 A2d 542.

Under statute providing that certificate from radar testing station showing that calibration and tests were made within required period and that device was accurate will be competent and prima facie evidence of those facts in every proceeding which violation of statute is charged, where certificate establishing testing station as official station contained state seal and certificate which established accuracy of particular radar device did not contain seal, but was certified by signature of person who calibrated device and by signature of person in charge of testing station and device was tested and found to be accurate within required period all of requirements of statute were met; where radar or other electronic device is used to calibrate defendant's speed in prosecution for violation of speeding laws, in order to introduce results of evidence Commonwealth must offer certificate, certified by secretary of transportation or designee certifying agency which performs test on device as official testing station and must introduce certificate of electronic device accuracy into evidence which must be signed by person who performed test and engineer in charge of testing station, must show device was accurate when tested and must show that particular device was tested within 60 days of date it was used to calibrate particular defendant's speed. *Commonwealth v Gernsheimer (1980, Pa Super) 419 A2d 528*.

Certificate stating that speedometer of test vehicle had been calibrated and that speedometer was found to be accurate after calibration met statutory requirements. *Howell v Commonwealth, 213 Va 590, 194 SE2d 758*.

[\*7] Factors affecting sufficiency of test for accuracy

[\*7a] Generally

There are various methods of checking the accuracy of a radar speedometer,<sup>n46</sup> and, as indicated in § 5[a], supra, proof of its accuracy is essential to a speeding conviction based solely on the radar evidence. The following subsections will examine various factors affecting the sufficiency of a test upon the accuracy of a radar device, such as the time and place of making the test, the type of test conducted, and the necessity of showing the accuracy of the testing apparatus.

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Trial court's finding that police officer failed to conduct sufficient external testing of laser speed tracking device for accuracy both before and after defendant was stopped for speeding supported determination to exclude results of speed testing. *Neb.Rev.St. § 60-6,192(1)(d). State v. Hall, 269 Neb. 228, 691 N.W.2d 518 (2005)*.

At time defendant was clocked by S-80 radar device at speed unreasonable for conditions, S-80 radar was in good condition for accurate use, where qualified radar expert had checked device three times on date of incident and had found each time that each calibration result was what it should have been, and where procedure followed by him was in accordance with radar manufacturer's instructions. *Pemberville v Dietrich (1983) 7 Ohio Misc 2d 48, 7 Ohio BR 399, 455 NE2d 727*.

Trial court erred in denying driver charged with speeding cross-examination of state's radar expert as to expert's qualifications, since proof that particular radar unit used to clock driver's speed was properly designed, manufactured and calibrated is prerequisite to admission of speed reading. *City of Bellevue v Lightfoot (1994) 75 Wash App 214, 877 P2d 247*.

[\*7b] Type of test conducted

In considering whether a radar device had been shown to be accurate, the courts in the following cases held that the particular testing procedures used were sufficient to measure a radar unit's accuracy.

Where a motorist convicted of the crime of speeding contended that the evidence of speed recorded on a radar unit was improperly admitted into evidence, since the tests for accuracy conducted by the operator of the unit by means of 40- and 60-mile-per-hour tuning forks were insufficient to test the overall accuracy of the radar unit in the range from 20 to 100 miles per hour, the court in *State v Carta (1963) 2 Conn Cir 68, 194 A2d 544*, certif den (Conn) 197 A2d 932, reviewed expert testimony to the effect that the two tuning forks used to test the accuracy of this machine were sufficient to test a range of 20 to 70 miles per hour and that a reading of 51 miles per hour, the speed at which the defendant motorist was clocked, on a unit tested only by the 40- and 60-mile-per-hour forks, was an accurate measurement of speed. Regarding the contention that the radar unit should have been given an additional test by driving a car with a calibrated speedometer through the radar field, the court noted expert testimony that such a test was not absolutely necessary but should be made in most cases, as a means of substantiating the tuning-fork test; and the court said that there was no authority to be found for the proposition that both the tuning-fork test and the test-car test were necessary to establish the accuracy of a radar device. In affirming the conviction, the court pointed out that the question of the adequacy of the test for accuracy here had properly been submitted to the jury.

In affirming a speeding conviction based upon evidence obtained by the use of a radar speedometer, the court in *People v Abdallah (1967) 82 Ill App 2d 312, 226 NE2d 408*, denied, in effect, that the testing of a radar device by a single tuning fork would not suffice to establish its accuracy, although in answering the motorist's argument on this point, without addressing the problem directly, the court merely pointed out that the case upon which the motorist had relied did not support his proposition.

Tests involving the use of an internal switch and the use of tuning forks were held sufficient to establish the accuracy of a radar speedometer, in *People v Lynch (1969) 61 Misc 2d 117, 304 NYS2d 985*, the court rejecting an argument that test runs by police vehicles through the zone of influence of a radar speedometer were essential in proving the accuracy of radar equipment. It was pointed out that the internal switch test was a calibration by an electronic tone within the machine itself, and that the tuning forks used were calibrated to emit frequencies equivalent to readings on the speedometer of 50 and 30 miles per hour. Noting testimony by the officer operating the radar equipment that the tests had been performed both before and after each setup of the machine on the day in question and had indicated no irregularities in the radar unit, the court affirmed a speeding conviction based on the radar evidence and said that it was inconceivable that the internal check and the two tuning-fork tests could all have been inaccurate to the same degree.

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In one case it was held that testing a radar speedometer by the use of a tuning fork which was an integral part of the machine would not, alone, sufficiently demonstrate the accuracy of the device, so that a conviction of speeding could not be sustained solely on evidence derived from the device.

Thus, referring to a test of a radar speedometer by use of a tuning fork which was an integral part of the machine as "bootstrapping," the court in *State v Gerdes (1971) 291 Minn 353, 191 NW2d 428*, reversed a speeding conviction which had been based solely on evidence obtained by the use of a radar speedometer which the operating officer had tested by pressing a button on the machine which indicated whether the radio waves from the antenna head were being properly emitted and received. Pointing out that the only other test performed by the officer was "to take a reading of traffic which by personal observation he estimated to be approximately 30 m.p.h.," the court said that it was proper for the trial judge to take judicial notice of the reliability of radar as a means of establishing speed, but that it would not be proper to take such notice of the accuracy of a particular radar set. On the occasion when the machine is set up, the court continued, its accuracy must be tested in some external manner by a reliably calibrated tuning fork or by an actual test run, using another vehicle with an accurately calibrated speedometer.

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Conviction for speeding was upheld where: (1) accuracy of radar unit was established by evidence that officer had tested unit's internal calibration devices and checked unit before and after defendant's arrest by using two different tuning forks which had been checked by manufacturer; (2) qualifications of officer to operate radar device were established by evidence that officer had received several hours of classroom and field training as to particular radar unit in question and had used unit for over a year as highway patrolman; and (3) expert testimony regarding construction and method of operation of radar unit was not prerequisite to officer's testimony as to reading obtained by him. *State v Primm* (1980) 4 Kan App 2d 314, 606 P2d 112 (citing annotation).

See *State v Dow* (1984, Minn App) 352 NW2d 125, § 4.

In speeding prosecution radar evidence was properly received where evidence that police officer tested radar unit for accuracy before and after he checked speed of defendant's car by striking two tuning forks against hard object and holding them up to radar unit, and that each month tuning forks were tested for accuracy by use of digital frequency counter was sufficient to prove radar units were accurate without proof that digital frequency counter had been tested for accuracy. *Kansas City v Tennill* (1982, Mo App) 630 SW2d 173.

See *State v Ahern* (1982) 122 NH 744, 449 A2d 1224, § 9.

Performance testing of laser speed detector demonstrated sufficient reliability that speed readings produced by such detector should generally be received as evidence of the speed of motor vehicles without the need for expert testimony in individual prosecutions arising under the motor vehicle laws, in light of prior determination that using laser to measure speed was widely accepted in relevant scientific community and was valid. *Matter of Admissibility of Motor Vehicle Speed Readings Produced by LTI Marksman 20-20 Laser Speed Detection System*, 314 N.J. Super. 233, 714 A.2d 381 (Law Div. 1998).

Proof of accuracy of radar speed gun was not sufficient where only test performed to check accuracy was by use of single 50 m.p.h. tuning fork. *State v Readding* (1978) 160 NJ Super 238, 389 A2d 512 (citing annotation).

See *People v Bellizzi* (1980) 108 Misc 2d 209, 441 NYS2d 147, § 8[b].

Although accuracy of radar unit and testing apparatus are generally essential to speeding conviction based solely on radar evidence, use of two tuning forks, one producing reading of 30 mph and other producing 80 mph, to calibrate moving radar device was corroborative, since it is unlikely that two forks would be inaccurate to same degree. *State v Bechtel* (1985, Wayne Co) 24 Ohio App 3d 72, 24 Ohio BR 126, 493 NE2d 318, motion overr.

Testimony of state trooper as to his training in use of radar devices, that he had used device for eight months as a trooper on average of one to two days per week, that he had calibrated the radar device using both unit's own internal calibration system and two external tuning forks approximately one hour prior to defendant's arrest for speeding and then 12 minutes after arrest and that on both occasions radar unit was operating properly satisfied criteria that speed meter be expertly tested within reasonable proximity following arrest and that testing be done by means which do not rely on radar device's own internal calibration and raised rebuttable presumption that radar device was functioning accurately; where operating officer employed two tuning forks to test radar device at two different speeds, it was not required that tuning fork's accuracy be tested by some other device. *State v Kramer* (1981) 99 Wis 2d 700, 299 NW2d 882.

Where officer who used radar device in determining speed of motorist's vehicle using both internal crystal and external tuning fork test 25 minutes before arresting defendant for speeding and again 25 minutes after using device, and at both times results showed device was working properly, evidence satisfied requirement to establish rebuttable presumption of accuracy of moving radar device that device be expertly tested within reasonable proximity following arrest and that

testing be done by means which do not rely on device's own internal calibrations, even though there was no evidence that officer possessed any expert training in using tuning fork test nor any testimony regarding accuracy of tuning forks themselves. *State v Mills* (1981) 99 Wis 2d 697, 299 NW2d 881.

[\*7c] Time and place of conducting test

Whether tests upon the accuracy of a radar device were conducted at a proper time<sup>47</sup> and a proper site to establish the machine's ability to measure precisely the speed of passing vehicles has been at issue infrequently in cases involving speeding prosecutions based on radar evidence. See the following cases.

## ILLINOIS

*Schaumburg v Pedersen* (1978) 60 Ill App 3d 630, 18 Ill Dec 99, 377 NE2d 252 (citing annotation)

In one case a speeding conviction was reversed where tests upon the accuracy of the radar unit involved were considered too remote to insure the machine's effectiveness. Where in a prosecution for speeding, no test of the radar speedometer used to determine a motorist's speed was made at the site of, or immediately prior to the time of, his arrest, the radar evidence was held inadmissible in *St. Louis v Boecker* (1963, Mo App) 370 SW2d 731, the court reversing a conviction which had been based solely on the radar readings. Noting that the accuracy and proper functioning of a radar speedometer, an instrument "dealing with delicate measurement," might easily be affected by its movement from place to place, the court pointed out that the only test upon the machine used in this case was made at some unknown time and at some undisclosed place. Even if it was assumed, the court said, that the radar unit was operating properly at the time of the test, evidence to that effect would have no probative force to establish that the machine was accurate and functioning properly after what may have been (for all that the evidence showed) a great number of individual movements, to far distant sites, over a substantial period of time. The court recognized the difficulties encountered by the authorities in the enforcement of traffic laws and ordinances, and said that such efforts were to be encouraged, but emphasized that requiring that proof be adduced that a radar speedometer was tested and found to be operating properly at the site of, and reasonably close to the time of, an arrest should not place an undue burden on the prosecution, and should at the same time protect the rights of motorists.

In another case, however, the accuracy of the radar device was held established by tests conducted at the beginning and end of a 7-hour period, despite evidence that the machine had been moved occasionally in the meantime. In *Thomas v Norfolk* (1966) 207 Va 12, 147 SE2d 727, a motorist appealing a speeding conviction based upon radar evidence which indicated that he had been traveling at 46 miles per hour in a 30-mile-per-hour zone argued unsuccessfully that accuracy tests conducted at another site several hours before, and several hours after, his arrest, did not constitute adequate proof that the radar set which clocked his speed was operating accurately at the time and place of his arrest. The officers operating the unit had testified that prior to, and after, the motorist's arrest, a number of automobiles passed through the radar beam at excessive speeds, and that each of these cars was stopped. In each instance, after the alleged speeder had passed the radar beam, the machine was turned off and the speeder chased and apprehended in the radar vehicle. Subsequently, the radar vehicle was returned to the check point, parked, and set for the next speeder. In denying that this occasional change of the radar set's location necessarily interfered with its accuracy, the court pointed out that proof of the instrument's accuracy at 2:30 p.m. and at 9:30 p.m., in the absence of evidence to the contrary, warranted the inference that the machine was operating accurately during the interim, or at 4 p.m., the time of the defendant's arrest. The court also noted that the motorist had presented no evidence indicating that the radar set had to be tested for accuracy at the exact site of its use in clocking his speed, nor any evidence that the use of the radar car in apprehending other speeders interfered with the accuracy of the radar set installed in that car. The evidence was sufficient in the court's opinion to warrant the finding that the radar set had been properly set up and recently tested for accuracy, and the motorist's conviction was, therefore, affirmed.

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Radar device that was tested for accuracy three weeks after defendant's arrest and found to be working properly was tested within reasonable time within meaning of statute requiring that radar device be tested within reasonable time following arrest to accord it presumption of accuracy sufficient to support conviction. *State v Stoll* (1983) 39 Conn Supp 313, 464 A2d 64.

Where police officer who was operating radar unit made necessary tests to insure its proper functioning and accuracy just hours before defendant's automobile was checked and also at end of officer's shift, and on both occasions tests indicated proper functioning of machine, relying solely on his training and depending on accuracy of unit after testing, police officer could give speed of defendant's automobile as calibrated by radar unit. *State v Harper* (1978, Del) 382 A2d 263.

See *State v Primm* (1980) 4 Kan App 2d 314, 606 P2d 112, (citing annotation), § 7[b].

See *State v Dow* (1984, Minn App) 352 NW2d 125, § 4.

In speeding prosecution there was sufficient proof of accuracy of radar unit at time of its use relative to offense, and evidence was sufficient to establish that adopted testing procedures supported finding that unit was operating accurately, where unit was tested approximately seven months before date in question and five months thereafter and was found to be accurate, expert testified in detail as to procedures followed which led to certification for accuracy and that tuning forks were utilized to secondarily check unit's accuracy, and trooper testified that he made tests with tuning forks while his patrol vehicle was stationary in both stationary and moving mode of unit. *State v Hunziker* (1982, Mo App) 638 SW2d 793.

State failed to make prima facie case in speeding prosecution when it failed to prove that radar unit was tested at site of arrest and reasonably close in time to arrest, notwithstanding that unit was tested four hours before arrest at trooper's home and five hours after arrest and was found to be operating properly at those times. *State v Weatherwax* (1982, Mo App) 635 SW2d 34.

See *State v Bonar*, 40 Ohio App 2d 360, 69 Ohio Ops 2d 320, 319 NE2d 388, § 5[b].

Vehicle must be timed for 3/10 of a mile before offense of disobedience of traffic-control device relating to posted speed limit can be established with use of speedometer. 75 Pa.C.S.A. §§ 3111(a), 3368(a). *Com. v. Masters*, 737 A.2d 1229 (Pa. Super. Ct. 1999).

See *State v Kramer* (1981) 99 Wis 2d 700, 299 NW2d 882, § 7[b].

See *State v Mills* (1981) 99 Wis 2d 697, 299 NW2d 881, § 7[b].

[\*7d] Accuracy of testing apparatus

A number of cases have considered whether it is necessary in proving the accuracy of a radar speedmeter to prove also that the apparatus used to test the radar device was itself accurate. Many, but not all, of these cases have ruled that proof of the accuracy of testing apparatus is a necessary prerequisite to proof of the accuracy of the radar unit.<sup>n48</sup>

In affirming the conviction of a motorist whose allegedly excessive speed was measured by a radar speedmeter, the court in *State v Tomanelli* (1966) 153 Conn 365, 216 A2d 625, pointed out that the admissibility of radar evidence was dependent upon proof of the accuracy of the particular radar set used to measure the defendant's speed, and said that

where the accuracy of the instrument was tested by the use of tuning forks, it was obvious that the tuning forks themselves must be shown to be accurate before their use could be accepted as a valid test of the radar instrument. The court then observed that while no attempt had been made in the present case to establish the accuracy of the tuning forks which had been used to test the accuracy of the radar unit in question, both before and after the motorist's speed was recorded, no effort had been made by the motorist to attack the accuracy of the tuning forks; and the court concluded that under these circumstances the accuracy of the radar unit was unimpeached.

Thus, where a motorist contested his speeding conviction, arguing that the foundation for the radar evidence of speed was deficient, since the state had failed to produce evidence that the tuning forks which were used to test the accuracy of the radar equipment had themselves been tested within a reasonable time prior to their use on the day of his arrest, the court in *State v Lenzen (1962) 24 Conn Supp 208, 189 A2d 405*, held that the admission of the radar evidence was justified by evidence that the tuning forks, which were calibrated to indicate readings on the speedometer of 40, 60, and 80 miles per hour, had been tested for accuracy by the manufacturer; that the radar set had been tested by the use of the tuning forks both before and after it was placed in operation on the day of the motorist's arrest and had, on both occasions, indicated readings identical with the numbers stamped on the forks; and that the radar unit was also tested by running a police car with a calibrated speedometer through its zone of influence and comparing the speed indicated on the radar device with the speed indicated on the car's speedometer. The favorable results of the various tests upon the accuracy of the radar device, as well as the fact that not one but three forks were used, went far, in the opinion of the court, to indicate that both the forks and the radar device were functioning properly on the day in question.

Pointing out that the value of tests upon a radar speedometer's accuracy would depend upon the accuracy of the measuring device against which the radar was checked, the court in *State v Graham (1959, Mo App) 322 SW2d 188*, stated that testing a speedometer for accuracy by running a police patrol car through the device's zone of influence at speeds of 50 miles per hour and 70 miles per hour, when the patrol car's speedometer was not shown to be accurate, would probably not be sufficient to render radar evidence admissible in a prosecution for speeding where the speedometer indicated only a slight difference between the speed of the defendant's vehicle and the legal limit. However, the court continued, since the speedometer indicated in the present case that the defendant motorist was driving in excess of 15 miles per hour over the legal limit, and since the accuracy of the speedometer had been confirmed by tests conducted with tuning forks calibrated to register 50 miles per hour and 70 miles per hour on the radar dial, the accuracy tests were sufficient to render the radar speedometer evidence admissible; and a conviction of speeding was affirmed.

In *St. Louis v Boecker (1963, Mo App) 370 SW2d 731*, a prosecution for speeding based upon evidence obtained by the use of a radar speedometer, where the court was primarily concerned with the time and place of testing the radar unit, it was pointed out that the value of any test of a radar speedometer depended upon the accuracy of the measuring device against which it was checked, whether the measuring device used was an automobile speedometer, a stopwatch, or as in the instant case, a tuning fork. The court accepted without question the principle of testing a radar speedometer by use of a tuning fork, but noted that all measuring devices were the product of human endeavor and therefore subject to error in manufacture, or to subsequent impairment and damage, and that because of the precise measurement which must be made in order to determine the accuracy of a radar unit, it was apparent that any imperfection in the tuning fork would materially affect the speed registered on the radar dial. Thus, in the absence of any evidence that the tuning fork used to test the radar unit in the present case was itself accurate, the court doubted that the city's evidence was sufficient to establish prima facie that the radar speedometer was functioning properly, even at the time the test was made.

Testimony by the officer operating a radar device that a few days prior to, and a few days after, a motorist's arrest for speeding, the two tuning forks which were used to check the accuracy of the speedometer had been calibrated in the officer's presence by electronic equipment, and had been found to need no adjustment, was held a sufficient showing of the accuracy of the tuning forks, in *Kansas City v Hill (1969, Mo App) 442 SW2d 89*, the court recognizing that proof of the accuracy of the speedometer was necessary to the admissibility of radar evidence, and that the value of any check upon the accuracy of the radar unit would depend upon the accuracy of the measuring device against which it was

tested.

See *State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR2d 460, infra § 8[a], where it was held that the defendant in a speeding prosecution had waited too long to contest the state's failure to offer affirmative evidence establishing the accuracy of patrol car speedometers used to test the accuracy of a radar speedmeter, the court remarking, however, that it would have been the better course for the state to have introduced testimony on this point.

It was the opinion of the court in *People v Sachs* (1955) 1 Misc 2d 148, 147 NYS2d 801, that as a prerequisite to a speeding conviction based upon evidence obtained by the use of a radar speedmeter, the prosecution should be required to present operative and mechanical proof to the effect that the speedometer on the motorcycle or other police vehicle used to test the accuracy of the radar device had itself been tested and found to be accurate.

In the absence of proof of the accuracy of a tuning fork which was used to test a radar speedmeter, a conviction of speeding based upon evidence obtained by the use of the speedmeter was reversed in *People ex rel. McCann v Martirano* (1966) 52 Misc 2d 64, 275 NYS2d 215. The court stated that for radar evidence alone to support a conviction of speeding, the accuracy of the radar unit must be established beyond a reasonable doubt by clear, convincing, and unequivocal proof. The court added that it was certainly not beyond the realm of possibility that the pitch of the tuning fork had been affected in some way so that it was no longer an accurate fork. And the court declared that although this fork had been calibrated to emit frequencies which would register a 40-mile-per-hour reading on the radar unit, as it did when it was used to test the radar device which clocked the defendant's speed, it was not inconceivable that both the unit and the tuning fork were inaccurate to and in the same degree.

In *Biesser v Holland* (1967) 208 Va 167, 156 SE2d 792, the court recognized that the accuracy of a test of radar apparatus by the use of a tuning fork would necessarily depend upon the type and the accuracy of the tuning fork which was used.

And see *Sweeney v Commonwealth* (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817, supra § 6[b], where it was pointed out that the statutory provision to the effect that the accuracy of a radar device used to measure the speed of motor vehicles might be proved by a certificate signed by the officers testing the accuracy of the device required that the certificate reflect not only the accuracy of the radar apparatus, but also the accuracy of the speedometer of any motor vehicle used in conducting the accuracy tests. The court pointed out that a certificate reflecting identical speeds registered on a radar meter and on a police vehicle's speedometer would only indicate that the radar meter was accurate if the automobile speedometer was accurate. If the speedometer were defective or inaccurate to the same degree as the radar meter, the court continued, then both devices would be reflecting an improper speed. While this was unlikely, the court said, it demonstrated the necessity that the speedometer of the motor vehicle used to test the radar meter be accurate.

The necessity of proving the accuracy of testing apparatus was also recognized, at least impliedly, in the following cases where the courts were more concerned with questions relating to the sufficiency of such proof.

Evidence that a radar speedmeter had been tested by use of a tuning fork and by comparison with a police car speedometer both before and after the device had been used for determining the speed of motor vehicles was held sufficient to sustain a speeding conviction, in *People v Stephens* (1967) 52 Misc 2d 1070, 277 NYS2d 567, the court stating that although the prosecution's offer of the test car's calibrated speed record was ruled inadmissible and no offer of proof had been made as to the accuracy of the tuning fork, the prosecution should not be subjected to the burden of offering proof of the accuracy of both the calibrated tuning fork and the speedometer of the test car beyond the simple comparative analysis made in the instant case. The court pointed to the possible frustration of law enforcement that might result from slavish adherence to hypertechnical requirements of myriad testings of the components of every device used to measure the accuracy of other measuring devices. It was more than coincidence, the court concluded, that four testings of the radar device indicated a speed of 50 miles per hour; it was inconceivable that the radar unit, the

tuning fork, and the test car speedometer could all have been inaccurate to and in the same degree.

In affirming a speeding conviction based upon radar evidence, the court in *Farmer v Commonwealth* (1964) 205 Va 609, 139 SE2d 40, rejected an argument that as part of the proof necessary to establish the accuracy of the radar unit the prosecution was required to prove the accuracy of the tachometer which had been used to calibrate the speedometer of the police patrol car driven through the radar beam as a test upon the radar's accuracy. The court feared that agreement with the motorist's contention would lead to the further requirement of proof of the accuracy of the instrument or instruments by which the accuracy of the tachometer was tested, and said that common sense demanded that there be a "point of faith somewhere," noting that a calibrated master speedometer was generally accepted as being prima facie correct.

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There is some authority to the effect that the prosecution in a speeding prosecution based upon radar evidence is not required to prove the accuracy of equipment used to test the radar device.

Pointing out that the readings of radar equipment designed to determine the speed of motor vehicles were admissible as evidence of speed if a sufficient foundation was laid as to the accuracy of the equipment in operation, the court in *Peterson v State* (1957) 163 Neb 669, 80 NW2d 688, affirmed a speeding conviction and rejected the defendant motorist's argument that there must be foundation evidence as to the accuracy of a police car speedometer used to test radar equipment before the speedometer evidence could be accepted as a foundation for the accuracy of the readings of the radar unit. The court was of the opinion that the testimony of a police officer as to the speedometer reading of a car driven by him at a given time was competent prima facie evidence of the speed of the car at that time; and the court concluded, therefore, that evidence produced in part by cross-examination of the state's witnesses which showed that the patrol car used in testing the radar equipment used in this case had been bought new and had been used only a few weeks, that it had normal tires, and that the speedometer had been tested and was found to be accurate, was sufficient foundation for the admission of the radar evidence, the court finding it unnecessary to discuss issues relating to whether the testimony regarding the testing of the speedometer was hearsay in that the person who tested the speedometer was not called as a witness.

A motorist's argument that any comparative testing devices used to determine whether radar equipment was accurate and functioning properly must themselves be proved accurate was rejected by the court in *State v Snyder* (1969) 184 Neb 465, 168 NW2d 530, since such a chain of evidence might have to proceed ad infinitum. Noting that statutory provisions permitted the use of radar to measure the speed of motor vehicles and rendered the results of such determinations acceptable as prima facie evidence of speed in any court or legal proceeding where speed was at issue, the court said that a speeding conviction might be sustained upon reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly, and affirmed the motorist's conviction here on evidence that the radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork and by comparison with the speedometer of a patrol car driven through the radar field, although there was apparently no evidence as to how recently the tuning fork had been calibrated, and the only evidence as to the accuracy of the patrol car speedometers was testimony that the speedometer on one of the cars had been calibrated some 3 months before the defendant's arrest and had been checked with radar approximately every other week since that time.

And in affirming a speeding conviction based upon radar evidence, the court in *Cromer v State* (1964, Tex Crim) 374 SW2d 884, pointed out that the state was not required to prove the accuracy of the speedometer in the police patrol car which was driven through the radar beam as a test upon the accuracy of the radar apparatus.

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Defendant was properly convicted of speeding based on evidence derived from radar device, notwithstanding that tuning fork used to calibrate device had not been recertified within one year prior to its use, where arresting officer testified he had used single tuning fork to test radar device prior to its use on day of offense, and where tuning fork had been previously certified and was recertified as accurate approximately three and one-half months later. *Aurora v McIntyre* (1986, Colo) 719 P2d 727.

See *People v Walker* (1980, Colo) 610 P2d 496, § 8[b].

Where all requirements as to proper foundation for admissibility of radar evidence were met, that is that officer stated his qualification and training in use of K-55 radar unit, internal calibration, external tests and light tests were performed to check operational integrity of radar unit, and officer identified car as tracked vehicle, and where court determined efficacy of K-55 unit to perform functions for which it was designed, testimony as to speed of car was admissible. *State v Newton* (1980, Del) 421 A2d 920.

See *People v Beil* (1979) 76 Ill App 3d 924, 32 Ill Dec 290, 395 NE2d 400, § 8[a].

See *State v Shimon* (Iowa) 243 NW2d 571, § 8[a].

See *State v Dow* (1984, Minn App) 352 NW2d 125, § 4.

In prosecution for manslaughter by culpable negligence in operating automobile, trial court did not err in admitting evidence of reading shown by radar unit directed toward defendant's car, notwithstanding that 18 days after defendant's arrest, device was tested and found to be in need of repairs for malfunction which showed constant reading of "00," where device was tested one month prior to defendant's arrest and found to be in proper working order, officer testified that he checked unit with two tuning forks shortly before seeing defendant's car and unit showed expected reading, unit was not malfunctioning by giving reading of "00 all of time" at time it purported to show speed of defendant's vehicle and thus it would appear that malfunction did not occur until thereafter, and tuning forks used were found to be accurate both before and after they were used to test unit. *State v Dahlgren* (1982, Mo) 627 SW2d 53.

See *State v Moore* (1985, Mo App) 700 SW2d 880, § 8[a].

See *State v Hunziker* (1982, Mo App) 638 SW2d 793, § 7[c].

See *State v Ahern* (1982) 122 NH 744, 449 A2d 1224, § 9.

See *State v Bechtel* (1985, Wayne Co) 24 Ohio App 3d 72, 24 Ohio BR 126, 493 NE2d 318, motion overr, § 7[b].

See *State v Doles* (1980) 70 Ohio App 2d 35, 24 Ohio Ops 3d 25, 433 NE2d 1290, § 8[b].

There was sufficient evidence to support conviction for speeding where arresting officer testified that he performed both external test of accuracy of radar speed detection device using calibrated tuning fork and internal test using component unit within radar itself, both tests indicated radar was operating accurately, and no evidence was presented to suggest that radar device was operating otherwise, notwithstanding defendant's contention that testing devices used in verifying accuracy of radar unit had not been proven accurate themselves; officer's testimony regarding his classroom and field training, in regard to particular radar unit in question and his experience with equipment was sufficient to establish his qualifications to operate device. *Shears v State* (1982, Okla Crim) 648 P2d 841 (citing annotation).

See *Commonwealth v Gernsheimer* (1980, Pa Super) 419 A2d 528, § 6[b].

See *State v Kramer (1981) 99 Wis 2d 700, 299 NW2d 882, § 7[b]*.

See *State v Mills (1981) 99 Wis 2d 697, 299 NW2d 881, § 7[b]*.

[\*8] Evidence of accuracy in particular cases

[\*8a] Accuracy held sufficiently demonstrated

In the following cases involving speeding prosecutions where the accuracy of the radar device used to clock a motorist's speed was at issue, it was held that the accuracy of the radar unit had been adequately proved.

There was held to be sufficient evidence to show that the radar equipment in question had been properly tested and checked, in *United States v Dreos (1957, DC Md) 156 F Supp 200*, where, although the manner of testing was not disclosed in the opinion, the court noted testimony to the effect that the officer operating the radar equipment had tested its accuracy immediately after he set it up in the location near the defendant's arrest and tested it again before he removed it, about 2 hours later, with satisfactory results both times. There was also evidence that an electrical engineer from a research laboratory which made periodic calibration checks of radar devices for the State of Maryland and the Commonwealth of Virginia, as well as for the United States Park Police, had checked the equipment in question 8 months prior to the defendant's arrest; that he checked the transmitter-receiver and the speedometer again one month after the defendant's arrest; and that on both occasions the equipment was recording accurately, with less than one percent of error at any speed.

Pointing out that while it was proper to take judicial knowledge of the usefulness of radar equipment for testing the speed of motor vehicles, it would always be necessary to prove the accuracy of the particular equipment used in the case being tried, the court in *Everight v Little Rock (1959) 230 Ark 695, 326 SW2d 796*, affirmed a speeding conviction based upon evidence obtained by the use of radar equipment, where the accuracy of the equipment was substantiated by expert testimony that the speedometer used in this case was accurate within 2 miles per hour up to 100 miles per hour, was simple to operate, and was virtually impossible to set up improperly, and by testimony offered by the police officers operating the equipment that it had been tested on the morning in question and was found to be working properly.

A speeding conviction based upon radar evidence was affirmed in *People v Abdallah (1967) 82 Ill App 2d 312, 226 NE2d 408*, where the accuracy of the radar device was tested by the use of a single tuning fork.

Where a radar speedometer clocked a truck's speed at 62 miles per hour, although a tachograph device installed in the truck indicated that the truck's speed did not exceed the 50-mile-per-hour limit at the time of the alleged violation, the court in *People v Barbic (1969) 105 Ill App 2d 360, 244 NE2d 626*, upheld the truckdriver's conviction of speeding, pointing out that testimony by the police officers operating the radar device that the device had been tested for accuracy a total of five times on the day of defendant's arrest, both before and after the arrest, and that the percentage of error in testing was less than one percent, was sufficient proof of the accuracy of the radar unit to establish the defendant's guilt. As to the defense based on the reading of the tachograph chart, the court said that the substantial testimony was that both the radar device and the tachograph were accurate, although a possibility of error at the time of the arrest existed in connection with each device; and that it was therefore the function of the trial judge, as trier of fact, to determine the credibility of the witnesses and the weight to be accorded their testimony.

Rejecting a bus driver's argument that the foundation for the admission of radar evidence in a prosecution for speeding might be laid only by the testimony of an expert witness regarding the construction, operation, and purpose of the particular machine used, its margin of error, and the ways and means of testing its accuracy, the court in *Dietze v State (1956) 162 Neb 80, 75 NW2d 95*, stated that the results of experimentation could also provide a proper foundation for the admission of evidence of speed, and held that a sufficient foundation for the radar evidence was furnished here by

testimony as to tests of the accuracy of the readings of the meter made by checking the readings with the known speed of other motor vehicles operated by members of the highway patrol both before and after the time of the defendant bus driver's arrest. In the light of common knowledge and the experience of the ages, the court said, nothing appeared more convincing with regard to the accuracy of inanimate mechanisms than a course of experiments which disclosed the production of unvarying results. The bus driver's conviction of speeding was reversed, however, since the record of the remarks of the trial judge, who was the trier of fact in this case, indicated a probability that he could not consider fairly, along with other evidence as to speed, evidence that the bus involved in this case was equipped with a governor which allegedly restricted its speed to 60 miles per hour, the legal limit in the area where the bus driver was accused of speeding.

Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, was held sufficient evidence of the accuracy of the radar equipment to sustain a conviction of speeding, in *State v Snyder* (1969) 184 Neb 465, 168 NW2d 530, the court pointing out that, by statute, the speed of any motor vehicle might be determined by the use of radio microwaves or other electronic devices, and the results of such determinations were admissible as prima facie evidence of the speed of the motor vehicle in any court or legal proceeding where the speed of the motor vehicle was at issue. The defendant's argument that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves have been proved accurate was rejected by the court, since such a chain of evidence might have to proceed ad infinitum. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly was all that was required, said the court.

Evidence that the officers who had operated the radar device at the time the defendant's speed was checked were sufficiently qualified to set up the equipment and had duly tested it before its use, against the speedometers of the police cars, had tested the meter to see that it registered "zero" when nothing was in range, and had tested needle reaction by the use of the designated switch, was held in *State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR 2d 460, to justify the reception of the evidence of the meter reading to support a conviction of speeding. Asserting that radar evidence was properly admissible upon a showing that the speedometer was properly set up and tested by the officers operating it, the court pointed out that the state's failure to offer affirmative evidence to establish that the speedometers in the police cars had been recently tested would not justify the exclusion of the radar evidence in this case, where the accuracy of the speedometers was not raised by the defendant until the testimony had been fully completed and summations were taking place.

In affirming the speeding conviction of a motorist whose appeal raised issues not pertinent to this annotation, the court in *State v Packin* (1969) 107 NJ Super 93, 257 A2d 120, noted that the motorist's speed had been clocked by radar and that there was proof to support the accuracy of the radar apparatus.

Although saying that the basic efficiency of radar as a means of testing speed must be demonstrated by expert testimony before the evidence could be admitted, the court in *People v Torpey* (1953) 204 Misc 1023, 128 NYS2d 864, apparently took the view that the accurate operation of the device on the occasion when defendant's speed was checked was sufficiently demonstrated by testimony of the police officers making the arrest that they had checked the device by driving their police car through its beam on the morning of the arrest, the officer who operated the police car and the one who operated the radar testifying that they registered identical speeds, and it being further shown that the speedometer on the car had been tested before and after the arrest was made, and found accurate.

Pointing out that the radar speedometer was no different from any other scientific device and that admissibility of tests made by it depended entirely upon its accuracy and reliability, the court in *People v Sarver* (1954) 205 Misc 523, 129 NYS2d 9, admitted evidence of speeding obtained by the use of a radar speedometer after the prosecution had presented ample expert testimony relating to the nature and function of a radar device and had shown that the speedometer used in this case, which had been acquired by the police department some 6 months prior to the arrest in question, had been

frequently tested during the 6-month period and found to be accurate and had been calibrated or tested on the morning of the day in question, when a police car was run past the radar device and the reading on the police car's speedometer was compared to the recording on the graph of the electromatic speedmeter. The court concluded that the radar evidence was sufficient to sustain the charge of speeding.

In sustaining a speeding conviction based upon evidence obtained by the use of a radar speedmeter, the court in *People v Sachs (1955) 1 Misc 2d 148, 147 NYS2d 801*, required proof that at the beginning and the end of the radar device's tour of duty on the day of the defendant motorist's arrest a motorcycle or other police vehicle equipped with a calibrated speedometer had been driven through the radar zone of influence in order to test the accuracy of the radar set.

Evidence that a radar speedmeter had been tested against an untested speedometer of a police patrol car and had been tested by the tuning-fork method was held sufficient to establish the accuracy of the radar equipment, in *People v Johnson (1960) 23 Misc 2d 11, 196 NYS2d 227*, although a speeding conviction based upon the radar evidence was reversed because the prosecution had failed to allege and prove the erection and display of any signs indicating the existence and limit of the 60-mile-per-hour speed regulation established by the Thruway Authority.

Although primarily concerned with issues relating to the admissibility in a prosecution for speeding of testimony by two deputy sheriffs maintaining a radar control along a highway as to their opinion regarding the speed of the defendant's vehicle when passing through the radar beam, the court in *People v Smalley (1970) 64 Misc 2d 363, 314 NYS2d 924*, pointed out with regard to the officers' testing of the radar device by the use of a 35-mile-per-hour tuning fork and a 65-mile-per-hour tuning fork that while it could not be established on trial that the officer reading the indicating meter knew which of the two forks was being held in front of the radar device during the testing process, this failure of proof would not, in view of the wide variation in the calibration of the two forks, invalidate the testing process. The court also noted, however, that the trial judge had properly excluded evidence relating to the accuracy of the speedometer of the police car driven through the radar beam as a test on the radar unit's accuracy, since the prosecution had failed to lay a sufficient foundation for this evidence, presenting testimony only by the deputy sheriff who took part in the test as driver of the car, but not presenting the observer to that test. Nevertheless, the reading taken from the radar unit, though an untested unit, was considered, along with the opinion testimony of the police officers, sufficient evidence of speeding to sustain the defendant motorist's conviction.

The court in *East Cleveland v Ferrell (1958) 168 Ohio St 298, 7 Ohio Ops 2d 6, 154 NE2d 630*, affirmed a speeding conviction based solely upon a reading taken from a radar speedmeter and held, inter alia, that the accuracy of the particular speedmeter used in this case had been adequately demonstrated by the uncontroverted testimony of the city electrician that the meter had been checked by him on the morning of the violation, had been calibrated by injecting into it known frequencies checked against those transmitted by the United States Bureau of Standards radio station, and had been checked in its actual operation, after installation in the police car, by driving another police car through the radar beam and comparing the meter-registered speed with actual speedometer readings; and that the meter had been found to be working properly in all respects.

Where, on the day before a truck driver allegedly drove through a radar beam at 53 miles per hour, 13 miles per hour in excess of the legal limit, the radar speedmeter had been tested for accuracy at an official testing station in accordance with the provisions of the statute permitting the use of radar to enforce speed regulations, and on the day of the alleged violation the speedmeter's accuracy had been confirmed by tests performed with 35-, 50-, 60-, 65-, and 100-mile-per-hour tuning forks, it was held in *Commonwealth v Long (1965, Pa) 84 Dauph Co 255*, that there was overwhelming evidence to sustain the truck driver's speeding conviction, despite his contention that at the time of the alleged violation he was operating his vehicle in ninth gear at approximately 45 miles per hour, as evidenced by his truck's tachometer.

And see the Pennsylvania cases discussed in § 6[a], supra, where the degree of accuracy established with regard to the radar units in question was held sufficient to comply with the statutory provision authorizing the use of radar evidence

in speeding prosecutions.

Evidence that a radar unit had been checked for accuracy at the time that it was first set up on the day in question, by use of a 60-mile-per-hour tuning fork and by driving a patrol car past the unit at 60 miles per hour, was held, along with the other testimony by the other police officers who had operated and tested the radar device, sufficient to sustain a speeding conviction, in *Holley v State* (1963, *Tex Crim*) 366 SW2d 570, the court noting that the ample opinion testimony, independent of the radar findings, regarding the defendant motorist's speed and the conditions of the highway at the time of his arrest, overcame the apparently inadvertent failure to show the results of accuracy tests conducted after the defendant's arrest and at the end of the unit's operation on the day in question.

And in affirming speeding convictions based upon radar evidence, the courts in the following cases held that the accuracy of the radar device which had been used to clock the motorist's speed was sufficiently shown, where --

-- the radar operator tested the accuracy of the set with 40-, 60- and 80-mile-per-hour tuning forks both before and after the defendant motorist's speed was recorded, the court concluding that although no attempt was made to establish the accuracy of the tuning forks, no effort was made by the defendant to attack the accuracy of the forks, and under these circumstances the accuracy of the radar unit was unimpeached. *State v Tomanelli* (1966) 153 Conn 365, 216 A2d 625.

-- tests with 40-, 60-, and 80-mile-per-hour tuning forks were conducted at the beginning and end of the radar set's period of operation on the day in question, and a test car with a calibrated speedometer was driven through the radar zone at a speed of 60 miles per hour shortly after the radar device was set up, and the speedometer reading was compared to the 60-mile-per-hour speed indicated on the radar's meter and graph. *State v Lenzen* (1962) 24 Conn Supp 208, 189 A2d 405.

-- tests with 40- and 60-mile-per-hour tuning forks were conducted at the beginning and end of the radar set's period of operation on the day of defendant motorist's arrest, the court rejecting an argument that adequate testing of the device demanded, in addition to the tests conducted, tests with an 80-mile-per-hour tuning fork and by running a car with a calibrated speedometer through the radar field. *State v Carta* (1963) 2 Conn Cir 68, 194 A2d 544, supra § 7[b], cert den (Conn) 197 A2d 932.

-- there was evidence that both before and after the defendant motorist's speed was recorded, the police officer operating the radar unit had tested the accuracy of the instrument by using three tuning forks, which had been calibrated 2 months prior to the day of the arrest in question to produce readings on the radar unit of 40 miles per hour, 60 miles per hour, and 80 miles per hour. *State v Naumec* (1966) 3 Conn Cir 575, 222 A2d 239.

-- there was evidence that the radar set, which had been factory-tested less than 2 months prior to the defendant motorist's arrest, had been tested for accuracy at the beginning and the end of its period of operation on the day of the defendant's arrest by the use of 40-, 60-, and 80-mile-per-hour tuning forks, which were factory-tested every 6 months; and there was no evidence produced upon which the defendant could claim that he had shown the tuning forks to be inaccurate and therefore the radar machine to be inadequately tested. *State v McCoy* (1966) 4 Conn Cir 109, 226 A2d 116.

-- there was evidence that the radar speedometer had been checked by "the usual test," using tuning forks described as 40-, 60-, and 80-mile-per-hour tuning forks, which themselves had been tested a month earlier than the date in question, and with a minute tolerance for error, had been found to be accurate. *State v Greenman* (1969) 6 Conn Cir 160, 268 A2d 808.

-- the officers operating the radar equipment testified that the set had been checked for accuracy only a few minutes prior to the defendant motorist's arrest, both by driving a car past it at a set speed and by use of a tuning fork, the court pointing out that conflicting testimony regarding the presence of other vehicles in the radar's zone of influence at the

time defendant's speed was measured did not warrant a reversal of a finding of fact by the trial court. *People v Cash* (1968) 103 Ill App 2d 20, 242 NE2d 765.

-- the officer who had operated the radar unit testified that he had allowed it to warm up properly before it was placed in operation, and that he had twice tested the machine with a tuning fork, once immediately before the defendant's car entered into the radar field and once 3 hours prior to that time. *People v Stankovich* (1970) 119 Ill App 2d 187, 255 NE2d 461.

-- the operating officer testified that the accuracy of the radar instrument had been tested a few hours prior to the defendant motorist's arrest, by the use of a calibrated tuning fork and by comparison with the speedometer of a police cruiser driven through the radar field. *Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421.

-- comparisons of 50- and 70-mile-per-hour radar readings with 50- and 70-mile-per-hour speeds registered on the apparently untested speedometer of a police patrol car driven through the radar zone of influence were confirmed by tests using tuning forks, so calibrated to correspond with oscillations activating the radar meter registration of 50 miles per hour and 70 miles per hour. *State v Graham* (1959, Mo App) 322 SW2d 188.

-- it was shown that the accuracy of the radar device was checked at the start and finish of its use at a particular location by the use of two recently calibrated tuning forks, which had been cut to register frequencies equivalent to readings on the meter of 35 miles per hour and 50 miles per hour. *Kansas City v Hill* (1969, Mo App) 442 SW2d 89.

-- there was evidence that a police patrol car was driven past the radar unit on two occasions, once before and once after the time of the defendant motorist's arrest, for the purpose of comparing the readings on the patrol car's speedometer with those indicated on the radar speedometer, the court rejecting the motorist's argument that the state was required to demonstrate the accuracy of the patrol car speedometer before using the speedometer readings to establish the accuracy of the radar unit, and denying that the readings of the radar speedometer and the patrol car speedometer were not sufficient to prove guilt beyond a reasonable doubt. *Peterson v State* (1957) 163 Neb 669, 80 NW2d 688.

-- there was evidence that the radar set had been tested at the beginning and at the end of its use on the day of the defendant motorist's arrest, by the use of two tuning forks calibrated to register readings of 25 miles per hour and 50 miles per hour, and by comparison with the speedometer of a police test car driven through the radar zone of influence at 40 miles per hour. *People v Blattman* (1966) 50 Misc 2d 606, 270 NYS2d 903.

-- the officer operating the radar equipment testified that he had tested it for accuracy both before and after the defendant's arrest by using a tuning fork calibrated to register 50 miles per hour on the radar meter and by comparing the radar meter readings with those indicated on the speedometer of a police test car driven through the radar zone of influence at 50 miles per hour, the court stating that it was more than coincidence that four testings of the radar device indicated speeds of 50 miles per hour, and that it was inconceivable that the radar unit, the tuning fork, and the test car speedometer could all have been inaccurate to, and in, the same degree. *People v Stephens* (1967) 52 Misc 2d 1070, 277 NYS2d 567.

-- it was shown that on the night in question the radar device was checked: (1) about 2 hours prior to the defendant motorist's arrest by the use of a 65-mile-per-hour tuning fork and by comparison with the speedometer of a police patrol car driven through the radar beam at 35 miles per hour; (2) about 20 minutes prior to defendant's arrest, by use of a 65-mile-per-hour tuning fork and by comparison with the speedometer of a police patrol car driven through the radar beam at 40 miles per hour; and (3) about 10 minutes after the defendant's arrest by the use of a 65-mile-per-hour tuning fork. *People v Stuck* (1967) 54 Misc 2d 811, 283 NYS2d 564.

-- the officer operating the radar equipment allowed the set to warm up for 15 minutes and then activated an internal calibration by an electronic tone within the machine itself, and also tested the machine with tuning forks calibrated to

register readings of 50 and 30 miles per hour, and the officer confirmed on redirect examination that he tested the machine "before and after each set up" on the day in question and had found no irregularities. *People v Lynch* (1969) 61 Misc 2d 117, 304 NYS2d 985.

-- there was evidence that both before and after a motorist's arrest the radar device used to time his speed was tested by using a tuning fork calibrated to register a reading of 65 miles per hour on the radar meter, and by comparing the speed indicated on the radar set with that registered on the speedometer of a police patrol car driven through the radar beam. *Cromer v State* (1964, Tex Crim) 374 SW2d 884.

-- there was evidence that both before and after the radar unit had been set up, a state trooper had driven through the radar zone of influence at varying speeds of from 50 to 80 miles per hour in a vehicle equipped with a speedometer calibrated by the use of a tachometer. *Farmer v Commonwealth* (1964) 205 Va 609, 139 SE2d 40.

-- it was shown that the radar set had been tested for accuracy by comparing its readings with those registered on the calibrated speedometer of a police patrol car driven through the radar beam at speeds of 30, 40, and 50 miles per hour, and there was corroborative testimony that the set had also been checked with factory pretested tuning forks calibrated to register speeds of 35 and 50 miles per hour on the radar meter. *Thomas v Norfolk* (1966) 207 Va 12, 147 SE2d 727.

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In prosecution for speeding, testimony by police officer that he had calibrated radar machine in accordance with instructions he had received was sufficient to establish accuracy of radar reading, even though officer could not explain functioning of machine. *People v Flaxman* (1977) 74 Cal App 3d Supp 16, 141 Cal Rptr 799.

Trial court's reliance on uncontested admission of laser calibration certificate and officer's testimony in speeding prosecution, which established that calibration of laser used to determine vehicle speed was accurate and working properly, was proper for purposes of allowing into evidence laser reading that indicated defendant was traveling well over designated speed limit, and thus, supported conviction for speeding. C.G.S.A. § 14-219(c). *State v. Parham*, 70 Conn. App. 223, 797 A.2d 599 (2002).

See *State v Newton* (1980, Del) 421 A2d 920, § 7[d].

There was sufficient evidence to support conviction for speeding, notwithstanding defendant's contention that state failed to establish accuracy of radar, where state trooper testified that according to radar unit defendant's vehicle was traveling at rate 12 miles per hour in excess of speed limit, and defendant presented no evidence or expert testimony demonstrating inaccuracies of particular unit or circumstances which would cause inaccuracy. *People v Boalbey* (1980) 90 Ill App 3d 738, 46 Ill Dec 113, 413 NE2d 553.

State laid sufficient foundation to admit radar evidence where officer testified that he tested device both before and after issuance of citation, indicated that there was nothing to interfere with device, and stated that in his opinion, device was working accurately. *People v Beil* (1979) 76 Ill App 3d 924, 32 Ill Dec 290, 395 NE2d 400.

Where arresting officer testified that he tested his radar apparatus before and after its use in apprehending defendant while utilizing electronic plug-in device, evidence sufficiently established accuracy of radar unit. *People v Burch*, 19 Ill App 3d 360, 311 NE2d 410.

Evidence of reading on radar speed meter was admissible in prosecution for speeding, notwithstanding there was no foundation testimony as to accuracy of device used to test radar unit, where tests performed on radar unit by use of tuning fork and comparison with police vehicle speedometer were performed only hours before defendant was observed

operating his car at high speed and, after defendant was so observed and his speed recorded as 94 miles per hour, tuning fork was again employed to check accuracy of equipment which produced same reading of 50 miles per hour obtained earlier in evening. Furthermore, such evidence was sufficient to support defendant's conviction of speeding 94 miles per hour in 55 mile-per-hour zone. *State v Shimon (Iowa) 243 NW2d 571.*

In negligent homicide prosecution, proper foundation was laid for admissibility of measurement by radar of defendant's speed where before he went on duty, trooper tested set for accuracy with calibrated tuning forks, furnished by manufacturer with unit, and testified that he determined unit on day of incident was functioning properly, and where state trooper testified in detail as to his past training and experience as operator of radar equipment. *State v Spence (1982, La) 418 So 2d 583* (citing annotation).

In prosecution for speeding, state laid sufficient foundation to admit testimony by troopers about speed of defendant's car, where state established that trooper calibrated radar unit in accordance with manufacturer's specifications, using two or more tuning forks supplied with unit, and both troopers using unit were experienced in its use and operation. *State v Creel (1986, La App 2d Cir) 490 So 2d 711.*

Accuracy of radar equipment used to check speed of motor vehicle is sufficiently shown by testimony of officer that he had faithfully followed all checkout and startup procedures, had performed two calibration tests, was certified operator of particular device, and that maintenance records existed. *Fitzwater v State (1984) 57 Md App 274, 469 A2d 909.*

Accuracy of radar speed meter was adequately checked by use of two tuning forks, one internal and one external, where both were calibrated by manufacturer to register and in fact did register same speed. *State v McDonough (Minn) 225 NW2d 259.*

Officer's testimony as to training and calibration of radar unit on date of speeding citation sufficiently established accuracy of readout, where officer had training in four different schools in preceding ten years and performed five separate calibration tests on day of citation. *State v Bogren (1987, Minn App) 410 NW2d 383.*

See *State v Dow (1984, Minn App) 352 NW2d 125*, § 4.

In prosecution for speeding, testimony by highway patrol officer as to certification of accuracy of radar speed gun, that before using unit he had performed three different tests to check its accuracy -- tuning fork test, internal calibration test, and checking it against patrol car's speedometer -- and that he was trained to determine accuracy of speed gun prior to its operation and to correct for spurious readings, was sufficient to satisfy prosecution's burden of proving accuracy of particular radar speed gun used to determine defendant's speed at time of his arrest. *State v Calvert (1984, Mo) 682 SW2d 474.*

Evidence supported conviction for speeding based on radar measurement, where citing officer testified that he had received training in use and calibration, that he had tested unit before and after clocking defendant, and that tuning forks used for testing had themselves been tested three months prior to citation. *State v Guenther (1988, Mo App) 744 SW2d 564.*

In prosecution for speeding, trooper's testimony that he had used tuning forks to check accuracy of moving radar unit before starting his shift and "right after" defendant's arrest was sufficient to meet state's burden of proving that radar unit was checked for accuracy reasonably close to time of its use; evidence that trooper tested tuning forks with frequency finder was sufficient to establish accuracy of tuning forks. *State v Moore (1985, Mo App) 700 SW2d 880.*

See *State v Hunziker (1982, Mo App) 638 SW2d 793*, § 7[c].

See *Kansas City v Tennill (1982, Mo App) 630 SW2d 173*, § 7[b].

See *State v Ahern* (1982) 122 NH 744, 449 A2d 1224, § 9.

Performance testing of laser speed detector demonstrated sufficient reliability that speed readings produced by such detector should generally be received as evidence of the speed of motor vehicles without the need for expert testimony in individual prosecutions arising under the motor vehicle laws, in light of prior determination that using laser to measure speed was widely accepted in relevant scientific community and was valid. *Matter of Admissibility of Motor Vehicle Speed Readings Produced by LTI Marksman 20-20 Laser Speed Detection System*, 314 N.J. Super. 233, 714 A.2d 381 (Law Div. 1998).

In prosecution for speeding, radar device was scientifically reliable and accurate in speed detection of vehicles, its accuracy being up to one mile plus-or-minus per 100 miles an hour, and training of officer who used device, in light of its design simplicity, was sufficiently established. *State v Boyington* (1978) 159 NJ Super 426, 388 A2d 276.

Certificates of calibration and accuracy of radar machine and tuning fork used to test machine were properly admitted in evidence in prosecution for speeding as proof of accuracy of devices used for testing proper operation of machine on morning in question, notwithstanding no proof was offered to qualify certificates as records made in regular course of business, where certificates were used by court solely as evidence of proper operating condition of radar device as prerequisite to admissibility of radar readings and where such evidence appeared to be reliable. *State v Cardone*, 146 NJ Super 23, 368 A2d 952.

Use of four external tuning forks to test radar unit total of 12 times within period of approximately 90 minutes, including 8 tests before defendant's vehicle was stopped for speeding and 4 tests afterward, with 3 tests by each of 4 forks producing radar reading identical to that for which particular fork was calibrated, was adequate to demonstrate accuracy of radar unit. *State v Overton*, 135 NJ Super 443, 343 A2d 516.

Radar unit's accuracy was adequately established in prosecution for speeding, where properly trained officer testified that unit had been calibrated by use of two tuning forks prior to arrest, notwithstanding failure to test unit after arrest. *People v Farrell* (1987) 137 Misc 2d 926, 523 NYS2d 383.

Radar equipment used in charging defendant with speeding was properly tested where trooper, before putting unit in operation, made various calibration tests, including internal calibration tests as well as tests with two tuning forks, one showing a readout of 35 miles per hour and other 65 miles per hour. *People v Maniscalco* (1978) 94 Misc 2d 915, 405 NYS2d 888.

Although he did not qualify himself as expert, unobjected to testimony of police officer that he observed defendant's vehicle through his rearview mirror travelling at speed estimated at 75 miles per hour and that he pursued defendant in his own vehicle for one-quarter mile at "a high rate of speed," was, in view of substantial difference between speed limit of 30 miles per hour and estimated speed of defendant's vehicle, sufficient to corroborate reading of 70 miles per hour on untested radar unit and to sustain defendant's conviction for speeding. *People v Cunha* (1978) 93 Misc 2d 467, 402 NYS2d 925.

Motorist was properly convicted of speeding solely upon evidence obtained from NR-7 moving radar device mounted on moving patrol vehicle where record contained: (1) expert testimony as to construction of device and its method of operation in determining speed of approaching vehicle from opposite direction; (2) evidence that device was in good condition for accurate work; and (3) evidence that officer using device was one qualified for its use by training and experience. *State v Shelt*, 46 Ohio App 2d 115, 75 Ohio Ops 2d 103, 346 NE2d 345.

Accuracy of K-55 radar unit was sufficiently demonstrated where judicial notice had been accorded to general accuracy and reliability of unit for measuring speed of vehicles and where officer issuing citation at issue was shown to have

been properly qualified to operate unit, unit was in good operating condition and had been properly calibrated both by the use of tuning fork certified for its calibration and by use of its internal calibration device and operator had properly read unit in that he had visually identified speed violator, monitor had indicated violation, and audio had indicated and that target vehicle was violator. *Akron v Gray* (1979) 60 Ohio Misc 68, 14 Ohio Ops 3d 303, 397 NE2d 429.

Evidence of driver's speed as measured by radar device was properly admitted in speeding prosecution where officer using device testified that he had calibrated it internally and externally at beginning of his shift on day he issued citation to driver and he testified that he had received on the job training on use of equipment for 6 months. *Jackson v Oklahoma* (1984, Okla Crim) 678 P2d 725.

See *Shears v State* (1982, Okla Crim) 648 P2d 841 (citing annotation), § 7[d].

Certificate of accuracy of radar that contained signatures of person who performed tests and engineer in charge of testing station was sufficient to comply with statutory prerequisite to introduction into evidence of results of speed timing device utilized by officer in determining that defendant was travelling at 80 miles per hour, notwithstanding fact that date on which accuracy of radar was certified was typed instead of handwritten. *Commonwealth v Gussey* (1983, Pa Super) 466 A2d 219.

See *Commonwealth v Gernsheimer* (1980, Pa Super) 419 A2d 528, § 6[b].

See *State v Sprague* (RI) 322 A2d 36, § 5[b].

Evidence was sufficient in speeding prosecution to support trial court's finding that radar unit utilized by officer had been accurate and that defendant was guilty of exceeding legal speed limit of 55 miles per hour, where trial court properly took judicial notice of general reliability of radar speedometers as devices for measuring speed of auto, where arresting officer testified that he was certified to operate radar unit and that he had calibrated unit to ensure that it was operating correctly before he came in contact with defendant, and where officer further testified that defendant's vehicle had been two-tenths of mile from radar unit when it was clocked at 69 miles per hour. *State v Amarantes* (1983) 143 Vt 348, 465 A2d 1383.

Trial court properly considered certificates authenticating accuracy of speed measuring devices in speeding infraction prosecution, even though they were not properly part of the officers' testimony and no prosecuting attorney was there to offer them; rules governing prosecution of a contested hearing on a traffic infraction contemplate that the hearing may proceed without a prosecuting attorney and without the citing officer's presence, while rule governing certification made in authenticating accuracy of a speed measuring device allows the certificate to stand in the stead of an expert witness and, thus, requiring a prosecuting attorney's presence to offer expert's certificate into evidence would run contrary to entire statutory scheme. IRLJ 3.3(b, c), 6.6(b); West's RCWA 46.63.080. *City of Bellevue v. Hellenthal*, 144 Wash. 2d 425, 28 P.3d 744 (2001).

Whether stationary radar device was inaccurate or unreliable was matter of defense as there is presumption of accuracy automatically arising by use of stationary units, and conviction for speeding was affirmed where defense failed to rebut presumption on accuracy. *Wauwatosa v Collett* (1980, App) 99 Wis 2d 522, 299 NW2d 620.

[\*8b] Accuracy held not sufficiently demonstrated

Under the particular circumstances of the following cases involving speeding prosecutions where the accuracy of the radar device used to clock a motorist's speed was at issue, it was held that the accuracy of the radar unit had not been sufficiently established.

Thus, the accuracy of a radar speedmeter was held not to have been adequately established by a test conducted with a

tuning fork which was an integral part of the machine itself, in *State v Gerdes (1971) 291 Minn 353, 191 NW 2d 428*, the court reversing a speeding conviction which had been based solely on the radar evidence, and calling such a test "bootstrapping."

In holding the evidence insufficient to establish the accuracy of a radar unit at the time the defendant motorist's speed was checked, the court in *St. Louis v Boecker (1963, Mo App) 370 SW2d 731*, although resting its decision upon the fact that no test of the radar speedometer was made at the site of or immediately preceding the defendant's arrest, expressed grave doubts that the evidence of a test performed with a single tuning fork which had not itself been shown to be accurate was sufficient evidence to establish prima facie that the radar speedometer used in this case was functioning properly, even at the time the test was made.

See also *People v Magri (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728*, where, although a radar device had been tested for accuracy on the day in question by running a police "chase car" through the radar beam on two separate occasions and comparing the radar readings with the speeds registered on the car's speedometer, and by striking a 50-mile-per-hour sounding fork in front of the transmitter-receiver both before and after the defendant motorist's alleged speeding violation, the results of these tests did not appear adequately in the record. Stating that evidence obtained from an untested radar device was insufficient, standing alone, to sustain a conviction for speeding, the court regarded the radar speedometer used in this case as an untested speedometer, but affirmed a speeding conviction, since the radar evidence was corroborated by the opinion testimony of the police officers operating the unit.

In *People ex rel. McCann v Martirano (1966) 52 Misc 2d 64, 275 NYS 2d 215*, supra § 7[d], the accuracy of a radar unit was held not sufficiently established in the absence of proof that the tuning fork which was used to test the radar device was itself accurate.

Where in a speeding prosecution there was no showing as to what the speedometer of a radar unit registered when a police patrol car was driven by the device as a test upon its accuracy, a speeding conviction based upon the readings taken from the radar unit was reversed in *Wilson v State (1959, Tex Crim) 328 SW2d 311*, the court pointing out that the accuracy of the radar unit at the time of clocking a motorist's speed was an essential element of the state's case.

Where the police officer operating a radar speedometer testified that he had tested the accuracy of the device by the use of a "tuning fork," which was not otherwise described, but failed to explain the manner of testing and failed to relate the results of the test, it was held that the radar evidence was insufficient to establish beyond a reasonable doubt the guilt of a motorist who had allegedly been clocked by radar at 48 miles per hour in a 35-mile-per-hour zone, in *Biesser v Holland (1967) 208 Va 167, 156 SE2d 792*, the court reversing the conviction of the motorist, and pointing out that the statute which permitted the use of radar to measure the speed of motor vehicles and provided that the results of such measurements should be accepted as prima facie evidence of speed "in any court or legal proceedings where the speed of the motor vehicle is at issue" did not eliminate the necessity for the prosecution to prove that the device used for measuring speed had been properly set up and recently tested for accuracy. Pointing out also that tests upon the accuracy of radar machines should be made both before and after the machines were used and that the accuracy of tuning-fork tests would necessarily depend on the type and accuracy of the tuning fork used in the test, the court noted that the only evidence of the accuracy of the tuning fork in this case was testimony by the officer operating the radar device that the fork had been tested by some unknown member of the police department, which was objected to as hearsay and ruled inadmissible.<sup>n49</sup>

In reversing a speeding conviction based upon radar evidence, because the prosecution had failed to introduce "any legal evidence" tending to show that the radar machine used to measure the speed of the defendant motorist had been properly set up and recently tested for accuracy, the court in *Royals v Commonwealth (1957) 198 Va 876, 96 SE2d 812*, pointed out that the officer operating the radar machine at the time of the defendant's arrest had testified on direct examination that according to the regulations of the department of state police and the practice of police officers, radar units were tested for accuracy both before and after their use at each location at which they were set up, by comparing

the radar readings with the speeds registered on the calibrated speedometer of a police patrol car run through the radar beam, but on cross-examination stated that he did not know whether or not the tests of the machine used in this case were made on the day of the defendant's arrest, and had merely assumed that the officers who set up the machine at that location and removed it had made the tests required by the department. Noting that the use of radar or other electrical devices to check the speed of vehicles was permitted by a statute which also provided that "The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue," the court held that this statute was intended to render evidence obtained by the use of radar or other electrical devices admissible without the necessity of proving by expert testimony the theory and operation of these devices, but that the statute did not eliminate the necessity to prove that the machine used for measuring speed in a particular case had been properly set up and recently tested for accuracy.

This same motorist was again arrested for speeding later in the same day and while driving on the same highway in another county of Virginia. His conviction of driving at 70 miles per hour in a 55-mile-per-hour zone, as determined by a radar speedometer, was reversed in *Royals v Commonwealth* (1957) 198 Va 883, 96 SE2d 816, the court stating that although proper testing of the accuracy of the radar device was a vital issue in this case, the only evidence on this point was clearly hearsay or mere deductions offered by one trooper who apparently was operating the device at the time of the defendant's arrest and who testified that he "understood" the accuracy tests to have been made both before the machine was put in operation and after its use on this occasion, although he did not see the tests made and did not know who made them, and by another trooper who had driven his patrol car through the radar beam, testing the accuracy of the device at the time that it was set up, and who testified to the performance of accuracy tests prior to the machine's removal from this location, although he also stated that he did not know who had made those tests.

And a speeding conviction based upon radar evidence was reversed on the ground that the state's evidence as to the testing of the accuracy of the radar device was hearsay and should not have been admitted, in *Crosby v Commonwealth* (1963) 204 Va 266, 130 SE2d 467, where the trial judge erroneously permitted the state trooper who had operated the radar machine on the day in question to testify, over objection, as to the speed reading registered on the speedometer of the patrol car driven through the radar zone as a test upon the unit's accuracy, although the trooper had personally observed only the readings registered on the radar meter itself. Recognizing the necessity to carry out the tests for accuracy on radar machines both before and after they were used, and the necessity in a subsequent prosecution for speeding of proving these tests by proper evidence, the court rejected an argument to the effect that upon a showing that the radar machine was in fact functioning, the statute which permitted the use of radar to check the speed of motor vehicles rendered the functioning prima facie correct. While the statute did provide, in part, "such checks shall be accepted as prima facie evidence of the speed" of a motor vehicle, the court declared that this provision contemplated that the radar equipment had been checked to insure accuracy, and added that the burden of showing the accuracy of the radar machine was on the prosecution. The court pointed out that, in ruling the trooper's testimony admissible upon the erroneous conception of the accuracy test as one operation to which only one of the troopers involved need testify, the trial judge had denied the motorist the right to be confronted by his accusers and to examine both officers who had collaborated in testing the accuracy of the radar machine as to the sufficiency of the test they had performed.n50

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Use of single uncalibrated tuning fork did not provide legally sufficient foundation to support reading taken from radar device, and thus conviction of speeding was properly reversed; where tuning fork is used to calibrate radar device prosecution must show, for evidence to be admissible, that two tuning forks have been used or that single tuning fork used has been certified as accurate within one year of test. *People v Walker* (1980, Colo) 610 P2d 496.

In prosecution for exceeding speed limit in violation of city ordinance, prosecution failed to make prima facie case that radar unit was functioning properly at time defendant's speed was tested and thus state failed to make admissible case against defendant, where police officer testified that he was certified to operate radar gun which he used to test

defendant's speed, he identified two tuning forks used to verify accuracy of radar gun, but when he was asked whether, prior to time he started using radar, he did anything to check accuracy of radar gun, he testified that it was policy of department prior to using instrument to check it with two tuning forks, and in light of burden which city had, officer's testimony was insufficient to establish beyond reasonable doubt that radar unit was found to be operating properly at site of and reasonably close in time to arrest of defendant. *Jackson v Langford* (1983, Mo App) 648 SW2d 927.

See *State v Weatherwax* (1982, Mo App) 635 SW2d 34, § 7[c].

In prosecution for speeding, evidence concerning use of radar gun to determine defendant's speed was inadmissible, although police officer tested radar with tuning fork, by means of its internal calibration equipment, and by having fellow officer conduct drive-through test in his patrol car, where none of the tests was itself tested for accuracy. *Ballwin v Collins* (Mo App) 534 SW2d 280.

Where in municipal court prosecution for speeding police officer was permitted to testify that he had measured driver's speed at 68 m.p.h. in 45 m.p.h. zone with K-55 device and, over defendant's objection to admission into evidence the state had not proven scientific reliability of device either by expert testimony or through judicial notice, court admitted evidence, superior court judge erred in permitting state to supplement municipal court record with evidence of scientific reliability of K-55 unit and, as that reading was sole evidence of driver's speed, conviction should be reversed, notwithstanding that superior court judge concluded that device was scientifically reliable and that its speed readings were admissible into evidence. *State v Musgrave* (1979) 171 NJ Super 477, 410 A2d 64.

Judgment of conviction of speeding was reversed where it was apparently based on reading from radar unit located in police vehicle traveling in opposite direction from oncoming vehicle; before such radar readings could be considered reliable, there must be testimony detailing operative principles underlying capability of radar unit to accurately compensate for relative speeds and directions of respective vehicles. *People v Bellizzi* (1980) 108 Misc 2d 209, 441 NYS2d 147.

There was insufficient evidence to support defendant's conviction for speeding where it was improper for trial court to take judicial notice of dependability of K-55 radar unit mounted in patrol car driving in opposite direction from defendant's car in absence of any expert testimony with respect to construction of K-55 radar unit and its method of operation with respect to its ability to differentiate speed of vehicle approaching moving patrol car from opposite direction from combined speed at which they are moving toward each other in any case within jurisdiction of trial court; testimony of state patrolman concerning use of internal calibration as well as use of tuning forks supplied by manufacturer would have been sufficient to establish that radar unit was in good condition for accurate work had proper basis for judicial notice of dependability of mobile radar unit been established in jurisdiction by evidence describing construction and method of operation of radar unit. *State v Doles* (1980) 70 Ohio App 2d 35, 24 Ohio Ops 3d 25, 433 NE2d 1290.

Evidence was insufficient to support conviction for speeding solely on basis of reading from speed meter where there was no testimony concerning the accuracy of the particular speed meter involved, particularly with respect to moving vehicles, or qualifications of person checking, calibrating and using meter. *State v Wilcox*, 40 Ohio App 2d 380, 69 Ohio Ops 2d 333, 319 NE2d 615.

See *State v Bonar*, 40 Ohio App 2d 360, 69 Ohio Ops 2d 320, 319 NE2d 388, § 5[b].

Accuracy of radar not sufficiently established, due to insufficient evidence that speedometer of testing vehicle was accurate. *Whitehead v Lynchburg*, 213 Va 742, 195 SE2d 858.

See *State v Hanson* (1978) 85 Wis 2d 233, 270 NW2d 212, (citing annotation), § 3.

[\*C] Proper operation of radar set

[\*9] Generally; expertise required of operator

It is generally recognized that proper operation of a radar device is a prerequisite to a speeding conviction based on evidence obtained by use of the device,<sup>n51</sup> and no case has been found to dispute this point. Moreover, in no reported case was it necessary for the court to weigh or discuss evidence tending to prove or disprove that the radar equipment involved had been properly operated

An issue closely related to the proper operation of the radar unit involves the qualifications required of the police officer manning the radar equipment. In this regard, among the following cases, where the sufficiency of a radar operator's training or experience was at issue, there was general agreement that the operator of a radar speedometer need not be an expert in the science of radar or electronics.

Thus, in considering whether, in a prosecution for violation of speed regulations, the officer operating a radar speedometer was qualified to testify as to the accuracy and operation of the instrument used to clock the defendant motorist's speed, the court in *State v Tomanelli (1966) 153 Conn 365, 216 A2d 625*, felt that it was unnecessary to recite in detail the evidence offered to establish the qualifications of the radar operator, but was satisfied, upon a review of the evidence, that the trial judge was amply justified in concluding that the operator was qualified to testify on these subjects. The court pointed out that it had discovered no writer who stated that the operation of police radar required the technical knowledge of a radar scientist.

Where a motorist charged with speeding attempted to dispute the admissibility of evidence obtained by the use of a radar speedometer by contesting, inter alia, the qualifications of the operator of the radar device, it was held that the motorist's objections were properly overruled, in *State v Naumec (1966) 3 Conn Cir 575, 222 A2d 239*, the court stating that the operation of police radar required no technical knowledge of radar science, and pointing out that the officer who had clocked the defendant's speed had been performing on the radar detail for 4 months and had previously received instructions in radar operation at the state police traffic division.

In *State v McCoy (1966) 4 Conn Cir 109, 226 A2d 116*, the court affirmed a speeding conviction and held, inter alia, that the operator of a radar device used by the state police to monitor the speed of vehicles on a highway was qualified to testify as to the accuracy and operation of the radar machine without proof that he had the knowledge of a radar scientist.

In *State v Moffitt (1953) 48 Del 210, 100 A2d 778*, a speeding prosecution based in part upon evidence obtained by the use of a radar speedometer which had been operated by two highway troopers, the court stated that the mere fact that the radar clocking of defendant's speed had been made by persons not skilled in electronics was not of sufficient import to render the radar evidence inadmissible.

In affirming a speeding conviction based upon evidence obtained by the use of a radar speedometer, the court in *People v Abdallah (1967) 82 Ill App 2d 312, 226 NE2d 408*, rejected the defendant motorist's argument that the arresting police officer was "wholly unqualified to operate any radar set under any circumstances" because he had no knowledge of the scientific principles involved in the operation of the radar instrument, had no knowledge of the frequency or power output of the instrument, and had no knowledge of the scope of the radar beam. Pointing out that the operator of a radar instrument did not have to be an expert in the science or theory underlying the functions of the instrument, the court said that his familiarity with the device and its operation was adequate qualification to operate the device, and added that the sufficiency of his familiarity was a question of weight and credibility for the jury, and that in the present case the operating officer had had 5 1/2 years of on-the-job experience with this type of radar equipment.

Testimony by the police officer who operated the radar speedmeter which had been used to clock a motorist's speed at 76 miles per hour in a 65-mile-per-hour zone that he had been trained in the use of the radar unit and had operated it approximately 60 to 100 days per year for several years was held evidence of his qualification to operate the device sufficient to sustain the motorist's conviction of speeding, in *People v Cash (1968) 103 Ill App 2d 20, 242 NE2d 765*, the court noting also that there was sufficient evidence to prove the accuracy of the device, and that conflicting testimony as to the presence of other vehicles within the radar's zone of influence at the time the defendant's speed was measured did not warrant a reversal of a finding of fact by the trial court.

In considering whether there had been established a sufficient foundation for the introduction of radar evidence of speeding the court in *People v Stankovich (1970) 119 Ill App 2d 187, 255 NE2d 461*, pointed out, inter alia, that the operator of the radar instrument did not have to be an expert in the science or theory underlying the functions of the instrument, and said that the qualifications of the police officer in this case as an operator of the radar unit were sufficiently established by evidence that he had attended indoctrination and training classes for police officers conducted by the company which manufactured the radar unit, and had also attended a 1-day familiarization session given by the police department several years earlier.

Affirming a speeding conviction based upon evidence obtained by the use of a radar speedmeter, the court in *Honeycutt v Commonwealth (1966, Ky) 408 SW2d 421*, held that evidence indicating that the policeman operating the radar device had received 13 weeks' training as a radar repairman and had operated radar equipment for almost 2 years was sufficient to show the policeman's qualification to operate and interpret the radar device properly. In demonstrating a radar operator's qualifications for purposes of laying a foundation for the admissibility of radar evidence, the court said that it was sufficient to show that the operator had such knowledge and training as enabled him properly to set up, test, and read the instrument. The court stated that it was not required of a radar operator that he understand the scientific principles of radar or have the ability to explain its internal workings, and said that a few hours' instruction normally should be enough to qualify a radar operator.

In holding that a state trooper who had attended for a short time a school of instruction on the use of a radar speedmeter was adequately qualified to operate the device for purposes of admitting evidence obtained by the device in a prosecution for speeding, the court in *State v Graham (1959, Mo App) 322 SW2d 188*, stated that the intelligent use of a radar speedmeter did not require that the operator understand all of the intricate steps in its manufacture or its process of operation, and noted that according to authority on the subject of radar, a reasonably intelligent person could learn to operate such a device after 1 1/2 hours' instruction.

In *People v Magri (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728*, a speeding prosecution based upon radar evidence and the opinion testimony of the police officers operating the radar equipment, the court held that the police officers had been shown to be sufficiently qualified to operate the radar equipment used by the state park police by evidence that they had been instructed in the operation of the radar device at a school in Connecticut as well as at one connected with the police department, and that each officer had also served on radar patrol duty for 5 years.

Pointing out that a prerequisite to sustaining a speeding conviction based solely upon evidence obtained by the use of a radar speedmeter was proof that the witness relying upon the radar apparatus as the source of his testimony was qualified for its use by training and experience, the court, in *East Cleveland v Ferrell (1958) 168 Ohio St 298, 7 Ohio Ops 2d 6, 154 NE2d 630*, observed that in a police radar unit consisting of a car containing the radar apparatus and a "chase" car, the officer in charge of the radar car was merely required to read a dial on the speedmeter in the same way that a speedometer dial was read, and said that an officer with 5 years of experience was certainly qualified to do that.

A state highway patrolman who had had 3 hours' training initially and 6 months' experience in the use of a radar speedmeter was held sufficiently qualified to operate the machine properly, in *Hardaway v State (1957) 202 Tenn 94, 302 SW2d 351*.

Although concerned primarily with the insufficiency of the state's proof of the accuracy of a radar device at the time of a motorist's arrest for speeding, the court in *Wilson v State* (1959, *Tex Crim*) 328 SW2d 311, apparently considered 9 1/2 years of experience in highway traffic work sufficient qualification for a highway patrolman to operate a radar speedmeter, and to testify in a speeding prosecution as to readings obtained from the device.

In *Cromer v State* (1964, *Tex Crim*) 374 SW2d 884, where a motorist's speed was measured at 76 miles per hour in a 55-mile-per-hour zone by a portable radar set mounted on a highway patrol car, it was held that the state was not required to call qualified experts to testify as to the principles underlying radar apparatus and as to the manner and means of testing the accuracy of a radar set. Pointing out that there was no question here as to the admissibility of the radar evidence, which had been introduced without objection, the court held that the testimony of the patrolmen operating the radar apparatus as to the speed shown by the device, which they were trained to operate and to test for accuracy, and which they did operate and test and find accurate, was sufficient to sustain a finding by the jury that the motorist was driving at a speed in excess of 70 miles per hour. The court noted that the patrolmen agreed that they had not been trained in and were not experts on the mechanics of the radar set, or how to repair it, but that they testified that they had received instructions and had been trained in its operation and in how properly to test it for accuracy.

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In prosecution for speeding, in which police officer testified that defendant drove 45 mph in 25 mph zone and that he had been certified in 1980 to operate radar device upon which his testimony was based, officer's certification was not invalidated by statute providing that police radar operators had one year from March 22, 1983, to complete new training or have previous training determined to be equivalent, where defendant's trial was in January, 1984. *Price v State* (1985) 285 Ark 148, 685 SW2d 506.

For officer to testify as to speed based on reading of K-55 radar device, he need not understand scientific operation of device provided that he is properly trained to operate, test and read unit. *State v Newton* (1980, *Del*) 421 A2d 920.

See *State v Primm* (1980) 4 Kan App 2d 314, 606 P2d 112 (citing annotation), § 7[b].

See *State v Spence* (1982, *La*) 418 So 2d 583 (citing annotation), § 8[a].

A testifying officer's testimony regarding results obtained from radar gun is not expert testimony even though the technical mechanisms underlying how the radar gun works is not common knowledge. Rules of Evid., Rule 701. *State v. Cochrane*, 897 A.2d 952 (N.H. 2006).

In prosecution for operating motor vehicle in excess of speed limit officer's qualifications to operate radar equipment were sufficiently established where officer testified that he had been state trooper for approximately four years prior to date in question, he was familiar with use of radar and had often correctly set up and tested radar equipment, and he had completed two-day course and was certified in operating radar; there was sufficient evidence as to accuracy of unit on day in question where trooper testified that he calibrated unit before and after alleged violation and had followed procedural steps printed on outside of radar equipment, he used two external tuning forks, set at different speeds, and use of two tuning forks provided sufficient assurance that tuning forks themselves were accurate because each tuning fork corroborated accuracy of other. *State v Ahern* (1982) 122 NH 744, 449 A2d 1224.

Evidence supported trial court's judgment of guilt in speeding prosecution, where, although court noted gross inexperience of rookie state trooper who operated radar speed gun and issued citation, experienced supervisor who rode along with rookie at time citation was issued testified that she calibrated speed gun and that rookie followed all proper procedures, including prior visual determination that defendant's car was speeding. *State v. Ferrier*, 105 Ohio App. 3d 124, 663 N.E.2d 729 (3d Dist. Van Wert County 1995).

See *State v Shelt*, 46 Ohio App 2d 115, 75 Ohio Ops 2d 103, 346 NE2d 345, § 8[a].

See *State v Wilcox*, 40 Ohio App 2d 380, 69 Ohio Ops 2d 333, 319 NE2d 615, § 8[b].

See *Jackson v Oklahoma* (1984, Okla Crim) 678 P2d 725, § 8[a].

See *Shears v State* (1982, Okla Crim) 648 P2d 841 (citing annotation), § 7[d].

Officer's testimony that he was certified to use radar gun to detect speed, that he calibrated and tested his radar instrument on day he stopped defendant for speeding, and that gun used radar waves to calculate speed was sufficient to establish proper foundation for admitting radar evidence. Rules of Evid., Rule 702. *Mills v. State*, 99 S.W.3d 200 (Tex. App. Fort Worth 2002), petition for discretionary review filed, (Mar. 26, 2003).

Trooper's uncontroverted testimony was sufficient to sustain conviction for speeding, where trooper testified that he visually observed defendant traveling at high rate of speed on interstate highway, radar clocked defendant going 95 miles per hour in 70 mile per hour zone, trooper was certified in use of radar device, and trooper tested radar prior to his shift to ensure its accuracy. V.T.C.A., Transportation Code §§ 545.351(a), 545.352(a, b). *Nam Hoai Le v. State*, 963 S.W.2d 838 (Tex. App. Corpus Christi 1998), petition for discretionary review refused, (July 1, 1998).

See *State v Mills* (1981) 99 Wis 2d 697, 299 NW2d 881, § 7[b].

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[\*D] Effect of other statutory provisions

[\*10] Prohibition against "speed traps"

The contention that evidence obtained by a radar device should be excluded because such devices constitute an illegal speed trap was rejected by the courts in the following cases.n53

According to a statement in 43 Cal L Rev 710 at 713, it was held, in the unpublished case of *Salem v Franz* (Or) June 22, 1954, that the use of the radar speedmeter did not violate a speed-trap law similar to that discussed in the *Beamer* Case, supra, since the distance measured by the device was not the highway but the wave length of the broadcast beam.

A statute forbidding the admission of evidence obtained by use of a speed trap, and defining such a trap as a particular section of a highway measured as to distance and with boundaries marked or otherwise determined in order that the speed of a vehicle might be calculated by securing the time it took the vehicle to travel the known distance was held in *Ex parte Beamer* (1955) 133 Cal App 2d 63, 283 P2d 356, not to have been violated by the use of evidence secured by a radar speedmeter, the court saying that when such a device was used, no particular section of the highway was marked, since any few inches of the roadway within the effective range of the instrument could have been used for measuring purposes, and the device could be used anywhere on the highway wherever it was located, whether stationary or on a moving vehicle. It was also said that the evidence could not be rejected merely because it involved the measurement of the distance a vehicle traveled on the highway and the computation of the time it took to travel that distance, since this process was necessarily involved in any evidence as to speeding. The absence of any trap was also held to be evidenced by the facts that the officers operating the device were dressed in uniform, and that the automobile upon which the meter was mounted was properly painted in the distinctive colors usually used on police cars, and was parked at the curb in plain view.

See *State v Moffitt* (1953) 48 Del 210, 100 A2d 778, where the court instructed the jury that whether or not they agreed with the policy of using hidden radar equipment to detect speeders was not an issue before them, since in the absence of

legislation to the contrary the highway department had the power to determine the manner of patrolling the highways.

Since radar speedmeter reading did not involve the "lapsed time" required by a vehicle to travel through a measured section of highway, but judged speed by measuring the amount of frequency variation between the signal transmitted down a highway and that reflected back to the unit's receiving antenna, the court in *State v Ryan (1956) 48 Wash 2d 304, 293 P2d 399*, held that the use of a radar unit did not constitute a "speed trap" within the meaning of a statutory provision rendering evidence of speed obtained from a speed trap inadmissible.

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In prosecution for violating basic speed law, citing officer's testimony based on use of radar establishing that motorist was traveling 16 miles per hour over speed limit in 30 mile-per-hour zone was properly admitted, notwithstanding contention that engineering and traffic survey produced by prosecution did not justify posted speed and that therefore section of street covered by survey was speed trap, where engineering and traffic survey covering street section contained all of required elements governing contents of such survey. *People v Smith (1981) 118 Cal App 3d Supp 7, 173 Cal Rptr 659*.

In prosecution for driving on highway at speed greater than 55 miles per hour, trial court properly admitted radar evidence to establish that defendant had been speeding, despite defendant's contention that evidence of his alleged speeding violation was inadmissible under statute which excluded speed trap evidence, since 55 miles per hour speed limit in effect on area of highway in question was not prima facie speed limit; area in question was not speed trap which is defined as particular section of highway with prima facie speed limit that is unjustified by engineering and traffic survey. *People v Miller (1979) 90 Cal App 3d Supp 35, 153 Cal Rptr 192*.

[\*11] Requirements as to radar-warning signs

[\*11a] Necessity of proving existence of signs

The statutes which permit the use of radar speedmeters or other electronic devices in speed regulation enforcement usually require that signs warning motorists of the use of electronic speed detection equipment be erected along those highways where the devices may be used. That these signs have been erected was regarded, in the following cases, as an element essential to a conviction in a speeding prosecution based on radar evidence.

And taking judicial notice of the existence of signs warning motorists of radar speed checks was held reversible error in *Commonwealth v Brose (1963) 412 Pa 276, 194 A2d 322*, the court pointing out that in failing to prove that official warning signs had been erected on the highway at the point of the defendant's arrest, the prosecution had omitted an element essential to its case under the statutory provisions authorizing the use of radar to prove speed regulation violations.

Thus, where there was a total absence of proof that official radar-warning signs had been erected along the highway where the defendant motorist's speed was timed, and that the radar device used was of a type approved by the secretary of highways, the court in *Commonwealth v Sheetz (1962) 27 Pa D & C2d 566, 10 Chester Co 415*, reversing a speeding conviction based on the radar evidence, declared that affirmative proof of both of these facts was a necessary prerequisite to a speeding conviction under the statutory provisions permitting the use of radar in measuring the speed of motor vehicles.

As also recognizing the necessity of proving the existence of radar-warning signs, see *Sabatino License (1963) 31 Pa D & C2d 215, infra § 11[b]*.

That a court may not take judicial notice of the existence of official radar-warning signs was also recognized in *McClelland's License* (1965) 36 Pa D & C2d 378, 15 Bucks Co LR 48, where a speeding conviction based upon radar evidence was reversed because, inter alia, the record was totally silent as to the erection, at the time in question, of any official warning signs along the Pennsylvania Turnpike indicating that radar was in operation, as required by statute.

Failure to prove that the "radar enforced" signs along the highway in question met the specifications established by the secretary of highways in accordance with statutory authority was held fatal to a prosecution for speeding based upon radar evidence, in *Commonwealth v Taylor* (1966) 38 Pa D & C2d 749, the court acquitting a motorist whose speed had allegedly been clocked by radar at 31 miles per hour in excess of the posted 50-mile-per-hour maximum speed.

[\*11b] Permanence and placement of signs; proximity of radar

In considering where radar warning signs should be placed along highways, and whether they should be permanently positioned or set up only temporarily when radar is actually in operation, the following cases have indicated that sufficient compliance with the radar statute requires only that permanent signs be erected at reasonable intervals so as to give motorists notice that radar may be in use at some point along the highway.

In finding radar evidence sufficient to convict a motorist of speeding, in *Commonwealth v Lewis* (1964, Pa) 82 Dauph Co 153, the court rejected the motorist's argument that the state was required to prove that he had seen a radar-warning sign. The court pointed out that the radar-warning sign closest to the point of the motorist's arrest was located about 3.4 miles back down the highway in the direction of the motorist's travel, and that between this sign and the radar checkpoint there were nine rural roads from which access could be had to the highway upon which the motorist was arrested. Although the defendant motorist did not take the stand and testify as to where he entered the highway, it was his argument that if he had entered the highway from one of the nine side roads, he would not have been able to see any official warning sign, and that he must therefore be found not guilty of the speeding charge. The court expressed the opinion, however, that the state was not required to erect radar-warning signs at every crossroad, but only at reasonable intervals along highways upon which radar would be used to measure the speed of motor vehicles, and said that in the present case there were two official and adequate radar-warning signs within a distance of 4.8 miles -- a much shorter distance than the 10-mile maximum interval permitted by the regulations of the secretary of highways. The court added that these signs were erected at reasonable places, so that the motorist was legally presumed to have knowledge of their existence.

Similarly, it was held in *Commonwealth v Fornwalt* (1964) 203 Pa Super 411, 202 A2d 115, that the provision of the "Radar Act" which required official warning signs to be erected on the highways, indicating "that radar is in operation," did not require the erection of signs only on the particular highways and at the particular times that radar was in fact being used. The motorist's argument that the statute forbade permanent radar-warning signs was based upon the use of the verb "is," which he said indicated a legislative intent that the signs be temporary in nature, limited to the time and place of state police use of radar devices. In rejecting this contention, the court pointed out that during the process of the enactment of the "Radar Act," an amendment which would have added the words "at the immediate time and place" to the clause requiring the erection of warning signs was defeated in the state senate. The court added that giving the authority for control of the signs to the secretary of highways was indicative of legislative intent to have permanent signs erected, since this authority would otherwise have to be given to the state police, who alone could determine when and where signs of a temporary nature should be erected.n54

That no sign warning of radar enforcement of speed regulations had been erected on the 2-mile portion of a highway traveled by a motorist prior to his apprehension for speeding as detected by radar apparatus, was held not a valid defense to a speeding charge in *Sabatino License* (1963) 31 Pa D & C2d 215. The court recognized that the erection of proper warning signs was a statutory prerequisite to a conviction of speeding based upon evidence obtained through the use of radar apparatus, but denied that the statute required, as the motorist in effect contended, the erection upon all state highways of two warning signs, one for traffic proceeding in each direction, at every intersection with any road from

which vehicular traffic would enter those highways. Pointing out that the statute required only that warning signs be placed at reasonable intervals and places, the court concluded that the three warning signs which had been placed along the 5-mile length of the bypass upon which the defendant motorist was traveling at the time of his apprehension constituted sufficient compliance with the statutory requirements and the regulations established by the secretary of highways, although there was in fact no sign erected in defendant's direction of travel upon the 2-mile portion of the bypass which he had traversed. But see *Gibson License (1964) 36 Pa D & C2d 476*, where, in the absence of any evidence which would indicate what rules and regulations were established by the secretary of highways regarding the intervals at which radar warning signs were to be erected, the court was unable to determine whether three warning signs within a distance of 7 miles were in fact erected at the required intervals, and concluded that the highway in question was not posted in conformity with the law as to radar signs.

See *Commonwealth v Wrye (1963) 32 Pa D & C2d 385*, infra § 11[c], where, in rejecting a motorist's argument that radar-warning signs should state explicitly that "radar is in operation," the court pointed out that the statute's use of the word "erected" indicated a legislative intent that the signs be permanently placed, rather than set up only at those times when and at those places where a radar device was actually in operation.

In holding evidence of speeding obtained by the use of radar speedmeters sufficient to convict three motorists whose speeds had been clocked by the devices, the court in *Commonwealth v McConnell (1965) 35 Pa D & C2d 541*, pointed out, inter alia, that the prosecution had presented adequate proof that in accordance with the statute permitting the use of radar to enforce speed regulations, signs had been erected warning motorists of the presence of radar, and that at least one such sign was erected within 10 miles of the spot where each of the motorists drove through a radar beam, the distance being measured from the radar zone in question back along the motorist's route of travel. There was evidence in the record of the regulations adopted and amended by the secretary of highways which established the size, color, and type of warning signs to be used and the intervals at which the signs should be erected along highways. The motorists argued that the prosecution had proved the erection of only one sign, and that an "interval" could not be proven until the positions of at least two signs were established. The court held, however, that the purpose of the radar statute was to warn the traveling public that radar was in use, and, noting that each motorist had passed one sign within 10 miles of the spot where his speed was timed by radar, the court said that as far as these motorists were concerned, the full purpose of the act had been served, and that the location of the next sign along their proposed routes could not possibly be relevant.

And in *Commonwealth v Schoenfeld (1963, Pa) 54 Luzerne Leg Reg R 213*, the court pointed out that the erection of radar warning signs was not limited, under the statute, to the exact time and place of a radar speedmeter's use by the state police to detect speed regulation violations.

Although reversing on other grounds a speeding conviction based upon radar evidence, the court in *Royals v Commonwealth (1957) 198 Va 876, 96 SE2d 812*, rejected the motorist's argument that his conviction was illegal because the prosecution had failed to present adequate proof of compliance with the section of the radar statute which provided that "[n]o operator of a motor vehicle may be arrested under this section unless signs have been placed at the State line on the primary highway system, and outside cities and towns having over 3,500 population, on the primary highways to indicate the legal rate of speed and that the speed of motor vehicles may be measured by radio microwaves or other electrical devices." The court pointed out that the object of this provision of the statute was to eliminate the possible contention that the use of radar to determine a motorist's rate of speed was an entrapment creating a feeling of hostility between the motoring public and police officers, and said that the posting of the required signs gave every motorist using the highway between signs a fair warning that radar might be in use and that he would violate the speed limit at his peril. In this case, the motorist had been proceeding in a westerly direction when he was clocked by radar a few miles east of a town having a population in excess of 3,500. The court noted proof that the required signs were posted on the highway in and around the town; and the motorist admitted that he was informed at a service station just prior to his arrest that radar was being used to the west of him on the highway over which he was traveling. Thus, the court said, he had constructive notice from signs posted on the highway and actual knowledge that officers were using radar on this particular highway to measure the speed of motorists. The court concluded that proof of these two facts

showed sufficient compliance with the provision of the statute.

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Presenting problems akin to the question of the proper placement of statutorily required "radar warning" signs is the issue of the proper location of the radar device itself, where a statutory provision forbids its use within a specified distance of certain regulatory signs. In this regard, a few cases have considered problems relating to the construction of an Illinois statute providing generally that a posted speed limit would suspend the applicability of the general state speed limit prescribed in a foregoing section of the statute, and further providing that "[e]lectronic speed-detecting devices shall not be used within 500 feet beyond any such sign in the direction of travel; if so used in violation hereof, evidence obtained thereby shall be inadmissible in any prosecution for speeding."

Applying this statutory provision, the court in *People v Russell (1970) 120 Ill App 2d 197, 256 NE2d 468*, reversed a speeding conviction based upon the reading of a radar device which, according to the testimony of the officer operating the equipment, was being operated within 6 inches of "a" speed limit sign when the defendant motorist drove through its zone of influence. Pointing out that the statutory provision provided the motorist with an affirmative defense, the court saw no necessity to decide whether the phrase "any such sign," referring to the statutory requirement of posting speed limit signs, was intended by the legislature to refer to any sign denoting a speed limit or only to the first sign, in what might prove to be a series of signs, upon entry into a changed speed zone. Since the evidence offered by the state to prove the existence of other speed signs in the area failed to establish whether the sign in question was or was not the first in a series of signs, the court concluded that the state had failed, even on its own theory of interpretation of the statute, to meet its burden of proof to overcome the motorist's affirmative defense.

However, addressing itself directly to the question whether police might employ a radar speed detection device within 500 feet of any speed limit sign, the court in *People v Johannsen (1970) 126 Ill App 2d 31, 261 NE2d 551*, affirmed a speeding conviction, where the only evidence of the defendant motorist's speed was ascertained by the use of a radar device which the operating officer had testified was set up within 200 feet of a sign indicating a 35-mile-per-hour speed limit, but where the officer further testified that there was another 35-mile-per-hour speed limit sign about three-quarters of a mile before the sign in question. Pointing out that statutes must be reasonably construed in accordance with practical application, the court expressed the opinion that the intention of the legislature was to give a driver time to adjust to the speed limit before subjecting him to radar detection. The court pointed out that the motorist in this case had obviously been informed of the 35-mile-per-hour speed limit more than 500 feet in advance of the radar device, and said that to require radar devices to be placed more than 500 feet beyond any sign, regardless of how many similar signs had preceded it and had been passed by the vehicle in question, would be unreasonable.

[\*11c] Illumination and wording of signs

In attempting to establish a defense in a speeding prosecution based on radar evidence, motorists in a number of cases have argued that radar-warning signs in the area of their arrests failed, because of alleged structural deficiencies, to comply with the statutory provision which required the posting of such signs.

In one case a speeding charge was dismissed where the radar-warning sign and other traffic control signs in the area of the motorist's arrest were found to be inadequately illuminated or reflectorized so as not to conform to statutory requirements. Under statutory provisions requiring law enforcement officers to post signs warning motorists of the use of radar or other mechanical or electrical timing devices for the determination of speed, and requiring that signs intended to convey their messages during hours of darkness be reflectorized or illuminated, the court in *State v Wibelt (1967) 9 Ohio Misc 158, 38 Ohio Ops 2d 245, 223 NE2d 834*, dismissed a charge of speeding, brought against a motorist who was clocked by radar at 60 miles per hour in a 45-mile-per-hour zone at night, where it was found that the highway markers and control signs were not illuminated, that the "Speed Meter Ahead" sign definitely was not

illuminated or reflectorized, and that there was no definite proof in the evidence that the 45-mile-per-hour speed control sign was reflectorized.

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Motorists' objections based upon the wording of radar-warning signs were rejected by the courts in the following cases.

And it was pointed out, inter alia, in *Commonwealth v Fornwalt (1964) 203 Pa Super 411, 202 A2d 115*, that it was not necessary for radar-warning signs to contain the language "radar is in operation," since any sign that would "indicate" this fact would, in the court's opinion, meet the requirement of the "Radar Act."

In *Commonwealth v Schoenfeld (1963, Pa) 54 Luzerne Leg Reg R 213*, a sign containing the words "Radar Enforced" was held to comply with the statutory provision requiring the erection of signs warning "that radar is in operation."

And signs marked "Radar Enforced" were held sufficient to comply with a statutory directive that signs indicating "that radar is in operation" be posted, in *Commonwealth v Giller (1964, Pa) 54 Luzerne Leg Reg R 215*, the court noting that the words "Radar Enforced Now" were not required by the statute.

A sign marked "Radar Enforced" was held to comply with the statutory command that signs be erected warning motorists of the use of radar to measure the speed of motor vehicles, in *Commonwealth v Lewis (1964, Pa) 82 Dauph Co 153*, the court expressing the opinion that the words "Radar in Operation" were not specifically required by the statutory provision, and that the words "Radar Enforced" would cause an ordinary, prudent motorist to be put on notice "that radar is in operation" and that radar apparatus was available to check the speed of his vehicle.

Pointing out that the entire radar act would be useless and ineffective if police were required to post the exact time and place where radar was then and there operating, the court in *Commonwealth v Wrye (1963) 32 Pa D & C2d 385*, held that signs stating merely "Radar Enforced" were sufficient to comply with the statutory provision requiring the posting of signs warning motorists that radar was in operation. The court stated that it was a strained construction of the act to require radar-warning signs to be set on the road in the same manner as "Men Working" signs used by highway work crews to indicate the presence of men in the road ahead. In support of this position, the court noted that the act itself did not specify the wording required to be on the sign, and that the use of the word "erected" in the statute, indicating substantial or permanent construction, and the legislature's delegating to the secretary of highways the authority to designate the intervals at which warning signs were to be placed, both indicated a legislative intent that the signs should be erected on all highways on which radar speed detection devices were to be used. Quite obviously, the court said, radar units could not be operated at the same time on each mile of state highways. The court concluded that compliance with the statute requires only that the signs "indicate" that radar is in operation, or, in other words, warn a traveler that somewhere on the highway system on which he is traveling, radar is being used to detect speed violation.

[\*12] Requirement that radar set be of approved type

In the following cases, where the statute permitting the use of radar to enforce speed regulations required that the particular device used be of a type approved by a designated state official, it was held that affirmative proof that the radar set used to clock a motorist's speed was in fact approved for police use by the proper authority was necessary to a speeding conviction based on the evidence produced by the device.

A speeding conviction based upon radar evidence was reversed in *Commonwealth v Perdok (1963) 411 Pa 301, 192 A2d 221*, since the prosecution had failed to offer any competent evidence to prove that the radar device used was "of a type approved by the Secretary" as required by statute. In this connection, it was pointed out that although the "Certificate of Radar Speedmeter Accuracy" contained a statement that the device was of a proper type, the certificate

was admissible under the statute only to prove the accuracy of the radar apparatus, and the statement on the certificate regarding the type of device involved was hearsay and inadmissible in the absence of proof that the certificate fell within the business records or official statements exceptions to the hearsay rule.<sup>n55</sup>

A speeding conviction based upon radar evidence was reversed in *Commonwealth v Sheetz* (1962) 27 Pa D & C2d 566, 10 Chester Co 415, where there was a total absence of proof in the record that the radar apparatus used was of a type approved by the secretary of highways, and that official warning signs indicating that radar was in operation had been erected on the highway in question by the proper authority. The court pointed out that affirmative proof of both of these facts was a necessary prerequisite to a speeding conviction under the statutory provisions permitting the use of radar in measuring the speed of motor vehicles.

And in *McClelland's License* (1965) 36 Pa D & C2d 378, 15 Bucks Co LR 48, a speeding violation was held not sufficiently established, in the absence of any proof that the radar equipment used to clock the defendant motorist's speed was of a type approved by the secretary of revenue as required by the statute permitting the use of radar speedmeters to enforce speed regulations.

[\*13] Construction of term "officers"

It was held in the following cases that a statutory provision permitting state police "officers" to make use of radar equipment in speed regulation enforcement did not require that the radar device be operated by more than one officer.

And in *Commonwealth v Keeney* (1963, Pa) 59 Lanc L Rev 31, a speeding prosecution based upon evidence obtained by the use of a radar speedmeter, the court rejected the motorist's argument that the proof against him was deficient in that it indicated that only one officer had timed his speed, whereas the statute permitting the use of radar in measuring the speed of motor vehicles required that the timing be made by "officers" of the Pennsylvania state police. The court pointed out that the statute was indefinite with regard to the number of "officers" required to time a motorist's speed, and said that if the legislature had intended that the radar tests be made by a certain number of officers of the Pennsylvania state police, it would clearly have so stated.

The definition of the word "officers" in the Pennsylvania statute permitting the use of radar to measure the speed of motor vehicles was also considered in *Re Appeal from Suspension of Operator's License of Simon* (1964, Pa) 65 Lack Jur 121, where it was held that the terms of the statute encompassed all "members" of the Pennsylvania state police, without regard to their status on the police force. The court also expressed the opinion that there was nothing in the language or history of the statute which would indicate that there must be more than one officer in each of the cars used by a police radar unit in order to fulfil the statutory requirements, even though in many instances, as in this case, there were in fact two members of the state police in both the radar car and the so-called "chase" car.

A statutory provision permitting the rate of speed of any vehicle to be "timed. . . by officers of the Pennsylvania State Police through the use of radio-microwaves" was held in *Commonwealth v Wrye* (1963) 32 Pa D & C2d 385, not to require two or more officers to be located in the police vehicle with the radar equipment. Affirming a conviction of a truckdriver whose speed was timed by a single police officer seated in a vehicle with the radar timing device in front of him, the court expressed the opinion that if the legislature had intended to require two police officers to operate radar equipment used for enforcing speed regulations, it would have specifically spelled out that fact in that section of the statute which listed specific prerequisites to a conviction of speeding based upon radar evidence. The court cited a number of other instances in the Vehicle Code where the word "officers" was used, although it was quite clear that the act did not require two or more officers to be present, and the court noted that the Statutory Construction Act provided that the singular would include the plural and the plural the singular. The court concluded that although the Vehicle Code was a penal statute and should be strictly construed, the word "officers" in the radar statute referred to any officer of the Pennsylvania state police who might be assigned to the radar detail.

## [\*14] Miscellaneous provisions or construction problems

The courts in the following cases discussed various problems relating to the construction of miscellaneous statutes affecting proof of speed by radar.

In reversing a speeding conviction based upon the readings obtained from a radar speedmeter, the court in *Dayton v Adams* (1967) 9 Ohio St 2d 89, 38 Ohio Ops 2d 223, 223 NE2d 822, held that the police officer operating the radar device was incompetent to testify as a witness for the prosecution because he had been operating the device from an unmarked city-owned vehicle, in violation of a statute which provided that "Any motor vehicle used by a member of the state highway patrol or by any other peace officer, while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, shall be marked in some distinctive manner or color."

In affirming the speeding conviction of a motorist who had been clocked by radar at 60 miles per hour in a zone where speed was restricted to 50 miles per hour, the court in *Commonwealth v Gideon* (1962) 28 Pa D & C2d 157, 4 Adams Co Leg J 11, denied that the statute which authorized the use of radar to enforce speed regulations required that a motorist's speed be timed by radar for a distance of a quarter of a mile, as was the case with speed measurements made by speedometer in police patrol cars. In explanation, the court pointed out that the statutory provisions relating to the measurement of speed of motor vehicles provided for several types of measurements, and added that since the radar equipment made an instantaneous measurement of the rate of speed of a vehicle, no distance was specified for such a measurement in the statute. Had the legislature intended otherwise, the court said, it would have so provided specifically, as was done in the case of measurements by speedometer. Noting also that the Statutory Construction Act provided for a presumption that the legislature did not intend a result that was absurd, impossible of execution, or unreasonable, the court concluded that to require the measurement of the rate of speed by radar to be for a distance of a quarter of a mile would render that portion of the statute referring to radar speed measurements useless and inoperative.

In affirming a speeding conviction based upon radar evidence, the court in *Commonwealth v Wrye* (1963) 32 Pa D & C2d 385, rejected the defendant truckdriver's argument that the radar timing device must, under the Pennsylvania radar statute, be located on the highway right of way. The court said that in requiring the rate of speed to be timed on the highway, the act was referring to the vehicle being timed, and not to the radar unit doing the timing. So long as it could be shown that the radar unit operated safely and accurately, the court said, its location was immaterial.

Although reversing on other grounds a speeding conviction based on radar evidence, the court in *Royals v Commonwealth* (1957) 198 Va 876, 96 SE2d 812, found no merit in the defendant motorist's contention that the statute permitting the use of radar in speed regulation enforcement required the prosecution to procure a mechanical record of the speed of the motor vehicle as registered by the radar set, and to introduce in evidence a graph of that speed. The court pointed out that the statute contained no such requirement, and said that the result of a radar measurement of speed might be established either by a graph of a mechanical recorder properly identified or by the testimony of the police officers who observed the speed registered by the radar machine.n56

## [\*E] Other considerations

## [\*15] Sufficiency of evidence as to identification of speeding vehicle

Under the particular facts of the following cases, it was held that there was no merit to motorists' arguments that their vehicles had been mistakenly identified as those detected speeding by radar speedmeters.

In rejecting a motorist's contention that the police officers operating a radar unit mistakenly identified his automobile as the vehicle picked up by radar, the court in *People v McNulty* (1968) 90 Ill App 2d 465 (abstract), 233 NE 2d 229,

affirmed a speeding conviction based upon the radar evidence, and said that the motorist's guilt was established beyond a reasonable doubt by evidence disclosing that two veteran police officers had identified the defendant motorist as the driver of the vehicle in question, and had testified that there was no vehicle in the defendant's lane of traffic or interfering with identification of the defendant's automobile, and that the license plate number recorded by the officer operating the radar device was identical to the number radioed back to him by the two officers in the chase car.

In *Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421, a motorist convicted of traveling at 50 miles per hour in a 35-mile-per-hour zone contended that evidence obtained by the use of a radar speedmeter should not have been admitted, because, inter alia, there was insufficient proof that his car was the one that caused the speedmeter to show a reading of 50 miles per hour. In rejecting this argument, the court reviewed testimony by the police officer who had operated the radar device that he had estimated the speed of the defendant's vehicle, from visual observation alone, at approximately 40 to 45 miles per hour; that he had observed the defendant's car passing others at the same time the radar dial showed a fluctuating reading with a 50-mile-per-hour maximum; and that when the dial stabilized at 50 miles per hour, the defendant's car was in front by itself, nearest to the radar unit. The court stated that this evidence reasonably pointed to the defendant's car as the offending vehicle; and in answering a further contention made by the defendant, the court expressed the opinion that the radar evidence was not reduced to worthlessness by the remote chance of coincidence that a southbound vehicle broke clear from a passing situation, at 50 miles per hour, at the same moment that the defendant's car got out in front in the northbound lanes. Additionally, the court noted that the policeman's testimony indicated with reasonable certainty that a southbound car, when it entered the range field of the radar, would have been beyond the northbound cars, and therefore would not have registered a stabilized reading on the radar unit.

The identification of the defendant's truck by the state police officer who was operating the radar device, and the corroborative testimony of another state police officer who was aiding in the operation of the radar unit on the night in question, were held, in *Commonwealth v Bartley* (1963) 411 Pa 286, 191 A2d 673, to be sufficient evidence to convince the trial judge beyond a reasonable doubt that the defendant's truck was the vehicle which registered 60 miles per hour on the radar meter which was being used to determine the speed of vehicles in a 50-mile-per-hour zone.

[\*16] Difference between alleged speed of accused and legal limit

The few cases which have considered the problem have indicated that a motorist should not be convicted of speeding on radar evidence showing his speed to have been only slightly in excess of the legal limit.

In *State v Graham* (1959, Mo App) 322 SW2d 188, a speeding prosecution based upon evidence obtained from a radar unit which had been tested for accuracy by running a police patrol car through its zone of influence at speeds of 50 and 70 miles per hour, the court pointed out that since the patrol car's speedometer was not shown to be accurate, these tests would probably not be sufficient proof of accuracy to render the radar evidence admissible in a case where the speedmeter indicated only a slight difference between the speed of the defendant's vehicle and the legal limit. In affirming the speeding conviction in this case, however, the court pointed out that the radar speedmeter had indicated that the defendant was driving in excess of 15 miles per hour over the legal limit, and that the accuracy of the radar device had been confirmed by tests conducted with tuning forks calibrated to register 50 miles per hour and 70 miles per hour on the radar instrument.

Interpreting the *Graham Case*, *supra*, as indicating that radar speed readings showing a motorist's speed to be only 1 to 3 miles per hour over the legal limit should not be admitted in a prosecution for speeding, the court in *Kansas City v Hill* (1969, Mo App) 442 SW2d 89, held, inter alia, that radar evidence indicating a motorist's speed to have been 8 miles per hour in excess of the lawful limit was acceptable in evidence.

It was pointed out in *Sabatino License* (1963) 31 Pa D & C2d 215, that under the statute permitting the state police to enforce speed regulations by the use of radar speedmeters, no conviction of a motor vehicle operator might be had on

evidence obtained through the use of radar apparatus unless, inter alia, the speed recorded by the radar device was 6 or more miles per hour in excess of the legal speed limit.

[\*III] Admissibility and sufficiency of evidence obtained by use of other devices

[\*17] "Speed watch"

[\*17a] Conviction sustained or affirmed

Under the particular facts of the following cases, evidence obtained by the use of a "speed watch," or, as it is apparently also known, a Prather speed device or "electric timer," was held to support speeding convictions.

Evidence of speed obtained by the use of a Prather speed device, consisting of two rubber hoses stretched across a highway at a measured distance and activated by the wheels of passing cars so that by measuring with a stopwatch the time a car took to pass from one to the other of the hoses, its speed could be mathematically computed, was held in *Carrier v Commonwealth (1951, Ky) 242 SW2d 633*, to support a conviction where it was established by "proof of a high quality" that the device fulfilled the function for which it was designed, and was mechanically sufficient at the time it was used in connection with the defendant's apprehension.

The speeding conviction of a city bus driver was held justified by evidence obtained through the use of a "speed watch," a device which consisted of a stopwatch and two rubber tubes stretched across a roadway at a premeasured distance and which computed the speed of a passing vehicle by measuring automatically the time in which the vehicle traversed the distance between the tubes, in *People v Kenney (1958) 354 Mich 191, 92 NW2d 335*, where it was shown that the method of operation of this device was simple and accurate; that the officers operating the device had properly set it up and checked it for accuracy before using it on the day in question; that an expert had examined this particular speed watch and found it to be working accurately at least three times in a 60-day period, including an inspection 3 days after the arrest made in this case; and that the officer operating the equipment had personally observed the defendant's bus and estimated its speed at something in excess of the legal limit. The court pointed out that although this was a test case in which the defendant had offered no evidence to indicate that the instrument in question was mechanically or scientifically inaccurate, it was not necessary to find that the speed watch was infallible in order to admit its readings as evidence. And the court found without merit the defendant's contention that the evidence should have been suppressed, because he was unable to cross-examine the device.

Evidence obtained by the use of a similar device, which was referred to as an "electric timer," and which consisted of two rubber tubes stretched across the width of a street and a control panel containing a stopwatch, a switch, and a reset button, was held properly admitted, in *Webster Groves v Quick (1959, Mo App) 323 SW2d 386, n57* where the motorist was convicted of driving at a speed of 40 miles per hour in a 30-mile-an-hour zone. In rejecting the motorist's argument that the operating officer's testimony as to the readings of the timer constituted hearsay evidence, the court pointed out that the hearsay rule could not be applied to what a witness, on the stand and subject to cross-examination, observed, either through his own senses or through the use of scientific instruments. The court went on to say that the circumstantial guaranty of the trustworthiness of testimony relating to the use of scientific instruments was satisfied by the exercise of the right to cross-examination of the witness on the stand, both as to the results obtained by him and as to the reliability and accuracy of the device which he used. The reliability and accuracy of the electric timer were adequately shown, said the court, by evidence that a police vehicle was driven through the device on the morning of the arrest in question and its speed was accurately measured; and that the stopwatch was tested, and found to be accurate, during the week of the defendant's arrest and during the first week of the preceding and subsequent months. The court emphasized that the persons who had conducted these tests were subjected to rigorous cross-examination. As to the motorist's contention that it was error to admit evidence of the accuracy tests performed on the stopwatch, for the reason that at the time of the tests the watch was not connected to the timer cable and hoses as it was on the morning of the

motorist's arrest, the court failed to see any merit in this argument, since the accuracy of the stopwatch would depend upon its own mechanism and have no relation to the other pieces of equipment.

Where a motorist allegedly drove through a "speed watch" device at 46 miles per hour, her conviction for violating a 30-mile-per-hour speed limit ordinance was affirmed in *People v Asheroff (1955) 12 Misc 2d 10, 174 NYS2d 525*, the court stating that there was sufficient evidence to establish the accuracy of the "speed watch," even though test certificates purporting to establish the accuracy of police car speedometers against which the accuracy of the "speed watch" had been tested were ruled inadmissible. Referring to unchallenged expert testimony by an admittedly qualified engineer that he was familiar with, and had tested and examined, the speed watch equipment, and that it was capable of correctly ascertaining the speed of a motor vehicle within plus or minus 2 miles per hour, the court said this testimony alone would be sufficient to support the conviction. The court added that despite the inadmissibility of the speedometer test certificates, testimony that the speedometers and the speed watch showed identical speeds on the same day that the speed watch recorded the speed of the defendant's vehicle was not without probative value, even assuming that none of these speed-recording devices had been tested.

Where a "speed watch" had been tested for accuracy by driving police patrol cars, whose speedometers had previously been checked for accuracy, across the hoses which formed a part of the machine, evidence derived from the device was held, along with testimony by the police officer operating the "speed watch" as to his opinion of the defendant's speed, sufficient to sustain a conviction for speeding, in *People v Duskin (1958) 11 Misc 2d 945, 174 NYS2d 527*, the court stating that although expert testimony had been offered in this case to establish the reliability of the "speed watch" device, expert testimony as to the scientific principles underlying the "speed watch" device was no longer necessary.

Evidence that a "speed clock" or "whammy," which was operated by two highway patrolmen who had tested the device and found it to be working properly, registered a motorist's speed at 79 miles per hour in a 55-mile-per-hour speed zone, was held sufficient to sustain a conviction of speeding in excess of 70 miles per hour, in *State v Clark (1967) 272 NC 114, 157 SE2d 621*, the court noting testimony by the motorist that he had crossed the whammy at a speed of 55-60 miles per hour, and stating only that this conflicting evidence presented a very simple fact issue for the determination of the jury.

[\*17b] Conviction not sustained or affirmed

Under the particular facts of the following cases, speeding charges based upon "speed watch" evidence were dismissed because of the prosecution's failure to lay a proper foundation for the introduction of the "speed watch" readings.

Testimony by one of the officers operating a "speed timer" which was used to clock a motorist's speed that "[w]e put the two tubes across the center of the road, then we took down the box and hooked it up and Durkin ran it through a few times and I made sure that it was working properly," along with statements that the timer had been in use for approximately 1 hour and 20 minutes at the time of the motorist's arrest and had been set up in front of two named stores, was held to be insufficient proof of the motorist's speed and of the accuracy of the speed-timing device, in *People v Charles (1958) 15 Misc 2d 401, 180 NYS2d 635*. The court pointed out that there was no other proof in the record of the qualifications of the police officer to operate the speed-timing equipment, no other proof regarding the accuracy of the speed-timing equipment, nor any tests made to determine its accuracy prior to the time of its use in this case, and no other proof of the manner in which the equipment had been set up or of the proper spacing of the hoses which activated the machinery. While testimony as to the general scientific principles underlying the operation of this type of speed-timing equipment was no longer necessary, the court said, it was still necessary to prove that any particular instrument was in proper operating order, had been properly tested, and was being properly operated at the time of the alleged violation; and the court concluded that the failure of the prosecution to establish these points required that the information in this case be dismissed.

It was held that there was an insufficient foundation for the introduction of evidence obtained by the use of a "Speed

Watch," in *People v Tiedeman* (1960) 25 Misc 2d 413, 207 NYS2d 95, where the prosecution had failed to offer adequate proof as to the accuracy of the device and as to the operating officer's qualifications to operate it. It was stated that in the absence of scientific proof of the accuracy of the instrument itself, testimony that the machine was checked against a calibrated speedometer, under conditions assuring the accuracy of such a test, would have been a sufficient basis for the introduction of speed watch readings; but that the evidence offered in the present case indicated that the speedometer of the patrol car, which had been driven through the speed watch as a test upon its accuracy, had been calibrated a short time prior to the day of the defendant motorist's arrest and found to be somewhat inaccurate, although this inaccuracy was not accounted for by the officers who tested and operated the speed watch on the date in question. Furthermore, the court pointed out, the machine had been in operation some 2 hours and 15 minutes at the time the defendant in this case was arrested, and it would seem the better practice, after such a period of operation, to test the machine before dismantling it and discontinuing its operation at that particular location, so that the machine's accuracy throughout the period of operation could be established. The court then noted the absence of evidence as to the operating officer's qualification to operate the speed watch, and said that as a minimal requirement, testimony should have been offered to show his training and experience in the operation of the device as a foundation for his testimony on its reading. Because of these deficiencies in the evidence the court reversed the defendant's speeding conviction and dismissed the charges against him.

[\*18] Photographic devices

In the following cases, speeding convictions were sustained upon evidence derived from electronic devices involving the use of photography.

Thus, a conviction based upon evidence obtained by a "Photo-Speed-Recorder" which operated by taking two pictures, at a measured time interval, of the speeding automobile, and then calibrating the difference in the size of the automobile in the two photographs so as to determine, by a mathematical formula, the distance traveled in the time elapsed, was sustained in *Commonwealth v Buxton* (1910) 205 Mass 49, 91 NE 128, as against the objection that the ex parte experiments intended to show the reliability of the machine were insufficient and also that the prosecution had failed to establish the trustworthiness of the stopwatch mechanism which was an integral part of the apparatus. The court said that whether evidence of the experiments should be admitted depended largely upon the discretion of the trial judge, and that in the instant case the result of the experiments did not depend upon the fluctuations of human agency nor on conditions whose relations to the result were uncertain, but upon the immutable working of natural laws, so that the trial judge might well have found that such experiments were likely to be more reliable than the conjectural statement of an eyewitness. The court asserted that it was desirable to have some machine whose action, depending upon the uniform working of the laws of nature, would record the speed of a moving object; and the court said that the fact that the experimenter was not an expert was not fatal to the introduction of the machine in evidence. Evidence as to the accuracy of the stopwatch was also held admissible and sufficient to support the verdict.

See also *People v Hildebrandt* (1955) 308 NY 397, 126 NE2d 377, 49 ALR2d 449, where a speeding conviction based upon evidence obtained by a "photo-traffic" camera which took two photographs of a moving vehicle at a set time interval was reversed because of the absence of any evidence to show that the defendant, who was the registered owner of the car and who was not notified of the alleged offense until 2 weeks after it was supposed to have happened, was operating the car at the time the pictures were taken.

And a motorist's violation of a village speed ordinance was held established beyond a reasonable doubt, in *People v Pett* (1958) 13 Misc 2d 975, 178 NYS 2d 550, where his speed was clocked at 41 miles per hour in a 30-mile-per-hour zone by a speed measuring device known as a "Foto-Patrol," which consisted of two parallel tapes cemented to a roadway across a lane of traffic and 36 inches apart and connected to two boxes which in turn were connected to a camera and strobe light set upon a stanchion on the sidewalk beside the roadway. It was explained that the machine was basically an electronic counter which was started and stopped as passing vehicles made contact with the two tapes in the roadway; that the count thus arrived at was automatically compared to a predetermined count programmed into the machine's

computer; and that when the measured count exceeded the predetermined count, which in this case was the equivalent of a speed of 40 miles per hour, the strobe light and camera were activated to photograph the license plate of the speeding vehicle and to record the measured speed of the vehicle on the photograph in terms of figures which could be decoded by reference to a prepared table or chart. Because this was the first case involving the use of the Foto-Patrol, the court pointed out that the prosecution was required to present expert testimony establishing the reliability of the device. And it was noted that the requisite evidence of reliability was supplied by one expert who testified that he had inspected the device, and found it to be accurate, on the evening before the defendant motorist was apprehended, and by another expert who testified that he had developed the film and had prepared the conversion chart, using a definite formula involving time, rate, and distance. The court then noted that the accuracy of the device was substantiated by evidence that the officers operating the machine had compared its readings with the speeds indicated on the calibrated speedometer of a police patrol car driven through the device both before and after the time of the defendant's apprehension. Giving some weight also to opinion testimony as to the defendant's speed offered by one of the officers operating the Foto-Patrol, the court concluded that the machine had accurately recorded the defendant's speed at the time in question.

[\*19] "VASCAR"

A speeding conviction was sustained in the following case where the motorist's speed was determined by the use of a device known as a "VASCAR."

Thus, in *People v Persons* (1969) 60 Misc 2d 803, 303 NYS2d 728, a motorist was convicted of speeding upon evidence derived from a "visual average speed computer recorder" (VASCAR). It was explained that this instrument was designed to measure the distance traveled by a vehicle and the time elapsed in traveling that distance, so that the average speed of the vehicle over the distance could be computed by mathematical formulae and visually displayed to the operator of the device. Since the accuracy and reliability of this device had not yet been challenged in the New York courts, the court pointed out that the prosecution was required to present expert testimony as to the construction, operation, accuracy, and reliability of the device, as well as the scientific principles upon which the machine was based. This evidence was supplied by duly qualified experts who had been in charge of the development, manufacture, and marketing of VASCAR, and the court found that the machine was an accurate and proper instrument for detecting speed violations on highways, if properly tested and used. With regard to the machine's accuracy, the court first recognized that because of the human factor involved in operating speed-detecting devices, it was impossible to measure exact speed; and the court noted that there was evidence to indicate that due to the extensive training and testing of VASCAR operators, human error would result in a measurement error of less than one mile per hour. Adding that proof of proper testing was the key to demonstrating the accuracy of the VASCAR device, the court observed that the accuracy of the machine used in this case was sufficiently and convincingly proved by testimony of the operating officer that he had tested the machine, using a one-half mile course, which had been measured by a certified measuring tape, and a stopwatch, the accuracy of which had been tested by WWV, the radio station whose accuracy was universally recognized. The court also pointed out that the officer's testimony concerning his clocking of the defendant motorist was clear and exact, and proved beyond a reasonable doubt that he had properly operated the VASCAR device in measuring the defendant's speed.

[\*20] Miscellaneous devices

The courts in the following cases adjudicated whether a speeding conviction was warranted where the motorist's speed was determined by the use of miscellaneous devices.

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Event data recorder (EDR) in manslaughter defendant's automobile was not "device" within scope of statute regulating

police use of speed-measuring devices, where EDR was internal to vehicle and installed by manufacturer, and recorded defendant's speed on impact without any intervention by police officer. West's F.S.A. § 316.1905(1). *Matos v. State*, 899 So. 2d 403 (Fla. Dist. Ct. App. 4th Dist. 2005).

Sufficient evidence supported finding that motorist had violated statute requiring compliance with speed limit; reading from laser speed-detection device used to measure speed of motorist's vehicle indicated that motorist had been driving 42 miles per hour, and area in which motorist was driving had posted speed limit of 25 miles per hour. HRS § 291C-102. *State v. Stoa*, 112 Haw. 260, 145 P.3d 803 (Ct. App. 2006).

Testimony of officers who participated in speed detail, and measurement of defendant's speed taken by lidar equipment, provided sufficient evidence upon which to base defendant's conviction for speed in a school zone. McKinney's Vehicle and Traffic Law § 1180(c)(1). *People v. Deep*, 12 Misc. 3d 1137, 821 N.Y.S.2d 381 (City Ct. 2006).

Laser speed detector, used by law enforcement officers to detect when motorists are speeding, is reliable and accurate scientific measure of speed of moving object, if the device is used in accordance with certain procedures delineated by manufacturer, i.e., laser is pointed so that red dot on scope is aligned with reflective area on target vehicle, target vehicle is moving either directly toward or away from laser or at no more than slight angle, and laser was properly calibrated prior to use, which calibration included self-test done by the instrument internally and a measurement at distance conducted on test range, which distance test must be conducted on test range prior to use of device before each shift, with laser measuring a known distance. *Upper Arlington v. Limbert*, 138 Ohio Misc. 2d 30, 2005-Ohio-7159, 856 N.E.2d 336 (Mun. Ct. 2006).

## FOOTNOTES

n1 Superseding the annotation at 49 A.L.R.2d 469.

n2 The use of information obtained from a tachograph or other device as evidence of speed in a civil action is not within the scope of this annotation.

n3 The term "regulations" is intended to encompass all types of speed control enactments, whether federal, state, or municipal.

n4 See, for example, *State v. Moffitt* (1953) 48 Del 210, 100 A2d 778; *People v. Torpey* (1953) 204 Misc 1023, 128 NYS2d 864; and *People v. Beck* (1954) 205 Misc 757, 130 NYS2d 354. Note that in *People v. Pett* (1958) 13 Misc 2d 975, 178 NYS2d 550, *infra* § 18, expert testimony explaining the nature, construction, and operation of the "Foto-Patrol" was required, since this was the first case involving its use. And in *People v. Persons* (1969) 60 Misc 2d 803, 303 NYS2d 728, *infra* § 19, the first case dealing with evidence of speed obtained from a "visual average speed computer recorder" (VASCAR), expert testimony was necessary to explain the device.

n5 § 3, *infra*.

n6 See, for example, the Virginia statutory provisions quoted in *Sweeny v Commonwealth* (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817.

n7 § 4, *infra*.

n8 See §§ 5-8, *infra*.

n9 § 5[a], *infra*.

n10 § 5[b], *infra*.

n11 § 2[b], *infra*.

n12 § 7[c], *infra*.

n13 § 8[a, b], *infra*.

n14 § 7[d], *infra*.

n15 § 6[a], *infra*.

n16 *Commonwealth v Perdok* (1963) 411 Pa 301, 192 A2d 221, *infra* § 6[b].

n17 *Sweeny v Commonwealth* (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817, *infra* § 6[b].

n18 § 9, *infra*.

n19 § 12, *infra*.

n20 § 11[a], *infra*.

n21 § 11[b], *infra*.

n22 § 11[c], *infra*.

n23 See, for example, *Commonwealth v Wrye* (1963) 32 Pa D & C2d 385, *infra* § 11[c]; and *Commonwealth v Fornwalt* (1964) 203 Pa Super 411, 202 A2d 115, *infra* § 11[b].

n24 *State v Wibelt* (1967) 9 Ohio Misc 158, 38 Ohio Ops 2d 245, 223 NE2d 834, *infra* § 11[c].

n25 § 10, *infra*.

n26 § 13, *infra*.

n27 § 15, *infra*.

n28 § 16, *infra*.

n29 § 17[a], *infra*. Note that this device has apparently also been known as a "Prather speed device," an "electric timer," and a "whammy."

n30 *Commonwealth v Buxton* (1910) 205 Mass 49, 91 NE 128, *infra* § 18.

n31 *People v Pett* (1958) 13 Misc 2d 975, 178 NYS2d 550, *infra* § 18.

n32 *People v Persons* (1969) 60 Misc 2d 803, 303 NYS2d 728, *infra* § 19.

n33 § 17[b], *infra*.

n34 Speed, Proof 2., 11 Am. Jur. Proof of Facts 1 And see Kopper, The Scientific Reliability of Radar Speed Meters. 33 NC L Rev 343. The word radar is formed from the capitalized letters in "RAdio Detection And Ranging."

n35 The "Doppler effect," which is the basis of the police radar, is familiarly experienced when driving past

a car whose horn or siren is sounding, the pitch or frequency of the sound falling suddenly just as the vehicle is passed. For a strong criticism of radar speed-check devices on technical grounds, see Carosell & Coombs, *Radar Evidence in the Courts*, 32 *Dicta* 323. The authors contend that the Doppler or frequency radar ordinarily used in the police instruments, unlike the pulse radar commonly used by the military, is subject to many limitations as to accuracy and by way of interference from objects or power sources other than the moving automobile which is being checked. Also noting the possibility of interference with police radar from outside sources, see 1 Ridenour, *Massachusetts Institute of Technology Radiation Laboratory Series 132* (1947) cited in Comment, 10 *Rutgers L Rev* 454.

n36 Where the radar equipment is portable and is contained totally within a police vehicle, or where the police officer operating the radar equipment is able to "unhook" from radar equipment set up outside his car along the side of the road, a single police officer may perform both the function of radar operator and of "chase car" driver.

n37 11 Am Jur Proof of Facts, Speed; Proof 3 Supp, Expert Testimony as to Theory of Operation and General Scientific Accuracy of Radar Speed Meter in Reading Traffic Speeds.

n38 For example, testimony of the police officers who had operated the radar device at the time defendant's speed was checked, that earlier on the same day a police car had been driven through the radar beam, and that the speed observed on the speedometer of that car by one of the officers was the same as the radar reading observed by the other, was held in *People v Offermann* (1953) 204 Misc 769, 125 NYS2d 179, to have been improperly admitted, since it necessarily depended upon the hearsay statements of each officer to the other as to the reading each had made. Also sustaining a hearsay objection is *Crosby v Commonwealth* (1963) 204 Va 266, 130 SE2d 467, *infra* § 8[b].

n39 See, for example, *State v Graham* (1959, Mo App) 322 SW2d 188.

n40 Cases discussing the effect of legislative acceptance of radar devices are dealt with in § 4, *infra*.

n41 Evidence of speeding obtained by the use of a radar speedmeter was ruled admissible after the prosecution had offered ample expert testimony to demonstrate that the device was sufficiently accurate, in *People v Sarver* (1954) 205 Misc 523, 129 NYS2d 9, the court pointing out that the radar speedmeter was no different from any other scientific device, and that admissibility of tests made by it depended entirely upon its accuracy and reliability. Where there was detailed expert testimony regarding the construction and operation of a radar device, and the expert also testified that the operator of the equipment could tell when it was out of calibration and could quite easily determine when it was not working properly, the court in *People ex rel. Laibowitz v Katz* (1954) 205 Misc 522, 129 NYS2d 8, sustained a conviction based upon radar evidence, saying that the equipment was a scientifically reliable device which, if properly operated and functioning, fell in the category of recognized instruments used to determine the speed of moving vehicles. And in the absence of expert testimony explaining the construction, nature, and function of a radar speedmeter as a reliable instrument for the measurement of the speed of motor vehicles, speeding convictions based on radar evidence were reversed in *People v Offermann* (1953) 204 Misc 769, 125 NYS2d 17

*People v Torpey* (1953) 204 Misc 1023, 128 NYS2d 864; *People v Beck* (1954) 205 Misc 757, 130 NYS2d 354; and *People v Jamison* (1957) 8 Misc 2d 408, 165 NYS2d 906.

n42 For cases involving statutes allowing the admission of radar evidence, but expressly, or by possible implication, recognizing the necessity of expert evidence in the absence of such a statute, see § 4, *infra*.

n43 Prior to the enactment of the Pennsylvania statute permitting the use of radar by the Pennsylvania state police to measure the speed of motor vehicles, radar evidence of speed was held highly competent and admissible in *Demarest License* (1955) 5 Pa D & C2d 197, after the prosecution had introduced expert

testimony explaining in some detail the principles underlying the radar equipment used in this case, had presented evidence that the machine had been twice tested for accuracy during the day in question, and had shown that the radar equipment was operated by members of the Pennsylvania state police who had been specially trained in setting up and operating such equipment.

n44 The court in *Royals v Commonwealth* (1957) 198 Va 876, 96 SE2d 812, adhered to the decision in *Dooley v Commonwealth* (1956) 198 Va 32, 92 SE2d 348, app dismd 354 US 915, 1 L Ed 1432, 77 S Ct 1377, supra, and without discussion, reaffirmed the constitutionality of the statute authorizing the use of radar to measure the speed of motor vehicles.

n45 *People v Sarver* (1954) 205 Misc 523, 129 NYS2d 9.

n46 See detailed discussion in § 2[b], supra.

n47 The lack of any agreement among the courts of various jurisdictions as to a general guideline regarding the proper time for conducting accuracy tests is illustrated by the following cases. For example, in *State v Carta* (1963) 2 Conn Cir 68, 194 A2d 544, certif den (Conn) 197 A2d 932, the court said that in a prosecution for violation of speed regulations the speed recorded on a radar unit might be admissible in evidence, provided, inter alia, the accuracy of the radar unit at the time in question was established by tests made within a reasonable time before and after the speed was recorded. And in submitting to the jury issues related to the accuracy of a radar device and its ability to measure the speed of the defendant motorist's vehicle under all the circumstances of the present case, the court in *State v Moffitt* (1953) 48 Del 210, 100 A2d 778, instructed them that before they could return a verdict of guilty based solely upon the radar evidence, they must be satisfied beyond a reasonable doubt, inter alia, that the radar device had been properly tested for accuracy within a reasonable time from the date of its use in clocking the defendant's speed. In affirming a speeding conviction based upon radar evidence, the court in *People v Stankovich* (1970) 119 Ill App 2d 187, 255 NE2d 461, placed some emphasis upon the fact that the accuracy of the radar speedometer in question had been tested twice on the day of the defendant motorist's arrest, once about 3 hours prior to his arrest and again just shortly before the motorist's car entered the radar device's zone of influence. And in *Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421, the accuracy of a radar speedometer was held established by a test conducted a few hours before it was used to clock the defendant motorist's speed. The court in *State v Graham* (1959, Mo App) 322 SW2d 188, stated that for radar evidence to be admissible in a prosecution for violation of speed regulations, it must be shown that the device was carefully tested and found to be accurate at or near the time of its use in traffic regulation.

n48 It should be noted that in those jurisdictions which require proof of the radar's accuracy as a prerequisite to admissibility of radar evidence, proof of the accuracy of the testing apparatus has by necessary implication become a prerequisite to admissibility of radar evidence. On the other hand, in jurisdictions where the accuracy of the radar unit is treated as a matter affecting only the weight of radar evidence, proof of the accuracy of the testing apparatus is critical in determining whether the radar evidence alone will support a speeding conviction. For example, in New York it was held in *People v Dusing* (1959) 5 NY2d 126, 181 NYS2d 493, 155 NE2d 393, that failure to prove the accuracy of a speedometer used to test radar equipment would not render evidence of the radar reading inadmissible in a prosecution for speeding, although it might affect the weight to be given to the radar evidence.

n49 It was pointed out in *Sweeny v Commonwealth* (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817, supra § 6[b], that, following the decision in the Biesser Case (Va) supra, the Vehicle Code was amended to obviate the necessity of having two troopers testify in every contested speeding case which involved the use of radar. It was the intention of the legislature, the court said, to provide, in cases where any question should arise as to the calibration or accuracy of any radio microwave or any other electrical device, that such accuracy could be shown by a certificate of the officers who conducted the test of the device, and who had knowledge of its accuracy.

n50 As sustaining a hearsay objection to the testimony of two officers as to comparative radar and speedometer readings where each individually observed one reading only, see *People v Offermann* (1953) 204 Misc 769, 125 NYS2d 179. However, this difficulty may be easily avoided. See discussion in § 2[b], supra.

n51

#### SUPREME COURT

*United States v Dreos* (1957, DC Md) 156 F Supp 200

#### CONNECTICUT

*State v Tomanelli* (1966) 153 Conn 365, 216 A2d 625

*State v Naumec* (1966) 3 Conn Cir 575, 222 A2d 239

*State v Gilmore* (1967) 5 Conn Cir 65, 241 A2d 545

*State v Greenman* (1969) 6 Conn Cir 160, 268 A2d 808

#### DELAWARE

*State v Moffitt* (1953) 48 Del 210, 100 A2d 778

#### ILLINOIS

*People v Stankovich* (1970) 119 Ill App 2d 187, 255 NE2d 461

#### KENTUCKY

*Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421

#### MISSOURI

*State v Graham* (1959, Mo App) 322 SW2d 188

*Kansas City v Hill* (1969, Mo App) 442 SW2d 89

#### TENNESSEE

*Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351 (by implication).

n52 Statutory provisions pertaining specifically to the accuracy of radar equipment are discussed in § 6, supra; the general effect of statutes permitting the use of radar, upon issues relating to the overall reliability of radar to measure speed, is dealt with in § 4, supra.

n53 Note that the "speed watch" devices referred to in § 17, infra, the "Foto-Patrol" instrument discussed in

§ 18, *infra*, and the "VASCAR" gadget dealt with in § 19, *infra*, would apparently be considered speed traps under the statutes discussed in this section, since they depend upon the time taken by a car to traverse a measured section of the highway.

n54 In *Murray Motor Vehicle Operator License Case (1964) 203 Pa Super 418, 202 A2d 118*, the court, without discussion, and basing its decision upon the reasons set forth in *Commonwealth v Fornwalt (1964) 203 Pa Super 411, 202 A2d 115*, *supra*, held that speeding convictions based upon radar evidence had been erroneously reversed on the grounds that the radar warning signs in the area of the arrest did not meet the requirements of the Vehicle Code.

n55 It was noted by way of dictum, in *Commonwealth v Weaver (1963) 30 Pa D & C2d 631, 11 Chester Co 150*, that a certificate under the hand and seal of the secretary of revenue, in which he issued formal approval of certain types of radar speedmeters, was admissible, under the "official statements" exception to the hearsay rule, to prove that the radar device used in this case was of a type approved by the secretary, as required by statute. With regard to the fact that the certificate was dated 6 months prior to the date of the defendant's arrest, the court said that there was certainly no justification for requiring repeated approvals of radar apparatus for each and every speeding violation detected by the device, and added that an approval of a radar instrument, once issued, presumably would continue until revoked. A memorandum from the secretary of revenue to the commissioner of the Pennsylvania state police notifying him that the secretary issued approval "of Model S2 electronic speed meter and Model S5 electromatic speed meter manufactured by the Automatic Signal Device, Eastern Industries, Inc., as approved equipment for use by Pennsylvania State Police," was held in *Commonwealth v McConnell (1965) 35 Pa D & C2d 541*, to be admissible under the "official statements" exception to the hearsay rule as proof that the radar speedmeter used in this case to measure a motorist's speed was "of a type approved by the secretary" in accordance with the statute permitting the use of radar to enforce speed regulations.

n56 See also *State v Lenzen (1962) 24 Conn Supp 208, 189 A2d 405*, where the court rejected a motorist's contention that the best evidence rule required, as evidence of tests conducted upon the accuracy of a radar speedmeter, the introduction of the radar graph's recording of the results of tuning-fork and test-car tests. The court pointed out that the best evidence rule comprehended a situation where the evidence offered was clearly substitutionary in its nature, although directed to the same issue as the original evidence which was withheld, and that the rule would not prohibit a witness from testifying to what he observed on a visual mechanical indicating device, even though the indication was mechanically reduced to writing on a graph at the same time.

n57 The motorist's contention that his conviction of speeding on the basis of the reading of this electric timer had violated his constitutional rights by depriving him of his right to confront and cross-examine the witnesses against him was answered in the earlier decision, *Webster Groves v Quick (1959, Mo) 319 SW2d 543*, where the court held that the purported constitutional issues were without substance and only colorable, since the constitutional provisions in question applied to crimes against the state, and did not apply to proceedings by municipalities for violations of municipal police regulations, which were not considered to be prosecutions for crime in a constitutional sense.

JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

JURISDICTIONAL TABLE OF STATUTES AND CASES

SUPREME COURT

*United States v Dreos (1957, DC Md) 156 F Supp 200*

UNITED STATES CODE

*Federal Rules of Evidence, Rule 803*

#### ARKANSAS

*Everight v Little Rock (1959) 230 Ark 695, 326 SW2d 796*

#### CALIFORNIA

*People v Flaxman (1977) 74 Cal App 3d Supp 16, 141 Cal Rptr 799*

*People v MacLaird (1968) 264 Cal App 2d 972, 71 Cal Rptr 191*

#### COLORADO

*People v Walker (1980, Colo) 610 P2d 496*

#### CONNECTICUT

*State v Carta (1963) 2 Conn Cir 68, 194 A2d 544, certif den (Conn) 197 A2d 932*

*State v Gilmore (1967) 5 Conn Cir 65, 241 A2d 545*

*State v Greenman (1969) 6 Conn Cir 160, 268 A2d 808*

*State v Greenman (1969) 6 Conn Cir 160, 268 A2d 808 (recognizing rule)*

*State v Lenzen (1962) 24 Conn Supp 208, 189 A2d 405 (apparently recognizing rule)*

*State v Lenzen (1962) 24 Conn Supp 208, 189 A2d 405 (by implication)*

*State v McCoy (1966) 4 Conn Cir 109, 226 A2d 116*

*State v Naumec (1966) 3 Conn Cir 575, 222 A2d 239*

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#### DELAWARE

*State v Harper (1978, Del) 382 A2d 263*

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#### GEORGIA

*O.C.G.A. § 40-14-17*

*O.C.G.A. § 40-6-181*

#### ILLINOIS

*People v Abdallah (1967) 82 Ill App 2d 312, 226 NE2d 408*

*People v Barbic (1969) 105 Ill App 2d 360, 244 NE2d 626 (dictum)*

*People v Beil (1979) 76 Ill App 3d 924, 32 Ill Dec 290, 395 NE2d 400*

*People v Cash (1968) 103 Ill App 2d 20, 242 NE 2d 765 (apparently recognizing rule)*

*People v Stankovich (1970) 119 Ill App 2d 187, 255 NE2d 461*

*Schaumburg v Pedersen (1978) 60 Ill App 3d 630, 18 Ill Dec 99, 377 NE2d 252 (citing annotation)*

#### KANSAS

*State v Primm (1980) 4 Kan App 2d 314, 606 P2d 112 (citing annotation)*

## KENTUCKY

*Honeycutt v Commonwealth* (1966, Ky) 408 SW2d 421

## MASSACHUSETTS

*Commonwealth v Whynaught* (1979) 377 Mass 14, 384 NE2d 1212

## MINNESOTA

*State v Gerdes* (1971) 291 Minn 353, 191 NW2d 428

*State v Pulos* (1987, Minn App) 406 NW2d 75

## MISSOURI

*Ballwin v Collins* (Mo App) 534 SW2d 280

*Kansas City v Hill* (1969, Mo App) 442 SW2d 89

*St. Louis v Boecker* (1963, Mo App) 370 SW2d 731

*St. Louis v Boecker* (1963, Mo App) 370 SW2d 731 (recognizing rule)

*State v Calvert* (1984, Mo) 682 SW2d 474, (citing annotation)

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## NEBRASKA

*Dietze v State* (1956) 162 Neb 80, 75 NW2d 95 (by implication)

*Peterson v State* (1957) 163 Neb 669, 80 NW 2d 688

*State v Green* (1984) 217 Neb 70, 348 NW2d 429

## NEW JERSEY

*State Musgrave* (1979) 171 NJ Super 477, 410 A2d 64

*State v Cardone*, 146 NJ Super 23, 368 A2d 952

*State v Dantonio* (1955) 18 NJ 570, 115 A2d 35, 49 ALR2d 460

*State v Overton*, 135 NJ Super 443, 343 A2d 516

*State v Readding* (1978) 160 NJ Super 238, 389 A2d 512 (citing annotation)

## NEW YORK

For New York cases, see § 5[b], *infra*

For earlier New York cases requiring expert testimony, see *infra*

*People ex rel. Igoe v Nasella* (1956) 3 Misc 2d 418, 155 NYS2d 463 (dictum)

*People v Dusing* (1959) 5 NY2d 126, 181 NYS2d 493, 155 NE2d 393

*People v Johnson* (1960) 23 Misc 2d 11, 196 NYS2d 227 (apparently recognizing rule)

*People v Magri* (1958) 3 NY2d 562, 170 NYS2d 335, 147 NE2d 728

*People v Sachs* (1955) 1 Misc 2d 148, 147 NYS2d 801 (dictum)

*People v Wylie* (1958) 13 Misc 2d 310, 179 NYS 2d 901

## OHIO

*East Cleveland v Ferrell* (1958) 168 Ohio St 298, 7 Ohio Ops 2d 6, 154 NE2d 630

## OKLAHOMA

*Jackson v Oklahoma* (1984, Okla Crim) 678 P2d 725

## TENNESSEE

*Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351 (by implication)

*Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351 (by implication).

*Hardaway v State* (1957) 202 Tenn 94, 302 SW2d 351 (dictum)

## TEXAS

*Wilson v State* (1959, Tex Crim) 328 SW2d 311 (apparently recognizing rule)

## VERMONT

*State v Doria* (1977, Vt) 376 A2d 751 (citing annotation)

## WASHINGTON

*Seattle v Peterson* (1985) 39 Wash App 524, 693 P2d 757 (citing annotation)

## WISCONSIN

*Re Bardwell* (1978) 83 Wis 2d 891, 266 NW2d 618 (citing annotation)

## INDEX OF TERMS (Go to beginning)

Accuracy of apparatus used in testing radar § 7[d]

Accuracy of nonradar type of speed detecting device §§ 17- 19

Accuracy of particular radar device --

-certificate of accuracy of radar speedmeter, infra

-necessity of proving accuracy § 5

-sufficiency of evidence of § 8

-test of particular radar set for accuracy, infra

"Accurate," definition of statutory term § 6[a]

Admissibility of evidence --

-device other than radar speedmeter, evidence obtained by use of §§ 17- 19

-radar speedmeter, evidence obtained by use of §§ 3- 16

Admissibility or merely sufficiency of radar evidence, failure to prove accuracy of particular radar set as affecting § 5

Approved type, effect of statutory requirement that radar set be of § 12

Basic prerequisites to conviction based upon radar speed readings § 2[a]

Best evidence objection § 14

Burden of showing accuracy of radar device §§ 2[b], 8[b]

Certificate of accuracy of radar speedmeter --

-admissibility of § 6[b]

- particular facts stated in § 6
- sufficiency of certificate § 6[b]
- Changed speed zone, operation of radar speed detector in proximity to sign indicating § 11[b]
- Comment § 2
- Corroborative opinion testimony as to speed by police officer observing defendant's vehicle §§ 5[b], 8
- Difference between alleged speed and legal limit as factor § 16
- Due process clause, validity of statute authorizing use of radar in speed regulation enforcement under § 4
- Electric timer § 17
- Experience in operation of radar speedometer as factor § 9
- Expertise required of radar set operator § 9
- Expert testimony --
- concerning accuracy of nonradar speed timing device § 17[a]
- concerning accuracy of particular radar speedometer § 8[a]
- explaining nature, function and scientific principles of radar speedometer §§ 2[a], 3, 4
- refusal to allow motorist to contest basic reliability of radar device by introduction of § 4
- reliability and scientific basis of VASCAR device § 19
- reliability of photographic speed measuring device § 18
- "Foto-Patrol" speed measuring device § 18
- General reliability of radar speedometer to measure speed of motor vehicles as subject of judicial notice §§ 3, 4
- Governor allegedly limiting speed, vehicle equipped with § 8[a]
- Hearsay objections §§ 8[b], 17[a] evidence as to state approval of type of radar apparatus used, § 12
- Highway right-of-way, timing speed on highway with radar device located outside of § 14
- Identification of speeding vehicle, sufficiency of evidence as to § 15
- Illumination or reflectorization of radar warning signs, statutory requirement of § 11[c]
- Internal or integral method of testing accuracy of radar device §§ 2[b], 7[b], 8[a]
- Introduction §§ 1, 2
- Judicial notice --
- accuracy of particular radar device used § 5[a]
- existence of signs warning motorist of radar speed checks § 11[a]
- scientific basis, functioning, and general reliability, of radar speed measuring device §§ 3, 4
- Location of radar device --
- different when measuring defendant's speed than when tested for accuracy § 7[c]
- outside highway right of way § 14
- proximity to posted speed limit sign § 11[b]
- Location of radar warning signs § 11[b]
- Measured distance between actuating devices on highway, speed detector automatically timing passage through § 17
- Mechanically recorded graph of speed registered by radar device, introduction in evidence as not essential under particular statute § 14
- Mistake as to vehicle actuating radar speed reading, sufficiency of evidence concerning § 15
- Number and location of radar warning signs § 11[b]
- "Officers," construction of term in statute concerning use of radar in speed regulation enforcement § 13
- Photographic devices, evidence obtained by use of § 18
- "Photo-Speed-Recorder," evidence obtained by use of § 18
- Police officer's violation of statute by using unmarked vehicle in operating radar § 14
- Posted speed limit sign, construction of statute prohibiting operation of electronic speed-detecting device within 500 feet beyond § 11[b]
- Posting of highway with radar warning signs, necessity and sufficiency of § 11
- Practice pointers § 2[b]
- Prather speed device § 17
- Preliminary matters § 1

Proper operation of radar set, necessity of proving § 9  
 Qualifications of operator of nonradar speed measuring device §§ 17[b], 19  
 Qualifications of radar set operator, proof concerning § 9  
 Quarter-mile timing distance, applicability to radar timing of statute requiring § 14  
 "Radar Enforced," sufficiency of warning sign stating only § 11[c]  
 Radar speedmeter, evidence obtained by use of §§ 3- 15  
 Recording device in defendant's vehicle, variation between radar speed reading and speed registered by § 8[a]  
 Reflectorized or illuminated warning signs of radar or other devices for determining speed, statutory requirement of § 11[c]  
 Related matters § 1[b]  
 Reliability of radar generally §§ 3, 4  
 Reliability of speed measuring devices other than radar, necessity and sufficiency of proof of §§ 17- 19  
 Scientific and technical aspects of radar speed-detecting devices § 2[b]  
 Scope of annotation § 1[a]  
 Signs warning of use of radar, statutory requirements concerning --  
 -existence of signs, necessity of proving § 11[a]  
 -illumination of signs § 11[c]  
 -permanence of signs § 11[b]  
 -placement of signs § 11[b]  
 -proximity of radar § 11[b]  
 -wording of signs § 11[c]  
 Single officer in police vehicle, statute as authorizing operation and reading of radar speed detection device by § 13  
 Slightly excessive speed recorded, admissibility and sufficiency of radar evidence in situation involving § 16  
 Spacing of permanent radar warning signs along highway § 11[b]  
 Speed measuring devices other than radar, evidence obtained by use of §§ 17- 19  
 Speedometer of other vehicle used in testing radar speedmeter, necessity of showing accuracy of §§ 6[b], 7[d], 8[a]  
 Speed registered by radar as provable by testimony of police officer although mechanically recorded graph of speed registered not procured and introduced § 14  
 "Speed traps," effect of statutory prohibition of § 10  
 "Speed watch," evidence obtained by use of § 17  
 State-approved type of radar apparatus, necessity of proof that radar used was § 12  
 Statutory factors --  
 -provisions expressly concerning radar devices or their use, generally §§ 4, 6, 12, 13, 14  
 -signs warning of radar use, provisions requiring § 11  
 -"speed traps," prohibition of § 10  
 -timing speed for a quarter-mile, applicability of statutory requirement § 14  
 -unmarked vehicle, prohibiting use of, in traffic law enforcement § 14  
 Sufficiency of evidence --  
 -accuracy of radar set § 8  
 -device other than radar speedmeter, evidence obtained by use of §§ 17- 19  
 -radar speedmeter, evidence obtained by use of §§ 3- 16  
 Sufficiency rather than admissibility of radar evidence, failure to prove accuracy of radar device as affecting § 5  
 Summary § 2  
 Tachograph speed recording device in vehicle, discrepancy between radar speed clocking and record of § 8[a]  
 Testing nonradar timing device for accuracy, necessity and sufficiency of §§ 17- 19  
 Test of particular radar set for accuracy --  
 -certificate of accuracy § 6  
 -correspondence of results obtained from different types of tests, significance of § 7[d]  
 -factors affecting sufficiency of test §§ 6, 7  
 -methods of testing or checking accuracy §§ 2[b], 6[b], 7, 8

-sufficiency of evidence of accuracy § 8  
 -test runs through radar zone §§ 2[b], 6[b], 7[b, d], 8, 16  
 -time and place of conducting test § 7[c]  
 Tolerances in testing accuracy of radar device § 6[a]  
 Training and qualifications of police officer operating radar device, sufficiency of § 9  
 Training and testing of operators of VASCAR speed measuring device, proof concerning § 19  
 Tuning fork method of testing accuracy of radar device §§ 2[b], 7[b, d], 8, 16  
 Two or more officers in police vehicle with radar equipment, statute as not requiring presence of § 13  
 Unmarked vehicle, police officer's violation of statute by operating radar in § 14  
 Validity of statute permitting use of radar in speed regulation § 4  
 "VASCAR," evidence obtained by use of § 19  
 "Visual average speed computer recorder," evidence obtained by use of § 19  
 Warning signs. Signs warning of use of radar, statutory requirements concerning, *supra*  
 Wheels of vehicle traveling measured distance, stop watch timing device activated by § 17  
 Wording of radar warning signs, sufficiency under statutory requirements § 11[c]

#### TABLE OF REFERENCES(Go to beginning)

##### Annotations

See the related annotations listed in § 1[b]

##### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

A.L.R. Quick Index, Automobiles and Highway Traffic

A.L.R. Quick Index, Evidence

A.L.R. Quick Index, Speed

*Am. Jur. 2d, Automobiles and Highway Traffic §§ 315, 326-328*

*Am. Jur. 2d, Evidence §§ 103, 104, 110*

*Am. Jur. 2d, Expert and Opinion Evidence § 157*

Speed, 11 *Am. Jur. Proof of Facts* 1

#### ARTICLE OUTLINE (Go to beginning)

##### I. Introduction

§ 1 Preliminary matters

§ 1[a] Scope

§ 1[b] Related matters

§ 2 Summary and comment

- § 2[a] Generally
- § 2[b] Practice pointers

## II. Admissibility and sufficiency of evidence obtained by use of radar speedmeter

### A. Reliability of radar generally

§ 3 General rule in absence of statute that judicial notice may be taken of radar's ability to measure speed

§ 4 Effect of statutory provisions permitting use of radar in speed regulation enforcement

### B. Accuracy of particular radar set

§ 5 Necessity of proving accuracy

§ 5[a] View that evidence of accuracy is a prerequisite to admissibility of radar evidence

§ 5[b] View that evidence of accuracy is not a prerequisite to admissibility but affects only sufficiency of radar evidence

§ 6 Statutory provisions affecting sufficiency of test for accuracy

§ 6[a] Definition of term "accurate"

§ 6[b] Sufficiency of test certificate

§ 7 Factors affecting sufficiency of test for accuracy

§ 7[a] Generally

§ 7[b] Type of test conducted

§ 7[c] Time and place of conducting test

§ 7[d] Accuracy of testing apparatus

§ 8 Evidence of accuracy in particular cases

§ 8[a] Accuracy held sufficiently demonstrated

§ 8[b] Accuracy held not sufficiently demonstrated

### C. Proper operation of radar set

§ 9 Generally; expertise required of operator

### D. Effect of other statutory provisions

§ 10 Prohibition against "speed traps"

§ 11 Requirements as to radar-warning signs

§ 11[a] Necessity of proving existence of signs

§ 11[b] Permanence and placement of signs; proximity of radar

§ 11[c] Illumination and wording of signs

§ 12 Requirement that radar set be of approved type

§ 13 Construction of term "officers"

§ 14 Miscellaneous provisions or construction problems

E. Other considerations

§ 15 Sufficiency of evidence as to identification of speeding vehicle

§ 16 Difference between alleged speed of accused and legal limit

III. Admissibility and sufficiency of evidence obtained by use of other devices

§ 17 "Speed watch"

§ 17[a] Conviction sustained or affirmed

§ 17[b] Conviction not sustained or affirmed

§ 18 Photographic devices

§ 19 "VASCAR"

§ 20 Miscellaneous devices

191 of 195 DOCUMENTS

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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts

Jerre E. Box

*29 A.L.R.3d 248*

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] Preliminary Matters

[\*1] Introduction

[\*1a] Scope

This annotation<sup>1</sup> consists of a collection of cases that discuss whether a witness, expert or nonexpert, may give opinion testimony as to the speed of a motor vehicle, based on skid marks<sup>2</sup> and other physical facts at the scene of the accident.<sup>3</sup> Excluded are cases that involve the issue whether an eye witness is competent to testify as to speed of a motor vehicle,<sup>4</sup> and cases that involve the admissibility of expert opinion testimony as to speed based on the appearance or condition of the motor vehicle after an accident, where there were no skid marks.<sup>5</sup>

[\*1b] Related matters

Admissibility of expert testimony regarding questions of domestic law, *66 A.L.R.5th 135*

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, *64 A.L.R.4th 125*

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, *47 A.L.R.3d 822*

Automobiles: Liability of motorist for collision as affected by attempts to avoid dog or other small animal in road, *41 A.L.R.3d 1124*

Admissibility in evidence, in automobile negligence action, of charts showing braking distance, reaction times, etc, *9 A.L.R.3d 976*

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, *93 A.L.R.2d 287*

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like, *92 A.L.R.2d 1391*

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds, *84 A.L.R.2d 979*

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, *78 A.L.R.2d 218*

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, *66 A.L.R.2d 1048*

Admissibility of opinion evidence as to the cause of an accident or occurrence, *38 A.L.R.2d 13*

Admissibility of opinion evidence as to whether vehicle involved in collision was standing still or moving, *33 A.L.R.2d 1250*

Admissibility of evidence as to tire tracks on or near highway, *23 A.L.R.2d 112*

Expert or opinion testimony as to speed of vehicle by one who had no view, or only momentary view, of vehicle at time of accident, *156 A.L.R. 382*

Opinion as to distance within which automobile can be stopped, *135 A.L.R. 1404*

Opinion evidence as to speed of automobile or motorcycle, *94 A.L.R. 1190*

Opinion evidence as to speed of automobile or motorcycle, *70 A.L.R. 540*

[\*2] Background, summary, and comment

[\*2a] In general

The speed at which a motor vehicle was traveling immediately before, or at the time of, an accident, is often an important factor on the issue of the defendant's negligence,<sup>n6</sup> or the plaintiff's contributory negligence,<sup>n7</sup> in personal injury and wrongful death actions. Speed may also be an important factor in proving recklessness, wantonness, wilful misconduct, or gross negligence, in an action under a guest statute.<sup>n8</sup> And it may be an important factor in criminal prosecutions arising out of the operation of a motor vehicle.<sup>n9</sup>

Where a person of ordinary experience, intelligence, and ability was in a position to observe the movement of the motor vehicle at the time in question, he is generally held competent to give opinion testimony as to the speed of the vehicle, based on his observations and experience.<sup>n10</sup> On the other hand, where there is no eyewitness or friendly witness available to testify as to speed of a motor vehicle, its speed must be inferred from the physical facts, including skid marks, and the circumstances of the accident.<sup>n11</sup> Although there is authority to the contrary,<sup>n12</sup> a substantial number of courts have held that the speed of a motor vehicle, as based on skid marks and other physical facts, is a subject for expert opinion testimony.<sup>n13</sup> Thus, qualified expert witnesses, such as law enforcement officers,<sup>n14</sup> various engineers,<sup>n15</sup> and certain other witnesses,<sup>n16</sup> have been allowed to give opinion testimony as to the speed of a motor vehicle based on physical facts in addition to skid marks, such as the point of impact, the position of vehicles after the collision, damage to the vehicles, and the like. On the other hand, a lay or nonexpert witness who has not observed the

movement of the vehicle or vehicles at the time in question is not competent to give opinion testimony as to speed based on skid marks plus other physical facts.<sup>n17</sup> The rationale is that such opinion testimony would invade the province of the jury, which is as qualified to estimate the speed of a motor vehicle from the physical facts as is the lay or nonexpert witness.<sup>n18</sup>

Although most courts have permitted a qualified expert witness to estimate the speed of a motor vehicle on the basis of skid marks made *before and after* impact,<sup>n19</sup> the Alabama court limits opinion testimony as to speed to that based on skid marks *before* impact.<sup>n20</sup> And in Nebraska, modern cases indicate that the expert witness is limited to opinion testimony as to the *minimum* speed of the vehicle, based on skid marks.<sup>n21</sup>

As to cases tried in federal courts, the subject matter of this annotation may be affected by the Federal Rules of Evidence which became effective July 1, 1975.

[\*2b] Practice pointers

Before opinion testimony as to the speed of a motor vehicle, based on skid marks and other physical facts, may be admitted in evidence, counsel must show that the witness is qualified as an expert on the subject of determining speed, and he must lay a proper foundation by proving the evidentiary facts on which the expert's opinion is to be based.<sup>n22</sup>

Since the law gives the trial court considerable discretion in determining whether a witness qualifies as an expert,<sup>n23</sup> it is difficult to state precisely when a witness such as a police officer, highway patrolman, or other law enforcement officer will be considered qualified to give expert opinion testimony based on skid marks and other physical facts, on the question of the speed of a motor vehicle. Although there are a few decisions to the contrary,<sup>n24</sup> most appellate courts have held that the trial court does not abuse its discretion in permitting a law enforcement officer to give such opinion testimony where the witness testifies that he has had special training and substantial experience in the investigation of motor vehicle accidents, including their causes and the determination of speed based on physical evidence.<sup>n25</sup>

A proper foundation for a law enforcement officer's opinion as to speed may be laid by showing, for example, that he went to the scene of the accident; that he observed the size, weight, and type of vehicles involved in the accident; that he observed the type of highway surface, its condition, and the level or grade of the highway at the point of impact; that he observed the skid marks that appeared to have been made by the vehicle in question; that he measured the length of the skid marks and studied their depth and intensity; that he was able to determine the point of impact; that he observed the position of the vehicle or vehicles after the collision; that he observed the extent of the damage to each vehicle; and that he observed other debris scattered at the scene of the accident.<sup>n26</sup> If the witness does not have personal knowledge of these factors, it is necessary to prove the relevant facts by testimony of other competent witnesses,<sup>n27</sup> lay or expert, and then elicit the expert's opinion by incorporating the necessary facts into a hypothetical question addressed to the expert witness.<sup>n28</sup>

Engineers of various kinds -- such as mechanical engineers and safety engineers -- have been held qualified to testify as to the speed of a motor vehicle, on the basis of skid marks and other physical facts, where their testimony first established that they knew how to determine the speed of certain objects on the basis of certain physical laws or formulas, such as the coefficient of friction.<sup>n29</sup> On the other hand, their testimony has sometimes been excluded on the ground that no proper foundation had been laid in that the necessary facts were not properly incorporated into a hypothetical question addressed to the expert witness.<sup>n30</sup>

Although charts showing statistical data on the length of skid marks made by various vehicles traveling at various rates of speed are hearsay where they have been prepared by persons other than the witness,<sup>n31</sup> an expert witness may consider certain standard or recognized skid charts in forming his opinion as to the speed of a motor vehicle based on stopping distances. In fact, at least one court has said that it would take judicial notice of certain skid charts used by the

state highway patrol.n32 But a police officer's opinion testimony as to speed based solely on these charts has been held inadmissible on the ground that the charts are hearsay.n33

A party is more likely to be successful in having opinion testimony as to speed admitted in evidence if he offers to show the speed of the vehicle at the moment it started to skid, as distinguished from speed at the moment of impact with another vehicle or object. This can be shown by testimony as to how fast a vehicle would have to be traveling to make skid marks of a given length up to the point of impact, as distinguished from skid marks made after impact.n34

As a word of caution, questions that ask the expert to give an opinion whether a party's vehicle was traveling at an "excessive rate of speed" are clearly objectionable on the ground that they call for a conclusion of law, at least where the ultimate issue in the case is whether the party was driving his vehicle at an excessive rate of speed.n35 Counsel should, therefore, merely try to prove the rate of speed and leave it to the court or jury to decide whether the rate of speed was excessive.

Although opinion testimony as to speed is usually introduced to prove that a party's vehicle was traveling at an excessive rate of speed, it may also be used effectively to show that he was operating his vehicle at a safe or reasonable speed.n36

[\*II] Opinion testimony of particular witnesses

[\*3] Law enforcement officers

[\*3a] Opinion as to speed held admissible

In the following cases various law enforcement officers, such as policemen, highway patrolmen, sheriffs, and accident investigators employed by law enforcement agencies, were held qualified as experts and allowed to give opinion testimony as to the speed of a motor vehicle, based on skid marks and other physical facts:

## SUPREME COURT

*Bonner v Polacari* (1965, CA10 Okla) 350 F2d 493

*White v Zutell* (1959, CA2d NY) 263 F2d 613

For federal cases involving state law, see state headings infra

## ALABAMA

*Jackson v Vaughn* (1920) 204 Ala 543, 86 So 469

*Stanley v Hayes* (1964) 276 Ala 532, 165 So 2d 84

*Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716 (opinion based on skid marks before impact)

## CALIFORNIA

*Hastings v Serleto* (1943) 61 Cal App 2d 672, 143 P2d 956

*Jobe v Harlod Livestock Com. Co.* (1952) 113 Cal App 2d 269, 247 P2d 951

*Hoffman v Slocum* (1963) 219 Cal App 2d 100, 32 Cal Rptr 635

*Davis v Ward* (1963) 219 Cal App 2d 144, 32 Cal Rptr 796

*Ungefug v D'Ambrosia* (1967) 250 Cal App 2d 61, 58 Cal Rptr 223

#### COLORADO

*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229

*Bridges v Lintz* (1959) 140 Colo 582, 346 P2d 571; *Starkey v Bryan* (1968) (Colo) 441 P2d 314

#### FLORIDA

*Myers v Korbly* (1958, Fla App) 103 So 2d 215

*Quinn v Millard* (1978, Fla App D3) 358 So 2d 1378

#### GEORGIA

*Etheridge v Hooper* (1961) 104 Ga App 227, 121 SE2d 323

*Central Container Corp. v Westbrook* (1962) 105 Ga App 855, 126 SE2d 264

*Rouse v Fussell* (1962) 106 Ga App 259, 126 SE2d 830

*Firestone Tire & Rubber Co. v King* (1978) 145 Ga App 840, 244 SE2d 905

#### ILLINOIS

*Fannon v Morton* (1923) 228 Ill App 415

#### KANSAS

*Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907

*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451

*Johnson v Juskey* (1960) 186 Kan 282, 350 P2d 14

#### KENTUCKY

*Moore v Wheeler* (1968, Ky) 425 SW2d 541

#### MISSOURI

*Stutte v Brodtrick* (1953, Mo) 259 SW2d 820

*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260

*Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503

*Cheek v Weiss* (1981, Mo App) 615 SW2d 453

#### MONTANA

*State v Bosch* (1952) 125 Mont 566, 242 P2d 477; *Graham v Rolandson* (1967, 150 Mont 270, 435 P 2d 263

#### NEBRASKA

*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697

*Nisi v Checker Cab Co.* (1960) 171 Neb 49, 105 NW 2d 523

#### NEW HAMPSHIRE

*Peters v McNally* (1983) 123 NH 438, 462 A2d 119

#### NEW YORK

*Saladow v Keystone Transp. Co.* (1934) 241 App Div 161, 271 NYS 293

#### OHIO

*Davis v Zucker* (1951, App) 62 Ohio L Abs 81, 106 NE2d 169

*Barge v House* (1952) 94 Ohio App 515, 52 Ohio Ops 300, 63 Ohio L Abs 555, 110 NE2d 425

#### OKLAHOMA

*Bonner v Polacari* (1965, CA10 Okla) 350 F2d 493 (recognizing Oklahoma rule)

*Andrews v Moery* (1951) 205 Okla 635, 240 P2d 447

*Ruther v Tyra* (1952) 207 Okla 112, 247 P2d 964

*Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849

*Groninger & King, Inc. v T. I. M. E. Freight, Inc.* (1963, Okla) 384 P2d 39

#### TENNESSEE

*Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130

#### TEXAS

*Stamper v Scholtz* (1930, Tex Civ App) 29 SW2d 883, error ref

*Southern Transp. Co. v Adams* (1940, Tex Civ App) 141 SW2d 739, error dismd

*Rankin v Joe D. Hughes, Inc.* (1942, Tex Civ App) 161 SW2d 883, error ref w o m

*Beynon v Cutberth* (1965, Tex Civ App) 390 SW2d 352

*Billingsley v Southern Pacific Co.* (1966, Tex Civ App) 400 SW2d 789, error ref n r e

*Rogers v Gonzales* (1983, Tex App Corpus Christi) 654 SW2d 509, writ ref n r e

#### UTAH

*Gittens v Lundberg* (1955) 3 Utah 2d 392, 284 P2d 1115  
*Taylor v Johnson* (1966) 18 Utah 2d 16, 414 P 2d 575  
*Randle v Allen* (1993, Utah) 862 P2d 1329, 223 Utah Adv Rep 6

#### VIRGINIA

*Woodson v Germas* (1958) 200 Va 205, 104 SE2d 739 (apparently recognizing competency of police officers to testify as to speed based on skid marks)

#### WASHINGTON

*Knight v Borgan* (1958) 52 Wash 2d 219, 324 P2d 797

In affirming a judgment for the plaintiff, the court in *Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716, held that it was proper to permit a highway patrolman who had investigated the accident -- a collision between defendant's car and a car driven by plaintiff's decedent -- to testify as to the speed of the defendant's automobile immediately before the wreck, as based on 45 feet of skid marks made before impact, the point of impact, and damage to the vehicles. The defendant contended that the witness was asked to express an opinion as to speed on the basis of skid marks "from the point of impact," and that under Alabama law such evidence is not admissible. The court, recognizing that opinion testimony as to speed of a vehicle, based on skid marks made after impact, is not admissible under Alabama law, pointed out that the only evidence of skid marks in this case was of skid marks made before impact.

In an action for personal injuries allegedly sustained as the result of the deceased driver's wilful misconduct in the operation of his automobile, in which plaintiff was riding as a guest, the court in *Hoffman v Slocum* (1963) 219 Cal App 2d 100, 32 Cal Rptr 635, held that the trial court, in a nonjury trial, had not erred in permitting an officer of the Los Angeles police department to testify that in his opinion the decedent's car was traveling at least 80 miles per hour immediately before the accident, such testimony being based on skid marks and other physical evidence. In rejecting the defendant's contention that the witness was not properly qualified to make a determination of speed based on the physical conditions observed after the vehicle came to rest, and that the subject of speed was not one for expert testimony, the court pointed out that the witness had been in the accident investigating unit of the police department for 12 years, and during that time he had investigated 5,000 accidents; that as part of his training he had attended two courses in accident investigation, and these courses included instructions in the use of skid marks to determine speed; that this officer had arrived at the scene of the accident little more than an hour after its occurrence; that he had personally observed the condition of the road, the damage to a power pole and fence, and the position of the decedent's vehicle, as well as the damage it sustained; and that he had measured the skid marks and had taken photographs which were introduced into evidence. The court, noting that the officer did not purport to state the speed of the vehicle upon the basis of any scientific application of the principles of physics, said that he was simply a man who had seen more wreckage than most, and that for 12 years it had been his business to observe the consequences of highway accidents and study their causes. Judgment was affirmed for plaintiff.

In an action arising out of an intersection collision between the plaintiff's and defendant's automobiles, the court in *Davis v Ward* (1963) 219 Cal App 2d 144, 32 Cal Rptr 796, in affirming a judgment for the defendant, held that the trial court had not abused its discretion in permitting a traffic officer who had investigated the accident to state his opinion as to the speed of the plaintiff's automobile where his opinion was based on physical facts found at the scene of the accident, including skid marks, damage to the vehicles, and other pertinent details. In rejecting the plaintiff's contention that the officer was not qualified to testify as to the speed, the court said that a traffic officer whose duties include the investigation of automobile accidents may qualify as an expert entitled to give an opinion respecting the speed of

automobiles involved in an accident, based on his observations obtained in the course of his investigation thereof. The witness testified that in his opinion the plaintiff driver was traveling between 45 and 50 miles per hour at the time of the collision.

In affirming judgments for the plaintiffs in actions under the Colorado guest statute, the court in *Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229, held that the trial court had properly permitted a state highway patrolman to give opinion testimony as to the speed of the defendant's automobile, which went out of control as it rounded a curve on a mountain road. The witness testified that he had been a highway patrolman seven and a half years, that he had investigated about 120 accidents each year, two-thirds of which were accidents on mountain highways, that 95 percent of one-car accidents involved excessive speed, that he was familiar with the highway in question and had investigated the accident in this case, that by personal experiment he knew that 55 miles an hour was the maximum speed at which a car could be driven around the curve in question, that at that speed the marks of both right and left wheels were plainly discernible, and that a safe speed was 50 miles per hour. In addition, he testified that he observed the tire marks made by the automobile in question, that for 240 feet on the "black topped" road only the left wheels of the automobile left any mark, and that when it left the highway, the car was precipitated down a 40-foot embankment faced with large boulders and thereafter traveled 90 feet before coming to rest. On the basis of these facts, the witness was permitted to testify that in his opinion the automobile was going in excess of 70 miles per hour.

In *Myers v Korbly* (1958, Fla App) 103 So 2d 215, an action for wrongful death of a 17-year-old boy who was killed when the defendant's automobile, in which he was riding as a guest, went off the road, the court, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in finding the captain of the Miami police department qualified to testify as to the "critical speed" of the defendant's automobile as it went out of control on a curve, skidded sideways for a distance of about 200 feet, and hit two palm trees before coming to a stop. The court pointed out that the witness was director of training for the city police academy; that he had attended Northwestern University Traffic Institute for traffic police administration; that the course included subjects dealing with physical laws and accident investigation to determine what happened before, during, and after an automobile collision; that necessary statistics were provided at Northwestern on the basis of tests conducted there; that the witness had conducted various experiments with various types of automobiles on various surfaces; that he had machines to test the physical ability of a driver, including distance perception and brake reaction time; that he had conducted more than 6,500 tests; and that he had experience in determining the coefficient of friction. The court also quoted from a physics book which discussed a formula used by the witness for computing the speed of two objects that collide on different surfaces. Although the court concluded that the trial court had not abused its discretion in allowing the opinion testimony as to critical speed, it said that had the police officer's testimony been the sole evidence from which the jury could have made a determination of the speed of the defendant's automobile, the judgment would be reversed.

In an action by a child who was injured when struck by the defendant's automobile, the court in *Etheridge v Hooper* (1961) 104 Ga App 227, 121 SE2d 323, held admissible a police officer's opinion testimony that the speed of the defendant's vehicle at the time of the occurrence was from 20 to 25 miles per hour. In affirming a judgment for the defendant, the court pointed out that the witness had been investigating traffic accidents in and around Atlanta for at least 6 years, that he had been on the police force 28 years, that he had investigated the accident in this case, and that he had based his opinion as to the speed of the vehicle on the physical evidence at the scene, including skid marks, the distance the vehicle traveled from the place of impact to the place where the vehicle stopped, and other circumstances.

In reversing a judgment for the plaintiff, the court in *Central Container Corp. v Westbrook* (1962) 105 Ga App 855, 126 SE2d 264, held that the trial court had not abused its discretion in admitting an investigating police officer's testimony as to the speed of the defendant's truck, based upon 254 feet of skid marks made by the truck after it collided with the plaintiff's car, the relative positions of the vehicles after the accident, and the damage to both vehicles. The court said that if by further examination of the police officer it developed that his opinion was based on inadequate knowledge, the objection to his testimony would go to the credibility of the witness rather than to the admissibility of his testimony.

In an action to recover damages for injuries sustained in a collision between the plaintiff's automobile and the defendant's cattle truck, the court in *Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907, rejected the plaintiff's contention that the trial court erred in permitting a highway patrolman to testify as to the speed of the plaintiff's automobile, as based on a photograph of the skid marks made by the plaintiff's car. The court pointed out that the witness had served as a highway patrolman for 10 years, that he had attended the Northwestern University Traffic Institute and several other courses offered by the highway patrol relating to traffic investigation and physical evidence, and that he had conducted tests as to distances an automobile, traveling at different speeds, will go after the brakes have been applied.

In a parents' action for their infant son's wrongful death arising out of a collision of two automobiles, the court in *Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451, affirming a judgment for the plaintiffs, held that a sheriff and a police officer were qualified experts, and where a proper foundation was laid, it was proper for them to give their opinion as to the speed of an automobile involved in a collision, based on the length of skid marks, location of the vehicles, damage to the vehicles, and independent tests. The sheriff testified that while he was sheriff he had investigated 1,500 to 2,000 traffic accidents, and that while a police officer with the city he had investigated 2,500 to 3,000 traffic accidents, and that he had served as a patrolman, motorcycle traffic officer, and traffic-accident investigator for the police department. The police officer testified that he had been a police officer for over 18 years and presently was a lieutenant in the traffic division of the department, that one of his principal duties was to investigate accidents and make conclusions as the result of such investigations, that he was a graduate of the Traffic Institute at Northwestern University, had attended various other traffic schools, and had taught an accredited course at Wichita University and at Kansas University on various phases of accident investigation and traffic control.

In an action for wrongful death of a person who occupied the status of a guest under the Kansas guest statute, the court in *Johnson v Huskey* (1960) 186 Kan 282, 350 P2d 14, held that a highway patrolman who had more than 16 years of service as a highway patrolman, had read and studied Northwestern University Traffic Institute literature on the determination of speed of automobiles based on skid marks and other physical evidence, and had investigated this and many other accidents, was qualified to testify as to the speed of the defendant's automobile at the time of the accident, as based on the skid marks and damage to the automobiles. The court said that after proper foundation has been laid, a witness so qualified as an expert may give his opinion as to the speed of an automobile involved in a collision, based upon the length of skid marks, damage and location of vehicles and distance traveled by them, and other circumstances existing at the scene of the accident.

In consolidated actions for personal injuries and wrongful death of occupants of an automobile that went off a road as it was passing the defendant's tractor-trailer, the court in *Moore v Wheeler* (1968, Ky) 425 SW2d 541, in affirming a judgment for the defendant, held that the testimony of a highway patrolman concerning the speed of the plaintiff's vehicle before the accident in question was properly admitted over plaintiff's objection that the witness was not qualified to testify as to speed where his testimony was based on skid marks made by the car. The court pointed out that the witness had been a member of the highway patrol for more than 6 years, had investigated more than 450 accidents, and had received special schooling on the various techniques and procedures involved in investigating traffic accidents, and that he was at the scene of the accident immediately after it happened and had personally gathered all the information upon which his opinion was based.

In an action for personal injuries sustained by a passenger in an automobile that collided with the defendant's taxicab at an intersection, the court in *Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in permitting a police officer to testify as to the speed of the defendant's taxicab, as based on skid marks, where the witness had been a police officer for 6 years, had investigated accidents for 3 1/2 years, had conducted tests by measuring the length of skid marks made by many cars at different speeds, and had figured the coefficient of friction necessary to determine speed and braking distances.

In *Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503, an action for personal injuries suffered by a 3 1/2-year-old

child, the court held that the trial court had not abused its discretion in permitting a police officer to testify as to the speed of the defendant's automobile, on the basis of the skid marks made by the vehicle before it struck the child. The court pointed out that the witness had been a police officer 8 1/2 years, that he had familiarized himself with the stopping distances of automobiles, that he knew the stopping distance for a car that was traveling 30 miles per hour, and that he had investigated the accident in this case himself. He testified that the skid marks were longer than the average length of skid marks made by a car going 30 miles an hour.

In *State v Bosch* (1952) 125 Mont 566, 242 P2d 477, two passengers in the defendant's automobile were killed when the automobile in which they were riding went off the road while the driver was attempting to avoid hitting a car without taillights in front of him and also an oncoming car. In affirming the defendant's conviction for manslaughter, the court held that no error was committed in allowing a highway patrolman to give opinion testimony as to the speed of the defendant's automobile. The court pointed out that the witness had 11 years of service as a highway patrolman, had investigated many automobile accidents, had special training in traffic problems, and had attended traffic schools where he studied the cause and effect of skid marks. He had also examined and measured the skid marks made by the defendant's automobile, and had found the longest skid mark to be 181 feet long. From tables furnished by the Northwestern Traffic Institute, and his experiences, he testified that in his opinion the defendant's automobile was traveling at the minimum speed of 72 miles an hour at the time the skid marks were made.

In *Graham v Rolandson* (1967) 150 Mont 270, 435 P2d 263, an action for the wrongful death of an 8-year-old boy who, while riding a bicycle, was struck by an automobile driven by the defendant, the court rejected the defendant's contention that the witness, a former highway patrolman, was not qualified to give opinion testimony as to the speed of the defendant's car, based on the length of skid marks. The court pointed out that the witness had over 20 years of experience in investigating automobile accidents and their causes, including the determination of speed of automobiles based on skid marks and the surrounding circumstances, and that he had been schooled in the use of graphs and charts used by the National Safety Council and the Montana Highway Patrol in determining speed from skid marks. The court said that the facts that the witness had retired from the highway patrol some 6 years before the trial, that he had first heard of the accident in question approximately 2 weeks before trial, through plaintiff's counsel, that he did not measure any drag factor or coefficient of friction on the particular road surface involved, and that as a highway patrolman he would not be permitted to testify in a case where his investigation was made a year and a half after the accident, were facts that affected the weight rather than the admissibility of his testimony.

In *Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697, an action to recover damages for personal injuries and property damage sustained in a collision between the plaintiff's automobile and the defendant's taxicab, the court, in reversing a judgment for the defendant, held that it was error to exclude the testimony of a police officer as to the speed of the defendant's taxicab, based on skid marks, stopping time, and reaction time. In rejecting the defendant's contention that a proper foundation had not been laid, the court pointed out that the witness testified that he had been a police officer engaged in traffic matters for 10 years or more; that he had had specialized training at Northwestern University in determining stopping distances of cars at various speeds; that he had made experiments testing the formula for estimating speed from skid marks; that his experiments showed the formula to be true; that the type of car makes no difference; that the weight of a car makes no difference; that the grade and condition of the pavement have to be considered; that the condition of the tires on good pavement makes no appreciable difference; and that the type of brakes makes no difference after the wheels are sliding. The police officer testified that a car "at that particular location" traveling at 35 miles per hour should slide approximately 59 feet; that at 40 miles per hour the slide should approximate 77 feet; that at 45 miles per hour the slide should be in excess of 95 feet; that at 50 miles per hour the slide should be 110 feet to 112 feet; and that at 60 miles per hour the slide should be approximately 117 feet. In the instant case, the vehicle made 61 feet of skid marks before the impact. From this evidence, and other evidence as to the positions of the vehicles after impact, and the damage to the vehicles, the court concluded that the jury could properly have inferred that defendant's speed was in excess of the 40 miles per hour she testified to when the brakes took hold and locked the wheels in skid position.

In an action for wrongful death of a pedestrian who was struck by the defendant's taxicab, the court in *Nisi v Checker Cab Co.* (1960) 171 Neb 49, 105 NW2d 523, in affirming a judgment for the plaintiff, upheld the propriety of the testimony of a captain of the Nebraska safety patrol as to the speed of the defendant's taxicab, based on skid marks and other physical facts. The court pointed out that the witness had been associated with the patrol for 22 years and was in charge of the education and training division of the patrol; that he had been awarded a fellowship by Northwestern University in the study of traffic administration, which included specialized study of the investigation of physical facts; that he had had class work and had conducted tests at various speeds with different types of automobiles to compute various speeds from various stopping distances, and had made skid mark and speed computations; and that following his work at Northwestern University he had conducted a training course for new officers in the Nebraska safety patrol and was an instructor on the subject of skid marks. The court further pointed out that the witness testified that he had made an examination of the area where the accident in this case occurred; that the surface of the street was an asphalt-type pavement with coarse sand ground into the asphalt; that in arriving at an estimate and opinion relating to the speed of the taxicab as judged from the skid marks, he would take into consideration the type of paved surface of the street, the grade, and the condition of the pavement, whether it was wet or dry; that the weight of the automobile would make slight difference with respect to figuring speed from skid marks; that the condition of the tread on the tires would not make any difference on the stopping distance; that with respect to skidding with the wheels locked, the cramping of the wheels to the right or left makes no difference in the driver's ability to stop the car; that after the brakes are locked the driver would be unable to steer the car, since the wheels would be unable to turn; and that assuming a grade of 5.4 percent on the street where the taxicab left a total of 69 feet of skid marks, he estimated the speed of the taxicab to have been 34 or 35 miles an hour, which would be a minimum speed.

In *Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256, an action for injuries sustained in a collision between the plaintiff's car and the defendant's bus, the court, in affirming a judgment for the plaintiff on condition of remittitur, held that the trial court had not abused its discretion in allowing the testimony of a former police officer who specialized in testimony as an expert on speed. The defendant argued that the witness did not know whether the defendant's bus was skidding at an angle, and, not knowing about this factor, he could not form an opinion as to its speed. In rejecting the contention, the court concluded that the defendant placed undue emphasis upon certain answers made by the witness, without considering his testimony as a whole. The court pointed out that the witness arrived at his determination of speed from the theory that the wheels of the bus were locked, and that as based upon the skid marks it was immaterial whether the bus was skidding sideways or traveling in a normal direction.

In *Saladow v Keystone Transp. Co.* (1934) 241 App Div 161, 271 NYS 293, the court reversed a judgment for the defendant on the ground that it was error to exclude the testimony of a witness who was attached to the police department as an automotive expert, concerning the speed of the defendant's motor vehicle at the time it struck the decedent pedestrian. The witness had testified that he had examined the defendant's motor vehicle and had found that it had four-wheel brakes and was in good mechanical condition. He then attempted to testify that the vehicle could not have made four skid marks about 60 feet long unless it was exceeding the maximum speed limit.

In *Ruther v Tyra* (1952) 207 Okla 112, 247 P2d 964, an action for injuries sustained in a head-on automobile collision, the court, in affirming a judgment in favor of the defendant on his cross petition, held that the trial court had not abused its discretion in permitting the defendant to cross-examine the plaintiff's witness, a trooper of the state highway patrol, as to the speed of the plaintiff's automobile, as based on skid marks and other physical facts. In rejecting the plaintiff's contention that his witness was not qualified to give such an opinion, the court pointed out that the witness testified that he had been a member of the highway patrol for 9 years, that he had arrived at the scene of the accident about 15 minutes after it occurred, that he had studied the automobiles and that the plaintiff's Studebaker's weight was considerably more than that of the defendant's Ford, that he observed tire marks on the pavement, that the Studebaker marks were 157 feet long, and that plaintiff's left front tire crossed the centerline of the highway 34 feet from the point of collision. He further testified that a study of automobiles provides a rule-of-thumb theory that an automobile traveling at a speed of 60 miles per hour will travel 90 feet in one second, or that the feet traveled per second will be one and one-half times the miles per hour at which the vehicle is traveling. He further testified for plaintiff that he was

familiar with the reaction time required of a person confronted with an emergency, to do something intended to meet the emergency, and that the average reaction time varies from one-half to three-quarters of a second for one to apply brakes when the need occurs. He further testified as to the factors of efficiency in applying brakes, such as condition of the brakes, and condition of the tires and of the road surface. The plaintiff had produced a chart showing the distance a car will travel per second at any given speed, and had the witness testify as to distances required to stop a moving car, on average pavement, while traveling at different rates of speed. Over plaintiff's objection, the highway patrolman was permitted, on cross-examination, to testify that the plaintiff's car was traveling 75 to 80 miles per hour just before the brakes were applied. In holding the testimony admissible, the court said that while a layman knows that a speeding car will produce skid marks upon a pavement when the brakes are applied, and while it is a scientific fact that the speed of a motor vehicle can be closely approximated from the skid marks and other physical facts at the scene of the collision, the method of computing such speed from the physical facts is not a matter of common knowledge, and that such computation can be made only by an expert who has given special study to the subject.

In *Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849, an action for injuries sustained in a collision between the plaintiff's car and the defendant's truck, which made a left turn in front of the plaintiff's car, the court held that the trial court had not abused its discretion in permitting a police officer to testify that the speed of plaintiff's automobile was reduced a minimum of 60 miles per hour and a maximum of 65 miles per hour, as based on 75 feet of skid marks and the damage to the vehicles. The court pointed out that the witness had been a police officer in the city of Tulsa for 26 years, had been assigned to the traffic department, had taken special training courses in traffic and safety engineering work, including a course at Northwestern University Traffic Institute, and had taught such a course at Oklahoma University and Oklahoma A. & M. The court added that the witness qualified as a traffic engineer, or highway safety engineer, and as an expert as to the speed of a motor vehicle traveling on the highway, and his answer to the question propounded was based upon skid marks made by the automobile and other physical facts that he had observed.

In *Groninger & King, Inc. v T. I. M. E. Freight, Inc.* (1963, Okla) 384 P2d 39, the court, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in permitting a highway patrolman to testify as to the speed of the defendant's truck at the time it forced the plaintiff's vehicle off the highway, where such testimony was based on skid marks made by the defendant's truck, the condition of the roadway, and the damage to the vehicles. The court pointed out that the witness had completed the required course of study to become a highway patrolman, that he had attended refresher courses on investigation of traffic accidents, and that he had 15 years of experience investigating automobile accidents for the state of Oklahoma.

In *Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130, an action for injuries sustained by a 12-year-old boy who, while riding a bicycle, was struck by a taxicab owned by the defendant, the court, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in permitting an officer to testify that he had made certain tests at the place of the collision and that in his opinion the defendant's automobile was being driven at least 45 miles per hour at the time it left some 105 feet of skid marks. Rejecting the defendant's contention that no proper foundation had been laid for the opinion in that the road surface was not shown to be the same as at the time the accident happened and there was a difference in the temperature at the time of the two tests, the court pointed out that the objection went to the weight of the testimony, and not to the competency of it. The court added that the law is well settled that an expert witness may give his opinion as to the speed of an automobile from the length of its skid marks.

In affirming a judgment for the plaintiff, the court in *Beynon v Cutberth* (1965, Tex Civ App) 390 SW2d 352, held that the trial court had not erred in permitting a traffic investigator to give his estimate of the speed of the plaintiff's automobile before it collided with the defendant's automobile, based on the witness' examination of the automobiles at the scene of the accident and the skid marks made by the plaintiff's automobile. In rejecting the defendant's contention that the witness was not qualified as an expert, the court pointed out that the witness had been a traffic investigator with the Amarillo police department for approximately 18 months at the time of trial, that his job was to investigate automobile accidents, that he had investigated hundreds of accidents since September, 1963, that he had examined the cars at the scene of the accident, and that he had examined the skid marks made by the plaintiff's car and found 43 feet

of skid marks. He testified that he estimated the speed of the plaintiff's car at 25 to 28 miles per hour when the driver applied his brakes before the collision.

In an action to recover damages for personal injuries sustained when the plaintiff's automobile was struck by the defendant's train at a rural railroad crossing, the court in *Billingsley v Southern Pacific Co.* (1966, Tex Civ App) 400 SW2d 789, error ref n r e, held that the opinion testimony of a Texas highway patrolman constituted evidence of probative force in support of the jury's findings that the plaintiff was operating his automobile at an excessive rate of speed as he approached the railroad crossing. In support of its finding that the highway patrolman was qualified to give opinion testimony as to speed, the court pointed out that the witness had been a highway patrolman for 30 years, that he had investigated numerous collisions throughout the state, and that he had attended a 14-week school in Austin, conducted by the department of public safety, where he received training in the investigation of traffic accidents. The court also pointed out that the witness had been produced by the plaintiff, and was qualified by the plaintiff as an expert accident investigator, and that he was called to investigate the accident involved in this case, had made a personal investigation of the physical facts, including the location of the debris, as well as the measurement of skid marks leading up to the crossing, and had found 35 steps of skid marks up to the point about 18 inches beyond the first rail of the crossing. The witness established the point of contact between the automobile and the train, and upon measuring the distance from the automobile to the crossing found it to be 350 feet. There were no breaks in the skid marks. After the plaintiff's counsel had qualified the witness as to his ability to determine speeds of vehicles from skid marks, the witness testified that a vehicle going 60 miles per hour would require 270 feet within which to stop, and that a motorist approaching this crossing would be 150 feet from the crossing before he could determine whether a train was approaching. On cross-examination, the defendant's counsel elicited from the witness that at the time of his investigation he estimated the speed of the plaintiff's vehicle at 70 miles per hour prior to application of brakes, and he estimated, without objection, that a "safe speed" at that particular location under the existing conditions was 35 miles per hour.

In *Taylor v Johnson* (1966) 18 Utah 2d 16, 414 P2d 575, the plaintiff's husband was killed when the defendant's car struck the rear of a trailer that the plaintiff's husband was hitching to the rear of a car on a public highway at night. In affirming a judgment for the plaintiff in a wrongful death action, the court held that the trial court had not abused its discretion in allowing investigating officers to testify that the speed of defendant's automobile was at least 71 miles per hour immediately before the collision, calculated from the skid marks and the coefficient of friction. The court pointed out that the officers had many years of experience in investigating automobile accidents, and that they used precalculated charts the accuracy of which was not questioned.

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In some cases a police officer has been allowed to give opinion testimony as to the speed of a motor vehicle, based on skid marks and other physical evidence, although the courts referred to the witness as a nonexpert.

In *Gunter v Willingham* (1967) 116 Ga App 700, 158 SE2d 255, the court, in affirming a judgment for the plaintiff in an action for injuries sustained while riding as a guest passenger in the defendant's automobile, held that a police officer, although not qualified as an expert, was competent to testify that in his opinion the cause of the accident was speed, which he estimated to be 100 miles per hour, as based on the length of the car's skid marks, the distance it rolled over, the damage to the vehicle, and the condition of the road. Although the court recognized that ordinarily a witness who has not actually observed the vehicle in motion must qualify as an expert to give his opinion as to speed based on various external data, it also stated that a lay witness may give opinion testimony as to speed where he relates the facts on which such opinion is based.

In an action for wrongful death of a passenger in an automobile which the defendant's 82-year-old intestate was driving when it went off a road, the court in *Zellers v Chase* (1964) 105 NH 266, 197 A2d 206, sustaining the plaintiff's

exceptions to the granting of the defendant's motion for a directed verdict and motion for judgment notwithstanding the verdict, held that the trial court had not abused its discretion in permitting a state trooper, although not an expert, to give opinion testimony to the effect that the wheel marks indicated that the defendant's car had been accelerating for some distance before it went off the road. The court pointed out that although the witness did not claim to be an expert, it was his duty to investigate accidents, he was on the scene shortly after the occurrence, and he saw the tire tracks while they were still fresh and plain.

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Trial court in personal injury action arising from automobile accident properly allowed investigating police officer to give opinion of speed of vehicle based on physical damage to vehicle, where opinion was also based on skid marks and other investigative criteria. *Henry v Butts (1991, Ala) 591 So 2d 849.*

In action for wrongful death and injuries sustained in collision between motorcycles and automobile, any error in exclusion of officer's opinion as to speed of car at time of accident based on skid marks and comparison speed tests performed in his patrol car would have been harmless, where officer was permitted to testify that his patrol car would have to have been traveling at least 40 miles per hour to leave same skid marks as car, and that variance between patrol car and car involved in accident would mean that latter must have been traveling in excess of 40 miles per hour, and therefore essence of officer's conclusion was before jury. *Bailey v Lenord (1981, Alaska) 625 P2d 849.*

In view of training, experience, and on-the-scene investigation of physical facts involved in accident, including road conditions, road surface, skid marks, damages of guardrail, and damages to automobile, police officer was correctly allowed to express his opinion concerning speed of vehicle at time of 1-car accident. *Meader v People (Colo) 497 P2d 1010.*

Opinion as to speed of motor vehicle, based apparently on skid marks and other physical facts, given by patrolmen, who were experts in accident investigation, was admissible. *Cox v Bonser (Colo App) 507 P2d 1128.*

In wrongful death action, state trooper, who gained experience in traffic investigation over 3-year period and who received accident training at police academy, was properly allowed to testify with respect to speed of decedent's vehicle, where opinion was not based simply on length of skidmark, but was also based on damage to vehicles involved, location of vehicles after impact, and areas of impact. *Wise v George C. Rothwell, Inc. (CA3 Del) 496 F2d 384* (applying Del law), on remand for consideration of matters not herein relevant (DC Del) *382 F Supp 563.*

Opinion of police officer, who testified that he had had 3 years' experience in investigation of automobile accidents and had been trained in connection with this work, and that, considering physical facts and indication of skid marks and tire marks at scene of accident, there was no speed indication according to the skid marks, was not objectionable, since question whether witness is qualified to give opinion as expert upon subject under investigation was one for court, and not for witness. *Reeves v Morgan, 121 Ga App 481, 174 SE2d 460, revd on other grounds 226 Ga 697, 177 SE2d 68.*

Eight-year veteran police officer who investigated two-car collision was qualified as expert and properly testified that neither vehicle was traveling at excessive speed, where officer was experienced traffic investigator whose specialized knowledge and specific experience with accidents made his testimony as to speed of defendant's car material. *Micklos v Highsmith (1986, 3d Dist) 149 Ill App 3d 779, 103 Ill Dec 83, 500 NE2d 1154, app den (Ill) 108 Ill Dec 419, 508 NE2d 730.*

See *Ryan v Payne (Ky) 446 SW2d 273, § 5[a].*

Failure of police lieutenant to personally inspect road surface to determine coefficient of friction used in speed estimate

went to weight of his testimony but did not render it inadmissible where he fully explained scientific and empirical basis for coefficient of friction he used in his calculations. *Uhlik v Kopec*, 20 Md App 216, 314 A2d 732 (citing annotation).

Investigating police officer was properly allowed to testify as to causes of automobile accident, including estimation of speed by reference to standard chart of speed based on skid marks, where officer's testimony did not go beyond limitations imposed by trial court and gave jury clearer understanding of facts at issue. *Mitchell v Steward Oldford & Sons, Inc.* (1987) 163 Mich App 622, 415 NW2d 224.

Police officer who had been investigating accidents for 15 years was qualified to offer expert opinion as to speed of automobile involved in accident, based on length of skidmarks. *Brummitt v Chaney*, 18 Mich App 59, 170 NW2d 481.

Trial court in personal injury action properly allowed expert testimony by two peace officers as to probable speed of plaintiff's vehicle, which skidded off bridge allegedly due to sand and paint left on bridge, where both officers had lengthy histories in accident reconstruction as well as ample specialized training. *Miller v Stiglet, Inc.* (1988, Miss) 523 So 2d 55.

Trial court in prosecution for careless and imprudent driving properly admitted opinion testimony of officer who investigated collision, where trained traffic officer concluded that skid marks made by defendant's tires in gravel road indicated excessive speed for conditions and offense could be based on same. *State v Kaikkonen* (1988, Mo App) 756 SW2d 643.

Highway patrol officer who testified he had been patrolman for 12 years, had investigated about 1,500 accidents, and had training in accident investigation, including how to estimate speed from length of skidmarks and damage to automobiles was competent to testify as to speed of vehicle in action arising out of collision between two vehicles; question was not one of admissibility of testimony but weight it was to be given. *Goodnough v State* (1982, Mont) 647 P2d 364 (citing annotation).

Testimony of police officer as to relative speeds of vehicles involved in accident, based on type of skid marks, damage done to all vehicles, direction and distance that vehicles traveled after impact, condition of pavement, weather conditions, and other relevant circumstances, was properly admitted in evidence, where he had 8 years' experience in investigating accidents, had attended seminars and lectures concerning accident investigations, had a duty, in investigating accidents, to formulate opinion as to speed of various vehicles before impact, and, in doing so, took into consideration skid marks, type of impact, amount of damage done, and auto reaction and travel after impact. *Graham v Banks* (Okla App) 463 P2d 1014.

Since state trooper, who had 8 years of experience dealing with traffic matters, testified that he was familiar with chart which correlated speed with length of skid marks, it was not error to allow him to testify as to facts deduced by mere application of chart. *Jamison v Kline* (CA3 Pa) 454 F2d 1256 (applying Pa law).

Trial court did not err in permitting police officer to testify, based on skid marks, as to estimate of speed at which driver was traveling in action arising out of automobile-pedestrian accident on theory that officer was unqualified to testify as expert or that he was testifying on ultimate issue in case where officer testified that he had taken college seminars in traffic safety and traffic accidents and had attended state police seminars on traffic safety, he had been officer for eight years, and officer's testimony was confined to estimating speed at which defendant motorist had been traveling based on those experiences. *Morris v Moss* (1981) 290 Pa Super 587, 435 A2d 184.

Where police officer testified that skid marks from defendant's car were 88 feet long and that he had investigated countless such accidents in his 25 years of experience, court did not err in permitting officer to state that, based upon his examination of the accident scene, he "could not see where there had been any speeding whatsoever" since officer may, based upon skid measurements and his expertise, state approximate speed of car even though he was not present at

accident and since statement was not grossly speculative opinion. *Rosato v Nationwide Ins. Co.* (1979, Pa Super) 397 A2d 1238.

Police officer had special knowledge that qualified him, in intoxication manslaughter prosecution arising from vehicle accident, to render an opinion concerning the speed of defendant's vehicle at time it struck victims' vehicle; officer testified that he had been assigned to the special traffic investigations section, officer testified that he had received basic, intermediate, and advanced training in accident reconstruction, including speed reconstruction, officer testified that he had 80 hours of accident reconstruction training, and officer testified that he had done accident reconstruction for the special traffic investigations section. Rules of Evid., Rule 702. *Pena v. State*, 155 S.W.3d 238 (Tex. App. El Paso 2004) (citing annotation).

Mexican Federal Police supervisor who was traffic officer who investigated bus accident was qualified to estimate speed of bus at accident scene, where officer's first-hand examination of scene and training in accident reconstruction qualified him to give opinion testimony as to speed of bus from skid marks found on pavement and shoulder. *Trailways, Inc. v Clark* (1990, Tex App Corpus Christi) 794 SW2d 479, motion overr (Nov 7, 1990) and writ den (Dec 31, 1990) and reh overr (Jan 30, 1991).

Opinion of law enforcement officer as to speed of motor vehicle, based on skid marks and other circumstances at scene of accident, was properly admissible, where witness had extensive experience in investigating accidents and had attended special schools. *Bates v Barclay* (Tex Civ App) 484 SW2d 955, error ref n r e.

While opinion on speed cannot be based solely upon physical or impact damage to automobile, opinion of police officer, who had training and experience, as to speed of vehicles involved, based on his personal investigation of circumstances surrounding accident, including skid marks, was properly admissible. *Adams v Smith* (Tex Civ App) 479 SW2d 390.

Opinion of trooper who investigated one-car accident, as to speed of vehicle prior to collision, based on skid marks left by tire, road-surface conditions, fact that tire tread was good, damage to and location of vehicle after it had sheared off telephone pole, and condition of pole (that it was solid, not full of dry rot), was properly admitted, where police officer could not have meaningfully communicated what he perceived to jury without giving his opinion, and where trooper had 3 years of experience in investigating traffic accidents at time of accident and about 10 years at time of trial. *Talley v Fournier*, 3 Wash App 808, 479 P2d 96.

In action resulting from automobile accident, patrolman who had 13 years service, investigated many accidents, attended training courses in accident investigation, investigated accident in issue and determined that there were skid marks for 183 feet was properly allowed to testify as to speed of plaintiff's vehicle. *Runnion v Kitts* (Wyo) 531 P2d 1307 (citing annotation).

[\*3b] Opinion as to speed held inadmissible

Although it is recognized that a qualified law enforcement officer may give opinion testimony as to the speed of a motor vehicle on the basis of skid marks and other physical facts, in the following cases opinion testimony of law enforcement officers was excluded on the ground that proper foundations for their opinions had not been laid.

#### SUPREME COURT

*Ross v Newsome* (1961, CA5 Ga) 289 F2d 209

*Haug v Grimm* (1958, CA8 ND) 251 F2d 523

## ALABAMA

*Johnson v Battles* (1951) 255 Ala 624, 52 So 2d 702

*Jowers v Dauphin* (1962) 273 Ala 567, 143 So 2d 167

*Campbell v Barlow* (1962) 274 Ala 627, 150 So 2d 359

*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319

## ARKANSAS

*Ransom v Weisharr* (1963) 236 Ark 898, 370 SW2d 598

## COLORADO

*Baldwin v Schipper* (1964) 155 Colo 197, 393 P2d 363

## ILLINOIS

*Deaver v Hickox* (1967) 81 Ill App 2d 79, 224 NE2d 468

## INDIANA

*Pickett v Kolb* (1967, Ind App) 231 NE2d 856, superseded (Ind) 237 NE 2d 105

## KENTUCKY

*B-Line Cab Co. v Hampton* (1952, Ky) 247 SW2d 34

## MICHIGAN

*Jackson v Trogan* (1961) 364 Mich 148, 110 NW2d 612

## MINNESOTA

*Grapentin v Harvey* (1962) 262 Minn 222, 114 NW2d 578

*Pierson v Edstrom* (1968) 281 Minn 102, 160 NW2d 563

## MISSISSIPPI

*Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470

*Marsh v Johnson* (1968, Miss) 209 So 2d 906

## NEBRASKA

*Piechota v Rapp* (1947) 148 Neb 442, 27 NW2d 682

## NEW HAMPSHIRE

*Cormier v Conduff* (1968, NH) 241 A2d 795

## NEW JERSEY

*Nesta v Meyer* (1968) 100 NJ Super 434, 242 A2d 386

## NEW YORK

*Lopez v Yannotti* (1965) 24 App Div 2d 758, 263 NYS2d 523, motion to dismiss app den 17 NY2d 577, 268 NYS2d 334, 215 NE2d 514, app dismd 270 NYS2d 637, 17 NY2d 787, 217 NE2d 683

## NORTH CAROLINA

*Tyndall v Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828

## OREGON

*Bailey v Rhodes* (1954) 202 Or 511, 276 P2d 713

## TEXAS

*Austin v Hoffman* (1964, Tex Civ App) 379 SW2d 103

*Standard Motor Co. v Blood* (1964, Tex Civ App) 380 SW2d 651

*Terbay v Pat Canion Excavating Co.* (1965, Tex Civ App) 396 SW2d 482, error ref n r e

## WASHINGTON

*Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446

In a case involving an automobile collision at a highway intersection, the court in *Ross v Newsome* (1961, CA5 Ga) 289 F2d 209, held that the trial court had not abused its discretion in sustaining the plaintiff's objection to a highway patrolman's opinion testimony as to the speed of the vehicles, based on skid marks made by each vehicle before the point of impact. The court pointed out that the witness had previously said that he could not give an estimate of speed, and that the facts upon which he purported to give an opinion were insufficient.

In *Johnson v Battles* (1951) 255 Ala 624, 52 So 2d 702, an action under the Alabama homicide statute for a death which

occurred when the automobile in which the decedent was riding collided with an automobile owned and operated by the defendant, the court held that the trial court had not abused its discretion in refusing to allow the defendant to cross-examine the plaintiff's witness, a highway patrolman, as to the speed of the defendant's automobile, as based on 72 feet of skid marks, where the only evidence as to the witness' qualification to testify as an expert was that he had been a member of the highway patrol for 5 1/2 years, during which time he had investigated many automobile accidents.

In *Jowers v Dauphin* (1962) 273 Ala 567, 143 So 2d 167, the plaintiff was injured when an automobile driven by the defendant struck the rear end of the pickup truck in which the plaintiff was a passenger. Distinguishing between skid marks made before and after impact of two motor vehicles, the court reversed a judgment for the plaintiff on the ground that it was prejudicial error to admit the testimony of a highway patrolman as to the speed of both vehicles immediately before the collision, based on skid marks made after impact. The court added that it is a matter of common knowledge that when two moving objects collide they may behave in a manner which seemingly defies all the laws of physics.

Testimony of a highway patrolman was held erroneously admitted, in *Campbell v Barlow* (1962) 274 Ala 627, 150 So 2d 359, where he based his opinion as to the speed of the automobile involved in a collision on the distances of the vehicles from the point of impact, damage to the vehicles, the scattered debris, and markings on the road after impact. The court pointed out that there was no evidence of skid marks made before impact.

In *Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319, the defendant was prosecuted for manslaughter as the result of the death of a passenger in an automobile which was struck by the automobile driven by the defendant. There was testimony that the defendant had been drinking. The defendant's conviction for second degree manslaughter was reversed on the ground that prejudicial error was committed in allowing the state's witness, a highway patrolman, to testify that in his opinion, based on 111 feet of skid marks and the amount of damage to each vehicle, the speed of the defendant's vehicle before the skid marks started was roughly 80 miles per hour. Although recognizing that a nonobserver may testify as to the speed of an automobile on the basis of skid marks, particularly where there has been a collision and the object hit offers little or no resistance, such as a boy on a bicycle, the court concluded that the state had failed to present sufficient data on which the witness could give a scientific opinion as to the speed of the defendant's car.

In *Ransom v Weisharr* (1963) 236 Ark 898, 370 SW2d 598, an action for injuries sustained by a pedestrian struck by the defendant's automobile, the court reversed a judgment for the defendant on the ground that it was error to admit the testimony of a police officer as to the speed of the defendant's automobile where he had not witnessed the speed of the car or seen the scene of the accident and the skid marks, had not inspected the brakes of the car, did not know the condition of the tread of the tires and did not know the extent to which the tires were inflated, did not know the number of passengers in the car as it affected the weight of the vehicle, and had conducted tests for skid factors at a place other than the scene of the accident, with a different car, on the morning of the trial. The court concluded that there were too many unknown factors which, according to the testimony of the witness himself, influenced the results and should be considered by an expert before opinion testimony as to speed based on skid marks should be admitted.

In *Baldwin v Schipper* (1964) 155 Colo 197, 393 P2d 363, an action for injuries sustained by a passenger in an automobile that collided with the defendant's automobile, the court, in affirming a judgment for the defendant, said that the trial court did not err in excluding a police officer's opinion testimony as to the speed of the defendant's vehicle, based on the damage to the vehicles, their location after the impact, and skid marks made by the defendant's vehicle after the point of impact.

In actions for wrongful death arising out of a collision of two automobiles at an unmarked country intersection, the court in *Deaver v Hickox* (1967) 81 Ill App 2d 79, 224 NE2d 468, reversed a judgment for the plaintiff on the ground that it was error to permit a state highway police officer to testify as to the speed of the vehicles before the collision, on the basis of skid marks, damage to the vehicles, and other physical facts. The court pointed out that the witness had been

a state police officer for about 8 years; that he had 6 weeks' recruit training at the State Police Academy, a 2-week course on traffic patrol and accident investigation at Northwestern University, a 2-week refresher course conducted by Northwestern University, and a 1-month course in basic police work at the University of Illinois Police Institute in Champaign, Illinois; and further, that ambiguous testimony indicated that the determination of speed in reference to skid marks and damage to vehicles was studied. One court noted that the officer had investigated between 450 and 500 automobile accidents. In support of its holding that the witness should not have been allowed to give his opinion as to the speed of the vehicles, the court said that in the colloquy with the court, the witness largely abandoned the use of any training and education upon the subject of computing the speed, but expressed reliance upon his investigation of accidents over his 8 years of police service. The court further pointed out that the record was bare upon whether the accident investigations the witness referred to included any tests or computations or other determinations of speed of vehicles based upon physical damage, and that the witness had never previously qualified as an expert upon the subject. The court also observed, first, that no statement was elicited from the witness, or from others, that there exists a science requiring special skills beyond the ken of the average juror from which a judgment of speed with reference to the vehicles involved could be made with any degree of certainty; second, no statement was elicited from the witness that he was possessed of the skills necessary to make a determination of such speed with relative certainty from the facts presented to him; third, no discussion was elicited with reference to the factors involved in making a determination of speed either from skid marks or damage to the vehicles, or from a combination of the two; fourth, assuming that special skills exist from which a determination of speed may be made with relative certainty, no inquiry was made as to whether such special skills beyond the ken of the average juror were in fact employed by the witness, or anyone else in the case; fifth, if particular factors were employed to make the determination of speed, those factors were not analyzed in any manner sufficient to enable the jury to determine whether all factors used in arriving at the judgment were, in fact, present; sixth, as to the degree of certainty of the officer's opinion, an entirely different impression was gained from the testimony presented to the jury from that presented to the court out of the presence of the jury; and seventh, it appeared that if it may be assumed that there is a science involving special skills for determining speeds of vehicles from the physical facts, which skills are beyond the ken of the average juror, it affirmatively appeared that the officer did not use those skills, but relied rather upon his own general experience, which the officer himself described as speculation.

In *Pickett v Kolb* (1967, Ind App) 231 NE2d 856, superseded (Ind) 237 NE 2d 105, an action for injuries sustained when plaintiff's automobile collided with a tractor operated by the defendant, the court, in affirming a judgment for the defendant, held that the trial court had not abused its discretion in sustaining the defendant's objection to a question addressed to the plaintiff's witness, a police officer, concerning the speed that would cause the vehicle to leave 120 feet of skid marks.

In reversing a judgment for the plaintiff and ordering a new trial, the court in *B-Line Cab Co. v Hampton* (1952, Ky) 247 SW2d 34, held that it was error to admit a police officer's testimony -- as to the speed of the defendant's taxicab at the time it struck the plaintiff, a pedestrian -- based on skid marks made by the taxi. The court said that while the witness might have given his expert opinion concerning the relationship of skid marks to speed, his testimony concerning the speed of this particular taxi, which he did not observe in motion, was incompetent.

In *Jackson v Trogan* (1961) 364 Mich 148, 110 NW2d 612, an action for personal injury sustained in an automobile accident, the court reversed a judgment for the defendant on the ground that it was reversible error to admit a police officer's testimony as to the speed of the plaintiff's vehicle, where the police officer's opinion was based on skid marks made by the plaintiff's automobile before impact, and where the evidence did not show that he had experience in investigating automobile accidents. The court pointed out that the witness could not prove the speed of the plaintiff's vehicle by mathematical computation, that he based his opinion on a chart and on his own reasoning, and that there was no evidence as to the weight of the vehicles, the condition of the road, or the type of highway surface at the place of the accident.

A hypothetical question addressed to a police officer for the purpose of eliciting expert opinion testimony as to the

speed of a motor vehicle based on skid marks and other physical facts was held insufficient in *Grapentin v Harvey* (1962) 262 Minn 222, 114 NW2d 578, where it failed to state facts as to the condition of the highway and the length of the skid marks. The court pointed out that the testimony of the investigating officer was unclear as to the exact length of the skid marks made by the front wheels and by the rear wheels, and that his description of the highway as a regular and concrete highway was too vague on which to base expert opinion testimony. The court recognized that a hypothetical question need not contain all the small or unimportant details, but declared that such a question must contain the evidentiary facts that are necessary to support expert opinion.

In *Pierson v Edstrom* (1968, 281 Minn 102, 160 NW2d 563, the court held that it was error to permit cross-examination of the plaintiff's witness, a traffic officer, as to whether there was anything inconsistent between the defendant's statement to the officer that he was going 25 miles per hour and the witness' experience in investigating automobile accidents, the location and position of the defendant's vehicle after the accident, and the location of the skid marks. The court said that the officer, who was not an eyewitness to the accident, was not qualified to give an opinion as to the speed of the defendant's car.

In *Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470, a police officer's testimony as to the speed of the defendant's automobile, based on 120 feet of skid marks, was held properly excluded where his testimony would have been based solely on a mathematical chart given to him at a police academy. The court pointed out that the witness had no personal knowledge of the mathematical or physical factors involved, and that the chart was hearsay.

In *Marsh v Johnson* (1968, Miss) 209 So 2d 906, a widow's action for wrongful death of her husband, who was killed when the defendant's truck collided with the automobile in which he was a passenger, the court, in affirming a judgment for the plaintiff, said that it was error to permit a police chief with 31 years of experience as a policeman, who had investigated many accidents, to testify as to the speed of the defendant's truck, on the basis of 92 feet of skid marks. But since there was other evidence from which the jury could determine the speed of the defendant's vehicle, the error was held nonprejudicial.

In *Piechota v Rapp* (1947) 148 Neb 442, 27 NW2d 682, an action for wrongful death of a 17-year-old girl who was riding in the defendant's automobile, which went off the road and struck a building, the court, in reversing a judgment for the plaintiff, held that it was prejudicial error to allow a sheriff to testify as to the speed of the defendant's automobile where his opinion was based on skid marks and experiments conducted by him. The sheriff testified that he had made experiments as to speed on the curve in question a week or two after the accident, that he was an experienced driver and acquainted with the road, that he had used an automobile in the experiment that was about the same size as the defendant's automobile, that he drove the car around the curb at a speed of 45 miles per hour, and that his opinion, based on these experiments, was that the defendant's car must have been traveling at the minimum speed of 60 miles per hour when it went around the curve. In stating that the opinion testimony as to speed should have been excluded, the court pointed out that the sheriff knew the road and was driving it for the purpose of making an experiment, whereas the defendant had only slight knowledge of the road, and was driving while under the influence of intoxicating liquors.

In *Cormier v Conduff* (1968, NH) 241 A2d 795, actions for injuries sustained in a collision of two automobiles near the crest of a hill, it was held that the trial court had not abused its discretion in refusing to admit a police officer's testimony as to the speed of the defendant's Volkswagen, based on 156 feet of skid marks. The police officer had about 10 years of experience in police work, including special training in the investigation of accidents. The officer proposed to compute the speed of the defendant's automobile before the accident by use of a template. The defendant's objection to the offered testimony called the trial court's attention to the fact that the skid marks were not over a level road but over the crest of a hill. The trial court excluded the opinion evidence as to speed on the ground that it would not aid the jury.

In *Nesta v Meyer* (1968) 100 NJ Super 434, 242 A2d 386, an action for injuries sustained in an intersection collision of two automobiles, the court, in affirming a judgment for the defendant, held that the trial court had not abused its

discretion in refusing to permit a police officer to testify as to the speed of the plaintiff's car on the basis of skid marks. The court pointed out that the officer was not an engineer and had no special training in assessing the speed of vehicles from skid marks or other indicia at the scene, and that it is a matter of common knowledge that skid marks may be affected not only by the speed at which a vehicle is being driven, but by the condition of the surface of the highway, the type of tread and degree of wear of the tires, the weight of the vehicle, and the condition of the brakes and manner in which they were applied.

In *Tyndall v Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828, an action for injuries sustained by a girl who was struck by the defendant's truck as she was walking on the shoulder of a highway, the court reversed a judgment for the plaintiff on the ground that it was error to permit a state highway patrolman to give opinion testimony as to the rate of speed of the defendant's truck, based on marks the truck made on the shoulders of the road and upon the grass. The marks were not brake marks but were marks made when the truck made a sudden turn, thus shifting the weight to one side or the other. In support of its conclusion, the court pointed out that the witness had not seen the truck in motion, that he saw certain marks on the road, and that when he gave his estimate of speed he was not speaking of what he saw, but was giving a conclusion reached upon a consideration of the facts that he had observed. In addition, he gave a plain, clear, and distinct description of the signs, marks, and conditions he had found at the scene of the collision, so that ordinary jurymen could readily understand and appreciate what he had seen. Thus, the court concluded that the jury was as well qualified as he to determine what inferences the facts about which he testified permitted or required.

In *Bailey v Rhodes* (1954) 202 Or 511, 276 P2d 713, an action under the Oregon guest statute for injuries sustained when the automobile owned and operated by the defendant went off the road and plunged down an embankment, the court, in reversing a judgment for the plaintiff and ordering a new trial, held that prejudicial error was committed in permitting a state police officer to give opinion testimony as to the speed of the defendant's automobile where his opinion was based on physical facts which he observed in investigating the accident. The court said that when the matter of speed is involved, the question primarily is not how fast the automobile was traveling in specific miles per hour, but whether its speed, whatever it may have been in miles per hour, was excessive under all the facts, circumstances, and conditions existing at the time. The court added that competent and qualified eyewitnesses who have observed a motor vehicle in motion may give their opinion as to the rate of speed it was traveling, but one not an eyewitness cannot express an opinion based solely upon the physical facts existing after an accident, as to the rate of speed prior to the accident. A jury is as well able to draw its own inferences and reach its own conclusions from the facts presented as is the witness. Such testimony invades the province of the jury.

In determining the speed of the plaintiff's motor scooter, which collided with the defendant's pickup truck, the court in *Austin v Hoffman* (1964, Tex Civ App) 379 SW2d 103, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in excluding a police officer's testimony as to the speed of the plaintiff's motor scooter, based on the physical damage to the truck and scooter, and the skid marks left by the scooter. The court pointed out that the officer stated that he had never had any special training in school to determine how fast a vehicle must have been going to bend metal so many inches or make a dent of a certain size, did not know how much force it takes to bend the metal, and had made no such tests, and that such tests would have to be made to make an accurate estimate of speed.

In an action by the occupant of an automobile against the manufacturer of the automobile for injuries sustained in an accident allegedly caused by a defective braking system, the court in *Standard Motor Co. v Blood* (1964, Tex Civ App) 380 SW2d 651, in affirming a judgment for the plaintiff, held that the trial court had not abused its discretion in excluding the testimony of four police officers concerning the speed of the plaintiff's automobile -- based on skid marks and other facts -- before the moment that its brakes allegedly failed.

In *Terbay v Pat Canon Excavating Co.* (1965, Tex Civ App) 396 SW2d 482, error ref n r e, the court held that the testimony of a police officer concerning the speed of a dump truck was properly excluded on the ground that the officer was not sufficiently qualified to express an opinion. The court pointed out that although the witness had considerable training in the proper manner of investigating car collisions and had a great deal of experience in this field, he had no

knowledge or experience qualifying him to estimate the speed of cars from the amount of damage sustained by them, nor did he have any knowledge or experience which would qualify him to express an opinion as to the speed of the dump truck based on its skid marks left on a steep downgrade on wet, muddy, and slick pavement.

In *Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446, the court reversed a judgment for the plaintiff on the ground that it was error to allow a highway patrolman to give opinion testimony to the effect that the plaintiff's vehicle was not traveling at an excessive rate of speed at the time of the accident, where he had been asked how fast a car would be going to lay down a skid mark of 98 feet "and at that time stop," and where the uncontradicted evidence showed that the car did not stop after skidding, but collided with the defendant's bus.

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Opinion testimony of experienced police officer as to speed of automobile at time of accident, based in part upon scuff marks believed to have been made at point of impact and measured distance between point of impact and automobile, was inadmissible because automobile was not shown to have come to skidding halt and it was not established where driver had initially applied brakes. *McWhorter v Clark (Ala)* 342 So 2d 903.

Opinion of state trooper as to speed of defendant's car prior to collision should not have been admitted where trooper did not know exact distance of skid marks made by defendant's car. Opinion as to speed of plaintiff's truck prior to collision, while it was based on skid marks made after impact and upon condition of 2 vehicles, and therefore was not admissible, was harmless, since plaintiff himself testified that his speed was about 35 miles per hour prior to impact, while trooper's opinion was that plaintiff was traveling at about 40 miles per hour. *Giles v Gardner*, 287 Ala 166, 249 So 2d 824 (citing annotation).

Testimony by police officer as to speed of vehicle based on skid marks is not admissible where marks were made at time of impact or thereafter. *Holuska v Moore (Ala)* 239 So 2d 192.

Where there was lack of testimony concerning police officer's qualifications to give his opinion of defendant's speed at time of accident and where question put to officer was not clearly predicated on skidmarks made before impact but was based on what officer had observed talking to other persons, proper foundation was not laid for officer to express opinion as to speed of defendant's vehicle and trial court correctly refused to admit officer's testimony. *Hughes v Southern Haulers, Inc.* (1979, Ala App) 379 So 2d 601.

See *Bailey v Lenord* (1981, Alaska) 625 P2d 849, § 3[a].

Trial court correctly ruled that state trooper could not testify as to exact speed of automobile from examination of skid marks at scene of accident where trooper was not familiar with concept or calculation of friction coefficient. *Ball v Cameron* (1984) 282 Ark 357, 668 SW2d 942.

Police officer's expert testimony, in which he estimated the speed of motorist's vehicle, was inadmissible, though officer was qualified as expert, where officer took no measurements, made no calculations, and had no factual basis for his opinion. *Dozier v. Hodges*, 849 So. 2d 1094 (Fla. Dist. Ct. App. 3d Dist. 2003).

In action against city for failure to maintain certain traffic devices properly, allegedly resulting in death of motorist upon collision with street divider, testimony of police officers as to speed of vehicle, based on their observation of scene of accident, physical damage to vehicle, distance traveled, and tire marks left on pavement after vehicle struck divider, was not admissible, such testimony being conjectural and being only competent to show speed of automobile after collision with divider and not taking into account significance of previous collision so as to make proposed opinion relevant to speed of vehicle prior to collision. *Jorstad v Lewiston*, 93 Idaho 122, 456 P2d 766.

Accident investigator was properly allowed to testify about length of skid marks and average stopping distances of automobiles according to insurance reference book, where investigator gave no opinion concerning speed of car before accident. *Viehweg v Thompson* (1982, App) 103 Idaho 265, 647 P2d 311.

Admission of testimony of investigating officer as to speed of car based on nomograph test of skid marks constituted reversible error where officer was not qualified as expert in use of nomograph; even if he was qualified as expert, such testimony would have been inadmissible where there were two eyewitnesses capable of judging speed of car. *Diederich v Walters* (Ill App) 334 NE2d 283.

In wrongful death action arising out of collision between car and defendant's disabled truck stopped on highway, question asked of expert witness as to whether skid marks indicated violation of speed laws by decedent's car called for legal conclusion and trial court erred in overruling defendant's objection. *Schlichte v Franklin Troy Trucks* (1978, Iowa) 265 NW2d 725.

Opinion of police officer as to speed of vehicle before it struck pedestrian, based on skid marks, was not admissible, because (1) in giving his opinion, officer did not consider road surface, character of tires, and weight of vehicle, although estimation of speed based on skid marks without considering said factors may be made, if expert is shown to have experience testing vehicles of different weights, with tires in different conditions, on pavement in different conditions and varying grades, which experience expert in this case did not have; and (2) officer failed to state factual basis for his opinion. *Bernal v Bernhardt* (Iowa) 180 NW2d 437 (citing annotation).

Testimony of police officer as to vehicle speed based on measurement of skidmarks by use of template was inadmissible where, because of lack of training, understanding, and experience in use of template, officer could not qualify as an expert. *State v Rogers* (La) 324 So 2d 358 (citing annotation).

Skid marks and physical damage to culvert struck by plaintiff's automobile do not, standing alone, constitute proof of excessive speed under all circumstances. *Craig v Burch* (La App) 228 So 2d 723, writ refused 255 La 475, 231 So 2d 393.

Objections to questions whether police officer had opinion as to speed of defendant's vehicle at point of impact, and whether he had opinion as to maximum and minimum rates of speed defendant lost in incurring 162 feet of skid marks, were properly sustained, in view of fact that officer was not specifically questioned as to his expertise in estimating speed from his investigation of physical facts following accident. In any event, trial court has discretion to determine whether or not witness is sufficiently qualified to express expert opinion. *Owens v Creaser*, 14 Md App 593, 288 A2d 394, revd on other grounds 267 Md 238, 297 A2d 235.

Testimony of police officer as to speed of car involved in accident was inadmissible as hearsay where testimony was based on computation of speed from skidmarks observed by the officer but actual calculations were performed by another officer. *Haanke v Ball* (Mich App) 230 NW2d 333 (citing annotation).

Investigating officer's testimony, in negligence action by motorist, arising out of vehicle accident that occurred after driver crossed double yellow lines while skidding on ice, concerning his opinion that driver's speed was unsafe lacked sufficient foundation. *Arricale v. Leo*, 744 N.Y.S.2d 109 (App. Div. 4th Dep't 2002).

Trial court in action for wrongful death and personal injuries arising from intersection accident between tractor-trailer and automobile erroneously admitted police officer's estimate of truck's speed just before collision, where record failed to show officer's specific training and experience as to skid marks and failed to show scope of facts such as weight of vehicle, tire size and pressure, and similar facts necessary to estimate speed. *Johnson v Attkisson* (1986, Tenn App) 722 SW2d 390.

Trial court erred in declaring trooper to be expert witness as to speed of defendant's vehicle when it struck boy crossing road, where officer testified he had been such for five years, part of one week's annual training consisted of measure of skid marks and interpretation of speed from them, he drove car at given speed and applied his brakes, correlated his knowledge of speed and length of marks with marks laid by defendant to template supplied by state and arrived at speed ten miles per hour under that testified to by defendant, trooper did not know comparative weights of two vehicles or their tire types and pressures, and trooper had only proffered opinion of template as expert. *Walters v Glidwell* (1978, *Tenn App*) 572 SW2d 657.

Trial court properly excluded testimony of officer investigating head-on collision that cause of accident was that pick-up was driving faster than conditions would permit, even though trooper had been with department of public safety eight and one-half years, had received 17 weeks of training, and had investigated 350 accidents, and though officer testified he saw "eraser marks" on highway indicating defendant's westbound vehicle went into skid or hydroplaned after hitting puddle of water, went into eastbound lane, and struck plaintiff's vehicle, and that officer's training was that car could hydroplane at 56 mph when running through water. *Clark v Cotten* (1978, *Tex Civ App*) 573 SW2d 886.

Opinion of police officer as to speed of motor vehicle, based on skid marks, was not admissible, where witness did not consider other factors, such as material of road surface, material of tires, tire tread, temperature, air pressure in tires, and weight of car. *Orndoff v Rowan (W Va)* 192 SE2d 220.

[\*4] Engineers

[\*4a] Opinion as to speed held admissible

A number of cases hold or recognize that an engineer who qualifies as an expert may give opinion testimony as to the speed of the motor vehicle based on skid marks and other physical facts.

## PENNSYLVANIA

*Stacy v Thrower Trucking, Inc.* (1978, *Pa Super*) 384 A2d 1274

In *Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932, an action arising out of the collision of the plaintiff's car and the defendant's pickup truck at an intersection, plaintiff's car made 167 feet of skid marks leading to the point of impact. A safety engineer testified that a car driven at 55 miles an hour will lay down skid marks of 162 feet on pavement, and that about 7 feet should be added where the car is on a graveled highway. The witness' figures were based on over a thousand experiments conducted by the witness, involving all makes of cars, and on courses taken at Yale University, Yale Bureau of Traffic Research, and at Northwestern Traffic Institute. The court affirmed a judgment for the defendant on the ground that the plaintiff was contributorily negligent.

In *Snyder v New York Cent. Transport Co.* (1966) 4 Mich App 38, 143 NW2d 791, an action for injuries sustained when the automobile in which the plaintiff was riding collided with the defendant's tractor-trailer, the court, in affirming a judgment for the defendant, held that a mechanical engineer's testimony as to the speed of the plaintiff's automobile, based on skid marks and other physical facts, was properly admitted. In recognizing that the witness was qualified as an expert in his field, the court pointed out that he was a professor of mechanical engineering at the University of Detroit for the immediately preceding 4 years; that he had a Bachelor of Science degree in aeronautical engineering and mathematics, a Master of Science and Engineering Mechanics, and a doctorate in mechanical engineering, from the University of Michigan, and a Master of Science and Mechanical Engineering degree from Wayne State University; that he was a registered engineer in the state of Michigan; that prior to his professorship at the University of Detroit, he taught at Wayne State University for 5 years, and for 7 years taught automotive engineering at the Henry Ford

Community College; that he was also a director of the Transport Research Institute, which studied the various safety factors of automobiles, conducted experiments of taking vehicles out and colliding them with each other under various conditions, and then comparing results with anticipated results from studies made prior to the experiment; that he had extensively experimented with many vehicles as to skidding properties, speed, and damage resulting to vehicles by reason of collision under varying conditions; and that for 4 years he had worked as principal engineer with the Ford Motor Car Company and had directed analytical research at that time in the crash safety program. In giving his opinion on the speed of the plaintiff's vehicle, he was informed of the following factors testified to by witnesses at the scene: 44 feet of skid marks made by plaintiff's vehicle, the make and weight of plaintiff's automobile, the composition of the pavement, that it was a cold, clear night and the pavement described as dry, or slightly moist with dew; and photographs of the scene and the damage to plaintiff's automobile. From these factors, and applying a specialized scientific knowledge and experience, he gave his opinion that plaintiff was traveling a minimum of 40 miles per hour just before the accident. On the question of speed, assuming no impact or that plaintiff stopped within the 44 feet of skid marks without being stopped by running into an object, he estimated the minimum speed of plaintiff's car to be 32 1/2 miles per hour. The court concluded that the opinion testimony of the witness as to the speed of the plaintiff's automobile, deduced from the physical facts in the case, was within that area of knowledge in which the average juror would be unschooled and unexperienced, and that the evidence was, therefore, properly received.

In *Di Nizio v Burzynski* (1963) 81 NJ Super 267, 195 A2d 470, the court said that in an appropriate case, where the speed of a vehicle is an issue, opinion evidence from qualified experts bearing thereon is properly receivable in evidence in reply to a hypothetical question which includes the evidence in the case concerning the course, length, and nature of the skid marks left by such vehicle, and likewise, expert testimony as to average reaction time, and opinion evidence as to speed and distance traveled based thereon, may be received. Although the trial court had excluded testimony of a traffic engineer concerning the speed of the defendant's automobile at the time it struck the infant pedestrian, the court, in affirming a judgment for the defendant, held that the exclusion of the testimony did not constitute prejudicial error in view of other evidence as to speed and lookout.

In *Billingsley v Southern Pacific Co.* (1966, Tex Civ App) 400 SW2d 789, error ref n r e, an action for injuries sustained when the plaintiff's vehicle was struck by the defendant's train at a rural railroad crossing, the court, in affirming a judgment for the defendant railroad, held that testimony of a consulting engineer as to the speed of the plaintiff's vehicle was evidence of probative force to support the jury's finding that the plaintiff's vehicle was traveling at an excessive rate of speed at the time it struck the train. The witness, a consulting engineer called by the defendant railroad, had been engaged in accident analysis work since 1948, and had made a study of the automobile involved in the collision. He had also made photographs of the vehicle, and testified in great detail that he had examined exhibits showing the skid marks at the scene of the accident and had determined that the speed of the plaintiff's vehicle when the brakes were first applied was within the range from 56 miles per hour to a speed "in excess of" 65 miles per hour. He based his opinion upon his observations at the scene of the accident, examination of the damage to the vehicle, the defendant's photographic exhibits, measurements, mathematical calculations, and testimony in the record.

In *State v Lingman* (1939) 97 Utah 180, 91 P2d 457, the defendant was prosecuted for criminal negligence in causing the death of a woman who was driving an automobile that collided with an automobile driven by the defendant at a city intersection. Although the defendant's conviction for involuntary manslaughter was reversed on other grounds, the court held that a mechanical engineer's testimony as to the speed of the defendant's automobile, based on tire marks made by the car as it was pushed sidewise, was admissible. The witness was asked to testify as to speed on the basis of certain information as to weight of cars, type of highway, positions of the cars, point of impact, and the marks made by the car, which was struck as it skidded sideways and diagonally across and off the highway. The witness was asked his opinion as to the speed of the defendant's car at the moment of impact, which he computed according to a mathematical formula based upon the distance the impact had driven the struck car.

Engineer, who had previously been employed as expert in 40-50 cases involving accident reconstruction, was properly permitted to state opinion as to minimum speed of vehicle based upon length of skid marks before and after collision, friction coefficient of pavement, weight of vehicles involved, and distance between center of gravity of other automobile and point at which it was struck by vehicle. *Spain v McNeal (Dist Col App) 337 A2d 507.*

Admittedly qualified expert witness should have been allowed to give opinion as to speed at time of accident since plaintiff properly laid predicate to hypothetical question as to speed of defendant's vehicle. *Taylor v Posey (Fla App) 283 So 2d 118.*

Introduction of traffic engineer's testimony regarding defendant's estimated speed just before accident, based primarily on skid marks, did not deprive plaintiff of fair trial, though it served to bolster defendant's approximation of his speed, where there had been no eye witnesses, where evidence was responsive to one of main thrusts of plaintiff's case and was generally consistent with testimony introduced by plaintiff's own witnesses, and where, under the circumstances, expert testimony was necessary for interpretation of what skid marks meant about speed of defendant's vehicle. *Coffey v Hancock (1984, 3d Dist) 122 Ill App 3d 442, 77 Ill Dec 677, 461 NE2d 64.*

In action based on breach of implied warranty against car manufacturer brought by driver and passenger for injuries received in rear-end collision in which allegedly defectively designed gas tank ruptured, testimony of expert witness as to speed of co-defendant's car was admissible, even though there was eyewitness lay testimony on same point, where expert was engineer with extensive background in automobile collisions and had published articles that defendant's employees admittedly read, and where lay testimony was subject to considerable doubt in light of poor weather conditions and sudden nature of collision. *Elsasser v American Motors Corp. (1978) 81 Mich App 379, 265 NW2d 339.*

Opinion of mechanical engineer as to speed of defendant's automobile just prior to application of brakes and collision, given on basis of full disclosure to him of all relevant facts and testimony then in evidence, and arrived at after said expert conducted independent investigation and tests, including consideration of length of skid marks left by defendant's automobile, was properly admissible. *Le Mieux v Bishop (Minn) 209 NW2d 379.*

Trial court did not err when it permitted testimony by mechanical engineer as to calibration of speedometer of truck and skid tests and as to speed of truck at times brakes were applied based on known length of skid marks created when driver applied his brakes prior to striking nine-year-old plaintiff, where jury was properly instructed on how to evaluate assumed facts which formed basis of expert's opinion. *King v Branch Motor Express Co. (1980) 70 Ohio App 2d 190, 24 Ohio Ops 3d 250, 435 NE2d 1124, motion overr.*

Admission of opinion as to speed of vehicle of expert witness, who was licensed civil engineer, head of engineering firm specializing in highway design and accident reconstruction, and assistant dean of engineering and professor at university, was proper where opinion was based on weight of car, length of skid marks, grade of street, characteristics of road surface and other considerations which he identified. *Haeberle v Peterson (1978, Pa Super) 396 A2d 738.*

Opinion of consulting engineer as to speed of motor vehicle, based upon testimony of police officer as to skid marks and other circumstances at time of accident, expert's own examination of photographs and his evaluation of weight of several vehicles, was properly admissible, where engineer had specialized in analysis of accidents or collisions for more than 20 years. *Bates v Barclay (Tex Civ App) 484 SW2d 955, error ref n r e.*

[\*4b] Opinion as to speed held inadmissible

Although the following cases recognize that an engineer who is qualified as an expert may testify as to the speed of the motor vehicle, as based on skid marks and other physical facts, each holds such testimony inadmissible on the ground that no proper foundation had been laid on which his opinion could be based.

In an action by the driver of a Greyhound bus against the owner of a truck that collided with the bus, the court in *Solomon Dehydrating Co. v Guyton* (1961, CA8 Neb) 294 F2d 439, cert den 368 US 929, 7 L Ed 2d 192, 82 S Ct 366, held that testimony of a professor of mechanical engineering was properly excluded where he sought to give his opinion as to the speed of the plaintiff's bus, based solely on the evidence (which included skid marks) he had heard and had seen presented at the trial, and where the hypothetical question put to him failed to include the fact that the plaintiff's bus had pushed the defendant's truck 110 feet sideways after the impact.

Stating that a qualified expert may, upon the laying of a proper foundation, give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skidmarks shown in the evidence, the court in *Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686, nevertheless held that the trial court had not abused its discretion in refusing to allow the plaintiff's expert witness, a professor of mechanical engineering, to testify as to the speed of the defendant's truck before impact, or the speed of the plaintiff's vehicle and the defendant's vehicle at the moment of impact, where the hypothetical question addressed to the witness failed to state sufficient facts on which he could base his opinion. In affirming a judgment for the defendant, the court recognized that the witness was qualified as an expert, but said that there was considerable speculation concerning the facts on which his opinion as to speed was based. The court pointed out that the stopping distances of the vehicles after the accident were merely estimates, that the highway patrolman had estimated the distance that the plaintiff's pickup traveled after the accident, assuming a point of impact, and that the hypothetical question assumed that nothing had happened in the collision, other than the impact itself, to affect the distance the vehicles traveled after the impact. The court also pointed out that there was no testimony as to the coefficient of friction to be used by the witness, or any data as to how it was obtained, that there was no evidence of the tire pressure of any of the tires on the vehicles, or evidence of the depth or intensity of the skid mark, or of the temperature of the surface of the highway, or of the effect of a recently dragged surface with loose gravel in the center. The court also said that the coefficient to be used would depend considerably upon the type and condition of the vehicles involved and the exact condition of the surface of the highway where the collision occurred, and although the witness testified that he had performed experiments or had seen experiments performed on a like surface and knew the coefficient to be used, there was no testimony that he had seen experiments involving a pickup and a truck, nor was there any evidence from which it could be ascertained that the experiments he had performed or witnessed had been performed on a similar surface.

In *Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236, an action for wrongful death of a guest in the defendant Fischer's automobile, which collided at an intersection with an automobile owned by the codefendant Peterson, the court said that the trial court erred in permitting a professor of engineering mechanics to state his opinion as to the speed of the defendant Peterson's automobile, including the impact, and that his testimony should have been confined to speed based upon skid marks only. The trial court had permitted the witness to testify, over objection, that the defendant's automobile was traveling at not less than 52 miles per hour before the accident. The witness testified that he had determined a coefficient of friction by experimentation, and that upon the basis of the skid marks made by the defendant's automobile prior to the impact, it had a minimum speed of not less than 30 miles per hour if it was assumed that the automobile had stopped at the point of impact without impact. The court said that this evidence was proper, and that a qualified expert, upon laying a proper foundation, may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid marks shown in the evidence. The court pointed out that the witness' determination of the speed of the defendant's automobile, including the impact, involved an application of the law of conservation of energy, the law of conservation of momentum, and the law of recovery. It was essentially a mathematical calculation in which it was necessary to determine a large number of factors and variables. Some were determined by experimentation, and others were determined by inspection of the photographs taken at the scene of the accident. Others were determined by assumption. In holding that the witness' opinion as to the speed of the defendant's automobile should have been based upon skid marks only, the court said that the expert opinion depended upon the resolution of so many variables that it was, in effect, a statement of a possibility, and that under the circumstances in this case the expert testimony was neither necessary nor advisable as an aid to the jury. The court affirmed the defendant Fischer's motion for judgment notwithstanding the verdict, and sustained the codefendant Peterson's motion for a new

trial.

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Trial court did not err in excluding expert testimony of mechanical engineer as to speed of car where engineer testified on assumption that vehicle had left skidmarks of 174 feet, it would have been traveling between 64 and 72 miles per hour, but where investigating officer's testimony indicated that skid marks left by vehicle were approximately 100 feet in length. *Thibodeaux v Hulin Marble & Granite Works, Inc. (1980, La App) 386 So 2d 136.*

Opinion evidence as to speed based on calculations critically based on skid marks was properly excluded, there being no adequate demonstration of proper state of the art. *People v Zimmerman, 385 Mich 417, 189 NW2d 259* (citing annotation).

Testimony of engineer as to speed of vehicle, based on skid marks and in part upon crash damage, lacked sufficient foundation, both as to scientific basis for testimony and as to qualifications of witness. *Stein v Ohlhauser (ND) 211 NW2d 737* (citing annotation).

[\*5] Other witnesses

[\*5a] Opinion as to speed held admissible

Other witnesses have been held qualified as experts and permitted to give opinion testimony as to the speed of a motor vehicle based on skid marks and other physical facts.

Although the testimony of two witnesses was held inadmissible on other grounds, the court in *Linde v Emmick (1936) 16 Cal App 2d 676, 61 P2d 338*, said that the witnesses were sufficiently qualified as experts to testify as to the speed of the defendant's vehicle, as based on skid marks left by the vehicle at the scene of the accident. Each witness testified that he had driven all types of vehicles for over 20 and 30 years respectively, and had tested brakes on all kinds of roads, under all kinds of weather and road conditions.

In an action to recover damages for personal injuries sustained in a collision between the defendant's taxicab and a schoolbus on which the plaintiff, a minor, was riding, the court in *Harmon v Givens (1953) 88 Ga App 629, 77 SE2d 223*, held that a busdriver with 30 years of experience in operating a bus was qualified to give opinion testimony as to the speed of the defendant's taxicab before it "slowed down." The court pointed out that the witness' previous testimony that the taxicab was moving at 30 miles per hour when it struck the schoolbus, based on the appearance of the two vehicles a few minutes afterward and on his experience and observation of automobiles during 30 years of driving a schoolbus, had been admitted without objection. The court added that the opinion objected to, as to the speed of the taxicab before it slowed down, was based upon the speed at the time of the collision. The defendants admitted in their answer that the taxicab had skidded 24 feet before striking the school bus, and had introduced testimony to the same effect. The court said that on the basis of this fact and the witness' experience as a driver, his opinion as to how much the speed of the taxicab was reduced before it struck the schoolbus was admissible.

In affirming the defendant's conviction for manslaughter, the court in *State v Bosch (1952) 125 Mont 566, 242 P2d 477*, held that no error was committed in allowing an automobile mechanic to give opinion testimony as to the speed of the defendant's automobile. The court pointed out that the witness had 10 years' experience as a mechanic, had attended a braking school and a mechanics school, had regularly adjusted brakes on customers' cars, and was familiar with skid marks. The witness testified that he heard the screech of the defendant's automobile at the time of the accident, which took place across the highway from his driveway, that he was at the scene of the wreck about the same time as the highway patrolman arrived, and that in his opinion a car, in order to leave the tracks that this one had, would have to go

at an excessive rate of speed of over 60 miles an hour.

In *Heidner v Germschied* (1919) 41 SD 430, 171 NW 208, two witnesses, who showed themselves to be familiar with the handling of cars, and who had examined the roadbed and the skid marks made by the defendant's automobile, gave their opinion as to the rate of speed at which the defendant's car was going at the time of the accident. The court said that there was no error in the receipt of this evidence where there was evidence of the kind of car, the condition of the roadbed, the place where the brakes were applied, the place where the child was struck, and the length of the skid marks.

In *Monday v Millsaps* (1953) 37 Tenn App 371, 264 SW2d 6, the court, in affirming a judgment for the plaintiffs in consolidated actions for personal injuries sustained in a collision between an automobile and a truck, held that the trial court had not abused its discretion in permitting an expert witness to testify as to the minimum speed of the defendant's truck, as based on skid marks. The court pointed out that the witness had been employed for 4 years at Oak Ridge as chief of the analytical services and assistant to the traffic engineer, where his duties involved a reviewing of all traffic accidents, reports, and the like for that area; that since 1936 he had investigated and reviewed approximately 6,000 cases, and since being at Oak Ridge had investigated 50 accidents and had reviewed approximately 3,500 reported accidents; that in 1944 he completed a course at Northwestern University on traffic accident investigations, where he had as an instructor an eminent authority on traffic accidents; that he had subsequently run numerous tests on skid marks in connection with the U.S. Army while on special duty in the Caribbean and Panama Canal Zone; that in 1950, at the request of the FBI, he taught "Determining Minimum Speed From Skidmarks" to the Knoxville police; and that in 1951, on the invitation of the chief of the Tennessee highway patrol, he gave the same course to the officers of the highway patrol at Nashville. Upon being asked a hypothetical question based upon matters previously testified to by other witnesses, the expert witness testified that from the 100 feet of skid marks made by the dual wheels of the truck, its minimum speed was not less than 48 miles per hour and was probably more.

For additional cases recognizing that a qualified expert witness may give opinion testimony as to the speed of a motor vehicle, based on skid marks and other physical facts, see:

#### GEORGIA

*Hixson v Barrow* (Ga App) 218 SE2d 253

#### KANSAS

*Wegley v Funk* (1968) 201 Kan 719, 443 P2d 323

#### NEBRASKA

*McKinney v Wintersteen* (1932) 122 Neb 679, 241 NW 112

#### TEXAS

*Ball v Martin* (1955, Tex Civ App) 277 SW2d 182

#### WISCONSIN

*Luethe v Schmidt-Gaertner Co. (1920) 170 Wis 590, 176 NW 63*

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Crush data and length of skid marks provided reliable basis for accident reconstruction expert to form opinion on speed of approaching vehicle. 28 U.S.C.A. *Fed. Rules Evid. Rule 702 Ford v. Nationwide Mut. Fire Ins. Co., 62 Fed. Appx. 6 (1st Cir. 2003).*

Testimony from accident reconstructionist was admissible in personal injury case, despite questions as to whether expert's opinion of speed of automobile was based on sufficient facts and data and whether opinion was derived from application of scientific or technical methods that were acceptable in his field, since expert arguably applied principles and methods to sufficient facts and data, his opinion was product of reliable principles and methods, and it was for jury to assess his credibility. *Fed. Rules Evid. Rule 702, 28 U.S.C.A. Melberg v. Plains Marketing, L.P., 332 F. Supp. 2d 1253 (D.N.D. 2004).*

Generally, expert, not eyewitness to collision, can testify as to estimated speed of automobile predicated on distance tires skidded or were dragged along highway before impact, but not predicated on distance tires skidded after impact. Skid marks before impact, point of impact, and damage to vehicles, are three factors upon which expert can validly predicate opinion as to speed. *Maslankowski v Beam, 288 Ala 254, 259 So 2d 804.*

In action to recover damages for injuries sustained as result of accident in which plaintiff's car was hit from behind by defendant's vehicle when plaintiff stopped to make left turn, trial court erred in excluding evidence of severity of impact as indicated by rate of speed, length of tire marks after defendant applied his brakes, and distance between cars after impact since such items of evidence were relevant to probable extent of plaintiff's injuries. *Berndston v Annino (1979) 177 Conn 41, 411 A2d 36.*

Opinion testimony of accident reconstruction expert was admissible in action arising from auto-pedestrian accident, notwithstanding that initial "shadow" skid marks had disappeared from accident site at time of investigation, where opinion corroborated defendant's testimony and was helpful to jury. *Andrews v. Tew By and Through Tew, 512 So. 2d 276 (Fla. Dist. Ct. App. 2d Dist. 1987).*

Admission of expert opinion testimony of qualified accident reconstructionist as to motorist's speed prior to head-on collision with left-turning motorist was warranted, in motorist's personal injury action against left-turning motorist; although expert never investigated collision or visited accident scene, opinion was based upon length of skid marks left by motorist's vehicle before point of collision, motorist's deposition testimony as to her speed before collision, and circumstantial evidence from physical damage to both vehicles. *Cox v. Allen, 567 S.E.2d 363 (Ga. Ct. App. 2002).*

Trial court properly allowed, over objection, admission of testimony of expert witness concerning speed at which defendants' truck was traveling immediately prior to collision with car in which plaintiff was passenger, where expert had personal knowledge of length and character of skid marks left by truck, extent of damage to vehicles, distance by which collision displaced car, and listed weight for each vehicle; where evidence adequately supported expert's testimony; and where jury was accurately charged on weight to be given such testimony. *Mitchell v Reece (1978) 145 Ga App 553, 244 SE2d 99.*

While expert testimony as to speed of automobile, based on length of skidmarks, force of impact, type of vehicle, condition of road, and all surrounding factors, is competent, expert must be shown to have had some special training and experience in this field, and testimony of police officer solely as to what is shown by skid-speed tables would be hearsay. *Ryan v Payne (Ky) 446 SW2d 273.*

Where testimony of eye witnesses as to speed of vehicle was unsatisfactory to defendants, defendants could call expert to testify as to speed, based upon skid mark measurements made by police officer and upon expert's tests of friction coefficient of highway surface, and such testimony would be admissible even though tests were made three years after accident. *Bohach v Thompson (Minn)* 239 NW2d 764.

In action by driver of Jeep against its manufacturer to recover for injuries sustained in accident as to which there were no witnesses and of which plaintiff had no memory, having been found unconscious by side of road near overturned Jeep, trial court did not abuse its discretion in permitting plaintiff's accident reconstruction expert to testify that plaintiff's Jeep began to roll while vehicle was traveling at speed of 25-30 mph, that rollover occurred while Jeep was still on road, and that rollover was result of Jeep's defective design, where witness had carefully examined accident scene and physical evidence still there, where he had spoken with persons present at scene when accident was discovered who pointed out location where plaintiff was found and spot where Jeep came to rest, and also described tire marks left by Jeep on roadway as it swerved out of control, where witness examined appraiser's damage report and photographs taken of vehicle after accident, where he also spoke with subsequent owner of Jeep, who had repaired it, and where, finally, witness was familiar with handling and rollover characteristics of Jeep, based on his review of highway accident statistics, his study of other Jeep accidents, and his observation of numerous rollover tests involving Jeep. *Jeep Corp. v Murray (1985, Nev)* 708 P2d 297, *CCH Prod Liab Rep P 10751*.

Testimony as to speed of vehicles involved and point of impact, provided by expert witness who testified as to results of his experiments, his personal knowledge of handling characteristics of vehicles similar to one of vehicles involved in accident, and his observation of photographs of accident scene and of vehicles involved, had proper foundation where a police officer also testified as to measurements he had taken on scene, including length of skid marks. *Tobeck v United Nuclear-Homestake Partners (App)* 85 NM 431, 512 P2d 1267.

Opinion of expert as to speed of motor vehicle just prior to collision, based not only upon tire marks, but also upon expert's own analysis of scene as shown by photographs, was admissible. *Batt v State, 28 Utah 2d 417, 503 P2d 855*.

[\*5b] Opinion as to speed held inadmissible

The following cases hold that a witness who does not qualify as an expert may not give opinion testimony as to the speed of a motor vehicle, based on skid marks and other physical facts.

In an action for injuries sustained in a collision between the plaintiff's motorcycle and the defendant's automobile, the court in *Nelson v Hedin (1918)* 184 Iowa 657, 169 NW 37, held that a witness who did not see the defendant's car in motion, but observed the marks made in the street by the skidding of the wheels, was not competent to testify as to the rate of speed the car must have been moving at the time. In affirming a judgment for the defendant, the court said that it would be proper for the witness to prove the skid marks, if any, their appearance, length, and other circumstances relating thereto, and the jury could draw all legitimate inferences therefrom as well and as correctly as the witness.

In an action for damages for injuries sustained by a pedestrian when struck by the defendant's automobile, the court in *Ward v Zerzanek (1940)* 227 Iowa 918, 289 NW 443, in upholding the defendant's motion for a directed verdict, held that it was proper to exclude the plaintiff's testimony as to the speed of the defendant's car at the time of the accident, based solely on his observation of skid marks. The court said that although a witness may describe the marks, the inference to be drawn from them is solely within the province of the jury.

In an action for wrongful death of a pedestrian who was allegedly struck by the defendant's motorcar, the court in *Wisniewski v Weinstock (1943)* 130 NJL 58, 31 A2d 401, affd 135 NJL 202, 50 A2d 894, in affirming a judgment for the defendant, held that the trial court had not abused its discretion in excluding a truckdriver's testimony as to the speed of the defendant's automobile, based on an examination of the length of the skid mark made by the vehicle. In support of

its decision, the court, after pointing out that the witness had been a truck chauffeur for 15 years, said that that fact, standing alone, did not qualify him to express an expert opinion concerning the speed of the car, which he had not seen in motion, on the basis of the skid marks that he related to the car. Moreover, the court said, a sufficient foundation had not been laid to qualify him.

In *Everart v Fischer (1914) 75 Or 316, 145 P 33*, different result reached on reh *75 Or 321, 147 P 189*, the court, on rehearing, held that it was error to admit a woman's opinion testimony as to the speed of a motor vehicle based only on skid marks. The court pointed out that skid marks alone are not enough on which to base expert opinion, and that since the condition of the road, the tires, the brakes, the weather, and the weight of the car were all important factors that had not been presented in evidence, the witness' opinion testimony should have been excluded.

In an action to recover damages for personal injuries sustained by a pedestrian who was struck by the defendant's automobile, the court in *Cleasby v Taylor (1934) 176 Wash 251, 28 P2d 795*, in reversing a judgment for the plaintiff, held that it was error to admit the testimony of two witnesses concerning the speed of the defendant's automobile, based on skid marks. The witnesses were shown the skid marks made in the road about a week or 10 days after the accident. The court pointed out that neither of the witnesses had seen the defendant's car in motion, and therefore their conclusion or opinion was mere speculation or guess.

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There being no evidence as to how or where witness became expert in stopping distances of motorcycles, and no evidence that witness had personal knowledge of scientific processes or formulas underlying tables he proposed to use to determine stopping distance and length of skidmarks of vehicle traveling at specified speed, his opinion was correctly excluded. *Flick v James Monfredo, Inc. (DC Pa) 356 F Supp 1143*, affd without op (CA3 Pa) *487 F2d 1394*.

In personal injury action arising out of two-car collision, trial court did not abuse its discretion in granting new trial on grounds of error in admitting opinion of defendant's accident-reconstruction expert as to speed of plaintiff's automobile, where many factual assumptions made by expert in arriving at opinion, including "average acceleration," "average turning radius," expert's own estimation of lengths of deviated skid marks, and, without explanation, certain coefficient of friction of tires on pavement, lacked sufficient evidentiary support. *Richard v Scott (1978) 79 Cal App 3d 57, 144 Cal Rptr 672*.

Since hypothetical question presented to expert witness lacked sufficient predicate, objection to expert's opinion on speed of vehicles involved in accident, opinion being based on skid marks, should have been sustained. *Nat Harrison Associates, Inc. v Byrd (Fla App) 256 So 2d 50*.

Trial court properly excluded proffered testimony of plaintiff's accident reconstruction expert in action arising from fatal collision of truck and automobile, where expert's opinion testimony as to speed was inadmissible because eyewitness testimony as to speed was available. *Colonial Trust & Sav. Bank v Kasmar (1989, 3d Dist) 190 Ill App 3d 967, 138 Ill Dec 57, 546 NE2d 1112*, app den (Ill) *142 Ill Dec 880, 553 NE2d 394*.

Nonexpert opinion as to speed of motor vehicle based on skid marks was not admissible. *Suchy v Moore, 29 Ohio St 2d 99, 58 Ohio Ops 2d 194, 279 NE2d 878*.

Where accident reconstruction expert in action for personal injuries sustained in motorcycle-jeep collision was told to assume, inter alia, that there was skid mark on left rear wheel of jeep eight feet from right-hand side of usable part of road and that skid mark was twelve feet long, and expert testified that by looking at damage to vehicles and by determination of speed and other factors witness concluded that right fork of motorcycle struck jeep first and that motorcycle was traveling in its correct lane and jeep was over center line in motorcycle's lane, court was entitled to

conclude that witness' estimate of speed of vehicles on which his evidence on their point of impact depended lacked reliable factual foundation and was speculative and properly excluded evidence since witness determined speed of vehicles in large part from its examination of damage to motorcycle and description of damage to jeep and did not conduct test to determine energy consumed from damage done. *Kingsbury v Hickey* (1982) 56 Or App 492, 642 P2d 339, petition den 293 Or 146, 651 P2d 143.

In action for injuries sustained by minor pedestrian while crossing street to board school bus, court erred in permitting father of minor, who did not witness accident, to testify as to his opinion of speed of vehicle which struck minor pedestrian based upon skid marks and tests he performed since mere fact that father had driven vehicle in excess of 25 years did not support finding that the was expert on skid marks and estimate of speeds therefrom. *Alves v Jones* (1978, Tenn App) 577 SW2d 204.

Expert opinion testimony regarding defendant's speed was properly excluded where witness refused to give more specific opinion in absence of evidence as to length of skid marks. *Crowe v Prinzing*, 77 Wash 2d 895, 468 P2d 450.

## FOOTNOTES

n1 Earlier annotations at 156 ALR 382 and 23 A.L.R.2d 112 need no longer be consulted on the point annotated.

n2 The term "skid marks," as used in this annotation, includes all kinds of tire marks or marks made by the skidding of the vehicle in question.

n3 Rarely is a witness asked to give his opinion as to the speed of a motor vehicle based solely on skid marks. In most cases skid marks are merely one factor that is considered with other factors such as the size and weight of the vehicles, the extent of damage to the vehicles, the position of the vehicle after impact, and the nature and condition of the highway where the accident occurred. Cases involving the admissibility of opinion as to speed based on these factors are included herein only if skid marks were also considered.

n4 See 70 ALR 540; 94 ALR 1190; 156 ALR 382.

n5 See 93 A.L.R.2d 287.

n6

## ALABAMA

*Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716, infra § 3[a]

## GEORGIA

*Harmon v Givens* (1953) 88 Ga App 629, 77 SE2d 223, infra § 5[a]  
*Central Container Corp. v Westbrook* (1962) 105 Ga App 855, 126 SE2d 264, infra § 3[a]

## KANSAS

*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451, infra § 3[a]

*Johnson v Huskey* (1960) 186 Kan 282, 350 P2d 14, infra § 3[a]

#### MISSOURI

*Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503, infra § 3[a]

#### MONTANA

*Graham v Rolandson* (1967) 150 Mont 270, 435 P2d 263, infra § 3[a]

#### NEBRASKA

*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697, infra § 3[a]

*Nisi v Checker Cab Co.* (1960) 171 Neb 49, 105 NW2d 523, infra § 3[a]

*Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686, infra § 4[b]

*Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236, infra § 4[b]

#### NEW JERSEY

*DiNizio v Burzynski* (1963) 81 NJ Super 267, 195 A2d 470, infra § 4[a]

#### NEW MEXICO

*Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256, infra § 3[a]

#### NEW YORK

*Saladow v Keystone Transp. Co.* (1934) 241 App Div 161, 271 NYS 293, infra § 3[a]

#### NORTH CAROLINA

*Tyndall v Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828, infra § 3[b]

#### OKLAHOMA

*Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849, infra § 3[a]

*Groninger & King, Inc. v T.I.M.E. Freight, Inc.* (1963, Okla) 384 P2d 39, infra § 3[a]

#### SOUTH DAKOTA

*Heidner v Germschied* (1919) 41 SD 430, 171 NW 208, infra § 5[a]

## TENNESSEE

*Monday v Millsaps* (1953) 37 Tenn App 371, 264 SW2d 6, infra § 5[a]  
*Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130, infra § 3[a]

## UTAH

*Taylor v Johnson* (1966) 18 Utah 2d 16, 414 P2d 575, infra § 3[a]

## WISCONSIN

*Luethe v Schmidt-Gaertner Co.* (1920) 170 Wis 590, 176 NW 63, infra § 5[a].

n7

## ARIZONA

*Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932, infra § 4[a]

## CALIFORNIA

*Davis v Ward* (1963) 219 Cal App 2d 144, 32 Cal Rptr 796, infra § 3[a]

## KANSAS

*Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907, infra § 3[a]

## KENTUCKY

*Moore v Wheeler* (1968, Ky) 425 SW2d 541, infra § 3[a]

## MICHIGAN

*Snyder v New York Cent. Transport Co.* (1966) 4 Mich App 38, 143 NW 2d 791, infra § 4[a]

## OKLAHOMA

*Ruther v Tyra* (1952) 207 Okla 112, 247 P2d 964, infra § 3[a]

## TEXAS

*Billingsley v Southern Pacific Co.* (1966, *Tex Civ App*) 400 SW2d 789, error ref n r e, infra §§ 3[a], 4[a].

n8

## CALIFORNIA

*Hoffman v Slocum* (1963) 219 Cal App 2d 100, 32 Cal Rptr 635, infra § 3[a]

## COLORADO

*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229, infra § 3[a]

## FLORIDA

*Myers v Korbly* (1958, *Fla App*) 103 So 2d 215, infra § 3[a]

## KANSAS

*Johnson v Huskey* (1960) 186 Kan 282, 350 P2d 14, infra § 3[a]

## NEBRASKA

*Piechota v Rapp* (1947) 148 Neb 442, 27 NW2d 682, infra § 3[b]

*Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236, infra § 4[b]

## OREGON

*Bailey v Rhodes* (1954) 202 Or 511, 276 P2d 713, infra § 3[b].

n9

## ALABAMA

*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319, infra § 3[b]

## MONTANA

*State v Bosch* (1952) 125 Mont 566, 242 P2d 477, infra §§ 3[a], 5[a]

## UTAH

*State v Lingman (1939) 97 Utah 180, 91 P2d 457, infra § 4[a].*

n10 See *Am. Jur. 2d, Automobiles and Highway Traffic § 984.*

n11 As to reconstruction of an accident, see 10 Am Jur Proof of Facts 137.

n12 *Bailey v Rhodes (1954) 202 Or 511, 276 P2d 713, infra § 3[b].*

n13 §§ 3 and 4, *infra.*

n14 § 3[a], *infra.*

n15 § 4[a], *infra.*

n16 § 5[a], *infra.*

n17 §§ 3[b] and 5[b], *infra.*

n18 §§ 3[b] and 5[b], *infra.*

n19 §§ 3[a] and 4[a], *infra.*

n20 *Jowers v Dauphin (1962) 273 Ala 567, 143 So 2d 167, infra § 3[b]; Rosen v Lawson (1967) 281 Ala 351, 202 So 2d 716, infra § 3[a].*

n21 *Flory v Holtz (1964) 176 Neb 531, 126 NW2d 686, infra § 4[b]; Brugh v Peterson (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236, infra § 4[b].*

n22 §§ 3 and 4, *infra.*

n23 §§ 3-5, *infra.*

n24 § 3[b], *infra.*

n25 § 3[a], *infra.*

n26 § 3[a], *infra.*

n27 As to admissibility of evidence concerning tire tracks on or near a highway, see 23 *A.L.R.2d 112.*

n28 As to use of hypothetical questions, see and 6 Am Jur Proof of Facts 159., 5 Am. Jur. Trials 675

n29 § 4[a], *infra.*

n30 § 4[b], *infra.*

n31 See 9 *A.L.R.3d 976.*

n32 *Hoffman v Slocum (1963) 219 Cal App 2d 100, 32 Cal Rptr 635.* For a collection of decisions as to whether a court will take judicial notice of a driver's reaction time and of stopping distances of motor vehicles traveling at various speeds, see 84 *A.L.R.2d 979.*

n33 *Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470.

n34 Skidmarks and Stopping Distances, 10 Am. Jur. Proof of Facts 661; Reconstruction of Accident., 10 Am. Jur. Proof of Facts 137

n35 See *Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446, infra § 3[b].

n36 *Etheridge v Hooper* (1961) 104 Ga App 227, 121 SE2d 323, infra § 3[a]; *Beynon v Cutberth* (1965, Tex Civ App) 390 SW 2d 352, infra § 3[a].

## JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

### JURISDICTIONAL TABLE OF STATUTES AND CASES

#### SUPREME COURT

*Bonner v Polacari* (1965, CA10 Okla) 350 F2d 493

For federal cases involving state law, see state headings infra

*Haug v Grimm* (1958, CA8 ND) 251 F2d 523

*Ross v Newsome* (1961, CA5 Ga) 289 F2d 209

*White v Zutell* (1959, CA2d NY) 263 F2d 613

#### UNITED STATES CODE

*Fed. Rules Evid. Rule 702*

*Fed. Rules Evid. Rule 702*

#### ALABAMA

*Campbell v Barlow* (1962) 274 Ala 627, 150 So 2d 359

*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319

*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319, infra § 3[b]

*Jackson v Vaughn* (1920) 204 Ala 543, 86 So 469

*Johnson v Battles* (1951) 255 Ala 624, 52 So 2d 702

*Jowers v Dauphin* (1962) 273 Ala 567, 143 So 2d 167

*Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716 (opinion based on skid marks before impact)

*Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716, infra § 3[a]

*Stanley v Hayes* (1964) 276 Ala 532, 165 So 2d 84

#### ARIZONA

*Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932, infra § 4[a]

#### ARKANSAS

*Ransom v Weisharr* (1963) 236 Ark 898, 370 SW2d 598

#### CALIFORNIA

*Davis v Ward* (1963) 219 Cal App 2d 144, 32 Cal Rptr 796

*Davis v Ward* (1963) 219 Cal App 2d 144, 32 Cal Rptr 796, infra § 3[a]  
*Hastings v Serleto* (1943) 61 Cal App 2d 672, 143 P2d 956  
*Hoffman v Slocum* (1963) 219 Cal App 2d 100, 32 Cal Rptr 635  
*Hoffman v Slocum* (1963) 219 Cal App 2d 100, 32 Cal Rptr 635, infra § 3[a]  
*Jobe v Harlod Livestock Com. Co.* (1952) 113 Cal App 2d 269, 247 P2d 951  
*Ungefug v D'Ambrosia* (1967) 250 Cal App 2d 61, 58 Cal Rptr 223

#### COLORADO

*Baldwin v Schipper* (1964) 155 Colo 197, 393 P2d 363  
*Bridges v Lintz* (1959) 140 Colo 582, 346 P2d 571; *Starkey v Bryan* (1968) (Colo) 441 P2d 314  
*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229  
*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229, infra § 3[a]

#### FLORIDA

*Myers v Korbly* (1958, Fla App) 103 So 2d 215  
*Myers v Korbly* (1958, Fla App) 103 So 2d 215, infra § 3[a]  
*Quinn v Millard* (1978, Fla App D3) 358 So 2d 1378

#### GEORGIA

*Central Container Corp. v Westbrook* (1962) 105 Ga App 855, 126 SE2d 264  
*Central Container Corp. v Westbrook* (1962) 105 Ga App 855, 126 SE2d 264, infra § 3[a]  
*Etheridge v Hooper* (1961) 104 Ga App 227, 121 SE2d 323  
*Firestone Tire & Rubber Co. v King* (1978) 145 Ga App 840, 244 SE2d 905  
*Harmon v Givens* (1953) 88 Ga App 629, 77 SE2d 223, infra § 5[a]  
*Hixson v Barrow* (Ga App) 218 SE2d 253  
*Rouse v Fussell* (1962) 106 Ga App 259, 126 SE2d 830

#### ILLINOIS

*Deaver v Hickox* (1967) 81 Ill App 2d 79, 224 NE2d 468  
*Fannon v Morton* (1923) 228 Ill App 415

#### INDIANA

*Pickett v Kolb* (1967, Ind App) 231 NE2d 856, superseded (Ind) 237 NE 2d 105

#### KANSAS

*Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907  
*Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907, infra § 3[a]  
*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451  
*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451, infra § 3[a]  
*Johnson v Huskey* (1960) 186 Kan 282, 350 P2d 14, infra § 3[a]  
*Johnson v Juskey* (1960) 186 Kan 282, 350 P2d 14  
*Wegley v Funk* (1968) 201 Kan 719, 443 P2d 323

#### KENTUCKY

*B-Line Cab Co. v Hampton* (1952, Ky) 247 SW2d 34  
*Moore v Wheeler* (1968, Ky) 425 SW2d 541  
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#### MICHIGAN

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#### MINNESOTA

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#### MISSISSIPPI

*Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470  
*Marsh v Johnson* (1968, Miss) 209 So 2d 906

#### MISSOURI

*Cheek v Weiss* (1981, Mo App) 615 SW2d 453  
*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260  
*Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503  
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#### MONTANA

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*State v Bosch* (1952) 125 Mont 566, 242 P2d 477; *Graham v Rolandson* (1967, 150 Mont 270, 435 P 2d 263

#### NEBRASKA

*Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236, *infra* § 4[b]  
*Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686, *infra* § 4[b]  
*McKinney v Wintersteen* (1932) 122 Neb 679, 241 NW 112  
*Nisi v Checker Cab Co.* (1960) 171 Neb 49, 105 NW 2d 523  
*Nisi v Checker Cab Co.* (1960) 171 Neb 49, 105 NW2d 523, *infra* § 3[a]  
*Piechota v Rapp* (1947) 148 Neb 442, 27 NW2d 682  
*Piechota v Rapp* (1947) 148 Neb 442, 27 NW2d 682, *infra* § 3[b]  
*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697  
*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697, *infra* § 3[a]

#### NEW HAMPSHIRE

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## NEW JERSEY

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## NEW MEXICO

*Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256, infra § 3[a]

## NEW YORK

*Lopez v Yannotti* (1965) 24 App Div 2d 758, 263 NYS2d 523, motion to dismiss app den 17 NY2d 577, 268 NYS2d 334, 215 NE2d 514, app dismd 270 NYS2d 637, 17 NY2d 787, 217 NE2d 683  
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*Saladow v Keystone Transp. Co.* (1934) 241 App Div 161, 271 NYS 293, infra § 3[a]

## NORTH CAROLINA

*Tyndall v Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828  
*Tyndall v Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828, infra § 3[b]

## OHIO

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## OKLAHOMA

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*Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849, infra § 3[a]  
*Groninger & King, Inc. v T. I. M. E. Freight, Inc.* (1963, Okla) 384 P2d 39  
*Groninger & King, Inc. v T.I.M.E. Freight, Inc.* (1963, Okla) 384 P2d 39, infra § 3[a]  
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*Ruther v Tyra* (1952) 207 Okla 112, 247 P2d 964, infra § 3[a]

## OREGON

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*Stacy v Thrower Trucking, Inc.* (1978, Pa Super) 384 A2d 1274

## SOUTH DAKOTA

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## TENNESSEE

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*Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130  
*Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130, infra § 3[a]

## TEXAS

*Austin v Hoffman* (1964, Tex Civ App) 379 SW2d 103  
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*Billingsley v Southern Pacific Co.* (1966, Tex Civ App) 400 SW2d 789, error ref n r e, infra §§ 3[a], 4[a].  
*Rankin v Joe D. Hughes, Inc.* (1942, Tex Civ App) 161 SW2d 883, error ref w o m  
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*Southern Transp. Co. v Adams* (1940, Tex Civ App) 141 SW2d 739, error dismd  
*Stamper v Scholtz* (1930, Tex Civ App) 29 SW2d 883, error ref  
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## UTAH

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*State v Lingman* (1939) 97 Utah 180, 91 P2d 457, infra § 4[a].  
*Taylor v Johnson* (1966) 18 Utah 2d 16, 414 P 2d 575  
*Taylor v Johnson* (1966) 18 Utah 2d 16, 414 P2d 575, infra § 3[a]

## VIRGINIA

*Woodson v Germas* (1958) 200 Va 205, 104 SE2d 739 (apparently recognizing competency of police officers to testify as to speed based on skid marks)

## WASHINGTON

*Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446  
*Knight v Borgan* (1958) 52 Wash 2d 219, 324 P2d 797

## WISCONSIN

*Luethe v Schmidt-Gaertner Co.* (1920) 170 Wis 590, 176 NW 63  
*Luethe v Schmidt-Gaertner Co.* (1920) 170 Wis 590, 176 NW 63, infra § 5[a].

## OTHER REFERENCES

*Am. Jur. 2d, Automobiles and Highway Traffic* § 984

INDEX OF TERMS (Go to beginning)

Accident investigator as expert witness § 3[a]  
 Charts as basis of expert opinion § 2[b]  
 Coefficient of friction, formula for determining speed §§ 2[b], 4[b]  
 Engineers as expert witnesses §§ 2[a], 2[b], 3[a], 4[a]  
 Experiments as basis of opinion § 4[b]  
 Expert witnesses §§ 2[a], 2[b], 3[a], 4[a]  
 Eyewitness, opinion testimony of § 2[a]  
 Guest statute, speed as factor in proving gross negligence § 2[a]  
 Hypothetical questions eliciting expert opinion §§ 2[b], 4[b]  
 Inadmissible opinions §§ 3[b], 4[b], 5[b]  
 Judicial notice of skid charts § 2[b]  
 Law enforcement officers as expert witnesses §§ 2[a], 2[b], 3[a]  
 Laying foundation for opinion testimony §§ 2[b], 3[b]  
 Mechanic as expert witness § 5[a]  
 Mechanical engineer as expert witness §§ 2[b], 4[b]  
 Observation and experience, nonexpert opinion based on § 2[a]  
 Other witnesses, proof of relevant facts by testimony of § 2[b]  
 Police as expert witnesses §§ 2[a], 2[b], 3[a]  
 Province of jury, nonexpert testimony invading § 2[a]  
 Qualifications of expert witnesses § 2[b]  
 Safety engineers as expert witnesses §§ 2[b], 3[a], 4[a]  
 Schoolbus driver as expert witness § 5[a]  
 Scope § 1[a]  
 Summary § 2  
 Traffic engineer as expert witness § 3[a]

#### TABLE OF REFERENCES(Go to beginning)

##### Annotations

See the related annotations listed in § 1[b]

##### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

A.L.R. Quick Index, Skid Marks

A.L.R. Quick Index, Speed

*Am. Jur. 2d, Automobiles and Highway Traffic § 990*

*Am. Jur. 2d, Expert and Opinion Evidence § 157*

Reconstruction of traffic accidents, 9 *Am. Jur. Proof of Facts* 3d 115

Speed, 11 *Am. Jur. Proof of Facts* 1

Skidmarks and Stopping Distances, 10 *Am. Jur. Proof of Facts* 661

Unwitnessed Automobile Accident Cases, 18 *Am. Jur. Trials* 443

Preparing and Using Photographs, 3 *Am. Jur. Trials* 1 § 122

3 *Am. Jur. Pleading and Practice Forms, Automobiles and Highway Traffic, Forms* 821-827

ARTICLE OUTLINE (Go to beginning)

I. Preliminary Matters

§ 1 Introduction

§ 1[a] Scope

§ 1[b] Related matters

§ 2 Background, summary, and comment

§ 2[a] In general

§ 2[b] Practice pointers

II. Opinion testimony of particular witnesses

§ 3 Law enforcement officers

§ 3[a] Opinion as to speed held admissible

§ 3[b] Opinion as to speed held inadmissible

§ 4 Engineers

§ 4[a] Opinion as to speed held admissible

§ 4[b] Opinion as to speed held inadmissible

§ 5 Other witnesses

§ 5[a] Opinion as to speed held admissible

§ 5[b] Opinion as to speed held inadmissible

192 of 195 DOCUMENTS

American Law Reports 3d  
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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Automobiles: Speeding prosecution based on observation from aircraft

A. M. Vann.

*27 A.L.R.3d 1446*

#### JURISDICTIONAL TABLE OF STATUTES AND CASES

#### TABLE OF REFERENCES

#### ARTICLE OUTLINE

#### **ARTICLE:** [\*1] Generally

Diligent search revealed only two reported cases involving prosecution for speeding based on observation from an aircraft. However, because the practice of highway speed detection by means of surveillance from the air was initiated in the United States more than a decade ago,<sup>n1</sup> and has apparently been growing since, it seems quite certain that such litigation will be met with increasing frequency.

Legal issues occurring in other speeding prosecutions may, of course, occur in air observation cases as well. But it would appear that the particular fact of observation from an aircraft may create questions special to the subject matter of this annotation, ranging from due process considerations to technical issues as to the means employed.<sup>n2</sup>

The procedure for determining speed was apparently the same in both reported cases, and in neither case was any question raised as to the reliability or accuracy of the means employed, the only mechanical device involved, aside from the aircraft itself, which merely afforded a vantage for observation, being a stopwatch,<sup>n3</sup> used for timing the passage of the ground vehicle over a measured distance marked by painted lines on the highway.<sup>n4</sup>

One case raised an issue as to whether a posted sign warning of the imminence of a speed-timing arrangement<sup>n5</sup> was sufficient to comply with a statute. In the other, consideration was given to the legality of the defendant's arrest on the basis of information transmitted to the arresting officer by observers in the sky.

In *State v Cook* (1965) 194 Kan 495, 399 P2d 835, an appeal by the state from an order discharging the defendant on the ground that his arrest for speeding was illegal, the arrest having been effected by an officer on the ground on the basis of information radioed to him by two officers in an airplane, who checked the speed of the defendant's automobile by means of a stopwatch against previously established highway markings, and followed the automobile, keeping it in sight until they observed the stopping of it by the arresting officer stationed 3 1/2 miles distant, it was the defendant's position that no offense had been committed in the officers' presence, and further, that any arrest which resulted from the filing of the information was void because the arresting officer had verified the information without having personal

knowledge of the facts alleged. The court, however, saying that a crime is committed in the presence of an officer when facts and circumstances occurring within his observation, in connection with what may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case, and that for the purpose of determining the justification of an arrest effected by one member of a three-officer team from information conveyed to him by the others, the knowledge of one was the knowledge of all, held in sustaining the appeal, that the defendant was deemed to have committed the offense of speeding in the presence of the arresting officer and that the arrest was legal.

In *State v Peters* (1965) 9 oapp2d 343, 224 NE2d 916, it was contended by the defendant that the testimony of police officers who had clocked the defendant's automobile for a measured distance of one-quarter mile, using a stopwatch in an airplane, was improperly admitted in that the procedure employed by the officers failed to comply with a statute requiring the posting of a warning sign not less than 750 feet nor more than 1,500 feet in advance of any mechanical or electrical timing device or any component part of such device for the determination of the speed of a motor vehicle over a measured distance of a highway, the warning sign in this instance having been located 1,056 feet in advance of the first line painted on the highway but more than 1,500 feet from the stopwatch in the plane at the time when the defendant's vehicle traversed the second line. The court, however, finding that the purpose of the statute was to apprise the unwary motorist of his entry into a zone where speed was to be determined by radar or some other mechanical or electrical timing device, interpreted the provision as requiring the warning to be within the given distance of any one rather than every component part of the device, and held that, the procedure followed by the officers having been consistent with the statute's directive, their testimony was admissible, and the court affirmed a judgment of conviction.

Possession or operation of device for detecting or avoiding traffic radar as criminal offense, 17 A.L.R.4th 1334

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, 47 A.L.R.3d 822

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 A.L.R.2d 218

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 73 A.L.R.2d 1025

Proof, by means of radar or photographic devices, of violation of speed regulations, 49 A.L.R.2d 469

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, 21 A.L.R.2d 1200

Expert or opinion testimony as to speed of vehicle by one who had no view, or only momentary view, of vehicle at time of accident, 156 A.L.R. 382

Evaluation of the measurement of motor vehicle ground speed from aircraft. 52 J Crim L, C & PS 213 (1961)

Speed traps and the use of airplanes. 14 *Hastings LJ* 427

<>

In prosecution for speeding, municipal court erred in dismissing speeding charge against motorist whose speed had been measured by highway patrol officer from airplane, on basis of findings that the evidence had been obtained by means of "speed trap," where officer had verified speed by use of measured markers placed on highway by state transportation department, and had paced motorist with airplane to determine speed; motorist's speed was not calculated by use of any

"particular section" of highway or by computing time it took vehicle to travel a "known distance" and method used therefore did not constitute a speed trap as defined in statute. *People v Darby* (1979, 4th Dist) 95 Cal App 3d 707, 157 Cal Rptr 330.

Evidence of speed at which defendant charged with speeding violation was clocked with stopwatches by two police officers engaged in air traffic control was admissible where both watches tested properly two weeks after arrest and had been calibrated for accuracy six weeks before defendant's arrest; evidence was sufficient to convict defendant of speeding violation where state presented evidence of training and experience of two officers who used stopwatches in airplane over speed zone, and there was sufficient evidence of accuracy of stopwatches to create issue of fact for jury, notwithstanding defendant's testimony that she did not exceed speed limit. *People v Wilson* (1981) 97 Ill App 3d 505, 53 Ill Dec 80, 423 NE2d 272.

Trial court properly admitted evidence regarding distance measurement and speed where officer was monitoring traffic from aircraft, using stop watch to time motor vehicles as they passed through series of five hash marks painted on highway; although officer did not take measurements of hash mark zones until three months after citation was issued to defendant, witnesses testified that marks had not been moved or changed in interim, and tape measure was obtained from Department of Transportation, whose employees originally measured zones and painted hash marks on highway. *State v Frandsen* (1986, Minn App) 391 NW2d 59.

Evidence in speeding prosecution was sufficient to establish speed of defendant's vehicle as clocked by police officer using stop watch in airplane where officer had been trained and certified for clocking ground vehicles from aircraft, stop watch was tested one month prior to and one day after speeding violation and was found to be accurate and was tested on machine which was accepted method for determining accuracy of watches; although officer in aircraft was traveling at altitude of 1,800 feet at time he observed defendant's automobile, offense was committed in presence of that officer on ground who stopped vehicle at direction of officer in airplane. *State v Chambers* (1980) 207 Neb 611, 299 NW2d 780.

Truck driver was properly convicted of speeding, where officer testified that he observed truck from aircraft, activated stopwatch as vehicle crossed calibration line on pavement, stopped watch at second line, and calculated speed from time and known distance. *Commonwealth v Baslick* (1989) 389 Pa Super 413, 567 A2d 671.

## FOOTNOTES

n1 State police in Indiana began using air observation as a means of detecting speeding highway vehicles in April, 1956, as reported in 52 J Crim L, C & PS 213 (1961).

n2 While noting that of over 3,000 arrests effected over a 1-year period in Indiana as a result of the air observation method of detecting highway speeders, convictions averaged more than 99 percent, the author of the article in 52 J Crim L, C & PS 213 (1961), observes in a footnote that acquittals in some cases were based on the courts' uncertainty as to the element of error inherent in the method.

n3 As early as 1906, the stopwatch was given some judicial recognition as a reliable device for measuring a time interval. See the English case of *Plancq v Marks* (1906, Eng) 94 LT 577, 22 Times L 432 (Div Ct), in which a police officer's testimony as to the time in which the defendant's car traversed a measured distance, as registered on the officer's stopwatch, was found by the court to be evidence of fact rather than of opinion and sufficient to support the conclusion that the defendant was speeding, under a statute which provided that no one should be convicted of speeding merely upon the opinion of one witness as to the rate of speed.

n4 For a description of experiments designed to test the accuracy of ground speed determinations made

from the air in such manner, see the article in 52 J Crim L, C & PS 213 (1961).

n5 A discussion of the question whether such arrangement for the detection of speed of motor vehicles by means of air observation constitutes a "speedtrap" within the meaning of a California statute prohibiting the use of a speedtrap to obtain evidence as to the speed of any vehicle for the purpose of an arrest or prosecution under the California Vehicle Code is found in *14 Hastings LJ 427*.

JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

JURISDICTIONAL TABLE OF STATUTES AND CASES

OTHER REFERENCES

*Am. Jur. 2d, Automobiles and Highway Traffic § 326*

TABLE OF REFERENCES(Go to beginning)

Annotations

See the related annotations listed in § 1

REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

A.L.R. Quick Index, Automobiles and Highway Traffic

*Am. Jur. 2d, Automobiles and Highway Traffic § 326*

Speed, 11 Am. Jur. Proof of Facts 1

ARTICLE OUTLINE (Go to beginning)

§ 1 Generally

193 of 195 DOCUMENTS

American Law Reports 3d  
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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Right of accused in state courts to inspection or disclosure of evidence in possession of  
prosecution

C. P. Jhong.

*7 A.L.R.3d 8*

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] Introduction

[\*1] Prefatory matters

[\*1a] Scope

The present annotation<sup>1</sup> discusses cases<sup>2</sup> dealing with the question whether or under what circumstances a person accused of crime in a state court<sup>3</sup> is entitled to inspection or disclosure of evidence in the possession or under the control of the prosecution.

The term "evidence" as used herein refers to any statements, documents, papers, records, books, articles, or tangible objects, except for grand jury minutes, whether or not such items are admissible in evidence at the trial. Cases dealing with the accused's right to disclosure of the identity of an informant<sup>4</sup> or other nonevidentiary information relevant to the case<sup>5</sup> are not within the scope of the present discussion. Also beyond the scope of the annotation are cases dealing with the accused's right to examine a witness and take a deposition,<sup>6</sup> or his right to have the complaining witness examined by medical experts,<sup>7</sup> or his right to visit the scene of the alleged crime.<sup>8</sup>

The annotation includes all cases dealing with the production of evidence which appeared or was shown to be in the possession of the prosecuting attorney or his representatives or other law enforcement officers subject to his control. Also referred to herein are a number of cases wherein an accused requested the production of evidence allegedly, but not actually, in the possession of the prosecution and the court considered questions as to the accused's burden of showing that the evidence sought by him was actually in the possession of the prosecution. On the other hand, clearly beyond the scope of the annotation are cases dealing with the accused's right to production of private memoranda, documents, or books in the possession of an ordinary or expert prosecution witness or any other third party,<sup>9</sup> and

cases dealing with the accused's right to disclosure of documents or other evidence in the possession of a federal law enforcement agency but not released to the prosecution.n10

The annotation discusses the accused's right to inspection or disclosure of evidence at any stage of a criminal prosecution. It should be noted, however, that since the discussion is limited to the right of the defense, as distinguished from the right of a particular defense witness as such, to inspect evidence, the treatment herein does not purport to include cases dealing with the distinct question whether before a writing is to be used by the prosecution at trial in its cross-examination of a defense witness (including the defendant as a witness) such writing must be shown to the witness for his inspection.n11

The discussion here covers all questions relating to the accused's right to inspection or disclosure of evidence, except those relating to the defendant's right to inspection of a statement of a prosecution witness for purposes of cross-examination or impeachment.n12 Beyond the scope of the present discussion are such distinct questions as whether an accused has the right to have returned evidence illegally seized by the prosecution, whether a trial court's error in denying an inspection or disclosure of evidence is ground for the reversal of a judgment of conviction because it is prejudicial to the defendant, and what is the proper writ to compel or to prevent an inspection or disclosure of evidence in the possession of the prosecution.n13

[\*1b] Related mattersn14

Failure of State Prosecutor to Disclose Existence of Plea Bargain or Other Deals with Witness as Violating Due Process, *12 A.L.R.6th 267*

Failure of State Prosecutor to Disclose Pretrial Statement Made by Crime Victim as Violating Due Process, *102 A.L.R.5th 327*

Failure of State Prosecutor to Disclose Exculpatory Medical Reports and Tests as Violating Due Process, *101 A.L.R.5th 187*

Failure of State Prosecutor to Disclose Exculpatory Ballistic Evidence as Violating Due Process, *95 A.L.R.5th 611*

Failure of State Prosecutor to Disclose Fingerprint Evidence as Violating Due Process, *94 A.L.R.5th 393*

Failure of State Prosecutor to Disclose Exculpatory Photographic Evidence as Violating Due Process, *93 A.L.R.5th 527*

Duty of prosecutor to present exculpatory evidence to state grand jury, *49 A.L.R.5th 639*

Homicide: cremation of victim's body as violation of accused's rights, *70 A.L.R.4th 1091*

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, *66 A.L.R.4th 588*

What is accused's "statement" subject to state court criminal discovery, *57 A.L.R.4th 827*

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, *50 A.L.R.4th 1049*

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirement as to statements made by defendants or other nonexpert witnesses -- modern cases, *33 A.L.R.4th 301*

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution

-- modern cases, *27 A.L.R.4th 1188*

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like -- modern cases, *27 A.L.R.4th 105*

Right of prosecution to discovery of case-related notes, statements, and reports -- state cases, *23 A.L.R.4th 799*

Accused's right to production of composite drawing of suspect, *13 A.L.R.4th 1360*

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, *10 A.L.R.4th 1092*

Accused's right to depose prospective witnesses before trial in state court, *2 A.L.R.4th 704*

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, *2 A.L.R.4th 500*

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, *95 A.L.R.3d 832*

Interference by prosecution with defense counsel's pretrial interrogation of witnesses, *90 A.L.R.3d 1231*

Propriety and prejudicial effect of prosecuting attorney's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present, *90 A.L.R.3d 646*

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, *86 A.L.R.3d 1170*

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, *86 A.L.R.3d 571*

Physician-patient privilege as applied to physician's testimony concerning wound required to be reported to public authority, *85 A.L.R.3d 1196*

Validity, construction, and application of statutory provisions relating to public access to police records, *82 A.L.R.3d 19*

Prosecuting attorney as a witness in criminal case, *54 A.L.R.3d 100*

Validity and construction of statute requiring defendant in criminal case to disclose matter as to alibi defense, *45 A.L.R.3d 958*

Admissibility in evidence of composite picture or sketch produced by police to identify offender, *42 A.L.R.3d 1217*

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction, *34 A.L.R.3d 16*

Necessity and sufficiency of showing in a criminal prosecution under a "hit-and-run" statute accused's knowledge of accident, injury, or damage, *23 A.L.R.3d 497*

Accused's right to inspection of minutes of state grand jury, *20 A.L.R.3d 7*

Accused's right to interview witness held in public custody, *14 A.L.R.3d 652*

Discovery and inspection of prosecution evidence under *Federal Rule of Criminal Procedure 16*, 5 A.L.R.3d 819

Statements and reports of government witnesses producible in federal criminal case under Jencks Act (18 U.S.C.A. § 3500), 5 A.L.R.3d 763

Removal of all or part of operations to new location as unfair labor practice, 5 A.L.R.3d 733

Right of prosecution to pretrial discovery, inspection, and disclosure, 96 A.L.R.2d 1224

Propriety of discovery interrogatories calling for continuing answers, 88 A.L.R.2d 657

Pretrial deposition-discovery of opinions of opponent's experts, 86 A.L.R.2d 138

Suppression of evidence by prosecution in criminal case as vitiating conviction, 33 A.L.R.2d 1421

Right of accused to bill of particulars, 5 A.L.R.2d 444

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officer or employees, 165 A.L.R. 1302

Proper Procedure for Determining Whether Alleged Statement or Report of Government Witness Should Be Produced on Accused's Demand, Under Jencks Act (18 U.S.C.A. § 3500) and *Fed. R. Crim. P. 26.2*, 9 A.L.R. Fed. 2d 193

Statements of persons other than defendant as subject to discovery by defendant under *Rule 16 of Federal Rules of Criminal Procedure*, 115 A.L.R. Fed. 573

Defendant's confessions and statements, other than oral statements within Rule 16(a)(1)(A), as subject to discovery by defendant under *Rule 16 of Federal Rules of Criminal Procedure*, 111 A.L.R. Fed. 197

When is dismissal of indictment appropriate remedy for misconduct of government official, 57 A.L.R. Fed. 824

Accused's right to depose prospective witnesses before trial in federal court under *Rule 15(a) of Federal Rules of Criminal Procedure*, 43 A.L.R. Fed. 865

What is "oral statement" of accused subject to disclosure by government under *Rule 16(a)(1)(A), Federal Rules of Criminal Procedure*, 39 A.L.R. Fed. 432

Accused's right to bill of particulars in criminal prosecution for evasion of federal income taxes, 25 A.L.R. Fed. 8

Accused's right to inspection of minutes of federal grand jury, 3 A.L.R. Fed. 29

Proper procedure for determining whether alleged statement of government witness should be produced on accused's demand under Jencks Act (18 USC § 3500), 1 A.L.R. Fed. 252

*Restatement (Third) of the Law Governing Lawyers* § 88 (2000), Ordinary Work Product.

"Pre-trial inspection of prosecution's evidence by defendant." 53 *Dickinson L Rev* 301

Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure." 69 *Yale LJ* 1149

Langrock, Vermont's Experiment in Criminal Discovery 53 American Bar Asso Journal 733, August 1967

Louisell, "Criminal Discovery: Dilemma Real or Apparent." 49 Cal L Rev 56

Nakell, Criminal Discovery for the Defense and the Prosecution -- The Developing Constitutional Considerations 50 North Carolina L Rev 437, April 1972

Pretrial disclosure in criminal cases. 60 Yale LJ 626

Robert L. Fletcher, "Pre-trial discovery in state criminal cases." 12 Stanford L Rev 293

Traynor, "Ground Lost and Found in Criminal Discovery." 39 NYU L Rev 228.

[\*2] Background and comment

[\*2a] Summary

Traditionally, a person accused of crime has been held not, as a matter of right, entitled to inspection or disclosure of evidence in the possession of the prosecution.<sup>n15</sup> In a number of recent cases, however, this general rule has been relaxed.<sup>n16</sup> And, moreover, practically all the cases recognize that a trial court has the discretionary power to permit inspection of evidence in the possession of the prosecution,<sup>n17</sup> at least where the requested evidence is relevant and material to the case<sup>n18</sup> or is admissible in evidence<sup>n19</sup> or is favorable to the accused,<sup>n20</sup> or where inspection of the requested evidence by the accused is necessary to avoid delay in trial or to protect his basic constitutional rights or disclosure thereof is otherwise necessary for a fair trial or in the interest of justice.<sup>n21</sup> While the refusal to permit an accused to inspect evidence in the possession of the prosecution does not ordinarily violate his constitutional right to due process of law,<sup>n22</sup> it is well established that suppression by the prosecution of material evidence exculpatory of the accused is a violation of due process, irrespective of the good or bad faith of the prosecution.<sup>n23</sup>

While the issue whether in a *proper* case an accused may be permitted to inspect evidence in the possession of the prosecution has generally been resolved by the courts in favor of the accused, the question still remains largely unsettled as to when a "proper" case is presented. A review of the decisions, particularly in the light of the kind or type of evidence involved, reveals that in determining whether an inspection or disclosure should be allowed in a particular case, the attitude taken by the court as to the limit of discovery to be allowed to an accused has been as important a factor as the necessity of the accused for the requested inspection or disclosure, and that, although dealing with more or less analogous factual situations, the courts have frequently reached different conclusions.<sup>n24</sup> The only generalizations that may be made as to the trend of the decisions in relation to the discovery and inspection of different kinds or types of evidence are that most courts are reluctant to permit an accused to inspect statements made by other persons<sup>n25</sup> or reports made by police or investigating officers in connection with the case,<sup>n26</sup> although many courts have shown some liberality as to the discovery of written materials or tangible objects which were used or otherwise directly involved in the commission of the charged offense.<sup>n27</sup> As to the producibility of the so-called "work product" of the prosecuting attorney, although all the cases agree that such work product is not subject to inspection by the defense, they are not altogether clear as to what constitutes the "work product" of the prosecution.<sup>n28</sup>

Where there is a statute or rule of criminal procedure expressly providing for discovery of the prosecution's evidence, the accused's right to discovery is of course governed by such statute or rule at least as to matters provided therein.<sup>n29</sup> As to whether such a statute or rule of criminal procedure excludes the right to inspection or disclosure of matters not expressly provided for therein, the views are divided. The view prevailing in Arizona<sup>n30</sup> and Maryland<sup>n31</sup> is that the accused's right to discovery of the prosecution's evidence is not limited to matters provided for in its rules of criminal procedure, but that he may be allowed to inspect matters not provided therein under the inherent power of the trial court, while the view adopted by the Delaware courts<sup>n32</sup> is that the accused's right to inspection of the prosecution's evidence

is limited to matters which are discoverable under the relevant rule of criminal procedure. The civil statute or the code of civil procedure providing for discovery and inspection of evidence in the possession of an adverse party has generally been held not applicable to criminal cases,<sup>n33</sup> although a contrary conclusion has been reached in a few cases.<sup>n34</sup>

In order to be allowed an inspection or disclosure of evidence in possession of the prosecution, ordinarily<sup>n35</sup> the accused must properly assert and pursue his right to such evidence by making a timely request for production thereof<sup>n36</sup> in the proper court<sup>n37</sup> and by taking other necessary steps as required under the circumstances.<sup>n38</sup> It is his burden to show facts justifying inspection or sufficient reason why inspection should be allowed.<sup>n39</sup> The production of the prosecution's evidence is not allowed to the accused for merely exploratory purposes or for the purpose of prying into the prosecution's preparation for trial.<sup>n40</sup>

The rules governing the accused's right to inspection or disclosure of evidence seem to be generally the same regardless of at what stage of a criminal prosecution the inspection or disclosure is requested.<sup>n41</sup> In some cases, however, the fact that the accused's request for inspection was made during the trial while the evidence in question was in court has been given particular consideration in granting an inspection.<sup>n42</sup> And it is well established that the accused is entitled to inspection of a writing or an object in the possession of the prosecution when such item is offered in evidence at the trial of the case.<sup>n43</sup> On the other hand, the decisions are not altogether clear as to whether and under what circumstances the accused is entitled to inspection of a writing in the possession of the prosecution where the writing itself is not offered in evidence but a witness has testified to its contents or in relation thereto, or where the writing is marked for identification in court, but not offered in evidence, or where the writing is used by the prosecuting attorney during the trial in his examination of the accused or a witness.<sup>n44</sup>

[\*2b] Practice pointers

While the case law at the present time (1966) would support the statement that in criminal cases the accused has, if any, only a very limited right to discovery, there appears to be a definite trend toward a more liberal rule, as the result of court decisions in some states like California, and the enactment of discovery statutes or rules in other jurisdictions. One may hazard a guess that, other things being equal, this trend toward liberality will continue, primarily as a result of the "bleeding over" into the criminal area of the attitudes which have developed in connection with the liberal civil discovery rules now adopted in many jurisdictions.<sup>n45</sup> Accordingly, defense attorneys feeling the desire or need for discovery should not be too discouraged by the existing state of the case law nor should a prosecutor rely too heavily on the "established" rules, since a false and dangerous sense of security may result.

Defense counsel seeking to establish or expand the right of the accused to discovery will want to argue in concepts of fundamental fairness: that the aim of the trial is full disclosure of the truth, not merely a conviction, that the state, with all its resources, is in a much better position than the accused to investigate and present its case, especially if the accused is made to "fight in the dark,"<sup>n46</sup> and that a prosecutor who has properly done his duty has nothing to fear from full disclosure, since he, as well as the defense attorney, should be as interested in acquitting the innocent as in convicting the guilty. It may also be argued that the arguments against full disclosure are demonstrably mere bugaboos as shown by the fact that the adversary system has not only survived but flourished in the civil area notwithstanding the widespread development of discovery procedures there.

The prosecutor seeking to sustain the established restrictive discovery rules, on the other hand, should argue that it would be unfair to require disclosure by the prosecution, in view of the fact that the accused is protected against similar disclosure by the privilege against self-incrimination and also that to force disclosure of the prosecution's case in advance of trial would enable the accused to suborn or intimidate witnesses or otherwise fake or destroy essential evidence to meet the prosecution's case. And it may also be argued that prosecutors, if faced with the duty to make full disclosure, may forgo prosecution in many cases in order to avoid tipping the hand of the police or enforcement agencies in the continuing war against organized crime, since many prosecutions represent merely a skirmish in this campaign.<sup>n47</sup>

Where discovery is sought, the defense counsel will have a much better chance of success in most jurisdictions if he can present or argue his motion in such terms as to show that the matter as to which discovery is sought is closely involved in the crime, that it would in fact be difficult or impossible to prepare a defense without the information in question, and that it is not otherwise available to accused and is available to or in the possession of the prosecution. The more definite the motion in identifying the matter sought, the more likely it is to be successful, since there is an observable tendency to dispose of indefinite requests, no matter how meritorious otherwise, with the pejorative "fishing expedition." Clearly, the courts are more likely to entertain a motion for discovery if it is shown that the information or evidence sought is relevant to the charge and would be admissible in evidence for or against the accused. The best case of all for discovery is made where it appears that the prosecution is withholding matter that would be exculpatory of the accused.

The prosecutor, desiring to resist discovery will, where such a course is otherwise proper, try to present the contentions that the information sought is not relevant or essential to the defense, that its disclosure would unfairly hamper the prosecution in this or other cases, and that it is or was available to the accused if proper diligence had been exercised. Assuming a liberal attitude on the part of the court toward discovery, the best course for the prosecution would appear to be to identify the information sought as its "work product" rather than as "evidence."

Aside from attempts to obtain information as to the prosecution's case and evidence by a motion for discovery, defense counsel should not ignore more traditional methods of compelling disclosure. It may be that a motion attacking the indictment or information, or seeking a bill of particulars, may effectively bring out the information the accused desires. Similarly, the possibilities of obtaining information from the grand jury proceedings or from the report of the preliminary hearing should not be ignored. And a pretrial conference, properly conducted, may also afford opportunities for obtaining information.<sup>n48</sup>

◇

Mandamus did not lie to obtain production of report prepared by narcotics officers, for purpose of use in cross-examination of such officer at preliminary hearing, on grounds that object of preliminary hearing would be defeated if defendants aggrieved by adverse rulings of justices of peace were allowed to look to superior court for supervision over such rulings prior to final determination of hearing. *State ex rel. Corbin v Superior Court of Maricopa County*, 100 Ariz 104, 412 P2d 45.

Chain-of-custody problems proofing continuous possession of "known print" allegedly taken from defendant and marked with his name need not be disclosed by prosecution to defense prior to trial, and defendant suffered no prejudice when prosecutor surprised defense at trial by moving for production of a new set of defendant's fingerprints in effort to overcome failure to establish chain of custody for original prints. *People v Davis (1982) 106 Ill App 3d 260, 62 Ill Dec 40, 435 NE2d 838*.

[\*II] In general

[\*3] Rule that ordinarily accused has no right to inspection or disclosure

The following cases support, either explicitly or by necessary implication, the general rule that in the absence of a statute or court rule to the contrary, a person accused of crime is not, as a matter of right, entitled to inspection or disclosure of evidence in the possession of the prosecution.<sup>n49</sup>

ALABAMA

See *Spicer v State* (1914) 188 Ala 9, 65 So 972, *infra* § 27[a]

#### ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887, *infra* § 25[a]  
*Burke v Superior Court of Pima County*, 3 Ariz App 576, 416 P2d 997

#### ARKANSAS

*Edens v State* (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551, *infra* § 16[a]  
*Edens v State* (1963) 235 Ark 996, 363 SW2d 923, *infra*

#### COLORADO

See also *Massie v People* (1927) 82 Colo 205, 258 P 226, *infra* § 26.  
*Silliman v People* (1945) 114 Colo 130, 162 P2d 793, *infra* § 9[c], footnote § 12  
*Rosier v People* (1952) 126 Colo 82, 247 P2d 448, *infra* § 7  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287, *infra*  
*Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587, *infra*  
*Roybal v People* (Colo) 493 P2d 9

#### FLORIDA

*Padgett v State* (1912) 64 Fla 389, 59 So 946, *infra*  
*State v McCall* (Fla App) 186 So 2d 324

#### GEORGIA

*Walker v State* (1959) 215 Ga 128, 109 SE2d 748, 927, *infra*  
*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, *infra* (before trial)  
*Williams v State*, 222 Ga 208, 149 SE2d 449, cert den 385 US 887, 17 L Ed 2d 115, 87 S Ct 184  
*Jones v State*, 224 Ga 283, 161 SE2d 302, vacated on other grounds 393 US 21, 21 L Ed 2d 23, 89 S Ct 51  
*Bryan v State*, 224 Ga 389, 162 SE2d 349  
*Clark v State*, 230 Ga 880, 199 SE2d 786  
*Street v State*, 237 Ga 307, 227 SE2d 750  
*Phillips v State* (1978) 146 Ga App 423, 246 SE2d 438  
*Tippins v State* (1978) 146 Ga App 448, 246 SE2d 458  
*Daniel v State*, 118 Ga App 370, 163 SE2d 863  
*Whitlock v State*, 124 Ga App 599, 185 SE2d 90, *affd* in part and *revd* in part on other grounds 230 Ga 700, 198 SE2d 865  
*Rautenstrauch v State*, 129 Ga App 381, 199 SE2d 613  
*David v State*, 137 Ga App 425, 224 SE2d 83  
*Quick v State*, 139 Ga App 440, 228 SE2d 592  
*Lundy v State*, 139 Ga App 536, 228 SE2d 717

## ILLINOIS

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108, infra § 19  
*People v Hoagland*, 83 Ill App 2d 231, 227 NE2d 111

## INDIANA

*Lander v State* (1958) 238 Ind 680, 154 NE2d 507, infra § 25[d]

## KANSAS

*State v Oswald*, 197 Kan 251, 417 P2d 261

## KENTUCKY

*Wendling v Commonwealth* (1911) 143 Ky 587, 137 SW 205, infra  
*Kinder v Commonwealth* (1955, Ky) 279 SW2d 782, infra (before trial)

## LOUISIANA

*State v Bankston* (1928) 165 La 1082, 116 So 565, infra § 16[b]  
*State v Lee* (1932) 173 La 966, 139 So 302, infra § 16[a]  
*State v Williams* (1947) 211 La 782, 30 So 2d 834, infra (before trial)  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411 (before trial)  
*State v Matassa* (1952) 222 La 363, 62 So 2d 609 (before trial)  
*State v Shourds* (1954) 224 La 955, 71 So 2d 340 (before trial)  
*State v Paillet* (1964) 246 La 483, 165 So 2d 294, infra § 13[d]  
*State v Hunter*, 250 La 295, 195 So 2d 273  
*State v Crook*, 253 La 961, 221 So 2d 473  
*State v Anderson*, 254 La 1107, 229 So 2d 329  
*State v Redden*, 255 La 291, 230 So 2d 817  
*State v Fink*, 255 La 385, 231 So 2d 360  
*State v Nails*, 255 La 1070, 234 So 2d 184  
*State v Square*, 257 La 743, 244 So 2d 200  
*State v Coney*, 258 La 369, 246 So 2d 793  
*State v Burkhalter* 260 La 27, 255 So 2d 62  
*State v Rose (La)* 271 So 2d 863  
*State v Baker (La)* 288 So 2d 52  
*State v Brown (La)* 288 So 2d 339  
*State v Browning (La)* 290 So 2d 322  
*State v Herron (La)* 301 So 2d 312  
*State v Frierson (La)* 302 So 2d 605  
*State v Breston (La)* 304 So 2d 313

*State v Nelson (La)* 306 So 2d 745  
*State v Lewis (La)* 315 So 2d 626  
*State v Johnson (La)* 324 So 2d 349  
*State v Sims (La)* 329 So 2d 722  
*State v Huizar (La)* 332 So 2d 449  
*State v Jones (La)* 332 So 2d 466  
*State v Hills (La)* 337 So 2d 1155  
*State v Green (La)* 275 So 2d 184

#### MARYLAND

*Tisdale v State (1979, Md App)* 396 A2d 289

#### MASSACHUSETTS

*Commonwealth v Jordan (1911)* 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, infra  
*Commonwealth v Bartolini (1938)* 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, infra  
§ 5[a]  
*Commonwealth v Noxon (1946)* 319 Mass 495, 66 NE 2d 814, infra § 5[a]

#### MICHIGAN

*People v Maranian (1960)* 359 Mich 361, 102 NW2d 568, infra § 16[a]

#### MINNESOTA

*State ex rel. Robertson v Steele (1912)* 117 Minn 384, 135 NW 1128, infra § 13[c] (before trial)  
*State v Mastrian (Minn)* 171 NW2d 695

#### MISSISSIPPI

*Bellew v State (1958)* 238 Miss 734, 106 So 2d 146, cert den and app dismd 360 US 473, 3 L ed 2d 1531, 79 S Ct 1430,  
reh den 361 US 858, 4 L ed 2d 96, 80 S Ct 43, infra § 16[a]

#### MISSOURI

*State v Engberg (1964, Mo)* 377 SW2d 282, infra § 11[f]  
*State v Aubuchon (1964, Mo)* 381 SW2d 807, infra § 16[a]  
*State v Spica (1965, Mo)* 389 SW2d 35, infra  
*State v Yates (Mo)* 442 SW2d 21  
*State v Tressler (Mo)* 503 SW2d 13, cert den 416 US 973, 40 L Ed 2d 563, 94 S Ct 2000  
*Westfall v Enright (1982, Mo App)* 643 SW2d 839  
*State v Mitchell (Mo App)* 500 SW2d 320  
*State v Fitzpatrick (Mo App)* 525 SW2d 342

## MONTANA

See also *State v Hall* (1918) 55 Mont 182, 175 P 267, infra § 12.  
*State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, infra

## NEBRASKA

*Cramer v State* (1944) 145 Neb 88, 15 NW2d 323, infra  
*Linder v State* (1953) 156 Neb 504, 56 NW2d 734, infra § 21[d]  
*Parker v State* (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775, infra § 5[a]  
*Reizenstein v State* (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265, infra § 13[b]  
*State v Williams*, 183 Neb 257, 159 NW2d 549

## NEW HAMPSHIRE

*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, infra § 8  
See also *State ex rel. McLetchie v Laconia Dist. Court* (1964, NH) 205 A2d 534, infra § 8.  
But see *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, infra.

## NEW YORK

*People v Cleary*, 33 App Div 2d 814, 305 NYS2d 384  
*People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130, infra § 25[b]  
*People v Golly* (1964) 43 Misc 2d 122, 250 NYS2d 210, infra § 13[c]  
*Widziewicz v Golding*, 52 Misc 2d 837, 277 NYS2d 62  
*People v McDonald*, 59 Misc 2d 311, 298 NYS2d 625  
*People v Taylor*, 59 Misc 2d 597, 300 NYS2d 20  
*People v Parkinson* (1943, Gen Sess) 43 NYS 2d 690 (before trial)

## NORTH CAROLINA

*State v Alston* (1983) 307 NC 321, 298 SE2d 631  
*State v Tatum*, 291 NC 73, 229 SE2d 562  
*State v Philyaw*, 291 NC 312, 230 SE2d 370  
*State v McDougald* (1978) 38 NC App 244, 248 SE2d 72  
*State v Blue*, 20 NC App 368, 201 SE2d 548

## OREGON

*State v Tranchell* (Or) 412 P2d 520

## PENNSYLVANIA

*Lewis v Court of Common Pleas*, 436 Pa 296, 260 A2d 184  
*Commonwealth v Jones (Pa Super)* 369 A2d 733

## SOUTH CAROLINA

*State v Flood*, 257 SC 141, 184 SE2d 549

## SOUTH DAKOTA

*State v Wade (SD)* 159 NW2d 396

## WASHINGTON

*State v Peele*, 67 Wash 2d 893, 410 P2d 599  
*State v Beard*, 74 Wash 2d 335, 444 P2d 651  
*State v Tyler*, 77 Wash 2d 726, 466 P2d 120

## WISCONSIN

*State v Miller*, 35 Wis 2d 454, 151 NW2d 157  
*Ramer v State*, 40 Wis 2d 79 161 NW2d 209  
*State v Watkins*, 40 Wis 2d 398, 162 NW2d 48  
*State ex rel. Johnson v County Court, Waukesha County*, 41 Wis 2d 188, 163 NW2d 6

## WYOMING

*Coca v State (Wyo)* 423 P2d 382

But see the later New York cases discussed *infra*, indicating a recent trend toward permitting discovery in that jurisdiction.

## NORTH CAROLINA

See *State v Goldberg (1964)* 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, *infra* § 17

## OHIO

*State v Hahn (1937, CP)* 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, *infra*

## OKLAHOMA

*State ex rel. Sadler v Lackey* (1957, *Okla Crim*) 319 P2d 610, infra this section and infra § 22[a] (before trial)  
*Application of Killion* (1959, *Okla Crim*) 338 P2d 168, infra this section and infra § 13[b] (before trial)  
*Layman v State* (1960, *Okla Crim*) 355 P2d 444, infra § 22[a]  
*Bell v Webb* (1961, *Okla Crim*) 365 P2d 399, infra § 13[b]  
*Melchor v State* (1965, *Okla Crim*) 404 P2d 63, infra

## PENNSYLVANIA

*Commonwealth v Wable* (1955) 382 Pa 80, 114 A2d 334, infra § 21[d] (before trial)  
See also *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, infra § 25[a].  
*Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, infra § 5[a] (before trial)  
*Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 *York Leg Rec* 140, infra § 5[a]  
*Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 *Montg Co LR* 167, infra § 5[a] (before trial); *Commonwealth v Schaub* (1964) 55 *Luzerne Leg Reg R* 49, infra § 16[a] (before trial)

## RHODE ISLAND

*State v Di Noi* (1937) 59 *RI* 348, 195 *A* 497, reh den 60 *RI* 37, 196 *A* 795, infra

## TENNESSEE

*Witham v State* (1950) 191 *Tenn* 115, 232 *SW2d* 3, infra § 13[c]  
See also *Bass v State* (1950) 191 *Tenn* 259, 231 *SW2d* 707, infra § 23.

## TEXAS

*Smith v State* (1951) 156 *Tex Crim* 253, 240 *SW2d* 783, infra  
*Lopez v State* (1952) 158 *Tex Crim* 16, 252 *SW2d* 701, cert den 344 *US* 893, 97 *L ed* 691, 73 *S Ct* 213, infra  
*Freeman v State* (1958) 166 *Tex Crim* 626, 317 *SW2d* 726, infra § 13[c]  
*Hill v State* (1958) 167 *Tex Crim* 229, 319 *SW2d* 318  
*Hanes v State* (1960) 170 *Tex Crim* 394, 341 *SW2d* 428, infra § 25[a]  
*Dagley v State* (1965, *Tex Crim*) 394 *SW2d* 179, infra § 25[d] (before trial)

## VERMONT

*State v Lavallee* (1960) 122 *Vt* 75, 163 *A2d* 856, infra (before trial)  
See also *State v Fox* (1961) 122 *Vt* 251, 169 *A2d* 356, infra § 12.  
*State v Anair* (1962) 123 *Vt* 80, 181 *A2d* 61, infra § 11[i] (before trial)

## VIRGINIA

*Abdell v Commonwealth* (1939) 173 Va 458, 2 SE2d 293, infra (before trial)

## WASHINGTON

*State v Clark* (1944) 21 Wash 2d 774, 153 P2d 297, cert den 325 US 878, 89 L ed 1994, 65 S Ct 1554, infra § 13[b] (before trial)

*State v Payne* (1946) 25 Wash 2d 407, 171 P2d 227, adhered to on reh 25 Wash 2d 418, 175 P2d 494, infra § 21[b] (before trial)

*State v Gilman* (1963) 63 Wash 2d 7, 385 P2d 369, infra § 5[a]

## WISCONSIN

*State ex rel. Spencer v Freedy* (1929) 198 Wis 388, 223 NW 861

*State ex rel. Schroeder v Page* (1932) 206 Wis 611, 240 NW 173

*Steenland v Hoppmann* (1934) 213 Wis 593, 252 NW 146 (before trial)

*State v Herman* (1935) 219 Wis 267, 262 NW 718, infra

Thus, in *Edens v State* (1963) 235 Ark 996, 363 SW2d 923, wherein it appeared that the accused filed a pretrial motion for a bill of particulars asking for such matters as copies of any instruments to be used in evidence by the prosecution, any statements taken by the prosecution from its witnesses, and other similar information, the court, noting that the motion, although denominated a motion for a bill of particulars, was actually a request for discovery, held that the motion was properly denied. The court noted that the Arkansas discovery statute did not apply to criminal cases.

Following the rule that in the absence of statute a defendant in a criminal case has no right of inspection prior to the time an exhibit is actually offered in evidence at the trial, the court in *Walker v People* (1952) 126 Colo 135, 248 P2d 287, upheld the refusal to grant an order for the production of evidence in the possession of the prosecution, including blood and other stains, hair, fibers, and similar materials, found in the course of the investigation of the homicide, and upon which the defendant had hoped to conduct chemical experiments.

Noting that in criminal cases the right of examination and inspection of the prosecution's evidence by a defendant is nonexistent unless required by statute, and that in Colorado there was neither a statute nor a precedent authorizing the defendant's counsel to make an examination or inspection of the prosecution's evidence prior to the time it was offered at the trial, the court in *Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587, involving a prosecution for burning to defraud an insurer, held that there was no error in denying the defendant's pretrial motion for an order requiring the prosecution to return to him his business records which had previously been surrendered to the district attorney.

In *Padgett v State* (1912) 64 Fla 389, 59 So 946, it was held that the trial court did not abuse its discretion in denying the defendant's motion for an order requiring the prosecution to produce all articles in the possession of the prosecution intended to be adduced in evidence against the defendant, the court apparently taking the view that the defendant was not, as a matter of right, entitled to such production.

The denial of the defendant's petition, filed prior to the trial of the case, for production of certain documents and articles in the possession of the prosecuting attorney was upheld in *Walker v State* (1959) 215 Ga 128, 109 SE2d 748, 927, the court noting that there was no law in Georgia that gave to the defendant in a criminal case the right to inspect the file of the prosecuting attorney before it was put on trial.

To the same effect is *Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, wherein the court, noting that there was no statute or rule of procedure in Georgia requiring a solicitor general or other prosecuting officer to make his evidence,

documentary or otherwise, available to the accused or his counsel before trial, upheld the denial of the defendant's pretrial petition for an order granting defendant and his attorney the right to inspect (1) every written statement made by any witness, (2) written reports or statements in the possession of the solicitor general which were prepared by employees of a state crime investigation agency, and (3) clothing and any other object removed from the body of the victim of the alleged murder.

In *Wendling v Commonwealth* (1911) 143 Ky 587, 137 SW 205, the court, in holding that it was not error for the trial court to refuse to require the prosecution to produce before the trial, for inspection by the defendant, clothing and other articles which were subsequently introduced as evidence by the prosecution, said that it knew of no practice that made it incumbent upon the Commonwealth to submit before the trial for the inspection and examination of the accused or his counsel articles in the possession of the Commonwealth that it proposed to introduce as incriminating evidence against him, although both the accused and his counsel should have full and free opportunity to examine them when offered as evidence.

In *Kinder v Commonwealth* (1955, Ky) 279 SW2d 782, the court, following the rule that neither the accused nor his counsel is entitled to inspect and examine, before the trial, articles or evidence in the possession of the prosecution, upheld an order denying the defendant's pretrial motion to compel the prosecution to produce, for inspection by the defendant, the following items: (1) a copy of the FBI ballistic laboratory report; (2) the results of paraffin tests taken of the defendant and codefendants; (3) a copy of any signed statement or confession which the prosecution intended to introduce as evidence; (4) the gun and pellets the prosecution intended to introduce in evidence; and (5) the pellets that had been introduced in the trial of a co-defendant.

Noting that an accused is not entitled, prior to trial, to have the prosecution furnish him with the evidence upon which it intends to rely for his conviction, including evidence that has been reduced to writing by the prosecuting attorney for the latter's convenience, the court in *State v Williams* (1947) 211 La 782, 30 So 2d 834, rejected the defendant's contention that it was error for the trial court to deny his request for production of certain documents in the possession of the district attorney.

In *Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, the court, upholding the denial of the defendant's pretrial motion for an order requiring the prosecuting attorney to furnish him with a copy of the report concerning the autopsy performed on the body of the homicide victim, a copy of an alleged confession made by the defendant, and all weapons and other exhibits and things in possession of the prosecuting attorney, pointed out that the motion was not in any sense a motion for a bill of particulars, but was rather an attempt to compel the prosecution to disclose in part at least the evidence on which it relied; that so far as any information in the possession of the prosecution was necessary to enable the defendant to understand the nature of the crime with which he was charged and to prepare his defense, he was entitled to have it furnished to him in the form of a bill of particulars, upon a proper motion to that effect; that there was no rule of law which required the prosecution to comply with such production or which gave a defendant the right to ask it; that whether to grant or refuse the motion was within the discretion of the trial court; and that even if it was assumed in favor of the defendant, without so deciding, that the court had power to revise the action of the trial court, there was no showing which should lead it to do so.

Noting that there is no general right of discovery by statute or rule in Missouri in criminal cases, and indicating that evidence in the possession of the prosecution should not be produced for inspection by the defense unless there is a satisfactory showing that the requested evidence is of such nature that without it the defendant's trial would be fundamentally unfair, the court in *State v Spica* (1965, Mo) 389 SW2d 35, upheld the denial of the defendant's pretrial motion for inspection of (1) tape recordings of his conversations with the widow of the victim of the alleged murder, (2) motion pictures taken at the time they were engaged in the conversations, and (3) a written statement made by the widow to the police. As to the tape recordings and motion pictures, the court said that the defendant was not entitled to examine them in advance of trial in the absence of a showing that their production was necessary to make the trial fundamentally fair. As to the statement of the widow to the police, the court pointed out that this document was not used

in the trial of the defendant either as evidence or to refresh the recollection of any witness, and that there was no showing that it was favorable to the defendant.

In *State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, a prohibition proceeding to prevent the respondent judge from granting an order requiring the prosecuting attorney to produce, for inspection by the defendant, certain written material and tangible objects (including rifles, shells, bullets, clothing, and parts of a human body) taken by or on the order of the prosecuting attorney from the defendant's home in connection with the prosecution of the crime charged against him, the court rejected the contentions, made in support of the order of the respondent judge, that the judge had jurisdiction to order inspection of written material in a criminal case by virtue of the provision in the code of civil procedure relating to inspection of writings, and that as to tangible objects, the judge had inherent power, in his discretion, to order them produced for inspection. Noting that under the common law there was no right to have inspection of evidence in the hands of the prosecution, and that in Montana there was no constitutional provision or specific statute authorizing such inspection, the court held (1) that, assuming that the provision for civil discovery was applicable to criminal cases, the defendant in the present case was not entitled, under that provision, to inspection of written materials as ordered by the respondent judge, because, in order to allow inspection under the statute, the papers sought to be inspected must be admissible in evidence, and there was no showing as to what the written material sought to be inspected consisted of or whether it was relevant to the defense; and (2) that whether or not the respondent judge had inherent power to compel production of the articles in question for the defendant's inspection need not be decided, since the defendant did not show proper cause to move the respondent judge to exercise any discretion which he might have had. The court observed that even under the view that a trial judge has inherent power to require inspection, the right to inspection is not absolute, but is in the discretion of the judge, and that the device of inspection could not be used by the defense to go on a "fishing expedition" in hope that something would turn up to aid the defense. The most that could be said of the defendant's sweeping motion in the present case, the court said, was that it was an attempt to go on a tour of investigation in hope of finding something that would aid him, without showing anything as to how inspection might aid in producing evidence relevant to the defense.

In *Cramer v State* (1944) 145 Neb 88, 15 NW2d 323, the court, in upholding the denial of the defendant's application to inspect "the purported confession and other statements and documents" in the possession of the prosecution, held that the defense counsel in a criminal prosecution has no right to inspect or compel the production of evidence in the possession of the prosecution unless a valid reason exists for so doing; that the defendant has no inherent right to invoke such means of examining the prosecution's evidence merely in the hope that something may be uncovered which would aid his defense; and that in the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon.

In *State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, wherein the defendant filed a pretrial motion to compel the prosecuting attorney to exhibit to the defendant, for his inspection, all documents in the possession of the prosecution which were expected to be offered in evidence at the trial, and, on his motion for a new trial after the jury returned a verdict finding him guilty, contended that it was error to have admitted various documents in evidence without giving him the opportunity to inspect them, the court, in rejecting the defendant's contention, noted that the trial court had no authority to make an order granting the defendant the right to inspect any document in the hands of the prosecuting attorney until it was admitted as evidence in the trial, and that the Ohio Code of Civil Procedure providing for the right to inspect any document in the possession of the adverse party was not applicable to criminal cases.

In *Application of Killion* (1959, Okla Crim) 338 P2d 168, the court, denying the defendant's motion for permission to inspect a tape-recorded conversation had by him with the county attorney, noted that in the absence of statutory authority, the defendant in a criminal case has no absolute right to pretrial inspection or to compel the prosecution to produce documents and reports that may be beneficial to him, nor does he have an inherent right to examination of the prosecution's evidence merely in the hope that something may turn up which would aid his defense or supply clues for

gathering evidence; and that unless the requested documents are evidence themselves, "as in cases of forgery, threatening letters, etc., which are the very essence of the case," they should not ordinarily be required for inspection in pretrial proceedings. These rules were also recognized in *State ex rel. Sadler v Lackey* (1957, *Okla Crim*) 319 P2d 610.

Noting that a defendant has no inherent right to examination of the prosecution's evidence in the hope that something may turn up which will aid or supply clues for gathering evidence, the court in *Melchor v State* (1965, *Okla Crim*) 404 P2d 63, rejected the defendant's argument that the committing magistrate had, in the conduct of the preliminary hearing, erroneously refused to order the county attorney to allow him to examine certain exhibits.

In *State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, the court, upholding the denial of the defendant's pretrial motion for permission to examine the blunt instrument allegedly used in the commission of the crime charged, held that the defendant in a criminal case has no right to inspection of the prosecution's evidence, except under special and unusual circumstances where a strict adherence to the rule would amount almost to a denial of his constitutional rights; that in such special and unusual circumstances it is within the sound discretion of the trial judge to relax the rigor of the rule a sufficient extent to assure the defendant a reasonably fair opportunity to prepare his defense; and that the test in such a case is whether or not there is a real necessity for the defendant to inspect the articles in the possession of the prosecution in order to be able to prepare his defense. Adding that a necessity for inspection under special and unusual circumstances would arise but rarely, the court concluded that such circumstances did not appear to exist in the present case.

Relying on the rule that evidence in the hands of the district attorney is not a public document and not subject to inspection of the defendant prior to its introduction at the trial, the court in *Lopez v State* (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213, upheld the trial court's refusal to grant, prior to the trial, an order requiring the prosecuting attorney to allow the defendant to inspect and copy his confessions and other evidence in the hands of the prosecution. To the same effect is *Smith v State* (1951) 156 Tex Crim 253, 240 SW2d 783.

In *State v Lavallee* (1960) 122 Vt 75, 163 A2d 856, the court, noting that under the common law the defendant in a criminal case did not have the right to inspect objects or writings in advance of trial, and that in Vermont no such right was conferred by any statute,<sup>n50</sup> upheld the denial of the defendant's pretrial motion for permission to inspect all reports of investigators, police officers, and informers who were to testify at the trial, and any other relevant statements or reports in the possession of the prosecution touching the subject matter of the case.

Following the view that as a general rule the accused is not, as a matter of right, entitled to inspect evidence in the possession of the prosecution before trial, and stating that a different rule would tend to subject the prosecuting attorney to great annoyance and to the probable destruction or loss of material evidence, and also would tend to compel the prosecution not only to furnish the accused with a full bill of particulars, but also to supply him with the physical evidence it intends to introduce upon the trial, the court in *Abdell v Commonwealth* (1939) 173 Va 458, 2 SE2d 293, wherein the defendant was charged with the murder of his wife, held that it was not error to deny the defendant's pretrial motion for permission to inspect a diary kept by the defendant and certain notes written by him prior to the commission of the alleged offense.

In *State v Herman* (1935) 219 Wis 267, 262 NW 718, the court, stating that the rule was well established that a person accused of crime enjoys no right to inspection of evidence relied upon by the prosecution for his conviction, held that the trial court did not commit error in denying the defendant's pretrial motion for inspection of the prosecuting attorney's transcript of the testimony given at a so-called John Doe hearing on a complaint which was related to the present prosecution.

The rule that ordinarily a person accused of crime is not, as a matter of right, entitled to inspection or disclosure of evidence in the possession of the prosecution has been relaxed in some recent cases. See, for example, the following cases:

#### CALIFORNIA

*People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428, infra  
*Cash v Superior Court of Santa Clara County* (1959) 53 Cal 2d 72, 346 P2d 407, infra § 14  
*Norton v Superior Court of San Diego County* (1959) 173 Cal App 2d 133, 343 P2d 139, infra § 23  
*People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694, infra  
*People v Wilson* (1963) 222 Cal App 2d 616, 35 Cal Rptr 280, infra § 6[b]  
*People v Morris* (1964) 226 Cal App 2d 12, 37 Cal Rptr 741, infra  
*Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291, infra § 22[d]

#### NEW HAMPSHIRE

*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, infra  
*State v Healey* (1965, NH) 210 A2d 486, infra § 8

#### NEW JERSEY

*State v Cook* (1965) 43 NJ 560, 206 A2d 359, infra § 11[g]

#### NEW YORK

*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, infra § 21[a] (where the court stated: "I see no practical reason why we should continue to cling to old shibboleths and rituals for which I have in my experience observed no adequate justification.")  
*People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, infra §§ 13[a], 21[b], 25[b] (approving "a gradual trend toward an 'evolving practice of liberal discovery in criminal cases'")  
*People v Miller* (1964) 42 Misc 2d 794, 248 NYS2d 1018, infra §§ 8, 25[a]  
*People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599, infra § 13[a]  
*People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203, infra § 13[a]

#### WASHINGTON

*State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, infra § 10[b]

Thus, in *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428 (a case not within the scope of this annotation because dealing with the production of a prosecution witness' statement for purposes of impeachment) the court, in holding that it was error to deny the defendant's request for the production, said: "The defendant in a criminal case can on a proper showing compel production of documents in the possession of the People which are relevant and material to the defense." The rule to the same effect was also recognized in *People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694.

See also *People v Morris* (1964) 226 Cal App 2d 12, 37 Cal Rptr 741, where the court, in holding that the trial court's error in allowing the testimony of certain prosecution witnesses whose names were not on the pretrial list of witnesses was not prejudicial under the circumstances, noted: "A defendant's right to pre-trial discovery in a criminal case is well established in California. . . . This right is in accord with the philosophy. . . that the defendant's right to discovery is a corollary to his right to a fair trial and extends to the names of the prosecution witnesses and reports of expert witnesses for the People."

In *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, involving a prosecution for murder, the court, concluding that a trial court has the inherent power to permit an accused to inspect before trial writings and objects in the possession of the prosecution if it finds that such inspection is required by justice, upheld an order of the trial court granting an inspection of guns and bullets taken from the defendant's home, bullets removed from the victim's body, a "knife or sharp instrument used in the slaying," clothing worn by the defendant and victim and other ladies' apparel specifically described in the motion, specimens of hair taken from the defendant's person, a certain automobile owned by the defendant, and vacuum sweepings and a piece of fiber insulation taken from that automobile or another automobile of the defendant. As to that part of the trial court's ruling which denied the defendant's request for inspection of "[a]utopsy slides, photographs, movies, [autopsy] reports, contemporaneous notes (both recorded and written), laboratory and chemical reports, and parts of the body of [the victim] and contents thereof," the court, pointing out that the defendant's counsel were furnished with a report of the autopsy performed on the body of the victim, held (1) that any photographs, movies, and photographic or specimen slides taken or made as a part of the autopsy could properly be made available to the defendant, particularly since the corpse of the victim had been cremated; (2) that "parts" or "contents" of the corpse which had been preserved could also be made available to the defendant; (3) that if any "contemporaneous notes" were made under the direction of the medical referee in the course of preparing the report of the autopsy which was already furnished to the defendant, they also might be furnished in the trial court's discretion; and (4) that, on the other hand, such notes made by or on behalf of the attorney general, or his staff, and laboratory and chemical reports made as a part of the state's investigation, stood upon a different footing, and were not subject to pretrial discovery.

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Where trial court denied discovery of felony records, if any, of prosecution witnesses and motion to discover extra judicial statements of such witnesses, denial was proper absent showing of some prejudice to defendant. *People v Pearson* (Colo) 546 P2d 1259.

No error was committed in armed robbery trial in regard to defendant's right to discovery, where no state statute or rule of practice required discovery in criminal cases, and where defendant's counsel had access to state's entire file. *Sims v State* (1979) 148 Ga App 733, 252 SE2d 910.

See *Barker v State* (1977) 144 Ga App 339, 241 SE2d 11, § 11.

State has no duty to investigate to obtain exculpatory information, but rather has duty to provide defendant with exculpatory information which is in state's possession, custody, control or of which state has knowledge. *State v Edwards* (1982, La) 420 So 2d 663.

Pre-trial motion to produce gun and related items was properly denied as state was not required to produce physical evidence it intended to use at trial except copy of written confession in possession of prosecutor, production of taped confession, or some of confiscated narcotic evidence in narcotic prosecution; nor was it necessary for state to produce "rap sheet" of prosecuting witness for purpose of informing defendant as to criminal record of witness for use to impeach testimony particularly where state brought prior criminal record of witness to jury's attention and defendant cross-examined witness in detail concerning his prior conviction and produced detailed information concerning such

convictions. *State v Brumfield (La)* 329 So 2d 181.

Defense counsel's motion for dossier of all state witnesses, especially that of victim, was properly denied; prosecution is not required to produce evidence it intends to use at trial, except in limited circumstances. *State v Groves (La)* 311 So 2d 230.

Defendant was not entitled as of right, by pretrial motion, to names of state witnesses and to details of state's evidence where state did not withhold information of any exculpatory evidence and where it furnished defendant with information of alleged method of commission of crime. *State v Thomas (La)* 310 So 2d 517.

See *State v Hudson*, 253 La 992, 221 So 2d 484, § 17.

In Louisiana all evidence relating to pending criminal trial which is in possession of district attorney or police (except written confession of accused) is privileged, and not subject to inspection by accused unless and until introduced in evidence at trial. *State v Johnson*, 249 La 950, 192 So 2d 135, cert den 388 US 923, 18 L Ed 2d 1374, 87 S Ct 2144.

In prosecution for simple assault and battery and assault with dangerous weapon, state had no duty to inform defendant that five of jurors on panel had been part of prior panel in case tried by same assistant prosecutor, who had convicted another defendant for atrocious assault and battery. *State v Abernathy*, 137 NJ Super 83, 347 A2d 813.

See *State v Turner (App)* 81 NM 571, 469 P2d 720, § 8.

Discovery of many requested items denied where possibility of prejudice to prosecution was substantial and clearly outweighed convenience of defendants, and where denial did not unduly prejudice defendants. *People v Matera*, 52 Misc 2d 674, 276 NYS2d 776.

Except when accused proves exceptional circumstances and compelling reasons for disclosure, as general rule criminal defendant has no right to discover state's evidence against him prior to trial; therefore, trial court did not abuse its discretion in excluding defendant from proceeding during which co-defendant pled guilty to related charges. *Commonwealth v Vickers (1978, Pa Super)* 394 A2d 1022.

See *State v. Smart*, 274 S.C. 303, 262 S.E.2d 911 (1980), § 18.

Defendant in criminal trial is not entitled to examine prior to trial "any evidence which the State may have in its possession," under *Dennis v United States*, 384 US 855, 16 L Ed 2d 973, 86 S Ct 1840. *McDuff v State (Tex Crim)* 431 SW2d 547.

A defendant in a criminal case does not have a general right to discovery of evidence in possession of the State. *Luvano v. State*, 183 S.W.3d 918 (Tex. App. Eastland 2006), reh'g overruled, (Mar. 1, 2006).

In prosecution for aggravated robbery, defendant's motion for production of arresting officer's report, copy of complainant's report of vehicle being stolen, copy of inventory made by arresting officers, copy of complainant's statement to police concerning weapon, and copy of inventory made by police on receipt of weapon was properly denied where motion for production did not state any reason for request, nor did it show specifically what items were expected to be included in foregoing that were of exculpatory nature, and as defendant had no constitutional right to inspect state's entire file. *Rigsby v State* (1983, Tex App Houston (14th Dist)) 654 SW2d 737.

[\*4] Constitutional objections to denial of inspection or disclosure

[\*4a] Generally

In some state cases it has been recognized that the refusal to permit an accused person to inspect before trial evidence in the possession of the prosecution does not necessarily violate his constitutional right to due process of law.

Thus, in *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755, it was held that pretrial discovery in favor of a defendant is not required by due process.

In *State v Thompson* (1957) 50 Del 456, 134 A2d 266, the court, in denying the defendants' motion for production of statements of prospective witnesses, police reports made in the course of their criminal investigations, and the results of polygraph tests, blood tests, and fingerprint examinations, held that the pretrial disclosures sought in the present case were not required by due process.

The trial court's refusal to permit the defendant to inspect before trial evidence in the possession of the prosecution was held not violative of the due process clause of the Federal Constitution in *Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, the court pointing out that during the trial the defendant was given an opportunity to examine any evidence introduced by the prosecution, and that he had had full and adequate opportunity to prepare his defense and to meet all evidence against him.

See also *State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra 17, wherein the court, upholding the denial of the defendants' pretrial request for production of the reports of the investigation conducted by the state bureau of investigation in connection with the present prosecution, rejected the defendants' contention that the denial of production amounted to a violation of the defendants' rights guaranteed by the state and federal constitutions.

The view that the refusal to permit an accused person to inspect his confession before trial in a state criminal prosecution does not necessarily violate his right to due process of law guaranteed by the Federal Constitution has also been recognized in the following federal cases, which involved a petition for writ of habeas corpus by a prisoner convicted in a state court.

In *Cicenia v Lagay* (1958) 357 US 504, 2 L ed 2d 1523, 78 S Ct 1297, a habeas corpus proceeding based on the contention that the conviction of the petitioner for murder in a New Jersey state court violated the due process guaranteed by the Fourteenth Amendment, particularly because the petitioner was required to plead to the indictment for murder without the opportunity to inspect his confession, the court, rejecting the petitioner's contention, held that in view of the rule in New Jersey that the trial judge has discretion whether or not to allow inspection before trial, the discretionary refusal of the trial judge to permit inspection in the present case did not offend the Fourteenth Amendment.

Stating that while refusal to give the defense a copy of the defendant's confession may not be the better practice, failure to do so will not violate due process in the absence of a showing of prejudice, the court in *Application of Tune* (1956, CA3 NJ) 230 F2d 883, cert den 351 US 987, 100 L ed 1500, 76 S Ct 1057, a habeas corpus proceeding by a prisoner convicted in a state court, held that the refusal of the prosecution to allow defense counsel to inspect the defendant's confession prior to trial was not a denial of due process under the circumstances.

In *Welch v Beto* (1964, DC Tex) 234 F Supp 484, a habeas corpus proceeding, the court said that the refusal to furnish the defense a defendant's confession before trial in the state courts did not deny the constitutional rights of the defendant.

On the other hand, see *State v Dorsey* (1945) 207 La 928, 22 So 2d 273, infra § 13[d], holding that to deny an accused a pretrial inspection of his written confession was in violation of his constitutional rights.

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The denial of the defendant's motion, made after the verdict was returned, for production of documents in the prosecution's possession was held not violative of due process under the circumstances in *People v Norman* (1960) 177 Cal App 2d 59, 1 Cal Rptr 699, cert den 364 US 820, 5 L ed 2d 51, 81 S Ct 56, infra § 9[d].

And the defendant's contention that she was denied due process of law at the time of the preliminary hearing because her motion for production of certain incriminating tape recordings in the possession of the prosecution, which motion was made prior to the preliminary hearing, was not granted until such hearing was concluded, was rejected in *People v Aadland* (1961) 193 Cal App 2d 584, 14 Cal Rptr 462, although it was argued that the failure to allow the production of the recordings prior to the hearing curtailed proper cross-examination of the witnesses, and although it was shown that the cause was submitted on the transcript of the preliminary hearing, without introducing any additional testimony. Noting that the preliminary proceeding is subject to limited appellate review after judgment, and that the value to a defendant of seeing statements made by prosecution witnesses is to enable him to impeach testimony of the witnesses at the trial, the court pointed out that while a period of approximately 3 months had elapsed between the production of the recordings in question and the date of trial, the defendant had suggested no reason for the failure to avail himself of the material theretofore made accessible; and that under the circumstances it must be assumed that if the material possessed any intrinsic worth, the defendant certainly would not have hesitated to make use of it.

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See *Warren v State*, 292 Ala 71, 288 So 2d 826.

See *State v Traenkner* (Del) 314 A2d 202.

Due process clause did not entitle defendant to pre-trial discovery of written statements of prosecution witnesses in district attorney's files. *State v Gray* (La) 286 So 2d 644.

Even though state must not conceal material evidence, there was no denial of due process requiring reversal of defendant's conviction of manslaughter because of district attorney's failure to furnish defendant with copy of FBI report to effect that there was not enough material on lethal weapon to determine what caused stain thereon, since proof was overwhelming that tire tool was weapon used by defendant, and even if defendant had been furnished report it would not have constituted evidence sufficient to permit jury to render verdict of not guilty. *Murphree v State* (Miss) 228 So 2d 599.

See *State v Lewis* (1982, Mo App) 637 SW2d 421, § 23.

See *State v Charity* (1982, Mo App) 637 SW2d 319, § 16[a].

Pretrial discovery of accused's statements, although "the better practice," is not constitutionally compelled by Fourteenth Amendment, and discovery at trial, coupled with continuance if necessary, is probably adequate to meet constitutional requirements. *Mears v State* (Nev) 422 P2d 230, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 124, reh den 389 US 945, 19 L Ed 2d 303, 88 S Ct 299.

See *State v Turner* (App) 81 NM 571, 469 P2d 720, § 8.

See *People v Anderwkavich* (1982) 117 Misc 2d 218, 457 NYS2d 718, § 18.

See *People ex rel. Hairston v Adult Detention Center*, 76 Misc 2d 1010, 352 NYS2d 326, § 19.

Defendant in homicide prosecution was not denied due process by trial court's refusal to order state to disclose whether prosecutions were pending against state's chief witness, whether state had records or information revealing prior felony convictions attributed to such witness, or whether state had records or information showing prior misconduct or bad acts committed by witness, where defendant failed completely to show that state knew of any prior misconduct on part of prosecuting witness, and where, on cross-examination, defense counsel failed to ask witness if he had ever been convicted. *State v Ford* (1979) 297 NC 144, 254 SE2d 14.

See *State v Abernathy* (1978) 295 NC 147, 244 SE2d 373, § 9[a].

See *State v Gaddis (Tenn)* 530 SW2d 64, § 25[d].

Provision in federal and state constitutions that accused has right to be informed, with some degree of certainty, of crime of which he stands accused does not necessitate prosecution furnishing him with its proof. *Bosley v State (Tenn)* 401 SW2d 770.

See *Epperson v State* (1983, Tex App Tyler) 650 SW2d 110, § 17.

[\*4b] Suppression by prosecution of evidence favorable to defense

It is well established that suppression by the state of material evidence exculpatory to the accused is a violation of due process, irrespective of the good or bad faith of the prosecution.<sup>n51</sup> This rule is of course applicable both in the situation where the state suppresses material documentary evidence or tangible objects (types of evidence treated in this annotation)<sup>n52</sup> and the situation where the state suppresses any other material information.<sup>n53</sup> Without attempting to go into the issue of what amounts to a "suppression" of evidence or when the state may be considered to have suppressed evidence favorable to the accused,<sup>n54</sup> the treatment here intends to illustrate cases where the rule under consideration has been applied to the suppression of evidence of the type within the scope of this annotation, by way of denial of discovery or inspection.

## IDAHO

*State v Horn* (1980) 101 Idaho 192, 610 P2d 551

## ILLINOIS

*People v Wilken* (1980) 89 Ill App 3d 1124, 45 Ill Dec 489, 412 NE2d 1071

## KANSAS

*State v Taylor* (1979) 225 Kan 788, 594 P2d 211 as stated in *State v Hood*, 242 Kan 115, 744 P2d 816, appeal after remand 245 Kan 367, 780 P2d 160

## LOUISIANA

*State v Spears* (1977, La) 350 So 2d 603

*State v Major (La) 318 So 2d 19*

## TENNESSEE

*Banks v State (1977, Tenn Crim) 556 SW2d 88*

## VIRGINIA

*Lowe v Commonwealth (1977, Va) 239 SE2d 112, cert den (US) 55 L Ed 2d 526, 98 S Ct 1502*

In *Brady v Maryland (1963) 373 US 83, 10 L ed 2d 215, 83 S Ct 1194*, a proceeding on certiorari involving a petition for postconviction relief by a prisoner convicted in a Maryland state court, wherein the petitioner contended that he was deprived of a fair trial by reason of the fact that notwithstanding that prior to the trial of the case his counsel requested the prosecution to allow the defense to examine an accomplice's extrajudicial statements, the prosecution did not disclose at or before the trial the accomplice's confession admitting that he had actually strangled the victim, the United States Supreme Court, in holding that the prosecution's suppression of the accomplice's confession violated the due process clause of the Fourteenth Amendment, concluded that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Supreme Court affirmed the decision of the Maryland Court of Appeals in the same case, reported in *Brady v State (1961) 226 Md 422, 174 A2d 167*, wherein it was held that there was a duty on the part of the prosecution to produce the accomplice's confession or at least to inform the defense of its existence, and that the suppression or withholding by the prosecution of material evidence exculpatory to an accused is a violation of due process.

In *United States ex rel. Almeida v Baldi (1952, CA3 Pa) 195 F2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L ed 1341, 73 S Ct 639, reh den 345 US 946, 97 L ed 1371, 73 S Ct 828*, it was held that the petitioner, who was convicted of murder in a Pennsylvania state court, was deprived of due process of law where the prosecution had deliberately suppressed evidence, including a certain bullet, tending to show that the petitioner did not fire the fatal shot.

In *United States ex rel. Butler v Maroney (1963, CA3 Pa) 319 F2d 622*, involving a petition for writ of habeas corpus by a prisoner convicted of murder in a Pennsylvania state court, it was held that the due process clause of the Federal Constitution was violated where during the trial of the petitioner the prosecution withheld, notwithstanding request for it by the defense, a statement given to the police by the petitioner in which was related an admission by a prosecution witness which was favorable and vitally material to the defense.

The rule that it is a denial of due process if the state has obtained a conviction by the intentional suppression of evidence was also recognized in *Barbee v Warden, Maryland Penitentiary (1964, CA4 Md) 331 F2d 842, infra § 6[a]*.

In *Powell v Wiman (1961, CA5 Ala) 287 F2d 275*, an appeal from the District Court's judgment denying an application for a writ of habeas corpus filed by a prisoner convicted of robbery in an Alabama state court on the basis primarily of the testimony of an alleged accomplice, who was called as a witness in the trial of the petitioner after he (the accomplice) had pleaded not guilty by reason of insanity as to the charge made against him, it was held that the prosecution's suppression of vital evidence adversely reflecting on the credibility of the accomplice amounted to a denial of due process of law where it was shown, inter alia, that at the time of the petitioner's trial, the prosecution had a letter and other information which adversely reflected on the accomplice's sanity; and that the prosecution attorney had permitted the accomplice to testify, without correction, to material facts directly contrary to a written statement which the attorney had previously taken from the accomplice, and, furthermore, had bolstered the accomplice's testimony by reference to the statement, without disclosing the contents thereof to the defense. Pointing out, however, that the present

opinion had gone beyond the findings of the District Court in elaborating upon the prosecution's suppression of vital evidence upon the petitioner's trial, the court remanded the cause to the District Court for further proceedings to determine whether the prosecution had disclosed any evidence to the petitioner's counsel before he was tried and convicted. On a later appeal of the same case from an order of the District Court on remand, the court in *Wiman v Powell* (1961, CA5 Ala) 293 F2d 605, further held (1) that the evidence that prior to the trial of the petitioner the prosecution had in its possession a psychiatrist's report tending to show the insanity of the accomplice, but the prosecuting attorney declined the defense's request to see the report, with the statement that it would not show that the accomplice was insane, was so misleading as to amount to an instance of suppression of evidence; and (2) that the District Court's finding that the accomplice's statement in the possession of the prosecution, but not available to the petitioner's counsel, conflicted with the accomplice's testimony given as a witness for the prosecution, and that the prosecution had actually bolstered the accomplice's testimony by reference to the statement, while keeping the contents thereof to itself, was sufficient to support the conclusion that the petitioner's conviction had been obtained in violation of the Fourteenth Amendment.

Following the rule that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either as to guilt or as to punishment and has been requested by accused, the court in *People v Hoffman* (1965) 32 Ill 2d 96, 203 NE2d 873, a prosecution for the killing of a woman in a hotel room, reversed a judgment of conviction where it appeared that notwithstanding a request by the defendant during the course of the trial, the prosecution refused to produce a pair of men's shorts which were found by the police in the closet of the hotel room during their investigation and, when found, were wet in the frontal area, and which apparently did not belong to the defendant. The court appointed out that the shorts were potentially as material, if not more so, than the item of the victim's clothing offered and received in evidence.

See also *State v Cook* (1965) 43 NJ 560, 206 A2d 359, *infra* § 11[g], where the court, in holding that the defendant was entitled to examine, in preparation for trial, a medical report of the state's psychiatrist who had examined the defendant while he was in custody on murder charges, observed that a prosecuting attorney must deal fairly and may not constitutionally withhold material evidence which favors the defendant, and that disclosure of such psychiatric reports as the one sought by the defendant in the present case would not only aid in ferreting out the truth, but would also avoid any question of unconstitutional withholding.

In *Trimble v State* (1965) 75 NM 183, 402 P2d 162, wherein a minister of a church was charged with murder for the killing of a member of the board of stewards of the church, it was held that the defendant's constitutional right to due process of law was violated (1) by the prosecution's taking from the defendant and failure to return or produce a copy of a letter allegedly written by him to his presiding bishop about 6 weeks before the homicide advising the bishop of his difficulties with the victim because of improper advances being made by the victim to the defendant's wife, and (2) by the prosecution's taking from him a tape recording of a conversation between the victim and the minister's wife, wherein the victim made indecent suggestions, and its subsequent return of the tapes in a condition different than when taken in that the matters material to his defense had been erased from them. Noting that the defendant's position was that he had shot the victim in self-defense when the victim approached with a coffee table raised to strike him because he had accused the victim of having made improper advances to his wife, the court said that the presence and existence of the letter and tape recording in order to prove or substantiate the defendant's version of the reason for the argument between him and the victim and to support his claim of self-defense would seem to be too apparent for argument.

And see *People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, where the court, in holding that certain hospital reports and an autopsy report requested by the defendant could not be excluded under any evidentiary rule, so as to bar them from being disclosed to the defendant, noted that any action or omission by the district attorney which prevents a defendant from presenting evidence which may establish his innocence may result in a denial of due process of law under the Fourteenth Amendment, and that, even under an exclusionary rule of evidence, if withholding the documents in question in the present case might result in deprivation of procedural due process, inspection must nevertheless be granted.

The rule that the prosecution's failure to reveal evidence that may be usable by an accused may be a denial of the fairness required under the due process clause of the Constitution was noted in *People v Whitmore* (1965) 45 Misc 2d 506, 257 NYS2d 787, infra § 22[a], a case involving the suppression of a laboratory report which was evidently favorable to the defense.

The prosecution's failure to disclose the results of ballistic tests indicating that the murder weapon was a long-barreled .38 caliber revolver was held violative of the accused's right to due process of law in *McMullen v Maxwell* (1965) 3 Ohio St 2d 160, 32 Ohio Ops 2d 150, 209 NE2d 449, where the prosecution had no evidence to connect the accused with the long-barreled revolver, but proceeded on the theory that the killing had been committed with a snub-nosed .38 caliber revolver. The court said that in order for the nondisclosure to amount to a denial of due process the evidence must be vital and material to the issue of guilt or penalty.

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In state prosecution for possession of dynamite with intent to use for illegal purpose, failure of prosecution to disclose that sheriff's deputy had destroyed explosive that was subject of prosecution, though reprehensible, did not unconstitutionally prejudice defendant where it was undisputed that defendant had possessed dynamite two days prior to date specified in indictment. *Fambo v Smith* (1977, CA2 NY) 565 F2d 233.

In prosecution for rape, failure of prosecution to provide FBI lab reports of exculpatory nature to defendant prior to trial despite discovery order did not deny defendant effective defense in violation of due process or deprive defendant of his right to fair trial where reports were introduced into evidence by defendant and were considered by jury, where defendant's counsel requested and received recess to evaluate reports, and where revelation of reports did not force defendant to repudiate previous defensive posture. *Gorham v Wainwright* (1979, CA5 Fla) 588 F2d 178.

Question whether defendant's rights protected by due process clause of Fourteenth Amendment were violated by denial of his motions for pretrial production of prosecution's evidence should be determined in camera by state court, under circumstances of this case; if, after examination of demanded evidence, state court determines that favorable evidence "material either to guilt or to punishment" has been suppressed, then defendant convicted of murder must be granted new trial. *Williams v Dutton* (CA5 Ga) 400 F2d 797.

See *State v Jones* (1978) 120 Ariz 556, 587 P2d 742, § 11.

Failure of prosecution to reveal existence of knife found at scene of crime constituted denial of due process, even though (1) admissibility of knife might be questionable, and (2) defense did not request knife until learning of its existence after trial. *State v Fowler*, 101 Ariz 561, 422 P2d 125.

See *People v Morgan* (1980, Colo) 606 P2d 1296, § 27[b].

See *State v Carrione* (1982) 188 Conn 681, 453 A2d 1137, cert den (US) 76 L Ed 2d 347, 103 S Ct 1775, § 9[b].

See *State v Grasso* (1977) 172 Conn 298, 374 A2d 239, § 8.

Defendants in prosecution for unlawful possession of dangerous drug were not entitled to relief on grounds that urine test results should have been furnished to defense counsel and that government knowingly presented false testimony where results of urinalysis were as readily available to defense counsel as they were to prosecutor, who did not see results until they were produced at trial by defendants. *Holt v United States* (1978, Dist Col App) 381 A2d 1388.

Failure by prosecution to reveal report that police at one time heard rumor pointing finger of suspicion at individual known by name other than defendant's did not constitute suppression of evidence favorable to accused where such report was inadmissible hearsay and did not reach level of evidence material to guilt or innocence of accused. *United States v Sedgwick* (1975, *Dist Col App*) 345 A2d 465.

Failure of prosecution to disclose to defendant in murder prosecution that police had questioned on day of murder eyewitness who at defendant's trial identified him as perpetrator of crime, or failure to include that witness' name on list of state witnesses demanded by defendant did not constitute impermissible suppression of evidence favorable to defendant where there was no showing that shortly after murder witness had made statements to police that were favorable to defendant, and where witness did not identify defendant as perpetrator of crime until immediately prior to trial. *Stroud v State* (1980) 246 Ga 717, 273 SE2d 155.

No suppression of evidence resulted from prosecution's failure to provide defendant, in response to his pretrial nonspecific for discovery of exculpatory material, with notes of investigating officer's report respecting oral statements made to him by state witnesses where content of notes was furnished defendant in form of officer's testimony at defendant's preliminary hearing, and where there was no showing by defendant that notes added to or differed from officer's testimony. *Chafin v State* (1980) 246 Ga 709, 273 SE2d 147.

Constitutional right of defendant in criminal manslaughter prosecution to confront hostile witnesses was not violated by denial of his discovery motion for production of statements given to law enforcement officials by two key prosecution witnesses and desired by defendant for impeachment purposes where it was clear from their trial testimony that statements must have been inculpatory rather than exculpatory and that they were in nowise impeaching in character. *Odom v State* (1980) 156 Ga App 119, 274 SE2d 117.

In response to discovery motion in rape prosecution, trial court properly ordered state to reveal to defendant any information known to it which was arguably favorable to defendant and of exculpatory nature, together with any such information acquired by state after date of order. *Burke v State* (1980) 153 Ga App 769, 266 SE2d 549.

In prosecution for murder, trial court did not err in refusing to order production of letter written by prosecutor to prosecutor's office in Alaska requesting that embezzlement charges against witness be dismissed on grounds of insufficiency of evidence, where specific letter at issue, even if it had been produced, would not have had material effect on outcome of trial in light of substantial evidence produced regarding dismissal of charges against witness in return for his testimony rendering letter merely cumulative, government's case did not rest solely on witness' testimony in that witness was called by prosecution for limited purpose of testifying about map that codefendant had shown him indicating where victim might have been buried, statements of witness incriminating defendant were brought out on cross-examination by defense counsel, and even without these incriminating statements testimony of other witnesses was sufficient to support jury's verdict of manslaughter. *State v Arnold* (1983) 66 Hawaii 175, 657 P2d 1052.

See *Chung v Lanham*, 53 Hawaii 617, 500 P2d 565, § 7.

In prosecution for rape, defendant was not denied due process by state's failure to reveal evidence of hospital show-up in which victim was unable to identify defendant, where defendant was unable to demonstrate any surprise or unfairness in state's failure to provide requested information in that defendant knew before trial that confrontation occurred and failed either to ask court to compel compliance or to seek continuance at trial to interview witnesses, and defendant was able to make full and effective use of evidence adduced at trial in that victim admitted that she was unable to identify defendant at hospital. *People v Smith* (1982) 111 Ill App 3d 895, 67 Ill Dec 565, 444 NE2d 801.

In prosecution for armed robbery, State's failure to disclose that witness did not identify defendant at show-up did not deny defendant his due process and statutory rights, since State cannot disclose any exculpatory evidence which it does not possess, no matter how specific, relevant and material it may be, and in instant case, court could have reasonably

concluded from assistant state's attorney's testimony and State's considerable efforts to call witness during trial that exculpatory evidence in question was not in possession of State or any of its police officers until after trial's termination. *People v Palmer* (1982) 111 Ill App 3d 800, 67 Ill Dec 442, 444 NE2d 678.

See *People v Keith* (1978) 66 Ill App 3d 93, 22 Ill Dec 847, 383 NE2d 655, § 11.

State was not required to furnish criminal defendant with everything in its file which might influence jury where allegedly suppressed evidence, evaluated in context of entire record, did not create reasonable doubt of guilt that did not otherwise exist. *People v Morris* (1977) 47 Ill App 3d 732, 8 Ill Dec 186, 365 NE2d 424.

In prosecution for murder, state did not suppress evidence favorable to defendant where, although witness' grand jury testimony would have corroborated defendant's testimony that there was fight, defense had made no motion for grand jury testimony, there were no unusual circumstances that should have alerted trial prosecutors to need to examine witness' grand jury testimony, and where state had complied with defense discovery motion and submitted name and address of witness in answer thereto. *People v Jones*, 33 Ill App 3d 1000, 339 NE2d 519.

See *People v Bracy*, 14 Ill App 3d 495, 302 NE2d 747, § 8.

Rule of Brady Case does not support catch-all motion for discovery, and defendant must still show existence of evidence which he seeks, as well as that such evidence is material. *People v Frazier*, 2 Ill App 3d 639, 276 NE2d 801.

See *State v Aossey* (Iowa) 201 NW2d 731, cert den 412 US 906, 36 L Ed 2d 971, 93 S Ct 2292, § 16[a].

Accused's motion for inspection of all statements and other evidence exculpatory as to accused in files of police, sheriff, and county attorney, was properly denied by trial court as too broad and as imposing unreasonable burden on state. *State v Niccum* (Iowa) 190 NW2d 815.

In prosecution for aggravated robbery, defendant was not entitled to new trial or remand, notwithstanding that county prosecutor was under positive legal duty to disclose exculpatory evidence to him, since evidence alleged by defendant to be exculpatory was in county prosecutor's file which was open to defendant's attorneys at all times prior to and after trial, and materiality and relevance of report was questionable at best in that FBI concluded in report that it could not identify anyone in surveillance film as defendant because mug shots were not taken in view sufficiently comparable to views displayed in films, but eyewitnesses in case who were relying on their own knowledge of appearance of person who committed robbery, and not on mug shots which were sent to FBI, were able to identify defendant when shown surveillance film. *State v Shepherd* (1983) 232 Kan 614, 657 P2d 1112.

It is incumbent upon accused to show that evidence favorable to him, sought by discovery motion, is material to either guilt or punishment; thus, where defendant's motion for discovery of exculpatory evidence did not indicate any theory of defense which would aid court in identifying such evidence, nor did it set forth specific items which might be deemed to be exculpatory, trial court did not err in denying motion for such discovery or later motion for in camera inspection, by court, of prosecution files. *State v Hill*, 211 Kan 287, 507 P2d 342.

In prosecution for aggravated rape and murder, withholding of evidence that defendant had confessed to two additional rapes which he may not have committed did not require reversal of conviction where omitted material, when evaluated in context of record as a whole, did not create reasonable doubt as to defendant's guilt. *State v Manning* (1980, La) 380 So 2d 46.

No prejudicial error occurred where trial court denied defense motion for in camera inspection of items in possession of prosecution where items were not, in fact, beneficial to defendant or exculpatory. *State v Boyd* (1978, La) 359 So 2d 931.

In prosecution for having issued and transferred forged check, failure of state to inform defendant that certain individuals who viewed lineup in which he participated failed to identify him as individual who passed to them other forged instruments did not constitute suppression of exculpatory evidence where inability of these individuals to identify defendant in connection with other forged instruments not subject of present case could not have aided defendant. *State v Gilmore (La)* 323 So 2d 459.

In order to obtain reversal of conviction under rule of Brady Case, defendant must prove that state possessed evidence favorable to him and that state wilfully suppressed such evidence; thus, where trial court held hearing and determined that state did not possess any evidence favorable to defendants, such court did not err in denying motion for production of all evidence in possession of state which would tend either to exculpate defendants, or to mitigate their sentences. *State v Breville (La)* 270 So 2d 852.

Defendants' motion for disclosure of all evidence favorable to them was properly denied since it was obvious attempt to obtain pretrial inspection of prosecution's evidence. *State v Jones*, 263 La 164, 267 So 2d 559, cert den 410 US 946, 35 L Ed 2d 612, 93 S Ct 1406.

See *Alston v State*, 11 Md App 624, 276 A2d 225, § 8.

Suppression or withholding by state of material evidence exculpatory to accused violates due process and is ground for relief under *Uniform Post Conviction Procedure Act*. *Ross v Warden, Maryland Penitentiary*, 1 Md App 46, 227 A2d 42.

See *Commonwealth v Redding (1980)* 382 Mass 154, 414 NE2d 347, § 27[b].

See *Com. v Preston (Mass)* 268 A2d 922, § 7.

In prosecution for felony murder, prosecutor had no duty to disclose to defendant that prosecution's witnesses had future possibilities of receiving monetary awards in connection with case where none of witnesses were aware of rewards until after trial. *People v Dietrich (1978)* 87 Mich App 116, 274 NW2d 472.

See *People v McCarmey (1975)* 60 Mich App 620, 231 NW2d 472, later app 72 Mich App 580, 250 NW2d 135, § 25[c].

Defendant's motion for discovery of all information or materials of whatever kind that are favorable to defendant in terms of guilt or innocence, or that go to mitigation of punishment, was impermissible dragnet and was properly denied. *State v King (Minn)* 208 NW2d 287.

Defendant's motion, in murder prosecution, for production of all information which would tend to exculpate him, either through indication of innocence or potential impeachment of witness, and for all other information which would be of benefit to defendant, was too broad and sweeping to be sustained. *State v Scott (Mo)* 491 SW2d 514.

See *People v Anderwkavich (1982)* 117 Misc 2d 218, 457 NYS2d 718, § 18.

In murder prosecution, report and file of district attorney which disclosed that two men had given information to police that shooting had taken place outside of establishment where victim was found, rather than in another establishment wherein shooting allegedly had taken place, was crucial exculpatory information which should have been made available to defendant. *People v Boone (App Div)* 370 NYS2d 613.

Under rule of Brady Case, refusal to grant pretrial motion for discovery of exculpatory evidence is not reversible error

unless defendant shows that evidence favorable to him was actually suppressed; thus, where defendant in rape prosecution made no such showing and prosecutor stated that he had no evidence favorable to defendant, trial court did not err in denying motion for discovery of any and all evidence known to state which was favorable to or tending to favor defendant. *State v Gaines*, 283 NC 33, 194 SE2d 839.

Where defendant moved for discovery of all exculpatory evidence contained in files of prosecutor or personally known to prosecutor, of which defendant had no way of knowing, trial court erred in denying such motion without inquiry; however, since both prosecutor and defense counsel stated, in argument on appeal, that they knew of no evidence favorable to defendant which had been concealed, conviction of defendant was affirmed. *State v Patterson*, 28 Ohio St 2d 181, 57 Ohio Ops 2d 422, 277 NE2d 201, cert den 409 US 913, 34 L Ed 2d 174, 93 S Ct 242.

Essence of rule of *Brady v Maryland* is that it is violation of due process for prosecution, after request of defendant, to withhold evidence favorable to accused, but request of defendant, in form of motion, should state with as much particularity as possible, evidence which defendant contends is favorable to him, and if difference of opinion exists between defendant and prosecution as to whether evidence is favorable to defendant, difference should be resolved by trial judge, in camera; thus trial judge's order directing district attorney to make his entire files available for in camera inspection by judge, which exceeded request contained in defendant's discovery motion, was not justified by constitutional requirements of due process set forth in *Brady* decision, and district attorney should not have been held in contempt for refusal to obey it. *State ex rel. Dooley v Connall (Or)* 475 P2d 582.

See *State v Hockings (Or App)* 542 P2d 133, § 22[e].

Trial court was not required to conduct in camera inspection of results of prosecution's investigation in order to make its own independent appraisal of evidence where prosecution had agreed to supply defendant any evidence of exculpatory nature but none was forthcoming by reason of prosecution's determination that in fact it had in its possession no evidence that would tend to exculpate defendant. *Commonwealth v Martin (Pa)* 348 A2d 391.

Defendant was not deprived of his constitutional right to fair trial due to state's failure to provide him with results of tests performed by FBI which were allegedly exculpatory in nature where evidence was not suppressed, but was introduced by state at trial, and where evidence was, at best, neutral, and taken in its entirety might well have been cast as inculpatory rather than exculpatory. *Hamilton v State (1977, Tenn Crim)* 555 SW2d 724.

In murder prosecution, trial court properly overruled defendant's motion for new trial based on State's failure to disclose, pursuant to previously granted order, certain allegedly exculpatory evidence which it had possessed at time of trial, where evidence in question was statement of prosecution witness which indicated that others may have been involved in offense but which also indicated that defendant was involved, under state law participant in criminal transaction was fully responsible for his conduct, and evidence in question was not material in sense that would trigger "Brady Rule" in that it did not create reasonable doubt of guilt that did not otherwise exist. *Brooks v State (1982, Tex App 12th Dist)* 643 SW2d 440, review ref.

There was no suppression of exculpatory evidence or evidence which might have exonerated defendant in failure of prosecution to provide offense report of police officer witness before trial where report was delivered to defendant when witness testified and no identification witness testified contrary to description given in report. *Holloway v State (Tex Crim)* 525 SW2d 165.

[\*5] Power and jurisdiction of court to permit inspection

[\*5a] Trial court's discretionary power

In a large number of cases it has been recognized that whether to grant or deny an accused the right to inspect evidence

in the possession of a prosecution lies within the discretion of the trial court.n55

#### ALABAMA

*Thigpen v State*, 49 Ala App 233, 270 So 2d 666  
*McCorvey v State (Ala App)* 339 So 2d 1053, cert den (Ala) 339 So 2d 1059  
*Sowells v State (Ala App)* 339 So 2d 1090

#### ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County (1954)* 78 Ariz 74, 275 P2d 887  
*State ex rel. Polley v Superior Court of Santa Cruz County (1956)* 81 Ariz 127, 302 P2d 263  
*State v Colvin (1957)* 81 Ariz 388, 307 P2d 98  
*State ex rel. Helm v Superior Court of Cochise County (1961)* 90 Ariz 133, 367 P2d 6  
*State v McGee (1962)* 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75  
*State ex rel. Corbin v Superior Court of Maricopa County*, 103 Ariz 465, 445 P2d 441  
*State v Taylor*, 112 Ariz 68, 537 P2d 938  
*State v Rogers*, 4 Ariz App 198, 419 P2d 102

#### ARKANSAS

*Mobley v State (Ark)* 473 SW2d 176 (citing annotation)  
*Rodgers v State (Ark)* 547 SW2d 419

#### CALIFORNIA

*Powell v Superior Court of Los Angeles County (1957)* 48 Cal 2d 704, 312 P2d 698  
*People v Terry (1962)* 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446  
*Hill v Superior Court of Los Angeles County* 10 Cal 3d 812 112 Cal Rptr 257, 518 P2d 1353  
*Walker v Superior Court of Mendocino County (1957)* 155 Cal App 2d 134, 317 P2d 130  
*Brenard v Superior Court of Sacramento County (1959)* 172 Cal App 2d 314, 341 P2d 743  
*People v Burch (1961)* 196 Cal App 2d 754, 17 Cal Rptr 102  
*People v Newville (1963)* 220 Cal App 2d 267, 33 Cal Rptr 816  
*People v Gaulden*, 36 Cal App 3d 942, 111 Cal Rptr 803  
*People v Crovedi (Cal App)* 49 Cal Rptr 724, superseded 65 Cal 2d 199, 53 Cal Rptr 284, 417 P2d 868

#### COLORADO

See the Colorado cases referred to in the footnote below.

#### CONNECTICUT

See *State v Cocheo (1963)* 24 Conn Supp 377, 190 A2d 916, infra § 16[a]

## GEORGIA

*Pless v State* (1977) 142 Ga App 594, 236 SE2d 842

## IDAHO

*State v Oldham* (Idaho) 438 P2d 275

## ILLINOIS

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108

## INDIANA

*Gubitz v State* (Ind App) 360 NE2d 259

## IOWA

*State v Froning* (1982, Iowa) 328 NW2d 333  
*State v Eads* (Iowa) 166 NW2d 766 (citing annotation)

## KANSAS

*State v Schlicher* (1982) 230 Kan 482, 639 P2d 467  
*State v Martin* (Kan) 480 P2d 50 (citing annotation)  
*State v Humphrey* (Kan) 537 P2d 155

## LOUISIANA

See *State v Dowdy* (1950) 217 La 773, 47 So 2d 496, cert den 340 US 856, 95 L ed 627, 71 S Ct 75, infra § 25[a]  
*State v Nero* (La) 319 So 2d 303  
*State v Huizar* (La) 332 So 2d 449

## MARYLAND

*McKenzie v State* (1964) 236 Md 597, 204 A2d 678  
*Couser v State* (1978) 282 Md 125, 383 A2d 389  
*Washburn v State*, 19 Md App 187, 310 A2d 176

## MASSACHUSETTS

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651  
*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950  
*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814  
*Commonwealth v Stewart* (Mass) 309 NE2d 470  
*Commonwealth v MacDonald* (Mass) 333 NE2d 194  
*Commonwealth v Sheeran* 370 Mass 82, 345 NE2d 362  
*Commonwealth v Walker* 370 Mass 548, 350 NE2d 678, cert den (US) 50 L Ed 2d 314, 97 S Ct 363  
*Commonwealth v Dominico* (Mass App) 306 NE2d 835

#### MICHIGAN

See also *People v Johnson* (1959) 356 Mich 619, 97 NW2d 739, infra § 13[a].  
*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568

#### MISSISSIPPI

*Armstrong v State* (Miss) 214 So 2d 589  
*Peterson v State* (Miss) 242 So 2d 420

#### MISSOURI

*State v Aubuchon* (1964, Mo) 381 SW2d 807

#### NEBRASKA

See also *Marshall v State* (1927) 116 Neb 45, 215 NW 564, infra § 24[b].  
*Cramer v State* (1944) 145 Neb 88, 15 NW2d 323  
*Hameyer v State* (1947) 148 Neb 798, 29 NW2d 458  
*Linder v State* (1953) 156 Neb 504, 56 NW2d 734  
*Parker v State* (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775  
*Reizenstein v State* (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265  
*Erving v State* (1962) 174 Neb 90, 116 NW2d 7, cert den 375 US 876, 11 L ed 2d 121, 84 S Ct 151  
*State v Novak*, 181 Neb 90, 147 NW2d 156  
*State v Williams*, 183 Neb 257, 159 NW2d 549  
*State v Isley*, 195 Neb 539, 239 NW2d 262

#### NEVADA

*Pinana v State* (1960) 76 Nev 274, 352 P2d 824

#### NEW HAMPSHIRE

*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403

*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1  
*State v Healey* (1965, NH) 210 A2d 486  
*State v Booton*, 114 NH 750, 329 A2d 376 (citing annotation), cert den 421 US 919, 43 L Ed 2d 787, 95 S Ct 1584

## NEW JERSEY

*State v Winne* (1953) 27 NJ Super 304, 99 A2d 368

## NEW MEXICO

*State v Zinn*, 80 NM 710, 460 P2d 240 (citing annotation)

## NEW YORK

*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd without op 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698 (admissible evidence only)  
*Silver v Sobel* (1958) 7 App Div 2d 728, 180 NYS2d 699 (admissible evidence only)  
*People v Munoz* (1960) 11 App Div 2d 79, 202 NYS2d 743, affd 9 NY2d 638, 210 NYS2d 533, 172 NE2d 291  
*People v Cleary*, 33 App Div 2d 814, 305 NYS2d 384  
*People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130  
*Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843  
*People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438  
*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542  
*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222 (admissible evidence only)  
*People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827  
*People v Calandrillo* (1961) 29 Misc 2d 491, 215 NYS2d 361  
 See also *People v Calandrillo* (1961) 29 Misc 2d 495, 215 NYS2d 364, *infra*.  
*People v Bruno* (1962) 36 Misc 2d 330, 232 NYS2d 530  
*People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457  
*People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599  
*People v Perrell* (1965) 47 Misc 2d 1024, 263 NYS2d 640  
*People v Powell*, 49 Misc 2d 624, 268 NYS2d 380  
*Widziewicz v Golding*, 52 Misc 2d 837, 277 NYS2d 62  
*People v Chirico*, 61 Misc 2d 157, 305 NYS2d 237

## OHIO

See *State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437, *infra* § 13[b]  
*State v Laskey*, 21 Ohio St 2d 187, 50 Ohio Ops 2d 432, 257 NE2d 65  
**But see** *State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, *supra* § 3.  
*State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, *infra* § 21[e]  
*State v Hill* (1963, CP) 23 Ohio Ops 2d 255, 91 Ohio L Abs 125, 191 NE2d 235, *infra* § 13[a]

## OKLAHOMA

*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610  
*Application of Killion* (1959, Okla Crim) 338 P2d 168  
*Layman v State* (1960, Okla Crim) 355 P2d 444  
*Bell v Webb* (1961, Okla Crim) 365 P2d 399  
*Melchor v State* (1965, Okla Crim) 404 P2d 63

## OREGON

*State v Leland* (1951) 190 Or 598, 227 P2d 785, affd 343 US 790, 96 L ed 1302, 72 S Ct 1002, reh den 344 US 848, 97 L ed 659, 73 S Ct 4

## PENNSYLVANIA

See also *Commonwealth v Smith* (1965) 417 Pa 321, 208 A2d 21

*Commonwealth v Hoban* (1952) 54 Lack Jur 213, both infra.  
*Commonwealth v Doberstein*, 223 Pa Super 554, 302 A2d 513  
**But see** *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140; *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35; *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167; *Commonwealth v Zayac* (1954) 2 Pa D & C2d 646; *Commonwealth v Graham* (1955) 42 Del Co 313, all infra.  
*Commonwealth v Stepper* (1952) 54 Lack Jur 205; *Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120; *Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59.  
*Commonwealth v Stepper* (1952) 54 411 Pa 563, 192 A2d 894

## RHODE ISLAND

See *State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, supra § 3

## SOUTH CAROLINA

*State v Pickering* (SC) 207 NW2d 511

## SOUTH DAKOTA

*State ex rel. Wagner v Circuit Court of Minnehaha County* (1932) 60 SD 115, 244 NW 100  
*State v Wade* (SD) 159 NW2d 396  
*State v Goodale* (SD) 198 NW2d 44

## TENNESSEE

See *Ivey v State* (1960) 207 Tenn 438, 340 SW2d 907, infra

## TEXAS

*Hanes v State* (1960) 170 Tex Crim 394, 341 SW2d 428  
*Quinones v State* (1980, Tex Crim) 592 SW2d 933  
*Young v State* (1982, Tex App 14th Dist) 644 SW2d 18, review ref

## UTAH

*State v Lack* (1950) 118 Utah 128, 221 P2d 852  
*State v Knill* (1982, Utah) 656 P2d 1026

## WASHINGTON

*State v Allen* (1924) 128 Wash 217, 222 P 502  
*State v Clark* (1930) 156 Wash 543, 287 P 18  
*State v Morrison* (1933) 175 Wash 656, 27 P2d 1065  
*State v Clark* (1944) 21 Wash 2d 774, 153 P2d 297, cert den 325 US 878, 89 L ed 1994, 65 S Ct 1554  
*State v Payne* (1946) 25 Wash 2d 407, 171 P2d 227, adhered to on reh 25 Wash 2d 418, 175 P2d 494  
*State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319  
*State v Olsen* (1959) 54 Wash 2d 272, 340 P2d 171  
*State v Mesaros* (1963) 62 Wash 2d 579, 384 P2d 372; *State v Gilman* (1963) 63 Wash 2d 7, 385 P2d 369  
*State v St. Peter* (1963) 63 Wash 2d 495, 387 P2d 937  
*State v Beard*, 74 Wash 2d 335, 444 P2d 651  
*State v White*, 74 Wash 2d 386, 444 P2d 661  
*State v Music*, 79 Wash 2d 699, 489 P2d 159  
*Seattle v Apodaca* (1977) 18 Wash App 802, 572 P2d 732  
*State v Butler*, 4 Wash App 303, 480 P2d 785  
*State v Messinger*, 8 Wash App 829, 509 P2d 382  
*State v Krausse*, 10 Wash App 574, 519 P2d 266 (citing annotation)  
*State v Greene*, 15 Wash App 86, 546 P2d 1234

## WEST VIRGINIA

See *State v Price* (1926) 100 W Va 699, 131 SE 710, *infra*  
*State v Dye* (1982, W Va) 298 SE2d 898  
*State v Cowan* (W Va) 197 SE2d 641 (citing annotation)

Thus, in *Brenard v Superior Court of Sacramento County* (1959) 172 Cal App 2d 314, 341 P2d 743, involving a prosecution for manslaughter in the driving of a motor vehicle and other offenses, an order denying the defendant's motion for pretrial inspection of certain documents in the possession of the prosecution (including reports of blood tests taken of the defendant and other individuals involved in the accident; statements made by the defendant and recorded by the state highway patrol; and statements made by other individuals involved in the accident and recorded by the state highway patrol) was upheld where the record disclosed only that the motion for pretrial inspection was made and argued before the trial court, and was denied, and there was nothing in the record to show what had transpired at the hearing or whether or not affidavits in support of the motion were filed in the trial court. Stating that in determining whether or not

an appellate court should order a trial court to permit the inspection of documents in the hands of the prosecution, the question is whether or not the trial court abused its discretion in refusing to permit such inspection, and noting that no case had gone so far as to state that the denial of a motion for pretrial inspection was an abuse of discretion without a showing before the trial court as to why the material was needed, the court said that unless a proper showing was made before the trial court, and unless the record made before that court was presented to an appellate court, there was nothing before the appellate court from which it could be determined whether or not the trial court had abused its discretion in refusing pretrial inspection; and that on the record before the present court it was impossible to ascertain whether or not there was an abuse of discretion in the instant case. The court added that if a proper showing were made, the defendant would be entitled to an order requiring production of the blood test report and his statement allegedly recorded by the state highway patrol.

Holding that it was within the discretion of the trial court to grant or deny the motion in question, and that the prosecution was not required to disclose evidence upon which it relied nor did the defendant have a right to ask such disclosure, the court in *Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE 2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, upheld the denial of the defendant's motion, made before and at the beginning of the trial, for an order requiring the prosecution to produce, for inspection by the defense, various evidence in the possession of the prosecution, including the parts of the body of the victim of the alleged murder and the material in which they were wrapped at the time of their discovery, a medical examiner's report relating to the parts of the body, all property and other materials taken from the victim's cottage and the defendant's house, all fingerprints taken by the prosecution at the victim's cottage, and photographs of the victim's cottage and the parts of her body. To the same effect is *Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, upholding the denial of a pretrial motion for production of the stenographic record of a formal statement made by the defendant and his wife at the police station, certain personal property taken from him, certain tissue removed from the body of the victim of the alleged murder, photographs and slides of such tissue, and papers and reports relating to an autopsy.

In *Parker v State* (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775, the court, upholding the denial of the defendant's request to examine contents of the stomach of the victim of the alleged homicide, said that the rule which should be applied in a situation such as was presented in the present case is the one generally applicable in the case of a request for examination of documentary evidence, and this rule is that in a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the prosecution to produce written confessions, statements, and other documentary evidence for the inspection of the defendant's counsel before the trial, and that error may be predicated only for an abuse of such discretion.

In *Pinana v State* (1960) 76 Nev 274, 352 P2d 824, the court, holding that in the absence of statute the allowance of pretrial inspection of the prosecution's evidence in a criminal case rests within the discretion of the trial court, upheld the denial of the defendant's motion for an order requiring the pretrial disclosure of the report of an autopsy and blood alcohol test on the victim of the alleged homicide, the report of a blood alcohol test on the defendant, and certain statements made by the defendant to police officers. Stating that although there are many good reasons why courts should in the exercise of their discretion be liberal in allowing pretrial inspection of prosecution evidence, proper limitations to such inspections must be respected, and that unless a trial judge is required by statute to permit a particular type of inspection, it is not erroneous for him to deny inspection where the basic rights of a defendant would not thereby be prejudiced, the court concluded that in the present case there was no showing to support the defendant's contention that the denial of her motion for pretrial disclosure prevented her from having a fair trial.

See also *People v Calandrillo* (1961) 29 Misc 2d 495, 215 NYS2d 364, wherein the court recognized that there is an inherent power in a court of criminal jurisdiction to permit discovery of evidentiary documents in advance of trial in furtherance of justice.

In *Application of Killion* (1959, Okla Crim) 338 P2d 168, the court, in denying the defendant's motion for permission to inspect a tape-recorded conversation had by him with the county attorney, noted that in the interest of justice for good

cause shown, the trial court has the inherent right in the exercise of sound judicial discretion to grant the remedy of pretrial inspection to the accused where the denial of pretrial inspection might result in a miscarriage of justice. The same rule was also recognized in *State ex rel. Sadler v Lackey* (1957, *Okla Crim*) 319 P2d 610.

See also *Ivey v State* (1960) 207 Tenn 438, 340 SW2d 907, where the court, in holding that an order denying a pretrial inspection of certain FBI reports containing evidence which the defendant expected the prosecution to use in the trial of the case was not reviewable by certiorari, said that the matter under consideration was a procedural question addressed to the discretion of the trial judge and his action thereon did not cast the defendant in a final judgment.

In *State v Lack* (1950) 118 Utah 128, 221 P2d 852, the court, upholding the denial of the production of certain documents for examination by the defendant prior to trial, noted that it is within the sound discretion of the trial court whether a defendant shall be allowed or denied the privilege of examination of evidence in the possession of the prosecution prior to trial. The defendant's contention that the trial court abused its discretion in denying the production was rejected, the court concluding that no such abuse of discretion appeared from the record.

In *State v Clark* (1930) 156 Wash 543, 287 P 18, the defendant's assignment of error to the trial court's refusal to permit him to inspect "certain articles taken from" him was held not sustainable, the court concluding that the trial court did not abuse its discretion in this matter. The court pointed out that the only articles taken from the defendant that were introduced in evidence were a knife and a cloth; that the defendant's counsel was permitted to inspect the knife prior to the trial, and to examine the cloth before it was introduced in evidence; and that the defendant had not at any time made a request to examine the articles by experts.

Noting that it is a settled law of Washington that questions relating to an accused's right to inspection of evidence in the possession of the prosecution are peculiarly within the discretion of the trial court, and that such discretion will be interfered with only when there has been a manifest abuse of discretion, the court in *State v Morrison* (1933) 175 Wash 656, 27 P2d 1065, rejected the defendant's contention that the trial court committed error in its refusal to permit inspection of "certain writings and documents in possession of the prosecuting attorney which had been considered by the grand jury." The court pointed out that the affidavit in support of the motion for inspection failed to state any specific facts from which it might appear that an inspection was necessary in the preparation of the defense or that the defendant would be prejudiced by the denial of his motion, although a conclusion to that effect was incorporated; and that even in the present proceeding on appeal the defendant failed to point out any prejudice which resulted from the trial court's ruling, nor did the record show any prejudice actually suffered by the defendant for this reason.

In *State v Gilman* (1963) 63 Wash 2d 7, 385 P2d 369, the court, in upholding the denial of the defendant's request for inspection during trial of a prosecution witness' statements on the ground that there was no abuse of discretion in the trial court's ruling, followed the rule that the accused is not entitled to examine documents in the hands of the prosecution as a matter of right, but the granting or denying of such inspection rests in the discretion of the trial court, and said: "Judicial discretion to grant or to deny the examination of the state's files in a criminal case is compounded of many things, among which are: timeliness of the application; time and opportunity of the defendant to prepare for trial; reactions and attitudes of witnesses if interviewed before trial; indications of prior inconsistencies in the testimony; surprise at the trial, which reasonable diligence in preparation would not have avoided; reasonable opportunity for examination and experiment by experts consistent with the preservation of the evidence; a clear showing of real danger to and concern for the personal safety of witnesses; needless damage to reputation; financial inability of the defendant to obtain technical and investigative aid; and any other considerations, the denial of which shows an unfair deprivation or the granting of which supports the ideal of substantive due process."

See also *State v Price* (1926) 100 W Va 699, 131 SE 710, where the court, in holding that a new trial should be granted because of surprise at certain evidence introduced by the prosecution, said, in its syllabus of the case, that "unless required to do so by the court, counsel have the right to refuse to disclose the evidence which they expect to introduce upon the trial of a cause."

◇

Pennsylvania decisions are not altogether in agreement as to whether the trial court has the discretionary power to permit an accused to inspect evidence in the possession of the prosecution. In some cases (including all those decided by the Pennsylvania Supreme Court) the existence of such power was recognized at least to some extent.

Thus, in *Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, a proceeding for a writ of mandamus resulting from an order granting the defendant's request for permission to inspect all statements of all witnesses listed upon the indictment, the Pennsylvania Supreme Court, while denying the petition on the ground that the proper remedy in the case should be a writ of prohibition, noted that as a general rule the accused has no right to the inspection or disclosure before trial of evidence in the possession of the prosecution; that, at the very least, a defendant should be required to present exceptional circumstances and compelling reasons; that the mere allegation that the indictment did not set forth facts with sufficient particularity is not a sound basis on which to grant unlimited discovery; and that in the present case the lower court before granting any discovery should at the very least have conducted a preliminary hearing in order to determine the necessity for discovery and the extent of the discovery, if any, which should be granted.

Attention is also called to *Commonwealth v Smith* (1965) 417 Pa 321, 208 A2d 219 (a case not within the scope of this annotation because involving an application for production of statements made by certain prosecution witnesses to the FBI which had not been released to the prosecution), wherein the court recognized that under certain circumstances a defendant may be granted an inspection of statements made by prosecution witnesses which are in the possession of the prosecution.

And in *Commonwealth v Stepper* (1952, Pa) 54 Lack Jur 205, the court, in holding that the defendant's petition for permission to inspect a confession made and signed by him the day after the alleged homicide in the presence of police officers and representatives of the district attorney's office should be granted under the circumstances of the case, said that it had discretion to permit a pretrial examination of the confession to be conducted under its supervision and control, and that on the question of the discretionary power of a trial court to permit such an inspection, it could not agree with the opinions rendered in *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140; *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35, and *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167, all *infra*.

The view that the trial court has the discretionary power to permit a defendant to inspect evidence in the possession of the prosecution was also taken in *Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120, *infra* § 25 [a], and *Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59, *infra* § 13[b]. See also the concurring opinion in *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, *infra* § 25[a].

In *Commonwealth v Hoban* (1952, Pa) 54 Lack Jur 213, the Pennsylvania Supreme Court, denying a writ of prohibition restraining the respondent judge from enforcing an order permitting the defendant's counsel to inspect a signed confession made by the defendant to the police authorities and staff of the district attorney's office, held that while the defendant's counsel in a criminal case has no absolute right to an inspection of the defendant's confession, the trial court has the discretionary power to direct the prosecuting attorney to grant defense counsel permission to inspect such confession if, under the particular circumstances of the case, the interests of justice so require, and that in the present case there was no abuse of discretion in the action of the respondent judge, "in view of the facts stated in the opinion which it filed." The court noted that the present decision was to be understood as being confined to the defendant's confession, as distinguished from any other papers, documents, or articles in the possession of the district attorney.

In other Pennsylvania cases (all of which were decided by courts of lower level), the court refused to recognize the existence of the discretionary power of a trial court to permit an accused to inspect evidence in the possession of the

prosecution.

The decision relied on as leading case by the Sherman, Smith, and Zayac Cases (Pa) all supra, is *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140, wherein the court, concluding that the defendant had no right to compel the district attorney to turn over to him, for his inspection, evidence which the district attorney might intend to present at his trial, denied the defendant's petition for an order directing the district attorney to permit him to inspect a statement made by him to the district attorney.

Similarly, taking the view that a trial court has no authority to direct the district attorney to turn over to the defense any evidence which he may have in his hands, the court in *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35, denied the defendant's petition for an order directing the district attorney to permit the defendant to inspect all written statements made by him and his wife and any declarations made by the victim of the alleged homicide before his death.

Thus, in *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167, the court, in denying the defendant's pretrial petition seeking to compel the district attorney to allow his counsel to inspect certain statements previously made by him to the police, held that under the present state of the law it was not within the discretionary power of the court to compel the district attorney to turn over such statements to the defendant's counsel for his inspection. The court noted that since there was no statute governing the question, the common law controlled, and admittedly at common law no right of inspection of documents before trial was conceded to the accused.

And in *Commonwealth v Zayac* (1954) 2 Pa D & C 2d 646, wherein the defendant, who was "the holder of a gun at the time such gun went off and killed" her husband, filed a petition seeking permission to have an expert inspect such gun and any other guns which might have been taken from her home after her husband was shot, the court held that the order sought could not be granted, since it was doubtful "whether or not the court of quarter sessions has any power to make the order sought upon the district attorney" and "whether a simple petition and rule is such original process as would allow an order to be made." The court denied the defendant's contention that it was within the discretion of the court to make such an order.

Finally, following the Sherman, Smith, and Zayac Cases, the court in *Commonwealth v Graham* (1955, Pa) 42 Del Co 313, denied the defendant's petition for an order directing the district attorney to permit him to inspect statements made by codefendants, tape recordings of the voices of all defendants, the alleged murder weapon and bullet, and all other physical and documentary evidence in the possession of the district attorney.

◇

Granting of motion for discovery of names and addresses of prosecution witnesses and certain items of documentary evidence, such as reports by physicians and toxicologists, search warrants, and reports of police officers, was within trial court's discretion. *Daniels v State*, 49 Ala App 654, 275 So 2d 169.

In prosecution for rape and kidnapping in which defense sought disclosure of journal kept by victim before, during and after events in question, trial court properly examined journal in camera and turned over to defendant only that which was written during time she was with him where journal contained no passages which tended to exculpate defendant or to impeach victim. *Morrell v State* (1978, Alaska) 575 P2d 1200.

Trial court did not abuse its discretion in denying defendant's motion to require prosecuting attorney to disclose whatever information he might have pertaining to criminal record of officer defendant was charged with assaulting where officer testified on cross-examination that he had been convicted of burglary and grand larceny in California and on re-direct examination that his conviction had been reviewed some three years later and charges dismissed. *Turner v*

*State (Ark) 527 SW2d 580.*

Defendant's motion to discover evidence of deputy sheriffs' propensities for violence, including records of several investigations conducted by sheriff's internal administrative services bureau, which indicated that such deputies had used excessive force on previous occasions, was addressed solely to sound discretion of trial court; right to discover such evidence was based on fundamental proposition that defendant was entitled to fair trial and an intelligent defense in light of all relevant and reasonably accessible information; requisite showing of sufficient good cause was satisfied so as to warrant trial court in compelling discovery, where defendant did not have access to sheriffs' investigative records, information which defendant sought might have had considerable significance in preparation of his defense, and where documents were requested with adequate specificity to preclude possibility that defendant was engaged in "fishing expedition." *Pitchess v Superior Court of Los Angeles County, 11 Cal 3d 531, 113 Cal Rptr 897, 522 P2d 305.*

See *Lemelle v Superior Court of Orange County (1978) 77 Cal App 3d 148, 143 Cal Rptr 450, § 27[a].*

See *Hutchinson v State (1981, Fla App D1) 397 So 2d 1001, § 13[a].*

See *Easterling v State (1981, Fla App D1) 397 So 2d 999, § 13[a].*

See *State ex rel. Duncan v Crews (Fla App) 241 So 2d 754, § 17.*

Trial court has authority to order discovery and such authority is inherent and based upon affirmative duty to grant accused fair trial; hence, although trial court's order granting motion for discovery of all statements of any witnesses and copy of all memoranda or oral statements of witnesses, together with list of witnesses to any oral statements, as well as for inspection by court of state and police files to determine existence of any statements, or of reports regarding such matters, was very broad and couched in general terms, it was not void for want of authority, and state's attorney improperly refused to comply therewith. However, since issues as to specifics of items discoverable must be resolved in trial court upon case-by-case, and possibly item-by-item, basis, case was remanded to trial court for further proceedings on discovery issue. *People v Crawford, 114 Ill App 2d 230, 252 NE2d 483 (citing annotation).*

See *People v Endress, 106 Ill App 2d 217, 245 NE2d 26, § 25[a].*

In prosecution for voluntary manslaughter, trial court did not err in refusing to grant discovery related to defendant's pretrial request for copies of any written statements or voice recordings of persons interviewed by any law enforcement agency or officer and for names of all persons with knowledge germane to victim's death, where, in denying defendant's request, court ordered that at trial any such statements of state witnesses would be furnished to defendant prior to cross-examination, and where it was not mandatory for court to order state to disclose names of all persons with knowledge of incident. *State v Thompkins (1982, Iowa) 318 NW2d 194.*

Grant or denial of defendant's motion for pretrial discovery of written statements, or written memoranda of statements, of prosecution witnesses, was matter for discretion of trial court. *State v Lamb, 209 Kan 453, 497 P2d 275.*

Where defense counsel in homicide prosecution during interrogation of chief prosecution witness moved for production of prior statements of that witness for purposes of impeachment, and asked for in camera inspection for material inconsistencies and Brady information, trial court erred by not conducting in camera inspection of witness' prior written or recorded statements. *State v Ates (1982, La) 418 So 2d 1326, later app (La App) 429 So 2d 176 and later app (La App) 429 So 2d 177.*

Trial judge had legal authority to order prosecution to furnish defense names and addresses of actual and potential state witnesses, and trial judge did not abuse his discretion by doing so in this case. *State v Walters (1982, La) 408 So 2d 1337.*

See *State v Morton* (1979, Me) 397 A2d 171, § 11.

It was not error to deny defendant access to statements of prosecution witnesses relative to identification of defendant where denial of motion was made at pretrial hearing, defendant did not renew demand at trial, and under rules then prevailing judge had broad discretion whether to permit discovery before trial of statement of prospective prosecution witnesses. *Com. v. Lacy*, 371 Mass. 363, 358 N.E.2d 419 (1976).

Denial of further discovery by way of particulars -- which necessarily limited Commonwealth's case -- was not abuse of discretion where court had granted defendant right to inspect all Commonwealth's documentary evidence except statement of witnesses, particulars furnished included time, place and manner of crime charged, and Commonwealth's case at trial did not present anything substantially more than what was contained in indictment and particulars. *Commonwealth v Gallo* (Mass App) 318 NE2d 187.

See *Commonwealth v Lamattina* (Mass App) 310 NE2d 136, § 16[a].

See *People v Brocato*, 17 Mich App 277, 169 NW2d 483, § 16[a].

See *State v Charity* (1982, Mo App) 637 SW2d 319, § 16[a].

See *State v Coleman*, 186 Neb 571, 184 NW2d 732, § 17.

See *State v Reichel*, 184 Neb 194, 165 NW2d 743 (citing annotation), § 7.

Although in many cases prosecutor is well advised to disclose identity of witnesses to defendant before trial, and court may order such disclosure in order to avoid surprise and expedite a just result, the identity of prosecution witnesses is not available to defense as a matter of course. *People v Vargas* (1983) 118 Misc 2d 477, 461 NYS2d 678.

See *People v Blair*, 64 Misc 2d 519, 315 NYS2d 179, § 13[a].

See *People v Nassar*, 60 Misc 2d 27, 301 NYS2d 678, § 8.

Court has inherent power to direct discovery and inspection in criminal actions. *People v Christiano*, 53 Misc 2d 433, 278 NYS2d 696.

See *State v Kassow*, 28 Ohio St 2d 141, 57 Ohio Ops 2d 390, 277 NE2d 435, vacated as to imposition of death penalty, 408 US 939, 33 L Ed 2d 762, 92 S Ct 2876, § 22[a].

Where after examination of several documents produced in response to order to "produce all records" relating to indictments, trial judge gave defense counsel two statements to examine, court properly refused to allow counsel to inspect other papers in file as "in camera inspection" was for judge's determination and is not carte blanche order for defense counsel to rummage through files. *State v Moore*, 47 Ohio App 2d 181, 1 Ohio Ops 3d 267, 353 NE2d 866.

In prosecution for murder and assault stemming from violent attack by defendants on unarmed penitentiary guards, withholding discovery on statements made by several inmate witnesses was not error where trial court made in camera review of statements and concluded discovery would not be granted, where sealed documents disclosed that inmate after inmate refused to testify strongly believing that coming forward with testimony would produce death, and where court feared dissemination of information in prison riot scenario would imperil lives of witnesses. *State v Layton* (1983, SD) 337 NW2d 809.

See *State v Tyler*, 77 Wash 2d 726, 466 P2d 120, § 16[a].

Factors to be considered by trial court in exercising discretion in ruling upon defendant's request for disclosure of prosecution's evidence include (1) avoidance of surprise which reasonable diligence could have guarded against, (2) reasonable time to discover and obtain evidence, (3) fair chance to prove material and relevant facts, and (4) timely opportunity to examine crucial evidence not otherwise, in exercise of reasonable diligence, available for inspection before trial; all such factors should be considered in consonance with trial court's duty to keep trial moving along in orderly fashion. *State v White*, 74 Wash 2d 386, 444 P2d 661.

Denial of motion to produce "all statements by witnesses, all confessions and all physical evidence" was not abuse of discretion, where prosecution possessed only a statement from victim of forgery who had already testified at preliminary hearing, and of companion of accused, whose statement was shown to accused's counsel, and where examination just before trial of clothing allegedly obtained through forgery would have served no useful purpose. *State v Green*, 70 Wash 2d 955, 425 P2d 913, cert den 389 US 1023, 19 L Ed 2d 670, 88 S Ct 598.

[\*5b] Absence of jurisdiction

In the following cases an accused's application for permission to inspect evidence in the possession of the prosecution was held to be denied for the reason that the application was made to a court which had no jurisdiction to grant it.

An order of a county superior court granting an accused's request for inspection of the premises on which the offense charged against the accused had allegedly been committed and which had been taken into possession of the sheriff for the purpose of preserving material evidence in the case was quashed in *State ex rel. Andrews v Superior Court of Maricopa County (1931)* 39 Ariz 242, 5 P2d 192, where it appeared that at the time of the issuance of the order a criminal complaint against the accused had been filed by the county attorney in a justice court, and the accused had been arraigned in that court upon the charge contained in the complaint, and that no case or proceeding against the accused was pending in the superior court so as to give it jurisdiction to make the order in question.

In *Curran v Craven (1956)* 36 Del Ch 71, 125 A2d 375, wherein the petitioners, who had been convicted of rape and sentenced to life imprisonment by the Delaware Superior Court, and who intended to petition the United States Supreme Court for certiorari to review whether they had had a fair trial, brought an action in the Delaware Court of Chancery, seeking an order requiring the attorney general to turn over to them, for their inspection and use in connection with their petition for certiorari to the United States Supreme Court, a psychiatric report on a police officer who had allegedly testified falsely at their trial, the Court of Chancery dismissed the action on the ground that it had no jurisdiction to grant the prayers of the petition.

[\*6] Necessity of making timely request; waiver of right to inspection

[\*6a] Generally

In order to be entitled to disclosure or inspection of evidence in the possession of the prosecution, the defendant must properly assert and pursue his right to such evidence by making a request for production thereof and by taking other necessary steps as required under the circumstances.n57

In *People v Sauer (1958)* 163 Cal App 2d 740, 329 P2d 962, cert den 359 US 973, 3 L ed 2d 839, 79 S Ct 888, a prosecution for forgery, the defendant's contention that the trial court abused its discretion in not permitting him to inspect before trial a handwriting expert's report was held not sustainable in view of the fact that the trial court denied the motion without prejudice to a renewal of it at the trial if it became necessary, but the defendant did not renew the motion at the trial. Stating that pretrial inspection of reports in the hands of the prosecution is not a matter of right in all cases, the court rejected the defendant's argument that the prosecution's case was based on the testimony of the

handwriting expert and hence without an opportunity to examine the report before trial the defense could not adequately prepare to meet it.

Thus, noting that a defendant can compel the prosecution to permit the inspection of written statements and other papers and instruments, but that where no proper demand is made by the defendant for the desired documents or papers, the prosecution cannot be expected to volunteer the information to the defendant, the court in *People v Nothnagel* (1960) 187 Cal App 2d 219, 9 Cal Rptr 519, held that the defendant's contention that he should have been furnished with a copy of a physician's report respecting the condition of the victim was not sustainable in view of the fact that the defendant's motion for production included statements of certain named persons but not the doctor's report in question.

Similarly, stating that there was no rule requiring the prosecution voluntarily to produce all documents for the defense, although such documents could be obtained upon demand, the court in *People v Hauser* (1962) 206 Cal App 2d 272, 23 Cal Rptr 731, a prosecution for illegal sale and possession of marijuana, held that the defendant's right to compel the production of a statement of a prosecution witness was waived where it appeared that at the beginning of the trial the defendants requested permission to inspect crime reports prepared by an undercover agent for the state narcotics bureau, and in response to this request, the district attorney made his entire file available to the defendants for their inspection, and that subsequently, when the testimony of the agent revealed that there was a report which had been prepared by him and which was in the files of the narcotics department in another city, the defendants moved for production of this report, and the trial court thereupon offered a continuance of the case to permit the defendants to have the report available, but the defendants then withdrew their motion for production, objecting to any continuance for this purpose.

In *People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, wherein the defendant's motion for the production of certain documents in the possession of the prosecution was granted in part and was denied in part, the court held that the defendant had waived his right to complain on appeal about the denial of a portion of his motion by failing to renew it, as directed by the trial court, if he was still dissatisfied after inspecting all of the other requested material.

In *State v Bittner* (1929) 209 Iowa 109, 227 NW 601, the defendant's contention that the trial court committed error in refusing to compel the production of a written confession of an accomplice was rejected, the court pointing out that after it was discovered that the prosecution had possession of such confession, the defendant's counsel asked the prosecuting attorney if he would produce it, to which the reply was made, "No, produce nothing"; and that no subpoena duces tecum was issued and no means was adopted by counsel for the defendant to effectuate the request made by him to the prosecuting attorney.

See also *Dayton v Thomas* (1963) 118 Ohio App 165, 25 Ohio Ops 2d 19, 193 NE2d 521, app dismd 175 Ohio St 179, 23 Ohio Ops 2d 462, 191 NE2d 806, where the defendant's complaint that he was denied access to papers and documents in the possession of the prosecuting attorney, especially a statement allegedly made by himself, was held without merit, since the record did not reflect any demand, motion, notice, or order of the trial court, and no such statement was offered in evidence nor did it appear that it was used in the examination of witnesses, and no other document was specifically referred to or offered in evidence by the prosecuting attorney.

Where the trial judge issued an order requiring the county attorney to allow the accused to examine certain exhibits, but the defense was not satisfied with the order and proceeded to the trial by waiving examination of the exhibits, it was held in *Melchor v State* (1965, Okla Crim) 404 P2d 63, that there was no abuse of discretion on the part of the trial judge in proceeding to the trial without allowing the requested examination of the exhibits.

In *Commonwealth v Neill* (1949) 362 Pa 507, 67 A2d 276, it was held that at least in the absence of a request, the prosecuting attorney was not required to exhibit a private communication or report of his expert witnesses to the defendant's counsel.

In *Commonwealth v Gockley* (1963) 411 Pa 437, 192 A2d 693, it was held that the trial court did not abuse its discretion

to the prejudice of the defendant where it ruled that the defendant's pretrial request for permission to inspect certain matters (it was not shown what these matters were) should be denied "unless he could produce authorities" which would require the trial court to act favorably on the defendant's application, the court further pointing out that during the period of 6 months between the denial of the request and the commencement of the trial the defendant's counsel had never asked for an additional or final order or ruling on the application.

Where, on appeal from a judgement of conviction, the defendant contended that the conviction should be set aside "by reason of the purposeful suppression of evidence by the Commonwealth which, while in the sole custody and control of the prosecution and while not being exhibited at the trial, was alluded to and incriminated the appellant, resulting in the denial of due process of law," the court in *Commonwealth v Whalen (1959) 189 Pa Super 351, 150 A2d 133*, cert den *362 US 944, 4 L ed 2d 772, 80 S Ct 809*, stating that the gist of the defendant's contention was that the prosecution failed to reveal the results of the examination of the clothing and shoes worn by the defendant at the time of his arrest, held that the failure of the prosecution to produce such clothing and shoes did not constitute fundamental error. Noting that at least in the absence of a request, it is not the duty of a district attorney to exhibit the private report of an expert witness, the court pointed out that the defendant had made no demand for the production of evidence relating to the examination of the clothing and shoes; that the prosecution had offered no evidence as to such articles; and that the defendant's counsel did not attempt to cross-examine in this regard a chemist who had testified for the prosecution.

In *State v Mesaros (1963) 62 Wash 2d 579, 384 P2d 372*, it was held that there was no abuse of discretion on the part of the trial court in ruling upon the defendant's pretrial motion for discovery of evidence in the possession of the prosecution where the trial court granted a portion of the motion for inspection and reserved the right to the defendant to renew the motion on a further showing of necessity, and the defendant prepared an additional motion, but failed to present it to the trial court.

Also recognizing that defendant must properly request production of evidence and take other necessary steps:

#### ARIZONA

*State v Raffaele, 113 Ariz 259, 550 P2d 1060*

#### GEORGIA

*Yeargin v State (1982) 164 Ga App 835, 298 SE2d 606*

#### ILLINOIS

*People v Benhoff (1977) 51 Ill App 3d 651, 9 Ill Dec 102, 366 NE2d 359*

*People v Schabatka, 18 Ill App 3d 635, 310 NE2d 192, cert den (US) 43 L Ed 2d 400, 95 S Ct 1128*

#### INDIANA

*Thomas v State (Ind App) 330 NE2d 325*

#### IOWA

*State v Froning (1982, Iowa) 328 NW2d 333*

## WASHINGTON

*State v Ervin (1979) 22 Wash App 898, 594 P2d 934*

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As to whether suppression by the state of material evidence exculpatory to the accused is a violation of due process in the absence of a request for disclosure of such evidence, the United States Supreme Court in *Brady v Maryland (1963) 373 US 83, 10 L ed 2d 215, 83 S Ct 1194*, supra § 4[b], specifically held that the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment.

However, in *United States ex rel. Meers v Wilkins (1964, CA2 NY) 326 F2d 135*, involving a petition for habeas corpus by a prisoner convicted in a New York state court, the court, in holding that the petitioner's right to a fair trial as guaranteed by the due process clause of the Federal Constitution was violated where the prosecution, knowing the existence of witnesses whose testimony would have aided the defendant in his defense, failed to disclose such information to either the court or to the defendant or his counsel, said that although the present case differed from the *Brady Case (1963) 373 US 83, 10 L ed 2d 215, 83 S Ct 1194*, supra, in that the defense counsel here had never requested the disclosure of evidence from the prosecution, such request was not an indispensable requisite to establish a duty on the prosecution's part.

The view that the state is required to disclose material evidence exculpatory of the accused even in the absence of a request for disclosure, at least for purposes of habeas corpus proceedings, was also taken in *Barbee v Warden, Maryland Penitentiary (1964, CA4 Md) 331 F2d 842*, wherein a writ of habeas corpus was granted to the petitioner, who was convicted in a Maryland state court of assault with intent to murder, under the record showing that during the trial of the petitioner the prosecution produced his revolver in court, offered it for identification, and elicited from prosecution witnesses incriminating statements in respect to it, but without disclosing at any time to the court or to the defense reports of ballistics and fingerprint tests made by the police department, which reports cast grave doubt upon the petitioner's involvement in the shooting in question. Observing that the withheld evidence tending to exculpate the petitioner became highly relevant the instant his revolver was produced in open court and formally marked for identification and witnesses were interrogated about it, and stating that where evidence was withheld by the police which had a direct bearing upon and could reasonably have weakened or overcome testimony adverse to the defendant, it would not indulge in the speculation that the undisclosed evidence might not have influenced the fact finder, the court rejected the prosecution's contention that the petitioner was not entitled to any relief because he had failed to show (1) that his counsel had ever asked that the results of the tests in question should be revealed to him or to the court, and (2) that the prosecuting attorney had any knowledge of the existence of the reports. In concluding that it was no answer that the petitioner's attorney failed to ask for the results of the tests, the court pointed out that while a diligent defense counsel might have learned about the police reports, this was too speculative a consideration to outweigh any unfairness that actually resulted at the trial; that he might not have known that tests had been made; and that this was not a case where defense counsel merely made a wrong tactical calculation, but was a case where the influence strongly projected by the prosecution's evidence might have been destroyed by other evidence in its possession which was concealed from the court and defense counsel. And in concluding that the effect of the nondisclosure of the evidence in question was not neutralized because the prosecuting attorney was not shown to have had any knowledge of it, the court observed that failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely or negligently withheld; that it makes no difference if the withholding is by officials other than the prosecutor; and that the police are also part of the prosecution and the taint on the trial was no

less if they, rather than the prosecuting attorney, were guilty of the nondisclosure. Although recognizing, in footnote 3 of the opinion, that it would have been a denial of due process if the prosecutor had obtained a conviction by the intentional suppression of evidence, the court added that in the absence of a showing that the prosecuting attorney had been told by the police of the existence of the reports in question, and that the prosecuting attorney was himself guilty of any intentional suppression, it did not pass on the question whether the defendant was deprived of due process at his trial.

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And see *People v Tarantino* (1955) 45 Cal 2d 590, 290 P2d 505, a prosecution for extortion and conspiracy to commit extortion, wherein much of the evidence against the defendant consisted of recordings of conversations in his hotel room obtained by the police without his knowledge or permission, and wherein the court, in denying the defendant's contention that he was denied a reasonable opportunity to hear and decipher such recordings before or after excerpts therefrom were received in evidence, pointed out that the record showed that defense counsel were offered but did not avail themselves of opportunities to hear the recordings.

See also *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571, where the court, in rejecting the defendant's contention that there was a failure upon the part of the prosecution to comply with certain of the pretrial discovery orders, said that the prosecuting attorney was not required to seek out the defendant's counsel and present the statements to him for inspection, but rather it was the duty of the defendant's counsel to go to the office of the prosecuting attorney and inspect the statements available to him there.

Where the defendant's request for inspection of evidence in the possession of the prosecution was granted, but the defendant has not followed up the order granting his request by taking the necessary steps to procure the evidence from the prosecution, he may be held to have waived his right to inspection. Thus, in *Drozewski v State* (1955, Fla) 84 So 2d 329, it was held that where the defendant's pretrial request for "a list of all witnesses and statements" was granted by the trial court, but the defendant did not thereafter request the information from the prosecuting attorney or follow up the order granting the request, no error had occurred in proceeding to trial. The court said that the prosecuting attorney was not required to deliver the information to defense counsel when he did not follow up the advantage given him of the order granting his request. To the same effect is *Perez v State* (1955, Fla) 81 So 2d 201, infra § 11[c].

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Where the defendant's request for inspection of documents and reports in the possession of the prosecution is granted, the prosecution is bound to produce only such documents and reports as it has in its possession at the time of the order.<sup>n58</sup> Thus, where the defendant's pretrial request for inspection of all reports and documents in the possession of the prosecution was granted, the court in *People v Briggs* (1962) 58 Cal 2d 385, 24 Cal Rptr 417, 374 P2d 257, holding that the order granting the inspection was complied with when the prosecution allowed inspection of all documents in its possession at the time of the order, rejected the defendant's contention that the order was a continuing one so as to require the prosecuting attorney to produce written reports subsequently obtained by him from his own witnesses. Noting that the defendant produced no authority supporting the claim that an attorney must subject to inspection each note he gives to or receives from a witness during trial, the court pointed out that to impose such a duty upon the attorney would be tantamount to requiring him to maintain his trial file open for inspection at all times.

To the same effect is *People v Bazaure* (1965) 235 Cal App 2d 21, 44 Cal Rptr 831, wherein the court rejected the defendant's contention that the trial court's order granting discovery of statements of prosecution witnesses was a continuing one so as to cover statements made by a certain prosecution witness subsequently to the entry of the order. Pointing out that the discovery order was not worded so as to be a continuing one, the court said that in the absence of a

request or court order the prosecution was not under an absolute continuing duty to furnish subsequently acquired documents, at least where there was no showing of bad faith.

See also, as holding to the same effect, *Belger v State* (1965, Fla App) 171 So 2d 574, infra § 11[c].

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Defendant in murder trial who did not learn of existence of knife possibly belonging to victim, found at scene of crime, until after trial, did not waive right to disclosure by prosecution. *State v Fowler*, 101 Ariz 561, 422 P2d 125.

State's failure to comply with pretrial discovery order did not result in prejudicial error where defendant's attorney did not inform court or seek court's assistance in obtaining compliance with order prior to trial. *Goodwin v State* (1978, Ark) 568 SW2d 3.

District attorney was not required to seek out defendant's trial counsel and present statements to him for inspection but rather, it was duty of defendant's trial counsel to go to office of district attorney and inspect statements available to him there. *People v Crovedi* (Cal App) 49 Cal Rptr 724, superseded 65 Cal 2d 199, 53 Cal Rptr 284, 417 P2d 868.

Trial court did not err in overruling motion to produce exculpatory information of specific statements taken from witnesses by state during investigation of case where defendant did not demand in camera inspection of file and assistant district attorney stated that inspection by him disclosed no exculpatory material. *McGuire v. State*, 238 Ga. 247, 232 S.E.2d 243 (1977).

Defendant was not deprived of opportunity to inspect photographic and videotape evidence regarding condition of child victims, in prosecution for cruelty to children; State notified defendant more than 10 days before trial that such evidence was available for his inspection, but defendant made no attempt to inspect evidence. West's Ga. Code Ann. § 17-16-4(3). *Copeland v. State*, 589 S.E.2d 319 (Ga. Ct. App. 2003).

In response to defendant's motion requesting, inter alia, all oral statements and/or admissions by her, district attorney should have informed defendant of substance of oral statement made by her to law enforcement officer, instead of merely notifying defendant that state intended to offer such statement in evidence, but, by failing to provoke hearing at which trial court could have been called upon to judge sufficiency of state's response, defendant waived right to relief on appeal. *State v Fisher* (1980, La) 380 So 2d 1340.

Voluntary disclosure by police to defense counsel of statement by rape victim, while withholding different handwritten statement without disclosing its existence, constituted discovery violation; offer to recall witness for further cross-examination would have afforded adequate relief, and demand for mistrial was properly denied. *State v Siegfried* (1983, Me) 460 A2d 1382.

In drug prosecution court did not abuse discretion in denying defendants' request to review tapes of wire tap where prior to hearing on defendants' motion prosecution had given defendants opportunity to review tapes which they had not done. *Washburn v State*, 19 Md App 187, 310 A2d 176.

In criminal prosecution, court properly found that prosecutor did not breach duty to disclose grants of immunity or threats or inducements made to secure witness' testimony, and prosecutor did not fail to correct inaccurate testimony concerning bargains and threats used to obtain witness' testimony where defense counsel and court were fully aware of contempt "threat," so that defense demand was necessary to trigger prosecutor or court's duty to disclose information to jury. Neither was defendant entitled to reversal of conviction based on prosecution's failure to produce tape recording of statements made by prosecution witness to police where tape was lost at least three years prior to trial, and tape was

unavailable at time discovery order in question was entered. *People v Till* (1982) 115 Mich App 788, 323 NW2d 14.

Trial court did not err in refusing to permit defendant to examine statements or reports of statements by eyewitnesses in state's file where defendant did not request statements until after state had rested, request was limited to seeing anything which was favorable to defendant's case, and trial court made in camera inspection of statements and determined that they contained nothing favorable to defendant or inconsistent with anything witnesses had said while testifying. *State v Kirkwood (Mimm)* 249 NW2d 890.

Where defendant, after voir dire examination and while jury was being selected, renewed motion for production of statements of witnesses and documents and evidence which motion had been made several months before, trial court did not commit error in overruling motion as being violative of rule requiring movement to pursue motion to decision during term of court motion filed absent indication from record that prosecution had statements beneficial to or exculpatory of defendant or that failure to disclose any material in possession of prosecution prejudiced defendant. *Ponder v State (Miss)* 335 So 2d 885.

In robbery prosecution for stealing purse, trial court did not err in admitting into evidence certain items from purse which had been found during search of defendant, notwithstanding that prosecution failed to disclose existence of such evidence before trial, since defendant did not make written request for such disclosure. *State v Childress* (1978, Mo App) 576 SW2d 557.

Trial court, in prosecution for selling controlled substance, properly exercised its discretion and refused to exclude laboratory report concerning analysis of LSD police officer purchased from defendant, notwithstanding fact that prosecutor failed to comply with discovery request of defendant seeking production of report, where defendant refused offer of time by trial court to examine report and did not assert he needed additional time to review report or that delay in receiving report would adversely affect his rebuttal. *State v Flenoid* (1978, Mo App) 572 SW2d 179.

Error resulting from pretrial refusal of prosecutor to comply with defense counsel's demands to be furnished with statements of state's witnesses in capital-homicide prosecution (set forth in letters to county attorney) was waived by counsel's failure to file discovery motion until after trial began. *State v McKenzie* (1980) 186 Mont 481, 608 P2d 428, cert den 449 US 1050, 66 L Ed 2d 507, 101 S Ct 626, later proceeding 195 Mont 26, 640 P2d 368, habeas corpus proceeding (CA9 Mont) 801 F2d 1519, reh gr, en banc (CA9) 815 F2d 1323 and vacated, in part on other gnnds, on reh, en banc (CA9 Mont) 842 F2d 1525, cert den 488 US 901, 102 L Ed 2d 239, 109 S Ct 250, habeas corpus proceeding (CA9 Mont) 915 F2d 1396.

See *State v Malsbury* (1982) 186 NJ Super 91, 451 A2d 421, § 22[a].

Trial court did not err in failing to rule upon and allow defendant's discovery motion, where record failed to show any request for information made to or denial of information by prosecutor prior to discovery motion, and where record failed to show that defendant's motion was ever brought to trial judge's attention with request that judge rule upon it. *State v Splawn*, 23 NC App 14, 208 SE2d 242, cert den 286 NC 214, 209 SE2d 318.

Statute requiring that breathalyzer test report be made available to subject of test did not require prosecution to furnish defendant with test report in absence of defendant's request. *Abshire v State (Okla Crim)* 551 P2d 273.

Failure of prosecution to have informed defense of neutron activation analysis test for presence of chemical residue on hands which would indicate that individual had fired gun, which had been given to defendant, was not improper where defense counsel had not made any request for discovery of tests and where prosecutor asserted that he did not know test had been given until officer testified on stand that test had been given; trial court properly refused to allow defense counsel to argue concerning test to jury where jury was never informed that test result was negative and where defense, despite guarantee of cooperation from court, made no attempt to introduce evidence of test. *Commonwealth v Jones*

(1981) 285 Pa Super 112, 426 A2d 1167.

See *State v Gaddis (Tenn)* 530 SW2d 64, § 25[d].

Despite supposed "open file" policy in prosecutor's office, defense counsel representing defendant charged with armed robbery was not denied discovery even though information regarding identification by show up, drawing, and picture display, victim's examination of mug books, and oral exculpatory statement were not disclosed by file; boilerplate discovery motion was deemed insufficient to require state to assemble specified information. *State v Mallard (1983, Tenn Crim)* 653 SW2d 763.

See *Boles v State (1980, Tex Crim)* 598 SW2d 274, § 22[b].

It was error for state to fail to disclose statement made by witness to police, even in absence of request, and even though district attorney maintained "open file," but error was harmless where witness made statement to defense counsel upon which he was cross-examined and which he testified was false. *Tucker v State (1978)* 84 Wis 2d 630, 267 NW2d 630.

[\*6b] Timeliness of request

Where the defendant's request for disclosure or inspection of evidence in the possession of the prosecution is not timely, such request may properly be denied.

See also *People v Cooper (1960)* 53 Cal 2d 755, 3 Cal Rptr 148, 349 P2d 964, where the court, in upholding the trial court's denial of the defendant's pretrial motion for inspection of statements of certain witnesses, said that the trial court was entitled to consider, as bearing on the strength or weakness of the defendant's claim that he needed the statements to prepare for trial, the fact that the defendant was indicted on June 11, that on July 29 trial was set for August 10, and that not until July 31 did the defendant present his motion that the prosecution be required to furnish the statements in controversy.

Thus, in *People v Norman (1960)* 177 Cal App 2d 59, 1 Cal Rptr 699, cert den 364 US 820, 5 L ed 2d 51, 81 S Ct 56, infra § 9[d], the court, in upholding the denial of the defendant's motion for production of documents in the possession of the prosecution where the motion was made after a verdict was returned, held that under the circumstances the motion was not timely and the defendant had waived any right to compel production of the documents.

In *State v Colson (1930)* 325 Mo 510, 30 SW2d 59, wherein a township officer was charged with embezzlement, it was held not error to deny the defendant's request during the trial for sufficient time to examine a mass of checks, warrants, and other papers relating to his disbursements of township funds, which were among the books, records, and papers produced by the prosecution at the trial. The court said that, considering the nature of the offense charged, the defendant should have anticipated the necessity of examining those checks, warrants, and other papers in the preparation of his defense, and that the trial court did not abuse its discretion in refusing to allow him time for such an examination during the progress of the trial.

Where, following the overruling of his motion for judgment of acquittal after the prosecution had rested, the defendant orally requested the privilege of inspecting any articles taken from the body of the victim of the homicide involved, the court in *State v Malone (1957, Mo)* 301 SW2d 750, in upholding the denial of the motion, said that the fact that the defendant's request was not timely was a sufficient reason for sustaining the trial court's action in overruling it.

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In this connection, see also *People v Wilson (1963)* 222 Cal App 2d 616, 35 Cal Rptr 280, where the court, in holding

that although the defendant complained that his counsel at the trial was denied the right to see a certain police report, there was no showing that any error in this respect was prejudicial to him or caused a miscarriage of justice, said that the defendant in a criminal case is entitled to disclosure by the prosecution of matters which are discoverable under the law, even though he makes his demand for the first time at the trial, at least where the demanded material is readily available.

On the other hand, the defendant's request for permission to examine certain evidence material to the defense was held timely in *People v Hoffman* (1965) 32 Ill 2d 96, 203 NE2d 873, although the defendant's counsel, knowing of the existence of the evidence for about 3 weeks before the trial, had made no request for its production until the trial was in progress. The court pointed out that there was nothing in the record to indicate that production of the evidence would have delayed the trial as was suggested in the prosecution's brief.

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See *People v Thatcher* (1981, Colo) 638 P2d 760, § 9[b].

Delivery of State's scientific reports to defense six days prior to trial, in technical violation of ten-day disclosure requirement, did not require reversal of conviction after trial judge allowed State's witnesses to testify as to contents of scientific reports, where request for production of reports was made only ten days prior to trial. *State v Meminger* (1982) 249 Ga 561, 292 SE2d 681, on remand 163 Ga App 338, 295 SE2d 235.

Where trial of case was delayed approximately three years from date defendant was indicted for possession of marijuana, and defendant's request for independent examination of evidence was not made until three months before trial, motion was not timely. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233 (1977).

Violation of law's letter by defense filing of discovery request less than 10 days prior to trial would not justify trial without discovery where defendant was not represented by counsel at all until less than 10 days prior to trial. *Pealor v State* (1983) 165 Ga App 387, 299 SE2d 904.

Testimony concerning scientific tests performed on suspected contraband was properly admitted into evidence in prosecution for possession of marijuana with intent to distribute even though reports were not furnished to defense until four days before trial where discovery request was not timely. *Abrams v State* (1982) 164 Ga App 553, 297 SE2d 324.

Where defendants knew that burned automobile might be factor in arson prosecution, they could not wait until eve of trial, almost one year after event, to request production, nor could they wait until second day of trial to complain of failure to receive report of expert who tested items for presence of gasoline vapors. *People v Schabatka*, 18 Ill App 3d 635, 310 NE2d 192, cert den (US) 43 L Ed 2d 400, 95 S Ct 1128.

In prosecution for manslaughter and negligent driving, court's denial of defendant's motion for inspection of Alcoholic Influence Report and continuance for that purpose was proper where defendant did not request report during discovery or during week's previous continuance, where defendant made the request after influence of alcohol charge had been nolle prossed and where the report was not material to charges then pending. *People v Robinson*, 13 Ill App 3d 506, 301 NE2d 55.

See *Johnson v State* (Ind) 319 NE2d 126, § 25[c].

Where Kansas statute required pretrial discovery motion to be filed no later than 20 days after arraignment, and defendant failed to make any such motion until more than 100 days after he had been arraigned, trial court did not abuse discretion in denying motion. *State v Lightle*, 210 Kan 415, 502 P2d 834, cert den 410 US 941, 35 L Ed 2d 607, 93 S Ct

1406.

See *State v Howard (La)* 325 So 2d 812, § 25[a].

Defendant is entitled to inspect tangible evidence which might be used against him, but where request for sample of marijuana was not made until 3 days prior to trial, and defendant had had ample time to familiarize himself with his rights, court did not err in denying motion for continuance in order to have sample analyzed. *Pooley v State (Miss)* 257 So 2d 212, cert den 408 US 928, 33 L Ed 2d 340, 92 S Ct 2492, reh den 409 US 899, 34 L Ed 2d 158, 93 S Ct 104.

Where accused did not make motion for discovery of documents bearing his signature until after court had ruled on 7 other pretrial motions, and where motion for discovery was not made until 10 days before trial, even though accused knew of existence of documents and of intention of prosecution to present testimony of handwriting expert with respect thereto, motion was not timely filed and court did not err in denying it. *State v Scott (Mo)* 491 SW2d 514.

See *State v Charity (1982, Mo App)* 637 SW2d 319, § 16[a].

Notwithstanding fact that defendant's written request for inspection of tangible objects which were subject of indictment was not submitted within ten-day period required by rule, where prosecutor had actual notice of defendant's request for inspection by virtue of letter delivered to him shortly after seizure of tangible objects, defendant would not be held to strict time limitation of rule. *State v Polito, 146 NJ Super* 552, 370 A2d 478.

Discovery motions on misdemeanors may be made only by defendant against whom information (as contrasted with complaint) is pending. *People v Zisis (1982)* 113 Misc 2d 998, 450 NYS2d 655.

See *People v Wyssling (Misc)* 372 NYS2d 142, § 13[a].

Defendant who failed to adequately explain failure to make timely request for minutes of preliminary hearing prior to its conclusion was not entitled to dismissal of indictment on ground that minutes of hearing were unavailable; however, attorneys would be required to attempt reconstruction of such proceedings and, if such reconstruction could not be had, trial court would be required to fashion appropriate order directing prosecutor to turn over to defendant, prior to trial, all grand jury testimony and all non-privileged police records and prosecutor's records relating to statements of witnesses. *People v Pinion, 56 App Div 2d* 664, 392 NYS2d 53.

Motion to require prosecuting attorney to permit defendant to examine certain exhibits which he intended to introduce in trial came too late where it was made after trial was in progress; in such case trial court should act in exercise of its sound discretion. *State v McClellan, 6 Ohio App 2d* 155, 35 Ohio Ops 2d 315, 217 NE2d 230, cert den 386 US 1022, 18 L Ed 2d 462, 87 S Ct 1380.

Where defense counsel requested statements and interviews of witnesses for prosecution after jury was selected and sworn, trial court properly denied request as premature and informed defense counsel that request for information could be renewed as each witness was called, but defense failed to renew request at any time after initial request, defense neglected to make timely request for evidence at trial and could not complain on appeal of failure to produce evidence. *Commonwealth v Krasner (1981)* 285 Pa Super 389, 427 A2d 1169.

Under statute requiring defendant to apply to court for discovery no later than five days prior to commencement of trial defendant was not entitled to later discovery of taped conversations between himself and co-worker; defendant had not requested statement made by him and fact defendant had no knowledge of tape before trial did not impose affirmative duty on prosecution to inform him of tape's existence. *Commonwealth v Brocco (1979, Pa Super)* 396 A2d 1371.

See *State v Gaddis (Tenn)* 530 SW2d 64 (citing annotation), § 25[d].

In drug prosecution, defendant's motion for order directing district attorney general to furnish sample of controlled substance to enable defendant to have substance analyzed and motion to grant continuance in order to allow analysis were properly disallowed where motions were not made in ample time so as to avoid postponement or continuance of final hearing. *State v Christmas (Tenn)* 529 SW2d 717.

[\*7] Burden of showing proper cause for inspection or designating specific evidences<sup>59</sup>

It is generally recognized that in order to be granted an inspection of evidence in the possession of the prosecution, the accused must make a proper showing<sup>60</sup> or must show a proper cause,<sup>61</sup> whether by stating the purpose for which inspection is sought<sup>62</sup> or by showing the relevancy<sup>63</sup> or materiality<sup>64</sup> of the requested evidence, or by otherwise showing facts justifying inspection<sup>65</sup> or sufficient reason why inspection should be allowed.<sup>66</sup> The defendant must show some better cause for inspection than a mere desire for all information which has been obtained by the prosecution in its investigation of the crime.<sup>67</sup> The production of the prosecution's evidence is not allowed to the defendant for exploratory purposes<sup>68</sup> or for the purpose of prying into the prosecution's preparation for trial.<sup>69</sup> The defendant has no right to invoke the means of examining the prosecution's evidence merely in the hope that something may turn up to aid him.<sup>70</sup> A blanket request for production of the prosecution's evidence will not be granted.<sup>71</sup> The defendant's motion for production of the prosecution's evidence must be based on facts, and not on conclusions<sup>72</sup> or mere surmise and conjecture.<sup>73</sup> The mere allegation that the indictment did not set forth facts with sufficient particularity is not a sound basis on which to grant unlimited discovery.<sup>74</sup>

Thus, the denial of the defendant's request for production of evidence allegedly in the possession of the prosecution has been upheld in a number of cases where the defendant failed to designate specific evidence which he desired to inspect or where there was no showing of the existence of such evidence as he requested.

#### CALIFORNIA

*Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838, 18 ALR3d 1416

#### GEORGIA

*Whitaker v State (1980)* 246 Ga 163, 269 SE2d 436

#### ILLINOIS

*People v Brown*, 52 Ill 2d 94, 285 NE2d 1

*People v Jones*, 66 Ill 2d 152, 5 Ill Dec 576, 361 NE2d 1104

*People v Schabatka*, 18 Ill App 3d 635, 310 NE2d 192, cert den (US) 43 L Ed 2d 400, 95 S Ct 1128

#### INDIANA

*Dillard v State*, 257 Ind 282, 274 NE2d 387

#### LOUISIANA

*State v Linkletter* (1977, La) 345 So 2d 452

## MASSACHUSETTS

*Commonwealth v Sullivan*, 354 Mass 598, 239 NE2d 5, cert den 393 US 1056, 21 L Ed 2d 698, 89 S Ct 697  
*Commonwealth v Colella* 2 Mass App 706, 319 NE2d 923

## TEXAS

*Ransonette v State* (1976, Tex Crim) 550 SW2d 36  
*Brown v State* (Tex Crim) 488 SW2d 818

## WISCONSIN

*State v Humphrey* (1982) 107 Wis 2d 107, 318 NW2d 386

## WYOMING

*Jones v State* (1977, Wyo) 568 P2d 837

The defendant's request for subpoenas duces tecum directed to the county attorney and requiring him to bring to the preliminary hearing all written statements of witnesses, other papers or documents, canes, sticks, and any other physical objects relating to any charge in the complaint or that might be offered in evidence, or that might constitute evidence relating to any charge in the complaint, in the county attorney's possession or control, was held properly denied in *State v Colvin* (1957) 81 Ariz 388, 307 P2d 98, the court stating that such vague subpoenas duces tecum were, in the main, an attempt to go on a "fishing expedition," probably in order to obtain the "work product" of the county attorney.

Where the defendant's pretrial motion for inspection of statements made to the police by seven persons who had testified at the preliminary hearing in another case involving the same crime as the one charged against the defendant in the present case was denied by the trial court with a reservation that if any of such persons were put on the stand by the prosecution at the trial of the defendant, then the defendant might have the statements of the persons put on the stand, and of the seven persons whose statements were requested by the defendant, only three persons testified at the trial of the defendant, and although the prosecution furnished the defendant with a summary of the statement made by one of them, the defendant did not renew his request that the statements of the other witnesses should be produced, the court in *People v Cooper* (1960) 53 Cal 2d 755, 3 Cal Rptr 148, 349 P2d 964, in holding that there was no error in the trial court's ruling as to the defendant's request for inspection, observed that the trial court had properly denied the blanket request that the prosecution should turn over to the defendant all the statements in its possession; that the defense must show some better cause for inspection than a mere desire for the benefit of all information which had been obtained by the prosecution in its investigation of the crime; and that further investigation of the persons whose statements were requested for inspection could not have aided the defendant in the preparation of his case.

In *People v Lane* (1961) 56 Cal 2d 773, 16 Cal Rptr 801, 366 P2d 57, the court, noting that the defendant must show some better cause for inspection than a mere desire for the benefit of all information which has been obtained by the prosecution in its investigation of the crime, held that where, upon the defendant's pretrial motion for the production of statements of 13 alleged eyewitnesses to the homicide charged against the defendant, the trial court gave the defendant permission to examine the statement made by one of those witnesses, and denied the request as to the others "without

prejudice of defendant to make any further motion," there was no error in the ruling of the trial court.

Where, after the commencement of the trial, the defendant made a motion for discovery asking for statements of all eyewitnesses to the crime charged against him, the court in *People v Terry* (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446, upholding the ruling of the trial court granting the motion in part and denying it in part, noted that the defendant's motion was simply couched in language indicating that he wanted to learn the facts, and was a blanket request that the prosecution turn over to defense counsel all the statements in its possession, showing no better cause for inspection than a mere desire for the benefit of all information which had been obtained by the prosecution in its investigation of the crime; and that the trial court's order in response to the defendant's motion rested largely in its exercise of sound discretion.

See also *People v Nothnagel* (1960) 187 Cal App 2d 219, 9 Cal Rptr 519, where the court, in refusing to sustain the defendant's contention that he was improperly denied certain discovery proceedings, held that the defendant's request for production of "statements" made by a witness to police officers did not include the witness' conversations which had never been reduced to writing.

Where a police officer testified, on cross-examination, that during the course of the investigation of the crime he had received oral and written reports from other officers, and that there "may be" some reports besides those theretofore produced, and the defendant thereupon requested him to furnish "those additional reports," the court in *People v Carella* (1961) 191 Cal App 2d 115, 12 Cal Rptr 446, held that the defendant's request was so general that it should have been denied. The court pointed out that the "additional reports" referred to in the testimony included oral as well as written reports, and that the proof did not relate the actual existence of any additional written reports.

The defendant's contention that he was denied a fair trial because the trial court failed to grant "all of his blanket motions for notes, written statements and tape-recorded interviews with various persons who were possible witnesses" was held not sustainable in *People v Curry* (1961) 192 Cal App 2d 664, 13 Cal Rptr 596. Pointing out that although the defendant's motion was without any supporting affidavits, the trial court did grant the defendant's motion to some extent, and that the trial court also informed the defendant that he might renew his motion on further affidavits, but the motion was not renewed, the court noted that the defendant must show some better cause for inspection than a mere desire for the benefit of all information which has been obtained by the prosecution in its investigation of the crime, and that a blanket request for production of all statements in the possession of the prosecution may be denied.

A denial of the defendant's pretrial motion for the production of statements or notes made by an assistant district attorney of his interview with a certain friend of the defendant was upheld in *People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102, where it appeared that the statement sought by the defendant did not actually exist.

The trial court's ruling that the defendant's motion for the production of "all police reports" made in connection with the present prosecution should be denied for the reason that the request was too indefinite was sustained as proper in *People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, the court stating that the order for such production must be based upon a proper showing, and that whether to grant or deny it rested largely in the discretion of the trial court. Pointing out that in the instant case the declarations of the defendant and his counsel, which were not opposed by counterdeclarations, merely stated on information and belief that police reports were made and that they would be material to the defense, the court said that even though such declarations were not contradicted, this did not mean that the trial court must grant the motion, but it was still discretionary, and that a mere desire to see all matters which might be helpful to the defense was not a sufficient cause to compel production thereof.

In *People v Collins* (1963) 220 Cal App 2d 563, 33 Cal Rptr 638, the court, in upholding the denial of the defendant's pretrial motion for inspection of evidence, pointed out that the demand for inspection was not intelligible; that "the data taken at" a certain police station was too vague to be meaningful; and that there was no reference to any existing statement of the defendant or of witnesses or to any police reports or other documents to clarify the matter under

dispute.

In *Rosier v People* (1952) 126 Colo 82, 247 P2d 448, the court upheld an order denying the defendant's request for pretrial production of all the files and records in the possession of the police department covering a certain period insofar as they in any wise pertained to the present case. Noting that in Colorado there was neither statute nor precedent authorizing defendant's counsel to make an examination or inspection of the prosecution's evidence prior to the time such evidence was offered on the trial, and stating that under some most unusual circumstances a defendant might be entitled to inspect and examine documents in the possession of the law enforcement officers, but then he first must make a prima facie showing of their materiality, the court observed that in the present case it was obvious that defense counsel wished an opportunity of rummaging at will through the police files and records on a "fishing expedition," hoping thereby to discover something which they could use in their client's defense. The court pointed out that the defendant's counsel had never specified to the trial court just what documents they desired to inspect or the purpose for which the inspection would be made, and that the records in question could never have been introduced in evidence.

In *Newton v State* (1884) 21 Fla 53, the denial of the defendant's pretrial motion for an order requiring the prosecution to produce all articles in its possession intended to be used in evidence against the defendant was held not error where, in answer to the defendant's motion, the prosecuting attorney filed a written statement reciting that all articles in the possession of the prosecution which were intended to be offered in evidence had been seen and examined by the defendant's counsel and experts in their behalf at the preliminary examination, and that if there were any articles in his possession intended to be offered in evidence but not yet seen or inspected by the defendant, the defendant should specify what such articles were. The court pointed out that the defendant's counsel had made no reply to such written statement of the prosecuting attorney and in no way denied the truth of any part of the statement.

In *Russom v State* (1958, Fla App) 105 So 2d 380, cert dismd (Fla) 109 So 2d 30, the defendant's contention that the trial judge committed error in refusing to compel the prosecuting attorney to produce all pretrial statements by witnesses or the prosecutrix for examination by defendant's counsel was held not sustainable, since the testimony and evidence adduced at the trial had never disclosed the existence of any statements given to the prosecuting attorney, nor did the motion designate a particular statement or paper, but the motion was made on the belief of the defendant's counsel that such writings did exist.

The defendant's contention that the trial court had committed error in denying his application for the production of books, papers, and copies of statements made by any prospective witnesses was denied in *State v Stump* (1963) 254 Iowa 1181, 119 NW2d 210, cert den 375 US 853, 11 L ed 2d 80, 84 S Ct 113, the court pointing out that some of the information sought was nonexistent, that the things to which the defendant was entitled had been produced, and that parts of the motion constituted an obvious "fishing expedition." The court noted that the demand for production must relate to specific documents and should not propose any broad or blind fishing expedition among documents possessed by the prosecution, and that the demand for production must be for documents shown to be in existence. Holding to the same effect and noting the same rules is *State v Kelly* (1958) 249 Iowa 1219, 91 NW2d 562, wherein the court upheld the denial of the defendant's motion for production of "copies of any statements, reports, investigations, confessions, and other evidence" the prosecution intended to use in the case.

In *State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, the court, in holding that there was no error in refusing to require the prosecution to make available to the defense for its inspection reports of conversations had between police officers and certain prosecution witnesses, pointed out that the defendant did not show that the requested reports were in existence or that they were material and relevant, and that he assigned no reason for granting his request for inspection, but appeared to have been embarking on a fishing expedition. The court noted that it was not required to order the production of irrelevant and immaterial matter not admissible in evidence, even where such matter might aid in the preparation for trial.

The defendant's contention, on appeal from a judgment of conviction for rape, that the trial court should have required

the state police to produce for his inspection their files, reports, and statements in the case, because "it may well have been" that such files and reports contained statements of state police officials in conflict with their testimony or the prosecutrix's testimony, was rejected in *People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698. Stating that if a party has in court material which would be itself competent for admission as an exhibit in evidence, he may be required to produce it, and that even as to such potential exhibits there is under state practice some measure of discretion vested in the trial court and there must be some demonstration that there is "evidence" in the possession or control of the prosecution "favorable to the defendant," the court concluded that no such demonstration had been made in the vague speculations of possibility as advanced by the defendant on appeal in the present case. The court also noted that a work sheet and files of an adverse party in a criminal or civil case will not ordinarily be made available to the other party.

In *People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, the defendant's motion for permission to examine "the weapons alleged to have been used in the murder" charged against the defendant was denied. Noting that physical objects may be made available to a defendant in the discretion of the court before trial, and that it need only appear that such "evidence" is relevant, competent, and outside any exclusionary rule, the court pointed out that in the present case the moving papers failed to show the existence of any weapon or the relevance or competence thereof or that such weapon was outside any exclusionary rule. The court added that the New York rule requires demonstration in the record of the materiality as well as the existence of the evidence.

In *Application of Shafer* (1961) 31 Misc 2d 859, 226 NYS2d 727, app dismd 18 App Div 2d 766, 235 NYS2d 95, wherein the defendant moved for permission to inspect any ex parte orders for eavesdropping granted with respect to his telephone conversations, alleging that the inspection sought was necessary to lay the foundation for a timely motion to suppress evidence illegally obtained, the court held that the motion should be denied. Pointing out that the defendant's motion was based upon statements, allegedly made by an assistant district attorney and a state police officer, that telephones used by him had been tapped, and that the defendant asked to inspect orders, believed to exist, copies of which might be in the possession of several county judges and of unnumbered Supreme Court justices, and the originals, if any, of which might be in the possession of the district attorney or other law enforcement officers, the court said that if the relief asked were granted, "the order would lack certainty and read in substance like the words of the childhood game, 'Come out, come out, wherever you are.'"

In *Anderson v State* (1960) 207 Tenn 486, 341 SW2d 385, wherein, upon discovering during the testimony of certain prosecution witnesses that they had given written statements to the police and the Federal Bureau of Investigation, the defendant's attorney requested an order compelling the production of such statements, the court, upholding the denial of the request for production, pointed out that the record did not show whether the statements in question had been preserved, or were in existence, or were in the possession of the police or the prosecution or the Federal Bureau of Investigation, nor was there any showing why such statements were desired by the defendant or how they might aid the defense, and that the identification or conviction of the defendant in no way depended upon the statements. The court said that in the absence of any showing that such statements were still in existence and were in some way relevant or needful to the defense, the trial judge could not be said to have committed error in overruling the request for production.

Also recognizing that accused has burden of showing purpose for which inspection is sought or showing relevancy or materiality of evidence requested:

#### CALIFORNIA

*Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838, 18 ALR3d 1416 (purpose of inspection)

## DISTRICT OF COLUMBIA COURT

*United States v Holmes (Dist Col App) 343 A2d 272*

## FLORIDA

*Glow v State (Fla App) 319 So 2d 47*

## GEORGIA

*Buford v State (1982) 162 Ga App 498, 291 SE2d 256*

## ILLINOIS

*People v Frazier, 2 Ill App 3d 639, 276 NE2d 801 (materiality)*

## INDIANA

*Dillard v State, 257 Ind 282, 274 NE2d 387 (materiality)*

*Kleinrichert v State (Ind) 297 NE2d 822*

## KANSAS

*State v Glazer (1978) 223 Kan 351, 574 P2d 942*

*State v McQueen (1978) 224 Kan 420, 582 P2d 251*

*State v Campbell, 217 Kan 756, 539 P2d 329 (citing annotation)*

*State v Humphrey (Kan) 537 P2d 155*

## LOUISIANA

*State v Tauzier (1981, La) 397 So 2d 494*

*State v Darby (La) 310 So 2d 547*

## MAINE

*State v Burnham (Me) 350 A2d 577*

## MASSACHUSETTS

*Commonwealth v MacDonald (Mass) 333 NE2d 189*

## MICHIGAN

*People v McIntosh (Mich App) 234 NW2d 157*

## OKLAHOMA

*Bettlyoun v State (Okla Crim) 562 P2d 862*

## PENNSYLVANIA

*Commonwealth v Martinolich, 456 Pa 136, 318 A2d 680, cert den and app dismd (US) 42 L Ed 2d 661, 95 S Ct 651*

## TEXAS

*Spaulding v State (Tex Crim) 505 SW2d 919*

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In this connection, attention is also called to the following cases in which the denial of the defendant's request for production of evidence allegedly in the possession of the prosecution was upheld in view of the fact that the evidence in question was beyond the control of the prosecution at the time of the request.

In *State v Thomas (1928) 167 La 386, 119 So 401*, a prosecution for illegal sale of intoxicating liquor, the defendant's pretrial motion for production of the liquor in question in order that he might have it analyzed to determine the alcoholic content was held properly denied where the prosecution answered the motion by stating that the liquor was not in the possession of the prosecution or any officers under its control. Pointing out that the liquor in question had been turned over to the federal authorities for analysis and use in a prosecution against the defendant in a federal court and had not been returned to the state officials, the court said that the prosecution was not required to demand of the federal officers the return of the confiscated liquor in order that the defendant might have the benefit or use of it in the present prosecution.

In *Parker v State (1962) 244 Miss 332, 141 So 2d 546*, the defendant's contention that the trial court committed error in failing to require the prosecution to produce a tape recording of his confession which was made by a court reporter when he was taking the confession in shorthand was rejected, the court pointing out that neither the prosecuting attorney nor any representative of the prosecution had such recording, but it was in the possession of the court reporter.

In *Columbus v Mercer (1963) 118 Ohio App 394, 25 Ohio Ops 2d 290, 194 NE2d 901*, a prosecution for operating a motor vehicle while under the influence of alcohol, the defendant's assignment of error concerning the overruling of her motion to require the prosecution to furnish evidence of body fluids for examination by her expert witnesses was held not sustainable where there was no evidence in the file indicating that the evidence requested was in the hands of the prosecution at the time the motion was made.

In *Morrison v State (1899) 40 Tex Crim 473, 51 SW 358*, wherein the defendant argued that the trial court committed error in refusing to grant an order compelling the prosecution to produce certain letters written by him so that he might inspect them in the preparation of his defense, the court, pointing out that at the time of the motion for production the letters were in the hands of a witness for the prosecution, held that the trial court did not commit error in refusing to

grant the motion, because at the time of the motion the prosecution could not comply with it.

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See *Pitchess v Superior Court of Los Angeles County*, 11 Cal 3d 531, 113 Cal Rptr 897, 522 P2d 305, § 5[a].

See *Lemelle v Superior Court of Orange County (1978)* 77 Cal App 3d 148, 143 Cal Rptr 450, § 27[a].

See *In re Valerie E.*, 50 Cal App 3d 213, 123 Cal Rptr 242, § 17.

See *State v Traenkner (Del)* 314 A2d 202, § 11[b].

There was no duty on part of prosecution to disclose any information regarding performance of members of jury panel in prior criminal jury trials in absence of prior governmental impetus affecting juror's prior service of nature likely to escape attention of reasonably diligent defense counsel; nor did such information constitute evidence favorable to defense since jury panel information was neither evidence nor was it material to guilt or punishment of defendant. *Britton v United States (CA Dist Col)* 350 A2d 735.

United States Constitution does not require pretrial disclosure of prosecution evidence favorable to accused without some predicate for such disclosure being established, and, under Florida law, such disclosure, for in camera inspection prior to trial of statements of witnesses taken by state to determine whether such statements come within scope of Brady rule requiring disclosure of evidence favorable to accused, may be ordered only upon proper request of accused, in which accused must show (1) cause to believe that state possesses evidence materially favorable to issue of guilt or punishment that it has refused to reveal upon request, and (2) that such evidence cannot be obtained through utilization of appropriate portions of Florida Rules of Criminal Procedure or applicable statutes; thus where accused charged with murder and arson moved for disclosure of any written statements, memoranda, or summaries of statements made by any persons to agents of state and no reason for granting such motion was shown other than that offense charged was punishable by death, trial court erred in granting motion, since such reason was clearly insufficient to meet proper requirements. *State v Williams (Fla App)* 227 So 2d 253.

In prosecution for aggravated assault and armed robbery of 76-year-old woman, state was properly permitted to introduce testimony from state crime laboratory forensic serologist and victim's physician regarding substance of crime laboratory report identifying blood found on suspected assault weapon (hammer) and on defendant's socks as consistent with victim's blood type, and emergency room report specifying victim's injuries and treatment, despite prosecution's failure to disclose contents of reports prior to trial where inculpatory substance of reports eliminated any Brady violation, and where pretrial discovery motion filed by defendant failed to specify statutory provision mandating discovery of such reports at least ten days prior to trial. Nebulous request that copies of scientific reports be provided "sufficiently in advance of trial to give defendant a reasonable opportunity to prepare a proper defense" were insufficient to warrant sanctions against prosecution for failing to make discovery available. *State v Madigan (1982)* 249 Ga 571, 292 SE2d 406, on remand 163 Ga App 460, 295 SE2d 236 and (ovrld by *Law v State*, 251 Ga 525, 307 SE2d 904).

Trial court did not err in denying defendant's Brady motion requesting production of all material favorable or arguably favorable to defendant's defense, an in camera inspection of state's file by trial court, and copies of all items reviewed by court being sealed and placed with clerk, where defendant made no showing at trial, and none on appeal, that state had any exculpatory material in its possession. *Simmons v State (1979)* 152 Ga App 643, 263 SE2d 522.

See *Watson v State (1978)* 147 Ga App 847, 250 SE2d 540, § 17.

See *Allanson v State* (1978) 144 Ga App 450, 241 SE2d 314, § 17.

Defendant's motion for production of list of names and addresses of all persons known to prosecution to have information relevant to offense charged, except privileged informers, was properly denied as overbroad; however, defendant was entitled to discovery and inspection of any material or information in possession of prosecution which might be exculpatory in nature within meaning of rule of *Brady v Maryland*. *Chung v. Lanham*, 53 Haw. 617, 500 P.2d 565 (1972).

See *People v Son* (1982) 111 Ill App 3d 273, 66 Ill Dec 952, 443 NE2d 1115, § 23.

If prosecution claims that part of report of prior statements made by prosecution witnesses contains irrelevant matter, trial court should examine documents and, at its discretion, delete unrelated material before delivery to accused. *People v Hoagland*, 83 Ill App 2d 231, 227 NE2d 111.

Where discovery motion was extremely overbroad and asked for information that was either impossible or unreasonably difficult for state to obtain, trial judge's order to both sides to produce all information within their power to produce was proper, and defendant did not show that he was prejudiced by state's failure to file anything in response to this order where he did not indicate any particular information he failed to receive or any evidence that was admitted at trial that should have been disclosed to him under the motion. *Anderson v State* (1983, Ind) 448 NE2d 1180.

Defendant's motion for production of alleged additional statements of witness was correctly denied where defendant failed to establish that evidence would have been exculpatory or that additional statements even existed. *Swan v State* (1978, Ind) 375 NE2d 198.

Where defendant's motion to require state to produce evidence for inspection was overly broad and non-specific and where defendant failed to show or allege that he was, in any way, harmed by non-disclosure, motion was properly overruled. *Brandon v State* (1978, Ind) 374 NE2d 504.

See *Rowe v State* (Ind) 314 NE2d 745, § 23.

Pretrial discovery motions are governed by 3 factors: (1) item must be designated with reasonable particularity; (2) item must be material to defense or beneficial in preparation of defense; and (3) discovery will be ordered unless state makes sufficient showing of paramount interest in nondisclosure of item. *Auer v State* (Ind App) 289 NE2d 321.

In prosecution for murder it was not improper for prosecution to fail to produce statement allegedly made by deceased to sheriff and his deputies where defendant's original motion for discovery was all-inclusive blanket motion for all statements and investigative reports in prosecution's possession and where there was no showing that alleged statement was ever reduced to writing. *State v Hummell* (Iowa) 228 NW2d 77.

Court committed no reversible error in denying motion for list of voting records of prospective jurors compiled by district attorney's office, where defendant made no showing that list was necessary in order to prevent undue prejudice to his case, hardship or injustice. *State v Wright* (La) 344 So 2d 1014.

In murder prosecution, denial of defendant's requests, made after opening statement, for issuance of instanter subpoenas (1) for copy of complaint relative to shooting of murder victim, (2) for all other complaints filed against defendant, and (3) for "rap sheets" on all prosecution witnesses other than police officers, was not reversible error where (a) there was no allegation or showing that defendant had inadequate notice of crime with which he was charged or that he was in any way surprised or prejudiced, (b) any other complaints filed against defendant would have been inadmissible, and (c) record, as designated by defendant, did not give list of prosecution witnesses or any indication whether any witnesses in fact had criminal records and defendant did not allege that he was prejudiced as result of ruling, nor was any prejudice

discoverable by record. *State v Moore (La)* 344 So 2d 973.

Where prosecution witness testified he remembered event in question and was relying on his memory not on written statement which he had read on day "it happened" prosecution was not required to furnish statement to defendant. *State v Monroe (La)* 329 So 2d 193.

Defendants in rape prosecution, having exercised right of discovery and inspection under Maryland rule to obtain names of witnesses to be called on behalf of state, names of all law enforcement officials who had any communications with defendants, all articles removed from persons of defendants, all reports of law enforcement officials (including laboratory tests) received by state's attorney, all written and oral statements given by defendants, and all papers, memoranda, and recordings made in connection with statements given to law enforcement officials by defendants, were not entitled to conduct thorough examination of all information and documents known to state and its investigators to determine if they had knowledge of anything favorable to defendants; to grant such motion would be to authorize general, exploratory examination of state files in midst of trial, which could substantially disrupt, if not abrogate, fundamentals of our existing system of criminal procedure and practice. *Ward v State, 2 Md App* 687, 236 A2d 740.

Trial court did not abuse discretion in denying request for "[a]ny evidence of an exculpatory nature that the State has in its possession," under rule providing that upon defendant's motion and showing that items sought may be material to preparation of defense, and that request is reasonable, court may order production of certain types of evidence. *Leyva v State, 2 Md App* 120, 233 A2d 498.

Rule of Brady Case that suppression by prosecution of evidence favorable to accused, when requested, violates due process, did not support defendant's blanket request for all evidence of exculpatory nature or which might be favorable to him which was in possession, control, or knowledge of prosecution, since motion indicated that defendant was merely speculating as to existence of exculpatory evidence and intended only fishing expedition. *Com. v Preston (Mass)* 268 A2d 922.

In order to ensure fair trial for defendant, obligation of prosecution to disclose evidence must be considered that of entire "prosecution team" which would include police officers and would apply to evidence which officer has even though existence of such evidence had not been divulged to prosecutor. *State v Swanson (Minn)* 240 NW2d 822.

See *State v Charity (1982, Mo App)* 637 SW2d 319, § 16[a].

In trial for driving while intoxicated, court did not err in admitting into evidence documents regarding qualification of officers connected with breathalyzer test equipment, notwithstanding that such documents had not been previously disclosed to defendant in response to his request for discovery, since discovery request was for "reports of scientific tests" and challenged documents were not reports but rather were background evidence concerning administration of test. *State v Vaughn (1979, Mo App)* 577 SW2d 131.

Trial court has broad discretion in ruling on discovery motion in criminal case and such motion should be granted where required by interests of justice, but burden is on defendant to show why motion should be granted. *State v Reichel, 184 Neb* 194, 165 NW2d 743 (citing annotation).

For accused to be granted right to inspect evidence in possession of prosecution, he must show something more than mere desire for all information obtained by prosecution; in particular, production of state's evidence is not allowed for exploratory purposes, or for purpose of prying into state's preparation of case for trial; defendant's motion for production must be based upon facts, not conclusions, and blanket request will not be granted, because defendant has no right to examine state's evidence merely in hope that something will turn up to aid him. *State v Tackett, 78 NM* 450, 432 P2d 415, 20 ALR3d 1 (citing annotation).

See *People v Daniels (Misc)* 371 NYS2d 595, § 13[b].

See *State v Tate (1982)* 58 NC App 494, 294 SE2d 16, app dismd, petition den (NC) 295 SE2d 763 and affd 307 NC 464, 298 SE2d 386, § 17.

Where defendant failed to make some showing that prior incident or incidents of arresting officer using force actually occurred and source and nature of information, trial court was not obligated to make in camera inspection of personnel records of arresting officer. *State ex rel. Johnson v Schwartz (Or App)* 552 P2d 571.

See *Commonwealth v Jenkins (1978)* 476 Pa 467, 383 A2d 195, § 13[d].

Although defendant did not have to show that evidence which he sought to have produced would be admissible at trial, he did have to show some better cause for inspection than mere desire before refusal to permit inspection would constitute constitutional error. *State v Hill (SC)* 234 SE2d 219.

See *Elliott v State (Tenn Crim)* 454 SW2d 187, § 11[h].

In prosecution for aggravated robbery, trial court did not err in failing to permit defense counsel opportunity to inspect certain evidence in possession of State under authority of state rules of criminal procedure, where rules required trial court to permit discovery only if evidence sought was material to defense of accused, and no evidence was presented at trial of materiality of items listed in discovery motion that were not already available to defendant. *Young v State (1982, Tex App 14th Dist)* 644 SW2d 18, review ref.

In prosecution for capital murder, prosecutor was under no constitutional obligation to deliver entire file to defense counsel for examination; defendant's general request for prosecutor to produce "all exculpatory evidence which the prosecution may have" was the equivalent of no request at all. Constitutional error would be presented only if there was a showing that undisclosed evidence existed which created a reasonable doubt that did not otherwise exist. *Villarreal v State (1978, Tex Crim)* 576 SW2d 51.

In robbery prosecution, trial court did not err in denying motion for discovery of all reports and materials relating to alleged rape where motion did not request this information and defendant failed to establish that reports and other matter existed at time motion for discovery was entered. *Smith v State (Tex Crim)* 547 SW2d 6.

See *Jackson v State (Tex Crim)* 501 SW2d 660, § 11[m].

Motion for inspection of all papers and letters written or stenographically recorded and for copies of all written statements and interviews was too broad to be effective and did not reflect "good cause" required for motions for discovery; moreover, defendant was not entitled to written statements of witnesses and the work product of counsel and their investigators. *Smith v State (Tex Crim)* 468 SW2d 828.

See *Solomon v State (Tex Crim)* 467 SW2d 422, § 11[m].

Defendant's motion for discovery of copies of arrest records, offense reports, and any and all other records and photographs prepared by the police in their investigation of case was properly denied as too broad, and also because there was no showing that items sought were material to defense or to assessment of punishment. *Hardin v State (Tex Crim)* 453 SW2d 158.

Defendant in murder prosecution was not entitled to carte blanche in rummaging through state's files in hope of discovering some shred of evidence which might be of assistance to her on issue either of guilt or punishment and trial court properly denied her motion for discovery where she made no showing that matters sought to be discovered were

material to her defense or issue of punishment, or that material matters were in prosecutor's possession and withheld by state, and where many of matters set out in motion were public records available on request, others were matters not within knowledge of prosecutor, and others had been held to be exempt from discovery. *Bell v State (Tex Crim) 442 SW2d 716.*

Trial court did not abuse discretion in denying discovery motion generally requesting production of "all statements, documents and evidence now in possession" of police officers or district attorney, since such motion was too broad to be effective; it did not specifically designate evidence referred to nor reflect "good cause" required by statute, and there was no showing that evidence sought was material to defense, that it was nonprivileged, that request was reasonable, or that items demanded were in possession or control of state or any of its agencies. *Sonderup v State (Tex Crim) 418 SW2d 807.*

Motion to produce for pretrial inspection "any document" in possession of prosecution or police which might be relevant on issue of guilt or innocence or punishment was far too broad, even under new discovery statute, since such statute excepts by its terms written statement of witnesses, work product of counsel and their investigators, and their notes or reports. *Smith v State (Tex Crim) 409 SW2d 408, cert den 389 US 822, 19 L Ed 2d 73, 88 S Ct 45.*

Discovery request asking for information of when, where, and in what manner each person became a member of a conspiracy, where illegal agreement was made, names and addresses of all coconspirators known to state, time of day, date, and place where conduct constituting offense occurred, time of day, date, and place where overt acts in pursuance of agreement occurred, and any overt acts in pursuance of conspiracy not pled in indictment but which state intended to prove at trial, was not a request for documents, objects, and other tangible things discoverable under state statute relating to discovery in criminal cases, but was instead a request for information about state's case which was not within scope of discovery statute. Further, defendant did not demonstrate good cause, materiality, or possession by state of any of the information requested. *Kennard v State (1983, Tex App Fort Worth) 649 SW2d 752, review ref.*

In prosecution for auto theft, trial court properly denied defendant's pretrial motion for discovery and inspection of automobile, where automobile had been released from prosecutor's possession and returned to its owner in another state over three months before defendant's demand and defendant failed to show that automobile had any evidentiary significance to the defense in that defendant's primary purpose for inspecting vehicle was to show that serial number on owner's vehicle registration card did not match number stamped on automobile door, a fact that was uncontroverted by state. *State v Knill (1982, Utah) 656 P2d 1026.*

Court did not err in not requiring disclosure of prosecution's evidence in burglary and larceny case, where disclosure demand was "all-inclusive and unreasonable," and "fraught with dangerous adversary procedural implications" if request had been granted. *State v Martinez, 21 Utah 2d 187, 442 P2d 943.*

In prosecution for first-degree murder and first-degree sexual assault, defendant was not entitled to discovery of an accurate copy of parking ticket which he had received and paid for by check, since state's duty to disclose covers only evidence within state's exclusive possession, and evidence here was not in exclusive possession of state in that defendant knew he had been ticketed, he paid ticket by check, and cancelled check was returned to him. *State v Armstrong (1983) 110 Wis 2d 555, 329 NW2d 386, cert den (US) 77 L Ed 2d 1304, 103 S Ct 2125.*

[\*8] Inspection of evidence relevant, material, or favorable to defense; inspection for fair trial or in interest of justice

In some cases it has been explicitly recognized that an accused person may be permitted to inspect evidence in the possession of the prosecution which is relevant and material to the defense<sup>75</sup> or which is favorable to the accused,<sup>76</sup> or that evidence in the possession of the prosecution may be disclosed to avoid delay in trial<sup>77</sup> or to protect essential,<sup>78</sup> basic,<sup>79</sup> or constitutional<sup>80</sup> rights of the accused or where the disclosure of evidence is otherwise

necessary for a fair trial<sup>81</sup> or in the interest of justice.<sup>82</sup> And in many other cases the court, in denying, or upholding the denial of, the accused's request for inspection of evidence in the possession of the prosecution, took into account the fact that there was no showing of relevancyn<sup>83</sup> or materialityn<sup>84</sup> of the requested evidence. Suppression by the state of material evidence exculpatory to the accused is a violation of due process, irrespective of the good or bad faith of the prosecution.n<sup>85</sup>

Also recognizing that accused may inspect evidence which is relevant or material to defense or which is favorable to accused:

#### SUPREME COURT

*Woodcock v Amaral (CA1 Mass) 511 F2d 985, cert den 423 US 841, 46 L Ed 2d 60, 96 S Ct 72*

*Mitchell v Wyrick (1982, ED Mo) 536 F Supp 395, affd (CA8 Mo) 698 F2d 940, cert den (US) 77 L Ed 2d 1373, 103 S Ct 3120*

#### CALIFORNIA

*Murguia v Municipal Court for Bakersfield Judicial Dist., 15 Cal 3d 286, 124 Cal Rptr 204, 540 P2d 44*

*People v Moore, 50 Cal App 3d 989, 123 Cal Rptr 837*

#### COLORADO

*People v Trujillo, 186 Colo 329, 527 P2d 52*

*People v Austin (Colo) 523 P2d 989*

#### DISTRICT OF COLUMBIA COURT

*Jackson v United States (Dist Col App) 329 A2d 782, cert den (US) 46 L Ed 2d 74, 96 S Ct 95*

#### GEORGIA

*Brooks v State (1977) 141 Ga App 725, 234 SE2d 541*

*Osborn v State (1982) 161 Ga App 132, 291 SE2d 22*

*Mason v State (1982) 162 Ga App 167, 290 SE2d 499*

*Wallace v State (1982) 162 Ga App 367, 291 SE2d 437*

#### ILLINOIS

*People v Veal (1978) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963*

*People v Dixon, 19 Ill App 3d 683, 312 NE2d 390*

*People v Nichols, 27 Ill App 3d 372, 327 NE2d 186 (citing annotation)*

#### INDIANA

*Hall v State (1978, Ind App) 374 NE2d 62*

*State v Bryant (Ind App) 338 NE2d 690*

#### KANSAS

*State v Johnson (1977) 223 Kan 119, 573 P2d 976 (name and address of undisclosed witness to robbery)*

*State v Kelly, 216 Kan 31, 531 P2d 60*

*State v Humphrey (Kan) 537 P2d 155*

#### LOUISIANA

*State Ex Rel. Clark v Marullo (1977, La) 352 So 2d 223*

*State v Lovett (1978, La) 359 So 2d 163*

*State v Thomas (La) 306 So 2d 696*

*State v Williams (La) 310 So 2d 528*

*State v Owens (La) 338 So 2d 645*

#### MAINE

*State v Smith (1983, Me) 455 A2d 428*

#### MICHIGAN

*People v Florinchi (1978) 84 Mich App 128, 269 NW2d 500*

*People v Walton, 71 Mich App 478, 247 NW2d 378*

#### MISSISSIPPI

*Armstrong v State (Miss) 214 So 2d 589, cert den 395 US 965, 23 L Ed 2d 750, 89 S Ct 2109*

#### MISSOURI

*State v Hicks (Mo) 515 SW2d 518*

#### NEW HAMPSHIRE

*State v Booton, 114 NH 750, 329 A2d 376 (citing annotation), cert den 421 US 919, 43 L Ed 2d 787, 95 S Ct 1584*

*State v Lemire (NH) 345 A2d 906*

#### NEW MEXICO

*Chacon v State*, 88 NM 198, 539 P2d 218

#### NEW YORK

*People v Simmons*, 36 NY2d 126, 365 NYS2d 812, 325 NE2d 139

*People v Prim*, 47 App Div 2d 409, 366 NYS2d 726

*People v Turner*, 48 App Div 2d 674, 367 NYS2d 562

*People v Testa*, 48 App Div 2d 691, 367 NYS2d 838

*People v Utley*, 77 Misc 2d 86, 353 NYS2d 301

#### NORTH CAROLINA

*State v Alston* (1983) 307 NC 321, 298 SE2d 631

#### OREGON

*State v Michener* (Or App) 550 P2d 449

#### TEXAS

*Nelson v State* (Tex Crim) 511 SW2d 18

*Thomas v State* (Tex Crim) 511 SW2d 302

*Davis v State* (Tex Crim) 516 SW2d 157

*Payne v State* (Tex Crim) 516 SW2d 675

#### VERMONT

*State v Kasper* (1979) 137 Vt 184, 404 A2d 85

#### WASHINGTON

*State v Christopher* (1978, Wash App) 583 P2d 638

#### WEST VIRGINIA

*State v Moran* (1981, W Va) 285 SE2d 450

#### WISCONSIN

*State v Humphrey* (1982) 107 Wis 2d 107, 318 NW2d 386

Also recognizing that evidence may be disclosed where necessary for fair trial or in interests of justice:

## IOWA

*State v Eads (Iowa) 166 NW2d 766 (citing annotation)*

*State v Hall (Iowa) 235 NW2d 702*

## KANSAS

*State v Kelly, 216 Kan 31, 531 P2d 60*

## MICHIGAN

*People v Hayward (1980) 98 Mich App 332, 296 NW2d 250*

*People v Walton, 71 Mich App 478, 247 NW2d 378*

## MISSISSIPPI

*Armstrong v State (Miss) 214 So 2d 589, cert den 395 US 965, 23 L Ed 2d 750, 89 S Ct 2109*

## MISSOURI

*State v Rodriguez (Mo App) 519 SW2d 565*

## OREGON

*State v Koennecke (1977) 29 Or App 637, 565 P2d 376*

## TEXAS

*Granviel v State (1976, Tex Crim) 552 SW2d 107*

Similarly, where the defendant sought an order for the pretrial production of a notebook used by a police officer during the course of his investigation of the case, asserting that the notebook contained certain notes of the defendant's statements made at the time of his arrest, and the trial court thereupon ordered its production, but the prosecution delivered only one page of the notebook, it was held in *People v Burch (1961) 196 Cal App 2d 754, 17 Cal Rptr 102*, that there was no abuse of discretion in refusing to permit the defendant to examine the whole of the notebook in view of the fact that the trial court had examined the entire notebook and found nothing in it except the one page which applied to the case. Noting that to be producible at the request of the defendant, documents in the possession of the prosecution must be relevant and material to the defense, the court said that the trial court was not required to compel the production of written material that was unquestionably irrelevant. The court also noted that application for pretrial inspection of a signed confession or admission or a transcript of statements of an accused is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice.

In *People v Darnold* (1963) 219 Cal App 2d 561, 33 Cal Rptr 369, cert den 376 US 927, 11 L ed 2d 623, 84 S Ct 694, it was held that where a report of investigating officers containing statements of a prosecution witness did not relate, except for a page and a half, to the charges in the present indictment, it was not error for the trial court to allow an inspection of only the portion of the report which applied to the case.

In *People v Fleisher* (1948) 322 Mich 474, 34 NW2d 15, the denial of the defendant's request for an order requiring the prosecution to produce a written statement made by a prosecution witness in connection with an offense not involved in the present prosecution was upheld, the court pointing out that it was not made to appear before the trial judge that the statement contained anything relative to the issue in the present case, but that the statement pertained solely to a collateral matter.

See also *State v Maples* (1936, Mo) 96 SW2d 26, where the court, in holding that the defendant's assignment of error relating to the trial court's refusal to tell the prosecuting attorney to deliver to defense counsel, for inspection, certain written statements secured by the investigating officials from the defendant, his wife, and the wife of the victim was too general to preserve anything for appellate review, noted that while it appeared that during the cross-examination of the defendant his counsel requested the production of a written statement made by him for the express purpose of asking him "qualifying questions," "we do not understand why it was necessary to have an inspection of the statement for the purpose of asking qualifying questions with reference to the circumstances under which the statement was given by the witness."

In *State v Hinojosa* (1951, Mo) 242 SW2d 1, a prosecution of a motorist for manslaughter in killing a pedestrian, the court, pointing out that there was no showing of relevancy or materiality, held that it was not error for the trial court to deny the defendant's motion for the production of diagrams of the scene of the alleged offense, notes taken and compiled by investigating police officers relating to conditions at the scene, notes and recordings of statements made by the defendant, etc. The court noted that the trial court had no authority to order the production of irrelevant and immaterial matter which is not admissible in evidence, even though such matter might aid in the preparation for trial.

In *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, the court, in granting a writ of prohibition restraining the enforcement of an order requiring the prosecution to produce in advance of trial certain photographs, reports, and records in the possession of the prosecution, held that while the trial court might in some instances require the production before trial of objects or writings in the possession of the prosecution, the present case was not shown to be a case for such an order, because there was no showing of the nature or materiality of the writings ordered to be produced. The court said: "We do not hold the Court to be without power, in the exercise of reasonable discretion and to prevent manifest injustice, to require the production of specific objects or writings for inspection under appropriate safeguards and at a time appropriately close to the time of trial, if it should appear that otherwise essential rights of the respondents may be endangered or the trial unnecessarily prolonged. Circumstances under which such a necessity might arise are not readily envisioned in advance. . . . Conceivably writings so material as to be the very 'subject of the charge'. . . may be required to be produced in advance of trial. . . . Justice might be thought to require that a respondent be permitted to inspect the corpse of a victim or an autopsy report. Beyond such essential matters, the rights of the accused to inspection in advance of trial do not go."

See also *State ex rel. McLetchie v Laconia Dist. Court* (1964, NH) 205 A2d 534, a proceeding to prohibit the lower court from requiring certain prosecution witnesses to produce records and writings relative to the case at a preliminary examination upon a complaint charging one with murder, wherein the court, in denying the petition for writ of prohibition, stated that since the record in the present proceeding disclosed no ruling by the lower court as to what if anything it would require the witnesses in question to produce, no speculation could be made as to "the probable admissibility, status as an attorney's work product, or relevance to the issues presented by the preliminary hearing" of any writings which might be sought; and that in passing upon such questions when and if presented, the lower court would be governed by the rules announced in *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, *supra*.

Noting that in New Hampshire the trial court has the inherent power in its discretion to compel discovery in a criminal case if the interests of justice so require, and stating that a basis for the granting of discovery is the defendant's need before trial for documents or information in order to insure an adequate preparation of his case for the safeguard of his essential rights, and that in exercising its discretion the trial court is to consider, under the circumstances of the case, the defendant's need of the requested evidence to properly defend himself and the adverse effect which such discovery might have on the proper prosecution of the offense, the court in *State v Healey (1965, NH) 210 A2d 486*, involving a prosecution for arson and for murder, held (1) that medical reports of a hospital relating to the defendant's confinement for observation as to his sanity could be produced for inspection by the defense to the extent that the trial court, after examining the documents, deemed any part thereof necessary for the protection of the defendant's essential rights in the proper preparation for trial; and (2) that a report of the state fire marshal containing his conclusions with respect to the cause and origin of the fire involved in the case could likewise be made available to the defense by the trial court in its discretion with proper safeguards by excising or withholding any part which might unduly hamper the prosecution if given to the defendant in advance of trial. The prosecution's argument that the medical reports relating to observation as to the defendant's sanity were not discoverable because they were its work product was rejected, the court stating that there was no reason why such reports could be classified as the work product of the prosecution when the report of an autopsy was not so classified.

In *People v Miller (1964) 42 Misc 2d 794, 248 NYS2d 1018*, a prosecution for abortion on an indictment charging that the abortion was committed by the use of certain instruments and substances, the court, in permitting the defendant to inspect the instruments and substances which were allegedly used to procure the abortion, observed that where it appears that there is evidence in the possession of the prosecution that may aid in the speedier trial of the case without damage or prejudice to the prosecution, a right sense of justice requires that it should be available for discovery and inspection; and that in deciding where the justice lies in any individual case there should be considered, among other things, "the specific purpose for which the accused seeks discovery and inspection, his likelihood of being able to inform his counsel of its character and capabilities, whether the physical evidence tends to exculpate him, the danger of giving the accused the opportunity to tailor a defense and whether or not the request is for obviously exploratory purposes."

◇

Drug defendant's discovery rights were not violated by fact three government witnesses testified to information that was not contained in any of the reports furnished to defense by government where, inter alia, none of the three witnesses had personally prepared a written report or statement of events in question, government was under no duty to develop written statements, and defendant made no showing of unfair prejudice or surprise. *United States v Rodarte (1979, CA5 Tex) 596 F2d 141*.

Where main defense of defendant, charged with preparing false income tax returns for clients, was that associate prepared all false returns, government, in response to motion to produce all material evidence, was obligated to furnish defendant with associate's confession that he had prepared false returns for clients not named in indictment as confession was in part exculpatory material and elemental sense of fair play demands disclosure of evidence that in any way may be exculpatory. *United States v Miller (CA9 Cal) 529 F2d 1125, cert den 426 US 924, 49 L Ed 2d 379, 96 S Ct 2634*.

Where, in prosecution for making false statements to investigating agencies, prosecution witness testified that defendant had admitted to making false statements during meeting, prosecution's failure to produce memorandum that reflected admissions were made by attorney and not by defendant who continued to maintain his innocence and failure to produce original notes made at meeting which indicated attorney alone made admission at proper time to allow court to make considered decision as to admissibility of witness' testimony amounted to suppression of evidence and to prosecutorial

misconduct requiring dismissal. *United States v De Marco (DC Cal) 407 F Supp 107.*

Failure to inform murder defendant that coroner had found razor in back pocket of deceased's pants was not a withholding of exculpatory evidence when several witnesses testified that deceased did not have anything in his hands when he was shot, none of those witnesses saw deceased reach for his pocket, defendant was the only person who saw deceased reach for his pocket, and even defendant admitted that he did not see razor at the time of shooting or at any time that night. Even if state acted improperly by failing to disclose this information, defendant was not prejudiced since it did not completely alter his theory of the case but only bolstered his contention that he acted in self-defense. *Poole v State (1983, Ala App) 430 So 2d 894.*

Blanket request for disclosure of evidence favorable to accused, material to issue of guilt or punishment, affecting evidence proposed to be introduced against defendant, or relevant to subject matter of indictment was properly denied where state had furnished defendant with copy of his own statement made to investigating officers and where record did not reveal any evidence favorable to defendant withheld by state. *Giddens v State (Ala App) 333 So 2d 615.*

See *Wyrick v State (1979, Alaska) 590 P2d 46, § 25[a].*

Where defendant was charged with driving while intoxicated, ampoules used in administering breathalyzer test were to be made available to defendant for tests when requested and state's duty to preserve ampoules was as operative as the duty of disclosure. *Lauderdale v State (Alaska) 548 P2d 376.*

See *State ex rel. Corbin v Superior Court of Maricopa County, 103 Ariz 465, 445 P2d 441, § 11[a].*

Contents of test ampoule and test ampoule itself used in breathalyzer test of defendant, which would have provided information of value to both prosecution and defense, should not have been destroyed by prosecution; in future, sanctions would be imposed for such nonpreservation in violation of duty to disclose unless prosecution could show that governmental agencies involved had established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve test ampoule and its contents and reference ampoule used in such chemical test. *People v Hitch, 12 Cal 3d 641, 117 Cal Rptr 9, 527 P2d 361.*

Defendant was entitled to pretrial lineup in order to disclose weakness, if any, of identification evidence, where net effect of denial was same as if existing identification evidence was intentionally suppressed. *Evans v Superior Court of Contra Costa County, 11 Cal 3d 617, 114 Cal Rptr 121, 522 P2d 681.*

See *Pitchess v Superior Court of Los Angeles County, 11 Cal 3d 531, 113 Cal Rptr 897, 522 P2d 305, § 5[a].*

In prosecution for various criminal violations relating to prostitution, municipal court properly granted discovery order requiring production, inter alia, of statistical information regarding arrests or investigations of sexual acts or solicitations at homosexual bath houses and through male escort services, where such evidence was relevant to defense of alleged discriminatory enforcement of certain criminal statutes against women dealing in heterosexual prostitution but not against adult male homosexuals. *People v Municipal Court for San Francisco Judicial Dist. (1979, 1st Dist) 89 Cal App 3d 739, 153 Cal Rptr 69.*

Where two or more persons are accused, and then charged, of complicity in same offense, and where district attorney plans to call one of them as prosecution witness, he must disclose to all other defendants any offer he has made to prospective witness concerning plea of guilty to lesser offense, or other lenient treatment, regardless of reasons for making offer and must disclose to all defendants any discussions he may have had with potential witness as to possibility of leniency in exchange for favorable testimony, even though no offer actually was made or accepted. *People v Westmoreland, 58 Cal App 3d 32, 129 Cal Rptr 554.*

Destruction by police of wallet belonging to co-defendant found outside scene of crime did not deprive defendant of fair trial, where fact that wallet contained receipts which would have established that co-defendant had not lost wallet as claimed but was in possession of it on date preceding crime would not have established defendant's innocence, but would only have seriously damaged testimony of co-defendant who had been acquitted of crime. *People v James*, 56 Cal App 3d 876, 128 Cal Rptr 733.

In implementation of policy that accused is entitled to fair trial and intelligent defense, that purpose of criminal action is ascertainment of truth, and that state has no interest in denying accused access to all nonconfidential evidence that can throw light on issues in case, prosecution must disclose items of substantial and material evidence known to it to be favorable to defense, even in absence of request for disclosure. *Craig v Superior Court in and for Alameda County*, 54 Cal App 3d 416, 126 Cal Rptr 565.

See *People v Standifer*, 38 Cal App 3d 733, 113 Cal Rptr 653, § 14.

See *People v Johnson*, 38 Cal App 3d 228, 113 Cal Rptr 303, § 22[e].

See *People v Hower* (1981, Colo App) 626 P2d 734, § 27[b].

Defendant's request for all relevant information was properly denied where, under applicable rule of criminal procedure, prosecution was only under duty to disclose exculpatory material. *People v Peterson* (1977, Colo App) 576 P2d 175.

In prosecution for assault, defendant failed to present reliable evidence that prosecution knew victim was unconscious for four days prior to photo identification of defendant, or that prosecution knew victim was suffering from paranoid delusion, and use of term "paranoid" in describing victim, by prosecutor while arguing for imposition of sentence, was at most expression of personal opinion and was not encompassed by rule requiring disclosure of exculpatory information and material. *State v Falcone* (1983) 191 Conn 12, 463 A2d 558.

When conviction depends entirely upon testimony of certain witnesses, information that witness has been arrested, is being prosecuted, or has confessed to crime, tends to show that state has power over such witness that may induce him to give testimony which will win favor with state and, when such witness is essential link in state's case, information must be disclosed. *State v Grasso* (1977) 172 Conn 298, 374 A2d 239.

See *State v Gilbert* (1979) 36 Conn Supp 129, 414 A2d 496, § 16[a].

Motion representing indiscriminate, wholesale, blanket demand, and lacking any demonstration that material sought would have tendency to clear defendant, was denied, particularly where there was no showing that requested information was exculpatory or that material was necessary for fair trial. *State v Bowden*, 29 Conn Supp 86, 272 A2d 141 (citing annotation).

See *State v Traenkner (Del)* 314 A2d 202, § 11[b].

In kidnap prosecution state's failure to disclose to defendant evidence of act of perjury on part of key government witness was not denial of fair trial where perjury and its effects were not "material;" witness' false statement regarding her legal marital status was not sufficiently germane to outcome of trial to render jury verdict based on her testimony inherently unjust. *Brooks v United States* (1978, Dist Col App) 396 A2d 200.

Production of police reports, statements given by witnesses to prosecution and other documents was required only where such information could reasonably be considered admissible and useful to defense in sense that it was probably material and exculpatory. *Pitts v State* (1978, Fla App D3) 362 So 2d 147, cert den (Fla) 368 So 2d 1372.

Under Florida law, if prosecution is or should be aware of evidence favorable to accused, it must disclose it to accused, but disclosure of evidence in possession of prosecution should not be compelled when it is otherwise available under rules of criminal procedure; moreover, although trial judge is not authorized, merely on demand, to rummage through files of prosecution to seek evidence favorable to accused, if it is shown to him that facts or circumstances exist which support inference that Brady rule (requiring disclosure of prosecution evidence favorable to accused) is being violated, or if he is persuaded by facts that it is otherwise in interest of fairness or expediency to compel disclosure, pretrial, of that which could be compelled at trial, he may (if direct disclosure to accused is not otherwise called for) order in camera inspection as prelude to full disclosure to accused of that which he may ultimately determine to be favorable to accused. Thus, where defendant's pretrial discovery motion was mere naked demand for all prosecution evidence favorable to him or which might weaken or affect any evidence against him, trial court was without authority to grant such broad and all-encompassing order. *State v Gillespie (Fla App) 227 So 2d 550*.

See *State v Williams (Fla App) 227 So 2d 253*, § 7.

Failure to disclose statement by prospective witness favorable to defendant prior to trial did not violate Brady rule when the statement was introduced at trial and defendant made no objection, motion for mistrial, or motion to suppress, and did not show how his defense was prejudiced so that he was denied a fair trial. *Chambers v State (1983) 250 Ga 856, 302 SE2d 86*.

See *Spain v State (1979) 243 Ga 15, 252 SE2d 436*, § 16[a].

Defendant in murder prosecution was not entitled to disclosure of crucial evidence by state's fingerprint expert and firearms expert since such evidence was not favorable to defendant and such disclosure could not be compelled. *Pryor v State (1977) 238 Ga 698, 234 SE2d 918*.

In camera inspection by trial court of prosecution's file and order of disclosure of part of file, with which state complied, satisfied right of discovery of defendant who had been denied commitment hearing. *Fleming v State, 236 Ga 434, 224 SE2d 15*.

It was not error to deny accused's pre-trial discovery motion where in camera inspection of prosecution's files showed that there was nothing in file favorable to accused and where accused at no time pointed even vaguely or generally to any item of information in file which might conceivably have been favorable to him. *Payne v State, 233 Ga 294, 210 SE2d 775*.

Trial court did not err in denying defendant's motion for discovery of lab report concerning examination of rape victim's clothing, where trial judge examined lab report and found nothing favorable to defendant in it. *Wanzer v State, 232 Ga 523, 207 SE2d 466*.

See *Strong v State, 232 Ga 294, 206 SE2d 461*, § 18.

Trial court did not err in prosecution for violation of controlled substances act in denying defendant's motion to produce evidence in state's file specifically concerning alleged "quota system" of arrests and grant funding, since defendant failed to indicate materiality and favorable nature of evidence sought. *Ault v State (1979) 148 Ga App 761, 252 SE2d 668*.

Trial court in narcotics prosecution properly denied defendant's motion to produce exculpatory evidence where, at pretrial hearing, district attorney stated that there was nothing exculpatory or materially favorable to defendant in state's file and where defendant made no motion for in camera inspection. *Howard v State (1977) 144 Ga App 208, 240 SE2d 908*.

Defendant was entitled to copy of arrest warrant, list of state's witnesses, copy of search warrant, and statement made by co-indictee, if it were favorable to his defense, and was entitled to any other information within hands of state which might be considered exculpatory in nature; if counsel for state was in doubt as to whether or not certain material or information was exculpatory, he should have asked trial judge for in camera inspection in order to make proper determination as to value of such prospective evidence. *Maddox v State*, 136 Ga App 370, 221 SE2d 231.

See *Quaid v State*, 132 Ga App 478, 208 SE2d 336, § 14.

See *Mobley v State*, 130 Ga App 80, 202 SE2d 465, § 25[d].

Failure of government to preserve as evidence tape recording of telephone calls made by codefendant to police station on night of crime did not deny defendant due process under state constitution, since prosecution is required to preserve only that evidence which is "material," evidence is material if, viewed in relation to all competent evidence admitted at trial, it appears to raise reasonable doubt concerning defendant's guilt, and in instant case, tape recordings were simply secondary source of information about what codefendant and police may have said to each other, and direct evidence as to codefendant's side of conversations was presented through witness and evidence of police side of conversation presumably could have been sought from police themselves. *State v Leatherwood* (1982, App) 104 Idaho 100, 656 P2d 760.

Where body of murder victim was found in barrel of concrete on city dump and witness testified that he had helped defendant load some trash, including heavy barrel, and take it to dump, refusal of trial court to require prosecution to make available to defendant reports of investigating officers' interviews with witness was equivalent to suppression of evidence favorable to defendant and a denial of due process, since such reports contained statements of witness that he and defendant had visited victim (whom witness identified from photograph) immediately after dumping barrel, and that he had seen victim on street twice within 2 months after dumping incident. *People v Sumner*, 43 Ill 2d 228, 252 NE2d 534.

See *People v Ojeda* (1980) 91 Ill App 3d 723, 47 Ill Dec 40, 414 NE2d 1156, § 17.

Where defendant's pretrial discovery motion specifically named certain information and items desired, but also included a catchall request for disclosure of all evidence favorable to him, court did not err in denying that part of motion which did not attempt to identify any specific evidence or attempt to establish the relevancy, competency, or materiality thereof. *People v Brown* (Ill App) 267 NE2d 142.

See *People v Manley*, 19 Ill App 3d 365, 311 NE2d 593, § 11[d].

In robbery prosecution it was not error for court to deny defendant's request that court make in camera inspection of prosecution's file to determine if favorable evidence had been withheld, particularly information relating to witnesses listed but not called where, while there was a duty to disclose evidence favorable to defendant on issues of guilt or punishment, there was no constitutional requirement that prosecution make complete accounting of its investigative work and where there was no showing of benefit or materiality to defendant by failing to provide information. *People v Bracy*, 14 Ill App 3d 495, 302 NE2d 747.

See *State ex rel. Meyers v Tippecanoe Superior Court* (1982, Ind) 438 NE2d 989, § 18.

Defendant in murder prosecution was entitled to disclosure of nonexculpatory statement made to police by his alibi witness where state failed to object to overly broad discovery order requiring disclosure of all information relevant to subject matter or which could in any manner aid accused in ascertainment of truth. *Reid v State* (1978, Ind) 372 NE2d 1149 (citing annotation).

State had duty to disclose to defendant evidence which tended to exculpate him. *Monserrate v State (Ind)* 352 NE2d 721.

Defendant's motion for production of exculpatory evidence was properly denied where defendant did not attempt to prove that exculpatory evidence existed. *White v State (Ind)* 330 NE2d 84.

See *Dillard v State (Ind)* 274 NE2d 387, § 7.

In prosecution for first degree murder, trial court erred in denying defendant's motion to produce evidentiary materials where defendant did not have access to list of names of 18 to 20 witnesses present at the shooting, some of whom were not called to testify and whose statements might have exculpated defendant. *State v Johnson (1978, Iowa)* 272 NW2d 480.

In rape prosecution, in which defendant admitted having sexual contact with prosecutrix, prosecution was not required to disclose medical results indicating prosecutrix had gonorrhoea since sole issue at bar was that of her consent to intercourse. *State v Sanders (1980)* 227 Kan 892, 610 P2d 633.

Although trial judge's refusal to order discovery of reports relied on by police officer in furnishing description of rape suspect to newspaper, which description did not match defendant, violated discovery statute since it related to reliability of victim, a crucial state witness, and was exculpatory in material, but did not prejudice defendant so as to deny him a fair trial when reports were produced during trial and admitted in evidence, officers concerned testified and were subject to cross-examination with respect to the description which had been obtained from victim, and victim testified and could have been cross-examined with use of reports to test certainty of her identification, but defense counsel chose not to do so. Neither did trial judge abuse discretion in denying motion for mistrial on ground that late disclosure was a violation of the due process clauses of the Fifth and Fourteenth Amendments as declared in *Brady v Maryland (1963)* 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194, since the case did not involve information discovered only after conviction, as in *Brady*, but evidence which became available to defense during trial and which, for the same reasons as stated above, did not result in such prejudice to defendant as to deny him a fair trial. *State v Smith (1983, La)* 430 So 2d 31.

In prosecution for rape and armed robbery, wherein defense counsel made specific request for information in victim's statement, trial judge did not err in refusing to order state to provide defendant with copy of statement, where judge examined statement and found that evidence was inculpatory rather than exculpatory. *State v Meriwether (1982, La)* 412 So 2d 558.

See *State v Henderson (1978, La)* 362 So 2d 1358, § 16[a].

Although demonstration that state intended to use information concerning past jury experience and that such information was inaccessible to defendant would constitute showing that information was necessary to prevent undue prejudice to defendant's case, hardship, or injustice, such claim would be premature where voir dire has not yet been conducted. *State v Holmes (1977, La)* 347 So 2d 221.

Criminal defendant has right to discover state's evidence in cases where failure to disclose such evidence might seriously handicap defense. *State v Johnson (La)* 333 So 2d 223.

See *State v Melton (La)* 296 So 2d 280, § 9[d].

Where defendant had been furnished with copies of all written and oral confessions made by him and state agreed to turn over any exculpatory statements or evidence in its files, defendant was not entitled to remainder of state's files, including inculpatory statements of codefendants and other inculpatory evidence. *State v Thomas (La)* 290 So 2d 317.

Motions for production of exculpatory evidence were properly denied where state claimed it had no evidence in its possession favorable to defendants. *State v Baker (La)* 288 So 2d 52.

See *State v Barnard (La)* 287 So 2d 770, § 9[c].

Refusal of presiding judge to impose any sanction upon prosecutor for failing, in violation of new "automatic" discovery rule, to provide defendant with statement describing evidence to be used at trial which had been obtained through search of defendant was not error where circumstances of seizure effectively forewarned defendant that evidence related to marijuana charge would be introduced at trial and where defendant was not prejudiced by failure of prosecutor to comply with discovery rule. *State v Bishop (1978, Me)* 392 A2d 20.

Following extortion convictions, trial court properly refused to inspect all prosecution files and notes related to case where undisclosed evidence did not include perjured testimony which was known to prosecution or specific material evidence that might have affected outcome of case. *Bing Fa Yuen v State (1979)* 43 Md App 109, 403 A2d 819, cert den (US) 62 L Ed 2d 759, 100 S Ct 1024.

It was not improper to fail to furnish to defendant pretrial statements of witness where defendant failed to establish that suppressed material was favorable and where very phrasing of issue evidenced that he desired only to rummage for something helpful on cross-examination. *Green v State, 25 Md App* 679, 337 A2d 729.

Evidence favorable to defendant sought via discovery motion must be material to either guilt or punishment of accused, and burden is on accused to show that information he seeks may be material to preparation of his defense or that state actually suppressed evidence favorable to him. *Alston v State, 11 Md App* 624, 276 A2d 225.

Trial court's denial of defendant's pretrial discovery request did not absolve the Commonwealth of its obligation to disclose specific materials requested; Commonwealth had a continuing duty to review the materials specifically requested by the defendant and to disclose any favorable evidence found in those materials. *Com. v. Daniels, 445 Mass.* 392, 837 N.E.2d 683 (2005).

In prosecution for receiving or concealing stolen property, disclosure of location of secret vehicle identification number was properly suppressed where defendant did not show actual materiality of disclosure to defense and where in camera hearing disclosed that location was not material to defense raised. *People v Brown (1983)* 126 Mich App 282, 336 NW2d 908.

It was error to fail to advise defense counsel of fact that billfold which did not belong to victim or defendant was found in pocket of victim's car where defendant had filed appropriate motions to require district attorney to produce any and all evidence of every kind which might be exculpatory or assist defense in preparation of case. *McNeil v State (Miss)* 308 So 2d 236.

Defendant charged with illegal sale of stimulant drug was not denied fair trial by reason of overruling of his motions to inspect police reports of pre-arrest surveillance and arrest, and to produce any and all evidence favorable to him, where defendant did not specify any particular fact, document, report, or paper the withholding of which violated his rights, and where there was no showing that any report in hands of state was of such nature that without it defendant's trial was fundamentally unfair, no showing that any documents in hands of police would have impeached testimony of any state witness, and no showing of probable materiality of any paper in hands of prosecution. *State v Yates (Mo)* 442 SW2d 21.

See *State v Charity (1982, Mo App)* 637 SW2d 319, § 16[a].

Failure of prosecution to reveal previous statement given to investigator by victim was not prejudicial where defendant had access to court files and affidavit for warrant based on statement and where it was not sufficiently material to have

given him significant chance to create reasonable doubt in jurors' minds. *State v Richards*, 193 Neb 345, 227 NW2d 18.

See *State v Reichel*, 184 Neb 194, 165 NW2d 743 (citing annotation), § 7.

Defendant was not denied fair trial by prosecution's failure to disclose to him that murder victim was codefendant of one of prosecution's witnesses in pending robbery charge, where alleged materiality of this information was very tenuous, as was defendant's proposed use of it. *State v Whitehead* (1979) 80 NJ 343, 403 A2d 884.

Where certain representations had been made to prosecution witnesses as to favorable or sympathetic treatment in their criminal problems and promises clearly possessed capacity to have affected jury's evaluation of credibility of witnesses, state had obligation to disclose such material evidence, even absent inquiry. *State v Carter*, 69 NJ 420, 354 A2d 627.

In prosecution for conspiracy to commit robbery and armed robbery, trial court did not err in refusing to exclude from evidence letter threatening prosecution's primary witness, notwithstanding that prosecutor failed to furnish letter to defendant during pretrial discovery, since letter did not constitute information material and favorable to defendant's cause. *State v Phillips* (1979) 166 NJ Super 153, 399 A2d 315.

Where defense was based on excessive use of force by arresting officer and defendant had shown two prior instances of officers' alleged misconduct, court should have, at defendant's request, conducted in camera inspection of records of internal affairs investigations concerning allegations of excessive use of force to determine whether files, whether or not confidential, contained evidence material to defense. *State v Pohl* (App) 89 NM 523, 554 P2d 984.

There is no right to discovery by a defendant in criminal proceedings under New Mexico statutes or rules, although discovery is accorded where to deny it would deprive defendant of a constitutional right; however, where there was no showing nor claim of deprivation of a constitutional right, or of a particularized need, trial court did not err in refusing to inspect prosecutor's file to determine whether state had complied with defendant's request for any exculpatory material therein. *State v Turner* (App) 81 NM 571, 469 P2d 720.

Alleged Brady violation resulting from prosecutor's failure to turn over exculpatory evidence before defendant's trial for criminal possession of weapon in third degree did not require reversal, where defense counsel knew about allegedly exculpatory evidence during trial and was given meaningful opportunity to use it. McKinney's Penal Law § 265.02(1). *People v. Barney*, 743 N.Y.S.2d 793 (App. Div. 4th Dep't 2002).

See *People v Amidon* (1980) 102 Misc 2d 850, 427 NYS2d 727, § 22[a].

Where one of three misdemeanors with which defendant was charged was dropped after preliminary hearing and where minutes of hearing were irretrievably lost, although defendant, after timely request, was entitled to have minutes of proceeding transcribed for later use, reconstruction of preliminary hearing would suffice since this right was grounded on fairness doctrine rather than constitutional mandate. *People v Hicks*, 85 Misc 2d 649, 381 NYS2d 794.

See *People v Player*, 80 Misc 2d 177, 362 NYS2d 773, § 11[m].

Defendants in murder prosecution were entitled to pre-trial disclosure of all evidence probative of theory that different individual was killer, subject to in camera examination by court to separate exculpatory evidence from that which was exempt from discovery under state rules of criminal procedure. *People v Bottom*, 76 Misc 2d 525, 351 NYS2d 328.

See *People v Johnson*, 68 Misc 2d 708, 327 NYS2d 690, § 22[a].

Court has inherent power to direct discovery and inspection in criminal cases and each case must rest upon its own particulars and discovery should be allowed only where injustice may result should relief be denied. *People v Nassar*,

60 Misc 2d 27, 301 NYS2d 678.

Power to compel discovery of particulars in pretrial stage of criminal cause should not be exercised simply because study of evidence will help defendant prepare his defense, although if defendant could be substantially prejudiced by failure to particularize, disclosure should be made regardless of impact on prosecution. *People v Matera*, 52 Misc 2d 674, 276 NYS2d 776.

Trial court did not err in denial of discovery motion for inter-office memoranda of Department of Social Services in prosecution of defendant for larceny and violation of Social Services Law where documents did not constitute exculpatory material necessary to preparation of defense. *People v Prim*, 40 NY2d 946, 390 NYS2d 407, 358 NE2d 1033.

See *People v Clark* (1982, 4th Dept) 89 App Div 2d 820, 453 NYS2d 525, cert den (US) 74 L Ed 2d 937, 103 S Ct 577, § 9[c].

See *State v Hilling* (ND) 219 NW2d 164, § 17.

See *Stevenson v State* (Okla Crim) 486 P2d 646, cert den 404 US 1040, 30 L Ed 2d 733, 92 S Ct 724, § 17.

See *State v Koennecke* (Or) 545 P2d 127 (citing annotation), § 25[b].

Denial of motion to produce report of polygraph examiner who examined robbery and kidnapping victim, sought by defendant to assist in cross-examination and possible impeachment of victim, did not amount to Brady violation, in absence of showing of at least a belief and contention in good faith that report was favorable to him and material to his guilt or innocence. *State v Bodenschatz* (1983) 62 Or App 606, 662 P2d 1, petition den 295 Or 446, 668 P2d 382.

See *State v Peters* (1979) 39 Or App 109, 591 P2d 761, § 11.

See *State v Goodson* (1981, SC) 277 SE2d 602, § 23.

See *Marshall v State* (1980, SD) 305 NW2d 838, § 21[a].

Defendant's discovery in criminal cases should ordinarily be confined to relevant, tangible or written evidential matters, and should be denied whenever (1) there is danger or likelihood of witnesses being coerced, intimidated, or bribed; (2) state may be unduly hampered in its investigation, preparation, and trial of defendant's case or of other related criminal cases; or (3) other evil or danger to public interest may result from inspection or disclosure. *State v Wade* (SD) 159 NW2d 396.

In prosecution for willful injury of another by explosives, written statement by witness which included information that plaintiffs possessed dynamite and blasting caps was not favorable to defendants, and thus was not required to be produced by prosecution in pretrial discovery. *Lackey v State* (1978, Tenn Crim) 578 SW2d 101.

See *Boles v State* (1980, Tex Crim) 598 SW2d 274, § 22[b].

See *Jackson v State* (Tex Crim) 501 SW2d 660, § 11[m].

See *Bell v State* (Tex Crim) 442 SW2d 716, § 7.

See *Rigsby v State* (1983, Tex App Houston (14th Dist)) 654 SW2d 737, § 3.

See *Epperson v State* (1983, Tex App Tyler) 650 SW2d 110, § 17.

In prosecution for assault with deadly weapon, request for statement of each witness called by state and any other police statements prepared in connection with case was properly denied where defense counsel failed to establish materiality of statements of witnesses. *State v Dowell*, 30 Utah 2d 323, 517 P2d 1016, cert den and app dismd 417 US 962, 41 L Ed 2d 1135, 94 S Ct 3164.

See *State ex rel Lynch v County Court, Branch III* (1978) 82 Wis 2d 454, 262 NW2d 773, § 9[a].

It was not error for prosecutor to conclude that duty to disclose upon demand did not include, on statutory or constitutional grounds, furnishing of exculpatory material not in exclusive possession of state where such material consisted of police summaries containing statements made by two sons and niece of defendant, sons living with defendant and niece being frequent visitor to defendant's home and all being present at preliminary hearing. *State v Calhoun*, 67 Wis 2d 204, 226 NW2d 504.

In rape prosecution, reversal in interest of justice was required where copy of complainant's statement furnished to defendant was neither complete nor accurate, where prosecution failed to produce evidence as to fingerprints taken from complainant's bicycle, and where, although defense counsel had been assured he had been furnished all lab reports, he had not been given results of tests of pubic hairs found on complainant's body and clothing, which tests showed that hairs were not defendant's. *State v Stanislawski*, 62 Wis 2d 730, 216 NW2d 8.

[\*9] Inspection at particular stages of proceedings

[\*9a] At preliminary hearing

In some cases wherein the accused requested the production of certain evidence in the possession of the prosecution for the purpose of inspecting it at or in connection with the preliminary hearing, the court treated the motion without giving any particular consideration to such fact. See *State v Colvin* (1957) 81 Ariz 388, 307 P2d 98, supra § 7; *State ex rel. McLetchie v Laconia Dist. Court* (1964, NH) 205 A2d 534, supra § 8; *Melchor v State* (1965, Okla Crim) 404 P2d 63, supra § 3.

And the defendant's contention that she was denied due process of law at the time of the preliminary hearing because her motion for production of certain incriminating tape recordings in the possession of the prosecution, which motion was made prior to the preliminary hearing, was not granted until such hearing was concluded, was rejected in *People v Aadland* (1961) 193 Cal App 2d 584, 14 Cal Rptr 462, supra § 4[a].

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Denial of defendant's pretrial motion for disclosure of grand jury testimony was proper where there was no demonstration of any "particularized need" to examine testimony at that time. *United States v Thompson* (CA9 Cal) 493 F2d 305, cert den 419 US 834, 42 L Ed 2d 60, 95 S Ct 60 and cert den 419 US 834, 42 L Ed 2d 60, 95 S Ct 60.

Defendant in criminal proceeding, in exercise of discretion by magistrate, was entitled to reasonable, limited pretrial discovery prior to preliminary examination. *Holman v Superior Court of Monterey County* (1981) 29 Cal 3d 480, 174 Cal Rptr 506, 629 P2d 14.

See *People v Kingsley* (Colo) 530 P2d 501, infra § 11[m].

See *Watson v State* (1978) 147 Ga App 847, 250 SE2d 540, § 17.

Although defendant in reckless homicide prosecution was entitled to pretrial disclosure of report prepared by mechanic who examined defendant's car, state's failure to make such disclosure was not reversible error where report was furnished to defense counsel during his cross-examination of mechanic, where report was cumulative of other testimony, where witness' name was provided to defendant prior to trial, and where defendant was furnished before trial with officer's report containing summary of mechanic's report. *People v Griffith (1978) 56 Ill App 3d 747, 14 Ill Dec 393, 372 NE2d 404.*

Exclusion of officer's description of burglar seen leaping from roof to roof, rather than dismissal of criminal charges, was proper sanction for any negligence by prosecutor in failing to preserve from routine police destruction broadcast description of suspect at time of observation. *State v Tunstall (1982) 8 Kan App 2d 76, 651 P2d 19.*

Pre-trial discovery is limited; state is not required to produce physical evidence it intends to use at trial, with exception of right of defendant to view and copy his written confession, to obtain production of taped confession, to obtain some of confiscated narcotic evidence in narcotic prosecution and weapon used by alleged victim against defendant supporting claim of self-defense; hence, court's denial of defense request that state produce any weapons and all items of physical evidence or tangible property which it intended to offer into evidence was proper. *State v Collins (La) 308 So 2d 263.*

Accused was not entitled to pretrial discovery of prosecution evidence and could not, upon motion to suppress, circumvent rule by questions seeking to determine results of tests performed upon clothing and other objects taken from accused. *State v Square, 257 La 743, 244 So 2d 200.*

Defendant was not entitled to copies of all witness' statements at preliminary hearing stage. *State v Howell (Mo) 524 SW2d 11.*

When witness called to testify by state in preliminary examination has made prior written statement concerning matter about which he is called to testify, accused is entitled to order directing prosecution to produce for inspection all statements or reports of such witness in its possession touching events about which witness will testify. *State v Mascarenas, 80 NM 537, 458 P2d 789 (citing annotation).*

See *People v Clow (1978) 62 App Div 2d 880, 406 NYS2d 598, § 16[a].*

Defendant was entitled to inspect copy of transcription of her recorded confession at time of pretrial hearing conducted to determine voluntariness of such confession. *People v Bach, 33 App Div 2d 560, 305 NYS2d 677.*

See *State v Lake (1982) 305 NC 143, 286 SE2d 541, § 16[c].*

Defendants' constitutional rights were not violated by refusal of the trial court to comply with pre-trial discovery motions for disclosure of statements made by witnesses or prospective witnesses of state to anyone acting on behalf of state where such material was disclosed to defendants at trial in form of corroborative testimony of state police officer, where counsel for defendants were permitted to see notes transcribed at interrogation from which officer testified, and where there was no showing that there was suppression of any evidence material or favorable to either defendant. *State v Abernathy (1978) 295 NC 147, 244 SE2d 373.*

See *State v Tate (1982) 58 NC App 494, 294 SE2d 16, app dismd, petition den (NC) 295 SE2d 763 and affd 307 NC 464, 298 SE2d 386, § 17.*

Where defendant moved for full discovery prior to preliminary examination, motion was premature and although defendant was properly furnished conviction record of witnesses expected to be called to testify at preliminary hearing,

state was not required to disclose information tending to exculpate defendant or mitigate his punishment in the event of conviction at preliminary examination stage. *Stafford v District Court of Oklahoma County* (1979, *Okla Crim*) 595 P2d 797.

Court did not err in failing to require pretrial inspection of medical report of examination of prosecutrix in rape case, at preliminary hearing stage, where such report was made available to accused before trial, and neither state nor accused sought to offer testimony of physician at trial. *Shapard v State* (*Okla Crim*) 437 P2d 565.

See *Commonwealth v Dalahan* (1979, *Pa Super*) 396 A2d 1340, § 16[a].

Trial judge would be restrained from taking any action to enforce his order directing agent of state criminal investigation division to deliver all records, statements taken, police reports, photographs and any other materials to attorney for defendant charged with assault with dangerous weapon where such order was made prior to preliminary hearing; unwarranted delay in prompt determination of probable cause could result if discovery procedures were routinely carried out at preliminary hearing stage of proceedings. *Janklow v Erickson* (*SD*) 233 NW2d 809.

Defendant was not entitled to names and addresses of all of state's witnesses prior to time defendant was bound over for trial. *Janklow v Talbott* (*SD*) 231 NW2d 837.

Although defendants in narcotics prosecution were entitled to disclosure of exculpatory material, trial court erred in permitting generalized inspection of prosecution's files by defense at preliminary examination stage of proceedings. *State ex rel Lynch v County Court, Branch III* (1978) 82 Wis 2d 454, 262 NW2d 773.

[\*9b] During trial, generally

While in many cases wherein the defendant's request for inspection of the prosecution's evidence was made during the trial, the court treated the request the same as ordinary pretrial motions for inspection,<sup>n86</sup> the fact that the defendant's request for inspection was made during the trial while the evidence in question was in court was given particular consideration in some cases in granting an inspection

The view that the defendant in a criminal case can compel production of the prosecution's evidence when it becomes clear during the course of a trial that the prosecution has in its possession relevant and material evidence which is not confidential was also taken in some earlier California cases. See, for example, *People v Riser* (1956) 47 Cal 2d 566, 305 P2d 1, cert den 353 US 930, 1 L ed 2d 724, 77 S Ct 721, app dismd 358 US 646, 3 L ed 2d 568, 79 S Ct 537 (disapproved on another ground *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428, and also disapproved on other grounds *People v Morse* (1964) 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33); *People v Carter* (1957) 48 Cal 2d 737, 312 P2d 665. It should be noted, however, that in later California cases the court has taken the view that the accused's right to inspection of the prosecution's evidence before trial is generally the same as his right to inspection during a trial. See, for example, *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428; *Funk v Superior Court of Los Angeles County* (1959) 52 Cal 2d 423, 340 P2d 593; *People v Norman* (1960) 177 Cal App 2d 59, 1 Cal Rptr 699, cert den 364 US 820, 5 L ed 2d 51, 81 S Ct 56; *People v Morris* (1964) 226 Cal App 2d 12, 37 Cal Rptr 741.

Thus, stating that, as a general proposition, where the prosecution has a document in court during the course of the trial which the accused thinks is relevant and material to his defense, the accused should not be denied the right at least to examine it in order to see what use he may make of it, the court in *Arthur v Commonwealth* (1957, Ky) 307 SW2d 182, held it error to deny during the trial the defendant's request for the production of a written statement previously made by him which was then in the possession of the prosecuting attorney. The court said that the situation and conditions in the present case were quite different from where a demand was made for the pretrial disclosure of the evidence in the possession of the prosecution.

See also *People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698, wherein the court, in rejecting the defendant's contention that the trial court should have required the state police to produce for his inspection their files, reports, and statements in the case, recognized that "if a party has in court material which would itself be competent for admission as an exhibit in evidence if relevant, he may be required to produce it."

And see *Cloniger v State* (1921) 91 Tex Crim 143, 237 SW 288, infra § 15[a], permitting inspection of the defendant's letters which had been brought to court in response to a subpoena duces tecum.

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Court's refusal during trial for rape to allow defense counsel to inspect investigator's notes as to conversations with rebuttal alibi witnesses, did not require reversal, where defense could have but didn't inspect notes prior to trial, defense had spoken with all but one of nine rebuttal witnesses, counsel cross-examined them effectively, and investigator's notes would have added little, if anything, to defense counsel's information or effectiveness. *People v Thatcher* (1981, Colo) 638 P2d 760.

See *People v Angelini* (1982, Colo App) 649 P2d 341, later app (Colo App) 706 P2d 2, § 16[b].

In prosecution for larceny in the first degree, defendant was not prejudiced by tardy disclosure of letters written by one of state's witnesses to town chief of police and to governor, where tardy disclosure was not deliberate, prosecutor made letters known as soon as he discovered them in police file, defendant chose not to avail herself of opportunity to recall witness for further cross-examination regarding contents of letters, and prosecutor who had requested police to furnish any notes or records of interviews appeared to have done all that was reasonably possible to obtain oral statements given to police by another witness. *State v Carrione* (1982) 188 Conn 681, 453 A2d 1137, cert den (US) 76 L Ed 2d 347, 103 S Ct 1775.

See *Carver v State*, 137 Ga App 240, 223 SE2d 275, § 25[a].

See *People v Ferguson* (1981) 102 Ill App 3d 702, 57 Ill Dec 958, 429 NE2d 1321, cert den (US) 74 L Ed 2d 133, 103 S Ct 159, § 13[b].

Modification of rule governing disclosure of statements by prosecution witnesses, first sentence of which was amended to begin with words "Before witness called by the Commonwealth testifies," rather than "After a witness called by the Commonwealth has testified," would be construed to mean that if Commonwealth intends to use witness and defense seeks access to his recorded statements, it is within trial court's sound discretion whether to allow disclosure prior to trial rather than, as technical matter, waiting until witness is "called" by bailiff to testify, thus avoiding necessity for interrupting trial to permit reasonable opportunity for inspection of such statements. *Wright v Commonwealth* (1982, Ky) 637 SW2d 635.

In perjury prosecution against three employees of Department of Elections and Registration based on testimony given before grand jury investigating allegations of prohibited political activities by Civil Service employees, defendants had right to pretrial discovery of their secretly recorded conversations with whistle-blowing coworker, but prosecution was under no pretrial duty to assemble at trial location eight tapes deposited in various law enforcement offices statewide where defendants were provided transcripts. *State v Hennigan* (1981, La) 404 So 2d 222.

See *Commonwealth v Lapka* (1982) 13 Mass App 24, 429 NE2d 1029, app den 385 Mass 1103, 440 NE2d 1174, § 13[d].

Furnishing discovery of photographic line-up in burglary prosecution three days prior to trial did not constitute

"egregious" prosecutorial conduct. *State v Carter* (1982) 185 NJ Super 576, 449 A2d 1362.

Irrespective of exact point at which New Jersey rule authorizes discovery of information held by prosecutor and by coordinator of pretrial intervention program, trial court has inherent power to order disclosure of such material if necessary and appropriate to instant case. *State v Barath* (1979) 169 NJ Super 181, 404 A2d 373, § 21[a].

See *People v Dee*, 44 App Div 2d 721, 355 NYS2d 13, § 25[c].

Since motion to require prosecuting attorney to permit defendant to examine certain exhibits was made after trial was in progress, it was matter for court's sound discretion, and overruling motion was not error where record revealed that defendant was afforded inspection of such exhibits before they were presented at trial. *State v McClellan*, 6 Ohio App 2d 155, 35 Ohio Ops 2d 315, 217 NE2d 230, cert den 386 US 1022, 18 L Ed 2d 462, 87 S Ct 1380.

See *Romero v State* (1982, Tex App 13th Dist) 636 SW2d 782, § 16[a].

Court did not abuse discretion in overruling motion to discover tire tool allegedly involved in difficulties between defendant and murder victim, which was filed on day of trial, and renewed orally at close of evidence, where officer who knew about tire tool was available during trial as witness but not called, and evidence on trial of merits revealed nothing pertaining to use of tire tool at time of shooting. *Moody v State* (Tex Crim) 413 SW2d 109.

See *State v Helmick* (1982, W Va) 286 SE2d 245, § 17.

[\*9c] When requested item is offered in evidence, marked for identification, or used by prosecution during trial

The rule that the defendant is entitled to inspection of a writing or object in the possession of the prosecution when such item is offered in evidence at the trial of the case is well established.<sup>n87</sup> And in at least one case the court evidently took the view that where portions of the contents of a writing are offered in evidence the defendant is entitled to inspect the remaining portions.<sup>n88</sup>

As to whether and under what circumstances the defendant is entitled to inspection of a statement in the possession of the prosecution where the writing itself is not offered in evidence but a witness has testified to its contents or in relation thereto, the decisions are not altogether in agreement. In some cases the fact that a witness had testified to the contents of a statement was evidently taken into consideration by the court in permitting the defendant to inspect the statement.<sup>n89</sup> In other cases, however, the court apparently took the view that the mere fact that a witness has testified to the contents of a statement in the possession of the prosecution or that he has refreshed his recollection from it does not necessarily entitle the defendant to inspection of the statement.<sup>n90</sup> And in one case wherein a prosecution witness testified to the circumstances under which the defendant had made an oral confession, it was held that such fact did not warrant an order requiring the production of a written confession made by the defendant subsequently to the oral confession.<sup>n91</sup>

Where evidence in the possession of the prosecution was marked for identification in court, but not offered in evidence, the court in at least one case held that the defense was not entitled to inspection of the evidence.<sup>n92</sup> In another case, however, a contrary conclusion was reached.<sup>n93</sup>

As to whether and under what circumstances the defense has the right to inspect a document or paper in the possession of the prosecution where such document or paper is used by the prosecuting attorney during the trial in his examination of the accused or a witness, the decisions are not altogether clear.<sup>n94</sup> In a number of cases a document or paper used by the prosecuting attorney during the trial in his examination of the accused or a witness has been held producible for inspection by the defense, at least in view of the particular facts presented in the case, whether the item in question was a confession or statement of the defendant,<sup>n95</sup> or a statement of a defense witness,<sup>n96</sup> or an FBI record of alleged

prior convictions of the defendant,<sup>n97</sup> or a photograph of the victim of the alleged homicide.<sup>n98</sup> And in some cases it is also held that before a document or paper is to be used by the prosecuting attorney in his examination of the defendant or a witness, such document or paper should be produced for inspection by defense counsel.<sup>n99</sup> In other cases, however, the court denied the defense's right to inspection of a writing although it had been used by the prosecuting attorney in his examination of the accused or a witness.<sup>n100</sup> And in one case wherein the prosecuting attorney handed to a witness a state's exhibit which had been marked for identification and asked him to identify it, it was held not error to refuse to permit defense counsel to see the exhibit before it was handed to the witness for identification.<sup>n101</sup> Finally, the view taken in earlier California cases<sup>n102</sup> appears to be that even where a statement allegedly made by the defendant or a defense witness is to be used or has been used by the prosecution in its examination of the defendant or any witness, the defense has no right to inspect the statement where it was not signed or approved by the defendant or witness who allegedly made it.<sup>n103</sup>

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At time police officer testifies in case defendant has right to examine notes and reports of officer in regard to matters about which he has testified. *State ex rel. Corbin v Superior Court of Maricopa County*, 99 Ariz 382, 409 P2d 547 (dictum).

Pre-trial motion for inspection and examination of pistol and cartridge allegedly used in murder was properly denied where defendant could have had them examined by experts of his own choosing after gun and slug were introduced in evidence and where items sought were not shown to be evidence favorable to accused. *State v Barnard (La)* 287 So 2d 770.

There was no deprivation of fair trial to murder and conspiracy defendants by alleged late disclosure of exculpatory evidence during prosecution's direct case, since due process fair trial standard does not direct disclosure at any particular stage of proceedings, defense had sufficient time to utilize material and there was no indication earlier disclosure would have substantially affected nature of evidence or altered defendants' trial strategy, and defendants failed to request mistrial or adjournment based on late disclosure of evidence. *People v Clark (1982, 4th Dept)* 89 App Div 2d 820, 453 NYS2d 525, cert den (US) 74 L Ed 2d 937, 103 S Ct 577.

Inspection of police officer's report was not required under "use before the jury rule" where existence of report was brought out by examination of officer by defendant's counsel and not by any State action. *Haywood v State (Tex Crim)* 507 SW2d 756.

Police officer's report was not subject to inspection under "use before the jury rule" where officer witness did not have his attention directed to report itself, it was not exhibited or read aloud to him, there was no reference in record to indicate to jury it was being used as basis for interrogation and, although it was taken from file in jury's presence, this was not done in such manner that its contents became an issue. *Howard v State (Tex Crim)* 505 SW2d 306.

[\*9d] After verdict is returned

The defendant's motion after the entry of a judgment of conviction for inspection of certain documents in the possession of the prosecution was granted in *People v McElroy (1955)* 285 App Div 846, 136 NYS2d 693, wherein it appeared that the defendant appealed from a judgment convicting him of murder in the second degree under an indictment charging murder in the first degree; that after conviction the defendant made public admissions in open court of facts which would indicate that he had committed murder in the first degree; that his counsel thereupon, meeting the problem that if he successfully prosecuted the appeal and a new trial was ordered, the statements volunteered by the defendant on a new trial was ordered, the statements admissions by him on a subsequent trial, made the present motion for inspection of the psychiatric studies of the defendant made for the district attorney during the pendency of the first trial and of the

similar studies made by the department of correction after the defendant was in prison. Pointing out that if the defendant was sane when the admissions in question were made in court his interests might be served by discontinuing the appeal, the court said that the power to allow the inspection sought was inherent in the court in aid of a determination of whether it was in the interest of the defendant to continue or withdraw the appeal.

In other cases, however, the court denied or dismissed under the circumstances the defendant's motion or application for inspection of certain evidence in the possession of the prosecution where the motion was made after a verdict was returned.

The denial of the defendant's motion, made after a verdict was returned, for production of documents in the possession of the prosecution was upheld in *People v Norman* (1960) 177 Cal App 2d 59, 1 Cal Rptr 699, cert den 364 US 820, 5 L ed 2d 51, 81 S Ct 56, notwithstanding the defendant's argument that such denial had precluded him from developing legal grounds in support of a motion for a new trial. Pointing out that during the course of the trial the defendant was well aware of the existence of documents in the possession of the prosecution which might be relevant and material to the defense, but took no action to compel inspection or production of them, and that no reason appeared from the record, and none was suggested, for not having made a motion for production during the course of the trial, the court concluded that the defendant had waived any right to compel production of the documents; that his motion, made long after the verdict was returned, was not timely; and that there was no denial of due process. The court said that a defendant may not gamble on a favorable verdict and take advantage of his want of diligence in the event it is unfavorable.

In *Curran v Craven* (1956) 36 Del Ch 71, 125 A2d 375, supra § 5[b], a postconviction application for permission to inspect a certain psychiatric report was denied on the ground that the Delaware Court of Chancery, in which the application was made, had no jurisdiction to grant the prayers of the application.

In *People ex rel. Reed v Hogan* (1945) 269 App Div 802, 55 NYS2d 71, wherein it appeared that after being convicted of a crime, the petitioner applied for an order in the nature of mandamus, under the New York Civil Practice Act, to compel the district attorney to deliver to him a copy of certain exhibits used on his trial, the court, upholding the denial of the application, said that there was no duty on the part of the district attorney to furnish the copies sought.

Where a petition for the production of photostatic copies of entries made in the desk book, day book, and radio log book of a certain police department was filed after the petitioner had been convicted and sentenced, the court in *Commonwealth v Barclay* (1957, Pa) 47 Del Co 203, dismissed the petition on the ground, inter alia, that the evidence upon which the defendant had been convicted was already of record and that the petitioner had access to the complete record.

See also *Commonwealth ex rel. Balles v Weber* (1945, Pa) 66 Montg Co LR 256, where a petition by a prisoner in a state penitentiary for a writ of mandamus to compel the district attorney of a certain county to furnish certain information to the trial judges of a Federal District Court in which he had instituted proceedings seeking his discharge from imprisonment was denied on the ground, among other things, that the prisoner had ample opportunity to subpoena any records of the state court he thought necessary to his case.

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Petition for writ of mandamus by prisoner seeking his prosecutorial case file from state's attorney was properly denied, even though his case was not active at time petition was filed, where case became active when writ of habeas corpus was granted, thus giving prisoner avenues of direct appeal. Contents of file were to remain secret until conclusion of appeal. *Tal-Mason v. Satz*, 614 So. 2d 1134 (Fla. Dist. Ct. App. 4th Dist. 1993).

Postconviction defendant was entitled to examine results of polygraph tests administered to accomplice to determine if they indicated that accomplice passed polygraph exam, as represented at trial court and before clemency board; results were not exempt from disclosure under Public Records Act provision exempting criminal intelligence information and criminal investigation information, as results were no long "active" criminal investigation information, and, inasmuch as state had twice publicly disclosed results to its advantage, there was no further purpose to be served by preventing disclosure. *Downs v. Austin*, 522 So. 2d 931 (Fla. Dist. Ct. App. 1st Dist. 1988).

Defendant convicted of rape had no entitlement to discovery regarding identity and testimony of witness at sentencing hearing who testified to other offenses which did not result in conviction. *People v Siefke* (1981) 97 Ill App 3d 14, 52 Ill Dec 208, 421 NE2d 1071.

Where felon was charged with possession of handgun, and his testimony regarding circumstances of arrest differed dramatically from that offered by police, and where defense was wrongfully denied subpoena duces tecum before trial to discover radio communications involving five police vehicles from two jurisdictions, materiality and relevancy of evidence was established by defendant, and case on appeal was remanded to trial court for determination of (1) whether police radio communications contained information inconsistent with testimony of police officers, or other evidence favorable to accused; and, if so, (2) whether such evidence would be material to defendant's guilt or punishment, employing standard applicable on basis of totality of facts and circumstances of case. *State v Cobb* (1982, La) 419 So 2d 1237.

While prosecution could not suppress evidence favorable to accused without violating his Constitutional right to due process of law, refusal of trial court to sustain post-conviction motion to produce palm print, which did not match that of defendant, did not warrant new trial, where such favorable evidence was brought out at trial and was considered by jury, and where defendant thus had advantage of whatever exculpatory effect such information might have had with jury. *State v Melton* (La) 296 So 2d 280.

See *Hoffman v State* (Tex Crim) 514 SW2d 248, § 11[m].

[\*9e] At new trial

The fact that the defendant's request for inspection of certain evidence in the possession of the prosecution was made at the commencement of a new trial of the case was given particular consideration by the court, in holding that under the circumstances the request for inspection should be granted, in *Mohler v Commonwealth* (1922) 132 Va 713, 111 SE 454, a prosecution for murder, wherein it appeared that there was a previous trial of the case, in which the jury failed to agree, and the defendant's attorney had a stenographic record of the evidence taken on that trial; that prior to the first trial there had been an inquest over the body of the alleged victim and a stenographic record of the evidence taken at that inquest had been made by the prosecuting attorney at his expense; and that at the commencement of the second trial the attorney for the defendant desired to have the transcript made at the coroner's inquest which was in the possession of the prosecuting attorney, while the prosecuting attorney desired to have the report of the evidence taken at the first trial which was in possession of the defendant's attorney, but each refused to furnish the other with the requested document. On appeal from a judgment of conviction on the second trial, the court held: "The witnesses had been examined on several occasions with reference to the accusation, and it is a manifest advantage to an attorney to have a stenographic copy of the testimony previously given so as to elicit all the facts by him deemed pertinent. The opposing attorney should not be denied an equal advantage. Such transcripts of the evidence previously given, when brought into court for use, cease to be strictly private property, and opposing attorneys should then have equal access thereto. This access is so essential in the interest of justice that if the courtesy usually accorded is not sufficient to secure it, and the question is raised during the trial for the first time, then the trial court should exercise all of its powers to that end." The defendant's assignment of error in this connection was held not sustainable, however, because the transcript desired by the defendant's attorney was eventually furnished to him at the suggestion of the trial court.

[\*9f] On Appeal

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Refusal to allow defense counsel to inspect alleged work product on appeal, did not deprive defendants of argument that trial court erred when it denied discovery of information in prosecutor's felony review folder and used on cross-examination of defendant. *People v Stevens (1981) 102 Ill App 3d 773, 58 Ill Dec 389, 430 NE2d 331.*

[\*10] Miscellaneous factors affecting right to inspection

[\*10a] Admissibility in evidence

In many cases it has been held or recognized that an accused has no right to inspection or disclosure of a document or article in the possession of the prosecution which is not admissible in evidence.n104

#### ARIZONA

*State v Wilder, 22 Ariz App 541, 529 P2d 253, cert den 423 US 843, 46 L Ed 2d 64, 96 S Ct 78*

*State v McGee (162) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75, infra § 22[d]*

#### COLORADO

*Rosier v People (1952) 126 Colo 82, 247 P2d 448, supra § 7*

#### DISTRICT OF COLUMBIA COURT

*Griffin v United States (1950) 87 App DC 172, 183 F2d 990, supra § 8 (apparently applying District of Columbia law)*

#### GEORGIA

*Jefferson v State (1981) 159 Ga App 740, 285 SE2d 213*

#### LOUISIANA

*State v Bankston (1928) 165 La 1082, 116 So 565, infra § 16[b]*

#### MICHIGAN

*People v Maranian (1960) 359 Mich 361, 102 NW2d 568, infra § 16[a]*

#### MISSOURI

*State v Brown* (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]  
*State v Hinojosa* (1951, Mo) 242 SW2d 1, supra § 8  
*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, supra § 7

## NEBRASKA

*Cramer v State* (1944) 145 Neb 88, 15 NW2d 323

## NEW YORK

*People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, infra  
*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698, supra § 7  
*Silver v Sobel* (1958) 7 App Div 2d 728, 180 NYS2d 699, infra § 21[b]  
*Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843, infra § 25. [b]  
*People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[a]  
*Mulry v Beckmann* (1947) 188 Misc 648, 69 NWS2d 43, affd 272 App Div 780, 69 NYS2d 519, infra § 17  
*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, infra § 21[a]  
*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, supra § 7  
*People v Wilson* (1959) 17 Misc 2d 349, 183 NYS2d 669, infra § 21[a]  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 221, infra § 16[a]  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222, infra § 21[b]  
*People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457  
*People v Riley* (1965) 46 Misc 2d 221, 258 NYS2d 932, infra § 13[d]  
*People v Jordan* (1953, Gen Sess) 128 NYS2d 457

## NORTH CAROLINA

*State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra § 17

## OKLAHOMA

*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610  
*Application of Killion* (1959, Okla Crim) 338 P2d 168  
*Bell v Webb* (1961, Okla Crim) 365 P2d 399

## SOUTH DAKOTA

*State ex rel. Wagner v Circuit Court of Minnehaha County* (1932) 60 SD 115, 244 NW 100, infra § 24[a]

Thus, in *People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, a proceeding to restrain an order granting the defendant's request for the pretrial production of statements made by an accomplice, the statements and memoranda of the post mortem examination of the victim of the alleged homicide, and all the reports and information made or given to the district attorney with reference to any chemical analysis or examination of the organs or parts of the victim, the court, affirming an order of prohibition, held that the documents in

question were not subject to inspection by the defendant in advance of a trial because they would not have been admissible in evidence. The court concluded that assuming, but without deciding, that there was an inherent power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice, the documents to be exhibited must be evidence in support of the cause of action or defense of the party seeking the discovery.

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In the following California cases, however, the court has, either explicitly or by necessary implication, taken the view that the failure to show admissibility of evidence is no bar to discovery and inspection by the defense.<sup>n105</sup> *Funk v Superior Court of Los Angeles County* (1959) 52 Cal 2d 423, 340 P2d 593; *People v Cooper* (1960) 53 Cal 2d 755, 3 Cal Rptr 148, 349 P2d 964; *People v Lane* (1961) 56 Cal 2d 773, 16 Cal Rptr 801, 366 P2d 57; *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571; *Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130; *McAllister v Superior Court of San Diego County* (1958) 165 Cal App 2d 297, 331 P2d 654; *People v Curry* (1961) 192 Cal App 2d 664, 13 Cal Rptr 596; *Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291.

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See *State v Fowler*, 101 Ariz 561, 422 P2d 125, § 4[b].

In criminal prosecution the material sought on discovery need not be admissible evidence since accused is entitled to discover all relevant and material information in possession of prosecution that will assist him in preparation and presentation of his defense; thus, in prosecution for rape and kidnapping, trial court erred in denying defense motion for discovery of prosecutor's notes of interview with rape victim on ground that there was nothing in notes which could be used by defendant to impeach victim as witness. *People v Williams* (1979, 2d Dist) 93 Cal App 3d 40, 155 Cal Rptr 414.

See *In re Valerie E.*, 50 Cal App 3d 213, 123 Cal Rptr 242, § 17.

See *United States v Sedgwick* (1975, Dist Col App) 345 A2d 465, § 4[b].

Trial court did not err in denying defendant's motion for disclosure where only page of police report not disclosed to defendant summarized deceased's account of stabbing incident and such statement could not be admitted at trial for purpose of impeachment. *People v Jenkins* (Ill App) 333 NE2d 497.

Examination of police reports for purposes of cross-examination of complaining witness in attempted rape prosecution was properly denied where reports contained no verbatim statements of complaining witness, defense failed to lay adequate foundation and -- in view of defendant's admissions at trial that he was present in complaining witness' room at time in question -- defendant could not have been substantially prejudiced by denial of his motion for production of reports. *People v Hankins*, 90 Ill App 2d 51, 234 NE2d 104.

See *State v Moore (La)* 344 So 2d 973, § 7.

Test for determining whether suppression of evidence amounts to denial of due process is whether evidence withheld was admissible, useful to the defense, and capable of clearing or tending to clear the accused of guilt. *Ross v Warden, Maryland Penitentiary*, 1 Md App 46, 227 A2d 42.

See *State v Caldwell* (1982, Minn) 322 NW2d 574, § 22[e].

See *State v Lewis* (1982, Mo App) 637 SW2d 421, § 23.

Trial court has discretionary power to direct discovery of items in possession of prosecution that would be admissible in evidence. *People v Bradford*, 54 Misc 2d 54, 281 NYS2d 480.

In prosecution for murder of wife and her boyfriend, it was not error to fail to allow defendant and his counsel to inspect letters allegedly written by boyfriend to wife where contents of letters would have been inadmissible under hearsay rule, where defendant had no knowledge of contents of these letters prior to homicides and thus his state of mind at time could have not been affected thereby, and where state did not attempt to impeach defendant's contention tht his wife and her boyfriend were carrying on illicit romance. *Humphreys v State* (Tenn Crim) 531 SW2d 127.

[\*10b] Age and status of accused

The age and status of the defendant was taken into consideration in upholding an order granting in part his motion for production in *State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, a prosecution for murder, wherein the defendant moved for an order requiring the prosecuting attorney to produce certain statements and reports and other evidence in the possession of the prosecution, asserting that inspection of the requested documents and evidence was necessary to the proper preparation for trial of the case and was essential to cross-examination, and the trial court granted the motion as to (1) all statements given by the defendant, (2) all reports of an autopsy performed upon the victim, and (3) any written statements or reports made by the Federal Bureau of Investigation as the result of any examination made of the clothing, personal effects, and blood samples of the defendant and the victim. Following the view that the defendant's right to inspection of evidence in the possession of the prosecution is a matter within the discretion of the trial court, which will not be disturbed on appeal unless there is a manifest abuse of discretion, the Supreme Court of Washington held (four justices dissenting) that there was no abuse of discretion on the part of the trial court in granting the defendant's motion to the extent as limited by its order, in view of the fact that the trial court, in ruling on the motion, took into consideration that the defendant was from a foreign country, was scarcely above juvenile court age, was indigent and without funds to assist in the conduct of his own investigation, and was charged with a capital offense.

The fact that the defendant was a 15-year-old boy charged with murder in the first degree was also taken into consideration in *People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, wherein the court granted the defendant's pretrial request for inspection of a statement made by him.

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Counsel representing armed robber suffering from retrograde amnesia (alcoholic blackout) was granted pretrial discovery of any and all prior written, recorded or oral statements of actual witnesses to alleged crimes (not including statements of police who were non-witnesses), including grand jury transcripts, but court ordered that names, addresses and other identifying characteristics of all witnesses must be redacted to foreclose possibility of retaliation, with orders that discovered materials must be maintained in exclusive possession of attorney for defendant only to be used for exclusive purpose of preparing defense at trial. *People v Johnson* (1982) 115 Misc 2d 366, 454 NYS2d 248.

[\*11] Inspection under criminal statute or rules of criminal procedure106

[\*11a] Arizona

Rule 195 of the Arizona Rules of Criminal Procedure, which came into effect June 1, 1956, provides that upon motion of a defendant at any time after the filing of the indictment or information, the court may order the county attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents, or tangible objects

obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.n107

In *State ex rel. Polley v Superior Court of Santa Cruz County (1956) 81 Ariz 127, 302 P2d 263*, it was held that statements taken from the defendant by the county attorney were not subject to inspection under this rule.

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Trial court did not err in prosecution for possession of stolen motor vehicle by admitting into evidence certified public record indicating true owner of vehicle, notwithstanding violation of state rules of criminal procedure by failure of prosecution to disclose document to defendant prior to trial, where there was no controversy over ownership and vehicle registration was not vital to either state's case or defense. *State v Alvarado (1979) 121 Ariz 485, 591 P2d 973*.

In prosecution for theft, failure of prosecution to turn over to defendant notes of interview with associate of defendant, where defendant did not know if any exculpatory evidence was revealed at interview, merited dismissal of two counts against defendant; Arizona Rules of Criminal Procedure and U.S. Constitution require disclosure of evidence favorable to defense. *State v Jones (1978) 120 Ariz 556, 587 P2d 742*.

Under discovery rule requiring prosecution to make available to defense all material or information which tended to mitigate or negate defendant's guilt as to offense charged, trial court in prosecution for murder did not err in refusing to order disclosure of police reports and other information regarding disturbances during year 1974 at apartment house where murders occurred and rapsheets on any person or persons involved in such disturbances where suggestion that police reports might disclose that person other than defendant committed homicides was purest speculation. *State v Hatton (1977) 116 Ariz 142, 568 P2d 1040*.

Although results of test-firing should have been made known to defense counsel in prosecution for assault with deadly weapon, question of whether weapon was in working order on date of offense was not directly relevant to guilt of defendant on assault charge. *State v Parker (1977) 116 Ariz 3, 567 P2d 319*.

Statute requiring that all statements of defendant and of any person who would be tried with him should be made available to defendant for examination applied only to recorded or written statements and did not prevent testimony as to oral statement without prior disclosure. *State v Escherivel, 113 Ariz 300, 552 P2d 1194*.

Piecemeal revelation of items required to be disclosed under Criminal Procedure Rule was violation of that rule where, although prosecutor was prompt in making information available to defendant once he became aware of evidence, he should have made greater effort in familiarizing himself with facts of case he was to try. *State v Castaneda, 111 Ariz 264, 528 P2d 608*.

Defendant was not denied due process of law, where defense counsel failed to move for discovery of test results; such scientific results were in fact discoverable. *State v Jones, 110 Ariz 546, 521 P2d 978, cert den 419 US 1004, 42 L Ed 2d 280, 95 S Ct 324*.

Although inherent power of court to order production and inspection is broader than Arizona court rule permitting such inspection, order requiring county attorney to produce in camera for court's inspection "all statements, notes, or any other items or material pertaining to this case," as aid to court in determining what, if any, material in hands of prosecution should be made available to defense, was beyond jurisdiction of Superior Court, since unrestricted foray into state's files and preparations for trial is not permitted. As guide for future, (1) trial judge in sound discretion must determine reasonableness of request for exercise of his inherent power to grant discovery, (2) court may not order production before trial of statements made by prosecuting witness or others (not including accused), (3) defense may

not examine "work product" of law enforcement authorities except upon showing that either (a) authorities have sought to subvert otherwise valid discovery by alleging that material is privileged under work product exclusion, or (b) compelling and exceptional circumstances indicate to court that to deny discovery would materially prejudice defendant in preparation of defense, and (4) although defendant does not have unqualified right to inspect his written statement in hands of prosecutor, court may order production and inspection of any statement made by accused to authorities, if state, on its avowal, is to present statement at trial as evidence in its case-in-chief. *State ex rel. Corbin v Superior Court of Maricopa County*, 103 Ariz 465, 445 P2d 441.

Defendant in murder prosecution was not entitled to pretrial examination of reports of police officers, notwithstanding request was restricted to reports of those officers whom state intended to call as witnesses, such reports being part of work product of prosecution. *State ex rel. Corbin v Superior Court of Maricopa County*, 99 Ariz 382, 409 P2d 547.

Fingerprint card of informant used for comparison with latent prints taken from packet of heroin was not paper, document, photograph, or tangible object which prosecutor would use at trial or which was obtained from or purportedly belonged to defendant and producible under rules nor was it discoverable under rule as tending to mitigate or negate defendant's guilt. *State v Moreno*, 26 Ariz App 178, 547 P2d 30.

Trial court may not, under Arizona rules, order production, before trial, of statements made by prosecuting witness or others, since defendant does not have right to examine such statements until witness has testified; consequently defendant was not entitled, at time of preliminary hearing, to examine statements given by accomplice to police where accomplice did not testify at such hearing. *State v Rendel*, 18 Ariz App 201, 501 P2d 42.

Under Colorado Rules of Criminal Procedure, accused in murder prosecution should have been permitted discovery of names of those whose prints had been compared with palm print on broken bottle and with unidentified prints on cash register, and should also have been allowed to examine photographs of crime scene and to inspect statements which he gave prior to time he testified at trial. *Hervey v People (Colo)* 495 P2d 204.

[\*11b] Delawaren108

Rule 16 of the Delaware Rules of Criminal Procedure, prior to its amendment in 1965,<sup>n109</sup> provided that upon motion of a defendant at any time after the filing of the indictment or information, the court could order the attorney general to permit the defendant to inspect and copy or photograph designated books, papers, documents, tangible objects, confessions, or written statements obtained from or belonging to the defendant or a codefendant or obtained from others by seizure or by process, upon a showing that the items sought might be material to the prosecution of his defense and that the request was reasonable.<sup>n110</sup>

And in *State v Thompson (1957) 50 Del 456, 134 A2d 266*, it was held that then-prevailing Delaware Criminal Rule 16 did not authorize pretrial production of (1) statements of prospective witnesses, written or otherwise recorded, in the possession of the attorney general, (2) police reports made in the course of their criminal investigations, and (3) the results of polygraph tests, blood tests, and fingerprint examinations in the possession of the attorney general. As to the defendants' contention that the court had inherent power to order the discovery even though there was no rule of court specifically authorizing it, the court said that even assuming the existence of such inherent power, there was no sufficient reason for the grant of extraordinary pretrial discovery in the present case, and that it was inadvisable to enlarge existing practice and procedure, which was limited by a specific rule, by the exercise of inherent power on a case-to-case basis.

Approving the decision in *State v Thompson (Del) supra*, the court in *Wisniewski v State (1957, Sup) 51 Del 84, 138 A2d 333*, also upheld the denial of the defendant's pretrial motion, made under Delaware Criminal Rule 16, for permission to inspect statements of a certain prosecution witness.

And the defendant's motion, under then-prevailing Criminal Rule 16, for permission to hear tape recordings made by the police of statements of a codefendant was granted in *State v Minor* (1962, Del) 177 A2d 215, the court pointing out that the rule specifically provides for the inspection of "confessions or written statements obtained from or belonging to the defendant or a codefendant." Stating that the rule applies to recorded confessions or statements no matter how they are recorded, and that since statements may be inspected when they are recorded on paper, the same material may be made available when recorded on tape, the court rejected the prosecution's offer to produce only the written record of such of the tapes as it saw fit to have transcribed. As to the prosecution's suggestion that this type of discovery would permit a defendant to fabricate a defense which is consistent with the codefendant's statement, the court noted that all pretrial discovery carries with it the possibility of misuse of the information obtained, and that such discovery is permitted because the advantages of reasonable and limited pretrial discovery in the administration of justice are deemed to outweigh the possibilities of abuse. Pointing out that in the present case there was no contention by the prosecution that the tape recordings contained scandalous or impertinent matter or that the disclosure of the contents thereof would hamper orderly police procedures or investigations of other crimes, the court said that the items listed in Criminal Rule 16 should be produced when the requirements of the rule are met, unless special circumstances exist.

Thus, in *State v Winsett* (1964, Del) 200 A2d 237, wherein the defendants were charged with murdering a police officer, the defendant's motion, under then-prevailing Criminal Rule 16, for production of the automobile in which the defendants were located at the time of the death of the victim and the weapon which was allegedly used in the commission of the offense was granted. Pointing out that both the automobile and the alleged death weapon were tangible objects apparently obtained from or belonging to one or some of the defendants, and were clearly material to the defense, and that the requests were reasonable, the court concluded that such items came within the specific language of the criminal rule relied upon. The court in this case also granted the defendants' motion, under the same rule, for production of (1) the weapon possessed by the victim at the time of his death, (2) the weapon in the possession of a fellow officer who was with the victim at the time of his death, and (3) shells and spent shells for each weapon, on the ground that these items were obtained by "seizure" within the meaning of the rule authorizing the production of tangible objects "obtained from others by seizure." Making a distinction between information arising out of the analytical or investigative phase of police effort, that is, the work product of detection (including such items as the results of polygraph tests, blood tests, and fingerprint examinations) and the mere gathering or collection of tangibles which could be done by anyone physically present at a given time and place, and pointing out that in the present case the defendants sought to discover tangible objects which came into possession of the police during examinations of persons, places, or things, the court concluded that the word "seizure" as used in Criminal Rule 16 should be construed in its dictionary meaning and not in a technical or legal sense, and that tangible objects, therefore, may be regarded as having been obtained by "seizure" within the meaning of the rule if they are in the possession of the prosecution. Noting that by the dictionary definition "seizure" simply means to take possession of, or to take into physical custody or control, the court said that to attach a technical or legal meaning to the word "seizure" as used in the rule is inconsistent with the entire trend of the law in the area of criminal discovery, which is to broaden rather than to narrow the areas of pretrial inquiry.

On the other hand, in *State v Winsett* (1964, Del) 200 A2d 237, it was held that then-prevailing Delaware Criminal Rule 16 did not authorize production of the report of an autopsy performed on the body of a homicide victim.

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The defendant's motion, under Rule 17(c) of the Delaware Rules of Criminal Procedure,<sup>n111</sup> for an order requiring the prosecution to produce before trial statements of prospective witnesses for the prosecution and a report on the results of an analysis of the samples of the defendant's blood was denied in *State v Hutchins* (1957) 51 Del 100, 138 A2d 342. Stating that Delaware Criminal Rule 17(c) is not a pretrial discovery rule, and that, therefore, the court must guard against its being used as such, thereby rendering Delaware Criminal Rule 16 meaningless, the court concluded that, generally speaking, Rule 17(c) may be properly invoked only for the procurement of documentary evidence and for the

production of documents which are admissible in evidence at the trial. The court pointed out that obviously neither the written report of the blood analysis nor the written statements of witnesses would be admissible in evidence at the trial except, perhaps, for impeachment purposes.

The defendant's pretrial motion, under Rule 17(c), for permission to inspect statements of a certain prosecution witness was also held properly denied in *Wisniewski v State* (1957, Sup) 51 Del 84, 138 A2d 333, the court stating that Rule 17(c) related to the manner of the issuance of a subpoena.

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Notes of officer's recollection of conversation with defendant's father who had related statements made to him by defendant could not, under rule, be discovered. *Smith v State* (Del Sup) 317 A2d 20.

Requests for all books, papers, documents, and tangible objects which state planned to offer into evidence at trial which were obtained voluntarily by seizure and/or by process from defendant or others was denied under state rule of criminal procedure where motion did not designate particular documents or objects sought and there was no showing of their materiality to preparation of defense; request for all information and material which was favorable to defendant was denied since state rule did not provide for and due process did not require such discovery prior to trial. *State v Traenkner* (Del) 314 A2d 202.

[\*11c] Floridan112

Section 925.04 (former § 909.18) of the Florida statutes provides that when a crime has been committed and the evidence of the state relates to ballistics, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photographs, objects, or other tangible things, upon motion showing good cause therefor, and upon notice to the prosecuting attorney, the court in which the action is pending, whether a committing magistrate's court or the court having jurisdiction to try the cause, may order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things.n113

Noting that the Florida statute referred to above fails or omits to include written confessions made by a defendant, although it does provide for the production of "other tangible things," and stating that the phrase "other tangible things" could not be construed to include written confessions, the court in *Williams v State* (1940) 143 Fla 826, 197 So 562, upheld the denial of the defendant's pretrial motion for an order requiring the prosecution to produce the defendant's confession, notwithstanding the defendant's contention that the trial court's denial of the motion was contrary to the spirit and meaning of the statute, had the effect of taking defense counsel by surprise at the time of the trial, and deprived him of the opportunity or privilege of a thorough investigation so as to determine whether or not the confessions had been unlawfully obtained.n114

Where a defendant's request for inspection of evidence in the possession of the prosecution is granted under the Florida statute referred to above, but the defendant does not follow up the order granting his request by taking the necessary steps to procure the evidence from the prosecution, he may be held to have waived his right to inspection. Thus, where, on the defendant's motion for discovery under § 909.18 of the then Florida statutes, the trial judge entered an order requiring the prosecution to produce and allow the defendant to inspect, copy, or photograph objects which the prosecution intended to use as evidence, but the record was silent as to anything done by the prosecuting attorney or demanded by the defendant with reference to the order between the day it was entered and the time some of the objects seized were offered in evidence at the trial, the court in *Perez v State* (1955, Fla) 81 So 2d 201, held that the defendant's counsel had no right to object to the admission of the objects on the ground that the prosecution had not complied with the order. Noting that the primary purpose of the statute and an order entered pursuant thereto is to furnish a defendant

with information that would enable him to better prepare his defense, the court said that under the circumstances the defendant had waived any advantage he might have gained by the inspection. See also *Drozewski v State* (1955, Fla) 84 So 2d 329, supra § 6[a], holding to the same effect, but not referring to the Florida statute under consideration.

In upholding the trial court's ruling on the defendant's pretrial motion, made in a prosecution for murder, for an order requiring the prosecution to produce, under § 909.18 of the then Florida statutes, "all the evidence in its possession, including ballistic reports, fingerprint reports, and transcript of oral confessions," the court in *Ezzell v State* (1956, Fla) 88 So 2d 280, cited decisions supporting the rule that confessions of a defendant and statements of witnesses are not subject to inspection by the defense, and pointed out that the ballistic reports, which had been made by the FBI, were "nothing more than an outline of testimony the examiner could give at the trial," that the prosecution was ordered to produce all bullets and weapons for inspection by the defendant, that no fingerprints were lifted from the pistol that was introduced in evidence, and that some fingerprints of the defendant lifted from the automobile in which the victim was killed were ordered to be produced for inspection by the defendant.

The denial of the defendant's motion for an order requiring the prosecution to produce the transcribed notes of a court reporter which were made in recording statements of accomplices who were not on trial was held not error in *Raulerson v State* (1958, Fla) 102 So 2d 281, although the motion was said to have been based on § 909.18 of the 1955 Florida statutes, the court noting that the statute was no authority for the request made in the present case. Pointing out that the statements sought by the defendant would not have been admissible against the accomplices even had they been on trial, that the court reporter was not a witness and did not testify at the trial, and that the accomplices were available for interview by the defendant, the court also said that the rule that a defendant is not entitled to a transcript of the testimony of prosecution witnesses was applicable to the present situation with the same, if not greater, force.

Similarly, the denial of the defendant's motion for permission to inspect and copy tape recordings which were secretly made by investigating officers under the direction of the prosecuting attorney and which contained conversations between the defendant, another participant in the crime, and other persons who later testified at the trial, was upheld in *Peel v State* (1963, Fla App) 154 So 2d 910, the court holding that the defendant was not entitled to production of the tape recordings either under § 909.18 of the then Florida statutes or under a subpoena duces tecum. Noting that the tape recordings could not be considered substantive evidence, but were clearly the work product of the prosecuting attorney, the court pointed out that the statute under consideration does not cover the tape recordings; that to support the issuance of a subpoena duces tecum in a criminal prosecution, it must be shown that the evidence sought is material and necessary to the defendant's case; and that a subpoena duces tecum in no sense reaches notes or evidence taken by the prosecuting officer at his expense and by his private stenographer.

A lottery ticket purchased by a confidential informant was held not producible under § 925.04 of the Florida statutes in *Miami v Jones* (1964, Fla App) 165 So 2d 775, a prosecution for violation of gambling laws, the court pointing out that production of the ticket would operate to reveal the identity of the informant, that the purchase of the ticket by informant was incidental, and that neither the fact of its purchase nor the ticket itself was evidence that would have any materiality or bearing on the merits of the issues tried.

Where an order for production of evidence in the possession of the prosecution is granted under the Florida statute referred to above, the prosecution is obligated to disclose all such items that it then has in its possession, and it is not necessarily bound, because of such order for production, to produce items to be acquired subsequently to the order. Thus, where the defendant moved, under the statute, for an order requiring the prosecution to produce, for his inspection, any items which were to be used by it as evidence in the case, and the prosecution consented to the demands of this motion without the entry of a formal order thereon, and thereafter the prosecution procured the services of a ballistics expert to make tests with the defendant's pistol, and exhibits showing the results of such tests were subsequently introduced and admitted in evidence notwithstanding the defendant's objection based on the ground that these exhibits had not been submitted to him for his inspection in accordance with the requirements of his pretrial motion for discovery, the court in *Belger v State* (1965, Fla App) 171 So 2d 574, in holding that the trial court did not

commit error in admitting in evidence the exhibits in question, rejected the defendant's contentions that the spirit of the Florida statute under consideration required the prosecution to notify him immediately of any evidence coming into its possession which it intended to use at the trial if an order had theretofore been entered by the trial court pursuant to the provisions of the statute, and that the prosecution's failure to do so should render any subsequently acquired evidence inadmissible. The court said that if an order for inspection of evidence is entered pursuant to the provisions of the statute, the prosecution is obligated to make a good-faith disclosure of all such items which it then has in its possession and which it intends to introduce at the trial; that if subsequent investigation develops additional evidence prior to the commencement of the trial, the defendant is likewise entitled to have it submitted for inspection if a motion for that purpose is seasonably made; that failure of a defendant to make such a motion and procure an order thereon, or failure of the prosecution to voluntarily submit such evidence to the defendant prior to the trial, will not necessarily render the evidence inadmissible; and that a broad discretion rests in the trial judge to determine whether the prosecution has acted in good faith in making timely disclosure to a defendant of the items of evidence in its possession, if an order requiring such disclosure has been entered in the case.

In *State v Shouse* (1965, Fla App) 177 So 2d 724, a prosecution for embezzlement, it was held (1) that an order requiring the prosecution to produce, for inspection and copying by the defendants, all documents and legal papers which the prosecution intended to use at the trial was substantially in accord with § 925.04 of the Florida statutes; and (2) that an order directing the prosecution to produce all sworn statements given by prospective witnesses for the prosecution was not authorized by the statute.

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State's noncompliance with discovery rule requiring disclosure of prospective witnesses did not mandate reversal of first-degree murder conviction where, despite fact that undisclosed witness was permitted to testify in rebuttal to defendant's testimony concerning his intoxication, defense failed to make timely objection and thereby allow trial court to specifically rule on issue. *Lucas v State* (1979, Fla) 376 So 2d 1149.

Reversible error occurred in first-degree murder prosecution which charged codefendants with murder-for-hire killing of wife involved in extramarital affair, where defendant's testimony constituted repudiation of his prior confession and attempt to place blame for killing on codefendant, and where prosecution, after reaching immunity agreement with codefendant and his counsel, called codefendant to testify as rebuttal witness without having listed codefendant as potential witness during pretrial discovery proceedings. *Kilpatrick v State* (1979, Fla) 376 So 2d 386.

In prosecution for burglary and sexual battery, trial court correctly denied motion seeking discovery, under criminal procedure rules, of police reports which were not statements of officers as eyewitnesses but which only contained non-verbatim statements of victim who did not sign or ratify said reports. *Lockhart v State* (1980, Fla App D4) 384 So 2d 289.

In prosecution for possession of marijuana, state violated statute requiring production of substance of all oral confessions and of names of all witnesses to such confessions where state's response to defendant's request merely acknowledged existence of "written, recorded and/or oral statement of accused" and list of witnesses supplied by state did not specify those who were party to confession. *Thompson v State* (1979, Fla App D2) 374 So 2d 91.

Reciprocal discovery rule applied to oral statement by witness, inconsistent with prior written sworn statement, given to prosecutor immediately preceding trial, and prosecutor's failure to disclose such statement breached duty to make continuing discovery and resulted in reversible error where principal jury issue was proper identification and oral statement by defendant's girlfriend was inculpatory. *Waters v State* (1979, Fla App D3) 369 So 2d 979.

Trial court's granting carte blanche production of all police reports filed in defendant's case was overbroad and in error

where, under Fla Rules Crim Proc 3.220[a][1][i], [ii], prosecution was only required to produce police reports written or signed or otherwise adopted or approved by person whose name had been furnished by prosecutor to defendant upon demand, and those reports containing substantially verbatim recital of oral statement made by person whose name had been furnished by prosecutor to defendant upon demand and made to officer or agent of state who recorded statement contemporaneously with its making. *State v Dumas* (1978, Fla App D3) 363 So 2d 568.

See *King v State* (1978, Fla App D3) 355 So 2d 831, § 23.

Court committed reversible error erred in permitting rebuttal witness to testify where prosecution refused to list name of rebuttal witness in response to defendant's demand for discovery. *Hardison v State* (Fla App D2) 341 So 2d 270.

Pursuant to rule of criminal procedure providing that defendant was entitled to discover names and addresses of all persons known to prosecution to have information which might be relevant to offense charged and to any defense with respect thereto, defendants were entitled to address of state's key witness where she had moved from address given by state and such information was necessary so that defendants could take her deposition. *Anderson v State* (Fla App) 314 So 2d 803.

When motion for discovery is presented, trial court should first determine whether any or all of information sought is readily available to defendant through deposition, subpoena, or other means, and if so, motion should be denied; next, court should determine whether information sought is reasonably admissible and useful to defense as probably material and exculpatory, in which case motion should be granted. *State v Coney* (Fla App) 272 So 2d 550.

Florida discovery statute does not contemplate fishing expedition, but is limited to documents or things used as "evidence of the state." *Barton v State* (Fla App) 193 So 2d 618.

Florida statute providing that trial court may order evidence relating to certain enumerated items of tangible property furnished to accused for inspection, copying, or photographing does not apply to oral confessions of accused, or to material that cannot be considered substantive evidence but is clearly work product of prosecuting attorney, or to transcript of testimony of state witnesses. *State v McCall* (Fla App) 186 So 2d 324.

[\*11d] Illinoisn115

Under Chapter 38 paragraph 729, of the 1961 Illinois Revised Statutes,<sup>n116</sup> which provided that whenever a written or oral confession was made before any law enforcement officer or agency by any person charged with any crime, a copy of such confession, if written, together with a list of all witnesses to its making, should be given to the defendant or his counsel prior to arraignment, or at such later time as the court, in its discretion, may direct, upon motion by either the prosecution or defense at the time of arraignment, and that if such confession was not reduced to writing, then a list of the names and addresses of all persons present at the time the confession was made should be furnished, it was held in *People v Shockey* (1964) 30 Ill 2d 147, 195 NE 2d 703, that the admission of the defendant's written confession in evidence without furnishing the defense with a copy thereof until the day before it was introduced in evidence constituted prejudicial error in view of the fact that, excluding the evidence concerning the confession, there was not a sufficient quantum of evidence to prove the defendant guilty beyond a reasonable doubt. The court noted that the statutory requirement was mandatory.

The defendant's contention that the trial court committed error in denying his request to see a written copy of his alleged oral confession was held not sustainable in *People v Carter* (1962) 24 Ill 2d 413, 182 NE2d 197, although it was shown that a police officer had made some writing based on the defendant's oral statement and had included it in his report. Noting that under Chapter 38 paragraph 729, of the 1959 Illinois Revised Statutes, although a defendant was entitled to a copy of a written confession, he was only entitled to a list of witnesses present at the making of an oral confession, the court concluded that since a list of persons present at the making of the defendant's alleged oral confession was

provided, there was no error.

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Tape-recorded confession was "written" confession within purview of and for purpose of Illinois statute providing that court in criminal case shall, on motion of defendant, order state to furnish him with copy of any written confession made by him to any law enforcement officer. *People v Purify*, 43 Ill 2d 351, 253 NE2d 437.

See *People v Mims* (1982) 111 Ill App 3d 814, 67 Ill Dec 448, 444 NE2d 684, § 16[a].

See *People v Palmer* (1982) 111 Ill App 3d 800, 67 Ill Dec 442, 444 NE2d 678, § 4[d].

See *People v Ferguson* (1981) 102 Ill App 3d 702, 57 Ill Dec 958, 429 NE2d 1321, cert den (US) 74 L Ed 2d 133, 103 S Ct 159, § 13[b].

See *People v Spain* (1980) 91 Ill App 3d 900, 47 Ill Dec 451, 415 NE2d 456, § 17.

See *People v Kradenych* (1980) 83 Ill App 3d 547, 39 Ill Dec 104, 404 NE2d 488, § 14.

Under statute requiring production of oral or written confessions upon defendant's proper pretrial motion, defendant in prosecution for murder was entitled to production of his confession taken on officer's scratch pad during interview despite exculpatory nature of confession and state's argument that officer did not make existence of statement known until immediately prior to trial. *People v Spurlack* (1979) 74 Ill App 3d 43, 29 Ill Dec 657, 392 NE2d 214.

Trial court erred in burglary trial in denying motion to preclude evidence of jewelry store receipt which prosecution had not listed in its answer to discovery request, although error did not require reversal since defendant did not demonstrate that he was thereby prejudiced. *People v Hambrick* (1979) 68 Ill App 3d 447, 25 Ill Dec 184, 386 NE2d 455.

In proceeding to revoke probation based on alleged felony theft committed by defendant, trial court properly denied defendant's motion to produce written statements of witness; supreme court rules require that, for discovery rules to apply, accused must be charged with an offense and petition to revoke probation did not constitute a felony charge. *People v De Witt* (1978) 66 Ill App 3d 146, 22 Ill Dec 886, 383 NE2d 694.

In prosecution for murder, state violated discovery obligation imposed upon it by court rule where state provided defendant with illegible copy of expert's report on results of test to determine if defendant had fired gun and where report tended to negate defendant's guilt, although state had denied possessing any information negating defendant's guilt. *People v Keith* (1978) 66 Ill App 3d 93, 22 Ill Dec 847, 383 NE2d 655.

See *People v Boucher* (1978) 62 Ill App 3d 436, 19 Ill Dec 675, 379 NE2d 339, § 13[d].

Police reports, ballistics tests, and statement by witness regarding finding of gun, which fired bullet which killed victim, under co-defendant's bed were improperly withheld from defendant who had requested such material, where material was not disclosed to defendant until close of trial, during jury deliberations, and where material would have been relevant to defense theory that co-defendant and another person had committed crime. *People v Baxtrom* (1978) 61 Ill App 3d 546, 18 Ill Dec 718, 378 NE2d 182.

See *People v Veal* (1978) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963, § 14.

See *People v Loftis* (1977) 55 Ill App 3d 456, 13 Ill Dec 133, 370 NE2d 1160, § 25[c].

See *People v Clark* (1977) 55 Ill App 3d 379, 13 Ill Dec 84, 370 NE2d 1111, § 27[a].

Under rule providing that state should disclose to defense counsel all memoranda containing substantially verbatim reports of witnesses' oral statements, trial court's in camera review of such memoranda in response to prosecution objection, was to determine whether the memoranda were substantially verbatim reports of witnesses' oral statements and not merely to determine whether the memoranda contained privileged work product. *People v Holmes*, 41 Ill App 3d 956, 354 NE2d 611.

Statute requiring state on motion by defendant to furnish list of witnesses to oral confession did not require state to furnish oral confession itself. *People v Crosby*, 39 Ill App 3d 1008, 350 NE2d 805.

Purpose of discovery rules -- to prevent surprise and any unfair advantage -- had been honored where, although list of physical evidence received pursuant to pre-trial discovery motion did not include stolen checks, list included "miscellaneous papers," and where defense had requested and been furnished copy of Crime Detection Laboratory report which listed canceled checks issued to prosecution witness. *People v Britt*, 22 Ill App 3d 695, 318 NE2d 138.

Discovery order properly required that specific and known oral admission by defendant, which prosecution intended to use at trial, be reduced to memorandum, where trial court determined within its discretion that reason for failure to reduce such statement to writing was to avoid discovery; blanket order, however, to reduce to memorandum any reports or summaries of oral statements of persons intended to be called as witnesses was overbroad and invalid; provisions of discovery order which allowed in camera inspection of entire State file were also invalid, where there was no showing that material evidence existed which State had withheld, and where incamera inspection to determine generally whether State's file contained exculpatory material was not authorized except upon proper showing of good cause and materiality to preparation of defense; if State intended to use statement of witness, such statement fell within its continuing obligation of disclosure. *People v Manley*, 19 Ill App 3d 365, 311 NE2d 593.

See *People v Schabatka*, 18 Ill App 3d 635, 310 NE2d 192, cert den (US) 43 L Ed 2d 400, 95 S Ct 1128, § 6[b].

Defendant's motion for criminal records of prosecuting witnesses, statements of other witnesses, and the like was properly denied where state discovery rules were not then in effect, nothing then required was refused defendant, and where there was substantial compliance with then pending decision governing discovery rights. *People v Stadtman*, 15 Ill App 3d 259, 304 NE2d 174, revd on other grounds 59 Ill 2d 229, 319 NE2d 813.

Court properly denied defendant's request for contents of oral statement defendant made to police under statute which provided for discovery of list of witnesses to oral confession, but excluded discovery of statement itself. *People v Green*, 14 Ill App 3d 972, 304 NE2d 32, cert den 417 US 972, 41 L Ed 2d 1143, 94 S Ct 3179.

Under Illinois Rules relating to discovery in criminal cases, defendant, who was charged with driving while intoxicated -- misdemeanor for which she could not be imprisoned -- was not entitled to police DWI report; consequently, when state refused to produce such report, trial court erred in suppressing evidence contained therein. *People v Schmidt*, 8 Ill App 3d 1024, 291 NE2d 225, affd 56 Ill 2d 572, 309 NE2d 557.

[\*11e] Marylandn117

Rule 728 of the Maryland Rules of Procedure provides that upon motion of a defendant and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court, at any time after indictment, may order the state's attorney to produce, for inspection by the defense, designated books, papers, documents, or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or by process, and to furnish the defendant the substance of any oral statements made by him which the state proposes to

produce as evidence to prove its case in chief, a copy of any written statement made by him, and the substance of any oral confession made by him. The rule also provides that nothing therein shall limit the inherent common-law power of the court to require or permit the discovery.n118

The view that the discovery and inspection of documents under Maryland Rule 728 are left to the sound discretion of the trial court, and that under the rule inspection is not granted as a matter of right, was also recognized in *Whittle v Munshower* (1959) 221 Md 258, 155 A2d 670, cert den 362 US 981, 4 L ed 2d 1016, 80 S Ct 1069 (a case not within the scope of this annotation).

Holding that the matter under consideration was one for the discretion of the trial court under Maryland Rule 728, the court in *Glaros v State* (1960) 223 Md 272, 164 A2d 461, rejected the defendant's contention that the trial court committed error in refusing to permit him to inspect before trial notes made by police officers after their conversations with him. Pointing out that the trial court had ordered the prosecution to permit the defendant to inspect all memoranda or transcripts of statements of the defendant made at the time of the conversation, although it had denied such inspection of any memoranda or statements made after the conversation, the court said that there was no abuse of discretion under the circumstances.

The defendant's contention that the trial court should have declared a mistrial when a detective was permitted to testify as a prosecution witness as to statements made by the defendant to him that were not given to the defense prior to trial pursuant to a motion for discovery made under Maryland Rule 728 was rejected in *Johnson v State* (1963) 232 Md 199, 192 A2d 506. The court pointed out that pursuant to the motion, the prosecution had furnished to defense counsel the substance of an oral statement made by the defendant to the detective the morning of his arrest, and that under Rule 728 the prosecution need only make a report of the substance of the oral statement, not in verbatim form.

The defendant's contention that the prosecution had failed to comply with an order for discovery and inspection entered under Maryland Rule 728 was held not sustainable in *Mayson v State* (1965) 238 Md 283, 208 A2d 599, where the contention was based on the claim that an order for the production of an "oral" synopsis of any statements made by the defendant required the prosecution to give defendant a "written" synopsis of the statements.

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Trial court did not abuse discretion in denying motion for discovery and inspection of all written statements of 3 codefendants charged with same crimes as defendant, since Maryland rule provides that state may be required to supply copy of any written statement made by defendant, and substance of any oral statement made by defendant which state proposes to produce as evidence to prove its case-in-chief, and substance of any oral confession made by defendant, but no Maryland rule provides for disclosure of written statements of codefendant; similarly, there was no abuse of discretion in refusing to require state to say when and where alleged oral statements made by defendant were made, and in refusing to furnish defendant with reports of experts whom state intended to call at trial, since Maryland rules require no such disclosure. *Veney v State*, 251 Md 159, 246 A2d 608.

Defendant in robbery trial was not prejudiced by state's delay in producing tape of police radio and telephonic communications to or from arresting officer before trial where tape was produced at trial, defendant was offered and refused a continuance, and in defense counsel's judgment it contained nothing of help to appellant. *Tisdale v State* (1979, Md App) 396 A2d 289.

See *McDowell v State*, 31 Md App 652, 358 A2d 624, § 13[b].

Maryland Rule providing for pretrial discovery and inspection does not require state to furnish to defendant statements of victims or other witnesses to crime. *Bailey v State*, 16 Md App 83, 294 A2d 123.

See *Austin v State*, 3 Md App 231, 238 A2d 569, § 14.

See *Boone v State*, 3 Md App 11, 237 A2d 787, § 14.

See *Ward v State*, 2 Md App 687, 236 A2d 740, § 7.

See *Leyva v State*, 2 Md App 120, 233 A2d 498, § 7.

Oral statements made by defendant during commission of robbery of taxi driver did not constitute type of statement discoverable under *Maryland rules*. *Barton v State*, 2 Md App 52, 233 A2d 330.

Under Maryland Rule 728, defendant in murder trial was not prejudiced when in response to his motion for discovery and inspection, prosecution furnished him with police captain's recollection of defendant's oral statement with exception of incident in which defendant allegedly tried to revive victim by dousing her in bathtub; omission of bathtub incident did not render state's response to motion insufficient. *Ferrente v State*, 1 Md App 342, 229 A2d 719.

[\*11f] Missouri119

Rule 25.19 of the Missouri Supreme Court Rules provides that upon application of either party in a criminal case, a subpoena duces tecum may be issued commanding the production of books, papers, documents, or other objects designated therein, and that the court may direct that the books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and that the court may, upon their production, permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys.

Stating that Supreme Court Rule 25.19 is not intended as a rule of discovery, but that its purpose is rather to enforce the production of documents and papers that contain evidence relevant and material to the issues, the court in *State v Kelton (1957, Mo)* 299 SW 2d 493, held that it was not error for the trial court to quash the defendant's subpoena to compel the production of a transcript of questions and answers taken at an interrogation of the defendant by the prosecuting attorney.

In *State v Engberg (1964, Mo)* 377 SW2d 282, wherein the defendant made a pretrial motion, under Supreme Court Rule 25.19, for inspection of "the books, papers, and documents" of the city police department, papers retained by the prosecuting attorney's office pertaining to the crime charged against the defendant, "any and all records or statements" pertaining to the crime, and especially the offense report and a statement of the chief prosecution witness, and the motion was based on allegations that the documents requested were necessary and contained conflicting information which was vital to the defense, that the defendant was without funds to take depositions, and that inspection should be allowed as in civil cases to obtain information that "might lead to the discovery of material evidence," the court, upholding the denial of the motion, pointed out that Rule 25.19 is not a rule of discovery, but that its purpose is to enforce the production of documents or objects at the trial which contain evidence material and relevant to the issues, and that the court in such a case may direct the production and inspection of the designated documents or objects before the court prior to trial if by doing so the trial of the case will be expedited; that except for the assertion that the motion in the present case was made pursuant to Rule 25.19, "the motion bears little resemblance to what is contemplated by the rule"; that in the absence of the issuance of a subpoena duces tecum under the rule and a showing that the documents designated in the motion contained material evidence and that the trial of the case would be expedited by the production and inspection of the documents before trial, the trial court did not commit error in denying the defendant's motion for inspection.

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Reversible error occurred in drunk driving prosecution where heavy caseload borne by prosecutor's office did not excuse untimely, eve-of-trial compliance with discovery request which disclosed amended information indorsing two additional witnesses, which advised defense counsel that defendant had been subject of "alcoholic influence report compiled from field sobriety test, which provided a "breathalyzer operational checklist purporting to indicate a blood alcohol level, and which disclosed certain admissions to officer by defendant that he had been drinking beer while taking valium and glycerine under doctor's orders. *State v Blake (1981, Mo) 620 SW2d 359.*

Motion for order directing prosecutor to disclose to defendant's counsel all evidence material to guilt or punishment in his files, or otherwise known to him, which is or may be favorable to defendant, was too broad and sweeping to be sustained under present state of Missouri law on discovery in criminal cases. *State v Sweazea (Mo) 460 SW2d 614.*

Missouri Supreme Court Rule 25.19 authorizing court to require production upon request of documents and papers at or before trial was not intended to be a general rule of discovery, and does not authorize a blanket request for all material in possession of prosecution or police. *State v Berry (Mo) 451 SW2d 144.*

Defense of surprise in theft prosecution, occasioned by prosecutor's failure to disclose existence of gold ring taken from defendant at time of his arrest pursuant to pre-trial discovery request, necessitated retrial. *State v Moore (1982, Mo App) 645 SW2d 117.*

See *State v Lewis (1982, Mo App) 637 SW2d 421, § 23.*

See *State v Charity (1982, Mo App) 637 SW2d 319, § 16[a].*

Trial court did not abuse its discretion in refusing to allow defendant to inspect police report where police officer had testified on direct examination concerning his search of area for weapon, evidence indicated that officer neither testified from report nor refreshed his memory at trial therefrom and where there was at time of trial no general right to criminal discovery in *Missouri*. *State v Booth (Mo App) 515 SW2d 586.*

[\*11g] New Jerseyn120

Rule 3:5-11 of the New Jersey Criminal Practice Rules, which has been in effect since September, 1953, provides that upon motion of a defendant made at any time after the filing of the indictment or accusation, the court shall order the prosecutor to permit the defendant to inspect and copy or photograph designated books, tangible objects, papers, or documents obtained from or belonging to the defendant, other than written statements or confessions made by him, and may, if the interests of justice so require, order the prosecutor to permit the defendant to inspect and copy or photograph written statements or confessions made by the defendant and designated books, tangible objects, papers, or documents obtained from others except written statements or confessions.

Discovery and inspection under this rule are not limited to evidence the prosecution intends to use; rather, the rule contemplates pretrial inspection as a matter of right of everything taken from a defendant, other than his statement, without reference to the use the prosecution may intend to make of such material. *State v Murphy (1961) 36 NJ 172, 175 A2d 622.*

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Under New Jersey Rule 3:5-11, pretrial inspection by a defendant of his own statement may be ordered if in the sound discretion of the trial judge the interests of justice should so require.

And in *State v Wise* (1955) 19 NJ 59, 115 A2d 62, the court, in holding that the mere fact that the defendant's confession was produced for his inspection under Rule 3:5-11 did not make the confession automatically admissible in evidence, noted that there is no unqualified right to inspect a confession, and that the privilege to do so is granted only in the sound discretion of the trial judge upon application.

Thus, stating that embodied in Rule 3:5-11 was the view that pretrial inspection by a defendant of his own statement may be ordered if in the sound discretion of the trial judge the interests of justice should so require, the court in *State v Johnson* (1958) 28 NJ 133, 145 A2d 313, held that where a defendant's application for pretrial inspection of his own statement showed that he did not recall his statement with sufficient detail to satisfy his counsel that he could fairly go to trial without it, the application should be granted in the absence of a showing by the state that inspection would improperly hamper the prosecution; and that in ruling upon such an application for inspection it was not necessary to have a hearing, with cross-examination as to the factual showing advanced by the defendant in support of his motion, but that, upon the defendant's ex parte proof of facts supporting his motion, the hearing should ordinarily shift to the prosecution's claim of extraordinary circumstances in opposition to the motion.

See also *State v Murphy* (1961) 36 NJ 172, 175 A2d 622, involving an application by an accused for pretrial discovery of statements which he had given to the Waterfront Commission of New York Harbor and which were then in the possession of such commission, wherein the court, noting that New Jersey Rule 3:5-11 provides that the court may order inspection of statements made by a defendant if the interests of justice so require, recognized that pretrial inspection by a defendant of his own statement should be ordered upon his showing that he cannot recall the statement with sufficient detail to satisfy his counsel that he can fairly go to trial without it, unless the state shows that inspection would improperly hamper the prosecution.

Stating that the application for inspection under consideration was addressed to the court's discretion, the court in *State v Echevarria* (1955) 38 NJ Super 415, 119 A2d 183, denied the defendant's motion, under Rule 3:5-11, for pretrial inspection of statements made by him, where all that the defendant stated in support of his motion was that the statements were made while he was without benefit of counsel, that he did not have copies of the statements, that he did not recall their contents, and that, therefore, he could not inform his counsel of them.<sup>n121</sup>

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Pretrial inspection of prospective witnesses is barred by New Jersey Rule 3:5-11. *State v Johnson* (1958) 28 NJ 133, 145 A2d 313; *State v Reynolds* (1963) 41 NJ 163, 195 A2d 44

*State v Trantino* (1965) 44 NJ 358, 209 A2d 117; *State v Moffa* (1960) 64 NJ Super 69, 165 A2d 219, affd 36 NJ 219, 176 A2d 1.

Thus, in *State v Johnson* (1958) 28 NJ 133, 145 A2d 313, it was held that the defendant was not entitled to pretrial inspection of statements of prospective witnesses. Noting that pretrial inspection of statements of prospective witnesses was barred by Rule 3:5-11, and pointing out that such a rule should not ordinarily be revised or abandoned except by an exercise of the rulemaking power, the court added that there was no showing in the present case which would invite relaxation of the rule under consideration.

Although statements of prospective witnesses are not subject to inspection under New Jersey Rule 3:5-11, a prospective witness' report containing the defendant's statements may nevertheless be produced under certain circumstances. Thus, in *State v Reynolds* (1963) 41 NJ 163, 195 A2d 449, the court, in holding that no prejudice had resulted to the defendant from the trial court's refusal to permit him to inspect a certain psychiatrist's written reports and memoranda which contained his confession, said that although Rule 3:5-11 forbids pretrial inspection of written statements of prospective

witnesses, yet where the defendant has made a statement to a prospective witness and such statement is included in the witness' written report, the circumstances may justify relaxation of Rule 3:5-11 to permit inspection of that part of the witness' report which contained the defendant's statement. The court added that relaxation should occur only in unusual circumstances, and that the trial court must be given broad discretion in determining when relaxation is warranted.

And in *State v Trantino* (1965) 44 NJ 358, 209 A2d 117, the court, in upholding the denial of the defendant's pretrial motion for inspection of statements made by witnesses, said that the trial court's action comported with Rule 3:5-11, which bars inspection before trial of statements of prospective witnesses, subject, however, to the discretionary power, under Rule 1:27A, of a court to relax rules "where it shall be manifest to the court that a strict adherence to them will work surprise or injustice."

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New Jersey Rule 3:5-11 warrants pretrial production, for inspection by the defense, of "the State's objective documents, such as autopsy reports, hospital reports and other scientific and laboratory reports, including chemical analyses, blood tests, etc.," at least where there is no showing by the state that its prosecution would be improperly hampered, said the court in *State v Cook* (1965) 43 NJ 560, 206 A2d 359. The court stated that in view of Rule 3:5-11 and *State v Johnson* (1958) 28 NJ 133, 145 A2d 313, supra, there would now appear to be little question that, absent a showing by the state that its prosecution would be improperly hampered, a defendant is entitled to such pretrial inspection, and held that the defendant, who was examined by psychiatrists designated by the state, while he was in custody on murder charges, was entitled to examine, in preparation for trial, the medical reports of the psychiatrists which were then in the possession of the prosecuting attorney, where the state had made no showing nor had it given any indication that the inspection would improperly hamper the prosecution. The court observed that none of the reasons advanced by those hostile to the expanding doctrine of discovery in criminal proceedings had any real bearing in the present case; that there was no likelihood of intimidation or perjury, and that the state, which had already had broad discovery of the defendant's mental condition, was in no position to talk about imbalance or unfairness; and that defense counsel, whose investigatory resources were far from those of the state, should have the benefit of all that was in the reports of the state's psychiatrists to the just end that he might intelligently advise as to the defense and properly prepare for trial. Also pointing out that even if the defendant was sane within the legal definition, he was nonetheless entitled to introduce evidence relating to his background and to any abnormal or subnormal mental condition, which evidence might bear heavily on the degree of guilt and on the measure of punishment, the court added that the prosecuting attorney must deal fairly and may not constitutionally withhold material evidence which favors the defendant, and that disclosure of such psychiatric reports as those sought by the defendant in the present case would not only aid in ferreting out the truth, but would also avoid any question of unconstitutional withholding. As to the prosecution's argument that the trial court's action in denying the defendant's request for inspection of the reports in question was within the discretionary authority vested in it by Rule 3:5-11, and that if there was to be a departure from the rule it should await formal rule revision, the court commented that although the rule precludes pretrial discovery of "written statements or confessions," it is doubtful that it ever had in mind documents such as medical reports by psychiatrists engaged by the state.

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New Jersey rules limit discovery as to prospective state witnesses, on order of court, to names and addresses of persons known to have relevant information or evidence, indications as to which of those persons may be used as witnesses, and copies of records of statements by such persons within possession, custody, or control of prosecutor; specifically not subject to defense discovery, however, are reports, memoranda, or internal documents made in connection with investigation or prosecution of case. *State v Farrow*, 61 NJ 434, 294 A2d 873, cert den 410 US 937, 35 L Ed 2d 602, 93 S Ct 1396.

See *State v Barath* (1979) 169 NJ Super 181, 404 A2d 373, § 21[a].

Rule dealing with discovery in "criminal actions" was not applicable to prosecution for drunken driving. *State v Roth* (1977) 154 NJ Super 363, 381 A2d 406.

Under rule allowing defendant to inspect and copy and photograph specified materials, prosecutor was not required to furnish at state expense transcripts of taped conversations which were irrelevant, immaterial and nonincriminatory, but defendants could, under circumstances, have access to all recordings and make copies at own expense. *State v Russo*, 127 NJ Super 286, 317 A2d 369.

[\*11h] Tennessee122

Section 40-2441 of the Tennessee Code, which came into effect in March 1963, provides that whenever a written or oral confession or admission against interest is made before any law enforcement officer or agency by any person charged with any crime, a copy of such confession or admission, if written, should be given to the defendant or his counsel on demand, and that no confession or admission against interest should be admitted as evidence in any case unless a copy thereof is furnished as required by § 40-2441.

In *Sambolin v State* (1965, Tenn) 387 SW2d 817, it was held that § 40-2441 was applicable to oral statements or confessions which were reduced to writing by police officials and were made a part of their police report. Noting that it was the intention of the legislature to allow any defendant, upon demand, to secure a copy of all confessions or admissions against interest made to law enforcement officers, whether they were written at the time or later reduced to writing, if such are to be used in evidence against the defendant, the court said that the statute includes signed confessions, but is not limited to such.

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See *State v Gaddis* (Tenn) 530 SW2d 64, § 25[d].

See *Tate v State* (Tenn) 413 SW2d 366, § 21[b].

Criminal defendant has statutory right to obtain his own written statement or a list of witnesses to any oral statements he may have made which are against his interest. *Bolin v State* (Tenn) 405 SW2d 768.

See *State v Pinkston* (1982, Tenn Crim) 644 SW2d 422, vacated, reinstated (Tenn Crim) 668 SW2d 676, § 16[a].

See *Latham v State* (1978, Tenn Crim) 560 SW2d 410, § 25[d].

See *Honeycutt v State* (Tenn Crim) 544 SW2d 912, § 16[a].

Statute relating to pre-trial discovery of defendant's oral confession or admission against interest did not contemplate defendant's exculpatory statement. *Wilson v State* (Tenn Crim) 537 SW2d 446.

See *Covey v State* (Tenn Crim) 504 SW2d 387, § 21[d].

In murder prosecution, court's refusal to allow defendant to examine written statements of state's witnesses was not error where state statute limited discovery in criminal cases to only those statements made by the defendant. *Pique v State* (Tenn Crim) 499 SW2d 4.

Tennessee Code does not specifically require furnishing of statements of prospective prosecution witnesses for pretrial inspection. *Williams v State (Tenn Crim) 491 SW2d 862*.

See *Aldridge v State (Tenn Crim) 470 SW2d 42*, § 16[a].

Defendant's preliminary motion to be allowed access to such information as state might have affecting character, credibility, conflicting statements and motives of state's witnesses did not fall within provisions of Tennessee discovery statute regarding books, papers, documents, or tangible objects belonging to defendant or others, but was conclusionary type of subjective information obtained from witnesses, not made available by statute; moreover, court was not required to permit blanket inspection of state's files or "fishing expedition." *Elliott v State (Tenn Crim) 454 SW2d 187*.

[\*11i] Vermontn123

Section 6727, Title 13, of the Vermont statute, which became effective June 7, 1961, provides that upon motion of a respondent at any time after the filing of an indictment, information, or complaint, the court may order the prosecuting attorney to permit the respondent to inspect and copy or photograph designated books, papers, documents, statements, or other objects, obtained from or belonging to the respondent upon showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

Holding that the Vermont statute referred to above did not cover statements made by an accomplice, the court in *State v Anair (1962) 123 Vt 80, 181 A2d 61*, reversed an order granting a defendant permission to inspect before trial any statement made by an accomplice. The court also noted that the right to inspect such a statement in advance of trial does not exist at common law.

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See *State v Kasper (1979) 137 Vt 184, 404 A2d 85*, § 21[a].

[\*11j] Washingtonn124

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Under state rule of criminal procedure, prosecutor was obligated to disclose to defendant any written or recorded statements and substance of any oral statements of witnesses prosecutor intended to call in homicide prosecution. *State v Peele, 10 Wash App 58, 516 P2d 788* (citing annotation).

[\*11k] Wisconsin125

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See *Kutchera v State (Wis) 230 NW2d 750*, § 14.

Statute requiring one party to produce for the other written or recorded statements of witness was applicable to both defense and prosecution and was not restricted to party who called witness. Prosecution was required to produce statement of defense witness in its possession and defendant was required to produce affidavit taken by defense counsel of state witness. *State v Lenarchick, 74 Wis 2d 425, 247 NW2d 80*.

Under Wisconsin Criminal Procedure Code which provides for pretrial discovery and inspection, court may order production of physical evidence intended to be introduced at trial, may permit scientific analysis thereof, and may order production of reports or results of any scientific tests. *State v Stewart*, 56 Wis 2d 278, 201 NW2d 754.

[\*111] Wyomingn126

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Trial court did not err in denying motion for inspection of reports of sheriff and police under Wyoming Rules of Criminal Procedure Rule 18(a) where reports contained no statements made by defendant to sheriff or police which statements were not repeated at trial. *Dodge v State (Wyo)* 562 P2d 303.

[\*11m] Other statesn127

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Although defendants in narcotics sale prosecutions were entitled to have prosecutor disclose information within his possession and control to defense counsel, including names and addresses of persons known by government to have knowledge of relevant facts, under criminal procedure rule, nothing in rule required prosecution to discover information that it did not possess or control such as in-depth investigation of possible aliases which prosecution witness had used in past or to make available to defense information not under prosecution's control that would aid in impeaching prosecution witness. *State v Clark (1977, Alaska)* 568 P2d 406.

Defendants, who were prison inmates under murder charge, were not entitled to disclosure of information, relating to lists of inmates, defendants' connection with certain organizations, and departmental records, that was specifically excluded from discovery by state statutes. *Procurier v Superior Court of Monterey County*, 35 Cal App 3d 207, 110 Cal Rptr 529.

Colorado Rule of Criminal Procedure 16, as amended, contemplates limited discovery prior to preliminary hearing but is not designed to convert preliminary hearing into mini-trial; defendant was entitled to obtain names of those witnesses who would be called at preliminary hearing and relevant statements which those witnesses might have provided to district attorney. *People v. Kingsley*, 187 Colo. 258, 530 P.2d 501 (1975).

See *People v. Maestas*, 183 Colo. 378, 517 P.2d 461 (1973), § 16[a].

Although Colorado Rule of Criminal Procedure dealing with discovery and inspection of prosecution evidence was applicable at pretrial hearing upon motion to suppress, as well as at actual trial, court did not err in refusing motion for production of purported statements of witnesses at such hearing where it was shown that as to one witness no written statement was in existence, and that as to other, his statement was not in possession and control of prosecution. *Dickerson v. People*, 179 Colo. 146, 499 P.2d 1196 (1972).

See *People v Smith*, 185 Colo 369, 524 P2d 607, § 16[a].

Under Colorado Rules of Criminal Procedure, accused in murder prosecution should have been permitted discovery of names of those whose prints had been compared with palm print on broken bottle and with unidentified prints on cash register, and should also have been allowed to examine photographs of crime scene and to inspect statements which he gave prior to time he testified at trial. *Hervey v People* 178 Colo 38, 495 P2d 204.

See *People v Peterson* (1977) 40 Colo App 102, App) 576 P2d 175, § 8.

In robbery prosecution, police-report copy of witness' statement was not discoverable prior to trial, since practice book limited availability of such statement until witness testified on direct examination at trial. *State v Davis* (1978) 175 Conn 250, 397 A2d 1347.

In prosecution for traveling unreasonably fast, defendant was not entitled as of right, under criminal discovery rule, to maintenance and calibration records of radar device where supervisor of state police radio division appeared as defense witness and brought those records to court; defendant was not entitled to radar manufacturer's operational and set-up manuals where he could have obtained requested manuals from manufacturer; defendant was not entitled to radar training record of arresting officer where officer testified at trial that no such records were kept; defendant was not entitled to description of location of officer's vehicle and orientation of radar device nor explanation of how officer identified defendant's vehicle as such matters were properly subject of cross-examination. *State v Stoll* (1983) 39 Conn Supp 313, 464 A2d 64.

In prosecution for murder, kidnapping and possession of a weapon, statute authorizing notices to produce books, writing or other documents in possession, custody, or control of opposite party could be used to compel evidence which would be admissible and of use to defendant, but notice to produce could not be used to require production of district attorney's work product or law enforcement officers' files. Material which prosecution failed to make available under separate Brady motion, concerning prior convictions of witness, was not material either to defendant's guilt or punishment and therefore was not grounds for reversal. *Wilson v State* (1980) 246 Ga 62, 268 SE2d 895, cert den 476 US 1153, 449 US 1103.

Under discovery statute, a prosecutor is required to permit the defendant to inspect and copy or photograph certain items, including photographs, that are within the possession, custody, or control of the state or prosecution. West's *Ga.Code Ann. § 17-16-4(a)(3)*. *Monroe v. State*, 614 S.E.2d 172 (Ga. Ct. App. 2005).

In prosecution for aggravated assault, trial court properly denied defendant's motion to require production of police reports and summaries where such materials were not "books, writings or other documents or tangible things" subject to statutory motion to produce. *Carter v State* (1979) 150 Ga App 119, 257 SE2d 11.

Hawaii Rule of Criminal Procedure providing that no statement made by prospective government witness shall be subject of discovery or inspection until witness has testified at trial of case, barred discovery requested by defendant of all written or recorded statements of codefendant. *Chung v Lanham*, 53 Hawaii 617, 500 P2d 565.

Under Hawaii Rules of Criminal Procedure, no statement of report in possession of state which was made by government witness for prospective government witness (other than defendant) to agent of government is subject to discovery or inspection until such witness has testified on direct examination at trial. *State v Kahinu*, 53 Hawaii 536, 498 P2d 635, cert den 409 US 1126, 35 L Ed 2d 258, 93 S Ct 944.

Idaho rules give trial court broad discretion in granting or denying motion for discovery, and trial court did not abuse discretion in denying motion for prosecutor to produce certain instruments listed in motion and to permit defendant to enter, inspect, and photograph premises allegedly burglarized. *State v Bailey*, 94 Idaho 285, 486 P2d 998.

While interrogatories might properly be used in criminal cases, it was within discretion of trial court to refuse to allow interrogatories where interrogatories sought were overbroad and information sought could have been obtained through other discovery techniques. *State ex rel. Grammer v Tippecanoe Circuit Court* (1978, Ind) 377 NE2d 1359.

Under statute providing that defendant in criminal case could "examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions," trial court did not err in denying 17-year-old

first degree murder defendant's right to file pretrial interrogatories directed to prosecutor. *State v McGhee* (1979, Iowa) 280 NW2d 436, cert den 444 US 1039, 62 L Ed 2d 674, 100 S Ct 712, reh den 445 US 920, 63 L Ed 2d 606, 100 S Ct 1285.

See *Hadjis v Iowa Dist. Court of Linn County* (1979, Iowa) 275 NW2d 763, § 13[a].

See *State v Shepherd* (1983) 232 Kan 614, 657 P2d 1112, § 4[b].

In prosecution for murder, court's refusal to grant defendant's request for discovery of all tape recordings and written statements of all persons contacted by prosecution during investigation of case, and for inspection of any documents made by any officer regarding case was not error, where defense counsel admitted that discovery statute had been complied with, and defense counsel had opportunity to inspect prosecutor's file prior to trial. *State v Schlicher* (1982) 230 Kan 482, 639 P2d 467.

Discovery under state rules of criminal procedure require only that state disclose, by way of discovery, those things that are known by attorney of state to be in possession, custody, or control of state. *Sweatt v Commonwealth* (1977, Ky) 550 SW2d 520.

See *Deskins v Commonwealth* (Ky) 512 SW2d 520, cert den 419 US 1122, 42 L Ed 2d 822, 95 S Ct 806, § 13[b].

Kentucky Rules of Criminal Procedure do not authorize pretrial inspection of statements made by prospective witnesses; however, accused is entitled to inspect any confession which he himself has made. *Robinson v Commonwealth* (Ky) 490 SW2d 481.

Kentucky Rules of Criminal Procedure authorizing court to permit defendant to inspect and copy documents, photographs, or tangible objects in possession of Commonwealth do not authorize pretrial discovery of reports, memoranda, or other documents made by officers or agents of Commonwealth in connection with investigation or prosecution of case; thus, defendants' requests for photographs upon which lineup witnesses were asked to indicate their identification of any participants in robbery, and for names of all witnesses who failed to so identify any of defendants, were properly denied by trial court. *Pankey v Commonwealth* (Ky) 485 SW2d 513.

Under Kentucky Rule of Criminal Procedure, court may direct Commonwealth to permit defendant to copy or photograph any relevant results or reports of scientific tests or experiments that are known by Commonwealth attorney to be in possession of Commonwealth; hence, it was error for trial court to refuse to order Commonwealth to provide defendant opportunity to inspect reports of chemist who analyzed narcotic which defendant allegedly sold. *James v Commonwealth* (Ky) 482 SW2d 92.

Discovery for purpose of possibly using evidence discovered to make showing of antagonistic defense is not within bounds of Louisiana's criminal discovery procedure. *State v Hunter* (La) 340 So 2d 226.

As a defendant in a criminal prosecution has no right to full pre-trial discovery under Louisiana jurisprudence, an oral statement by a defendant reduced to writing by an undercover agent, but not subscribed to by the defendant, could be introduced in evidence by the State as an oral statement, even though the State, in response to the motion for production of confession, answered that it was not in possession of any "written or stenographically recorded, or otherwise recorded, statement or confession signed or unsigned" by the defendant since the response did not imply that the State had no oral statement, and reference to "otherwise recorded" statements applied only to a videotaped or tape-recorded statement. *State v Perkins* (La) 337 So 2d 1145.

See *State v Engstrom* (1982, Me) 453 A2d 1170, § 16[a].

See *State v Furrow* (1981, Me) 424 A2d 694, § 22[a].

In burglary prosecution in which defendant made request for discovery under rule of criminal procedure providing for automatic discovery of all statements made by defendant, trial court erred in denying motion for mistrial upon testimony of officer concerning statements made by defendant contained in nondisclosed report, notwithstanding prosecutor's professed ignorance of report; rule requires diligent inquiry of police agencies by prosecutor as to what automatically discoverable information exists, and automatic nature of rule does not allow prosecutor to assume without inquiry that defense counsel is aware of report and contents. *State v Thurlow* (1980, Me) 414 A2d 1241.

In trial for felonious homicide court did not abuse discretion in denying defendant's request for discovery of financial reimbursement of prosecution witnesses in other trials where such information was available in public records, and discovery of psychiatric records of prosecution witness where those records were not in possession of prosecuting attorney. *State v Morton* (1979, Me) 397 A2d 171.

Pursuant to discovery rule providing for written recorded statements or confessions of defendant, defendant was entitled to inspection of undercover agent's handwritten notes which contained paraphrased statements allegedly attributed to defendant. *State v Sherburne* (Me) 366 A2d 1127.

Maine Rule of Civil Procedure 16(a), providing for discovery of written or recorded statements of witnesses, did not require the state to disclose the names of potential witnesses. *State v Tullo* (Me) 366 A2d 843.

See *State v Buzynski* (Me) 330 A2d 422, § 21[d].

Under Maine Rule of Criminal Procedure directing court to order prosecuting attorney to permit defendant to inspect and copy or photograph designated books, papers, documents, or tangible objects which are within possession, custody, or control of state, court did not err in denying pretrial request for criminal record of unindicted coconspirator where there was no showing that such record was within possession of state. *State v Toppi* (Me) 275 A2d 805.

See *Commonwealth v Lapka* (1982) 13 Mass App 24, 429 NE2d 1029, app den 385 Mass 1103, 440 NE2d 1174, § 13[d].

See *State v Caldwell* (1982, Minn) 322 NW2d 574, § 22[c].

Trial court in murder prosecution did not err in denying defendant's motions under state discovery statute for production of list of all sawed-off shotguns in possession of police and record of all arrests and convictions of state's witnesses, where there was no indication that state possessed such information regarding shotguns or that such information was material to defense, and where discovery statute did not entitle defendant to information concerning prior arrests of witnesses. *State v Smith* (1979) 92 NM 533, 591 P2d 664.

Question of which police records are "exempt property" not discoverable by defendant under discovery rules must be determined on ad hoc case-by-case basis and in camera inspection by court should be conducted of all disputed documents. No paper should be deemed absolutely exempt from discovery merely because of its label as "work product" or "opinion" or "research product" or "interior investigatory report" if, in fact, such item contains information that defendant would otherwise have right to discover. Likewise, item should not be automatically discoverable simply because it is prepared and completed upon regularly used police business form, filed in ordinary course of business, if it clearly contains information that defendant is not entitled to discover. *People v Simone* (1977) 92 Misc 2d 306, 401 NYS2d 130.

Witnesses' statements, notes of memoranda by police officers of witnesses' statements, photographs of defendant, names and addresses of persons interviewed by District Attorney's office were nondiscoverable work products exempt under

statute unless such material was favorable to defendant, but routine police reports containing information and which were required to be filed in normal course of business by police agency's regulations would not be exempt under statute; hence, defendant would be entitled to handwritten notes made by police of their conversations with him under statute mandating that discovery must be ordered with respect to "written or reported statements made by the defendant to a public servant engaged in law enforcement activity" and manner in which defendant's oral statements had been written or recorded was immaterial, and defendant would also be entitled to discovery of witnesses' names and addresses where defendant, at time he was alleged to have resisted arrest, was intoxicated and his memory of the event could have been affected. *People v Harrison*, 81 Misc 2d 144, 364 NYS2d 760.

Under New York statute discovery of reports concerning physical or mental examinations and scientific tests would be granted to extent such material was in possession or control of district attorney or was subsequently acquired, and defendant's application for copies of lineup or other photographs would be granted; motion for order directing that defendant be provided with copies of alleged written or recorded admissions or statements of all defendants would be granted to extent of defendant's own statements furnished and annexed to district attorney's opposing affidavit, but discovery of co-defendant's statement would be denied, and order directing disclosure of all exculpatory material would be denied because this obligation is imposed on prosecution at all times and is explicitly acknowledged by them. *People v Player*, 80 Misc 2d 177, 362 NYS2d 773.

Discovery of written or recorded statements made by defendant was not mandated pursuant to section of criminal procedural law, and defendant's motion for discovery should have been denied with leave to renew where defendant failed to set forth sworn allegations from which court might have determined that interest of justice would be served by order of discovery. *People v Lapetti*, 79 Misc 2d 323, 361 NYS2d 104.

See *People v Goetz*, 77 Misc 2d 319, 352 NYS2d 829, § 25[d].

See *People v Utley*, 77 Misc 2d 86, 353 NYS2d 301, § 13[d].

In prosecution for assault of off duty police officer who allegedly engaged in unwarranted and unprovoked assault on defendants, under state rules of criminal procedure defendants were entitled to discovery of test and records dealing with discharge or attempted discharge of officer's weapon as well as any report or memorandum made by officer concerning incident. *People v Torres*, 77 Misc 2d 13, 352 NYS2d 101.

Under statute, judge exceeded his authorized powers in directing discovery of police reports containing statements of witnesses and police reports of complaining police officer or other officer present at arrest. *Vergari v Kendall*, 76 Misc 2d 848, 352 NYS2d 383, app dismd (App Div) 360 NYS2d 1003.

Personnel records of police officers who were prospective witnesses in narcotics prosecution were not discoverable under state rules of criminal procedure requiring that material sought be within possession, custody, or control of district attorney. *People v Norman*, 76 Misc 2d 644, 350 NYS2d 52.

Under state rules of criminal procedure, defendant charged with murder was entitled to discovery of all police reports and records, including all photographs pertaining to his case, but excluding statements of all witnesses and work product. *People v Rice*, 76 Misc 2d 632, 351 NYS2d 888.

See *People v Bottom*, 76 Misc 2d 525, 351 NYS2d 328, § 8.

In prosecutions arising out of riots at Attica prison, under circumstances defendants were entitled to discovery of all potentially exculpatory evidence, their own statements, statements of co-defendants (subject to in camera inspection by trial judge), certain photographs prosecutor had in its possession, their own records of arrests and convictions, certain other prison records, results of various tests, experiments, and analysis (excluding reports of ballistics experts), notes

passed between specified defendants and certain prisoners, as well as notes received from hostages, and notes from correction officers and state troopers, all photographs, movies, and video tapes taken at scene of uprising, any and all weapons which state intended to introduce into evidence or which were recovered from prison, written reports of any physical examinations of defendants, and any material seized from defendants which was charged to be contraband: under circumstances defendants were not entitled to discovery of files of special prosecutor, statements of witnesses and prospective witnesses, statements of other persons who were neither witnesses nor prospective witnesses, names and addresses of witnesses, parole files of prisoner-witnesses, employment records of all guards during period in question, communications between correction officers and governor and his staff, draft of book relating to uprising, certain tape recordings, press releases, diary entries, and national guard record, and certain letter of district attorney. *People v Bennett*, 75 Misc 2d 1040, 349 NYS2d 506.

See *People v Robinson*, 75 Misc 2d 807, 349 NYS2d 259, § 16[a].

Television tape recording of Breathalyzer examination given to defendant charged with drunken driving came well within meaning of words "physical examination" as used in New York statute providing for discovery of reports and documents, or portions thereof, concerning physical or mental examinations, or scientific tests and experiments made in connection with case. *People v Royster*, 73 Misc 2d 89, 341 NYS2d 559.

Under New York statute patterned on *Rule 16, Federal Rules of Civil Procedure*, defendant was entitled to discovery of any written or oral statements made by him, and to inspection of allegedly forged lottery tickets and writings relative to scientific tests performed thereon; however, he was not entitled to discovery of statements of other persons, or to list of witnesses who had appeared before grand jury. *People v McMahan*, 72 Misc 2d 1097, 341 NYS2d 318.

Under New York Rule of Criminal Procedure permitting discovery and inspection of any statement or confession of defendant made to a public servant engaged in law enforcement activity, defendant was entitled to discovery of written statement made by him to official of town building department, since such official was engaged in law enforcement activity. *People v Brogan*, 70 Misc 2d 282, 332 NYS2d 499.

Under New York criminal procedure statute, modeled on Federal Rule 16, defendant was entitled to discovery of copies of electronically recorded conversations between him and police officers whom he allegedly attempted to bribe, such recordings being "statements" of defendant within meaning of statute even though they were made before defendant was arrested, and even though defendant was unaware that recordings were being made. *People v Zacchi*, 69 Misc 2d 785, 331 NYS2d 86.

Pretrial discovery of oral and written statements made by victim of burglary, kidnapping, and rape to law enforcement authorities was explicitly prohibited by statute. Further, failure to allow pretrial discovery of such statements, which defendant contended were critical to his cross-examination of victim at voir dire hearing conducted prior to trial to determine admissibility of her photographic identification of defendant, was not prejudicial when statement was made available to defendant for impeachment purposes during trial. *State v Williams (1983)* 308 NC 357, 302 SE2d 438.

See *State v Alston (1983)* 307 NC 321, 298 SE2d 631, § 18.

See *State v Lake (1982)* 305 NC 143, 286 SE2d 541, § 16[c].

See *State v Tatum*, 291 NC 73, 229 SE2d 562, § 17.

North Carolina statute authorizes pretrial order requiring state to produce for inspection and copying specifically identified exhibits to be used in trial, but it does not encompass broad-scale discovery contemplated by defendant's motion to produce names of all state witnesses and copies of any statements given by them and in possession of state. *State v Peele*, 281 NC 253, 188 SE2d 326.

Under North Carolina statute stipulating that for good cause shown, trial judge shall order state to produce for inspection and copying any specifically identified exhibits to be used in trial of case, provided that prior to issuance of such order the accused shall have made request to counsel for state for such inspection, copying, or examination, and that such request shall have been denied, accused is entitled to discovery when either he or his counsel has made written request to state's counsel to produce a specifically identified exhibit to be used in trial, and such request has been denied or gone unanswered for more than 15 days. *State v Macon*, 276 NC 466, 173 SE2d 286.

See *State v Morgan* (1983) 60 NC App 614, 299 SE2d 823, § 27[a].

Defendant in murder prosecution had no right under North Carolina statute to compel production of written statements or reports made by state witnesses where discovery statute specifically indicated that, absent circumstances not presented by this case, state was not required to produce statements made by prospective witnesses or witnesses of state to anyone acting on behalf of state. *State v McDougald* (1978) 38 NC App 244, 248 SE2d 72.

It was error for trial court to deny, without inspection of statements in camera, defendant's motion during trial for inspection of prior statements made by prosecution witnesses to police, but error was harmless where defense actually knew contents of statements. *State v Miller* (1978) 37 NC App 163, 245 SE2d 561, cert den (NC) 248 SE2d 255.

Under rule of criminal procedure governing discovery and inspection, the prosecution must disclose, upon the defendant's request, names and statements of witnesses the prosecution intends to call and also the relevant statements within the prosecution's possession or control of other persons. Rules Crim. Proc., Rule 16. *State v. Thorson*, 2003 ND 76, 660 N.W.2d 581 (N.D. 2003).

Criminal Rule 16 disallowing discovery or inspection of statements made by witnesses or prospective witnesses to defense attorney or his agents applied to tape recordings of statements made by prosecution witness to defense attorney. *State v Lockett*, 49 Ohio St 2d 71, 3 Ohio Ops 3d 41, 358 NE2d 1077.

Signed form waiving Miranda constitutional rights constituted "statement of defendant" within meaning of Criminal Rule 16 permitting discovery of statement of defendant. *State v Hall*, 48 Ohio St 2d 325, 2 Ohio Ops 3d 458, 358 NE2d 590, vacated, in part, on other gnds 438 US 910, 57 L Ed 2d 1154, 98 S Ct 3134.

Where prosecutor, in response to defendant's motion to be permitted to inspect papers which prosecutor intended to use at trial, answered that papers were in custody of police and where police officer made everything available to defense counsel at headquarters, rules permitting defendant to inspect and copy were complied with as police and prosecutor are not required to take counsel by hand and sift through belongings. *State v Mitchell*, 47 Ohio App 2d 61, 1 Ohio Ops 3d 181, 352 NE2d 636, motion over.

Under Oklahoma statute, accused person is entitled to copy of sworn statement which he gives to police or to district attorney. *White v State (Okla Crim)* 498 P2d 421.

Criminal discovery statute providing for inspection of certain items "in criminal actions in accordance with the provisions of subsection (1) of this section and no other" means that Oregon civil discovery statute is not applicable in criminal cases. *State v. Little*, 249 Or. 297, 431 P.2d 810 (1967).

Local court rule concerning discovery was interpreted to except from its 15-day time limitation any motion to produce evidence under criminal discovery statutes. *State v Simpson* (1979) 40 Or App 83, 594 P2d 425.

In prosecution for driving while under influence of intoxicants, trial court did not err in refusing to strike testimony of eyewitnesses, notwithstanding failure of state to disclose existence of audiotape recording of eyewitnesses taken at time

of defendant's arrest, where lack of prejudice supported finding that no sanction for violation of state discovery statute was warranted, and where speculation regarding contents of tape was insufficient to establish denial of due process. *State v Peters* (1979) 39 Or App 109, 591 P2d 761.

Oregon statute imposing obligation to afford adverse party opportunity to inspect or copy material did not require that prosecutor deliver material to defense counsel at his office or to defendant at his home or jail cell and obligation was fulfilled where material was available to defendant or his representative at prosecutor's office, notwithstanding that defendant failed to avail himself of opportunity afforded him by prosecutor. *State v Addicks* (1978) 34 Or App 557, 579 P2d 289.

See *State v McKeen* (1978) 33 Or App 343, 576 P2d 804, § 17.

Where defendant's attorney sent letter to district court entering plea of not guilty to charge of driving while under influence of intoxicants which concluded with sentence: "By copy of this letter I am demanding reciprocal discovery from the District Attorney's office," but where defendant did no more than to send copy of letter to district attorney's office, demand for discovery was insufficient to support dismissal of charges based on prosecution's alleged failure to allow pretrial discovery as provided by statute. *State v Sheppard* (1978) 32 Or App 345, 573 P2d 1276.

In prosecution for violation of motor vehicle traffic laws, although defendant's counsel sent letter to district attorney making demand for pretrial discovery and copies of requested documents were not provided to defendant until two days before date set for trial, there was no violation of discovery statute where statute provided no specific time limit within which requested material must be furnished to defendant, but merely stated that such material should be furnished "as soon as practicable," and where reason documents were not provided sooner was administrative delay on part of motor vehicle department in forwarding them to district attorney's office. *State v Carsner* (1977) 31 Or App 1115, 572 P2d 339.

Under pretrial discovery statute requiring district attorney to disclose to defendant names and addresses of persons whom he intends to call as witnesses, together with their relevant written or recorded statements or memoranda of any oral statements of such persons, fragmentary notes made by arresting officer at time he arrested defendant for driving under influence of intoxicating liquor did not constitute "statement" within meaning of statute and, thus, were not subject to production thereunder. *State v Bray* (1977) 31 Or App 47, 569 P2d 688.

"Lifts" of possible fingerprints taken at scene of crime, some of which were identified as fingerprints of defendant, were not included in subject matter of Oregon discovery statute. *State v. Hockings*, 29 Or. App. 139, 562 P.2d 587 (1977).

Statements which have been or are in possession of police are considered to have been in possession or control of prosecuting attorney and under statute providing for disclosure by district attorney to defendant of identity of witnesses together with their relevant written or recorded statements as soon as practicable following filing of indictment, destruction of original report of undercover officer after typewritten report had been prepared by another officer was violation of state's statutory duty even though destruction took place prior to indictment. *State v Johnson*, 26 Or App 651, 554 P2d 624.

Trial court properly refused defense request for names of prosecution witnesses and inspection of vehicle in which victim's body was found where defendant did not specify exceptional circumstances or compelling reasons in motion. *Commonwealth v Garcia* (1978) 478 Pa 406, 387 A2d 46.

See *Commonwealth v Jenkins* (1978) 476 Pa 467, 383 A2d 195, later app 273 Pa Super 227, 417 A2d 251, § 13[d].

Under Pennsylvania Rule generally proscribing pretrial discovery of prosecution evidence, defendant in murder prosecution was not entitled to pretrial inspection of laboratory reports concerning certain items of appellant's clothing in possession of Commonwealth. *Commonwealth v Stafford*, 450 Pa 252, 299 A2d 590, cert den 412 US 943, 37 L Ed 2d 404, 93 S Ct 2775.

Pennsylvania Rules of Criminal Procedure have given trial courts authority to order pretrial inspection of written confessions and written statements made by defendant, but they specifically proscribe pretrial disclosure and inspection of other evidence in possession of Commonwealth, including oral admissions, unless defendant can show existence of circumstances and compelling reasons why such should be permitted. *Com. v Turra*, 442 Pa 192, 275 A2d 96.

Rule 310 of Pennsylvania Rules of Criminal Procedure was adopted to incorporate general rule in criminal proceedings that in absence of exceptional circumstances and compelling reasons, accused has no right to inspection or disclosure before trial of evidence in possession of prosecution. *Lewis v Court of Common Pleas*, 436 Pa 296, 260 A2d 184.

See *Commonwealth v Brocco* (1979, Pa Super) 396 A2d 1371, § 6[b].

See *Commonwealth v Dalahan* (1979, Pa Super) 396 A2d 1340, § 16[a].

Denial of accused's petition for discovery seeking police investigative records, names of all persons involved in investigation and of persons with whom all investigators communicated, and all statements of witnesses, documents and physical evidence pertaining to accused's arrest and indictment was proper; rule did not expressly provide for discovery of these items. *Commonwealth v Mervin* (Pa Super) 326 A2d 602.

Under Rhode Island statute providing that where prosecution is in possession of tangible evidence which may be used at trial of any defendant, defendant shall have right, upon demand given in writing to prosecuting authorities, to inspect, examine, or copy such evidence at time and place to be fixed by court of proper jurisdiction, term "tangible evidence" includes real evidence such as weapons, clothing, photographs, maps, ammunition, knives, etc., but it does not include testimonial evidence such as statements, or documents which contain recordings or transcriptions of evidence testimonial in its nature, or lists of witnesses; moreover, statute requires that tangible evidence be in possession of prosecution and that right to examine shall accrue upon demand made in writing to prosecuting authority, such demand to be reasonably specific in identifying particular items for which disclosure is sought. *State v Ricci* (RI) 268 A2d 692.

See *Hernandez v State* (1982, Tex App 4th Dist) 636 SW2d 611, § 13[b].

See *Mott v State* (Tex Crim) 543 SW2d 623, § 18.

There was no error in failing to grant defendant's various motions for discovery where his request for grand jury testimony failed to show particularized need for such testimony, his pretrial request for statements of each witness was specifically exempted under statute as "work product," and where under statute it was necessary for defendant to show statutory requisites of good cause, materiality, possession by State, and that items requested existed. *Hoffman v State* (Tex Crim) 514 SW2d 248.

Blanket request for examination of all items of information favorable or useful to defendant was denied where motion did not specifically designate evidence referred to nor reflect "good cause" as required by state rule of criminal procedure, there was no showing that evidence sought was material to defense, that evidence was non-privileged, that request was reasonable, and that items demanded were in possession or control of state. *Jackson v State* (Tex Crim) 501 SW2d 660.

Analysis report in narcotics case is work product of prosecution, and as such is exempt from discovery under Texas statute. *Alba v State* (Tex Crim) 492 SW2d 555.

Written statements of witnesses are specifically excluded from discovery under provisions of Texas statutes. *Graham v State (Tex Crim) 486 SW2d 92.*

Under Texas statute setting out procedure for discovery, it was not error to overrule motion to produce police report where there was no showing that any such report was made by any officer; neither was there error in overruling further motion to produce documents, statements, tests, and examination of evidence, since motion was too broad to be effective and it did not show good cause. *Solomon v State (Tex Crim) 467 SW2d 422.*

[\*12] Applicability of civil statute or rule of civil procedure relating to discovery

In a number of cases the court, in ruling on the defendant's right to inspection of evidence in the possession of the prosecution, held that the civil statute or the code of civil procedure providing for discovery and inspection of evidence in the possession of an adverse party was not applicable to criminal cases.

#### ARKANSAS

*Bailey v State (1957) 227 Ark 889, 302 SW2d 796, cert den 355 US 851, 2 L ed 2d 59, 78 S Ct 77*  
*Edens v State (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551*  
*Edens v State (1963) 235 Ark 996, 363 SW2d 923*

#### CALIFORNIA

*People v Ratten (1940) 39 Cal App 2d 267, 102 P2d 1097*  
*People v Wilkins (1955) 135 Cal App 2d 371, 287 P2d 555*  
*Yannacone v Municipal Court of San Francisco (1963) 222 Cal App 2d 72, 34 Cal Rptr 838*  
*People v Lindsay (1964) 227 Cal App 2d 482, 38 Cal Rptr 755*  
*Ballard v Superior Court of County of San Diego (1965, Cal App) 44 Cal Rptr 291*

#### CONNECTICUT

But see *State v Trumbull (1961) 23 Conn Supp 41, 176 A2d 887; State v Fay (1963) 2 Conn Cir 369, 199 A2d 358*, both *infra*.  
See *State v Cocheo (1963) 24 Conn Supp 377, 190 A2d 916*, *infra*

#### KANSAS

*State v Jeffries (1925) 117 Kan 742, 232 P 873*  
*State v Furthmyer (1929) 128 Kan 317, 277 P 1019*

#### NEBRASKA

*Hameyer v State (1947) 148 Neb 798, 29 NW2d 458*

## NEVADA

*Pinana v State* (1960) 76 Nev 274, 352 P2d 824

## NEW YORK

See *People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203, *infra*

## OHIO

*State v Yeoman* (1925) 112 Ohio St 214, 147 NE 3

*State v Johnson* (1950, App) 57 Ohio L Abs 524, 94 NE2d 791, *reh den* 58 Ohio L Abs 334, 96 NE2d 604, *app dismd* 154 Ohio St 236, 43 Ohio Ops 41, 94 NE2d 797

*State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437

*State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, *affd* 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, *app dismd* 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, *app dismd* 305 US 557, 83 L ed 351, 59 S Ct 75

## VERMONT

*State v Fox* (1961) 122 Vt 251, 169 A2d 356

Thus, the defendant's contention that the trial court committed error in denying his motion under the code of civil procedure for inspection of certain documents in the possession of the district attorney was rejected in *People v Ratten* (1940) 39 Cal App 2d 267, 102 P2d 1097, the court holding that the code of civil procedure invoked by the defendant was applicable to civil actions only.

In *State v Jeffries* (1925) 117 Kan 742, 232 P 873, wherein the defendant was charged with the murder of her husband, the court, reversing an order requiring the prosecuting attorney to turn over to the defendant's counsel for inspection all letters written by the defendant to her husband and also to another person, which were in the possession of the prosecuting attorney and which he intended to use in evidence on the trial of the defendant, rejected the defendant's contention that the provision of the Kansas Civil Code relating to obtaining an inspection of books, papers, and documents which were to be used in evidence was made applicable in criminal cases by the so-called "adoption section" of the Kansas Criminal Code providing that the provisions of law in civil cases "relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt, to enforce the remedies and protect the rights of parties," should extend to criminal cases so far as they were in their nature applicable thereto. The court held that since the enumerated instances in the adoption section excluded all unspecified instances, and since there was no right to inspection of the letters in question except by virtue of express authorization by the legislature, there was no power in the trial court to make the order requiring the prosecuting attorney to turn over the letters for inspection by the defense.

In *Hameyer v State* (1947) 148 Neb 798, 29 NW2d 458, the court, in holding that there was no abuse of discretion in denying the defendant's pretrial motion for permission to inspect a certain document, held that while the defendant, in support of the motion, relied on a section in the Nebraska civil statute providing that either party or his attorney may demand of the adverse party an inspection of a book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein, this statute should not be applied to criminal cases. The court said that the statute was improperly applied to a criminal case in *Marshall v State* (1927) 116 Neb 45,

215 NW 564, *infra* § 24[b].

In *Pinana v State* (1960) 76 Nev 274, 352 P2d 824, the court, in upholding the denial of the defendant's request for disclosure of certain statements and documents, held that the Nevada Rules of Civil Procedure providing for pretrial disclosure in civil cases did not apply to criminal cases, irrespective of the statutory provision that the rules of evidence in civil actions should be applicable also to criminal actions, except as otherwise provided.

See also *People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203, where the court, in ruling on the defendant's motion for inspection of statements allegedly made by him, said that while in some areas there should be a correspondence in the extent of pretrial disclosure between civil and criminal actions, there are substantial points of divergence due to differences in policy considerations and in the mode of proceeding generally, and that, therefore, the various facets of the subject of pretrial disclosure in criminal actions must be separately analyzed with such considerations in mind, even though the analogous procedures in civil actions may also be taken into consideration.

In *State v Yeoman* (1925) 112 Ohio St 214, 147 NE 3, the court, in holding that the defendant was not entitled to pretrial inspection of a written confession signed by her and in the possession of the prosecuting attorney, said that the statute providing that the Ohio Code of Civil Procedure should be extended to criminal cases insofar as it related to the attendance, testimony, examination, and oaths of witnesses did not cover the inspection of documents. The view that the Ohio Code of Civil Procedure providing for inspection of books and documents is not applicable to criminal cases was also supported in the following Ohio decisions: *State v Johnson* (1950, App) 57 Ohio L Abs 524, 94 NE2d 791, reh den 58 Ohio L Abs 334, 96 NE2d 604, app dismd 154 Ohio St 236, 43 Ohio Ops 41, 94 NE2d 797, *infra* § 13[c]; *State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, *supra* § 3.

Concluding that the Ohio Code of Civil Procedure providing for inspection of books and documents was not designed or intended to apply in criminal cases, notwithstanding that such provision was contained in a chapter entitled "Evidence," and that another statute provided that "the rules of evidence in civil causes, where applicable, govern in all criminal causes," the court in *State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437, upheld the denial of the defendant's motion for inspection of a statement made by him respecting the crime involved. The defendant relied on *State v Fox* (1938) 133 Ohio St 154, 10 Ohio Ops 218, 12 NE2d 413, where the court, in dealing with the questions whether the appellant, who was indicted and tried jointly with others for a noncapital felony, should have been tried separately, and whether a confession made by one of the appellant's codefendants, containing statements implicating the appellant, should have been excluded from evidence in the trial, said that the rules of evidence in civil cases should govern all criminal cases, insofar as applicable, and that defense counsel in the case could have inspected before trial the confession of the appellant's codefendant in question by invoking the relevant discovery provisions in the Ohio Code of Civil Procedure, and could have predicated an application for a separate trial of the appellant on the basis of the contents of such confession. However, the court in the Corkran Case said that the dictum contained in the Fox Case "was not carried into the syllabus of the case and is not controlling over definite holdings to the contrary."

In *State v Fox* (1961) 122 Vt 251, 169 A2d 356, a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the court, upholding the denial of the defendant's pretrial request for permission to inspect an accident report on file with the police department (the present criminal proceeding being prompted by the accident which was the subject of the requested report), held that the Vermont statute providing that upon motion of any party and upon notice to all other parties and the person having custody, possession, or control of them, the court in which an action was pending might order any person to produce and permit the inspection of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, did not extend to criminal proceedings.

In some Connecticut cases, on the other hand, it was held that the provisions in the Connecticut Practice Book for the production of documents, papers, and physical objects were applicable to criminal cases.

See also *State v Trumbull* (1961) 23 Conn Supp 41, 176 A2d 887, *infra* § 13[c], holding that under Connecticut rules of practice, rules for civil action should apply in criminal cases insofar as they were adapted to such proceedings.

Thus, concluding that the provisions in the Connecticut Practice Book for the production of reports, papers, documents, maps, and physical objects had been made available to the defendant in a criminal case by another provision in the same statute reading that the rules for civil actions were applicable in criminal cases insofar as they were adopted to such proceedings, the court in *State v Fay* (1963) 2 Conn Cir 369, 199 A2d 358, held that the defendant, charged with speeding, had the right to inspect before trial radar equipment which had provided a speed reading to be used as evidence against the defendant. The court rejected the prosecution's contention that the defendant did not have the right to inspect the radar machine before trial in view of the decision in *State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, *infra* § 16[a], wherein the court, in dealing with the producibility of a statement made by a prosecution witness, said that the rules of discovery contained in the Connecticut Practice Book "are not applicable in criminal cases, and we have no statutory provisions which require the listing of witnesses or permit obtaining the tenor of their testimony." Pointing out that the present case involved a machine which had provided a speed reading that was to be used in evidence, the court observed that the inspection of the machine was not the listing of witnesses or the obtaining of the tenor of their testimony, the matters with which the Cocheo decision was concerned; that the ruling in the Cocheo Case had no application in the present prosecution, since an inspection of the machine was not a disclosure of the prosecution's evidence; and that, in fact, the purpose of the inspection of the machine was to prepare the defendant's own evidence rather than to obtain the prosecution's evidence.

The view that the civil statute providing for discovery of documents in the possession of the adverse party is applicable to criminal cases was also apparently taken in some Missouri cases, although the defendant's request for production was denied under the circumstances.<sup>n128</sup>

Thus, in *State ex rel. Page v Terte* (1930) 324 Mo 925, 25 SW2d 459, a prohibition proceeding to enjoin the enforcement of an order requiring the prosecution to produce before trial, for inspection by the defendant, written statements of the witnesses whose names were indorsed on the information and other papers and documents in the prosecuting attorney's possession, the court held that the lower court's authority to make such an order must be found in the statute (relating to civil procedure) which authorized a trial court to order the production of a paper where it contained evidence material to the pending action, and that the application for production in the present case did not measure up to the requirements of the statute. Noting that it was incumbent upon the moving party to bring himself within the terms of the statute by alleging facts sufficient to show that the requested papers contained evidence material to the merits or defense of the case, the court pointed out that while the application in the present case, a prosecution for murder, called for the production of written statements of the witnesses and "all deeds, mortgages, bills of sale, books, documents, papers, or other written copies of evidence in the hands of the prosecuting attorney, which are in any way connected with the case then pending," there was no hint or suggestion as to the contents of these documents, and no facts were alleged tending to show that they contained any evidence material to the defense; that although the application for production stated that the requested documents were or might be material, such allegation was a mere conclusion of the pleader and presented no issue; that the witnesses' statements would be hearsay and therefore would not be admissible in evidence except by way of impeachment in the event they testified to a state of facts different from those contained in the written statements; and that the fact that it could not be determined in advance of the trial whether the statement of a prospective witness would become material or competent for any purpose clearly showed that the statute did not authorize the enforced production of the statements in question.

See also *State v Richetti* (1938) 342 Mo 1015, 119 SW2d 330, where the court, relying on the *Terte Case* (1930) 324 Mo 925, 25 SW2d 459, *supra*, refused to sustain the defendant's assignment of error based on the fact that the prosecuting

attorney refused to let the defendant's counsel examine written statements of certain prosecution witnesses taken before the trial.

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In other cases the court, assuming, but not deciding, that the civil statute or the code of civil procedure providing for inspection of books or documents was applicable to criminal cases, held that under the circumstances there was still no error in the trial court's ruling on the defendant's request for inspection of documents in the possession of the prosecution.

Thus, where the defendant petitioned for an order requiring the prosecuting attorney to produce for his inspection in advance of the trial certain documents alleged to be in the possession of the prosecution, and the trial court, in passing upon the petition, ordered such documents to be produced at the trial, but on appeal from a judgment of conviction the defendant argued that the relief granted in this regard was inadequate and deprived him of a timely opportunity to prepare his defense, and the defendant claimed the benefit of the statute which provided that in all cases where no special provision was made in the Criminal Code, the rules of pleading and practice in civil actions should govern, the court in *Weer v State* (1941) 219 Ind 217, 36 NE2d 787, reh den 219 Ind 229, 37 NE2d 537, held that, assuming that the Civil Code authorizing, under certain circumstances, inspection of any book, paper, or document in the possession of an adverse party was applicable in the present case, the right to have papers produced under that statute was not an absolute one, but was addressed to the sound discretion of the trial court, and that in the instant case there had not been shown such a clear abuse of discretion as would warrant a holding that there was reversible error.

Similarly, in *State v Kelton* (1957, Mo) 299 SW2d 493, the court, in holding that it was not error for the trial court to quash the defendant's subpoena to compel the production of a transcript of questions and answers taken at an interrogation of the defendant by the prosecuting attorney, held that assuming (without deciding) that the defendant would have the benefit of the Missouri statute pertaining to the production of documents and papers in civil cases, she did not bring herself within the terms of the statute, since the application for production was oral and there was no showing that the demanded statements contained evidence material to the merits or defense of the case. The court noted that a mere suspicion that a statement contains evidence material to the merits or defense of the case does not warrant an order for its production; and that the production of books and papers under the statute is not authorized for the purpose of prying into an adversary's preparation for trial.

In *State v Hall* (1918) 55 Mont 182, 175 P 267, the denial of the defendant's application for the production or inspection of a statement made by a prosecution witness to the prosecuting attorney was upheld, notwithstanding the defendant invoked a section in the Montana Civil Code providing that the trial court might, upon notice, order either litigant to permit the other to inspect documents or papers in his possession which contained evidence relating to the merits of the action or defense. Noting that the statute referred exclusively to such documents and papers as might be introduced in evidence, the court held that, assuming that the statute was applicable to criminal cases, there was no error in the denial of the production or inspection of the requested statement in the present case, since such statement could not have been introduced as substantive evidence. The court said: "The ex parte statement of the prosecuting witness could not have been introduced as substantive evidence, and, however helpful it might have been to defendant, he was not entitled to it. The statute does not require the state to lay bare its case in advance of the trial." As holding to the same effect, see *State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, supra § 3.

And in *State v Cala* (1940, App) 20 Ohio Ops 400, 31 Ohio L Abs 97, 35 NE2d 758, the court, in rejecting the defendant's contention that it was error for the trial court to deny his pretrial request for inspection of confessions made by him, held that assuming, but not deciding, that the provision in the Ohio Code of Civil Procedure authorizing inspection of a book or document in the possession of the adverse party was made applicable to criminal cases by the statute providing that the rules of evidence in civil cases should govern in all criminal cases, insofar as they were

applicable, the defendant in criminal cases was still not entitled to inspection as a matter of absolute right, since under the language of the provision of the code of civil procedure in question, whether to grant or deny an inspection vested in the discretion of the trial judge, to be exercised in the light of all the surrounding circumstances under which the request was made. To the same effect is *State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, wherein the court, in denying the defendant's request for inspection of the hospital report concerning a blood test taken of him, extensively reviewed the earlier Ohio decisions dealing with the applicability to criminal cases of the Ohio Code of Civil Procedure relating to inspection of books and documents, and then took the same approach as that taken in the *Cala Case* (1940, App) 20 Ohio Ops 400, 31 Ohio L Abs 97, 35 NE2d 758, supra.n129

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Statute providing for production at trial of books, writings or other documents or tangible things in possession, custody or control of another party, was applicable to both civil and criminal cases, but statute was two-edged sword in that it obligated party desiring production of such items to also make disclosure. *Phillips v State* (1978) 146 Ga App 423, 246 SE2d 438.

See *People ex rel. Fisher v Carey* (1979) 77 Ill 2d 259, 32 Ill Dec 904, 396 NE2d 17, § 17.

Oregon civil discovery statute is not applicable to criminal cases, which are covered by separate criminal discovery statute. *State v Little* (Or) 431 P2d 810.

[\*III] Inspection or disclosure of particular kinds or types of evidence

[\*13] Accused's confession or statement made after offense<sup>131</sup>

[\*13a] Generally; inspection permitted

As to whether and under what circumstances an accused is entitled to inspect his confession or statement which was made after the alleged offense and which is in the possession of the prosecution, the decisions are divided. Either explicitly or by implication supporting the view that inspection by an accused of his confession or statement may be ordered in a proper case, the court in a number of cases permitted the defendant to inspect his confession or statement made after the alleged offense had been committed.

Holding that where an order requiring the prosecution to produce a statement made by the defendant is essential to the due administration of justice, the trial court has jurisdiction to issue such order under its inherent powers, the court in *State ex rel. Polley v Superior Court of Santa Cruz County* (1956) 81 Ariz 127, 302 P2d 263, upheld an order of the trial court requiring the prosecution to produce a stenographic transcript of statements made by the defendant to the county attorney, where it appeared that the defendant had suffered a bullet wound in the shooting affray in which the alleged killing with which he was charged had occurred, and that the statements in question were made at a hospital about 2 hours after an emergency operation when the county attorney asked questions concerning the circumstances surrounding the shooting. Stating that although the statements in question were not subject to discovery under Rule 195 of the Arizona Rules of Criminal Procedure,<sup>n132</sup> the court was free under its inherent residual power to permit broader discovery, and noting that an application for inspection such as the one involved in the present case is addressed to the sound discretion of the trial court and that such an application should be granted only under exceptional circumstances, the court concluded that in the exercise of sound discretion and as a matter of fairness to the defendant, it was essential to the administration of justice that the defendant was given an opportunity in advance of trial to inspect and copy his statements which he could obtain in no other way. The court rejected the prosecution's contention that the statements in question were a part of the "work product" of the county attorney.

See *Jones v State* (1948) 213 Ark 863, 213 SW2d 974, wherein the trial court denied the defendant's pretrial motion for an order requiring the prosecution to produce a copy of the defendant's confession, which was later offered in evidence at the trial, and the appellate court held that while the motion should have been granted, the denial thereof was not such prejudicial error as would call for the reversal of a judgment of conviction. The court pointed out that copying the confession would have furnished no evidence that it was not freely and voluntarily made.

Holding that application for pretrial inspection of a signed confession or admission or transcript of statements of an accused is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice, the court in *Powell v Superior Court of Los Angeles County* (1957) 48 Cal 2d 704, 312 P2d 698, held that defendant was entitled to inspect a signed statement made by him in the office of a police chief and also a tape recording made in the same office about 5 days later where it was alleged in support of the motion for inspection that such documents might be necessary for the defendant to refresh his recollection, and that the evidence contained therein was material to the issues to be tried.

Relying on the rule that in a criminal case an accused is entitled to hear recordings of his conversation with police officers and other recordings which were played to him at the time he was examined by them where he has forgotten what he said at the time of his examination and where he alleges that the recordings are necessary to refresh his recollection, the court in *Vance v Superior Court of San Diego County* (1958) 51 Cal 2d 92, 330 P2d 773, held that the defendant was entitled to hear (1) a recording of his conversation with police officers made during the time he was being questioned by them, and (2) a recording of a conversation between the victim and the police officers which had been played to him during his questioning by the officers. The court pointed out that the defendant did not remember what he had said at the time of his questioning by the police officers, and that the recordings of the conversations were necessary to refresh his recollection so that his attorney could adequately prepare his defense.

The denial of the defendant's motion, made during the trial, for an order permitting him to inspect the transcriptions of recordings of his conversations with the police officers subsequent to his arrest, which conversations he claimed he did not remember, was held error in *People v Cartier* (1959) 51 Cal 2d 590, 335 P2d 114, the court following the rule that in a criminal case an accused is entitled to hear recordings of his conversations with police officers where he has forgotten what he said at the time of his examination and where he alleges that the recordings are necessary to refresh his recollection.

See also *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571, where the court, in holding that the defendant's argument that there was a failure upon the part of the prosecution to comply with certain of the pretrial discovery orders was without merit under the circumstances, noted that the defendant's trial counsel was entitled to inspect, view, hear, or copy any and all statements of the defendant, and that such was the order of the trial judge in the pretrial discovery proceedings.

The denial of the defendant's pretrial motion for inspection of the statements he made to the police which were reduced to writing and were in the possession of the district attorney was held error in *Cordry v Superior Court of Santa Clara County* (1958) 161 Cal App 2d 267, 326 P2d 222, where the affidavit in support of the motion alleged that the defendant could not recall the contents of the statements, could not relate them to his attorneys, and needed them to refresh his recollection of the contents. The prosecution's contention that inspection in such a situation as involved in the present case could be allowed only where a defendant lacks memory of "the facts about which he made his statement, as distinguished from the contents and language of the statement," was rejected, the court holding that the test to be applied concerned the defendant's recollection of the contents of his statements, rather than his memory of the facts to which the statements were addressed.

In *Schindler v Superior Court of Madera County* (1958) 161 Cal App 2d 513, 327 P2d 68 (disapproved on another point in *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct

1571), it was held that the defendant was entitled to an order for pretrial inspection of his statements to the district attorney and his representatives with respect to the death of the homicide victim, where it appeared that the defendant could not remember the contents of the statements, that the statements were taken at the time when the defendant was without the benefit of counsel, and that knowledge of the contents of the statements was necessary in preparing his defenses to the charge of murder.

The denial of the defendant's motion, made at the trial, for production and inspection of a tape recording of the defendant's interrogation by police officers on the ground that the trial court had read a transcript of the recording and found nothing therein which would help the defendant was held error in *McAllister v Superior Court of San Diego County* (1958) 165 Cal App 2d 297, 331 P2d 654, where the defendant, in support of the motion, alleged that he was unable to remember all of the material covered by the interrogation, and that he could not safely proceed to trial without refreshing his recollection by an inspection of the taped record. Pointing out that the defendant had no idea what it was that the trial court had read in passing on the motion, and that there was nothing before the present court from which it could say that the trial court's discretion was properly or improperly exercised, the court said that on matters of this kind, involving a purported statement by the defendant himself which was the chief connecting link of the prosecution's case at the preliminary examination and which might reasonably be expected to be used in the trial of the case, there is no proper way by which the trial court can blindfold a defendant and secretly exercise a discretionary power. The court also observed that the prosecution has no interest in denying an accused access to all evidence that can throw light on issues in a case, and that obviously a defendant cannot show conclusively that a document is admissible without seeing it.

The rule that in a proper case a person charged with a crime may inspect before trial statements of his own in the possession of the prosecution, whether signed, unsigned, or on recording tape, was also recognized in *Vetter v Superior Court of Sacramento County* (1961) 189 Cal App 2d 132, 10 Cal Rptr 890; *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838; *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755.

In at least one case wherein the defendant's request for production of his statement was made during the trial, the court held that the request should be granted for the reason primarily that the request was made during the trial and the requested material was in court. See *Arthur v Commonwealth* (1957, Ky) 307 SW2d 182, supra § 9[b].

Holding that the question whether the prosecution in a criminal case may be required to furnish the defendant's counsel with a copy of a written confession which the prosecution has obtained from the defendant and which the prosecution could presumably use in the trial should be left to the discretion of the trial court, subject to review if abused, the court in *State v Haas* (1947) 188 Md 63, 51 A2d 647, upheld an order of the lower court directing the prosecution in the instant case to furnish to the defense copies of any statements made by the defendants. Noting that the argument made against any such discretion is based upon a fear that the state, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses, the court observed that whatever merit that argument has as applied to a situation where it is contended that the accused has a right to inspect the evidence, it has no application to a situation where the trial judge in each case and on each application determines what should be done in the interest of justice; that there are cases in which it would be clearly unjust to deny such an application and that, on the other hand, it is conceivable that there are cases in which it might improperly hamper the prosecution to grant such an application; and that the trial court can be made aware of the particular circumstances surrounding a confession in a particular case, and then determine whether it is in the interest of justice that the defendant see a copy of it before trial. The court carefully noted that it was not concerned in the present case with questions involving books, papers, documents, or tangible objects obtained from, or belonging to, the defendant, or obtained from others by seizure or by process, nor was it concerned with memoranda, oral statements made by a defendant, or statements made by other defendants to an indictment or by prosecution witnesses.

See *People v Johnson* (1959) 356 Mich 619, 97 NW2d 739, involving an appeal from an order denying the defendant's motion for inspection of the transcript of his confession taken shortly after the commission of the alleged offense, where

the court, pointing out that the trial judge clearly denied the motion in the belief that it did not lie within his power to grant it, reversed his order and remanded the cause for further proceedings upon the motion consistent with the present opinion. The court held that an order to allow inspection of a written confession taken by a prosecuting attorney from an accused person rests within the sound discretion of the trial judge; that the petitioner for such an order bears the burden of showing the trial court facts indicating that inspection of the confession is not simply a part of a fishing expedition, but is necessary to preparation of his defense and in the interest of a fair trial; and that on such a showing, the petition should be granted absent a more compelling showing by the prosecution of facts tending to prove that such an order would unfairly hamper the prosecution or do a disservice to the public interest. The court apparently disapproved *People v Parisi* (1935) 270 Mich 429, 259 NW 127, n133 by commenting that in the Parisi Case the common-law rule that no defendant has any right to the discovery of any evidence in the possession of the prosecution was held to apply to confessions or statements made by the defendant.

See also *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, infra § 18, where the court held that the trial court had the power in its discretion to order, if required by justice, discovery and inspection of any written confession or statement made by the defendant, or any recording or stenographic notes thereof, whether such confession or statement was signed by the defendant or not. The holding made in this case was also noted with approval in *State v Healey* (1965, NH) 210 A2d 486.

The rule that pretrial inspection by a defendant of his own statement may be permitted under certain circumstances in the exercise of the discretion of the trial court was also recognized in *State v Wise* (1955) 19 NJ 59, 115 A2d 62, and *State v Reynolds* (1963) 41 NJ 163, 195 A2d 449.

Where the defendant's application for pretrial inspection of his own statement showed that he did not recall his statement with sufficient detail to satisfy his counsel that he could fairly go to trial without it, it was held in *State v Johnson* (1958) 28 NJ 133, 145 A2d 313, supra § 11[g], that the application should be granted in the absence of a showing by the state that inspection would improperly hamper the prosecution. The rule announced in this case was also recognized in *State v Murphy* (1961) 36 NJ 172, 175 A2d 622.

In *People v Rogas* (1936) 158 Misc 567, 287 NYS 1005, a prosecution for murder in the first degree, wherein the defendant pleaded not guilty, with a specification of insanity, the court granted the defendant's motion for an order to permit alienists employed on his behalf to inspect certain statements in the possession of the district attorney which were allegedly made by him to members of the police department or the district attorney's staff shortly after the commission of the charged crime, where the motion was based on the ground that the alienists had made an exhaustive investigation, but were unable or unwilling, without an inspection of the defendant's statements, to form an opinion as to whether the defendant was insane at the time the crime was committed. Pointing out that the proposed inspection might be of incalculable benefit to the defendant, and that no disadvantage would result to the prosecution from the proposed disclosure, the court concluded that a right sense of justice seemed to decree that this was a proper occasion for the exercise by the court of its discretionary power. (Compare *People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[b], where the court refused to follow this decision.)

See also *People v D'Andrea* (1960) 20 Misc 2d 1070, 195 NYS2d 542, wherein the defendant moved for a pretrial discovery and inspection of his written statement given to the police and the district attorney immediately after his arrest. Noting that it was not advised of the nature of the statement and whether it was incriminatory or exculpatory, and stating that it could not reach a determination without first inspecting the statement, the court directed the district attorney to furnish the court with a copy of the statement in question pending further order by it, holding (1) that the power of the court to grant, in the exercise of its discretion, a motion for the inspection of documents in the possession of the prosecutor which are admissible on the trial as evidence for the prosecution is applicable to a defendant's own written statement made to the district attorney or the police after arrest; and (2) that pretrial inspection of a confession should be granted where the voluntary nature of the confession will become an issue and the defendant asserts that he does not remember the contents of his confession. However, in *People v Smith* (1960) 26 Misc 2d 1072, 206 NYS2d

993, *infra* § 13[b], the court refused to follow this holding.

Stating that if some circumstantial showing is made by a defendant to elicit the court's exercise of discretion in his favor, pretrial discovery of statements made by him and in the possession of the prosecuting attorney should be granted, unless there is a showing of prejudice to the prosecution, the court in *People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, held that such a showing was made in the present case in view of the fact that the defendant was a 15-year-old boy charged with murder in the first degree.

In *People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599, it was held that the transcribed statement made by the defendant to the police or district attorney at the time of his arrest, without the assistance of counsel and without waiver of his right to counsel, should be disclosed by the district attorney to defense counsel as a matter of right to enable the defendant properly to prepare a defense in accordance with the dictates of a fair trial. Recognizing that the court has the discretionary power to grant a motion for inspection of documents in the possession of the prosecution, and stating that the concept of fundamental justice defines mandatory constitutional minima to guide the exercise of the court's inherent power to compel pretrial disclosure of transcribed statements made by a defendant to the police or district attorney in a criminal case, the court concluded that the pretrial disclosure of a defendant's transcribed or written statements made at the time of his arrest without the assistance of counsel is essential to a fair trial.

The defendant's motion for pretrial inspection of statements allegedly made by him to the arresting officer and the district attorney was granted in *People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203. Stating that a reappraisal of the principles and considerations underlying the resolution of the issue in question was required in the light of recent decisions affirming and protecting the rights of accuseds, the expanding concept of liberalizing pretrial procedures to advance the function of a trial to ascertain truth, and the impact of the new procedure in New York for a hearing before trial on the voluntariness of a confession, and noting that under the new procedure for such a hearing, the prosecution must, within a reasonable time before trial, notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial, and if the prosecution gives such notice the defense, if it intends to attack the confession or admission as involuntary, must, in turn, notify the prosecution of the desire by the defense for a preliminary hearing on such issue, the court concluded that when the prosecution notifies the defense that a confession or admission will be offered in evidence at the trial, the defendant should be entitled to request and obtain a copy of such confession or admission in order to have his counsel decide whether he should request the preliminary hearing or endeavor to effect a disposition of the case by recommending a plea, and, if the hearing is requested, in order to aid in the preparation therefor, and that even before such notice is given by the prosecution, which would necessarily include situations where a statement may not be intended to be offered in evidence at the trial, the defendant should still be entitled to obtain a copy of his statement, at least in the absence of a showing by the prosecution of special circumstances justifying withholding disclosure of the statement in whole or in part. The court observed that since a statement would in practically all cases have been taken from an accused by the police or district attorney during a period of detention under the control of the authorities and without the assistance of counsel for the accused, it is a matter of fair play and simple justice that after he is indicted and obtains the assistance of counsel, his counsel should at least be furnished, on request, with a copy of his statement; that the prosecution's case will or should by that time have been substantially prepared; and that the fact that defense counsel is in possession of a copy of his client's own statement, whatever it may be, should not work to the prosecution's prejudice, if the prosecution has a case against the defendant, but should be of aid in assuring the defendant a fair trial as well as in the search for the truth. The rules announced in this case were also recognized in *People v Riley* (1965) 46 Misc 2d 221, 258 NYS2d 932, *infra* § 13[d]. In the Riley Case, however, the court further held that those rules have reference only to confessions or admissions written by the defendant himself or signed by him or in such question-answer form as would be admissible as an exhibit upon the trial after the giving of qualifying testimony.

The defendant's motion for production and inspection of his confession made to the police or district attorney was granted in *People v Harvin* (1965) 46 Misc 2d 417, 259 NYS2d 883. Noting that the district attorney had notified the defendant of his intention to use the confession at the trial, the court said that if the defendant had demanded a hearing

respecting the voluntariness of the confession, his counsel at that hearing would be entitled to see and use the confession, and that to deny the defendant's request to see the confession at this time and permit him to inspect it several months later seemed entirely pointless. Holding to the same effect is *People v Macht* (1965) 47 Misc 2d 404, 262 NYS2d 589.

Holding that to allow an inspection of statements, admissions, and confessions of the defendant where it is required by substantial justice is within the discretion of the trial judge, and stating that although the circumstances of each case will govern a determination whether such an inspection is required by substantial justice, the general guides in this respect are (1) that the defendant who seeks such an inspection should state, by affidavit, that he cannot recall the contents of his statements or confession, and set forth the circumstances giving rise to his claim that he cannot recall the contents thereof, and (2) that where the defendant has retained counsel, the request for inspection must be made seasonably before trial, the court in *State v Hill* (1963, CP) 23 Ohio Ops 2d 255, 91 Ohio L Abs 125, 191 NE2d 235, granted the defendant's pretrial motion for permission to inspect statements taken from him, including all those existing in the form of notes and transcriptions thereof, whether signed or unsigned by him, where the defendant asserted in an affidavit that he could not recall the contents of the statements taken from him, that he was unable to relate to his attorneys the contents of these statements, that the information was material to the question of his innocence, that the information was necessary to adequately prepare his case, that he was without benefit of counsel at the time the statements were taken, that he was mentally and emotionally disturbed at the time the statements were taken, that previous large quantities of intoxicating liquor consumed by him and a pronounced and severe effect at the time of the statements, and that a denial of the information would deprive him of a fair trial and would constitute a violation of his constitutional rights. Noting that the inherent power of the trial court to do substantial justice is vital and fundamental to the due administration of justice, the court said that the decision in *State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE 2d 684, supra § 9[c], footnote 16, wherein it was held that the defendant was not entitled to a copy of an alleged confession in the hands of the prosecuting attorney before trial, did not divest the trial judges of their discretion in the matters relating to inspection of confessions.

In *Commonwealth v Stepper* (1952, Pa) 54 Lack Jur 205, the defendant's petition for permission to inspect a confession made and signed by him in the presence of police officers and representatives of the district attorney's office on the day after the alleged homicide was granted, where the petition for inspection alleged that at the time of the confession the defendant was confused, mentally ill, and physically exhausted, and that the defendant was unable to inform his counsel as to the contents of the confession and could not clearly recall the events or circumstances surrounding the alleged offense, his arrest, and the making of the confession. At the oral argument, defense counsel also stated that they proposed to submit the confession, together with other information at their command, to medical opinions to determine the mental status of the defendant at the time of the alleged homicide. Noting that the defendant's mental status might be material in determining whether he was guilty of a felonious homicide, and, if so, what the degree of his guilt might be, the court held that under the circumstances of the case it had discretion to permit a pretrial examination of the confession to be conducted under its supervision and control. (The court refused to follow *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140; *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35; *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167, all infra § 13[c].)

See also *Commonwealth v Hoban* (1952, Pa) 54 Lack Jur 213, supra § 5[a], wherein the Pennsylvania Supreme Court refused a writ of prohibition restraining the respondent judge from enforcing an order permitting the defendant's counsel to inspect a signed confession made by the defendant to the police authorities and prosecuting officers.

An order of the trial court permitting the defendant to inspect all statements given by the defendant was also upheld in *State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, supra § 10[b], the court holding that under the circumstances there was no abuse of discretion on the part of the trial court.

For cases permitting inspection of the defendant's confession or statement during the trial where such material was offered, or its contents introduced, in evidence or where it was used by the prosecuting attorney in his examination of

the defendant or a witness, see § 9[c], supra.

For a case permitting inspection of the defendant's statement under a statute expressly authorizing such inspection, see *Sambolin v State* (1965, Tenn) 387 SW2d 817, supra § 11[h].

Recognizing that defendant's own statement or confession to police may be examined before trial:

#### ALABAMA

*Allison v State* (Ala) 200 So 2d 653

#### CALIFORNIA

*People v McGowan* (1980, 1st Dist) 105 Cal App 3d 997, 166 Cal Rptr 725 (failure to disclose punishable by giving offended party proper opportunity to meet new evidence, rather than suppression)  
*Rosser v United States* (1977, Dist Col App) 381 A2d 598

#### FLORIDA

*Cumbe v State* (1977, Fla) 345 So 2d 1061 (oral statement)  
*Potts v State* (1981, Fla App D4) 399 So 2d 505  
*State v O'Steen* (Fla App) 213 So 2d 751

#### GEORGIA

*Yeargin v State* (1982) 164 Ga App 835, 298 SE2d 606

#### ILLINOIS

*People v Sullivan* (1977) 48 Ill App 3d 555, 6 Ill Dec 393, 362 NE2d 1313  
*People v Donald* (1977) 56 Ill App 3d 538, 14 Ill Dec 48, 371 NE2d 1101  
*People v Crosby*, 39 Ill App 3d 1008, 350 NE2d 805  
*People v Tribbett* (Ill App) 232 NE2d 523

#### INDIANA

*Sexton v State* (Ind) 276 NE2d 836

#### KENTUCKY

*Lefevers v Commonwealth* (1977, Ky) 558 SW2d 585 (commonwealth's attorney should have furnished statements to defendant's counsel as soon as reasonably possible after he received them)

## LOUISIANA

*State v Johnson*, 249 La 950, 192 So 2d 135, cert den 388 US 923, 18 L Ed 2d 1374, 87 S Ct 2144  
*State v Hunter*, 250 La 295, 195 So 2d 273  
*State v Crook*, 253 La 961, 221 So 2d 473  
*State v Hudson*, 253 La 992, 221 So 2d 484  
*State v Anderson*, 254 La 1107, 229 So 2d 329  
*State v Fink*, 255 La 385, 231 So 2d 360  
*State v Coney*, 258 La 369, 246 So 2d 793

## MISSISSIPPI

*Armstrong v State (Miss)* 214 So 2d 589

## MISSOURI

*State v Broyles (1977, Mo App)* 559 SW2d 614

## NEW JERSEY

*State v Tate*, 47 NJ 352, 221 A2d 12  
*State v Giberson (1977)* 153 NJ Super 241, 379 A2d 480

## NEW YORK

*People v Remaley*, 26 NY2d 427, 311 NYS2d 473, 259 NE2d 901, cert den 400 US 948, 27 L Ed 2d 255, 91 S Ct 257  
*People v Bach*, 33 App Div 2d 560, 305 NYS2d 677  
*People v Paige*, 48 App Div 2d 6, 367 NYS2d 350  
*People v Bradford*, 54 Misc 2d 54, 281 NYS2d 480  
*Application of Guilianelle*, 80 Misc 2d 337, 363 NYS2d 220

## OHIO

*State v Smith (1976)* 50 Ohio App 2d 183, 4 Ohio Ops 3d 160, 362 NE2d 1239

## TENNESSEE

*Bolin v State (Tenn)* 405 SW2d 768

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Defendant would be entitled to any transcripts of illegally monitored conversations between him and his attorney and

any notes or memoranda regarding the conversations. *Fajeriak v State (Alaska) 520 P2d 795*.

Prior to trial, criminal defendant is entitled to obtain statements made by him to police officers, whether written, oral, or tape-recorded; however, even if magistrate erred in not permitting defendant to indulge in "fishing expedition," it did not prejudice defendant nor deprive him of substantial right where information sought would not "tend to overcome the prosecution's case or to establish a defense" at preliminary hearing, and would have been available to defendant before trial. *People v Superior Court of Shasta County, 264 Cal App 2d 694, 70 Cal Rptr 480*.

See *Wright v State (1983, Fla App D1) 428 So 2d 746*, ctfed ques ans, approved (Fla) *446 So 2d 86 § 17*.

In prosecution for aggravated battery with firearm and possession of firearm by convicted felon, trial court erred in admitting testimony of arresting officer that defendant made statement which essentially showed he had used gun, where statement was discovered simultaneously by prosecutor and defense counsel the day before, statement was in constructive possession of state at time of defendant's discovery request, no attempt was made by state to discover information known to officer, and court failed to make inquiry into question of procedural prejudice to defendant. *Hutchinson v State (1981, Fla App D1) 397 So 2d 1001*.

In prosecution for possession of marijuana, trial court's allowance of evidence of defendant's statement made in presence of investigator admitting he lived in bedroom in which marijuana was found was error, where state in response to demand for discovery indicated that there were no oral statements made by defendant known to prosecutor, and court exercised its discretion without making adequate inquiry covering whether state's violation was inadvertent or wilful, trivial or substantial, and what effect it had on ability of defendant to properly prepare for trial. *Easterling v State (1981, Fla App D1) 397 So 2d 999*.

See *Thompson v State (1979, Fla App D2) 374 So 2d 91, § 11*.

Conviction for homicide would be reversed where jail inmate was allowed to testify regarding confession by defendant even though before trial defense had filed timely and specific request for discovery of all statements made by defendant while in police custody, but defendant's statement to inmate was not disclosed by prosecution, where contention that statement was not required to be produced because it did not result from custodial interrogation was without merit, and where statement was direct evidence of defendant's guilt in primarily circumstantial case, and its admission into evidence thus was not harmless. *Walraven v State (1982) 250 Ga 401, 297 SE2d 278*.

Defense had right to pretrial examination of inculpatory custodial statements made by murder suspect, and sanction for prosecution's failure to make timely disclosure was exclusion and suppression from use in prosecution's case-in-chief or in rebuttal. *Hilburn v State (1983) 166 Ga App 357, 304 SE2d 480*.

Statement made by defendant to police prior to arrest was not a statement made while in police custody, therefore failure of prosecution to produce copy of statement in compliance with defendant's timely request did not require exclusion and suppression under statute requiring production of statements made by a defendant while in police custody; but statement made after arrest was made while in police custody, and failure of prosecution to produce that statement required exclusion and suppression. *Merritt v State (1983) 165 Ga App 597, 302 SE2d 136*.

Conviction for selling ounce of marijuana was reversed where prosecution failed to comply with discovery statute by making available before trial statements made by defendant in presence of police after his arrest, since it is always error to fail to give counsel on proper demand written summary of all relevant and material statements made by defendant while in custody. *Reed v State (1982) 163 Ga App 364, 295 SE2d 108*.

Codefendants' convictions of entering automobile with intent to steal were reversed where defense made timely pretrial request for discovery of any statements made by defendant, where state used testimony by police officer concerning

undisclosed oral statement by one codefendant as evidence rebutting that codefendant's testimony, and where sanction provision in discovery statute expressly mandated exclusion of undisclosed statements for use in prosecution's case-in-chief or in rebuttal. *Garard v State* (1981) 159 Ga App 248, 283 SE2d 27.

In prosecution for murder and armed robbery, prosecution failed to materially comply with court rule which required disclosure of defendant's statements when it turned over police report which summarized defendant's statements but did not give any indication that defendant had provided detailed information of possible alibi to two officers. Reversal, however, was not required where prejudicial impact was minimal and defendant waived objection to police officer's testimony by not objecting at trial. *People v McInnis* (1980) 88 Ill App 3d 555, 44 Ill Dec 120, 411 NE2d 26.

In aggravated-battery prosecution during which state failed to furnish defense with written copies of statements made by defendant at two pretrial court appearances concerning his acquaintance with accomplice, error occurred where state cross-examined defendant concerning his acquaintance with accomplice, but such error was harmless where defendant was allowed to explain on redirect his motivation for making such statements, identification of defendant was positive, and evidence of guilt was overwhelming. *People v Caliendo* (1980) 84 Ill App 3d 987, 40 Ill Dec 41, 405 NE2d 1133.

In murder prosecution against female defendant who killed her consort with knife during domestic altercation, prejudicial error occurred as result of prosecution's failure to disclose to defense counsel defendant's oral confession to police officers which was revealed to jury unexpectedly during defense cross-examination of investigating police officer. *People v Miles* (1980) 82 Ill App 3d 922, 38 Ill Dec 356, 403 NE2d 587.

See *People v Spurlark* (1979) 74 Ill App 3d 43, 29 Ill Dec 657, 392 NE2d 214, § 11.

In battery prosecution, State's failure, in response to defense request, to produce inculpatory statement allegedly made by defendant and subsequently used by prosecution at trial, constituted prejudicial error; trial court's admonition to jury was insufficient to overcome potential prejudice to defendant. *People v Young* (1978) 59 Ill App 3d 254, 16 Ill Dec 569, 375 NE2d 442.

Failure of state to furnish defendant, pursuant to his demand, tape recordings of his confession was reversible error, even though they substantiated police officer's testimony and refuted much of defendant's, where tapes would have had some probative value both at hearing on motion on question of voluntariness of confession and at trial on question of truthfulness of confession. *People v Abendroth* (1977) 52 Ill App 3d 359, 10 Ill Dec 183, 367 NE2d 571.

Where court had issued pre-trial discovery order as prescribed by rule directing state to produce evidence, if any, of oral confession and where prosecutor was unaware of oral confession prior to trial, prosecutor had continuing duty to disclose oral confession to defense even though he became aware of confession just before trial. *People v Shegog*, 37 Ill App 3d 615, 346 NE2d 208.

In prosecution for murder, defendant's threat that she would burn victim's house down overheard by witness was statement subject to discovery under court rule; however, failure to disclose such statement did not offend purpose of discovery rules to prevent surprise or unfair advantage and to aid in search for truth where record indicated defense counsel had knowledge of nature of statement to be testified to by witness and where court allowed counsel to question witness outside presence of jury regarding statement before he testified about it and where defendant's counsel, after interviewing him, made no motion for continuance. *People v Watkins*, 34 Ill App 3d 369, 340 NE2d 92.

Defendant was not placed at unfair disadvantage of surprise by failure of prosecution to reveal statements made by defendant to third parties subsequent to her husband's death where prosecution did not acquire possession of those statements until two weeks prior to trial and where defense counsel had interviewed both witnesses before they testified in rebuttal. *People v Carbona*, 27 Ill App 3d 988, 327 NE2d 546.

In prosecution for misdemeanors of criminal trespass and resisting an officer, trial court erred in denying defendant's motion for access to his own statements which had been recorded by police, since rule of criminal procedure requiring that defendant be permitted to copy his own statements is applicable to simple misdemeanor prosecutions. *Hadjis v Iowa Dist. Court of Linn County (1979, Iowa) 275 NW2d 763.*

Defendant's oral statement was not discoverable. *State v Jones (La) 332 So 2d 267.*

In prosecution for public bribery, inculpatory recorded telephone conversations relating to earlier offer to accept bribe and to mechanics of effecting consummation of transaction were discoverable where they were made after commission of crime. *State v Le Blanc (La) 305 So 2d 416.*

Under discovery statute entitling defense to substance of statements made by defendant to police where "substance" was defined as essence, or essential elements, of statement, disclosure that defendant stated he had fired several shots at named victim, but failure to disclose that defendants and another had been engaged in "game of shootouts" before shooting in question, complied with statutory mandate, and testimony by police officer at trial regarding latter disclosures did not impermissibly go beyond and expand state's response to discovery so as to require suppression. *State v Hill (1983, La App) 434 So 2d 428, cert den (La) 440 So 2d 759.*

See *Commonwealth v Stewart (Mass) 309 NE2d 470* (citing annotation), § 16[a].

In murder prosecution against woman charged with shooting her former boyfriend, lower court erred by admitting testimony concerning incriminating written statement made by defendant when same written statement had not been furnished to defense counsel in accordance with discovery request made prior to trial. *Jackson v State (1983, Miss) 426 So 2d 405.*

Prosecution's failure to furnish defense counsel with a copy of defendant's statement to FBI until shortly before voir dire examination of jury panel commenced despite formal and informal requests and court order was fundamentally unfair as defendant was entitled to pre-trial inspection. *State v Harrington (Mo) 534 SW2d 44.*

Prosecution of defendant for murder was rendered fundamentally unfair by denial of his motion for inspection of notes made by detective with respect to oral statement given by defendant to detective. *State v Scott (Mo) 479 SW2d 438.*

Statements made by defendant during interrogation by police officer which statements were indicative of mental illness and would have indicated good reason to pursue an insanity defense, were material and exculpatory, and their suppression by officers so that they did not appear in reports furnished under omnibus discovery order was prejudicial and a denial of due process, thus requiring a new trial. *State v Patterson (1983, Mont) 662 P2d 291.*

State had continuing duty to defendant to disclose that it had letter written by him which raised serious question as to truth of his alibi defense. *State v Smith (NM App) 543 P2d 834.*

Defendant charged with unclassified misdemeanor of driving while intoxicated under simplified traffic information was entitled by statutes to discover his oral statements made to police. *People v Ross (1981) 110 Misc 2d 818, 442 NYS2d 848.*

Defendant would be granted discovery of note relating to pre-indictment interview he voluntarily attended at office of district attorney; discovery of defendant of his own statements is not limited to custodial statements, and, despite district attorney's contention that since interview was voluntary it was non-custodial, statements subject to discovery are only required to be made by defendant to one engaged in law enforcement activity; neither would defendant's motion for discovery be barred by untimeliness where court would exercise its discretion to extend defendant's time in view of number of counts in indictment, seriousness of charges, and fact that requested discovery was particularly significant to

perjury allegations. *People v Wyssling (Misc) 372 NYS2d 142.*

Defendant's motion for audibility hearing of tape recording made of conversation or conversations of one or more defendants, either made with law enforcement officer, or overheard by said official, would be granted and prosecution would be ordered to furnish defendant's attorney with transcript of contents of such tapes not less than 15 days before trial; extent of defendants' right to disclosure, prior to trial, of contents of any recorded statements to or with law enforcement officers does not depend on whether prosecution intends to use such material on its direct case or for purpose of impeachment. *People v Di Matteo, 80 Misc 2d 1029, 365 NYS2d 126.*

Defendant was entitled to discovery of written or recorded statements, confessions, or admissions made by him; to reports, papers, and forms of police department relating to case, such as arrest disposition sheets and other papers concerning arrest and investigation; and to any and all evidence in possession of prosecution favorable to defendant. *People v Wright, 74 Misc 2d 419, 343 NYS2d 944.*

Defendant is entitled to copy of his statements given to police regardless of any showing of circumstances requiring same for his defense, but with respect to all other items of evidence sought by way of discovery and inspection they are within realm of judicial discretion; thus, motion for discovery was granted as to results of any chemical blood test of defendant and as to any statements or recorded transcripts of statements of defendant, but was denied, without prejudice to further application during trial, as to statements of prosecution witnesses, notes of police officers respecting conversations with defendant or prosecution witnesses, and various matters relating to identification of equipment used in giving chemical test to defendant. *People v Blair, 64 Misc 2d 519, 315 NYS2d 179.*

Copy of any statement or confession made by defendant at time of arrest and in absence of counsel should be furnished to him by prosecution, before trial, whenever he, or his counsel, requests such copy. *People v Chirico, 61 Misc 2d 157, 305 NYS2d 237.*

Even though defendant's confessions to police officers were summarily suppressed as violative of Miranda rules, it was error to deny motion to inspect such confessions, since another confession, made to private citizen, was admitted in evidence, and denial of inspection of police confessions deprived defendant of opportunity to demonstrate that private confession was inextricably woven in with and secured as part of same improper activities and procedures which led to police confessions, and that as consequence private confession should also have been suppressed. *People v Ruppert, 26 NY2d 437, 311 NYS2d 481, 259 NE2d 906.*

Prosecutor had no duty to disclose oral statements allegedly made by homicide defendant to third persons not acting on behalf of State. *State v Walker (1982) 56 NC App 237, 287 SE2d 455.*

In prosecution charging police supervisor with criminal assault on subordinate, reversible error occurred where trial court denied pretrial request for discovery of defendant's tape-recorded statement given to police investigators; prosecutor's contention that tape was not discoverable because he did not intend to make statement part of his case file, was without merit. *State v Tomblin (1981) 3 Ohio App 3d 17, 3 Ohio BR 18, 443 NE2d 529, motion overr.*

Upon proper application, state should be required to produce written statements of defendant and to reveal contents of any oral statements; however, where defendant requested certain papers, including any and all statements made by him, and prosecutor informed court that he had no written statements made by defendant, defendant could not complain of failure to furnish him with details of his oral confessions since he did not request them. *Watts v State (Okla Crim) 487 P2d 981.*

Where accused gives statements to police under "distressing circumstances" without benefit of counsel, and is later unable to remember what he said in statement in order to assist counsel in defense, substantial justice requires prosecution to allow accused or his counsel pretrial inspection of such statement; such disclosure was required in this

case where defendant was uneducated woman unfamiliar with legal proceedings, and was unable to recall content of her signed statement given to police without benefit of counsel while she was under stress and confusion of alleged attack, killing, and subsequent police interrogation. *Doakes v District Court of Oklahoma County (Okla Crim) 447 P2d 461*.

In murder prosecution growing out of shooting of deaf dry cleaner and his 15-year-old female employee, reversible error occurred where state's key witness was inmate at county jail who related jail house confession by defendant, but district attorney knowingly failed to correct certain false testimony concerning that witness' activities as undercover police agent and failed to provide defense counsel with witness' complete criminal background and record. *Commonwealth v Wallace (1983) 500 Pa 270, 455 A2d 1187*.

[\*13b] Inspection denied under circumstancesn134

Although explicitly or by implication recognizing that inspection by an accused of his confession or statement may be ordered in a proper case, the courts in many other cases have refused to permit the defendant to inspect his confession or statement made after the alleged offense on the ground that there was no showing of circumstances warranting the requested inspection.

Although noting that some cases in the District of Columbia had permitted discovery of confessions and statements to the police where the court deemed it necessary to allow such discovery in the interest of justice, the court in *United States v Pete (1953, DC Dist Col) 111 F Supp 292*, denied the defendant's motion for production of statements and confessions made by him to the police on the ground that there was no showing of necessity. (Apparently, the law of the District of Columbia was applied.)

The denial of the defendant's motion to inspect and copy statements made to police officers by defendant and an alleged accomplice was upheld in *State v McGee (1962) 91 Ariz 101, 370 P2d 261*, cert den *371 US 844, 9 L ed 2d 79, 83 S Ct 75*, the court holding that although the defendant's contention that the denial of his motion was an abuse of discretion was based on "the fact of diversity of defenses" and that the alleged accomplice was listed as a witness against him, these facts were not considered by the trial court to be sufficient to compel him to grant the motion, and that in the absence of a clear showing of abuse of discretion the present court would not upset a discretionary order. The court relied on the rule that an order granting or denying defendant's motion for inspection of statements of defendant and other documents is addressed to the sound discretion of the trial court.

In *State v Fitzgerald (1895) 130 Mo 407, 382 SW 1113*, wherein the trial court overruled the defendant's motion, filed before the taking of testimony, to compel the prosecuting attorney to produce a written statement of the defendant relative to his connection with the homicide, the court, upholding the trial court's ruling, said that no reason had been assigned by the defendant as to why it was error to overrule the motion, that at most, the matter was in the discretion of the trial court, and that the trial court did not act unwisely in overruling the motion. The court pointed out that while the defense had said that the statement was necessary and material to the defendant in the preparation and proper presentation of his defense, nevertheless, "as to wherein and how material we are left to conjecture."

In *Cramer v State (1944) 145 Neb 88, 15 NW2d 323*, the court, in upholding the denial of the defendant's application to inspect, among other things, a confession allegedly made by him, pointed out that medical experts were permitted to read the defendant's confession prior to the trial as a part of the evidence to be considered in determining defendant's mental condition at the time the confession was made, and that the defendant's counsel were given a copy of the confession 4 days before it was offered in evidence by the prosecution. Under this state of the record, concluded the court, the trial court had properly safeguarded the rights of the defendant with reference to his application to inspect the confession. The court said that while the authorities do not seem to be in agreement as to such right of inspection, the rule generally was that a confession need not be produced, although it seemed proper for the trial court to order a written confession produced where the interests of justice require, as where there is a question whether the signature is forged, or the written confession is necessary to a proper determination of the mental condition of the defendant at the

time the confession was made, or for other reasons affecting the merits of the litigation. However, the court concluded, where the only reason for the production of a written confession for the inspection of a defendant is that it would aid generally in preparing the defense, no basis exists for requiring the prosecution to produce it.

The denial of the defendant's pretrial motion for an order requiring the prosecuting attorney to produce, for inspection by the defense, written statements made by the defendant was upheld in *Reizenstein v State* (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265. Noting that in a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the prosecution to produce written confession, statements, and other documentary evidence for inspection by the defendant's counsel before the trial, and that error may be predicated only for an abuse of such discretion, the court said that there was no abuse of discretion under the circumstances.<sup>n135</sup>

Concluding that a defendant has no unqualified, absolute right to an inspection of his confession, but, on the contrary, his application for an inspection is addressed to the sound judicial discretion of the trial court to be exercised only when the interest of justice may require,<sup>n136</sup> the court in *State v Cicensia* (1951) 6 NJ 296, 78 A2d 568, cert den 350 US 925, 100 L ed 809, 76 S Ct 215, sustained the denial of the defendant's motion for pretrial inspection of confessions allegedly made by him, and rejected the contention that the defendant had an absolute right to an inspection before trial of his alleged confession.

In *State v Tune* (1953) 13 NJ 203, 98 A2d 881, it was held (four justices dissenting) that the trial court abused its discretion in permitting the defendant to inspect his confession where an affidavit filed by the defendant's counsel in support of the motion for inspection set forth (1) that the confession had been exacted through force and threats of violence; (2) that the confession had not been read to or by the defendant prior to signing; (3) that the defendant could not tell counsel anything of the contents of the confession; (4) that the defendant was without benefit of counsel; (5) that the defendant was suffering from a mental disorder when he signed the confession; and (6) that there was a discrepancy between the facts as ascertained by counsel and those alleged by the prosecution. Noting that it is incumbent on the moving party to produce such facts as will support the granting of the application, the court, in concluding that the defendant in the present case had failed to carry the burden of showing that in the interest of justice his application for inspection should be granted, observed that as to (1), (2), and (5) of the alleged grounds for inspection, the affidavit set forth no facts but merely conclusions; that as to grounds (3) and (4), the law does not protect an accused against his own voluntary act and a defendant is not entitled to inspection of his confession merely because he may not recall its contents; and that as far as ground (6) was concerned, the reason stated therein was no valid basis for an inspection.<sup>n137</sup> (The dissenting opinion stated: "I cannot conceive of any case in which an order allowing the inspection of a confession, for example, will be sustained if we can say, as we do, that in the circumstances of this case [the trial judge] committed error in allowing an inspection.") On a later appeal from a judgment of conviction in the same case, reported in *State v Tune* (1954) 17 NJ 100, 110 A2d 99, cert den 349 US 907, 99 L ed 1243, 75 S Ct 584, overrd on other grounds *State v Smith* (1960) 32 NJ 501, 161 A2d 520, cert den 364 US 936, 5 L ed 2d 367, 81 S Ct 383, and disapproved on other grounds *State v Reynolds* (1963) 41 NJ 163, 195 A2d 449, the court, adhering to the opinion expressed in the former case, held that the defendant's assignment of error relating to the trial court's refusal to allow pretrial inspection by the defense of the defendant's confession was not sustainable in the absence of a showing of an abuse of discretion on the part of the trial court.

Following the decision in *State v Tune* (1953) 13 NJ 203, 98 A2d 881, supra, the court in *State v Petroliia* (1955) 37 NJ Super 326, 117 A2d 281, revd on other grounds 21 NJ 453, 122 A2d 639, held that it was not error to deny the defendant's pretrial motion for inspection of his confession where the motion was predicated upon the allegations that the confession was extracted by such force and violence to the defendant's person that he had no recollection of its contents; and that the defendant could not recall the contents of the confession because 4 years had elapsed between the time of the making of the confession and the time of the making of the present motion. Stating that the record in the case did not sustain the allegations, the court concluded that under the circumstances no error had been demonstrated in connection with the denial of inspection. The decision in *State v Tune* (1953) 13 NJ 203, 98 A2d 881, supra, was also

followed in *State v Echevarria* (1955) 38 NJ Super 415, 119 A2d 183, supra § 11[g], wherein the court likewise denied the defendant's motion for pretrial inspection of statements made by him.

In *State v Williams* (1957) 46 NJ Super 98, 134 A2d 39, the defendant's motion prior to trial for permission to copy his sworn statement to the police was denied because of "proof deficiency."

In *State v Bunk* (149, NJ County Ct) 63 A2d 842, the court denied the defendant's motion for production, for his inspection, of confessions made by him and his codefendants, statements obtained from all other witnesses in the case, and reports and memoranda of the investigators. Pointing out that counsel for the defendant could see and interview the codefendants, and that each defendant knew the nature of his participation in the alleged crime and what his defense would be at the trial, and that he also knew "what he said in his statement unless it was obtained by some improper means or undue influences or when he was under some mental disability, in which event it would not be admissible against him," the court said that under the circumstances the motion for inspection of the confessions, the statements, and investigation reports should be denied. The court also said that confessions, investigation reports, and statements of witnesses obtained in a criminal prosecution might well be classed as "the work product of the prosecutor," and might be protected against inspection by the defense in advance of trial.

In *People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, the court, stating that until the legislature expanded the power of courts to permit the defendant in a criminal case to inspect a confession prior to the trial, the court should not exercise that power unless unusual circumstances demanded it, denied the defendant's motion for an inspection of statements and confessions allegedly made by him to the police and district attorney shortly after the commission of the crime, where the motion was based on the allegations that alienists engaged on behalf of the defendant were unable and unwilling to form an opinion as to whether the defendant was insane at the time he committed the alleged crime, without an inspection of his statements and confessions in question, and that because of his state of mind at the time he was interrogated by the police, the defendant had only a faint recollection of what had occurred at the time he was questioned and could not repeat what he had said at that time. Noting that on the trial of the defendant it would readily grant the alienists ample time and opportunity to inspect the confessions and statements in question, the court said that to permit the defendant to inspect statements and confessions prior to the trial as a matter of course in such a case, as was done in *People v Rogas* (1936) 158 Misc 567, 287 NYS 1005, supra § 13[a], would be very prejudicial to the prosecution's case. The court observed that one of the tests which seems to be applicable to cases of this kind is whether or not the requested statements or confessions would be admissible in evidence; that where there is evidence in possession or control of the prosecution which is favorable to the defendant it should be made available to the defendant unless there are strong reasons otherwise; and that to obtain an inspection, the defendant must show facts which would warrant the court's exercise of its discretion and would establish that an inspection at the time of trial will not answer his needs.

Noting that confessions made by a defendant are generally admissible in evidence against him as part of the prosecution's case, but are not admissible as evidence in support of his defense, and stating that, accordingly, a defendant is not entitled to the production of his confession unless there are appropriate reasons in the interest of justice why such production should be had prior to trial, the court in *People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, denied the defendant's motion for the production of a confession allegedly made by him, on the ground that no reason justifying such production was set forth in the motion. The court also pointed out that the right of the defendant could be protected sufficiently on trial because he might then be permitted to inspect his statements or confessions in connection with the cross-examination of witnesses testifying to the contents of such statements or confessions. Holding to the same effect is *People v Jordan* (1953, Gen Sess) 128 NYS2d 457.

Where the defendant moved for permission to inspect certain written statements made by him to law enforcement authorities, alleging that he "cannot be expected to recall or remember all of the details in connection with [these] statements which [were] taken about eight or nine months ago," and that inspection of the statement was necessary to prepare properly for trial, the court in *People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827, stating that a defendant

does not have an absolute right in all cases to inspect his pretrial statement, but that the court can grant or deny discovery of such statement on the basis of the facts in each case after evaluating the possibility and extent of perjury and balancing it against other considerations related to the ultimate purpose of a criminal trial, held that the motion should be denied with leave to renew, if the defendant was so advised, upon proper papers. The court held that a mere assertion by counsel that a defendant cannot recall his statement is not enough, but that there must be an affidavit by the defendant to that effect with adequate factual support, and that to establish such claimed inability of recollection, the defendant, in addition to giving the facts and circumstances surrounding the taking of his statement, should show the time elapsed since the giving of the statement or any other facts which may tend to generally support his contention, such as the length of the statement, his illiteracy or mental incapacity, if any, whether the statement was made through an interpreter, whether he was subjected to coercion, misrepresentation, deceit, or intimidation through fear or otherwise, or whether he was not in adequate control of his faculties because, for example, he was under the influence of alcohol or narcotics. The court also held that a defendant should establish the respect in which pretrial discovery of the statement is necessary for his preparation for trial. The court pointed out that in the present case there was no affidavit by the defendant himself showing, with sufficient factual support, that he could not recall the details of his statement, or why the statements were necessary at this stage of the proceedings in order to prepare properly for trial.

In *People v Leahey* (1960) 26 Misc 2d 438, 207 NYS2d 619, the defendant's motion for pretrial discovery and inspection of copies of written statements made by him was denied, notwithstanding that the affidavit in support of the motion stated that the defendant had been a deaf mute since birth, that prior to his arraignment before a magistrate he had made a written statement to investigators, that he was not represented by counsel at his preliminary arraignment before the magistrate, and that in order to properly represent him it was necessary for his attorney to have his written statements. Noting that the circumstances under which a defendant in a criminal action may be entitled to inspection of a written statement made by him to investigators of crime had not been clearly defined by the courts of New York, and stating that it would be difficult to enunciate a particular and definitive concept or controlling criteria applicable to all cases, and that the primary consideration in each case should be justice which will serve the accused and not prejudice the rights of the prosecution, the court pointed out that although the defendant was a deaf mute since birth, he did not lack means of communication, since he was able to read and write and to converse in sign language; and that it was not claimed that his handicap had prevented him from summarizing what information he had given to the investigating officers or what his written statements to them generally contained, nor was it claimed that the written statements would tend to exculpate the defendant. The court observed that in deciding where justice lies in any individual case there should be considered, inter alia, the specific purpose for which the defendant seeks an inspection of his written statement, his likelihood of being able to inform counsel of its general contents, whether it tends to exculpate him or to express his guilt, the danger of giving him the opportunity to tailor a defense around his particular statement, and whether or not the request is for obviously exploratory purposes.

Where the defendant moved for an order requiring the district attorney to furnish his counsel copies of any written statements made by him to the district attorney or any other members of any law enforcement agency, alleging that an inspection at the time of trial would not give the defendant adequate opportunity to prepare and present evidence showing the inaccuracy of such statements, which might be the only corroboration of testimony to be given by an alleged accomplice, the court in *People v Smith* (1960) 26 Misc 2d 1072, 206 NYS2d 993, denied the motion on the ground that the defendant had not shown any unusual circumstances to move the discretion of the court. The court said that if there actually were inaccuracies in his statements, the defendant must already be aware of them and able to inform his counsel, and consequently no valid reason existed to provide a copy in order to prepare for trial; and that if no inaccuracies existed, the same reason for refusal would prevail with equal force. As to the decision in *People v D'Andrea* (1960) 20 Misc 2d 1070, 195 NYS2d 542, supra § 13[a], wherein it was held that pretrial inspection of a confession should be granted where the voluntary nature of the confession will become an issue and the defendant asserts that he does not remember the contents of the confession, the court in the present case, refusing to follow the D'Andrea Case, said that to adopt the criteria suggested therein would "remove all discretion from the court since experience as a prosecutor and judge suggests that such criteria exist in practically all criminal proceedings where a confession is involved," and that, in addition, it would seem that if such criteria were to be applied to confessions, they

should also be applied whether the label was confession, admission, or exculpatory statements, and that to attempt to make that type of distinction in advance might well complicate the whole procedure much more than it presently appeared to be.

In *People v Baker (1961) 29 Misc 2d 145, 210 NYS2d 458*, the court, following the rule that a defendant is not entitled to inspection of his own statements in the absence of unusual circumstances which might justify such inspection, denied the defendant's motion for inspection of his statement made at the time of his interrogation after the alleged offense, although the defendant stated that he had no recollection of what had occurred. Pointing out that the defendant, by his own affidavit in support of the motion, stated that he was taken to the state police barracks in a certain town by state troopers, and was there interrogated by the district attorney at various times, and at other times he was taken into another room and was questioned by the state troopers, and that he remembered that there was a stenographer present apparently taking down the questions asked of and the answers made by him, the court said that the circumstances were not unusual, and that the court would protect the defendant's rights when the proper time came during the trial.

See also *People v Roldan (1964) 42 Misc 2d 501, 248 NYS2d 408*, where the court, in ruling on the defendant's motion for a bill of particulars as to whether the prosecution intended to present in evidence against the defendant any admissions allegedly made by him, recognized that a mere assertion by the defendant in seeking pretrial examination of his statement that he could not recall the statement is not enough, but that there must be an affidavit by the defendant to that effect with adequate factual support; and that a defendant should establish the respect in which pretrial discovery of the statement is necessary for his preparation for trial.

Where the defendant's affidavit in support of his motion for pretrial inspection of statements taken from him averred that on the night of his arrest he was questioned at the police station for over 5 hours, that because of the length of the interrogation he was unable to recall everything he had said, and that the answers he had made at the time of the interrogation were put down in writing, the court in *People v Torres (1965) 46 Misc 2d 264, 259 NYS2d 656*, denied the motion, holding that the averments in the affidavit fell short of showing such special circumstances and compelling reasons as would require pretrial disclosure of the statements. The court said that it was aware of earlier decisions<sup>138</sup> which took a contrary view and directed the disclosure of a defendant's transcribed statements to the police or district attorney after his arrest "as a matter of right to properly enable the said defendant to prepare a defense in accordance with the dictates of a fair trial," but that until the appellate courts or the legislature sanctioned such a departure from the present well-established general rule, it saw no reason for taking such a "long stride toward a new practice."

A motion for inspection was also denied where --

-- the motion was for permission to examine all statements made by the defendant, the court holding that there was no showing of unusual circumstances which might justify the granting of an inspection. *People v Higgins (1960) 21 Misc 2d 94, 196 NYS2d 222*.

-- the motion was for discovery of certain statements made by the defendant, the court pointing out that the mere assertion that the statements had been involuntarily extracted from him was not sufficient to support the motion; that if the statements were made under the influence of fear produced by threats or upon a stipulation of the district attorney that the defendant should not be prosecuted therefor, it was not admissible in evidence against him; that the defendant would be afforded a preliminary hearing upon the trial as to the voluntary nature of his statements; and that there was no claim that the statements in question were favorable to the defendant. *People v Carothers (1960) 24 Misc 2d 734, 203 NYS2d 512*.

-- the motion was for pretrial inspection of any statements made by the defendant to any police officer or the assistant district attorney at the time of his arrest, and the defendant's counsel alleged in support of the motion that the requested inspection was not for the purpose of prying into the prosecution's case, but was necessary under the unusual circumstances present in the case, and that the defendant had informed him that the defendant could not remember all of

the questions put to and answers made by him, and the court stated that the motion under consideration was addressed to its discretion, and that it relied primarily on *People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827, supra. *People v Buccanfuso* (1960) 25 Misc 2d 219, 206 NYS 2d 394.

-- the motion was for inspection of a statement allegedly made and signed by the defendant, based on the contention that the statement had been obtained by the use of intimidation, trickery, misrepresentation, and deceit, the court noting that the question of the submission of the statement to the defendant was a matter within the court's discretion, and stating that it would seem that the motion and objections were directed more to the admission of the statements in evidence at the time of trial. *People v Bruno* (1962) 36 Misc 2d 330, 232 NYS2d 530.

Holding that at most, the ordering of a pretrial inspection of a defendant's written statement requested by him rests in the sound discretion of the trial court, and that a clear abuse of such discretion would have to be shown before the defendant could predicate error on such refusal, the court in *State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437, upheld the trial court's denial of the defendant's motion to require the prosecuting attorney to submit for his inspection a statement made by him respecting the crime involved.

See also *State v Strong* (1963) 119 Ohio App 31, 26 Ohio Ops 2d 134, 196 NE2d 801, where the court, without discussion, held that there was no error in the trial court's refusing to order statements of the defendant to be furnished to defense counsel for examination and inspection before trial.

In *Bell v Webb* (1961, Okla Crim) 365 P2d 399, it was held that the prosecuting attorney would not be required to produce, for inspection by the defendant in pretrial proceedings, a taperecorded conversation between the defendant and an assistant county attorney. Pointing out that the tape recording itself could not be evidence in the case nor did it constitute the very essence of the case, but that, at most, it might possibly become incidentally material on cross-examination, the court said that the tape recording was not the proper subject of an order of mandamus to the county attorney requiring him to produce it, although in a proper case this kind of relief would be made available. The court recognized that in the absence of statutory authority, the defendant has no absolute right of pretrial inspection or to compel the prosecution to produce documents and reports that may be beneficial to him, although in the interest of justice for good cause shown, where the denial of pretrial inspection might result in a miscarriage of justice, the trial court has the inherent right in the exercise of sound judicial discretion to grant the remedy of pretrial inspection to the accused. Holding to the same effect is *Application of Killion* (1959, Okla Crim) 338 P2d 168.

Stating that the rights of the defendant in a criminal case will be fully protected if the power to compel production of evidence in possession of the prosecution is committed to the sound discretion of the trial judge, subject to a review for abuse, and holding that the trial court has discretionary power to grant or deny a defendant's pretrial motion for permission to inspect a confession made by him, the court in *State v Leland* (1951) 190 Or 598, 227 P2d 785, affd 343 US 790, 96 L ed 1302, 72 S Ct 1002, reh den 344 US 848, 97 L ed 659, 73 S Ct 4, held that in the instant case there was no abuse of discretion in the trial court denying the defendant's motion for permission to inspect his confession. Noting that the written motion itself set forth no grounds for its allowance, and that the grounds specified by the defendant's counsel, upon the oral application made just before the commencement of the trial, were that the inspection was necessary (1) to determine whether or not the defendant's confession was a rational or accurate statement of the facts as he had related them to his counsel, and (2) to attack the validity of the confession with respect to the formalities of taking it, the court pointed out that the confession was produced in court 5 days before the defendant rested his case at the trial; that there was ample time for the defendant's counsel and his expert witnesses to study the confession; and that a pretrial inspection of the confession would not have aided the defendant's counsel in his attack on its validity in the slightest degree.

The defendant's petition for permission to inspect a transcript of an interrogation of the defendant which was conducted shortly after he had been taken into custody was denied in *Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59, where the petition was based on the allegations that the interrogation of the defendant was

conducted while the defendant was "confused, ill, physically exhausted, and in a state of shock"; that the defendant was unable to inform his counsel what statements he had made at the time of the interrogation; that he could not clearly recall the circumstances surrounding the alleged homicide; and that the requested transcript was necessary in order to prepare a defense. Noting that the matter of permitting a defendant to inspect evidence in the possession of the prosecution depends upon an exercise of judicial discretion, the court concluded that "there has been shown neither significant fact nor logical reason why this transcript of interrogation is needed to prepare the defense."

In *State v Clark* (1944) 21 Wash 2d 774, 153 P2d 297, cert den 325 US 878, 89 L ed 1994, 65 S Ct 1554, it was held not error to refuse to permit the defendant to examine typewritten exhibits which recorded the confessions made by the defendant to police officers and to the prosecuting attorney, the court noting that the prosecution is not required to submit its evidence to defense counsel; that the accused is not, as a matter of right, entitled to have for inspection before trial evidence which is in the possession of the prosecution; and that such matter is peculiarly within the trial court's discretion, which will not be disturbed on review unless there is a manifest abuse of discretion.

For other cases wherein the court, although recognizing that inspection by an accused of his confession or statement may be ordered in a proper case, refused to permit the defendant to inspect his confession or statement made after the alleged offense on the ground that there was no showing of circumstances warranting the requested inspection, see the following:

#### CALIFORNIA

*Brenard v Superior Court of Sacramento County* (1959) 172 Cal App 2d 314, 341 P2d 743, supra § 5[a]  
*People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102, supra § 8

#### MASSACHUSETTS

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, supra § 3  
*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, supra § 5[a]

#### MISSOURI

*State v Hinojosa* (1951, Mo) 242 SW2d 1, supra § 8  
*State v Kelton* (1957, Mo) 299 SW2d 493, supra § 12  
*State v Spica* (1965, Mo) 389 SW2d 35, supra § 3

#### NEVADA

*Pinana v State* (1960) 76 Nev 274, 352 P2d 824, supra § 5[a]

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Where during a voir dire examination of a detective who had testified on matters pertaining to the circumstances surrounding the taking of each defendant's statement after the arrest, the defendants requested that they be allowed to see the statements to determine their voluntariness, the court in *State v Hashimoto* (1962) 46 Hawaii 183, 377 P2d 728, upheld the denial of the request, noting that the contents of such statements were not material to the question of

voluntariness.

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See *Smith v State*, 282 Ala 268, 210 So 2d 826, § 22[e].

See *McCorvey v State (Ala App)* 339 So 2d 1053, cert den (Ala) 339 So 2d 1058, § 17.

See *State ex rel. Corbin v Superior Court of Maricopa County*, 103 Ariz 465, 445 P2d 441, § 11[a].

In prosecution for introducing contraband into detention facility, district attorney should have informed defendant that he would use testimony of sheriff's officer concerning conversations he had with defendant in jail, regarding defendant's familiarity with jail procedures governing permissible items, where prosecution had agreed to comply with very broad terms of defendant's motion for discovery, which sought substance of all oral statements of defendant upon which prosecution sought to rely to support charges however, in absence of showing of prejudice to defendant, his conviction would not be reversed. *People v Wynsma (Colo App)* 541 P2d 328.

Admission by accused to cellmate which cellmate testified to before grand jury was not statement of accused subject to pretrial discovery under Rule 16(a) which is limited to statements made by accused to law enforcement officers or their agents and such statement would only be producible under Jencks Act after cellmate had testified on direct examination. *Robinson v United States (Dist Col App)* 361 A2d 199.

Trial court's error in not furnishing defendant, in response to his demand, with substance of any oral statements made by him, together with names and addresses of witnesses to statements, was harmless where record reflected that testimony given was corroborative of testimony subsequently given by defendant. *Cumbie v State (Fla App)* 327 So 2d 67.

Trial court's overruling of defendants' motion for discovery and disclosure of all statements made by them in connection with charged offenses did not deny them fair trial where they failed to meet their burden of showing how their case had been materially prejudiced and where evidence which they sought to inspect was introduced to jury in its entirety and therefore any favorable evidence was made available to jury. *Tarplin v State (Ga)* 222 SE2d 364.

Defendant charged with carrying concealed deadly weapon could not discover prior to trial statement purportedly made by him during noncustodial questioning in which police officer reported that defendant said he had permit to carry gun. *Jordan v State (1983)* 166 Ga App 417, 304 SE2d 522.

Denial of opportunity of defense counsel to examine alleged confession or admission made by defendant to police officers after his arrest did not constitute violation of constitutional rights where defendant did not show that he was entitled to examine statement during hearing held for purpose of deciding whether admission or confession was freely and voluntarily given and where contents of statement were read to jury when defense counsel requested that witness read it. *Sims v State (1978)* 144 Ga App 825, 242 SE2d 745.

Court's refusal to order notes and reports made during defendant's interrogation to be produced at pre-trial hearing was not prejudicial where they were offered in rebuttal testimony of police officer, were of little importance to case, and had no relation to issues involved. *People v Peter*, 55 Ill 2d 443, 303 NE2d 398, cert den 417 US 920, 41 L Ed 2d 225, 94 S Ct 2627.

In prosecution for armed robbery, court rule required prosecution to disclose existence of statements made by defendant to parole officer and existence of transcript of defendant's parole revocation hearing. However, defendant's right to object to use of transcript was waived when defense counsel withdrew objection made during cross-examination of

defendant by state. *People v Patterson* (1980) 88 Ill App 3d 168, 43 Ill Dec 396, 410 NE2d 396.

See *People v Lighting*, 83 Ill App 2d 430, 228 NE2d 104, § 17.

See *People v Green*, 14 Ill App 3d 972, 304 NE2d 32, cert den 417 US 972, 41 L Ed 2d 1143, 94 S Ct 3179, § 11[d].

Trial judge did not err in denying defendant's pretrial request for a written transcript of that portion of a videotape which contained defendant's confession to robbery in which police officer, prior to giving of Miranda advisements and obtaining a waiver, questioned defendant to obtain background information, where defendant cited nothing in the video tape which would have supported a conclusion different from that reached by the trial judge that the pre-Miranda portion of the tape would be suppressed but that the remainder would be admitted into evidence, and where defendant was given an opportunity to transcribe the tape but never did so. *Roarks v State* (1983, Ind) 448 NE2d 1071.

Prosecutor's failure to produce pre-trial statement by defendant and prosecutor's denial of its existence were inadvertent, non-prejudicial and did not warrant reversal where statement attributed to defendant was highly inculpatory and yet State did not use it at trial, where statement was short and contained no exculpatory information and where defendant had no need of statement for purposes of preparing defense against it. *Lagenour v State* (1978, Ind) 376 NE2d 475.

State complied with pre-trial discovery order under Kentucky statute, where trial court held hearing in chambers out of presence of a jury on introduction in evidence of tape recordings between defendant and state witness and permitted counsel for defendant to examine state police officer about manner of recordation of tapes and had tapes played in presence of defendant and counsel. *Deskins v Commonwealth (Ky)* 512 SW2d 520, cert den 419 US 1122, 42 L Ed 2d 822, 95 S Ct 806.

In criminal prosecution, defendant was not entitled to obtain contents of oral statement made by him to private citizen, where evidence was not of exculpatory nature even though state planned to use statement at trial. *State v Joseph* (1980, La) 379 So 2d 1076.

State was not required to disclose statement defendant had made where, although state is required to produce defendant's written confessions, such statement was exculpatory in nature and state is not required to disclose existence of exculpatory statement in advance of trial if statement is not suppressed and is later disclosed during progress of trial; nor was defendant entitled to information concerning any physical evidence relating to crime, including fingerprints and analysis of fingerprints nor was he entitled to list of witnesses state intended to call during trial. *State v Chase (La)* 327 So 2d 391.

Pursuant to discovery rule, state was not required to furnish defendant with substance of statements given by defendant to one who was not agent of state. *McDowell v State*, 31 Md App 652, 358 A2d 624.

Defendant was not entitled to pretrial discovery or inspection of statement by him to government witness where witness was not government agent. *Funderburk v State*, 12 Md App 481, 280 A2d 4.

There was no error in denying defendant information concerning oral confessions given by him to various police officers where some of his statements were furnished to him and these turned out to be substantially same as testimony of police officers at pretrial hearing on motion to suppress confessions; moreover, granting of such motion was discretionary with trial judge and no abuse of discretion was shown. *Com. v Therrien (Mass)* 269 NE2d 687.

Admission of oral confession was not discovery violation, even though State had failed to submit oral confession upon defendant's discovery request; suppression hearing served the purpose of disclosing the existence of the oral confession and the State's intended use of it against defendant, defendant also made written confession which was essentially the same as oral confession, and defendant had ample opportunity to disclose to his attorney that he had given an oral

confession, thereby giving his attorney plenty of time for preparation of defense in light of confession. Uniform Circuit and County Court Rule 9.04. *Wimberly v. State*, 839 So. 2d 553 (Miss. Ct. App. 2002).

Defendant was not entitled to automatic disclosure of his purported confession prior to trial, where defendant failed to submit written request for disclosure as required by court rule. Uniform Circuit and County Court Rule 9.04, subd. A, par. 2. *Erving v. State*, 815 So. 2d 434 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion, in prosecution for stabbing of boy, in not suppressing evidence of defendant's statement denying attack on boy, regardless of fact that defense counsel had not been timely provided with copy of statement, where defendant's trial strategy included taking stand to support his alibi defense and where introduction of his statement did not therefore per se cause him to take stand. *State v Carter* (1978, Mo) 572 SW2d 430.

Although defendant was entitled to discovery of tapes of three recorded conversations between defendant and police officer made after he was arrested, it would have been fruitless to order state to disclose material since tapes containing conversations had been erased, and trial judge acted properly in denying motion that case be dismissed but in excluding any testimony by police officer as to any information obtained from defendant during taped conversations. *State v Smith* (1983, Mo App) 650 SW2d 5.

See *State v Williams*, 183 Neb 257, 159 NW2d 549, § 17.

Denying inspection of defendant's pretrial statements was not abuse of discretion where none of defendant's statements was offered in evidence at trial. *Mears v State* (Nev) 422 P2d 230, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 124, reh den 389 US 945, 19 L Ed 2d 303, 88 S Ct 299.

In prosecution for unlawful possession and sale of dangerous drug, defendant's motion for discovery of any and all statements made by him denied where there was no claim that he made any statement; but district attorney ordered to disclose whether he intended to rely on any confession or admission made by defendant after being taken into custody, and if so, defendant would be entitled, under statute, to pretrial hearing to determine voluntariness. *People v Ricci*, 59 Misc 2d 259, 298 NYS2d 637.

See *People v Johnston*, 55 Misc 2d 185, 285 NYS2d 243, § 21[a].

Pennsylvania Rules of Criminal Procedure provide that in no event shall court order pretrial discovery or inspection of written statements of witnesses in possession of *Commonwealth*. *Com. v Kantos*, 442 Pa 343, 276 A2d 830 (citing annotation).

See *Wilson v State* (Tenn Crim) 537 SW2d 446, § 11[h].

Though it was error for trial court to allow testimony by two witnesses as to incriminating statements made to them by murder defendant while they were incarcerated with defendant, in that statements were encompassed by pretrial discovery order but not disclosed to defendant prior to trial, error was harmless and did not violate defendant's due process rights where statements made to witnesses constituted only one strand in web of incriminating evidence, and defendant failed to affirmatively show how he was injured in that witnesses were extensively cross-examined by defendant in attempt to impeach them, defendant did not show that defense could have been conducted differently had he been given notice of expected testimony or effect of any such change in defense, and defendant failed to request continuance for purposes of investigation into witnesses' history or character. *Hernandez v State* (1982, Tex App 4th Dist) 636 SW2d 611.

[\*13c] Inspection denied as matter of principlen139

Apparently taking the view that an accused's confession or statement is not subject to production and inspection (at least until it is offered in evidence or used in court on trial), and without indicating that inspection by an accused of his confession or statement may be ordered under any circumstances, the courts in the following cases have refused to permit the defendant to inspect his confession or statement made after the alleged offense.

## TEXAS

*Hackathorn v Decker (CA5 Tex) 369 F2d 150, cert den 389 US 940, 19 L Ed 2d 294, 88 S Ct 301* (stating Tex law)

In *Wooley v People (1961) 148 Colo 392, 367 P2d 903*, wherein the defendant pleaded insanity, it was held that the defendant had no right to an order requiring the district attorney to turn over a copy of the defendant's confession to a physician to be used by him in conducting his mental examination of the defendant.

The defendant's motion for an order requiring the prosecution to permit his counsel to inspect an alleged signed statement which he had given to the police was held properly denied in *State v Trumbull (1961) 23 Conn Supp 41, 176 A2d 887*. Noting that in any civil action the court, upon motion of either party, may order production and inspection of papers or documents which are material to the mover's cause of action or defense and which are within the knowledge, possession, or power of the adverse party, the court concluded that although under Connecticut rules of practice, rules for civil action should apply in criminal cases insofar as they were adapted to such proceedings, the defendant in the present case was not entitled to the disclosure of his statement, since it was not shown that the facts lay exclusively within the knowledge of the prosecution. The court pointed out that the defendant must be presumed to have knowledge of the contents of the statement, that no reason had been given why he lacked knowledge upon the subject, and that any knowledge which the prosecution might have would not, under ordinary circumstances, be exclusive. Moreover, added the court, in criminal cases the accused cannot compel the prosecution to produce documents which he has made, and he is therefore not entitled to inspection of incriminating letters written by him, nor is he entitled to have produced a statement made and signed by him, even on the ground that such statement is material to his defense.

Where during the cross-examination of a detective defense counsel sought to obtain a copy of a purported statement given by the defendant to the police, it was held in *State v Marzbanian (1963) 2 Conn Cir 312, 198 A2d 721, certif den (Conn) 197 A2d 944*, that there was no error in the ruling of the trial court denying the defendant access to the statement, since the statement was part of the prosecuting attorney's file.

The defendant's request for permission to inspect, in order to properly prepare his defense, his signed statement made to the police, was denied in *State v Kupis (1935) 37 Del 27, 179 A 640*, the court stating that the granting of the request would be contrary to all practice and would lead to dangerous results.<sup>140</sup>

See *State v Furthmyer (1929) 128 Kan 317, 277 P 1019*, where the court, in holding that there was no reversible error in the denial of the defendant's pretrial request for permission to inspect written statements made by the defendant and an eyewitness to the homicide involved, pointed out (1) that while the defendant's request was made under the provision of the civil code relating to obtaining an inspection of books, papers, and documents which are to be used in evidence, that statute has not been made applicable to criminal cases, and the trial court has no power to enforce a demand for inspection of statements in the custody of the prosecuting attorney which he designs to use in the prosecution of the defendant; (2) that while the penalty provided by that statute is the exclusion of the document from evidence when the party having control of the document fails or refuses to allow an inspection, neither of the documents in question in the present case had been introduced in evidence; (3) that if the prosecution had attempted to introduce these statements in evidence, the trial court might have properly excluded them, and it might have been reversible error to deny the defendant's application for inspection; and (4) that while the defendant relied on *State v Hinkley (1910) 81 Kan 838, 106 P 1088*, *infra* § 20, the document involved in that case was the evidence taken at a coroner's inquest, which under the law was a public document and should have been on file in the office of the county clerk and subject to public

inspection.

Following the rule that a defendant is not entitled to a copy of his confession, the court in *Commonwealth v Chapin* (1956) 333 Mass 610, 132 NE 2d 404, cert den 352 US 857, 1 L ed 2d 63, 77 S Ct 75, upheld the denial of the defendant's motion for an order requiring the prosecution to produce and furnish to the defendant before trial copies of any written statements, admissions, or confessions alleged to have been signed by the defendant which were in the possession of the prosecution. Holding to the same effect are *Commonwealth v Galvin* (1948) 323 Mass 205, 80 NE2d 825, and *Commonwealth v Lundin* (1950) 326 Mass 551, 95 NE2d 661.

In *State ex rel. Robertson v Steele* (1912) 117 Minn 384, 135 NW 1128, the court, following the common-law rule that a defendant in a criminal case is not entitled to be furnished, prior to trial, evidence the prosecution has against him, reversed an order requiring the prosecuting attorney to furnish the defendant with a copy of statement previously made by the defendant. The court added that even if it was conceded that the order in question was a discretionary one, the record did not sustain the trial court in granting it.

See *State v Hancock* (1937) 340 Mo 918, 104 SW2d 241, where it was held not error to deny the defendant's request, made during the cross-examination of a police officer, for permission to see statements of the defendant which had been made orally to the police and reduced to writing by a stenographer where it appeared that the officers present at the time of the making of the statements had testified concerning the oral statements made by the defendant, and that the prosecution had made no use of any written statement demanded by the defendant nor did the officers purport to testify as to the contents of the written statements.

In *People b Donnelly* (1953) 204 Misc 556, 124 NYS2d 72, the defendant's motion for the production of a statement made by him shortly after the alleged offense was denied, the court stating that the defendant's statement should be peculiarly within his knowledge that "no unusual circumstances would warrant production of the statement," that public policy does not indicate the necessity to compel the discovery of such document in the furtherance of justice, that the prosecution in a criminal case already has heavy burdens, such as the presumption of innocence, and that it would not seem that the courts should add to that heavy burden by letting the defendant see the prosecution's case prior to trial in a criminal matter.

In *People v Cox* (1960) 24 Misc 2d 998, 202 NYS2d 607, the defendant's motion for an order directing the district attorney to furnish him with a copy of a statement which he had voluntarily given to the district attorney was denied, the court stating that "a defendant is not entitled to a pretrial inspection of a statement made by him to the police or the prosecuting authorities."

See also *People v Ulisano* (1961) 28 Misc 2d 592, 215 NYS2d 800, where the defendant's pretrial application for a copy of the statement given by him to the police was denied for the reason that such relief is only granted under the statute providing for copies of statements or depositions taken on a preliminary examination in the Special Sessions Court.

Where the defendant, indicted for the crime of perjury in testifying before a grand jury, moved for discovery and inspection of evidence gained by electronic eavesdropping of his conversation with his attorney concerning the matter about which he was alleged to have lied to the grand jury, the court in *People v Golly* (1964) 43 Misc 2d 122, 250 NYS2d 210, denied the motion, stating that there was no general right to discovery in New York, and that the defendant would suffer no undue prejudice in awaiting trial before challenging the constitutionality of the eavesdropping evidence which he supposed would be used against him.

In *State v Yeoman* (1925) 112 Ohio St 214, 147 NE 3, it was held that defendant was not entitled to pretrial inspection of a written confession signed by her and in the possession of the prosecuting attorney. The court, in concluding that a denial of such inspection would not seriously interfere with the rights of the defendant, observed: "If the prosecuting attorney, after proof that the confession in his possession was signed by the defendant, should offer it as evidence

tending to establish proof of guilt, or should examine a witness in relation thereto, defendant's counsel could then make a demand for it, and it would be the duty of the court to submit the written confession for inspection by counsel; but the defendant has no right to demand or compel the inspection or copy of a signed confession unless the state attempts to use it at the trial."

The defendant's contention that the trial court committed error in overruling his pretrial motion to require the prosecution to produce, for his inspection, a statement taken from him by the police was rejected in *State v Johnson* (1950, App) 57 Ohio L Abs 524, 94 (ne2d 791, reh den 58 Ohio L Abs 334 96 NE2d 604, app dismd 154 Ohio St 236, 43 Ohio Ops 41, 94 NE2d 797, the court holding that the defendant had no right to compel the prosecution to produce a written confession made by him, and that the Ohio Code of Civil Procedure providing for the right of a party to books or documents in the possession of the other party has no application to criminal cases.

Relying on *State v Yeoman* (Ohio) supra, the court in *State v Potts* (1953, App) 69 Ohio L Abs 77, 124 NE2d 180, also upheld the denial of the defendant's pretrial motion for permission to inspect confession.

In *State v Thomasson* (1950, App) 46 Ohio Ops 402, 58 Ohio L Abs 402, 97 NE2d 42, the denial of the defendant's motion, made at the beginning of trial, for the production of statements made by him to the police and to the prosecuting attorney was upheld, the court stating that if found no authority requiring the prosecuting attorney to submit to defense counsel statements made by the defendant to the police and to the prosecuting attorney which were in the possession of the prosecuting attorney. Also holding that the defendant was not entitled to inspect or copy any written statements or confessions made by him which were in the hands of a prosecuting attorney is *State v Major* (1950, CP) 60 Ohio L Abs 271, 101 NE2d 397.

The denial of the defendant's request for permission to examine his confessions before they were admitted in evidence was upheld in *Witham v State* (1950) 191 Tenn 115, 232 SW2d 3, the court stating that an accused cannot compel the prosecution to produce documents which he has made, and that he is therefore not entitled to inspection of incriminating letters written by him, nor is he entitled to have produced a statement made and signed by him even on the ground that such statement is material to his defense. The court also noted that the general rule is that an accused has no right to inspection or disclosure of evidence in the possession of the prosecution.<sup>141</sup>

In *Davis v State* (1925) 99 Tex Crim 517, 270 SW 1022, the trial court's refusal at the beginning of the trial to permit the defendant to inspect his confession was upheld, the court noting that it was advised of no law which would require the trial court at that stage of the proceeding to command the prosecution to deliver the confession to the defendant for inspection, and that when the prosecution offered it in evidence, the defendant was then entitled to inspect it in order that he might offer objections, if any, to its introduction.

Noting that the writing called for by the defendant was a private paper, and stating that such paper becomes subject to the defendant's inspection only when used before the jury by the prosecution in some way so as to make its contents an issue, the court in *St. Clair v State* (1926) 104 Tex Crim 423 284 SW 571, upheld the denial of the defendant's motions, made during the trial, for the production of certain written statements made by him. The court pointed out that it was not shown in the record that the prosecution had asked any questions relative to the statements in question, nor that it had exhibited them or referred to them in any harmful way or otherwise before the jury. Holding to the same effect are *Goode v State* (1909) 57 Tex Crim 220, 123 SW 597, and *Avery v State* (1938) 135 Tex Crim 557, 121 SW2d 992.

Where a written confession made by the defendant was not offered in evidence at the trial and no limitation was placed by the trial court on the examination of the defendant or any other witnesses with reference to such statement, it was held in *Pierce v State* (1928) 109 Tex Crim 503, 5 SW2d 516, that there was no error in refusing to grant the defendant's motion for production of the confession during the trial.

In *Freeman v State* (1958) 166 Tex Crim 626, 317 SW2d 726, a prosecution for murder, wherein the defendant's sole

defense was that of insanity, the court held that it was not error to deny the defendant's motion, filed prior to the sanity hearing and main trial, to require the district attorney to produce for the defendant's inspection his confession and reports of certain named doctors, the court following the rule that the prosecution is not required to furnish the accused with statements of witnesses, exhibits, or confessions for the purpose of pretrial inspection.

In *Dowling v State* (1958) 167 Tex Crim 438 317 SW2d 533, cert den 358 US 886, 3 L ed 2d 114, 79 S Ct 127, the court, following the rule that the defendant is not entitled to pretrial inspection of his confession, said that a rule so well-established in Texas should not be abandoned without legislative sanction.

The denial of the defendant's request for the production of his confession was also upheld in *Welch v State* (1963, Tex Crim) 373 SW2d 497, notwithstanding the defendant's contention that such production was necessary because the confession might have proved helpful to a psychiatrist who had examined him. The court pointed out that the psychiatrist appeared to have all of the information which he would have obtained by reading the confession, that he had testified that he had relied upon information received from the defendant, the hypothetical questions were propounded to him covering all phases of the evidence, that there was not showing that he desired to see the confession, and that his testimony clearly showed that he did not need it to form his opinion that the defendant was insane.

In *State v Clark* (1930) 156 Wash 543, 287 P 18, the defendant's complaint on appeal from a judgment of conviction that he was not permitted to inspect a sworn statement obtained from him by the prosecuting attorney was held not sustainable, the court pointing out that the prosecution did not make any use of the statement on the trial of the defendant, and that if the defendant could disclose information to the prosecuting attorney, he certainly could have given the same information to his counsel. The court added that if the prosecution had introduced the statement to impeach the testimony of the defendant, a different question might have been presented.

For other cases wherein an accused's confession or statement, made after the alleged offense, was held not subject to production and there was no expression of any opinion as to whether inspection by an accused of his confession or statement may be ordered under proper circumstances, see the following:

#### ARIZONA

*Cochrane v State* (1936) 48 Ariz 124, 59 P2d 658, disapproved on another ground *Kinsey v State* (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3, supra § 9[c], footnote 1

#### COLORADO

*Silliman v People* (1945) 114 Colo 130, 162 P2d 793, supra. § 9[c], footnote 12

#### FLORIDA

*Williams v State* (1940) 143 Fla 826, 197 So 562  
*Ezzell v State* (1956, Fla) 88 So 2d 280, both supra § 11[c]  
*Peel v State* (1963)m Fla App) 154 So 2d 910, supra § 11[c].

#### KENTUCKY

*Kindr v Commonwealth* (1955, Ky) 279 SW2d 782, supra § 3

## OHIO

*State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE 2d 684, supra § 9[c], footnote 16  
*State v Cope* (1946) 78 Ohio App 429, 34 Ohio Ops 171, 46 Ohio L Abs 528, 67 NE2d 912, supra § 9[c], footnote 11  
*State v Strain* (1948) 84 Ohio App 299, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109, supra § 9[c], footnote 11

## TEXAS

*Smith v State* (1951) 156 Tex Crim 253, 240 SW2d 783, supra § 3  
*Lopez v State* (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213, supra § 3  
*Dagley v State* (1965, Tex Crim) 394 SW2d 179, infra § 25[o]

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In some Pennsylvania cases it was held that the trial court had no discretionary power to permit a defendant to inspect his confession or statement. See *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140; *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35; *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167; *Commonwealth v Graham* (1955, Pa) 42 Del Co 313, all supra § 5[a].

As to a defendant's right to inspection of his confession or statement in Pennsylvania, attention is also called to *Commonwealth v Butler* (1961) 405 Pa 36, 173 A2d 468, cert den 368 US 945, 7 L ed 2d 341, 82 S Ct 384, reh den 368 US 972, 7 L ed 2d 402, 82 S Ct 450, supra § 9[c], footnote 13, wherein the court upheld the denial of the defendant's request to inspect his statement which was identified during the trial, but was not offered in evidence.

It should be noted, however that these holdings are in conflict with the decision of the Pennsylvania Supreme Court in *Commonwealth v Hoban* (1952, Pa) 54 Lack Jur 213, supra § 5[a], and that they were rejected in *Commonwealth v Stepper* (1952, Pa) 54 Lack Jur 205, supra § 13[a].

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Defense discovery request for "A copy of any and all exculpatory and/or inculpatory written or recorded or taped statements and summaries of any oral statements made by the Defendant to a Prosecuting Attorney, his assistants or any law enforcement officer" did not give rise to prosecutorial duty to disclose letter written by defendant to friend while both were in custody few days before trial. *People v Lytal* (1982) 119 Mich App 562, 326 NW2d 559.

Defendant's statement to officer when arrested "that he was there, but he didn't rob the old lady" was not disculpable as statement to which People "intend to offer at trial," but statement was properly admissible where defense counsel opened door by cross-examining officer as to whether there ever came time when defendant "denied his involvement in this" and witness responded in affirmative, thereby entitling prosecutor on redirect to question witness as to exact words that defendant used. *People v Goodson* (1982) 57 NY2d 828, 455 NYS2d 757, 442 NE2d 54.

State is not required to furnish accused with statement of witnesses, copies of reports, or his written statements, for purpose of pretrial inspection. *Hackathorn v State* (Tex Crim) 422 SW2d 920.

[\*13d] Cases making distinction between written confession and other types of confessions; notes or memoranda

relating to oral statements.<sup>142</sup>

It is well established in Louisiana that an accused is entitled to inspection of a written confession made by him, but not to any other types of confessions or statements.<sup>143</sup>

This Louisiana rule was said to have been first adopted in *State v Dorsey* (1945) 207 La 928, 22 So 2d 273, wherein an order denying the defendant's pretrial motion to examine and copy a written confession allegedly made by him which was then in the possession of the prosecuting attorney was reversed. Rejecting the prosecution's contention that a written confession in the hands of the district attorney was a public record within the meaning of the Public Records Act providing that public records held by any sheriff, district attorney, or police officer as evidence in the investigation for or prosecution of a criminal charge were not subject to inspection until after such records had been used in open court or the criminal charge had been finally disposed of, the court concluded that to deny an accused a pretrial inspection of his written confession was tantamount to depriving him a fair trial and was in violation of his constitutional rights. The court added, however, that it did not intend to overrule the prior jurisprudence of Louisiana, particularly the earlier cases in which the defendant was denied pretrial inspection of written confessions of codefendants, written statements of witnesses, or police reports in the hands of a district attorney.

The Louisiana rule that an accused is entitled to inspection of a written confession made by him was also recognized in *State v Simpson* (1949) 216 La 212, 43 So 2d 585, cert den 339 US 929, 94 L ed 1350, 70 S Ct 625; *State v Alleman* (1950) 218 La 821, 51 So 2d 83; *State v Shourds* (1954) 224 La 955, 71 So 2d 340.

See also *State v Haddad* (1952) 221 La 337, 59 So 2d 411, where the denial of the defendant's request, during the trial, for an order requiring the prosecuting attorney to produce wire recordings of certain statements made by the defendant was upheld, the court pointing out that the withholding of the defendant's statements could afford him no cause for complaint in view of the fact that the prosecution did not offer the statements in evidence or refer to them in any manner; and that hence the defendant could not possibly have been prejudiced in any way.

In *State v Di Vincenti* (1954) 225 La 689, 73 So 2d 806, it appeared that during the course of an investigation of the crime charged against the defendant a tape recording was made of conversation between the defendant and another person; that for his convenience in the preparation of the state's case, the prosecuting attorney had prepared a written transcript of the recorded conversation; and that the defendant and his attorneys were permitted, on a pretrial prayer foroyer, to listen to the entire recording, but the trial judge refused to order the prosecuting attorney to furnish the defendant a copy of the written transcript of the recording. In holding that there was no error in refusing to order the production of a copy of the written transcript, the court pointed out that the transcript did not constitute a written confession of which the defendant was entitled to a pretrial view; that it amounted to no more than notes or memoranda, made for the use of the prosecuting attorney, which merely recited some of the contents of the confessions; and that since the defendant was granted access to the recording, he could have made his own written transcript had he desired.

In at least one case it was indicated that the Louisiana rule permitting inspection of a written confession is applicable only where such confession is to be used as evidence by the prosecution at the trial. Thus, in *State v Labat* (1954) 226 La 201, 75 So 2d 333, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144, it was held that the refusal of the trial judge to grant the defendant a pretrial inspection of his written confession was not error where the ruling was based on the prosecution's answer that it did not intend to offer the confession in evidence. The court said that since the prosecution did not rely on or offer in evidence the written confession, this document was no more than a written statement of a witness or a police report in the hands of the prosecuting attorney to be used by him in the preparation of the case.

Stating that the ruling in *State v Dorsey* (La) supra, does not apply to oral confessions made by a defendant, the court in *State v Bickham* (1960) 239 La 1094, 121 So 2d 207, cert den 364 US 874, 5 L ed 2d 98, 81 S Ct 123, upheld the trial court's refusal to order that any verbal statements made by the defendant should be reduced to writing and submitted to

him. The trial judge's refusal to grant the defendant's prayer for oyer of an oral statement or confession was also upheld as proper in *State v Martinez* (1952) 220 La 899, 57 So 2d 888, cert den 344 US 843, 97 L ed 656, 73 S Ct 58, and *State ve Lea* (1955) 228 La 724, 84 So 2d 169, cert den 350 US 1007, 100 L ed 869, 76 S Ct 655.

The denial of the defendant's pretrial request for permission to examine wiretap recordings of his telephone conversations which were made by the police during their investigation of the crime charged against the defendant was upheld in *State v Pailet* (1964) 246 La 483, 165 So 2d 294, the court noting that except for a written confession of the accused, all evidence relating to a pending criminal case which is in the possession of the prosecution is privileged and not subject to inspection by the accused unless and until it is offered in evidence at the trial.

A judgment of conviction was annulled, and the case remanded for a new trial, in *State v Simien* (1965) 248 La 323, 178 So 2d 266, on the ground, inter alia, of error in the trial court's refusal to order the production of an alleged written statement of the defendant and to examine it to determine whether it was in fact an admission or confession which the defense was entitled to inspect. Pointing out that an oral confession of the defendant had been used to establish his guilt, and that at the time of the motion, the district attorney admitted that he would use the statement if the defendant took the stand and gave contradictory testimony, the court said that under the circumstances of the case the trial court should have examined the statement in question as requested by the defense, and that if it, upon such examination, found that the statement was in fact a confession or admission, it should have permitted the defense to see the statement.

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In at least one New York case it has been held that notes or memoranda relating to an oral admission are not subject to inspection. Thus, in *People v Riley* (1965) 46 Misc 2d 221, 258 NYS2d 932, wherein the prosecution notified defense counsel that an admission allegedly made by the defendant would be offered in evidence at the trial, whereupon the defense requested a copy of the alleged admission, but the prosecution refused, stating that the admission was not in writing, and thereupon the defendant applied to the court for an order directing the prosecution to furnish him with a copy of the alleged admission before taking a position as to whether he desired a hearing on the issue of the voluntariness of the admission, the court, denying the defendant's application, held that the rule permitting pretrial or prehearing discovery of a confession or admission has reference only to confessions or admissions written by the defendant himself or signed by him or in such question-answer form as would be admissible as an exhibit upon the trial after the giving of qualifying testimony, and that notes or memoranda relating to an oral admission are not admissible in evidence and are not subject to inspection. The court pointed out that where a defendant has allegedly made an oral admission, whether or not a police officer has made a note thereof or given the substance or content thereof in some paper for the use of the prosecuting attorney, there is no "copy" which can be furnished to the defendant in advance of the testimony to be elicited at the hearing, and that actually, an alleged oral admission has no legal existence except when and as testified to by the witness.

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For Illinois cases dealing with a statute providing that an accused is entitled only to a copy of a written confession, see § 11[d], supra.

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Felony murder defendant was not denied fair trial by state's failure to disclose, pursuant to pretrial discovery order, unrecorded oral statement made by defendant to detective and original notes used by detective to write up defendant's statement, statement of prosecution witness made to police, and test results from analysis of defendant's jacket which

showed presence of blood and human tissue which defendant had told detective was catsup, since, even if defendant would not have testified had he known of unrecorded oral statement and jacket test results, due process protection applies primarily in field of exculpatory rather than inculpatory evidence and none of evidence was exculpatory, detective was prevented from testifying to "catsup" statement by defendant's motion to exclude, pretrial discovery order did not include production of unrecorded oral statement by defendant or refer to statements made by witnesses other than defendant, there was no evidence that state was ever in possession of detective's notes or knew of defendant's unrecorded oral statement so as to be in position to suppress evidence, and defendant had no right to production of detective's notes in that they were work product. *Rogers v State* (1982, Ala App) 417 So 2d 241.

Trial court did not abuse discretion in denying motion for discovery of defendant's oral statements made before trial, where no written statements of defendant were introduced during trial and only argument made on appeal as to prejudice to defendant by denial of motion was in connection with oral statement of defendant that he was in company of codefendant from approximately 12 midnight on evening in question until both were apprehended by police at 3:50 a.m. *State v Rogers*, 4 Ariz App 198, 419 P2d 102.

Whenever any oral statement has been made by defendant and that fact is known to prosecution, such statement is proper subject of discovery and inspection; thus, trial court erred in ruling that since defendant's oral statement had not been reduced to writing, it need not have been produced upon motion for pretrial discovery. *People v Campbell*, 27 Cal App 3d 849, 104 Cal Rptr 118.

See *Smith v State* (Del Sup) 317 A2d 20, § 11[b].

All statements by defendant directly to government agents were discoverable under discovery rules, however they were recorded, including transcript of policeman's grand jury testimony. *Rosser v United States* (1977, Dist Col App) 381 A2d 598.

Omission from discovery responses by prosecution of oral exculpatory statement made by defendant to police was not prejudicial to defendant's preparation of case. *Bush v State* (Fla App D3) 341 So 2d 534.

Where police officers made informal notes of their own as to oral statements made by defendant soon after his arrest, but there was no attempt or pretense to reduce such notes, either then or thereafter, to verbatim statement of defendant, such nonverbatim notes, in and of themselves, did not constitute substantive evidence subject to discovery, but were, on other hand, work product of officers. *Darrigo v State* (Fla App) 243 So 2d 171.

See *State v McCall* (Fla App) 186 So 2d 324, § 11[c].

State was not required to inform criminal defendant that it expected to use testimony of government agent with respect to agent's interview of defendant and unfavorable admission by defendant where the defendant received the entire written investigative report and where the defendant had ample opportunity to cross-examine the agent. *Hudson v State*, 237 Ga 443, 228 SE2d 834.

In prosecution for murder, prosecution's failure to disclose an oral statement by defendant did not preclude admission of testimony as to the statement, where, although prosecutor's omission was contrary to mandatory state Supreme Court rule, there was no showing of surprise or prejudice and defendant proceeded with trial rather than request continuation for investigation. *People v Ferguson* (1981) 102 Ill App 3d 702, 57 Ill Dec 958, 429 NE2d 1321, cert den (US) 74 L Ed 2d 133, 103 S Ct 159.

Reversible error occurred where, despite fact defense counsel had filed discovery motion requesting prosecution to furnish any statements made by accused, police officer testified at trial to statement by accused as to which defense counsel was not notified; contention by state that under court rules it had no duty to reduce oral statement to writing

merely for purpose of disclosing substance of such statement was without merit. *People v Boucher* (1978) 62 Ill App 3d 436, 19 Ill Dec 675, 379 NE2d 339.

See *People v Manley*, 19 Ill App 3d 365, 311 NE2d 593, § 11[d].

Where defendant made oral statement to detective following his arrest, longhand notes made by detective could not be construed to be written statement within meaning of statute and thus it was not error to permit detective to testify from such notes even though they had not been delivered to defendant's counsel in accordance with pretrial order for discovery. *State v Bircher* (1978, Kan App) 573 P2d 1128.

Trial judge properly refused defendant pretrial discovery of any oral inculpatory statements. *State v Alexander* (1977, La) 351 So 2d 505.

Trial judge did not err in refusing to order production prior to trial of written memorandum made by assistant district attorney concerning oral exculpatory statement previously made by defendant and in refusing to order disclosure on day of trial content of oral exculpatory statement. *State v Sheppard* (1977, La) 350 So 2d 615.

See *State v Hodges* (1977, La) 349 So 2d 250, cert den (US) 55 L Ed 2d 779, 98 S Ct 1262, § 25[b].

State was not required to produce oral inculpatory statements of defendants in response to pre-trial prayer for oyer. *State v Nix* (La) 327 So 2d 301.

In prosecution for murder, trial court's failure to require state to produce pretrial oral inculpatory statements of accused in its possession was not reversible error. *State v Berry* (La) 324 So 2d 822.

Oral confession was not subject to pretrial discovery. *State v Nelson* (La) 306 So 2d 745.

Denial of defendant's request that state produce oral statements made by him to police before trial was proper; discovery by defendants in criminal cases is greatly restricted, and prior decisions allowing pretrial inspection of confessions were specifically limited to written and taped ones. *State v Watson* (La) 301 So 2d 653 (citing annotation).

Accused was entitled to discovery of tape recording of conversation between himself and police informer in which accused admitted his participation in crime charged, recording having been made by police in adjoining room, such recording not being an "oral" statement or confession of accused. *State v Bendo* (La) 281 So 2d 106.

Defendant was not entitled to pretrial discovery of oral confessions or inculpatory statements, nor was he entitled to such discovery of copies of technical or laboratory reports, or examination or description of objects removed from scene of crime, or pictures of scene. *State v Frezal* (La) 278 So 2d 64.

Although accused is entitled to pretrial inspection of his own written or video-taped confession, he may not demand production of his oral statements or confessions. *State v St. Amand* (La) 274 So 2d 179.

Trial court properly denied defendant's motion for pretrial inspection of any oral confessions, statements, or admissions that he may have made. *State v Gibson* (La) 271 So 2d 868.

Defendant is not entitled to pretrial discovery of his oral statements. *State v McLeod* (La) 271 So 2d 45.

State is only expected to furnish accused with his own written or video tape confessions, and pretrial inspection of oral confessions, police reports, and the like, is not required. *State v Cripps*, 259 La 403, 250 So 2d 382, overruled on other grounds, *State v Lovett* (La) 345 So 2d 1139.

Although trial judge may have erred in denying pretrial inspection of tape recordings of defendants' confessions on ground that such confessions were oral statements, since videotape recorded confession constitutes better record than written confession, ruling was of no importance where district attorney, in response to motion for bill of particulars, had offered to make recordings available to defense counsel and to give opportunity to transcribe same. *State v Douglas*, 256 La 572, 237 So 2d 382.

It is well settled in Louisiana jurisprudence that the rule which permits a pretrial inspection by an accused of his written statements does not apply to oral confessions. *State v Pesson*, 256 La 201, 235 So 2d 568.

See *State v Sherburne (Me)* 366 A2d 1127, § 11.

Prosecutor's failure to disclose to defense, defendant's oral statement not reduced to writing did not require mistrial, where no prejudice was shown. Although possibly not required by precise language of discovery rule, prosecutors should make disclosure of substance of defendant's oral statements not reduced to writing when written statements of their witnesses are delivered. *Commonwealth v Lapka (1982)* 13 Mass App 24, 429 NE2d 1029, app den 385 Mass 1103, 440 NE2d 1174.

Any oral statement made by defendant which has been summarized, abridged, referred to or reflected in any book or paper in possession of law enforcement personnel is to be regarded as written or recorded statement subject to discovery; however, unrecorded oral statements were not discoverable where defendant failed to make satisfactory showing of materiality and reasonableness in any of his supporting papers. *People v Daniels (Misc)* 371 NYS2d 595.

See *People v Harrison*, 81 Misc 2d 144, 364 NYS2d 760, supra § 11[m].

Defendant had right, under statute, to disclosure of his written or recorded statements; defendant's request for disclosure of his oral statements was, under circumstances, highly relevant and material to his defense, and district attorney was directed to reduce to writing and to disclose substance of defendant's oral statements not already written or recorded which he intends to use as evidence or for impeachment or which directly or indirectly resulted in obtaining physical evidence, and to give particulars as to time and place and to whom statements were made, but disclosure of res gestae statements was not required. *People v Utley*, 77 Misc 2d 86, 353 NYS2d 301.

Copies of written or recorded statements made by defendant to law enforcement officers were discoverable under statute, but oral statements were not discoverable. *People v Gaissert*, 75 Misc 2d 478, 348 NYS2d 82.

Motion to require district attorney to furnish defense counsel with copy of any and all written statements of defendant, including copy of any transcript of question-and-answer statement given by defendant to law enforcement authorities, was granted; however, oral admission has no legal existence until and as testified to by witness, and therefore, motion was denied with respect to oral statements. *People v Cusano*, 63 Misc 2d 906, 313 NYS2d 833.

Court erred in denying defendant's request that he be furnished with transcript of recording made while being questioned by police immediately following his arrest; defendant had right to use that transcription to see if it could be helpful in attempt to establish that admissions sought to be introduced in evidence by state were not voluntary admissions but were obtained through improper methods. *People v Robles*, 29 App Div 2d 751, 287 NYS2d 100.

See *Curtis v State (Okla Crim)* 518 P2d 1288, § 18.

Discovery of unrecorded comments is not always necessary for due process; hence, trial court's refusal to grant mistrial on prosecution's failure to disclose oral statements made by defendant which were not contained in police reports was not reversible error in absence of showing of prejudice. *State v Curtis (Or App)* 530 P2d 520.

Trial court erred in refusing to grant new trial to defendant convicted of third degree murder where prosecution was permitted to impeach defendant's credibility through use of police report of defendant's oral statement, even though prosecution had denied existence of such report and had failed to make it available to defendant; trial court order requiring disclosure of such statement was properly entered under rule of criminal procedure then in effect where it determined, in absence of challenge by prosecution, that exceptional circumstances and compelling reasons existed so as to justify discovery of oral statements. *Commonwealth v Jenkins* (1978) 476 Pa 467, 383 A2d 195.

Defendants were not entitled to pretrial discovery of certain oral statements made by them to police and recorded by police in notes, in absence of exceptional circumstances and compelling reasons why such be permitted. *Commonwealth v Crawford* (Pa) 336 A2d 275.

It was reversible error for trial court to refuse defense request to see notes of conversation between defendant and police officer made by officer and reviewed by officer before testifying as to confession by defendant during conversation where court reviewed notes and offered to let defense see two relevant parts, but then refused to let defense see them at all after prosecutor objected, and refused defense request to have notes sealed and made part of record for appeal. *State v Hamilton* (1981, SC) 276 SE2d 784.

It was not error to refuse to furnish written copies of defendant's incriminating oral statements to defense counsel where statements had not been reduced to writing. *Bramlett v State* (Tenn Crim) 515 SW2d 895.

[\*14] Accused's statement or conversation made or had before or during offense

The refusal to grant, prior to trial, an order permitting the defendant to inspect any recordings or transcriptions of conversations between him and a police officer posing as a prospective accomplice was held error in *Cash v Superior Court of Santa Clara County* (1959) 53 Cal 2d 72, 346 P2d 407, a prosecution for attempted burglary and solicitation to commit burglary, wherein it was alleged in support of a motion for the order that the defendant did not remember the conversations in question, that he had reason to believe they were recorded, and that inspection and copies of the recordings were necessary to refresh his memory and to enable him to prepare his defense. Observing that the basis for requiring pretrial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial, and that although there is a possibility that a defendant may be acting in bad faith and may be seeking merely to acquire advance knowledge of the details of the prosecution's case with a view to shaping his defense accordingly, such a possibility is subordinate in importance to the danger of convicting the innocent and does not warrant denying a request for production where there is a sufficient showing that the request should be granted in the interest of a fair trial, the court concluded that careful study of the details of the conversations in question, particularly if there were ambiguities, would be necessary for an intelligent preparation of the defense. The court pointed out (1) that the conversations had occurred in the course of the commission of the alleged crime, and it was charged that what the defendant had said in those conversations constituted solicitation to commit burglary; (2) that recordings of the conversations were obviously composed not only of the defendant's own statements but also of those of the police officer posing as a prospective accomplice, who had testified for the prosecution at the preliminary hearing with respect to what had been said in the conversations; (3) that any effort to impeach the police officer and refute the charge of solicitation to commit burglary would depend to a great extent on the defendant's precise knowledge as to the contents of the conversations; (4) that the importance to the defendant of knowing the details of the conversations must be considered in connection with his inability to remember what had been said; (5) that, moreover, there was a possibility that entrapment would be a defense, and hence the sequence, as well as the nature, of the remarks made by the defendant and the police officer in the conversations would be extremely significant.

On the other hand, in *People v Tarantino* (1955) 45 Cal 2d 590, 290 P2d 505, a prosecution for extortion and conspiracy to commit extortion, wherein much of the evidence against the defendant consisted of recordings of conversations in his hotel room which were obtained by the police without his knowledge or permission, and which

related to threats, promises, and demands for money, the court held that the defendant's request for copies of transcriptions of those portions of the recordings which had not been introduced in evidence was properly denied, since the defendant did not suggest that such portions of the transcriptions contained anything relevant to the case.

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Where, in a prosecution for perjury, it was shown that the defendant had given a statement to deputy sheriffs of a county at the time of the arrest of another person for the offense of criminal negligence immediately after a fatal accident, the court in *People v Abbatoy* (1960) 21 Misc 2d 576, 198 NYS2d 22, granted the defendant's motion for permission to obtain a copy of such statement. The court said that it had read the requested statement and was of the opinion that the defendant was entitled to a copy thereof. (Apparently the statement in question was made by the defendant before the commission of the crime of perjury charged against him in the instant case.)

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See *State v Doty*, 110 Ariz 348, 519 P2d 47, § 17.

Trial court did not err in denying defendant's motion, made pursuant to statute permitting discovery of written or recorded statements or confessions, for discovery of statement made to police officers before alleged offense. *Williams v State* (Ark) 513 SW2d 793.

Even assuming prosecution erroneously suppressed material favorable to defense, such suppression was nonprejudicial, where prosecution indicated at trial that statements made by defendants to prosecution witness were to be introduced, prosecutor had stated prior to trial that there were no statements, but thought defendants were inquiring as to written statements, and where such statements, which were denied by defendants, were not incriminatory. *People v Standifer*, 38 Cal App 3d 733, 113 Cal Rptr 653.

In prosecution for possession of several drugs with intent to distribute, declarations by defendant to police at time of her arrest were properly admissible even though prosecution had not disclosed content of those declarations to defense where pretrial motion to compel disclosure by defense neither invoked discovery statute by specific reference thereto, nor made clear request that written copies of defendant's statements be furnished defense at least ten days prior to trial. *Tabb v State* (1982) 250 Ga 317, 297 SE2d 227.

Although state statute entitled defendant to discovery of any statement given by him while in police custody, statement made by defendant to victim during commission of offense was not statement required to be produced under statute. *Williams v State* (1983) 165 Ga App 69, 299 SE2d 402.

State statute allowing defendant discovery of prosecution's evidence upon proper written demand applied only to statements given by defendant while in police custody, and statement in instant case made by defendant in motel room prior to her arrest could not reasonably be characterized as custodial in nature, and did not come within discovery statute. *Yeargin v State* (1982) 164 Ga App 835, 298 SE2d 606.

In probation-revocation proceedings charging defendant with possessing with intent to distribute and sell a counterfeit substance, pretrial discovery statutes did not entitle defendant to examine and copy statements allegedly made by defendant's accomplice to undercover agents during commission of offense. *Holbrook v State* (1982) 162 Ga App 400, 291 SE2d 729.

In prosecution of husband for criminal attempt to murder his wife through use of supposed professional killer but

actually undercover police officer, defense had no right to pretrial discovery of tape recordings of conversations between defendant and officer even though defense was entrapment, and trial court properly denied Brady motion to compel discovery after in camera inspection resulted in ruling tapes contained no exculpatory material. *Howell v State* (1981) 157 Ga App 451, 278 SE2d 43.

Comparison on two documents by expert witness was properly admitted into evidence even though comparison was not submitted to defendant before trial in accordance with his discovery motion, where comparison was not made until midway through trial, and where testimony of expert witness was submitted as rebuttal to defense evidence; tape recordings of defendant's conversations before arrest and oral statements made by him to FBI agent were properly admitted into evidence even though not submitted to defendant before trial in accordance with his discovery motion, where it was not shown that tape recordings were materially favorable to defendant either or as direct or impeaching evidence, and where memoranda of statement concerning testimony of FBI agent was given to defendant before trial. *Quaid v State*, 132 Ga App 478, 208 SE2d 336.

In prosecution for murder, court did not err in allowing introduction of oral statement by one of three defendants and not disclosed by prosecution, where, even if state failed to exercise due diligence and violated mandatory rule, defendants declined court's offer of time to investigate and therefore no prejudice was shown. *People v. Patterson*, 102 Ill. App. 3d 844, 58 Ill. Dec. 542, 430 N.E.2d 574 (1st Dist. 1981).

Disclosure of oral statement made by defendant to witness prior to commission of murder was not required where prosecution was unaware that witness' testimony would include such statement until eve of trial; upon request, state has mandatory duty under court rule to disclose any oral statements made by defendant and known to state, unless failure to disclose occurs when prosecution is unaware of statement prior to trial and could not have become aware of its existence in exercise of due diligence. *People v Kradenych* (1980) 83 Ill App 3d 547, 39 Ill Dec 104, 404 NE2d 488.

It was error for state to fail to disclose to defendant, upon request, oral statements made by defendant and known to state, whether or not statements had been reduced to writing; error was harmless where defendant did not ask for continuance or opportunity to interview witness who related statements and admitted facts with which statements were, in part, concerned. *People v De Bord* (1978) 61 Ill App 3d 239, 18 Ill Dec 672, 377 NE2d 1308.

Disclosure was not called for under statute requiring state to produce list of witnesses to a defendant's oral confession, where defendant's statement to officer before shooting incident was at most admission rather than oral confession. *People v Veal* (1978) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963.

Discovery statute entitled criminal defendant to notice regarding existence of inculpatory oral statement imputed to him, with corresponding information relative to when, where and to whom such statement was made, but defendant was not entitled to discover content of statement. *State v Quimby* (1982, La) 419 So 2d 951 (not followed *State v Banks* (La App) 428 So 2d 544, cert gr (La) 433 So 2d 158).

See *State v Perkins* (La) 337 So 2d 1145, § 11.

Defendant is not entitled to production of his statements which are not inculpatory; thus, tapes of conversations between defendant and prosecution witness which did not involve any confessions or admissions of illegal acts were not producible. *State v Dimopoullas*, 260 La 874, 257 So 2d 644.

Oral statement made by robber to victim during commission of offense was not within purview of Maryland rule requiring state to furnish defendant with substance of any oral statement made by him which state proposes to produce as evidence to prove case in chief. *Austin v State*, 3 Md App 231, 238 A2d 569.

Testimony of witness, who was participant in robbery resulting in murder, that defendant, while preventing one robber

from killing another for the murder during the robbery in the cafe, said, "[I]t wasn't any sense in him. . . shooting him," was not testimony of "oral statements" that were required to be furnished before trial to defendant under *Maryland rule*. *Boone v State*, 3 Md App 11, 237 A2d 787.

See *Barton v State*, 2 Md App 52, 233 A2d 330, § 11[e].

Although earlier Massachusetts authorities were contra, defendant charged with perjury, whether before grand jury or crime commission or other body, is entitled as of right to a complete transcript of his own testimony before the tribunal where perjury allegedly occurred, sufficiently in advance of trial to enable him to prepare defense, without necessity of showing "any particularized need." *Commonwealth v Giles (Mass)* 228 NE2d 70.

In prosecution for theft by swindle and for conspiracy to commit theft, defendant was not entitled to inspect tape recording of conversation between defendant and undercover police officer where such recording did not contain exculpatory information. *State v Poganski (1977, Minn)* 257 NW2d 578.

Defendant's right to fair trial was not violated in prosecution for embezzlement by prosecutor's failure to permit discovery of notes made by state's witness during discussion with defendant where notes were neither inculpatory nor exculpatory standing alone, defendant himself knew of existence of notes, and pretrial discovery order did not mention notes. *Boteler v State (1978, Miss)* 363 So 2d 279.

Denial of motion to inspect and copy transcripts of recordings of conversations between witness for state and defendant in bribery prosecution, and for inspection of all other evidence in possession of prosecution relevant to exonerate defendant or to establish any defense available to defendant, was not abuse of discretion where court later ordered that defendant be furnished with transcript of tape recordings and defendant's counsel was given opportunity to hear recordings in entirety before they were received in evidence. *State v Novak*, 181 Neb 90, 147 NW2d 156.

See *State v Russo*, 127 NJ Super 286, 317 A2d 369, § 11[g].

Where taking facts as defendant argues them to be in his brief, government's agent did not commit any act or take any course which would be considered as an invasion of any constitutional right of defendant, pretrial hearing on matter would serve no useful purpose and defendant's motion for discovery of transcripts of defendant's conversations with third party submitted to court in camera were denied subject to audibility hearing. *People v Hochberg*, 87 Misc 2d 1024, 386 NYS2d 740.

In prosecution for possession of defaced weapon and of marijuana, accused was entitled to orders, affidavits, logs, tapes, reports, transcripts or summaries of reported telephone conversations which could possibly involve him where accused alleged that information derived from wiretap was sole probable cause for issuance of search warrant which permitted search of his home and discovery of weapon and marijuana. *People v Guerra*, 81 Misc 2d 82, 365 NYS2d 342.

See *People v Gaissert*, 75 Misc 2d 478, 348 NYS2d 82, § 13[d].

Defendant in prosecution for bribe-receiving was entitled to discover and inspect original recordings, and any transcriptions thereof, of that particular tapped telephone conversation between him and person from whom bribe was sought which was presented to grand jury that found indictment. Defendant was also entitled to discovery of recordings and transcriptions of other tapped telephone conversations between him and same person which were not presented to grand jury, since (1) they related to subject matter of indictment and under New York rules of evidence they would be available to prosecution either as evidence in chief or upon collateral issues; (2) concept of fairness inherent in due process imposes duty on prosecution to apprise defendant of evidence favorable to him and thus defendant would, at some time in trial, be entitled to inspect recordings unconditionally; and (3) special circumstances of instant case

required that he be granted inspection pretrial. *People v Nassar*, 60 Misc 2d 27, 301 NYS2d 678.

In prosecution for first degree murder and conspiracy to commit armed robbery, under statute governing defendant's right to discovery, defendant was not entitled to disclosure of statements she made to third parties which state intended to use as evidence against her, absent any indication that statements sought were made to third party who was agent of state, and defendant was not entitled to disclosure of statements of "codefendant" where trials had been severed and there was no joint trial. *State v Moore* (1980) 301 NC 262, 271 SE2d 242.

See *State v Detter* (1979) 298 NC 604, 260 SE2d 567, § 16[a].

See *Commonwealth v Brocco* (1979, Pa Super) 396 A2d 1371, § 6[b].

Statements made by defendant to undercover agent during cocaine conspiracy were not discoverable as "all relevant written or recorded statements or confessions, signed or unsigned or written summaries of oral statements or confessions made by Defendant" where the defense demand indicated that defendant was seeking confessions, statements, or summaries that had been reduced to writing or electronically transcribed, and in fact the restaurant conversation was never transcribed by pencil, pen, or electronic means. *State v Rudacevsky* (1982, RI) 446 A2d 738.

Defendant in bribery prosecution was not entitled to pretrial discovery and disclosure of statements made by him to two prosecution witnesses where neither witness was agent of state at time undisclosed statements were made. *Clariday v State* (1976, Tenn Crim) 552 SW2d 759.

In prosecution for criminal solicitation of murder, accused was not prejudiced by prosecutor's failure to reveal results of investigation which showed that accused had previously hired someone to commit murder but that person actually presented no threat of carrying out plot, where such evidence would have made no difference in outcome of trial. *Saunders v State* (1978, Tex Crim) 572 SW2d 944.

Statute providing that upon demand district attorney should furnish defendant with written summary of all oral statements of defendant which he planned to use in course of trial, included statements made to witnesses by defendant in addition to statements which were product of police interrogation and investigation. *Kutchera v State (Wis)* 230 NW2d 750.

[\*15] Accused's letter, diary, or other written material  
145

[\*15a] Letter

In some cases letters which had been written by the accused and which were in the possession of the prosecution have been held producible for inspection by the defense under the circumstances of the case.

See also *Commonwealth v Gliniecki* (1959) 339 Mass 464, 159 NE2d 657, where the court, in holding that there was no error in denying the defendant's motion for a continuance filed immediately before the trial and predicated upon an allegation that the prosecution had illegally acquired possession of certain property of the defendant, particularly some letters received by him from the victim or members of her family, said that if the defendant desired information about the contents of the letters referred to in his motion, he should have sought it by a motion to inspect.

And see *Trimble v State* (1965) 75 NM 183, 402 P2d 162, supra § 4[b], wherein it was held that the defendant's constitutional right to due process of law was violated by the prosecution's taking from him and failure to return or produce a copy of a certain letter written by him.

In *People v Wargo* (1933) 149 Misc 461, 268 NYS 400, it was held that the defendant, charged with murder, was

entitled to an inspection, with the privilege of interpretation, of certain allegedly incriminating letters in the possession of the prosecution which were claimed to have been written in the Hungarian language by the defendant to her codefendant, the court pointing out that the letters would not be competent evidence on the part of the defendant but only on the part of the prosecution; that no harm could be done to the prosecution by permitting the defendant to inspect them; that the letters were written in a foreign language, and the language used might not only be colloquial but might also call for a clear understanding of some unfamiliar dialect; and that the difficulty of such interpretation was apparent to anyone familiar with modern court procedure. Noting that where there is evidence in the possession or control of the prosecution which is favorable to the defendant, a right sense of justice demands its production for inspection by the defense unless there are strong reasons otherwise, the court said that under the circumstances of the case the letters in question were important to the defense at this stage of the proceedings in order that the defendant might properly prepare to present expert evidence as to their authenticity.

In *Cloniger v State* (1921) 91 Tex Crim 143, 237 SW 288, a prosecution for rape, it was held that where the prosecution introduced a letter written by the defendant to the prosecutrix and there were also other letters written by him to her which had been brought to court in response to a subpoena duces tecum, such letters should have been produced at the request of the defendant. The court noted that if upon inspection these letters revealed matters upon the same subject as the one introduced by the prosecution, they would have been admissible in evidence.

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On the other hand, the denial of the defendant's request for the production of a letter which had been written by the defendant to his father and which had been found by police officers along the route taken by the defendant when pursued by the officers immediately after the commission of the alleged homicide was held not error in *Langhorn v State* (1926) 105 Tex Crim 470, 289 SW 57. The court said that although the prosecution would be entitled to use the letter against the defendant if it contained incriminating evidence, the defendant did not bring himself within any rule requiring the prosecution to deliver to him such document. The court added that if the defendant wished to have the letter in a regular way, he might have had a subpoena duces tecum for it.

See also *Morrison v State* (1899) 40 Tex Crim 473, 51 SW 358, wherein the defendant argued that the trial court committed error in refusing to grant an order compelling the prosecution to produce certain letters written by him so that he might inspect them in the preparation of his defense. Pointing out that at the time of the motion for production the letters were in the hands of a witness for the prosecution, that the letters were produced upon the trial of the case, and that the defendant had the full right of cross-examination as to the letters during the trial, the court, in concluding that under the circumstances there was no error in refusing to grant the motion for production, said: "We know of no law compelling the prosecution to disclose the character and kind of evidence that it has against the defendant. Furthermore, it is not made to appear in the record before us in what way appellant's rights were injured, or that he was deprived of any substantial privilege. The evidence showed that all the letters were written by him. This being true, and uncontroverted, certainly he knew the contents of the letters, and could not claim any character or kind of surprise."

In the following cases it was also held or recognized that a letter which was written by an accused and which is in the possession of the prosecution is not subject to inspection by the defense.

#### CONNECTICUT

*State v Trumbull* (1961) 23 Conn Supp 41, 176 A2d 887, supra § 13[c]

#### KANSAS

*State v Jeffries* (1925) 117 Kan 742, 232 P 873, supra § 12  
*State v Furthmyer* (1929) 128 Kan 317, 277 P 1019, supra § 13[c]

## TENNESSEE

*Witham v State* (1950) 191 Tenn 115, 232 SW2d 3, supra § 13[c]

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See *Smith v State*, 282 Ala 268, 210 So 2d 826, § 22[e].

Letter voluntarily written by incarcerated defendant charged with trafficking in marijuana, which came to attention of state through its power to maintain discipline in detention facility, was not subject to disclosure as product of "custodial interrogation," and was admissible by State during rebuttal. *Franklin v State* (1983) 166 Ga App 375, 304 SE2d 501.

Substantial right of defendant to prepare defense was affected by state's failure to furnish defendant with copy of letter written by defendant to victim's family, which letter was received by state on morning of second day of trial, but which was not revealed to defendant until prosecutor had reopened his case, questioned victim's mother, rested, and defendant had taken stand. *State v Mitchell* (1982, La) 412 So 2d 1042.

Trial court should not have permitted introduction of inculpatory letter written by defendant from jail, where defendant had filed motion for pretrial inspection of all confessions, statements and admissions in writing made by defendant either before or after arrest and prosecution failed to produce them, even though at time of motion letter had not been written. *State v Hammler* (La) 312 So 2d 306.

Trial court did not err in refusing to impose sanction for state's failure to furnish defense letter written by accused to his ex-wife shortly after incident which gave rise to charge of assault where letter was produced on morning of trial and defense counsel did not request any protective rulings or sanctions other than exclusion of letter and permitted defendant to take stand with knowledge of state's possession of letter, then sought to preclude its use on cross-examination for impeachment purposes. *State v Landry* (1983, Me) 459 A2d 175.

[\*15b] Other materialn146

In *People v Buchalter* (1941, Co Ct) 29 NYS2d 621, the court, without discussion, permitted the defendant to make photostatic copies of the papers seized in his apartment (consisting of correspondence, hotel bills, souvenirs, and other unidentified documents) which the prosecuting attorney intended to use as evidence in behalf of the prosecution. (It was not shown what offense was charged against the defendant.)

See also *State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, supra § 3, holding that the defendant was not entitled to inspection of certain written material taken by or on the order of the prosecuting attorney from the defendant's home in connection with the prosecution of the crime charged against him.

On the other hand, the denial of the defendant's pretrial motion for permission to inspect a diary kept by him and certain notes written by him prior to the commission of the alleged offense was held not error in *Abdell v Commonwealth* (1939) 173 Va 458, 2 SE2d 293, wherein the defendant was charged with murder of his wife, the court following the rule that ordinarily the accused is not, as a matter of right, entitled to have evidence in the possession of the prosecution for inspection before trial.

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In prosecution for promoting gambling in which prosecution repeatedly failed to comply with demand for discovery of any physical evidence seized from defendants or from premises allegedly under their control, trial court would preclude use of such evidence since nature of charges, i.e., possessing gambling records, was such that discovery of requested items was vital to preparation of defense. *People v Bryant* (1980) 104 Misc 2d 157, 427 NYS2d 722.

Defendant was entitled to copies at government expense of voluminous records, books, and cancelled checks which had been seized from defendant's place of business where inspection of documents at prosecutor's office might serve to chill or impede defendant's ability to properly exercise right to discovery and inspection. *People v Feldman*, 87 Misc 2d 55, 384 NYS2d 904.

Corporation charged with offering false instrument for filing, and with grand theft, was entitled to discovery and inspection of books, records, and papers taken from it under subpoena duces tecum. *People v Leto Bros., Inc.* 70 Misc 2d 347, 334 NYS2d 298.

In prosecution for first-degree murder and first-degree sexual assault, defendant was not entitled to discovery of an accurate copy of parking ticket which he had received and paid for by check, since state's duty to disclose covers only evidence within state's exclusive possession, and evidence here was not in exclusive possession of state in that defendant knew he had been ticketed, he paid ticket by check, and cancelled check was returned to him. *State v Armstrong* (1983) 110 Wis 2d 555, 329 NW2d 386, cert den (US) 77 L Ed 2d 1304, 103 S Ct 2125.

[\*16] Statement of person other than accused<sup>n148</sup>

[\*16a] Generally

As to whether and under what circumstances an accused is entitled to inspect a statement made by a witness or any other person which is in the possession of the prosecution, the decisions are divided. In some cases it has been held or recognized that in a proper case an accused may be permitted to inspect a statement made by a witness or any other person.<sup>n149</sup> Thus, the denial of the defendant's request for pretrial inspection of statements of witnesses relating to the alleged homicide which were made to the district attorney immediately following the commission of the offense and which were either recorded on tape or taken down in shorthand was held an abuse of discretion in *Vetter v Superior Court of Sacramento County* (1961) 189 Cal App 2d 132, 10 Cal Rptr 890, where it appeared that when these witnesses were interviewed by the defendant's counsel about 44 days after the crime, they informed counsel that they had made statements to the district attorney but could not recall in detail what questions had been asked them; and that they were unable to state whether they had recalled and related to the defense counsel all of the details of the event which they had witnessed and which they had related to the district attorney. The court said that the right of a defendant in a criminal case to pretrial inspection of statements made by witnesses depends largely upon the facts of each case and generally rests within the sound discretion of the court to which the motion is addressed.

For other California cases wherein a statement made by a person other than the accused was held producible under the circumstances, see *Vance v Superior Court of San Diego County* (1958) 51 Cal 2d 92, 330 P2d 773, supra § 13[a], *Cash v Superior Court of Santa Clara County* (1959) 53 Cal 2d 72, 346 P2d 407, supra § 14, and *People v Darnold* (1963) 219 Cal App 2d 561, 33 Cal Rptr 369, cert den 376 US 927, 11 L ed 2d 623, 84 S Ct 694, supra § 8.

The view that in a proper case an accused may be permitted to inspect a statement made by a witness was also recognized in *Funk v Superior Court of Los Angeles County* (1959) 52 Cal 2d 423, 340 P2d 593; *People v Estrada* (1960) 54 Cal 2d 713, 7 Cal Rptr 897, 355 P2d 641; *People v Hollander* (1961) 194 Cal App 2d 386, 14 Cal Rptr 917;

*People v Rennie* (1962) 201 Cal App 2d 1, 19 Cal Rptr 734; *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838; *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755.

In *Commonwealth v Smith* (1965) 417 Pa 321, 208 A2d 219 (a case not within the scope of this annotation because involving an application for production of statements made by certain prosecution witnesses to the FBI which had not been released to the prosecution), the court recognized that under certain circumstances a defendant may be granted an inspection of statements made by prosecution witnesses which are in the possession of the prosecution, and said that where a defendant seeks statements made by prosecution witnesses, the fact that other similar statements made by the same witnesses have been made available to the defense for its inspection should not deprive the defendant of his right to the particular statement sought, at least in the absence of a showing that they are identical.

For cases permitting inspection of a statement made by a person other than the accused where such statement was offered, or its contents introduced, in evidence during the trial or where it was used by the prosecuting attorney in his examination of the accused or a witness, see § 9[c], supra.

Also recognizing that accused is not ordinarily entitled to pretrial inspection of statements of prospective prosecution witnesses:

#### GEORGIA

*Holton v State* (1979) 243 Ga 312, 253 SE2d 736  
*Hamby v State* (1979) 243 Ga 339, 253 SE2d 759  
*Roberts v State* (1979) 243 Ga 604, 255 SE2d 689  
*Welch v State* (1983) 251 Ga 197, 304 SE2d 391  
*Moten v State* (1979) 149 Ga App 106, 253 SE2d 467  
*Crosby v State* (1979) 150 Ga App 804, 258 SE2d 593  
*Harvey v State* (1983) 165 Ga App 7, 299 SE2d 61

#### IOWA

*State v Cuevas* (1979, Iowa) 282 NW2d 74

#### KANSAS

*State v Pierson* (1977) 222 Kan 498, 565 P2d 270

#### MASSACHUSETTS

*Commonwealth v Lewinski* (Mass) 329 NE2d 738

#### MISSOURI

*State v Chambers* (1977, Mo App) 550 SW2d 846

## NORTH CAROLINA

*State v Miller* (1983) 61 NC App 1, 300 SE2d 431

*State v Beam* (1984) 70 NC App 181, 319 SE2d 616, stay den 312 NC 86, 321 SE2d 223 and review den 312 NC 496, 322 SE2d 561

## OKLAHOMA

*Stidham v State* (Okla Crim) 507 P2d 1312

## PENNSYLVANIA

*Commonwealth v Lowery* (1980, Pa Super) 419 A2d 604

*Commonwealth v Nelson* (1983, Pa Super) 456 A2d 1383

## UTAH

*State v Dowell*, 30 Utah 2d 323, 517 P2d 1016, cert den and app dismd 417 US 962, 41 L Ed 2d 1135, 94 S Ct 3164

## WISCONSIN

*Sanders v State* (Wis) 230 NW2d 845

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Although either explicitly or by implication recognizing that in a proper case an accused may be permitted to inspect a statement made by a witness or any other person, the court in many cases refused to permit the defendant to inspect such a statement on the ground that there was no showing of circumstances warranting the requested inspection.

In *People v Ford* (1964) 60 Cal 2d 772, 36 Cal Rptr 620, 388 P2d 892, cert den 377 US 940, 12 L ed 2d 303, 84 S Ct 1342, the denial of the defendant's pretrial motion for access to a statement of an individual whom the prosecution did not intend to call as a witness was upheld, the court noting that the trial court's ruling on the question was within its discretion and that no abuse of such discretion appeared in the case.

Concluding that the defendant had shown no sufficient reason why he should have a pretrial inspection of the statement in question, the court in *Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130, upheld the denial of the defendant's pretrial motion for inspection of any statements made by an eyewitness to the crime charged against the defendant, notwithstanding that the eyewitness had been instructed by the sheriff not to talk to the defendant or his counsel about anything pertaining to the case. Pointing out that the defendant had the right to interview the eyewitness and he could learn through an interview what the eyewitness had observed, and noting that the prosecution or the sheriff may not order a witness not to talk to the defendant or his counsel, the court said that the defendant's allegation that neither he nor his attorney had been able to determine the things observed by the eyewitness at the time of the alleged offense was not alone a sufficient reason to hold that the trial court abused its discretion in not permitting a pretrial inspection of any statements made by the witness to the sheriff. The court relied on the rule that defense counsel in a criminal case have no absolute right to inspect evidence in the possession of the prosecution,

although in the interest of justice the trial court may grant pretrial discovery for good cause shown.

In *State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, the defendant's request, made during cross-examination of a prosecution witness, for permission to inspect a statement previously made by the witness to the police was held properly denied where the defendant, neither stating any reason for the request nor asserting that the witness' declarations in the statement were inconsistent with his testimony, requested to see the statement as a matter of right on the ground that "a communication of the police department, in the possession of the prosecutor, was not privileged and the defendant was entitled to inspect it." Noting that it is within the discretion of the trial court to grant or deny a defendant the right to inspect statements of prosecution witnesses in the possession of the prosecuting attorney, the court observed that "the rule denying examination of such prior statements of a state's witness to the defendant as a matter of right" is based on public policy, rather than any absolute privilege of nondisclosure.

In *McKenzie v State* (1964) 236 Md 597, 204 A2d 678, it was held that the trial court did not abuse its discretion in denying the defendant's motion for production of statements allegedly made by certain prosecution witnesses to the police, the court noting that a request for the production of documents or statements in the possession or control of the prosecution is within the bounds of discretion of the trial court.

The prosecuting attorney's refusal to exhibit to the defendant's attorney certain written statements alleged to have been made by a witness who was used by the defendant to prove an alibi claimed by him was held not error in *People v Parisi* (1935) 270 Mich 429, 259 NW 127, the court pointing out that the requested statements could have been of value to the defendant had the witness testified against him; that although the witness' name was indorsed on the information, she was one of the witnesses used by the defendant to prove the alibi claimed by him; and that the prosecuting attorney offered to furnish the statements to the defendant's counsel on condition that they be introduced in evidence by the defendant, which offer was refused. The court concluded that under the circumstances there was no error in withholding the statements from the defendant's attorney.

In *People v Maranian* (1960) 359 Mich 361, 102 NW2d 568, a prosecution for extortion, it was held not error to deny the defendant's motion, made prior to trial and at the commencement of the trial, for the production of statements made by the victim of the extortion and an alleged accomplice, memoranda and reports made by police officers in connection with the case, and all recordings of telephone conversations between the alleged extortioner and the victim of the extortion. Noting that discovery will be ordered in criminal cases where, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression, and that the moving party bears the burden of showing the trial judge facts indicating that such information is necessary to a preparation of the defense and in the interest of a fair trial, and is not sought simply as a part of a fishing expedition, the court pointed out that the trial judge in the present case had the records played out of the hearing of the jury so as to be able to determine whether the evidence was admissible, and the defendant's counsel, who was present at the time, presumably heard the information disclosed by the records; that some of the information sought could have been obtained on cross-examination of the victim at the preliminary examination; and that no sufficient showing was made to justify the granting of the broad discovery motion made by the defendant.

The denial of the defendant's request for production of a prosecution witness' statement was upheld in *State v Aubuchon* (1964, Mo) 381 SW2d 807, the court holding that a report or statement of a witness in the hands of the prosecution should be produced only if there is a satisfactory showing that the requested document is of such nature that without it the defendant's trial would be fundamentally unfair, and that the determination of whether the defendant's trial would be fundamentally unfair without the production of a report or statement sought by him rests, in the first instance, in the discretion of the trial court. The court also noted that there should be a showing of the probable materiality of the paper requested, and a mere fishing expedition is not to be permitted for prying into the prosecution's case.

In *State v Tune* (1953) 13 NJ 203, 98 A2d 881, an order denying the defendant permission to inspect statements signed by certain persons other than the defendant was upheld, the court stating that the defendant has no right to discovery of

the work product of the prosecuting attorney, such as the statements of prospective witnesses under consideration in the present case, and that only in the most exceptional cases and in the most unusual circumstances could such documents be turned over to the defendant for inspection. The court observed that to permit unqualified disclosure of all statements and information in the hands of the prosecution would defeat the very ends of justice.

Noting that the general rule is that the accused has no right to the inspection or disclosure before trial of evidence in the possession of the prosecution, and stating that to justify an exception to this rule the accused is required to present compelling reasons or exceptional circumstances, the court in *Commonwealth v Schaub (1964, Pa) 55 Luzerne Leg Reg R 49*, denied the defendant's pretrial motion for permission to hear tape recordings of statements made by the complaining witnesses. The court pointed out that the record was barren of exceptional circumstances or compelling reasons to warrant an exception to the general rule denying pretrial discovery.

The denial of the defendant's pretrial motion for production of copies of reports made by certain prosecution witnesses was upheld in *State v St. Peter (1963) 63 Wash 2d 495, 387 P2d 937*, the court concluding that the trial court did not abuse its discretion, since there was no showing that the defendant was handicapped by the refusal of production. The court noted that pretrial discovery in a criminal case rests entirely within the sound discretion of the trial court, and that its rulings will not be disturbed on appeal except for manifest abuse of that discretion.

For other cases wherein the court, although recognizing that in a proper case an accused may be permitted to inspect a statement made by a witness or any other person, refused to permit the defendant to inspect such a statement on the ground that there was no showing of circumstances warranting the requested inspection, see the following:

#### CALIFORNIA

*Brenard v Superior Court of Sacramento County (1959) 172 Cal App 2d 314, 341 P2d 743, supra § 5[a]*

#### MASSACHUSETTS

*Commonwealth v Noxon (1946) 319 Mass 495, 66 NE2d 814, supra § 5[a]*

#### MICHIGAN

*People v Fleisher (1948) 322 Mich 474, 34 NW2d 15, supra § 8*

#### MISSOURI

*State ex rel. Page v Terte (1930) 324 Mo 925, 25 SW2d 459, supra § 12*

*State v Richetti (1938) 342 Mo 1015, 119 SW2d 330, supra § 12*

*State v Engberg (1964 Mo) 377 SW2d 282, supra § 11[f]*

*State v Spica (1965, Mo) 389 SW2d 35, supra § 3*

#### NEBRASKA

*Cramer v State (1944) 145 Neb 88, 15 NW2d 323, supra § 3*

## NEW JERSEY

*State v Trantino* (1965) 44 NJ 358, 209 A2d 117, supra § 11[g]

## TENNESSEE

*Anderson v State* (1960) 207 Tenn 486, 341 SW2d 385, supra § 7

## WASHINGTON

*State v Gilman* (1963) 63 Wash 2d 7, 385 P2d 369, supra § 5[a]

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Either explicitly or by implication supporting the view that an accused is not entitled to inspect a statement made by a witness or any other person (at least until it is offered in evidence or used in court on trial), and without indicating that inspection by an accused of a statement made by any other person may be ordered under unusual circumstances, the court in other cases also refused to permit the defendant to inspect such a statement.

In *Edens v State* (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551, it was held that the defendant was not entitled to receive copies of statements which had been obtained by the prosecuting attorney from various witnesses for the prosecution, since such statements were a part of the prosecuting attorney's work papers. The court also noted that the Arkansas discovery statute did not apply to criminal cases. To the same effect is *Edens v State* (1963) 235 Ark 996, 363 SW2d 923, supra § 3.

In the following Florida cases it is held or recognized that the defendant in a criminal case is not entitled to inspection of statements of a prosecution witness which were taken by a prosecution officer in preparation for trial:<sup>n150</sup> *McAden v State* (1945) 155 Fla 523, 21 So 2d 33, cert den 326 US 723, 90 L ed 429, 66 S Ct 28; *Johns v State* (1946) 157 Fla 18, 24 So 2d 708; *Raulerson v State* (1958, Fla) 102 So 2d 281; *Urga v State* (1958, Fla App) 104 So 2d 43; *Bedami v State* (1959, Fla App) 112 So 2d 284, cert den 361 US 883, 4 L ed 2d 119, 80 S Ct 153; *Jackman v State* (1962, Fla App) 140 So 2d 627; *Peel v State* (1963, Fla App) 154 So 2d 910, supra § 11[c].

An order requiring the prosecution to produce, for inspection and copying by the defendants, all sworn statements given by prospective witnesses for the prosecution was quashed on certiorari in *State v Shouse* (1965, Fla App) 177 So 2d 724, the court stating that statements of prosecution witnesses are not ordinarily the proper subject of discovery, and that assuming, arguendo, that such statements may be required to be produced in advance of the trial under unusual circumstances or in exceptional cases, no such showing was made in the present case, since there was only a naked, general demand for production and inspection as a matter of right and for purposes not disclosed by the record.

Where, during the trial upon an indictment for murder, the defendant filed a petition for permission to examine, copy, and use, in preparation of the case, reports of the detectives who had investigated the case, written statements taken from witnesses interviewed in the case, photographs taken at the scene of the alleged crime by a police officer, and pistols and a revolver removed by a police officer from the scene of the alleged crime, and the trial judge denied the petition insofar as it sought the production of the reports of the detectives and the written statements taken from witnesses, it was held in *Bass v State* (1958) 98 Ga App 570, 106 SE2d 845, cert den 359 US 969, 3 L ed 2d 836, 79 S Ct 882, that there was no error in the trial judge's ruling. The court pointed out that the record disclosed that the

defendant was furnished a copy of a written statement made by him to police officers, and that the defendant's counsel presumably had the same opportunity to get the statements of witnesses as did counsel for the prosecution.

The denial of the defendant's motion for production of extrajudicial statements made by any and all witnesses in the case was upheld in *People v Moretti* (1955) 6 Ill 2d 494, 129 NE2d 709, cert den 356 US 947, 2 L ed 2d 822, 78 S Ct 794, the court stating that there was no duty on the part of the prosecution to furnish the defense with such extrajudicial statements.

The defendant's assignment of error based on a complaint that during the trial the prosecution did not turn over to him copies of certain statements given by prosecution witnesses to the police was held not sustainable in *People v Bailey* (1965) 56 Ill App 2d 261, 205 NE2d 756. Noting that the production of statements is restricted to impeachment purposes only, the court pointed out that defense counsel requested the production of the statements in question for informative reasons and not for impeachment purposes.

In *State v Lee* (1932) 173 La 966, 139 So 302, the denial of the defendant's application for inspection of all police reports and written statements of witnesses in the possession of the prosecution was upheld. Stating that the documents called for were not public documents but were the private property of the prosecution, the court noted that the defendant in a criminal prosecution has no right to inspection of a private document in the possession of the prosecution which is not offered in evidence.

The denial of the defendant's motion, made at the beginning of the trial, to require the prosecuting attorney to produce statements made by some of the prospective witnesses for the prosecution was held not error in *Bellew v State* (1958) 238 Miss 734, 106 So 2d 146, cert den and app dismd 360 US 473, 3 L ed 2d 1531, 79 S Ct 1430, reh den 361 US 858, 4 L ed 2d 96, 80 S Ct 43, the court noting that as a general rule an accused is not entitled to inspection of the prosecution's evidence.

The defendant's pretrial motion for inspection of all statements and reports made by persons who would testify for the prosecution at the trial was denied in *State v Williams* (1957) 46 NJ Super 98, 134 A2d 39, the court stating that if the defendant in the present case had the right to examine the statements which he sought to obtain, such right did not arise until such time as the witnesses who had made the statements or to whom the statements pertained had testified adversely to him at his trial.

Holding that the district attorney is not compelled to furnish copies of statements obtained from any source until a witness has actually been sworn for the prosecution on a trial or hearing and has testified, the court in *People v Graziano* (1965) 24 App Div 2d 682, 261 NYS2d 546, denied the defendant's pretrial motion for production of any statements made by witnesses whom the prosecution intended to call on the trial of the case.

Where a defendant, indicted for murder, moved for permission to inspect any statements made by certain persons with respect to the death of the victim, the court in *People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222, noting that the requested statements were pure hearsay and were not admissible in evidence in the present case under any theory of law, denied the motion.

The defendant's motion for permission to inspect statements, transcripts of interviews, and memoranda of conversations of any witnesses to be used in behalf of the prosecution at the trial was denied in *People v Giles* (1961) 31 Misc 2d 354, 220 NYS2d 905, where the defendant, in support of his motion, contended that under the ruling of *People v Rosario* (1961) 9 NY2d 286, 213 NYS 2d 448, 173 NE2d 881, 7 A.L.R.3d 174, cert den 368 US 866, 7 L ed 2d 64, 82 S Ct 117 (a case not within the scope of this annotation because dealing with inspection of a prosecution witness' statement during the trial for purposes of cross-examination), he would be entitled to examine all pretrial statements of the prosecution witnesses prior to the actual trial of his case. Noting that the Rosario Case held only that statements of a witness should be given to the defendant for cross-examination purposes on the trial, the court said that the Rosario Case did not hold

that the defendant should receive the prosecuting attorney's file prior to the trial for purposes of building a defense based on the prosecution's case. Holding to the same effect is *People v Mami* (1961, Co Ct) 214 NYS2d 788.

The denial of the defendant's motion to compel the prosecuting attorney to furnish to him all written statements made by any witness in the case which might then be in the possession of the attorney was held not error in *Tinker v State* (1923) 95 Tex Crim 143, 253 SW 531, the court noting that the requested statements were not before the jury.

In *Currie v State* (1925) 102 Tex Crim 653, 279 SW 834, it was held that although the prosecution had taken a written statement from one of its witnesses, it could not be compelled merely because of such fact to deliver the statement to the defendant for his inspection, since the prosecution had not used it in any way.

In *Saldana v State* (1964, Tex Crim) 383 SW2d 599, a prosecution for possession of marijuana on the charge that a certain quantity of marijuana was found under the seat of a taxi in which the defendant, with another passenger, was riding, the court upheld the trial court's denial of the defendant's motion, made prior to the trial and again at the close of the prosecution's case, for an order requiring the prosecution to produce, for his inspection, a written statement made by the passenger who was riding with the defendant in the taxi. Pointing out that the passenger had not been called as a witness to testify at the trial, the court noted that the rule permitting inspection of a prosecution witness' statement for purposes of cross-examination or impeachment after the witness has testified on direct examination at trial had no application in the present case.

See also *Crain v State* (1964, Tex Crim) 394 SW2d 165, wherein the court, in rejecting the defendant's contention that the trial court committed error in denying his pretrial motion for production of all written statements made by witnesses in connection with the case, pointed out that a psychiatric report was made available to the defense, and that in all other respects the trial court carefully followed the rules prevailing in Texas, and the defendant had shown no injury.

In *State ex rel. Byrne v Circuit Court for Dane County* (1962) 16 Wis 2d 197, 114 NW2d 114, a writ of prohibition restraining the respondent judge from issuing an order compelling the prosecution to turn over to the defendant before trial certain statements in its possession was granted, the court stating, "An occasion may arise after the commencement of the trial that will call for the production of a statement of a prosecution witness made prior to trial for impeachment purposes."

#### DELAWARE

*State v Thompson* (1957) 50 Del 456, 134 A2d 266

*Wisniewski v State* (1957, Sup) 51 Del 84, 138 A2d 333

*State v Hutchins* (1957) 51 Del 100, 138 A2d 342, all supra § 11[b]

#### DISTRICT OF COLUMBIA COURT

*Fuller v United States* (1949, Mun Ct App Dist Col) 65 A2d 589

#### GEORGIA

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, supra § 3

#### INDIANA

*Brown v State* (1959, Ind) 158 NE2d 290  
*Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, infra § 17

#### KANSAS

*State v Furthmyer* (1929) 128 Kan 317, 277 P 1019, supra § 13[c]  
See also *State v Hill* (1964) 193 Kan 512, 394 P2d 106, infra § 17.

#### LOUISIANA

*State v Dallao* (1937) 187 La 392, 175 So 4, app dismd and cert den 302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51, reh den 302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139  
*State v Simpson* (1949) 216 La 212, 43 So 2d 585, cert den 339 US 929, 94 L ed 1350, 70 S Ct 625  
*State v Martinez* (1952) 220 La 899, 57 So 2d 888, cert den 344 US 843, 97 L ed 656, 73 S Ct 58  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411

#### MONTANA

*State v Hall* (1918) 55 Mont 182, 175 P 267, supra § 12

#### NEW JERSEY

*State v Johnson* (1958) 28 NJ 133, 145 A2d 313  
*State v Reynolds* (1963) 41 NJ 163, 195 A2d 449, both supra § 11[g]  
*State v Moffa* (1960) 64 NJ Super 69, 165 A2d 219, affd 36 NJ 219, 176 A2d 1  
*State v Bunk* (1949, NJ County Ct) 63 A2d 842, supra § 13[b]

#### PENNSYLVANIA

*Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35, supra § 5[a]

#### TEXAS

*Hill v State* (1958) 167 Tex Crim 229, 319 SW2d 318

#### VERMONT

*State v Lavallee* (1960) 122 Vt 75, 163 A2d 856, supra § 3

#### WASHINGTON

For other cases wherein the court also held or recognized that an accused is not entitled to inspect, at least before trial, a statement made by a witness or any other person, see the following:

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For cases wherein inspection of statements of a prosecution witness was not permitted for the reason that the defendant failed to designate specific statements which he desired to inspect or that there was no showing of the existence of such statements as he requested, see § 7, supra.

<>

State's failure to disclose witness' prior written statements, pursuant to general discovery request by defendant, did not deprive defendant of his due process rights, where information testified to by witness was not favorable to defendant so that disclosure was not constitutionally mandated. *Mitchell v Wyrick* (1982, ED Mo) 536 F Supp 395.

Delayed disclosure of lineup information did not entitle defendant accused of capital offense to new trial where information was put before jury and subjected to thorough and sifting cross-examination, being exploited as fully as it could have been, and where defendant failed to show that information would create reasonable doubt where one did not otherwise exist. In determining the denial vel non of defendant's rights of due process and fair trial, the proper focus is upon materiality in nondisclosure or delayed disclosure of exculpatory information which is not shown by mere argument that information would have enabled more effective preparation for trial. *Ex parte Raines* (1982, Ala) 429 So 2d 1111, cert den 460 US 1103, 76 L Ed 2d 368, 103 S Ct 1804.

See *Smith v State*, 282 Ala 268, 210 So 2d 826, § 22[e].

See *Rogers v State* (1982, Ala App) 417 So 2d 241, § 13[d].

Trial court in murder prosecution did not err in denying defendant's request for statements or notations made by investigative authorities of verbal or written recitations made by any person in connection with investigation of crime as well as statements of witnesses taken by investigative authorities where such items were state's work product and, as such, were privileged from discovery; nor did trial court err in denying defendant's motion for production of photographs taken by investigative authorities. *Thigpen v State* (1977, Ala App) 355 So 2d 392, affd (Ala) 355 So 2d 400.

Prosecution did not act improperly and, more importantly, defense was in no way prejudiced by not receiving tape recording or transcript of interview with prosecution witness prior to trial where transcript of tape was supplied to defense for use on cross-examination, where tape and transcription, not being signed or otherwise authenticated, were no more than work product of prosecution in interview with state witness, and where transcript of tape was consistent with witnesses' testimony. *Harris v State* (1976, Ala App) 352 So 2d 460, affd (Ala) 352 So 2d 479.

Defendant was not entitled to pretrial discovery and inspection of taped interview with prospective prosecution witness. *Veith v State*, 48 Ala App 688, 267 So 2d 480.

Statements of witnesses taken during investigation of murder case, statements of investigating officers, and reports of police and other investigating officers, were not evidence, and thus accused was not entitled to production thereof prior to trial. *Davidson v State*, 48 Ala App 446, 265 So 2d 888, cert den 289 Ala 741, 265 So 2d 897.

See *Stevens v State* (1978, Alaska) 582 P2d 621 (police report concerning alibi witness), § 17.

See *Morrell v State* (1978, Alaska) 575 P2d 1200, § 5.

Statement of prospective prosecution witness, reported by a court reporter, relating to the defendant's prosecution and the witness' immunity from prosecution, was not discoverable by the defendant in absence of showing of exceptional circumstances. *State ex rel. Corbin v Superior Court of County of Maricopa*, 6 Ariz App 414, 433 P2d 65.

In prosecution of prison inmate for conspiracy to commit murder and conspiracy to commit assault upon prison inmate, arising from racial riot in prison during which gang of 20 Black inmates attacked Mexican and white inmates, killing two, trial court's denial of access by defendant to prosecuting attorney's notes of conversations with inmate witnesses did not prejudice defendant's trial preparation was not error; access to all written material collected or prepared by investigator with district attorney's office during course of his investigation adequately protected defendant's rights. *People v Alexander* (1983, 1st Dist) 140 Cal App 3d 647, 189 Cal Rptr 906.

In prosecution for battery against police officers, court properly denied defendants' motion for discovery of statements by persons interviewed during investigation of complaints against officers whom defendants were charged with battering and statements of persons who had filed complaints against such officers, where prosecutor indicated agreement to order for defendants' pretrial discovery of names and addresses of persons whose statements were sought. *Carruther v Municipal Court for Long Beach Judicial Dist.* (1980, 2d Dist) 110 Cal App 3d 439, 168 Cal Rptr 33.

In habeas corpus proceedings, trial court properly discharged defendant from custody imposed pursuant to murder conviction, on ground of people's prejudicial suppression of material evidence during defendant's trial, where trial court found that witness had advised police by phone call day after killing that he was eyewitness, but that information was withheld from defendant. *Re Chol Soo Lee* (1980, 3d Dist) 103 Cal App 3d 615, 163 Cal Rptr 204.

Defendant charged with battery on deputy sheriff while in visiting area of county jail was entitled to discovery of any witness statements obtained by or for county counsel in anticipation of civil litigation arising out of altercation which was basis of criminal charges, subject to determination of any claim of lawyer-client privilege which might be asserted. Fact that neither sheriff nor county counsel was party to underlying criminal proceeding was not sufficient reason to refuse discovery of information possessed by either of those agencies. Moreover, any such statements in possession of county counsel could not be withheld on ground that they were work product, since much of what is discoverable by defendant in criminal case could be classified as "work product" of prosecutor and law enforcement personnel whose duty it is to gather information for prosecution. *Robinson v Superior Court of Los Angeles County* (1978) 76 Cal App 3d 968, 143 Cal Rptr 328.

Statements made by defendant and several witnesses immediately after homicide were discoverable and should have been produced in response to defendant's demand; however, since there was little discrepancy between such statements and testimony of witnesses at trial, conviction of defendant would not be reversed. *People v McManis*, 26 Cal App 3d 608, 102 Cal Rptr 889.

See *People v Thatcher* (1981, Colo) 638 P2d 760, § 9[b].

Denial of motion for discovery of prosecution witnesses' statements was proper under state rules of criminal procedure where there was no indication that witnesses' statements were withheld or that they existed in written form; nor was defendant prejudiced by denial of motion for discovery of felony records of prosecution witnesses where defense counsel never asked witnesses on cross-examination whether they had been convicted of felony and there was total absence of any suggestion of prior felony convictions. *People v Maestas* (Colo) 517 P2d 461.

In prosecution of policeman for vehicular homicide, it was reversible error to deny policeman's motion, made pursuant to statute giving trial court discretion to order pretrial discovery of information relevant and material to defense, for

discovery of partner's statement made after accident and while under sedation, where partner could not recall contents of statement, and where policeman's counsel needed statement to determine whether to call partner as defense witness and to determine scope of interrogation. *People v Smith*, 185 Colo 369, 524 P2d 607.

During kidnapping prosecution in which identity of perpetrator was at issue, failure of prosecution to disclose specifics of witness' testimony concerning clothes worn by accused was harmless error where defense had adequate opportunity to interview witness prior to trial, and where, when defense counsel was given additional information about witness' testimony immediately prior to trial, he did not move to vacate trial date to enable him to investigate matter further. *People v. Goodwin*, 41 Colo. App. 23, 582 P.2d 1065 (1978), judgment rev'd, 197 Colo. 47, 593 P.2d 326 (1979).

In prosecution for aggravated assault state had no duty to disclose to defendant, in response to defendant's request for any exculpatory information state might have, statement of eyewitness shortly after defendant's shooting of assault victim that prior to shooting victim had pulled gun from his belt; in view of fact that defendant did not claim he acted in self-defense, eyewitness' statement was not so obviously exculpatory as to give notice to state that it should turn over statement to defendant. *State v De Santis* (1979) 178 Conn 534, 423 A2d 149.

In disorderly conduct prosecution in which defendant sought all relevant statements by persons not called as prosecution witnesses, trial court would order disclosure of only those statements containing exculpatory material, since request in effect sought wholesale emptying of state's file without compelling showing of materiality. *State v Gilbert* (1979) 36 Conn Supp 129, 414 A2d 496.

Police reports reflecting substance of conversation that detective had with defendant's mother and brother was not discoverable as "statement" where reports had not been signed, adopted, or approved by persons to whom they were attributed, they did not appear to be substantially verbatim, and they were not recorded contemporaneously with their making. *Breedlove v State* (1982, Fla) 413 So 2d 1, cert den (US) 74 L Ed 2d 149, 103 S Ct 184, reh den (US) 74 L Ed 2d 627, 103 S Ct 482.

Where it was probable that prosecution's failure to disclose to defendant convicted of sexual battery, that prosecutrix at her pretrial deposition had admitted that she was under influence of alcohol and drugs on night of her purported sexual battery by defendant, had prejudicial effect of concealing evidence on issue of prosecutrix's consent to defendant's sexual acts, trial court should have conducted hearing before defendant's conviction to determine degree of prejudice from prosecution's concealment of prosecutrix's admissions that had resulted to defendant who had filed proper demand for all evidence known to State that might negate defendant's guilt or credibility of State's witness. *Snow v State* (1980, Fla App D2) 391 So 2d 384.

In prosecution for arson and conspiracy to commit arson, defense counsel was entitled to see statement of alleged coperpetrator of crime, who had been given immunity, to use as counsel might see fit in conducting defense where there were obvious inconsistencies with statement given to state's attorney and testimony at trial. *Hernandez v State* (1977, Fla App D3) 348 So 2d 1224, cert den (Fla) 355 So 2d 517.

It was error to order state to produce testimony of grand jury witness; statement of grand jury witness was not statement within context of rule requiring automatic production upon demand and in absence of showing of predicate for its production. *State v McFarlane* (Fla App) 318 So 2d 449.

It was improper for prosecution to fail to notify defendant of deposition of eye witness to shooting and to fail to provide defendant with copy of deposition. *Kelly v State* (Fla App) 311 So 2d 124.

Defendant was not entitled to discovery of reports on prospective jurors, or to written statements made by prospective government witnesses to police officers. *Robertson v State* (Fla App) 262 So 2d 692.

Defendant was not entitled to pretrial discovery of statements given to investigating officers by prospective state witnesses; neither was he entitled to examine investigative report concerning prospective jurors. *Dixon v State (Fla App) 261 So 2d 205*.

See *State v Williams (Fla App) 227 So 2d 253*, § 7.

See *State v O'Steen (Fla App) 213 So 2d 751*, § 18.

Defendant in criminal case in Florida is not entitled to inspect, either before or during trial, statements of prosecution witness which were taken by prosecuting officer in preparation for trial, whether or not such statements are sought for purpose of cross-examination or impeachment. *Adjmi v State (Fla App) 208 So 2d 859*.

Order permitting defendant to inspect before trial statements of state witnesses was quashed in absence of showing of unusual circumstances warranting such production. *State v McCall (Fla App) 186 So 2d 324*.

Failure of district attorney to reveal assault victim's failure to identify third person present with defendant and victim at time and place of assault was not failure to reveal exculpatory material after general Brady motion since failure of victim to identify third party did not create reasonable doubt as to guilt of defendant whom victim positively identified in photographic lineup and again at trial as person who sat directly behind him in taxicab and who later pointed a gun at him, shouted "I'm going to blow [you] away," and pulled the trigger several times. *Radford v State (1983) 251 Ga 50, 302 SE2d 555*.

Trial court did not err in murder trial by failing to require state to produce statements of witnesses, since statements of witnesses in prosecutor's files may not be reached by notice to produce, and since defendant did not show that statements were material and exculpatory to him. *Spain v State (1979) 243 Ga 15, 252 SE2d 436*.

In prosecution for murder, no prejudice arose by state's failing to provide defendant with statement of key witness pursuant to notice to produce where defense counsel subjected witness to thorough cross-examination at trial and failed to assert prejudice due to nondisclosure of witness' statement before trial, and where no access to witness' statement was provided for under statute asserted by defense. *Stevens v State (1978) 242 Ga 34, 247 SE2d 838*.

In prosecution for murder, no prejudice arose by state's failing to provide defendant with statement of key witness pursuant to notice to produce where state did furnish defendant with list of witnesses' names, addresses, and "a brief of what they might testify," trial court made in camera inspection, defense counsel made thorough cross examination of witness at trial, and defendant made no further objection to nondisclosure in open court. *Burger v State (1978) 242 Ga 28, 247 SE2d 834*.

See *McGuire v. State, 238 Ga. 247, 232 S.E.2d 243 (1977)*, § 6[a].

See *Pass v State, 227 Ga 730, 182 SE2d 779*, § 17.

State's discovery violation did not give rise to reversible error in child molestation prosecution; although prosecution was under obligation to provide defense with copy of victim's pretrial statement to investigating officer, which remained in exclusive physical possession of police, defendant did not seek to prevent introduction of victim's pretrial statement to officer, as it was helpful to defense, and counsel was allowed to inspect report in which statement appeared, and thus, defendant had not shown how he was prejudiced by court's failure to order state to make report available to him for copying. West's *Ga.Code Ann. §§ 16-6-4(a), 17-16-1 et seq. Wilkerson v. State, 598 S.E.2d 364 (Ga. Ct. App. 2004)*.

See *Odom v State (1980) 156 Ga App 119, 274 SE2d 117*, § 4[b].

Despite allegation that witness' statement in prosecutor's file was exculpatory, prosecutor in homicide case was under no duty to disclose such statement simply because it might have been of aid to defense, and there was no violation of defendant's due process rights since omitted evidence failed to create reasonable doubt that did not otherwise exist. *Waters v State* (1978) 146 Ga App 813, 247 SE2d 555.

In general defense counsel is entitled to prior statements of key witnesses for state on proper demand. *James v State* (1977) 143 Ga App 696, 240 SE2d 149.

See *Quaid v State*, 132 Ga App 478, 208 SE2d 336, § 14.

Trial court did not abuse discretion in refusing discovery of statements and admissions of certain witnesses, a .22 caliber automatic pistol, a jacket, a watch, and \$125 taken from victim, where defendant convicted of robbery and kidnapping failed to allege any substantial prejudice resulting from failure to grant such discovery. *State v Oldham (Idaho)* 438 P2d 275.

In prosecution of wife for murdering her husband, reversible error occurred when prosecution concealed from defense statements allegedly made by defendant to female prosecution witness regarding defendant's extramarital affairs, where trial court refused to strike statements, and where less severe sanctions could not have enabled counsel to rebut witness' testimony. *People v Weaver* (1982) 92 Ill 2d 545, 65 Ill Dec 944, 442 NE2d 255.

Where relevancy and competency of pretrial statements or reports has been established, and where no privilege exists, trial judge should order reports or pretrial statements of prosecution witnesses in possession or control of state to be made available to defendant for inspection and use in impeachment, and same rule applies to police reports. *People v Flowers*, 51 Ill 2d 25, 281 NE2d 299.

See *People v Sumner*, 43 Ill 2d 228, 252 NE2d 534, § 8.

State's failure to disclose that witness who testified at robbery trial had viewed lineup, but failed to identify defendant, was not prejudicial when witness' testimony was limited to description of car at scene of robbery and its license plate number, she did not testify in order to identify defendant as offender, and defendant was identified as offender by another witness. *People v Malone* (1983) 114 Ill App 3d 55, 69 Ill Dec 844, 448 NE2d 562.

In prosecution charging 13-year-old boy with murdering 5-year-old girl, interview notes taken of 41 potential witnesses by prosecution were privileged work product material, rather than discoverable substantially verbatim reports of oral statements of witnesses, and were not discoverable, as none of reports were favorable to defense in constitutional sense. *People v Buss* (1983) 112 Ill App 3d 311, 68 Ill Dec 250, 445 NE2d 894.

State was not required to preserve some record of statements made by witnesses to state's attorneys who interviewed them shortly after crimes occurred since nothing in state discovery rules required State to reduce witnesses' oral statements to writing. *People v Mims* (1982) 111 Ill App 3d 814, 67 Ill Dec 448, 444 NE2d 684.

Absent intentional tactics to preclude discovery of relevant material, court discovery rules did not require prosecutor to reduce to writing the oral statement made by off-duty policeman witness concerning early morning brawl which resulted in a homicide, made to an off-duty assistant state's attorney who had been assigned to early stage of investigation in case. *People v Giovanetti* (1979) 70 Ill App 3d 275, 26 Ill Dec 241, 387 NE2d 1071.

Rules of disclosure did not impose upon state a duty to reduce rape complainant's oral statement to writing for purposes of discovery. *People v Witherspoon* (1979) 69 Ill App 3d 391, 26 Ill Dec 377, 388 NE2d 1.

Prosecution's failure to comply with pretrial discovery order requiring it to inform defendant of substance of witness

statements was not reversible error where defense objected on ground that written memoranda of statement should have been prepared and furnished to him and where, instead of requesting continuance, defendant moved for mistrial. *People v King* (1978) 58 Ill App 3d 199, 15 Ill Dec 573, 373 NE2d 1045.

See *People v Crawford*, 114 Ill App 2d 230, 252 NE2d 483 (citing annotation), § 5[a].

Trial court did not err in refusing to allow defendant in robbery prosecution to see original description of robber given to police by complainant where nothing in record indicated that such description had been reduced to writing, and in any event defense counsel voluntarily withdrew request for description when state inquired as to purpose of request. *People v Jelks*, 92 Ill App 2d 374, 235 NE2d 339.

See *People v Lighting*, 83 Ill App 2d 430, 228 NE2d 104, § 17.

In robbery prosecution it was reversible error for prosecutor to fail to respond to defendant's discovery motion for production of police officer's report, where report identified eyewitness to crime whose testimony might have assisted alibi defense and eyewitness did not testify at trial, and report also identified another person who was acquainted with defendant and this person believed that defendant did not fit eyewitness' descriptions of robbers. *People v Payne*, 44 Ill App 3d 502, 3 Ill Dec 242, 358 NE2d 409.

State was not required to disclose conversation between prosecutor and prosecution witness where witness' oral remarks had not been reduced to writing; there was no requirement that oral statement in possession of prosecution be reduced to writing absent bad faith. *People v Caldwell*, 39 Ill App 3d 1, 349 NE2d 462.

Criminal defendant was entitled to copy of statement of defense alibi witness made to state agent where state used statement for impeachment purposes. *People v Sanders*, 38 Ill App 3d 473, 348 NE2d 229.

See *People v Manley*, 19 Ill App 3d 365, 311 NE2d 593, § 11[d].

In rape prosecution, pretrial motion for inspection of written statement of prosecutrix was properly denied, particularly where statement was made available to defendant for use in cross examination after prosecutrix had testified at trial. *People v Sockwell*, 7 Ill App 3d 520 (abstract), 288 NE2d 33.

Defendant's motion for production of all affidavits, receipts, and documents signed by police informer and all records of State Narcotics Division pertaining to such informer was properly granted only upon condition that such informer should be called as witness. *People v Dollen*, 2 Ill App 3d 567, 275 NE2d 446.

Where defendant was afforded substantial discovery well in advance of trial and was granted an overnight continuance when faced with an additional witness during trial, trial court committed no error in refusing to assess any other of defendant's requested sanctions against state for failure to disclose the existence or identity or furnish statements of witness within time prescribed by pretrial discovery order. *Lloyd v State* (1983, Ind) 448 NE2d 1062.

See *Reid v State* (1978, Ind) 372 NE2d 1149, § 8.

Denial of defendant's request to discover witnesses' statements before trial was proper where discovery of such statements was only allowed after the witnesses had testified, and where defendant had not asked the witnesses if they had made any statements and thus made no showing that court's denial was harmful. *Gibson v State* (Ind App) 303 NE2d 666.

Trial court did not err in denying defendant's motions to produce prosecutor's notes relating to witness interviews where, in each instance, witness did not sign or otherwise adopt or approve notes made during his or her interview.

*State v Jacoby (1977, Iowa) 260 NW2d 828.*

Criminal defendant was not entitled to inspection of tape recording of police interview of witness from which witness' statement was transcribed where there was no showing that the statement as signed was inaccurate, incomplete, or different than that which was given on tape; destruction of tape did not require new trial. *State v Van Rees (Iowa) 246 NW2d 339.*

Defendant was not entitled to production of copies before trial of complete transcript of testimony of witnesses appearing before grand jury. *State v Hall (Iowa) 235 NW2d 702.*

Although state may not refuse to produce requested statements of persons other than defendant where such statements are exculpatory, it is not required to produce any statements of persons, other than defendant, which are not exculpatory, save and except upon showing that inspection of any such statement is necessary to preparation of defense. *State v Aossey (Iowa) 201 NW2d 731, cert den 412 US 906, 36 L Ed 2d 971, 93 S Ct 2292.*

Until witness has testified, it is generally held that there is no need for defendant to have statement of witness, since it is not itself admissible in evidence and cannot be used for any purpose except impeachment; thus trial court abused discretion in ordering state to deliver copies of statements of all witnesses expected to testify at defendant's trial. *State v Eads (Iowa) 166 NW2d 766 (citing annotation).*

See *State v Schlicher (1982) 230 Kan 482, 639 P2d 467, § 11.*

Trial court in robbery prosecution properly refused to order production of witness statements contained in police reports before state attempted to introduce any testimony regarding them where, in light of fact that witnesses had not adopted, approved or signed police reports, they did not constitute statements within meaning of statute. *State v Watie (1978) 223 Kan 337, 574 P2d 1368.*

Statements of witnesses in possession of prosecution are not official documents nor part of court record and therefore are not subject to discovery by accused prior to trial. *State v Hill, 211 Kan 287, 507 P2d 342.*

In capital homicide prosecution against Vietnam veteran charged with killing police officer, trial court properly denied defense motion for order compelling production and disclosure of statements and addresses of witnesses regarding defendant's state of intoxication where there was no indication that there were any exculpatory statements by such witnesses. *State v Felde (1982, La) 422 So 2d 370, cert den (US) 77 L Ed 2d 290, 103 S Ct 1903.*

Defendant was not entitled to discovery of prior statement made by victim and police reports, based on defendant's allegation that there was conflicting testimony at motion to suppress concerning whether defendant's picture or a photographic line-up was shown to victim before live line-up, where requested documents were found by trial judge to contain no exculpatory evidence, except that, in her statement, victim indicated that she had not seen defendant's face very clearly, and where victim also testified at trial that she had not seen defendant's face clearly and that she viewed photographic line-up prior to identifying defendant in physical line-up, so that production of documents would not have created reasonable doubt that did not otherwise exist. *State v Winn (1982, La) 412 So 2d 1337.*

High school teacher prosecuted for aggravated assault against student with gun had right to pretrial discovery of arguably exculpatory statement made by student to investigating officers which indicated that student pushed defendant before attempting to strike defendant with club. *State v Landry (1980, La) 381 So 2d 462.*

Where hearsay statement of deceased victim was to be admitted in murder prosecution as excited utterance and impeachment of statement by prior conviction was possible, defense request for prior conviction records of deceased victim was specific and relevant request for evidenced favorable to defendant, and trial judge erred in not requiring

prosecutor to respond to such request by stating whether state had knowledge or possession of any records of conviction of victim, and if so, by not requiring prosecutor to furnish them to defendant. Also, where police press release possibly contained evidence of victim's misidentification of prison inmate as one of her assailants was admissible for impeachment, court erred by not permitting defense to review press release. *State v Henderson (1978, La) 362 So 2d 1358*.

Eyewitness' and police officer's description of defendant concerning discrepancy as to whether defendant's complexion was medium black or dark black were not so inaccurate as to be considered exculpatory; state complied with request for exculpatory evidence when it responded that it had none. *State v Schamburge (La) 344 So 2d 997*.

It was not error to deny defendant's motion for state to produce note signed by decedent which incriminated accused where immediately after denial prosecutor furnished defense with xeroxed copy of note and no further complaint was made. *State v Dupuy (La) 319 So 2d 299*.

Motion by defendant for production of all statements made by particular person other than defendant was properly denied, since there was no contention that statements were sought for purposes of impeachment, but only that if statements tended to exculpate defendant he should be permitted to inspect them -- which was, in effect, merely argument for liberalized discovery which should be directed to legislature. *State v Didier, 259 La 967, 254 So 2d 262*.

Defendant in criminal case is not entitled to pretrial inspection of written confessions of codefendant, written statements of witnesses, or police reports in hands of sheriff, police department, or district attorney. *State v Cardinale, 251 La 827, 206 So 2d 510*.

In prosecution for criminal threatening with firearm, no violation of discovery rules arose out of State's failure to provide defendant with written summary of witnesses' statement where defense failed to request written or recorded statements of witnesses or summaries of such statements, defendant's counsel failed to file motion pursuant to state rules of criminal procedure seeking court-ordered disclosure of such statements and access to written statements of witnesses could be obtained only by motion and order of court. *State v Engstrom (1982, Me) 453 A2d 1170*.

See *State v Furrow (1981, Me) 424 A2d 694*, § 22[a].

Statute requiring that Commonwealth, in any criminal trial in which it intended to offer in evidence contents of any interception, serve defendant with complete copies of documents, applications, warrants and renewals, did not apply to evidence obtained by telephone company pursuant to statute which permitted telephone company to intercept communications necessary to prevent unlawful use of its facilities. *District Attorney for Plymouth Dist. v Coffey (1982) 386 Mass 218, 434 NE2d 1276*.

Error occurred in homicide prosecution where pursuant to discovery request defense counsel was, before trial, provided with statement of prospective prosecution witness which had been reduced to writing by police, and where day before testifying the witness informed prosecutor that statement was incorrect in material respects and that his testimony would be more incriminating of defendant than prior statement indicated, but prosecutor did not inform defense counsel of this development; however, prosecutor's error was harmless where defendant was not prejudiced due to weight of evidence against him and where witness' new story was incriminating rather than exculpatory, thus rendering Brady precedent inapplicable. *Commonwealth v Gilbert (1979) 377 Mass 887, 388 NE2d 1190*.

See *Commonwealth v Lacy 371 Mass 363, 358 NE2d 419*, § 5[a].

Although, under circumstances, denying defendant access to grand jury testimony was not prejudicial, prospectively, every defendant would be entitled to his transcript of grand jury testimony and to witness' grand jury testimony related to witness' testimony at trial, except that testimony may be withheld if irrelevant or for security reasons. *Commonwealth*

*v Stewart (Mass) 309 NE2d 470* (citing annotation).

Trial court did not abuse discretion in allowing inspection of grand jury minutes only in respect to testimony of unindicted coconspirator, or, in response to motion for discovery of statements of defendants and others, in allowing discovery only as to written statements signed by defendants. *Commonwealth v Lamattina (Mass App) 310 NE2d 136*.

See *People v Till (1982) 115 Mich App 788, 323 NW2d 14*, § 6[a].

In prosecution for breaking and entering with intent to commit larceny, trial court erred in admitting statements of two witnesses who were physically present at time of alleged breaking and entering which had not been turned over to defense pursuant to pretrial order. *People v Hayward (1980) 98 Mich App 332, 296 NW2d 250*.

Trial court did not abuse its discretion in refusing request for discovery of pretrial statement made by defendant's wife as res gestae witness, despite contention of need for statement to determine whether to invoke privilege and bar wife from testifying, where defendant called wife to testify after being given copy of statement at trial, where defendant had not set forth any specific facts or information he expected to glean from statement, and where defendant had opportunity to study statement and cross-examine police officer who had taken it. *People v Smith (1978) 81 Mich App 190, 265 NW2d 77*.

Trial court did not err in denying defendant's motion to produce copies of all statements, reports, notes or tapes made or given by witnesses where court provided for production of these requested materials if needed to refresh recollection of witness at trial and afforded defendant opportunity for full cross-examination of witnesses at trial. *People v Ranes, 58 Mich App 268, 227 NW2d 312*.

Under Michigan rule that discovery will be ordered in all criminal cases when, in sound discretion of trial judge, thing to be inspected is admissible in evidence and failure of justice may result from its suppression, trial court properly granted pretrial discovery of statement made to police by complaining witness in prosecution for taking indecent liberties, and of stenographic report of statement she made to prosecutor; however, court erred in restricting discovery of stenographic report -- on grounds of relevancy -- to portion thereof relating to defendant and permitting prosecution to excise other portions dealing with complainant's sexual adventures with other individuals, statements with respect to such adventures being relevant. *People v Brocato, 17 Mich App 277, 169 NW2d 483*.

Although prosecutor should have disclosed earlier than day before trial that particular person had claimed he had seen truck driving with its lights off in vicinity of restaurant where shooting occurred shortly after the shooting occurred, error was not prejudicial when witness' testimony apparently was not that he saw truck leaving restaurant but that he saw it driving toward restaurant and this was apparently well after commission of crime, when police already were on the scene. *State v Dye (1983, Minn) 333 NW2d 642*.

See *State v Caldwell (1982, Minn) 322 NW2d 574*, § 22[e].

See *State v Kirkwood (Minn) 249 NW2d 890*, § 6[a].

Where state did not disclose to defense, even though court rule and court order required it to do so, statements made by key prosecution witnesses which contradicted their trial testimony and under which, in light of other evidence produced by prosecution at trial, defendant could not have been present at time they identified defendant as being person they saw near scene of crime, state's action was flagrant violation and reversal was required, even though one of statements was discovered during course of trial and used by defense to cross examine rebuttal witness. *Hooten v State (1983, Miss) 427 So 2d 1388, later app (Miss) 437 So 2d 410*.

In prosecution for promoting prostitution and other crimes, trial court did not abuse discretion in overruling defendant's

motion to compel disclosure of state witnesses' names, addresses, police records and statements to police, since request for disclosure, though essentially proper in form, was filed in incorrect branch of court and so created no duty upon state to make disclosure under state discovery rule, later request for disclosure filed after filing of transcript in trial court did not comply with time requirements of discovery rule, test as to whether failure to disclose resulted in fundamental unfairness or prejudice to defendant, which is concerned with effect of specific evidentiary material, cannot be used to establish that defendant who does not comply with state discovery rule is entitled to disclosure under unfairness rule, and right to relief under Brady doctrine cannot be established by showing untimely discovery request followed by speculation, unsupported by showing of evidence allegedly not disclosed, upon what disclosure might have revealed. *State v Charity* (1982, Mo App) 637 SW2d 319.

In prosecution of prisoner of county jail for felonious assault upon fellow prisoner, trial court erred in failing to grant mistrial or continuance based upon prosecutor's inadvertent failure to disclose statement signed by 12 prisoners, where signatures on statement identified witnesses potentially favorable to defense. *State v Bebee* (1979, Mo App) 577 SW2d 658.

Defendant, in prosecution for assault with intent to kill, was entitled to withdraw his guilty plea and replead where prosecutor failed to disclose exculpatory evidence showing that assault victim had made misidentification at lineup and where victim was shown mug shot of defendant immediately before taking stand at preliminary hearing. *Lee v State* (1978, Mo App) 573 SW2d 131.

Failure of prosecution to inform defendant or his counsel of purported confession to crime for which defendant was convicted was improper where letters were received after trial was over and defendant was obviously well aware of their existence as defendant's own counsel filed motion for new trial based on newly discovered evidence. *State v Fowler*, 193 Neb 420, 227 NW2d 589.

See *State v Williams*, 183 Neb 257, 159 NW2d 549, § 17.

Refusal of trial court to allow defendant in murder trial to inspect statements of proposed prosecution witnesses before trial was not error, in absence of extraordinary circumstances, where defendant quite obviously knew names and addresses of witnesses and gave no indication that they had refused to see him or talk with him about case. *State v Funicello*, 49 NJ 553, 231 A2d 579.

See *State v Harrison*, 118 NJ Super 299, 287 A2d 229, affd 119 NJ Super 1, 289 A2d 548, § 17.

In absence of any showing of unusual circumstances, trial judge erred in requiring district attorney to furnish police reports and statements of witnesses to defendant. *State v Tackett*, 78 NM 450, 432 P2d 415, 20 ALR3d 1 (citing annotation).

See *People v Aviles*, 89 Misc 2d 1, 391 NYS2d 303, § 27[a].

See *People v Harrison*, 81 Misc 2d 144, 364 NYS2d 760, § 11[m].

Defense counsel was entitled to receive copies of any statement obtained by District Attorney from alibi witnesses whose names had been supplied by defendant. *People v Sanders*, 78 Misc 2d 205, 356 NYS2d 421.

See *Vergari v Kendall*, 76 Misc 2d 848, 352 NYS2d 383, app dismd (App Div) 360 NYS2d 1003 § 11[m].

See *People v Rice*, 76 Misc 2d 632, 351 NYS2d 888, § 11[m].

In harassment prosecution, defendant's motion for bill of particulars was granted for names and addresses of prospective

witnesses and their statements or memorandum where notes and memorandum were not statutorily exempt within meaning of state criminal procedure law. *People v Robinson*, 75 Misc 2d 807, 349 NYS2d 259.

See *People v Blair*, 64 Misc 2d 519, 315 NYS2d 179, § 13[a].

Defendant charged with possession of marijuana was not entitled, through discovery, to inspect statements, transcripts of interviews, and memoranda of conversations of witnesses to be used in behalf of prosecution at trial. *People v McDonald*, 59 Misc 2d 311, 298 NYS2d 625.

See *People v Johnston*, 55 Misc 2d 185, 285 NYS2d 243, § 21[a].

Defendant charged with murder was permitted to inspect statements of witnesses as to events leading up to and following alleged crime. *People v Powell*, 49 Misc 2d 624, 268 NYS2d 380.

Housing inspector was not entitled to reversal of conviction for bribery and receiving unlawful gratuities on basis that diary kept by chief prosecution witness, an "expediter" for contractor who was caught in bribe attempt and who agreed to cooperate during investigation of corruption, was not made available to defense, where witness turned diary over to law enforcement officials prior to commission of crime of which defendant was convicted, and where conviction was predicated upon criminal transaction to which diary had no bearing. *People v Kanefsky* (1980) 50 NY2d 162, 428 NYS2d 453, 405 NE2d 1019.

Where prosecution refused to produce or disclose identity of witness who may have been able to offer description of suspect which, in turn, may have exculpated defendant, issue would be remanded to trial court to determine whether materiality of witness was sufficient to warrant disclosure of identity to accused. *People v W.* (1978) 44 NY2d 179, 404 NYS2d 578, 375 NE2d 758.

Worksheets which consisted of printed questions and hand written notes made by interviewing officers capsulizing witnesses' answers thereto were statements made by prosecution witnesses and all such worksheets should have been examined by trial court to determine whether they contained exculpatory material and trial court's acceptance of prosecutor's representation that nothing contained in the questionnaires constituted exculpatory material was error. *People v Consolazio*, 40 NY2d 446, 48 NYS2d 62, 354 NE2d 801, on remand (App Div) 386 NYS2d 644.

Under "prior statement" rule defense counsel has right to examine prior statement of prosecution witnesses. *People v Jaglom*, 17 NY2d 162, 269 NYS2d 405, 216 NE2d 576.

See *People v. Hunt*, 227 A.D.2d 568, 643 N.Y.S.2d 175 (2d Dep't 1996), § 27[a].

Where prosecutor had delivered to counsel for defendant in perjury prosecution prior to trial a tape recording of conversation between defendant and person who identified himself as Stuart Goldberg and who requested defendant's help to prevent his incarceration because defendant's accomplice in scheme to receive kickbacks in exchange for awarding municipal contracts to payers of kickbacks was going to testify against him, which request defendant answered by disclaiming any knowledge with respect to subject of conversation, prosecutor's delay in informing defense counsel that voice on tape was that of undercover officer posing as Stuart Goldberg until after defense counsel had informed jury in his opening statement that tape recording of conversation between defendant and Stuart Goldberg would be played as part of the defense violated Brady rule, since tape on its face could have created in defense counsel's mind during trial preparation a wrong impression of its exculpatory impact. However, any prejudice resulting from delay was cured by trial judge's instruction before tape was played informing jury that defense counsel had first learned on previous day that person on tape was not Stuart Goldberg but an investigator for the district attorneys office. *People v Tempera* (1983, 2d Dept) 94 App Div 2d 748, 462 NYS2d 512.

Sanction imposed by trial judge for prosecution's failure to provide demanded Brady and Rosario material until after witnesses had testified, namely, offering defense opportunity to recall witness for further cross-examination after receipt of material, which defense counsel declined to do, was appropriate where record showed that failure was principally limited to one witness and that defense counsel declined opportunity to recall witness for further cross-examination after receipt of material; alternative sanction of reversal would be inappropriate absent a demonstration of intentional misconduct. *People v Keppler (1983, 3d Dept) 92 App Div 2d 1032, 461 NYS2d 513.*

Trial court correctly denied defense request for disclosure of detective's summaries of prior statements made by prosecution witnesses at pretrial suppression hearing where notes did not relate to subject matter of hearing, but motion would have had to have been granted had it been renewed at trial. *People v Clow (1978) 62 App Div 2d 880, 406 NYS2d 598.*

In prosecution for first-degree murder trial court properly examined statements of witnesses and found statements consistent with trial testimony of those witnesses and lacking in evidence exculpatory of defendant, under rule of Hardy case properly denied disclosure of those statements to defense counsel and properly ordered copies sealed for appellate review. *State v Brown (1982) 306 NC 151, 293 SE2d 569, cert den 459 US 1080, 74 L Ed 2d 642, 103 S Ct 503, post-conviction proceeding (NC) 345 SE2d 393, cert den 479 US 940, 93 L Ed 2d 373, 107 S Ct 423, habeas corpus proceeding (WD NC) 693 F Supp 381, affd in part and revd in part on other gnds (CA4 NC) 891 F2d 490, cert den 495 US 953, 109 L Ed 2d 545, 110 S Ct 2220.*

Defendant charged with murdering her husband by arsenic poisoning was not entitled to pretrial disclosure of statements allegedly made by defendant to prosecution witnesses which were in turn relayed to police officers since statements made by defendant to witnesses were shielded from discovery by statute even when those statements contained remarks made by defendant to those witnesses. *State v Detter (1979) 298 NC 604, 260 SE2d 567.*

In homicide prosecution against prisoner during which, upon retrial following grant of mistrial, two fellow prisoners testified to incriminating statements made to them by defendant, trial court did not err in denying pretrial defense motion for names of other prison inmates who allegedly would testify to incriminating statements defendant made to them where each of the witnesses who did testify against defendant were cross-examined at length during first trial, defendant had their names as well as copies of their prior recorded testimony, and statute afforded accused no right to discover names and addresses of state's witnesses or furnish accused list of witnesses who would be called to testify against him. *State v Sledge (1979) 297 NC 227, 254 SE2d 579.*

In prosecution for kidnaping, armed robbery, murder, and conspiracy to commit armed robbery and murder, although defendants were not entitled to pretrial inspection of tape-recorded statement of witness, they were entitled to such inspection after witness had testified at trial. *State v Hardy (1977) 293 NC 105, 235 SE2d 828.*

See *State v McDougald (1978) 38 NC App 244, 248 SE2d 72, § 11[m].*

Defendant in murder prosecution was not entitled to discovery of internal police reports and memoranda pertaining to case, statements by witnesses other than defendant, and criminal records of witnesses other than defendant where such evidence was not made discoverable by state statute and where defendant failed to follow mandatory procedure in pursuing discovery. *State v Gillespie (1977) 33 NC App 684, 236 SE2d 190.*

Police report which contained substantially verbatim recital of prosecution witness' statement written in narrative form was discoverable under court rule by defense after completion of witness' direct examination at trial. *State v Johnson (1978) 62 Ohio App 2d 31, 16 Ohio Ops 3d 74, 403 NE2d 1003.*

Defendant in murder prosecution was not entitled to inspection of tape-recorded statement of two witnesses who testified for prosecution at preliminary hearing but testified for defense at trial where tape-recorded statement did not

contain exculpatory matter. *Farmer v State* (1977, *Okla Crim*) 565 P2d 1068.

Accused is not entitled to discovery and inspection of unsworn statements of prosecution witnesses in possession of state, nor of "work product" of state consisting of unsworn statements signed by persons other than accused, nor of reports compiled by law enforcement agency in course of its investigation into criminal offense. *Trowbridge v State* (*Okla Crim*) 502 P2d 495.

Defendant is not entitled to inspection of work product of prosecutor consisting of statements signed by other than defendant unless such statements contain matter which is material to defense of case; thus, defendant charged with rape was not prejudiced by trial court's denial of request for statement of prosecutrix where her original statement indicated that she had been raped twice and she so testified at trial. *Smith v State* (*Okla Crim*) 481 P2d 468.

Pretrial inspection of statements given by children of defendant in manslaughter prosecution and of all pictures and reports concerning crime made by investigating officers, was denied, since accused is not entitled to discovery and inspection of statements of prosecution witness in possession of state, of transcript of statement of state witness taken before prosecution officer preparatory to trial, or of "work product" of prosecutor consisting of statements signed by others than defendant. *Doakes v District Court of Oklahoma County* (*Okla Crim*) 447 P2d 461.

Accused in rape prosecution was not entitled to pretrial discovery and inspection of statements of prosecutrix in possession of state, of transcript of statements by state witness taken before prosecuting officer preparatory to trial, or of "work product" of prosecutor, consisting of statements signed by persons other than defendant, where as to all persons giving pretrial statements accused was allowed extensive cross-examination. *Shapard v State* (*Okla Crim*) 437 P2d 565.

In prosecution for fourth degree assault on ten-year-old child, notes made by case worker in Children's Service Division file, respecting conversation with defendant's wife, were written statements of a witness in control of the district attorney and defendant was entitled to discovery of these notes, where Children's Service Division served investigative function, similar to a police agency. *State v. Johns* (1980) 44 Or App 421, 606 P2d 640.

See *State v McKeen* (1978) 33 Or App 343, 576 P2d 804, § 17.

See *State v Bray* (1977) 31 Or App 47, 569 P2d 688, § 11.

Prosecution in first-degree murder trial lawfully withheld identity (not existence) of youthful eyewitness where grounds existed justifying fear by witness and his mother of repercussions through suspected intimidation of witnesses. *Commonwealth v Bonacurso* (1983) 500 Pa 247, 455 A2d 1175, cert den (US) 77 L Ed 2d 1350, 103 S Ct 3090.

Pre-trial statements of state's witnesses, which have been reduced to writing and relate to witnesses' testimony, must be supplied to defendants if they request them. *Commonwealth v Hassine* (1985) 340 Pa Super 318, 490 A2d 438.

Arson defendant had no right to pretrial discovery of recorded statement of key prosecution witness where defendant had tape recording of statement by witness at preliminary hearing. *Commonwealth v Rineer* (1983, Pa Super) 456 A2d 591.

See *Commonwealth v Walters* (1982) 303 Pa Super 203, 449 A2d 649, § 18.

In prosecution for third degree murder, defendant's right to inspect statements of missing eyewitnesses was contingent upon whether statements included exculpatory information. Absent showing of some reason for believing inspection would lead to discovery of exculpatory evidence, court was under no duty to conduct in camera investigation and could rely on commonwealth's representation that statements included no evidence which would help defendant and

defendant's request to inspect statements was properly denied. *Commonwealth v Watson* (1980, Pa Super) 419 A2d 623.

Defendant on trial for attempted robbery was not entitled to discovery of prior written statement of victim where victim did not testify and prosecution represented statement was nonexculpatory; fact defendant made no pre-trial motion would not bar right to such discovery however. *Commonwealth v Dalahan* (1979, Pa Super) 396 A2d 1340.

Under court rule, trial court was permitted discretion in granting defense discovery requests for names of prosecution witnesses and copies of any pretrial statements by such witnesses furnished during investigation of case and refusal by trial court to require state to furnish such information prior to trial was not abuse of discretion absent specific assertion of prejudice. *Commonwealth v Johnston* (1978, Pa Super) 392 A2d 869.

Defendant was entitled, upon timely request, to production of all pretrial statements made by commonwealth witnesses, including police officer witnesses. *Commonwealth v Grimm* (1977, Pa Super) 378 A2d 377.

Where prosecution inadvertently failed to disclose to defense that victim claimed that defendant made her perform fellatio upon him, but jury acquitted defendant of first degree sexual assault charge, it seemed certain that evidence withheld by prosecution did not contribute to conviction of lesser offense. *State v Concannon* (1983, RI) 457 A2d 1350.

Trial court did not err in denying motion for inspection of statements made by prospective witness to investigating officers, where there was nothing in record to indicate that witness had in fact made any such statements. *State v Lerner* (RI) 308 A2d 324.

In marijuana possession case, defendant's claim that prosecution suppressed evidence as to identity of witness, who reported seeing a man not resembling defendant near farmhouse containing the marijuana a few days prior to defendant's arrest, and thereby denied him due process failed, where defense counsel knew identity of witness immediately prior to trial and did not move for continuance, and materiality and exculpatory nature of testimony was limited at best. *State v Vogel* (1982, SD) 315 NW2d 321.

Refusal to require attorney general to produce statement of prosecution witness, which amounted "simply to notations which the officers made in the course of their investigation," was not error since evidence was not material to defense in robbery prosecution. *Bolin v State* (Tenn) 405 SW2d 768.

State was under no obligation to furnish defendant with copy of assault-and-burglary victim's police statement which was contrary to statement victim gave to defendant's counsel, when statement contained no exculpatory information and defendant's trial counsel was aware of substance of statement. *Winrow v State* (1983, Tenn Crim) 649 SW2d 18.

In prosecution for first-degree murder and armed robbery, defendant was not entitled to new trial due to failure of prosecution to supply him with statement of witness based on his requests for previous statements of officer which contained witness' statement, where witness testified as to content of conversation and defense conducted extensive cross-examination of witness, and there were hardly any contradictions between withheld statement and testimony at trial. *State v Keele* (1982, Tenn Crim) 644 SW2d 435.

In prosecution for armed robbery, defendant was not erroneously denied statement of witness for cross-examination purposes as contemplated in state statute, where victim of robbery gave police description of person who had committed robbery, police wrote this description in their report, witness did not know and had never seen what was written, witness neither signed nor otherwise adopted writing as her own, and therefore police report contained no statement by witness within meaning of state statute. *State v Pinkston* (1982, Tenn Crim) 644 SW2d 422, vacated, reinstated (Tenn Crim) 668 SW2d 676.

See *State v Venable* (1980, *Tenn Crim*) 606 SW2d 298, § 17.

Defendant in murder prosecution was not entitled to examine statement of prosecution witness made to police officers during investigation of offense where such statement contained no information exculpatory for defendant. *Ellison v State* (1976, *Tenn Crim*) 549 SW2d 691.

Trial court did not err in denying defendant right to inspect copies of pretrial statements of prosecution witnesses immediately following their direct testimony at trial where at time case was tried state statute similar to the Jencks Act was not in effect. *Honeycutt v State* (*Tenn Crim*) 544 SW2d 912.

See *Pique v State* (*Tenn Crim*) 499 SW2d 4, § 11[h].

While statements of codefendant must be furnished to attorney representing such party, there is no compulsion for court to order codefendant's statements furnished to other defendants. *Graves v State* (*Tenn Crim*) 489 SW2d 74.

Right of defendant or his attorney to inspect and copy designated books and papers in possession of state does not extend to any oral or written statement given to any officer or attorney for state by any witness other than defendant. *Aldridge v State* (*Tenn Crim*) 470 SW2d 42.

See *Brooks v State* (1982, *Tex App 12th Dist*) 643 SW2d 440, review ref., § 4[b].

In prosecution for rape, trial court did not err by failing to compel state to produce handwritten statement of prosecutrix mentioned by her in cross-examination where defendant was provided with typewritten statement which prosecutrix testified was precisely same as handwritten statement, and defendant failed to establish that handwritten statement, which neither state's attorney nor prosecutrix knew whereabouts of, existed at time of prosecutrix's testimony. *Romero v State* (1982, *Tex App 13th Dist*) 636 SW2d 782.

See *Hernandez v State* (1982, *Tex App 4th Dist*) 636 SW2d 611, § 13[a].

Under express provisions of Texas statutes, defendant was not entitled to written statements of witnesses or to work product of counsel and their investigators. *Smith v State* (*Tex Crim*) 455 SW2d 748.

Court did not err in refusing to make available to defendant in murder prosecution all testimony of state's witnesses who appeared before grand jury and all pretrial statements made by all witnesses for state, where all events in case took place within 4 months of grand jury testimony and trial testimony; only 1 of 20 government witnesses' testimony was involved; testimony of defendant's confessed accomplice was corroborated thoroughly by other witnesses and by written and physical evidence; court properly charged jury on law of accomplices and their testimony, and jury resolved credibility of accomplice witness against defendant; evidence adduced corroborated accomplice, who was neither paid informer nor had reason to be hostile witness; and there was no uncertainty as to details in testimony of state's witnesses. *McDuff v State* (*Tex Crim*) 431 SW2d 547.

See *Hackathorn v State* (*Tex Crim*) 422 SW2d 920, § 13[c].

Whether court will direct production of written statements of witnesses in advance of trial, or at all, is matter peculiarly within trial court's discretion, and its ruling will not be disturbed unless there has been manifest abuse of such discretion. *State v Tyler*, 77 Wash 2d 726, 466 P2d 120.

See *State v Beard*, 74 Wash 2d 335, 444 P2d 651, § 17.

See *State v Green*, 70 Wash 2d 955, 425 P2d 913, cert den 389 US 1023, 19 L Ed 2d 670, 88 S Ct 598, § 5[a].

Failure of state to provide copy of statement by witness did not violate state discovery statute where state did not intend to call witness and alleged violation was not prejudicial where defendant was able to carry out complete cross-examination of witness' testimony. *State v Mounsey* (1982) 31 Wash App 511, 643 P2d 892 (disapproved on other grnds *State v Hudlow*, 99 Wash 2d 1, 659 P2d 514).

In murder and burglary prosecution during which evidence established that 81-year-old assault victim died of pneumonia caused in large part by rib fractures, failure of deputy medical examiner who performed autopsy to disclose to defendants until after trial his opinion that prominent bruise on deceased's back occurred during his hospitalization did not violate defendant's rights where, assuming doctor's knowledge was imputable to prosecuting attorney, defense made no pretrial request for disclosure, made no effort to determine date or nature of bruise during trial, and where prosecution was under no duty to disclose on its own initiative all it knew of case and witnesses. *State v Ervin* (1979) 22 Wash App 898, 594 P2d 934.

In rape prosecution court did not abuse discretion in denying discovery of victims' statements where trial of defendant's accomplice stemming from same occurrence took place immediately prior to defendant's trial, defendant's counsel was present at such trial, testimony of victims was presented in full at that time and victims were subject to cross-examination by accomplice's counsel. *State v Krausse*, 10 Wash App 574, 519 P2d 266 (citing annotation).

See *State v Audia* (1983, W Va) 301 SE2d 199, cert den (US) 78 L Ed 2d 307, 104 S Ct 338, § 17.

In prosecution for entering without breaking with intent to commit larceny of antique pump organ, no error was committed by prosecutor in failing to supply defense with copy of letter written by defendant's nephew in which nephew indicated that he had changed his mind about testifying against defendant, where prior to trial, prosecuting attorney found misplaced letter and sent copy of it to defense counsel, nephew corroborated authenticity of letter at trial, nephew's reasons for deciding against testifying were not related to any coercive tactics on part of State, and in any event, defense counsel was supplied with copy of letter prior to trial and agreed after having read it that it was of no value to defense. *State v Jacobs* (1982, W Va) 298 SE2d 836.

See *State v Lenarchick*, 74 Wis 2d 425, 247 NW2d 80, § 11[k].

[\*16b] Statement or confession of codefendantn151

In some cases it has been held or recognized that in a proper case a defendant may be permitted to inspect a statement or confession made by his codefendant which is in the possession of the prosecution.

Thus, in *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571, the court, in holding that the defendant's argument that there was a failure upon the part of the prosecution to comply with certain of the pretrial discovery orders was without merit under the circumstances, noted that the defendant's trial counsel was entitled to inspect, view, hear, or copy any joint confession given by the defendant and his codefendant, and that such was the order of the trial judge in pretrial discovery proceedings. The court disapproved any inference to the contrary in *Schindler v Superior Court of Madera County* (1958) 161 Cal App 2d 513, 327 P2d 68, wherein the court, stating that since any statements of the codefendant were presumably made outside the defendant's presence, such statements would not be admissible against the defendant, held that the defendant was not entitled to an order for pretrial inspection of statements made by a codefendant to the district attorney with respect to the death of the victim of the alleged homicide.

See also *State v Minor* (1962, Del) 177 A2d 215, supra § 11[b], wherein an inspection of tape recordings made by the police of statements of a codefendant was permitted under a criminal rule of procedure expressly authorizing such inspection.

And in *State v Fox* (1938) 133 Ohio St 154, 10 Ohio Ops 218, 12 NE2d 413, supra § 12, the court held that the appellant's counsel were entitled to inspect a written confession of the appellant's codefendant before trial.

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On the other hand, in the following cases the court, either explicitly or by implication supporting the view that an accused is not entitled to inspect a statement or confession made by his codefendant, refused to permit the defendant to inspect such a statement or confession.

In *State v Bankston* (1928) 165 La 1082, 116 So 565, wherein a codefendant had pleaded guilty and had testified as a witness for the prosecution in the trial of the defendant, the court held that it was not error for the trial judge to refuse to grant the defendant's request for an order requiring the prosecuting attorney to produce, during the cross-examination of the codefendant, a statement previously made by him. Noting that the defendant in a criminal case has no right to inspect a document or article in the possession of the prosecution which is not offered in evidence, and pointing out that in the present case the defendant's counsel did not disclose any purpose for which he desired the production of the document in question, whether to be used as evidence or to be used for the purpose of impeachment, the court said that if the document in question was wanted for the purpose of introducing and using it as evidence, the answer was that it would not have been admissible, and if the document was wanted for impeachment purposes, the answer was that no proper foundation had been laid. The court also rejected the defendant's argument that the document in question was a public instrument which any person was entitled to inspect and examine.

In *State v Livsey* (1938) 190 La 474, 182 So 576, it was held that the prosecution could not be compelled, prior to trial, to file in court, for inspection and examination by the accused or his counsel, statements made by a codefendant which were being held as evidence to be used on a joint trial. The court pointed out that such statements did not constitute public records until after they had been used in court.

Relying on the rule that an accused is not entitled to have the prosecution furnish him, prior to trial, with the evidence upon which it intends to rely for his conviction, the court in *State v Haddad* (1952) 221 La 337, 59 So 2d 411, held that the defendant was not entitled to pretrial inspection of written confessions made by codefendants. Holding to the same effect are *State v Simpson* (1949) 216 La 212, 43 So 2d 585, cert den 339 US 929, 94 L ed 1350, 70 S Ct 625, and *State v Martinez* (1952) 220 La 899, 57 So 2d 888, cert den 344 US 843, 97 L ed 656, 73 S Ct 58.

In *Commonwealth v Giacomazza* (1942) 311 Mass 456, 42 NE2d 506, the denial of the defendant's motion, apparently made before trial, for permission to be furnished with a copy of a confession made by a codefendant was upheld. Noting that there was no statutory provision requiring the prosecuting attorney to furnish the defendant with a copy of the confession, the court said that in Massachusetts the law was settled adversely to the defendant's contention.

For other cases wherein the court also held that the defendant was not entitled to inspect a statement or confession made by his codefendant, see *State v Bunk* (1949, NJ County Ct) 63 A2d 842, supra § 13[b], and *Commonwealth v Graham* (1955, Pa) 42 Del Co 313, supra § 5[a].

In *People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, the defendant's motion for the production of a confession allegedly made by a codefendant was denied, the court stating that confessions of a codefendant would not be evidence on the trial, and that, consequently, the defendant was not entitled to copies or an inspection thereof. To the same effect is *People v Jordan* (1953, Gen Sess) 128 NYS2d 457.

Holding that the defendant was not entitled to a disclosure of transcribed statements taken from his codefendants since they were not competent "evidence in support of the cause of action or defense of *the party seeking the discovery*," the

court in *People v Torres* (1965) 46 Misc 2d 264, 259 NYS2d 656, denied the defendant's motion for pretrial inspection of such statements. The court also held that the defendant was likewise not entitled to see notes made by a detective at the time of his interrogation of the codefendants.

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Defendant in murder prosecution was not entitled to grant of her discovery motion for prosecution's disclosure of statement that had been made to police by her accomplice and codefendant where defendant failed to show any reason or need for statement, codefendant was not called as witness, and statement was not alluded to nor referred to during defendant's trial. *Head v State* (1980, Ala App) 392 So 2d 860, cert den (Ala) 392 So 2d 869.

Defendant charged with robbery was entitled to inspection of police memorandum of extrajudicial statement made by his codefendant. *People v Aranda*, 63 Cal 2d 518, 47 Cal Rptr 353, 407 P2d 265.

In prosecution for felony murder and other crimes, trial court erred in denying defendant's motion for new trial where, following direct examination of former co-defendant who testified for state as sole eyewitness, defendant's attorneys learned that witness had been hypnotized by district attorney night before testimony and had been "interviewed" on morning of testimony, and defendant's attorneys then requested tape recordings made of either of two interviews, but did not learn until several months after trial that witness had also been hypnotized on morning of testimony, since, in light of facts that prosecution failed to disclose second hypnotic session after defense requested tapes of either interview, that defense was as specific in request as it could have been, and that request for tapes gave prosecution notice that defense was concerned about nature of both sessions, request was sufficiently specific to make applicable due process test whether undisclosed evidence might have affected trial's outcome, and since, in light of testimony at motion for new trial that being subjected to hypnotism could affect credibility of witness, witnesses' reliability could have been challenged, and failure by prosecution to disclose hypnotism might well have affected outcome of trial. *People v Angelini* (1982, Colo App) 649 P2d 341, later app (Colo App) 706 P2d 2.

Discovery statute did not entitle armed-robbery defendant to pretrial discovery of statements to police by co-defendant, and consequently no error occurred, where prosecution was allowed to use prior consistent statement to rehabilitate prosecution testimony by co-defendant impeached through demonstration of inconsistency with testimony given at guilty plea hearing. *Hill v State* (1982) 161 Ga App 346, 287 SE2d 779.

Although state failed to disclose to defendant convicted of aggravated battery threatening statement he had made to arresting officer and statement he had made on his arrest to assistant state's attorney until day of defendant's trial, such late disclosure did not deny defendant of fair trial where his threat to arresting officer was not brought to light until that officer testified on re-direct examination, where undisclosed threatening statement did not contradict defendant's trial testimony and was not essential to support his conviction, and where statement of defendant of same nature he had made on arrest to assistant state's attorney was contained in police report defendant had received in discovery. *People v Ingram* (1980) 91 Ill App 3d 1074, 47 Ill Dec 564, 415 NE2d 569.

Trial court did not abuse its discretion in denying discovery motion of defendant in murder prosecution for disclosure by State of confession or statement made by codefendant who did not testify at defendant's trial and was not called as witness either by State or defendant, where there was no showing that confession or statement was favorable to defendant on issue of guilt or punishment, and where under such circumstances State was under no continuing duty to make disclosure of confession or statement. *State v Moore* (1981) 229 Kan 73, 622 P2d 631.

In robbery prosecution, it was not error for trial judge to deny defense motion for continuance, which motion was based on grounds that prosecutor had failed to disclose statements or confessions made by co-defendant at preliminary hearing, where continuance was not mandated under statute and court did order prosecutor to make transcript of co-defendant's

testimony at preliminary hearing available to defendant. *State v Lee (1978, La) 364 So 2d 1024.*

See *State v Thomas (La) 290 So 2d 317, § 8.*

See *State v Cardinale, 251 La 827, 206 So 2d 510, § 16[a].*

See *Veney v State, 251 Md 159, 246 A2d 608, § 11[e].*

In robbery and murder prosecution reversible error occurred where defense made specific and timely request for pretrial statements given to police by codefendants which implicated accused, and where prosecutor's late, piecemeal, and incomplete disclosures forced on defense counsel necessity of making difficult tactical decisions quickly in heat of trial. *Commonwealth v Ellison (1978) 376 Mass 1, 379 NE2d 560.*

In felony prosecution trial court did not err or abuse its discretion in denying escapee's motion for disclosure of prosecution and prison records allegedly sought by escapee to aid in preparation of defense of "selective prosecution," for escapee neither alleged in motion nor in hearing thereon that he was invidiously selected by prosecution on account of his race or for reason that he sought to protect his exercise of his constitutional right, and where thrust of his hearing testimony was that prison conditions and policies were such that they motivated his escape. Since defendant had failed to show "colorable basis" for disclosure, court order can deny disclosure without determining whether disclosure request was reasonable within contemplation of rule requiring disclosure to defendant of requested information found by court to be reasonable, relevant and material to defendant's case. *State v Camillo (1980, Mo App) 610 SW2d 116.*

See *People v Player, 80 Misc 2d 177, 362 NYS2d 773, § 11[m].*

See *State v Moore (1980) 301 NC 262, 271 SE2d 242, § 14.*

Co-defendants in first-degree burglary prosecution were not entitled to pre-trial discovery of accomplice's statements where charges were dismissed against accomplice prior to filing of motion for discovery. *State v Thomas (1981) 52 NC App 186, 278 SE2d 535.*

Failure to furnish defendant in armed robbery trial with list of statements made by other 2 defendants and names of persons present at time statements were made was not error, where it appeared from bill of exceptions that no statements were made by other 2 defendants, no statements were introduced in evidence against defendant, nor was any motion made to court by defendant's counsel with regard to this subject. *Sneed v State (Tenn) 423 SW2d 857.*

In rape prosecution involving 3 defendants, it was not error to deny defendant examination of statements made by his 2 codefendants prior to trial. *Morrison v State (Tenn) 397 SW2d 826, reh den 400 SW2d 237.*

[\*16c] Statement or confession of accomplice<sup>152</sup>

In the following cases the court refused to permit the defendant to inspect a statement or confession made by an accomplice.

In *State v Brown (1950) 360 Mo 104, 227 SW2d 646*, the denial of the defendant's motion to require the prosecuting attorney to produce, for inspection by the defense, two written statements made by an accomplice at two different occasions was upheld, notwithstanding the defendant's contention that the inspection was necessary to prepare his case for trial, that he could not safely proceed to trial without such inspection, and that a comparison of the two statements would show that the accomplice had "made different statements of essential and material matters." The court pointed out that the motion stated conclusions and not facts; that it stated no facts to show any materiality of the statements to the defense; that it was a fishing expedition seeking to discover something of benefit to the defendant; and that the

statements were hearsay and inadmissible except by way of impeachment if the accomplice should testify differently.

In *Leahy v State* (1928) 111 Tex Crim 570, 13 SW2d 874, it was held not error to deny the defendant's pretrial motion for permission to inspect written statements or confessions made by an accomplice to the district attorney. Pointing out that no part of the requested statements appeared to have been made an issue on the trial, and none of their contents had been used against the defendant, and noting that the statements were not public documents but private papers, the court said that under the facts of the case such a motion could not be sustained unless and until the statements were in some way made material by the development of the trial.

In *Santry v State* (1886) 67 Wis 65, 30 NW 226, it was held that the prosecuting attorney was under no obligation to furnish the defendant with a copy of the confession of an accomplice, previously convicted, implicating the defendant in the crime.

For other cases wherein the court also refused to permit the defendant to inspect a statement made by an accomplice, see the following:

#### ARIZONA

*State v McGee* (1962) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75, supra § 13[b]

#### FLORIDA

*Raulerson v State* (1958, Fla) 102 So 2d 281, supra § 11[c]

#### MICHIGAN

*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568, supra § 16[a]

#### NEW YORK

*People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, supra § 10[a]

#### VERMONT

*State v Anair* (1962) 123 Vt 80, 181 A2d 61, supra § 11[i]

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On the other hand, attention is called to the following cases wherein the court held that the suppression by the prosecution of an accomplice's statement was a violation of due process under the circumstances: *Brady v Maryland* (1963) 373 US 83, 10 L ed 2d 215, 83 S Ct 1194; *Powell v Wiman* (1961, CA5 Ala) 287 F2d 275; *Wiman v Powell* (1961, CA5 Ala) 293 F2d 605; *Brady v State* (1961) 226 Md 422, 174 A2d 167, affd 373 US 83, 10 L ed 2d 215, 83 S Ct 1194, all supra § 4[b].

&lt;&gt;

Defendant was not entitled to pretrial discovery of alleged confession made by his accomplice where record did not indicate prior inconsistent statement by accomplice existed, where no attempt was made to introduce any statement by accomplice during trial and only account before jury of what accomplice said had occurred came during his testimony at trial, and where defendant's counsel thoroughly cross-examined accomplice and had ample opportunity to question him concerning any alleged prior inconsistent statements. *McLaren v State* (1977, Ala App) 353 So 2d 24, cert den (Ala) 353 So 2d 35.

Prosecution was not required to supply defendant with grand jury testimony of participant in crime which incriminated defendant. *Sinclair v United States* (1978, Dist Col App) 388 A2d 1201.

Defendant was not entitled to discover statements made by codefendant to police; nondisclosure of fact that tip from confidential informant may have led to defendant's arrest was not prejudicial, even if exculpatory, where omitted evidence did not create reasonable doubt; defendant was not entitled to inspection of state's files on co-conspirators who had been acquitted, even assuming that files were public records, where cases were still under investigation for possible federal prosecutions. *Castell v State* (1983) 250 Ga 776, 301 SE2d 234 later app 252 Ga 418, 314 SE2d 210, cert den (US) 83 L Ed 2d 159, 105 S Ct 230.

Where notes of 30 hours of interviews with accomplice and key prosecution witness were destroyed by prosecution after preparation of eight page outline of witness' expected trial testimony, defendant was deprived of in camera inspection of notes to determine whether they contained substantially verbatim reports of witness' statements and trial court, rather than denying defendant's motion for discovery of notes, should have ordered their reconstruction by prosecution, and case would be remanded for preparation of reconstructed notes. *People v Szabo* (1983) 94 Ill 2d 327, 68 Ill Dec 935, 447 NE2d 193.

State did not withhold exculpatory evidence to prejudice of defendant when it notified defense of existence and contents of tape recorded conversation between two co-conspirators in which one co-conspirator implicated himself in a kidnapping and conspiracy to commit theft by threat but stated that he did not know that defendant was involved, when neither state nor its agents were in possession of tape recording. Further it did not appear, in light of other testimony that co-conspirator who made recorded statement did not know other defendants personally, that missing evidence was such as to create new reasonable doubt of guilt that did not otherwise exist. *People v Bolla* (1983) 114 Ill App 3d 442, 70 Ill Dec 118, 448 NE2d 996.

Generally, testimony of an accomplice should be highly scrutinized, and in order for such testimony to be admissible full disclosure of any agreements between accomplice and the state is required. *Aikins v State* (1983, Ind) 443 NE2d 820.

Trial court did not err in refusing to permit defendant to examine pretrial statements of government witnesses who were involved in criminal activity with defendant, where cross-examination of such witnesses fully brought out fact of their prior inconsistent statements, and critical issue upon which defendant sought prior statements was witnesses' credibility; moreover, statements were not favorable to defendant, and even assuming defendant was entitled to examine them, review of record did not disclose that he was prejudiced by denial of his motion for their production. *State v Lemon*, 203 Kan 464, 454 P2d 718.

Louisiana law does not require pretrial discovery of statements taken from potential witnesses; thus, defendant in arson prosecution was not entitled to copy of statement given to police by accomplice. *State v Curry*, 262 La 616, 264 So 2d 583.

Defendant was not entitled to inspection of statements of accomplices in possession of district attorney particularly where record reflected that able counsel for defendant presented their case well and suffered no prejudice or deprivation by being denied evidence which they sought. *State v Mitchell*, 258 La 427, 246 So 2d 814, cert den 404 US 1000, 30 L Ed 2d 553, 92 S Ct 561.

No prejudice to defendant was shown by state's failure to inform defendant of oral pretrial statement made by accomplice which was allegedly inconsistent both with a pretrial written statement given by witness as well as with his trial testimony when district attorney's office was unaware of oral statement and that it had been recorded until its existence was disclosed during trial, where upon prosecutor turned it over to defense and transcription was made, one day prior to witness taking stand in trial, defense did not request a trial recess in order to have additional time to study transcript, and tape was played for jury, which then had opportunity to note any inconsistencies between oral statement and witness' written statement and trial testimony. *State v Davis* (1983, La App) 430 So 2d 680, cert den (La) 433 So 2d 1056.

People could not, with impunity, prevent defendant's access to testimony of police informant who had also been active participant in criminal transaction. *People v Osorio* (1982, 1st Dept) 86 App Div 2d 233, 449 NYS2d 968, app dismd 57 NY2d 671, 454 NYS2d 77, 439 NE2d 886.

In prosecution for murder, defendant was not entitled under state statute to pretrial discovery of statement by defendant's companion who, although he was charged with same murder, was not a "co-defendant being jointly tried" but was testifying for the state under offer of immunity. *State v Lake* (1982) 305 NC 143, 286 SE2d 541.

In kidnapping and homicide prosecution, defendant had no right to compel discovery of prior statements and grand jury testimony by co-conspirator who was not co-defendant, having been granted immunity by state. *State v Nabozny* (1978) 54 Ohio St 2d 195, 8 Ohio Ops 3d 181, 375 NE2d 784, vacated on other grounds, *Nabozny v Ohio* (1978, US) 58 L Ed 2d 103, 99 S Ct 70.

General rule requiring production of pretrial statements consisting of verbatim notes of witness statements would not be extended to prosecutor's "scribbled" notes of conversation with accomplice, which had been discarded before trial and before defense demand for production. *Commonwealth v Wade* (1978) 480 Pa 160, 389 A2d 560.

State's attorney was not obliged to disclose to defense counsel anticipated change in accomplice's testimony where changes in original version did not alter basic story substantially, defense counsel had interviewed witness shortly before trial, and defense counsel had full opportunity to cross-examine witness on stand and to establish credibility of defense's alibi witnesses before jury. *State v Hamm* (SD) 234 NW2d 60.

[\*17] Police or investigation report; police record; investigation file 153

In some cases the defendant was permitted to inspect a report of an investigating officer or a fire marshal relating to the case.

In *People v Darnold* (1963) 219 Cal App 2d 561, 33 Cal Rptr 369, cert den 376 US 927, 11 L ed 2d 623, 84 S Ct 694, involving a request for inspection of a report of investigating officers, the court held that it was not error for the trial court to allow an inspection of only those portions of the report which related to the present indictment.

For cases permitting inspection of a police record where such document was used by the prosecuting attorney in his examination of the accused, see *State v Stephens* (1949) 168 Kan 5, 209 P2d 924, supra § 9[c], footnote 20, and *People v Brown* (1956) 2 App Div 2d 202, 153 NYS2d 744, supra § 9[c], footnote 18.

And in *State v Healey* (1965, NH) 210 A2d 486, involving a prosecution for arson and for murder, the court held that a

report of the state fire marshal containing his conclusions with respect to the cause and origin of the fire involved in the case could be made available to the defense by the trial court in its discretion with proper safeguards by excising or withholding any part which might unduly hamper the prosecution if given to the defendant in advance of trial.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect a police or investigation report, a police record, or an investigation file which was made in connection with the case.

The defendant's contention that the trial court committed error in refusing to permit the examination by him of a police report which had been brought into the courtroom by the prosecution during the course of the trial was rejected in *State v Wallace (1965) 97 Ariz 296, 399 P2d 909*, where it appeared that during the cross-examination of a police officer testifying for the prosecution, the trial court, while permitting the defendant to examine those portions of a police report which were made by the officer,<sup>154</sup> denied the defendant's request to inspect the entire report. Stating that there is no reason why the rules governing pretrial discovery in criminal cases should not be applicable to discovery at or during the course of the trial, and noting that it had been specifically held in a number of instances that there was no right to inspect police reports which had not been offered in evidence, at least until there was some showing of relevancy, the court concluded that in the present case the defendant did not show good cause or any sufficient reason to require the prosecution to permit an inspection of the entire police record. The court recognized that even where the Arizona rule of criminal procedure providing for discovery and inspection of certain documents and objects is not applicable, the trial court has the inherent power to order discovery of documents and objects when the due administration of justice so requires.

In *People v Santora (1942) 51 Cal App 2d 707, 125 P2d 606*, it was held not error for the trial court to refuse to permit the defendant to examine a report made by a police officer relating to a conversation he had had with the complaining witness, the court pointing out that the report was confidential, was not admissible in evidence, and had not been used by the officer to refresh his recollection; and that the officer merely stated that such a report had been prepared, and that he had it in his possession.

In a prosecution for pandering, the defendants' motion for production of police records of call girls and their dispatcher, who had been used or employed by the defendants and who had been arrested for activities connected with prostitution, was held properly denied in *People v Wilkins (1955) 135 Cal App 2d 371, 287 P2d 555*, notwithstanding the defendants' allegation that such records were sought to obtain information which, if not admissible in evidence, they could use in the cross-examination of the girls and the dispatcher. The court noted that the files in law enforcement agencies relating to the apprehension, prosecution, and punishment of criminals are not subject to public inspection; that the code of civil procedure concerning inspection and discovery process does not apply to criminal proceedings; and that although the trial court in the present case requested the defendant to state the materiality of the records in question, the defendant did not do so, claiming that he had the right to see the records.

In *People v Chapin (1956) 145 Cal App 2d 740, 303 P2d 365*, a prosecution for grand theft, it was held proper to deny the production during the trial of reports made by police officers concerning the crime and statements made to the police by the victim of the theft and certain other persons connected with the place where the theft had occurred. (The court cited only *People v Wilkins (Cal) infra*.)

The trial court's refusal to allow the defendant to examine police reports was held not error in *People v Pearson (1957) 151 Cal App 2d 583, 311 P2d 927*. Pointing out that the reports had not been used by any witness, the court said that the refusal to permit their examination was proper.

In *State v Molinar (1962) 24 Conn Supp 160, 188 A2d 69*, a prosecution for speeding, the court, rejecting the

defendant's contention that it was error for the trial court to refuse to permit the defendant to examine the arrest sheet which was made by the arresting officer at the time of her arrest, said that the arrest sheet in question was a statement prepared by the arresting officer for the purpose of enabling the prosecuting attorney to perform the duties of his office, and that, therefore, the defense had no right to demand its production.

In *People v Turner* (1963) 29 Ill 2d 379, 194 NE2d 349, wherein it appeared that during direct examination of a police officer testifying for the prosecution, he was asked to produce, for examination by defense counsel, a copy of his report given to his superiors, but the prosecuting attorney objected to the request on the ground that such a report could be used for impeachment only, and defense counsel thereupon replied that he did not intend to impeach the officer, it was held that the trial court did not commit error in sustaining the prosecuting attorney's objection. Noting that the trial court may, in proper cases, order the production of such reports, but that the use of such documents is restricted to impeachments, the court pointed out that defense counsel disclaimed any intent to impeach the officer.

Reports of the offense made by police officers were also held not producible for inspection by the defendant in *Brown v State* (1959, Ind) 158 NE2d 290, the court following the decision in *Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, supra.

The denial of the defendant's motion, made during the course of the trial, for production of "police reports written by such officers following statements made by the prosecuting witnesses" was upheld in *Anderson v State* (1959) 239 Ind 372, 156 NE2d 384. Commenting that if the prosecution was required to turn over to an accused the statements of all witnesses compiled in the preparation of a case, justice would be seriously frustrated, and noting that the protection afforded to persons charged with crime does not include a right to examine statements and reports contained in the working files of the prosecution, the court said that if the reports in question were a matter of public record they could have been examined by the defendant before trial or brought into court by subpoena, and that if they were not matters of public record but only a part of the information which constituted the prosecuting attorney's file in the case, then the defendant was not entitled to inspect such alleged "statements."

In *State v Hill* (1964) 193 Kan 512, 394 P2d 106, it was held (three members of the court dissenting) that a report of the Kansas Bureau of Investigation containing statements of a prosecution witness could not be produced for the defendant's inspection. The court observed that the report in question was made in the course of investigating the crime charged against defendant and thus in the pursuance of official duty; that a report of such nature is not one of a public character even though it was compiled by public officials, but it is made solely for the use of officers in solving the crime under investigation and in bringing to justice the persons responsible for its commission; that, no doubt, the report in the present case contained information of a confidential nature, the disclosure of which might have serious adverse effect on the future course of efficient law enforcement; and that the book and papers acquired by a county attorney in investigating infractions of the law are his quasi-private data, which are of no concern to anyone but himself unless and until, in his discretion, he reveals their contents in court.

In *State v Mattio* (1947) 212 La 284, 31 So 2d 801, cert den 332 US 818, 92 L ed 395, 68 S Ct 145, the denial of the defendant's pretrial motion for an order requiring the production of the police reports disclosing the result of the entire investigation of the case conducted by police officers, which were then in the possession of the district attorney and the superintendent of the police department, was upheld, the court rejecting the defendant's contention that police reports were public records which were subject to inspection by the public, within the contemplation of the Louisiana Public Records Act.

Relying on the rule that an accused is not entitled to have the prosecution furnish him, prior to trial, with the evidence which it intends to rely upon for his conviction, the court in *State v Haddad* (1952) 221 La 337, 59 So 2d 411, held that the defendant was not entitled to pretrial inspection of police reports in the hands of the police department or the district attorney. Holding to the same effect are *State v Simpson* (1949) 216 La 212, 43 So 2d 585, cert den 339 US 929, 94 L ed 1350, 70 S Ct 625, and *State v Martinez* (1952) 220 La 899, 57 So2d 888, cert den 344 US 843, 97 L ed 656, 73 S Ct 58.

The prosecution's objection to the issuance of a writ of subpoena duces tecum which was applied for by the defendant for the production of the records of certain police stations for the stated purpose of proving that the defendant was incarcerated in several district police stations after his arrest and that numerous other men were being held at that time on suspicion for the same crime was held properly sustained in *State v Michel* (1954) 225 La 1040, 74 So 2d 207, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144, the court stating that the records sought to be subpoenaed were not material, because they were wholly irrelevant to the question of the defendant's guilt or innocence, and that if they could be considered as public records, they were clearly excepted from the provisions of the Louisiana Public Records Act, and were not subject to inspection until they were used in open court.

In *Commonwealth v McCann* (1950) 325 Mass 510, 91 NE2d 214, the denial of the defendant's request to see the report made by a police officer who, at the request of the district attorney, had conducted an investigation of those who had been summoned as jurors was upheld. The court pointed out that the defendant's counsel had no evidence indicating that the rights of the defendant were in any way prejudiced by the investigation, and he apparently accepted as true the statement of the district attorney that the police officer did not approach or talk with any prospective jurors; that a list of those who had been summoned as jurors was available to counsel; that each juror before his selection had been examined under oath by the judge and had answered that he was not conscious of any bias or prejudice.

The denial of the defendant's request for production of a police report concerning the crime charged against him was held not error in *State v Cochran* (1963, Mo) 366 SW2d 360, cert den 375 US 981, 11 L ed 2d 426, 84 S Ct 492, the court pointing out that the defendant's attorney said that he wanted to use the report for impeachment of witnesses, but also frankly admitted that "the report would not impeach the credibility of the witnesses"; and that while a case relied on by the defendant involved a police report which was used by a police officer to refresh his memory, there was nothing in the present case to show a use of the report to refresh the memory of any witness, and no witness was even asked if he had ever seen the report.

Where, during the examination of a prosecution witness in a prosecution for murder, defense counsel requested permission to examine certain police reports or records relating to surveillance by police officers of one of the defendants, which documents were then in the possession of an assistant district attorney, but the trial court denied the request, it was held in *People v Buchalter* (1942) 289 NY 244, 45 NE2d 425, that the trial court's ruling was correct upon the facts presented. Following the decision in *People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, supra § 10[a], the court pointed out: "The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. The reports established that the defendant could and did elude the police at will."

See also *Mulry v Beckmann* (1947) 188 Misc 648, 69 NYS2d 43, affd 272 App Div 780, 69 NYS2d 519, where the court denied an application for an order directing the police commissioner of a certain county and his assistant to permit an accused's attorney to inspect and examine the police blotter, teletype messages, radiograms, and reports pertaining to the offense allegedly committed by the accused. Stating that there was no difference between the police records in question and papers and records in the possession of a district attorney, and noting that documents and memoranda in the possession of the district attorney are not subject to inspection by a defendant where they are not themselves admissible in evidence, the court pointed out that the contents of the documents sought in the present case were not admissible in evidence against the accused.

In *State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, the denial of the defendants' petition for production, before trial, of the reports of the investigation conducted by the state bureau of investigation in connection with the present prosecution was upheld on the ground that the defendants had not shown facts which would have warranted the trial court in entering an order allowing them to inspect the files of the state bureau of investigation as prayed in the petition. The court pointed out that the defendants were not seeking an

inspection of any documents or articles which formed the basis of the charges against them and which were admissible in evidence, as, for example, where a defendant charged with forgery requested an inspection of the alleged forged document, but they were seeking an order permitting them before trial to go on a word-by-word and line-by-line and unlimited voyage of discovery through the files of the state bureau of investigation in respect to the present cases, without any allegation on their part that anything therein was the basis of the charges against them and was admissible in evidence against them, and in the fervent hope that something might turn up to benefit them or that thereby they might obtain an inspection of the prosecution's evidence. Stating that, in brief, the defendants contended that they had an unqualified right to an inspection of all papers and documents, if any, in the files of the state bureau of investigation in the present case, the court noted that in the absence of statutes or rules of practice providing otherwise, a defendant was not entitled under such circumstances to an order of inspection, and that the burden of showing facts justifying inspection before trial was on the moving party. The court also rejected the defendants' contentions that in order to prepare a defense against the charges in the present prosecution, they were entitled to examine the reports by the statute providing that all records and evidence collected and compiled by the director of the state bureau of investigation and his assistant might be made available to the public upon an order of a court of competent jurisdiction. Similarly, the court rejected the argument that the trial court's refusal to make such reports available to the defendants amounted to a violation of their rights guaranteed by the state and federal constitutions. The court observed that the statute relied on gave to a defendant no unqualified right to an order permitting him an inspection of all records and evidence collected and compiled by the state bureau of investigation in a criminal case pending against him, nor was there any statute in North Carolina that gave such a right to a defendant in a criminal case.

In *Commonwealth v McCarter* (1956) 385 Pa 236, 122 A2d 714, the defendant's contention that the prosecution should have turned over to him the official reports made by the state police was rejected, the court pointing out that the record showed that the trial court granted defense counsel permission (of which they did not avail themselves) to examine the original notes taken by a state police officer when he had interviewed the defendant.

The trial court's refusal to permit the defendant to examine an offense report was held not error in *Sirvello v State* (1958) 166 Tex Crim 572, 316 SW2d 753, where the report had not been used by a prosecution witness while on the stand to refresh his memory, nor was it exhibited in the presence of the jury, but it was first mentioned by defense counsel when he inquired whether it substantiated the testimony of a police officer.

In *Erwin v State* (1961) 171 Tex Crim 323, 350 SW2d 199, the court, relying on the rule that the defendant's right to see a document or writing does not obtain when such document is not used by the prosecution before the jury in some way so as to make the contents thereof an issue, upheld the trial court's refusal to require a police officer to furnish a copy of a written report concerning the arrest of the defendant and setting out some of the details of the case. The court pointed out that the officer did not have the report in his possession nor was he using any notes or memoranda therefrom, and that his only statement concerning the report was that it was seen by him after its completion and that it was "fixed up" by him and another officer.

For other cases wherein the court also refused to permit the defendant to inspect a document of the kind under consideration, see the following:

#### CALIFORNIA

*People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, supra § 7

#### COLORADO

*Rosier v People* (1952) 126 Colo 82, 247 P2d 448, supra § 7

## DELAWARE

*State v Thompson* (1957) 50 Del 456, 134 A2d 266, supra § 11[b]

## GEORGIA

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, supra § 3

*Bass v State* (1958) 98 Ga App 570, 106 SE2d 845, cert den 359 US 969, 3 L ed 836, 79 S Ct 882, supra § 16[a]

## LOUISIANA

*State v Lee* (1932) 173 La 966, 139 So 302, supra § 16[a]

*State v Dallao* (1937) 187 La 392, 175 So 4, app dismd and cert den 302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51, reh den 302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139, supra § 13[d], footnote 9

## MARYLAND

*Glaros v State* (1960) 223 Md 272, 164 A2d 461, supra § 11[e]

## MICHIGAN

*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568, supra § 16[a]

## MISSOURI

*State v Hinojosa* (1951, Mo) 242 SW2d 1, supra § 8

*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, supra § 7

*State v Hale* (1963, Mo) 371 SW2d 249, supra § 9[c], footnote 11

*State v Engberg* (1964, Mo) 377 SW 2d 282, supra § 11[f]

## NEW JERSEY

*State v Bunk* (1949, NJ County Ct) 63 A2d 842, supra § 13[b]

## NEW YORK

*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698, supra § 7

## TEXAS

*Artell v State* (1963, *Tex Crim*) 372 *SW2d* 944, cert den 375 *US* 951, 11 *L ed 2d* 312, 84 *S Ct* 439, supra § 9[c], footnote 11

#### VERMONT

*State v Lavallee* (1960) 122 *Vt* 75, 163 *A2d* 856, supra § 3

*State v Fox* (1961) 122 *Vt* 251, 169 *A2d* 356, supra § 12

#### WEST VIRGINIA

*State v Painter* (1950) 135 *W Va* 106, 63 *SE2d* 86, supra § 9[c] footnote 11

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In prosecution for murder, prosecution's failure to produce police report and teletype relating to the murder, which "was in all probability unlawfully withheld by the prosecution," was not reversible error where jury was nonetheless able to hear and evaluate exculpatory information contained in the report, and the information was cumulative at best. *Fulford v Maggio* (1982, *CA5 La*) 692 *F2d* 354, revd 422 *US* 111, reh den (US) 77 *L Ed 2d* 1451, 104 *S Ct* 29 and on remand (*CA5 La*) 715 *F2d* 162.

See *Gorham v Wainwright* (1979, *CA5 Fla*) 588 *F2d* 178, § 4[b].

Defendants in murder prosecution were not entitled to discovery of report of police officer as to description of suspects sought, where officer did not testify as witness, and report did not indicate whether descriptions of suspects set forth therein were based on statements made to him by prosecution witness or on statements made by other persons, or upon some composite. *U. S. ex rel. Durso v Pate* (*CA7 Ill*) 426 *F2d* 1083, cert den 400 *US* 995, 27 *L Ed 2d* 445, 91 *S Ct* 469.

See *Smith v State*, 282 *Ala* 268, 210 *So 2d* 826, § 22[e].

First-degree escape defendant who manifested psychotic-like behavior had no right to discover for impeachment purposes criminal records of unannounced prosecution witness. *Bailey v State* (1982, *Ala App*) 421 *So 2d* 1364.

Robbery defendant had no right to pretrial discovery of statements given by victim, an anti-robbery task force undercover officer equipped with body transmitter. And defendant had no right to compel district attorney to identify and produce the whereabouts of any witness or witnesses who allegedly were eye witnesses to incident in question. *Allen v State* (1982, *Ala App*) 414 *So 2d* 163.

Defense counsel's request for access and right to copy "all reports, police notations, photographs, witness statements, and all documents contained in the file," made after testimony by investigator indicated witness was using some notes in file to refresh his recollection, was properly denied in prosecution for receiving stolen property where defense had opportunity for pretrial discovery, and where target of the defense motion was much larger than combination of text and context of any information used by witness to refresh his recollection. *Johnson v State* (1981, *Ala App*) 398 *So 2d* 393.

Criminal defendant was not entitled to discovery of investigator's work product from interview with defendant despite contention that report contained statements of defendant. *McCorvey v State* (*Ala App*) 339 *So 2d* 1053, cert den (*Ala*) 339 *So 2d* 1058.

Trial court properly denied motion for production of all notes, affidavits, statements, and reports made or collected by investigating authorities, as well as FBI report, where none of such reports or notes included any statement by accused, and FBI report was only summary, in narrative form, of interviews with various witnesses. *Mitchell v State*, 50 Ala App 121, 277 So 2d 395, cert den (Ala) 277 So 2d 404.

Notes or memoranda personally compiled by law enforcement authorities in course of their investigation, even if they include notes of conversations with accused, constitute work product of state and are privileged from pretrial discovery. *Cooks v State*, 50 Ala App 49, 276 So 2d 634, cert den 290 Ala 363, 276 So 2d 640.

Prosecution was under duty to disclose to defense police reports containing information used on cross-examination by state to impeach accused's alibi witnesses where defense obtained continuing discovery order for all police reports containing statements of persons with relevant information. *Stevens v State* (1978, Alaska) 582 P2d 621.

Trial court erred in refusing to permit disclosure to defendant of police reports on prosecution witnesses' activities as undercover drug informer where such reports were relevant, although unrelated to crime for which defendant was being tried, in that they showed that witness was deeply involved in working for police, which would create material inference that he might be biased in favor of prosecution. *Braham v State* (1977, Alaska) 571 P2d 631.

In prosecution for sale of various narcotics, trial court abused its discretion in denying defendants' motion for production of "non-drug" expense logs of undercover officers involved where defendants asserted defense of entrapment and where defendants sought to show that quantities of money and gifts and purchases in kind were given to defendants and others during course of officers' investigation for purpose of procuring and inculcating defendant's friendship. *Batson v State* (1977, Alaska) 568 P2d 973.

Court order for inspection of all written statements by defendants or witnesses and all oral statements by informer or defendants did not include investigative officer's report or those portions of report dealing with statements made by defendants in course of offense. *State v Doty*, 110 Ariz 348, 519 P2d 47.

Court may not permit defense to examine work product of law enforcement authorities except upon showing that either (1) authorities have sought to subvert otherwise valid discovery by alleging that material is privileged under work product exclusion, or (2) compelling and exceptional circumstances indicate to court that to deny discovery would materially prejudice defendant in preparation of defense. *State v Fassler*, 108 Ariz 586, 503 P2d 807.

Trial court erred in granting motion to produce all police reports pertaining to investigation of defendant, since reports compiled by law enforcement authorities in course of investigation constitute work product of state and are, as such, privileged from discovery except upon showing, inter alia, of compelling and exceptional circumstances indicating that denial of discovery would materially prejudice defendant in preparation of his case; thus, even though compelling and exceptional circumstances were present in instant case where identification was material factor, nevertheless this was not sufficient to compel discovery of records otherwise privileged, and court should have examined police reports in camera and ordered production of only those parts relevant to identification. *State ex rel. Berger v Superior Court of County of Maricopa*, 105 Ariz 473, 467 P2d 61.

In prosecution for murder, defendant could not obtain inspection of police reports, notwithstanding reports were by police officers whom state intended to call as witnesses, such reports being excluded as work products. *State ex rel. Corbin v Superior Court of Maricopa County*, 99 Ariz 382, 409 P2d 547.

Demand by defendant in rape prosecution in form of blanket request that, in effect, prosecution turn over to defense counsel all statements it had was properly denied. *Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838.

See *Pitchess v Superior Court of Los Angeles County*, 11 Cal 3d 531, 113 Cal Rptr 897, 522 P2d 305 (police investigation file), § 5[a].

In burglary prosecution it was not abuse of discretion to deny discovery of "rap sheet" of eyewitness, which record might contain information regarding arrests or detentions of witness for burglaries having modus operandi common to offense for which defendant was charged, where there were no facts warranting reasonable belief witness committed present offense. *Hill v Superior Court of Los Angeles County*, 10 Cal 3d 812, 112 Cal Rptr 257, 518 P2d 1353.

See *Carruther v Municipal Court for Long Beach Judicial Dist. (1980, 2d Dist)* 110 Cal App 3d 439, 168 Cal Rptr 33, § 16[a].

In prosecution for indecent exposure by maintenance worker to two minor females in juvenile hall in which defendant sought, among other relief, discovery of victims' complete juvenile records for purposes of cross-examination, trial court properly denied what amounted to overbroad discovery request; defendant's interest in obtaining information to aid in effective cross-examination furnishes standard by which to measure limitations on principal of confidentiality of juvenile records. However, without further showing, defendant would appear entitled to victim's juvenile "rap sheets." *Foster v Superior Court of Santa Clara County (1980, 1st Dist)* 107 Cal App 3d 218, 165 Cal Rptr 701.

On motion by defendant charged with attempted murder of policeman and other crimes, for discovery of official records concerning prior conduct of two police officers and federal agent who, defendant alleged, utilized illegal tactics and excessive force and violence in executing search warrant on him, trial court erred in denying motion insofar as records sought were in possession or under control of prosecution, and in requiring defendant to attempt to secure records by subpoena duces tecum, where declaration supporting motion and motion itself described requested information with sufficient specificity and where it was sustained by plausible justification. *Saulter v Municipal Court for Oakland-Piedmont Judicial Dist. (1977)* 75 Cal App 3d 231, 142 Cal Rptr 266.

In prosecution for interfering with officer in performance of his duties, defendant was entitled to have all evidence relating to skirmish between him and arresting officers and of any physical resistance offered by him at time of his detention and arrest suppressed where police department of one arresting officer refused to turn over records deemed by trial court to be pertinent to defendant's attempt to show that two arresting officers had propensity to use excessive force and that any force which defendant may have used was used in self-defense, where people's case was predicated upon scuffle which took place when officers attempted to subdue defendant and where officers acted in concert and their actions were inextricably intertwined. *M. v Superior Court of Los Angeles County (1977)* 70 Cal App 3d 782, 139 Cal Rptr 149.

In order for police officer, who was complaining witness in criminal prosecution, to successfully invoke attorney-client privilege so as to protect from disclosure statements made by him to representatives of police department acting primarily as agents of city attorney, he had to demonstrate that professional attorney-client relationship existed between himself and city attorney's office, that communications were made in course of relationship, and that communications were intended to be confidential; where statements were made by officer to police department investigators who were assisting city attorney in preparing defense to possible civil action against officer, statements were not privileged and were subject to disclosure. *Gonzales v Municipal Court for Judicial Dist.*, 67 Cal App 3d 111, 136 Cal Rptr 465.

In prosecution for assault in which alleged victim was off-duty police officer and in which self-defense was raised, defendant was entitled to discovery of information in officer's personnel file pertaining to citizen complaints against him for alleged acts of unwarranted aggressive behavior, violence, or excessive force. *People v Superior Court of Santa Clara County*, 62 Cal App 3d 853, 133 Cal Rptr 440.

In prosecution for assaulting and obstructing police officer, defense counsel was entitled to names of witnesses who had

made allegations of use of excessive force even though municipal court, after in camera examination of police records sought by defendant in support of claim of self-defense, had declared that there was nothing in either officer's file showing propensity for violence and no material relevant to offense charged or to self-defense, where in camera examination was improper absent prosecutor's claim of privilege and defense request served as withdrawal of acquiescence in such examination. *Long v Municipal Court for Oakland-Piedmont Judicial Dist.*, 58 Cal App 3d 382, 128 Cal Rptr 918.

In prosecution for battery on police officer and obstructing officer in performance of duty, defendants, who claimed self-defense, were entitled to obtain information from police department records concerning propensity of officers involved to use excessive force, aggressive conduct, or violence where, even though defense did not point to any specific prior acts of violence, where records desired to be examined were identified by defense with reasonable particularity and pertinence to defense of requested information was demonstrated. *Caldwell v Municipal Court for Oakland-Piedmont Judicial Dist.*, 58 Cal App 3d 377, 129 Cal Rptr 834.

In prosecution in juvenile court alleging that minor had committed battery against two police officers, trial court erred in denying defendant's motion for pre-trial discovery of records involving all persons who had filed complaints against officers involved for unnecessary acts of aggressive behavior, excessive force, or for acts demonstrating racial prejudice where, although defendant could not identify exact content of material sought, she could identify type of material desired and where officer's disciplinary records would be relevant and admissible under evidence code and it was apparent that defendant could not readily obtain information through her own efforts. *In re Valerie E.*, 50 Cal App 3d 213, 123 Cal Rptr 242.

Prosecution should be required, on request, to obtain, and make available to defendant, felony conviction records of prosecution witnesses; moreover, in assault and murder prosecution in which defendant claimed self-defense, prosecution was required to produce, if available, any information concerning arrests for specific acts of aggression by alleged victims. *Engstrom v Superior Court of Alameda County*, 20 Cal App 3d 240, 97 Cal Rptr 484.

Discovery order relating to production of all statements, written, or otherwise transcribed in writing of endorsed or material witnesses did not include offense report, interdepartmental police report and interdepartmental letter. *People v Morgan (Colo)* 539 P2d 130.

See *People v Maestas (Colo)* 517 P2d 461, § 16[a].

Although police records were not public records, and thus were not open to inspection, information therefrom with respect to traffic or other convictions of prospective jurors, which was regularly supplied to district attorney's office for trial use, should have been made available on request to public defender's office and other defense attorneys. *Losavio v Mayber (Colo)* 496 P2d 1032.

In prosecution for conspiracy to commit murder, trial court did not abuse its discretion in denying defense access to file of sealed police reports concerning statements made by co-conspirator turned informant due to grant of immunity, where trial court correctly concluded that reports had no relevance to issues in case. *People v Goetz (1978, Colo App)* 582 P2d 698.

See *State v Davis (1978)* 175 Conn 250, 397 A2d 1347, § 11.

Refusal of trial court to inspect in camera lengthy investigative report made for chief of police regarding interdepartmental matters to determine (a) whether document contained statement by chief inconsistent with testimony that he had no opinion as to character of arresting officers for excessive violence or (b) presence of exculpatory material as to credibility of arresting officers was proper, where in first instance defendant's counsel never determined from chief of police whether report contained his prior statement and in second instance defendant was not prejudiced by court's

refusal as counsel vigorously pursued officer's capacity for violence by producing array of witnesses and determination as to whether officers employed excessive force in effecting arrest was irrelevant to issue of defendant's guilt. *State v Clemons*, 168 Conn 395, 363 A2d 33.

Trial court properly quashed subpoena seeking all search warrants for premises upon which crime occurred for two and one-half year period prior to crime where, even if records showed that apartment was notorious house of prostitution and drug distribution point, it would be mere speculation to conclude from that history that someone other than defendants had been present at specific time of crimes alleged. *Turner v United States* (1982, Dist Col App) 443 A2d 542.

Due process, as elaborated in Brady and subsequent case law, requires at-trial production of impeachable convictions of government witnesses, at least to extent of government's knowledge about them; government, and thus its prosecutorial agent, is deemed to know about all prior convictions of government witnesses which happen to be listed in government's records accessible to prosecution. *Lewis v United States* (1978, Dist Col App) 393 A2d 109, on reh (Dist Col App) 408 A2d 303.

Subpoena of police personnel files of officers to look for material indicating prior violent acts of officers for use as evidence that they might have been aggressors and for information about promotions or investigations of weapon firings that might show officer had motive for perjury was properly quashed as nothing more than fishing expedition where defendant did not proffer any reason to believe that either of two types of material would be found and refused offer of trial judge to inspect files in camera. *Cooper v United States* (Dist Col App) 353 A2d 696.

Trial court properly denied defense request for discovery of complete police investigative report concerning crime in question where other disclosures, including some not mandated by statute, were made to defense and defendant had benefit of all relevant information. *Perry v State* (1980, Fla) 395 So 2d 170.

Prosecuting attorney may be required to disclose to defense counsel any record of prior convictions of defendant or of persons whom prosecuting attorney intends to call as witnesses, if such material and information is within his possession; however, if this information is not in his possession, prosecutor is not required to secure it for defense counsel. *State v Crawford* (Fla) 257 So 2d 898.

Trial judge did not err in denying defense motion for discovery of police reports or in camera inspection of same when defense was able to depose officers who allegedly recorded statement by victim that was substantially verbatim as to description of robber, defense thoroughly explored discrepancies between victim's deposition and trial testimony as to her description of robber, police officer testified as to description of robber originally given him by victim, and discrepancies among descriptions of robber given by victim were minor and evidence of guilt was great. *Whiddon v State* (1983, Fla App D1) 431 So 2d 290, petition den (Fla) 438 So 2d 834.

Where police officer at deposition inadvertently gave defense erroneous information as to statements that defendant had made after arrest, and police report which contained true statements was not presented to defense despite discovery request until officer was testifying at trial, court correctly allowed officer to testify and offered defense recess to examine report. *Wright v State* (1983, Fla App D1) 428 So 2d 746, ctd ques ans, approved (Fla) 446 So 2d 86.

See *Lockhart v State* (1980, Fla App D4) 384 So 2d 289, § 11[c].

In robbery prosecution, trial court erred in not allowing defendant to discover police reports containing descriptions of perpetrator given by victims and alleged to contain verbatim recitals of discoverable contemporaneous oral statements, but such error was harmless when viewed in context of entire weight of evidence. *Black v State* (1980, Fla App D1) 383 So 2d 295.

In prosecution for resisting arrest defendant was not entitled to pretrial production of statements by officer defendant was accused of striking, made at hearings during intra-departmental investigation of officer's conduct; where trial court conducted in-camera inspection of requested materials after police officer testified at trial, trial court fully protected defendant's right to impeachment and access to "Brady" material. *Jackson v State (1979, Fla App D3) 369 So 2d 1029.*

Police reports, although not normally discoverable, should have been made available to defendant where officers writing reports were eyewitnesses to incident. *Miller v State (1978, Fla App D2) 360 So 2d 46.*

It was reversible error for trial court to refuse defendant's discovery of state's file on third party where warrant had been issued for third party's arrest on charges which were similar to those filed against defendant, and defendant claimed that he was "conned" by said third person in purchasing stolen motor vehicle. *Briskin v State (Fla App D3) 341 So 2d 780.*

Defendant is properly allowed discovery as to criminal records of state's witnesses to extent that information is in actual or constructive possession of the state and is not limited to that in physical possession of state attorney's office and may receive data obtainable from FBI; however, where demand for FBI report sheet on victim was not available when defendant requested it, trial court did not err in denying defendant's motion. *Yanetta v State (Fla App) 320 So 2d 23.*

Defendant's motion for discovery of criminal records of all prosecution witnesses was properly granted, and not only as to records in actual possession of prosecutor, but all records in constructive possession of or available to State of Florida through its ability to obtain such data by virtue of its being a party to compact or agreement with FBI, and through its direct connection with law enforcement agencies throughout the state. *State v Coney (Fla App) 272 So 2d 550.*

See *Darrigo v State (Fla App) 243 So 2d 171*, § 13[d].

Trial court in manslaughter prosecution arising out of automobile accident in which guest passenger in defendant's car was killed did not abuse discretion in ordering pretrial discovery of traffic homicide report prepared by investigator for Florida highway patrol and filed with state's attorney. *State ex rel. Duncan v Crews (Fla App) 241 So 2d 754.*

No Georgia statute or rule of practice requires district attorney to open his files to attorney for accused, nor is accused entitled, as matter of right, to receive copies of police reports and investigation reports made in course of preparing case against accused. *Pass v State, 227 Ga 730, 182 SE2d 779.*

Court in rape prosecution properly denied defendant's request for copies of all reports made by investigating officers and members of district attorney's staff; for list of witnesses who appeared before grand jury or who would appear in trial of case; and for copy or transcript of evidence taken in preliminary hearing. *Cummings v State, 226 Ga 46, 172 SE2d 395.*

Trial court properly refused to afford defendant's counsel opportunity to examine state's files as to reports, photographs, statements, and findings of investigating officers. *Manor v State, 225 Ga 538, 170 SE2d 290.*

Where, when defendant raised the issue immediately prior to trial of whether state had complied with notice to produce and two subpoenas relating to documents and records relevant to theft prosecution, state informed her and court that relevant records were then available, but defendant apparently did not take advantage of the opportunity to review them, there was no denial of defendant's right to discovery. *Johnston v State (1983) 165 Ga App 792, 302 SE2d 708.*

In criminal prosecution defendant was not entitled as matter of right to receive copies of police report and investigative report made in preparing case against him, and even if motion by defendant for disclosure by prosecution of exculpatory evidence had been granted, defendant would not have had right to examine notes used by police officer in refreshing his memory before completion of officer's testimony against defendant. *Jones v State (1980) 155 Ga App 926, 274 SE2d 1.*

See *Tankersley v State* (1980) 155 Ga App 917, 273 SE2d 862, § 22[a].

See *Carter v State* (1979) 150 Ga App 119, 257 SE2d 11, § 11.

In rape prosecution, trial court did not err in failing to compel district attorney to comply with notice to produce and motion for discovery where court held in camera inspection and found no exculpatory material; while state may not suppress evidence favorable to defendant, there is no constitutional or statutory requirement that state must make available to defendant all investigatory work, files, or police reports. *Watson v State* (1978) 147 Ga App 847, 250 SE2d 540.

In prosecution for possession and sale of cocaine, trial court did not err in refusing to order police officer to permit defense counsel to examine all notes in his file where court made in camera inspection of documents in officer's file and ordered officer to furnish to defense anything officer had used on direct examination to refresh his recollection, and defense counsel was then permitted to cross-examine officer regarding these materials. *Sprague v State* (1978) 147 Ga App 347, 248 SE2d 711.

Trial court in prosecution for attempted murder did not err in failing to compel state to produce copies of police reports where they were equally available to defense as to prosecutor through police and where defendant failed to show that evidence had been withheld that was materially favorable to his case. *Allanson v State* (1978) 144 Ga App 450, 241 SE2d 314.

In prosecution for aggravated assault with deadly weapon, trial court properly denied defendant's request for copy of investigative officers' memoranda pertaining to prosecution witnesses where defendant was not entitled as matter of right to receive copies of police reports and where trial court kept investigative file before it during trial for purpose of bringing to defense counsel's attention any departure between summaries of verbal statements given to police and testimony at trial. *Barker v State* (1977) 144 Ga App 339, 241 SE2d 11.

In prosecution for possession and sale of narcotics, trial court did not err in denying defendant's motion for discovery and to compel disclosure of FBI files on state witness, a nonresident police officer assigned to a state police unit, although it was asserted that FBI report would have indicated arrest for "phony drug bust" where evidence which defendant sought concerning this "phony drug bust" was elicited during trial, in part by prosecution, and where evidence was not in prosecutor's file. *Davis v State* (1977) 143 Ga App 329, 238 SE2d 289.

Criminal defendant was not entitled as matter of right to receive copies of police reports and investigation reports made in course of prosecution where there was no showing of suppression of evidence or that the denial of such information impaired defense sufficiently to deny defendant a fair trial. *Lundy v State*, 139 Ga App 536, 228 SE2d 717.

Police records concerning any and all citizen complaints of official misconduct including excessive force or overbearing conduct by arresting officer and records of any and all incidents which may have reflected moral turpitude of such officer were not absolutely privileged and immune from discovery in prosecution for assault, and any claim of privilege should be subject to in camera proceeding in trial court. *Nakagawa v Heen* (1977, Hawaii) 568 P2d 508.

Accused in criminal prosecution is entitled to obtain police reports through subpoenas duces tecum prior to preliminary hearing but subsequent to charging of accused, the court's discovery rules may not, without substantial reason, limit a criminal party's access to court's compulsory process; thus, discovery rules do not deprive public defender from seeking police reports through subpoenas prior to preliminary hearing. *People ex rel. Fisher v Carey* (1979) 77 Ill 2d 259, 32 Ill Dec 904, 396 NE2d 17.

Statute prohibiting publication of arrest records of juveniles should not have been construed to deny defendant access to such records respecting juvenile who testified as witness in criminal prosecution where objective sought was to impeach

such witness by showing possible motive for testifying falsely. *People v Norwood*, 54 Ill 2d 253, 296 NE2d 852.

See *People v Flowers*, 51 Ill 2d 25, 281 NE2d 299, § 16[a].

See *People v Smith* (1982) 111 Ill App 3d 895, 67 Ill Dec 565, 444 NE2d 801, § 4[b].

Since in event of defendant's conviction in misdemeanor prosecution he could be incarcerated only in facility less restrictive than penitentiary, he was not entitled to discovery of missing page from police officer's report under discovery rule applying only in criminal cases permitting incarceration on conviction in penitentiary, and since police witness whom defendant sought to impeach by missing page of report testified he had not prepared or signed report, defendant was not entitled to disclosure of missing page under discovery rule requiring state to furnish defendant in misdemeanor case evidence negating defendant's guilt. *People v Spain* (1980) 91 Ill App 3d 900, 47 Ill Dec 451, 415 NE2d 456.

In prosecution for unlawful delivery of controlled substance, defendant was not prejudiced by state's failure to produce one-page supplemental police report and other report relating to earlier offense prior to trial, where defendant received supplemental report during trial and defendant's strategy to show improbability of making a drug sale to officer three months after same officer arrested him was rendered inapplicable by showing that officer had not made actual prior arrest but had been listed on report in order to receive credit for undercover work. *People v Ojeda* (1980) 91 Ill App 3d 723, 47 Ill Dec 40, 414 NE2d 1156.

In prosecution for burglary of gas station, in which police officer testified that he had observed defendant drive by station on night in question and at time that garage door to gas station was observed to be open, prosecution committed prejudicial error in failing to provide officer's report as part of discovery, where officer was only non-codefendant witness to place defendant at scene of crime, and jury, in disregarding alibi defense, could have placed great weight on such testimony. However, supreme court rules specifying material to be disclosed in prosecutions did not require disclosure of psychiatric report of state witness. *People v Wilken* (1980) 89 Ill App 3d 1124, 45 Ill Dec 489, 412 NE2d 1071.

See *People v McInnis* (1980) 88 Ill App 3d 555, 44 Ill Dec 120, 411 NE2d 26, § 13[a].

In armed robbery and aggravated battery prosecution during which defense, pursuant to discovery statute, requested disclosure of any record of prior criminal convictions suffered by potential prosecution witnesses, trial court erred by requiring defense counsel to elicit from prosecution's own witnesses such necessary information as birthdates and social security numbers before compelling state to conduct records check; however, such error was harmless where record revealed that at various points during trial records check was in fact accomplished and where defense failed to show prejudice by procedure that was followed. *People v Higgins* (1979) 71 Ill App 3d 912, 28 Ill Dec 173, 390 NE2d 340.

See *People v Keith* (1978) 66 Ill App 3d 93, 22 Ill Dec 847, 383 NE2d 655, § 11.

Where defendant was arrested for possessing small amount of narcotics during lawful execution of residential search warrant, and where defendant sought disclosure of certain police reports which he felt might demonstrate that residence searched had reputation as distribution center for narcotics, trial court did not abuse discretion in refusing disclosure of such reports since reputation of residence was not relevant to question of whether defendant was guilty of possessing heroin, nor did reputation have any bearing on legality of searches. *People v Boykin* (1978) 65 Ill App 3d 738, 22 Ill Dec 614, 382 NE2d 1369.

Failure of prosecution to furnish defense with criminal record and pending criminal cases against certain witnesses was not sufficient to create reasonable doubt of defendants' guilt in murder prosecution where no criminal charges were pending against witnesses in question at time of trial and only information regarding juvenile proceedings against

witnesses concerned truancy and neglect. State's failure to produce police report likewise did not deny defendants fair trial where police report did not concern officer's testimony in case and where search of police files failed to locate report. *People v Veal* (1978) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963.

Trial court did not err in refusing to permit pretrial discovery of police report. *People v Thomas* (Ill App) 267 NE2d 703.

See *People v Crawford*, 114 Ill App 2d 230, 252 NE2d 483, § 5[a] (citing annotation).

"General and all-encompassing" motion by defendant in murder trial requesting (1) grand jury minutes with regard to statement allegedly made by defendant and accomplice, (2) memoranda of state interviews with several persons concerning the shooting, (3) reports of police and detective investigations and statements received thereby, (4) information pertaining to arrest of accomplice, (5) and "any other items, photographs, laboratory reports, statements and documents," was properly denied. *People v Lighting*, 83 Ill App 2d 430, 228 NE2d 104.

There was no ground for reversal where entire police file was made available to defense counsel and then turned over to court to be kept until needed, but through some inadvertence file was lost and not used at trial. *People v Cook*, 78 Ill App 2d 219, 222 NE2d 13.

Refusal to show defense attorney police reports prior to trial was not error. *People v Whitehead*, 68 Ill App 2d 488, 216 NE2d 237, revd on other grounds, 35 Ill 2d 501, 221 NE2d 256.

Where page of police report contained name and address of unknown witness in addition to investigating police officer's recollection of witness' observations, but there was nothing in record to show whether defendant had knowledge of missing page, defendant would be accorded evidentiary hearing to determine issue of whether he did or did not have knowledge of missing page. *People v Murphy* 46 Ill App 3d 940, 5 Ill Dec 269, 361 NE2d 592.

State was not required to produce police record of prospective witness where such witness was a minor, and his record was prohibited from publication by statute. *People v Norwood*, 5 Ill App 3d 130, 283 NE2d 256.

In prosecution for two of six rapes known locally as the "Southside rapes," denial of pretrial motion for discovery of all reports made by four law enforcement agencies concerning related rapes was not abuse of discretion despite defense contention information could have shown that four other rapes were committed by someone other than defendant, making it less likely that he committed two rapes with which he was originally charged, where such contention was mere conjecture, and state had interest in maintaining confidentiality with respect to on-going police investigation. *Williams v State* (1981, Ind) 417 NE2d 328.

Defendant was entitled to discovery of scale diagram of tavern in which murder occurred, which was prepared by police, where after offense and prior to trial, tavern had changed hands twice and interior had been rearranged and redecorated. *Sexton v State* (Ind) 276 NE2d 836.

"Miscellaneous crime report" made by investigating officer should have been produced in response to defendant's request for production of all memoranda and reports bearing upon his guilt or innocence. *Hancock v State* (Ind App) 345 NE2d 244.

Trial court's order requiring state to produce copies of police reports in murder prosecution was abuse of discretion; approval of such procedure would unreasonably and unnecessarily impede investigatory process, thereby depriving state of fair trial. *State v Eads* (Iowa) 166 NW2d 766 (citing annotation).

While accused is not entitled to unrestricted examination of police records, where there were radio calls for help and

large number of police officers involved in arrest for breaking and entering, captured accomplice refused to testify, and driver of car that brought accused to scene was never found, court should have determined in presence of county attorney and defense counsel whether there was anything germane to issue of entrapment on tape made of police radio calls, and if so, it should have been made available to accused for appropriate use. *State v White (Iowa) 151 NW2d 552*.

See *State v Schlicher (1982) 230 Kan 482, 639 P2d 467*, § 11.

See *State v Watie (1978) 223 Kan 337, 574 P2d 1368*, § 16[a].

Generally, opposing party or counsel has right, on proper demand, to inspect and use for cross-examination any paper or memorandum used by witness to refresh his memory, but accused has no right to inspection or disclosure of information in possession of prosecution which may be designed for use in prosecution of others; thus, where officer, in testifying, referred to small notebook which included notes on several criminal investigations, defendant was not entitled to inspection of entire notebook, and arrangements should have been requested to separate items pertinent to defendant's prosecution from other matters. *State v Guffey, 205 Kan 9, 468 P2d 254*.

Report compiled by law enforcement agency in course of its investigation into criminal offense is quasi-private in character, and it is not error for trial court to refuse defendant's motion to require state to produce such report for defendant's inspection and use in cross-examination of witness whose statement is contained therein. *State v Lemon, 203 Kan 464, 454 P2d 718*.

Failure of commonwealth's attorney to produce initial police report concerning robbery for which defendant was tried did not constitute error where there was nothing in record to show that first report existed and record also showed that commonwealth's attorney did not know of first report. *Kendricks v Commonwealth (1977, Ky) 557 SW2d 417*.

See *Pankey v Commonwealth (Ky) 485 SW2d 513*, § 11[m].

Defense in prosecution for trafficking in controlled substance had no right to discover handwritten notes of police officer made during interrogation of defendant. *White v Commonwealth (1980, Ky App) 611 SW2d 529*.

Trial court in armed robbery prosecution did not commit reversible error in refusing to require production of FBI agent's notes concerning conversation he had had with informant. *Mann v Commonwealth (1978, Ky App) 561 SW2d 335*.

Although prosecution may not suppress evidence, in face of defense production request, where evidence is favorable to accused and is material to either guilt or punishment, there is no constitutional requirement that prosecution make a complete and detailed accounting to defense of any or all police investigatory work on a case, nor is defendant entitled to an in camera inspection by court where state denies possession of specific information requested and defendant makes no showing to contradict state's answer. Although trial judge should have made a reviewable record by sealing all documents examined in camera and making them part of record his failure to do so did not constitute reversible error when he had previously noted after in camera examination that documents in question contained no exculpatory information. *State v Oliver (1983, La) 430 So 2d 650*, cert den (US) 78 L Ed 2d 688, 104 S Ct 495.

In prosecution for second-degree murder, trial court did not err in not compelling state to produce earlier complaint filed with police department, which recounted incident involving threat by victim to defendant, where trial judge ascertained that state did not have requested information; even if state had obtained alleged complaint and failed to notify defendant, nondisclosure would not constitute reversible error, where no overt act occurred, and thus evidence of threat would have been inadmissible. *State v Cavalier (1982, La) 421 So 2d 892*.

Defense had no right to names and addresses of state witnesses in prosecution for attempted first degree murder of off-duty deputy sheriff. *State v Stucke (1982, La) 419 So 2d 939*.

Police report was properly withheld from defense inspection, where testimony clearly indicated that detective was relying on his memory refreshed by his report; he did not have physical possession of his report when he testified nor did defense counsel make any showing that officer's testimony differed from his report. *State v Latin* (1982, La) 412 So 2d 1357.

See *State v Winn* (1982, La) 412 So 2d 1337, § 16[a].

In robbery prosecution in which defendant sought pretrial discovery of names and addresses of eyewitnesses to incident who were unable to identify defendant as perpetrator in photographic lineup, trial court's denial of discovery motion was error since defendant made substantial showing that such evidence might prove exculpatory and material as being contradictory to testimony of prospective witnesses who identified defendant as perpetrator. *State v Landry* (1980, La) 384 So 2d 786.

In prosecution for possession of heroin, trial court did not err in denying defendant's request for production of police report where police officer testifying for prosecution did so from his independent recollection of events and not from report itself. *State v Hawthorne* (1978, La) 364 So 2d 917.

Trial court, in prosecution for possession of heroin with intent to distribute, did not err in refusing to order prosecution to disclose to defense police report concerning analysis of substance found in defendant's presence where prosecution did not introduce report into evidence and criminologist who prepared report testified from his memory and not from report itself. *State v Carter* (1978, La) 363 So 2d 893.

In prosecution for armed robbery trial judge properly refused defense request at trial for production of police report since such reports were considered confidential and generally state could not be compelled to produce them for inspection; additionally, where officer did not refer to report while testifying on the stand, and officer's testimony was product of present memory refreshed rather than past recollection recorded, defense was not entitled to copy of police report based on rule permitting inspection where inconsistency exists between officer's testimony at trial and his report. *State v Taylor* (1978, La) 363 So 2d 699.

Trial court erred in burglary prosecution by failing to order production of police report for defendant's inspection where officer testifying for prosecution acknowledged that he was testifying from his report rather than from his memory. *State v Franks* (1978, La) 363 So 2d 518.

Assuming that state possessed arrest and conviction records of jurors, that state intended to use records in selecting jury, and that defendant could not practically obtain information from other sources, defendant was entitled to be given information before voir dire or else allowed to question prospective jurors on subject; but, failure to provide records did not amount to reversible error, where defendant was not denied right to question prospective jurors on subject; furthermore, trial judge erred in not requiring prosecutor to respond to defense request for prior conviction records of state's witnesses by stating whether state had knowledge or possession of records, and, if so, by not requiring prosecutor to furnish them to defendant or to submit them to court for determination as to whether defendant was entitled to material. *State v Harvey* (1978, La) 358 So 2d 1224.

Trial judge did not err in denying defense request for bureau of investigation and computer run off sheets containing information about state witness' criminal record, where defendants questioned witness in detail on cross-examination concerning his prior convictions, witness clearly admitted prior convictions, arrest and conviction records were public records available to defense, and defendants did not allege existence of any evidence of prior convictions not admitted by witness on cross-examination. *State v Robertson* (1978, La) 358 So 2d 931.

In prosecution for aggravated rape, defendant's motion to compel production of criminal records of state's witnesses was

properly denied, where motion would have required state to disclose names of witnesses and would have imposed obligation on state to furnish defense with copies of rap sheets of all state's witnesses, and where records of arrests and convictions were available to public and could be obtained by defense. *State v Sanders (1978, La) 357 So 2d 1089*.

In armed robbery prosecution, defendant was not entitled to pre-trial discovery of police investigative reports or of list of state's anticipated trial witnesses where state had willingly informed defendant that it had no fingerprints or blood samples connecting him to robbery. *State v Passman (1977, La) 345 So 2d 874*, habeas corpus proceeding (CA5 La) 652 F2d 559, cert den 455 US 1022, 72 L Ed 2d 141, 102 S Ct 1722, habeas corpus proceeding (CA5 La) 797 F2d 1335, cert den 480 US 948, 94 L Ed 2d 794, 107 S Ct 1609.

Where date of theft of property was clearly established by numerous witnesses, without any confusion, defendant suffered no prejudice by refusal of trial court to order subpoena duces tecum for production of sheriff's records showing date of report of theft of property involved. *State v O'Quinn (La) 342 So 2d 202*.

Trial judge did not err in overruling defendant's motion for production of evidence of post-arrest investigation demonstrating that portions of tips supplied by informant were false where state specifically denied that any post-arrest investigation had, to its knowledge, been conducted. *State v Robinson (La) 342 So 2d 183*.

Trial judge correctly refused to order police witnesses to produce their report where there was no genuine conflict in police officer's testimony relative to contents of police report. *State v Banks (La) 341 So 2d 394*.

See *State v Perique (La) 340 So 2d 1369*, § 27[a].

Right to pretrial discovery in criminal cases did not include right to defendant's criminal record in state's possession. *State v Lee (La) 340 So 2d 1339*.

Defendant was not entitled to production of testifying officer's report for purpose of refreshing his memory as to whether name of individual who was also arrested for crime was on report where officer remembered very clearly what defendant had said and done in connection with his oral confession following arrest and did not need to refresh his memory by consulting his report. *State v Jolla (La) 337 So 2d 197*.

State was not required to produce for defendants' pre-trial inspection all technical reports or analyses of any objects found or obtained at scene of alleged offense, copy of any picture taken of defendants at lineup, nor copy of any statement allegedly made by any witnesses or prospective witnesses that state intended to use against defendants at trial. *State v Ball (La) 328 So 2d 81*.

Police officer was not required to produce his police report for defense scrutiny where he was testifying from memory. *State v Dupuy (La) 319 So 2d 294*.

Prosecution was not required to allow its evidence file to be scanned by trial court for evidence favorable to defendant or sealed to be sent to court on review in absence of any showing that prosecution had suppressed any evidence which might have character favorable to accused. *State v Major (La) 318 So 2d 19*.

Defense was not entitled to copy of police report where there was no indication that officer was testifying from report but rather that he was testifying from memory (present memory refreshed). *State v Foret (La) 315 So 2d 278*.

Trial court erred in refusing defense counsel's demand for production of police report where police witness refreshed his memory while testifying from notes taken from report. *State v Perkins (La) 310 So 2d 591*.

State is not required to permit inspection of any of its evidence in pending prosecution, including police reports, with

exception of written confession of accused. *State v Brumfield*, 263 La 147, 267 So 2d 553.

Accused was not entitled to inspection of police report of his arrest. *State v Barnes*, 257 La 1017, 245 So 2d 159, cert den and app dismd 404 US 931, 30 L Ed 2d 244, 92 S Ct 289.

With exception of written confessions of accused, all evidence relating to pending criminal trial in possession of district attorney or police is privileged and not subject to inspection by accused unless and until introduced in evidence at trial; thus motion by defendant charged with murder for production of copies of police report of investigation was properly refused. *State v Hudson*, 253 La 992, 221 So 2d 484.

Notes and reports of law enforcement officers during a criminal investigation are privileged and immune from pretrial inspection by defendant. *State v Manuel*, 253 La 195, 217 So 2d 369. See to same effect *State v Brumfield*, 254 La 999, 229 So 2d 76, petition for writ of habeas corpus den *Brumfield v Henderson (DC La)* 317 F Supp 27, affd (CA5) 436 F 2d 1080.

*State v Cardinale*, 251 La 827, 206 So 2d 510, supra § 16[a].

Defendant in narcotics case was not entitled to inspection of moving pictures or tape recordings made while accused was in act of committing crime. *State v Dickson*, 248 La 500, 180 So 2d 403.

Defendant convicted of murdering his wife was entitled to be furnished with anonymous letter, which stated that victim was involved with another man, since note suggested that someone other than defendant may have been responsible for victim's death, and several passing references to letter, buried in police report and describing it nonspecifically as "anonymous letter" was insufficient disclosure. *State v Ledger (1982, Me)* 444 A2d 404.

In homicide prosecution in which defendant raised defense of accident and self-defense, trial court's refusal to require state to furnish defendant with any and all of decedent's criminal records was not error where, under local rule, evidence of other crimes, wrongs, or acts of deceased were not admissible to prove his character in order to show that he acted in conformity therewith. *State v Dutremble (1978, Me)* 392 A2d 42.

Defendant charged with drug-related killing was entitled to examine investigation report by officer after his testimony so as to allow defense counsel opportunity to discover any inconsistencies between witness' trial testimony and his prior statements, but failure to make that report available in this case was harmless error beyond reasonable doubt. *Kanaras v State (1983)* 54 Md App 568, 460 A2d 61.

See *Tisdale v State (1979, Md App)* 396 A2d 289, § 11.

Investigative reports made by police after interviewing prospective jurors should be as available to defendant as to district attorney, although denial of motion to examine such reports was not error where judge asked each juror questions concerning police interviews. *Commonwealth v Smith*, 350 Mass 600, 215 NE2d 897.

Court did not abuse discretion in denying pre-trial motion for production of police reports, where defendant obtained at trial copies of entry in police journal and police teletype containing descriptions of robbers, and where witness, who was source of descriptions, had been treated for mental illness, failed to identify defendant, and refused to obey prosecution summons. *Commonwealth v Cook (Mass)* 308 NE2d 508.

Although accused is entitled to names of prosecution witnesses, and to access to criminal records of such persons, under direction of court, prosecution is not required to take affirmative steps, on behalf of accused, to collect or secure such records. *Commonwealth v Clark (Mass)* 295 NE2d 163.

Defendant was not entitled to list of all persons interviewed by Commonwealth in connection with murder prosecution. *Com. v Therrin (Mass) 269 NE2d 687.*

Trial court properly refused demand for one police officer's entire files of notations, and for other officer's "worksheet." *Commonwealth v Guerro (Mass) 260 NE2d 190.*

Denial of motion for production and inspection of police records of prosecution witnesses and for inspection of records of their criminal convictions was within trial court's discretion. *Commonwealth v Dominico (Mass App) 306 NE2d 835.*

Prosecutor's policy of refusing to provide copy of police reports to defendants was inexcusable obstruction to pursuit of justice and justified dismissal of complaint against defendant, even though prosecutor read police report to defense counsel and was willing to let him see it in courtroom. *Bay County Prosecutor v Bay County Dist. Judge (1981) 109 Mich App 476, 311 NW2d 399.*

In prosecution for first degree murder, trial court abused its discretion in denying defendant access to police report concerning switchblade knife allegedly in possession of victim at time of homicide, but such error was harmless where defendant had testified that he saw something in victim's hand but did not know what it was and police officers testified that knife was removed from victim's pocket, placing issue before jury. *People v Fournier (1978) 86 Mich App 768, 273 NW2d 555.*

Once prosecutor represented to trial court that he would furnish defendant with all police reports, he became bound, in interest of fundamental fairness and in view of his duty to see justice done, to place broad interpretation on term "police reports," and to err on side of giving away too much rather than too little; prosecutor had duty to disclose certain documents, known as tip sheets, on which police recorded information received from informants which were connected to investigation of case. *People v Florinchi (1978) 84 Mich App 128, 269 NW2d 500.*

Defendant in prosecution for criminal sexual conduct was not entitled to have prosecutor produce police reports to superior officers, police write-ups presented to prosecutor, or police resumes prior to trial, where defense did not set forth any specific facts or information which it expected to glean from those reports. *People v Nkomo (1977) 75 Mich App 71, 254 NW2d 657.*

Defendant in prosecution for assault on police officer was entitled to discovery of information in files of citizens complaint bureau consisting of statements of witnesses to the action giving rise to the prosecution where such statements were relevant and admissible but was not entitled to internal police reports irrelevant to the prosecution. *People v Walton, 71 Mich App 478, 247 NW2d 378.*

Notes or reports prepared by police officer witness and delivered to prosecuting attorney, while available "for possible impeachment or at least elucidation purposes," were not discoverable generally through cross-examination of officer. *People v Johnson, 8 Mich App 462, 154 NW2d 671.*

No rule of discovery permits production of all records of police department. *State v Grunau, 273 Minn 315, 141 NW2d 815.*

Defendant was entitled to inspect and copy police report where there was suggested inconsistency between detective's testimony and psychiatric report, thus indicating that report might contain information beneficial to defendant. *State v Hicks (Mo) 515 SW2d 518.*

Defendant in robbery prosecution was not entitled to discovery of police report which was a composite description of defendant compiled by officers from individual descriptions given by several witnesses, and which did not show description given by each, particularly where report would have been useful only in cross-examining witnesses and

where nothing in record indicated that description in report would have been favorable to defendant. *State v Cannon (Mo)* 465 SW2d 584.

See *State v Yates (Mo)* 442 SW2d 21, § 8.

In prosecution for robbery, trial court did not err in refusing to dismiss case for prosecutor's five-month delay in producing legible copy of police report, where defense counsel made no effort during five-month period to enforce discovery order, and where defense declined court's offer of continuance and made no effort to demonstrate prejudice by delay in discovery. *State v Davis (1978, Mo App)* 577 SW2d 110.

Although it was error for prosecutor to fail to produce police report contradicting other reports as to date and identification, it was not prejudicial where trial court later ordered surrender of police report to defendant and continued the case to allow defendant to consult with counsel and make any investigation necessary to meet newly discovered matters which might affect defense strategy. *State v Wendell (Mo App)* 547 SW2d 807.

It was not error to deny defendant's motion to obtain names and addresses of all persons interrogated by law enforcement agencies where prior to trial defendant had moved for names and addresses of persons present at scene of offense and this motion had been granted. *State v Gamache (Mo App)* 519 SW2d 34.

In rape prosecution, court's denial of defendant's request to inspect copy of sheriff's report was not error, where no general right of discovery existed in state, where court personally examined report and concluded that it contained no facts outside witnesses' testimony, and where there was no demonstration that withholding report was unfair or that it contained evidence favorable to defendant. *State v Mitchell (Mo App)* 500 SW2d 320.

Where police officer in testifying did not use report which he had made and submitted to his superiors, or refer thereto in any way, trial court did not err in refusing to compel production of such report, it being within court's discretion to order or refuse to order such discovery. *State v Coleman, 186 Neb 571, 184 NW2d 732.*

Trial court did not abuse discretion in murder trial in overruling motion for discovery under which defendant sought copies of original notes of arresting officers, all police reports contained statements of witnesses and copies of all statements of defendant and other witnesses, autopsy reports, chemical analyses, blood tests, fingerprints, and all physical evidence in possession of state. *State v Williams, 183 Neb 257, 159 NW2d 549.*

In prosecution for selling less than single ounce of marijuana to a minor in which defendant faced mandatory life imprisonment upon conviction, harmless error occurred where trial court refused defendant's discovery request to examine juvenile record of principal prosecution witness, but permitted defendant to cross-examine witness extensively concerning witness' relationship with prosecution and possibility of immunity grant. *Pickard v State (1978, Nev)* 585 P2d 1342.

See *Walker v Fogliani (Nev)* 425 P2d 794, § 10[f].

See *State v Barath (1979)* 169 NJ Super 181, 404 A2d 373, § 21[a].

Defendants were entitled to inspect, copy, or photograph all statements and reports of police officers who might be called as witnesses at trial; however, court properly refused to permit inspection, copying, or photographing of other police reports relating to investigation of case. *State v Harrison, 118 NJ Super 299, 287 A2d 229, affd 119 NJ Super 1, 289 A2d 548.*

In absence of any showing of unusual circumstances, trial judge erred in requiring district attorney to furnish police reports and statements of witnesses to defendant. *State v Tackett, 78 NM 450, 432 P2d 415, 20 ALR3d 1* (citing

annotation).

Defendant in prosecution for second degree murder was entitled to inspection of supplemental police report referred to by police officer while testifying on stand. *State v Gomez*, 75 NM 545, 408 P2d 48.

Homicide defendant had no statutory right to discovery of "routine police reports" absent showing prosecution intended to introduce such material at trial. *People v Bissonette* (1981) 107 Misc 2d 1049, 436 NYS2d 607.

See *People v Simone* (1977) 92 Misc 2d 306, 401 NYS2d 130, § 11[m].

See *People v Aviles*, 89 Misc 2d 1, 391 NYS2d 303, § 27[a].

See *People v Harrison*, 81 Misc 2d 144, 364 NYS2d 760, § 11[m].

Police report which contained names and oftentimes observations of witnesses would not be discoverable where there was no inherent right under statute of defendant to be given names of witnesses. *People v Privitera*, 80 Misc 2d 344, 363 NYS2d 226.

See *People v Torres*, 77 Misc 2d 13, 352 NYS2d 101, § 11[m].

See *Vergari v Kendall*, 76 Misc 2d 848, 352 NYS2d 383, app dismd (App Div) 360 NYS2d 1003, § 11[m].

In prosecution for drunken driving, accused was entitled to production of police record of all answers given by him to questions and made part of report; however, he was not entitled to report of officer's visual observations of him which was part of officer's "work product." *People v Lawrence*, 74 Misc 2d 1019, 346 NYS2d 330.

See *People v Wright*, 74 Misc 2d 419, 343 NYS2d 944, § 13[a].

Defendant charged with unlawful possession and sale of dangerous drug was not entitled to discovery of original notes of arresting officers. *People v Ricci*, 59 Misc 2d 259, 298 NYS2d 637.

Inspection allowed of records and photographs made by or for police and district attorney in connection with defendant's arrest, interrogation, detention, and custody prior to arraignment, including police forms, records of police telephone switchboard, and police resume of homicide; police's notes of statements of witnesses are not proper subject for discovery and inspection. *People v Powell*, 49 Misc 2d 624, 268 NYS2d 380.

Defense attorney had no right to inspect prosecutor's file to determine what material, if any, contained therein was relevant and, therefore, subject to use by defense during cross-examination of police officer who heard defendant's confession; defense counsel's failure to assent to in-camera inspection of prosecutor's file to determine relevancy of its contents to subject matter of police officer's testimony precluded defendant from claiming on appeal that he was deprived of full and fair hearing. *People v Poole* (1979) 48 NY2d 144, 422 NYS2d 5, 397 NE2d 697.

Police should be required to make contemporaneous or reasonably prompt detailed records of communications from anonymous informers, and these records should be subject to inspection and examination on suppression hearing on issue of credibility. *People v Taggart*, 20 NY2d 335, 283 NYS2d 1, 229 NE2d 581, remittitur and 21 NY2d 729, 287 NYS2d 695, 234 NE2d 714, app dismd 392 US 667, 20 L Ed 2d 1360, 88 S Ct 2317.

Denial of due process requiring a new trial was not shown by state's failure to disclose statement by victim of attempted rape, sodomy and unlawful imprisonment alleged to contain exculpatory material in absence of any showing that material would have, in any reasonable likelihood, affected judgment of jury. A new trial is not automatically required

where evidence in possession of the people might possibly be useful to defense but not likely to change verdict. *People v McMullen* (1983, 3d Dept) 92 App Div 2d 1059, 461 NYS2d 565.

Sealed juvenile records as to only eyewitness able to identify defendant as perpetrator should have been made available to defense to establish motive for testifying falsely where witness had pleaded guilty to attempted burglary before trial and was sentenced as youthful offender one day after testifying at defendant's trial. *People v Davis* (1982, 4th Dept) 86 App Div 2d 956, 448 NYS2d 315.

In prosecution of two sisters for criminal possession of weapon and menacing, following altercation with two police officers, defense was entitled to inspect those portions of police internal investigations file relevant to guilt or innocence of defendants; however, proper remedy for district attorney when faced with police reluctance to turn over such confidential files to defense was to subpoena file for court or grand jury, not ex parte court order. *Rochester Police Dept. v Bergin* (1979, 4th Dept) 68 App Div 2d 340, 416 NYS2d 938.

See *People v Clow* (1978) 62 App Div 2d 880, 406 NYS2d 598, § 16[a].

In narcotics prosecution trial court should have conducted in camera proceeding to determine relevancy and materiality of personnel records of police officers so as to permit defendant to examine relevant portions of records where credibility of police officers who testified against defendant was key issue at trial and where prosecution introduced evidence of medals and departmental commendations they had received. *People v Vasquez* (App Div) 370 NYS2d 144.

Court's error in refusing defendant's request for production of police memoranda covering interviews with prosecution witness was harmless where witness was subjected to extensive cross-examination which was not curtailed by court. *People v Kampshoff*, 53 App Div 2d 325, 385 NYS2d 672.

Defendant was not prejudiced by failure of prosecution to furnish him with identification by witness of another as one who shot victim where that identification was first made known during defendant's case and where it was obvious that the defense knew of witness' statement and his later retreat therefrom; the prosecution has no duty to make complete and detailed disclosure of all results of police investigation of particular crime, particularly when mistaken information is believed to have been obtained. *People v Vinson*, 48 App Div 2d 730, 367 NYS2d 863.

Error of trial court in refusing to grant inspection of police reports to attorney for co-defendant, even if applicable to defendant, was harmless in view of overwhelming evidence of defendant's guilt of burglary and possession of burglar's tools. *People v Gilligan*, 48 App Div 2d 724, 367 NYS2d 610.

Failure of prosecution, which had been ordered to turn over any exculpatory materials to defense, to provide defense counsel with police reports which contained description of perpetrator of robbery-murder, which was inconsistent with description given by witnesses and which indicated that witness, contrary to testimony, had refused to look at mug shot, required reversal, even though inconsistencies might have been explainable. *People v Turner*, 48 App Div 2d 674, 367 NYS2d 562.

There was no prejudicial error resulting from failure of trial judge to allow discovery of exhibits consisting primarily of police records and statements of prospective witnesses where trial judge, upon defendant's request at trial for discovery of information within state's possession which might be relevant, competent, and not privileged, made in camera inspection of information and appropriate findings of facts concerning each excluded exhibit which he sealed in envelope and preserved in record for appellate review, and appellate court concluded that information in excluded exhibits would have added nothing to evidence produced at trial and would have been of no assistance to defendant at trial. *State v Waters* (1983) 308 NC 348, 302 SE2d 188.

See *State v Alston* (1983) 307 NC 321, 298 SE2d 631, § 18.

See *State v Ford* (1979) 297 NC 144, 254 SE2d 14, § 4[a].

Pursuant to discovery statute allowing discovery of specifically identified exhibits to be used in the trial of the case defendant was not entitled to notes taken by investigating police officers relating to scene of crime where notes were not exhibits to be used in trial, where notes were not specifically identified, and where such notes were not material to defendant's case. *State v Tatum*, 291 NC 73, 229 SE2d 562.

Defendant is not entitled to conduct fishing expedition or to receive work product of police or other state investigators; thus, motion which requested practically complete files of sheriff's department and solicitor's office, and all information obtained as a result of sheriff's investigation of case, was properly denied. *State v Davis*, 282 NC 107, 191 SE2d 664.

In prosecution for possession of cocaine, trial court properly denied defendant's motion, made at voir dire hearing on motion to suppress evidence, to inspect notes compiling detective's preliminary report, since notes were work product of police department and were not used by detective to refresh memory at trial and so were not discoverable, and, though two pages of supplemental report were used by detective at trial, and so were discoverable, trial court denial of inspection was not shown by defendant to have been prejudicial, and defendant never indicated reasons for examining notes. *State v Tate* (1982) 58 NC App 494, 294 SE2d 16, app dismd, petition den (NC) 295 SE2d 763 and affd 307 NC 464, 298 SE2d 386.

Trial court did not err in denying defendant's pretrial motion for production of copy of computerized print-out of criminal record of prosecution witness where he was allowed to confront such witness at trial. *State v Chappel* (1978) 36 NC App 608, 244 SE2d 483.

See *State v Gillespie* (1977) 33 NC App 684, 236 SE2d 190, § 16[a].

Failure of state to produce agent's daily reports, which differed considerably from agent's case reports, would have violated defendant's rights, had there been no theft of such reports, where prosecutor had duty to produce favorable or exculpatory materials under Brady rule, Brady rule was not affected by good faith of prosecutor, prosecutor had duty to inquire into and examine contents of police files to discover exculpatory and favorable materials and to make timely disclosure of them to defense, when demand was made, particularly where documents demanded were clearly described, and where inquiry would have uncovered discrepant reports of agent. *State v Hilling* (ND) 219 NW2d 164.

Work by detective investigating alibi defense was not "scientific test" or "experiment" within meaning of discovery statute where it involved utilizing common sense to figure possible routes taken by kidnapping suspect and times of travel involved therein, and failure to disclose basis for detective's testimony would not preclude its use at trial. *State v Goble* (1982) 5 Ohio App 3d 197, 5 Ohio BR 458, 450 NE2d 722.

See *State v Johnson* (1978) 62 Ohio App 2d 31, 16 Ohio Ops 3d 74, 403 NE2d 1003, § 16[a].

Notes made by police officer during interview with witness to crime were not subject to in camera inspection within intent and meaning of criminal rules of procedure. *State v Washington* (1978) 56 Ohio App 2d 129, 10 Ohio Ops 3d 150, 381 NE2d 1142.

In criminal trial, defense counsel is not entitled to inspect written police report, even though officer has read the report to refresh his recollection prior to taking witness stand, where officer does not use report while testifying. *State v Smith* (1976) 50 Ohio App 2d 183, 4 Ohio Ops 3d 160, 362 NE2d 1239.

In prosecution for felonious assault and attempted aggravated murder, prosecuting attorney would be ordered to deliver to defense counsel criminal record or records of witnesses in prosecuting attorney's possession or which he could obtain

by request made to appropriate state criminal record source and such criminal record as might be obtained by request made to *FBI. State v Kinney*, 44 *Ohio Misc* 69, 337 *NE2d* 668.

Failure of prosecution to supply defense with information concerning attempted rape which took place prior to incident for which defendant was being tried was not prejudicial where defense had knowledge of attempted rape as shown by defense counsel having investigative report filed by police concerning attempted rape read into evidence, and where defense counsel cross examined prosecutrix concerning information police had mentioned to her regarding this other incident. *Gregg v State* (1983, *Okla Crim*) 662 *P2d* 1385.

Defendant in prosecution for robbery with firearms was not entitled to examine copy of police investigation report for purpose of ascertaining description of assailants given by victim to police officers where defense counsel elicited such information from police officer on cross-examination at trial. *Hickerson v State* (1977, *Okla Crim*) 565 *P2d* 684.

See *Trowbridge v State* (*Okla Crim*) 502 *P2d* 495, § 16[a].

Although trial court's denial of request for discovery of criminal records of prosecution witnesses, and of materials favorable to defendant in possession of prosecution, was improper, it was not grounds for reversal of murder conviction, since no prejudice flowed from denial of criminal records, and there was no showing that prosecution actually possessed any materials favorable to defendant. *Stevenson v State* (*Okla Crim*) 486 *P2d* 646, cert den 404 *US* 1040, 30 *L Ed* 2d 733, 92 *S Ct* 724.

See *Doakes v District Court of Oklahoma County* (*Okla Crim*) 447 *P2d* 461, § 16[a].

In prosecution for disorderly conduct and resisting arrest, trial court properly denied defendants' motion for production of police officers' notebooks where they did not constitute statements within meaning of applicable rule of criminal procedure; as to statement of witness that was lost in police files, case would be remanded for determination of whether statement was actually unavailable and whether defendants were prejudiced by state's failure to furnish them with copy of it. *State v McKeen* (1978) 33 *Or App* 343, 576 *P2d* 804.

In prosecution for sale of heroin to undercover police officer, trial court did not err in denying defendant's motion to suppress testimony of undercover officer on ground that prosecution failed to disclose stenographer's shorthand notes and rough draft of his report of transaction with defendant, where final report was disclosed to defendant and where there were no significant differences between stenographer's notes, rough draft, and final draft. *State v Jackson* (1977) 31 *Or App* 645, 571 *P2d* 523.

Unless in particular case good reason to contrary exists, state should honor timely request by defendant to obtain and hand over FBI "rap" sheet or similar document with respect to convictions of state's witnesses when defendant establishes that such information will probably be relevant to ultimate issue of guilt or innocence. *State v Ireland* (*Or App*) 500 *P2d* 1231.

In prosecution for assault upon police officer in which state was permitted to introduce evidence of previous incidents of similar conduct by defendant, trial court erred in refusing to permit discovery and inspection of personnel record of one officer who testified to such former incidents, where such file contained material relative to officer's drunkenness on duty and his violent encounters when making arrests in other circumstances. *State v Fleischmann*, 10 *Or App* 22, 495 *P2d* 277.

Defendant charged with murder and criminal conspiracy was entitled to review any notes, reports or written records relating to interviews with witnesses who testify at trial where documents contain substantially verbatim statements relevant to issues at trial. *Commonwealth v Contakos* (1981) 492 *Pa* 465, 424 *A2d* 1284.

In homicide prosecution during which eye witness to killing provided in-court identification of accused, trial court's refusal to compel prosecution to furnish defense counsel with copy of witness' juvenile record was error where ruling made it impossible for defense counsel to know whether or not that record contained anything upon which he could argue that witness was biased against defendant; since it was not clear from record whether defendant was prejudiced by such error, cause was remanded to trial court with instructions that appellate, through his counsel, be given access to witness' juvenile record. *Commonwealth v Slaughter* (1978, Pa) 394 A2d 453.

Trial court properly denied defendants' request that police investigatory file be produced for in camera inspection by court where defendants made no showing that court's inspection would reveal evidence helpful to defense. *Commonwealth v Gartner* (1977) 475 Pa 512, 381 A2d 114.

Defendant in murder prosecution was not entitled to compel production of complete police investigative file. *Commonwealth v Royster* (1977, Pa) 372 A2d 1194.

Under Pennsylvania rules providing for pretrial discovery absent showing by defendant of "exceptional circumstances and compelling reasons," he is only entitled to discovery of his own statements and not discovery or inspection of written statements of witnesses in possession of state nor was defendant entitled to every test, result, or interview sheet taken in connection with polygraph test as exculpatory evidence where such evidence was exculpatory only in the sense it contained exculpatory statements by defendant which merely gave same version as prior informal statement and subsequent formal statement both of which were admitted in evidence. *Commonwealth v Gee* (Pa) 354 A2d 875.

In prosecution for violation of prohibited offensive weapons statute, trial court properly denied defendant's request for certain police report where it had been prepared by officer who did not testify at trial. *Commonwealth v McFarland* (1977, Pa Super) 382 A2d 465.

Rule requiring that relevant pretrial statements of witnesses in possession of state must be made available to accused upon request during trial applies to reports made by police officers who testify as witnesses and failure of trial court to order that defense counsel be provided with these statements was error. *Commonwealth v Cooper* (Pa Super) 362 A2d 1041, vacated (Pa) 363 A2d 783.

Trial court did not err in refusing to allow defendant to inspect notes used by state policeman to refresh his memory day before suppression hearing where witness did not refer to notes while on witness stand. *Commonwealth v Samuels* (Pa Super) 340 A2d 880.

See *State v Hamilton* (1981, SC) 276 SE2d 784, § 13[d].

Denial of request for discovery and inspection of reports of police and other investigating officers, and of logs, indexes, and other records kept in ordinary course of police filing and recording, was not abuse of discretion. *State v Pickering* (SD) 207 NW2d 511.

Trial court did not abuse discretion in denying motion for discovery and inspection of police records. *State v Goodale* (SD) 198 NW2d 44.

In prosecution for second degree murder, defendant was not entitled to inspect summaries of witnesses' statements contained in investigative report; under rules of criminal procedure, such summaries were not "statements" in that they had not been signed or otherwise adopted or approved by witnesses involved nor were they verbatim recital of oral statements of witnesses. *State v Venable* (1980, Tenn Crim) 606 SW2d 298.

Where it was alleged that prosecution was tainted by evidence which had been gathered through illegal electronic eavesdropping, trial judge was required to inspect all relevant available records in camera for purpose of making

determination as to whether illegal wiretap was installed on defendant's telephone and, if court found existence of illegal wiretap, any surveillance records made by government or state must be turned over to defendant for use in rebutting prosecution's contention that case was untainted by illegal wiretap. *Armstrong v State* (1977, *Tenn Crim*) 555 SW2d 870, cert den (US) 55 L Ed 2d 495, 98 S Ct 1450.

Although trial judge may, if he deems it in interests of justice to do so, order state to make available to defendant such items as FBI reports, or police records of witnesses, he is clearly justified in refusing to do so if, in his opinion, such disclosure is not needed to insure orderly administration of justice. *Graves v State* (*Tenn Crim*) 489 SW2d 74.

Felon charged with attempted murder by ambush had no right to pretrial discovery of names, addresses and telephone numbers of witnesses who were interviewed by prosecution, and State's failure to disclose did not violate defendant's constitutional right to effective assistance of counsel where record reflected that defense counsel interviewed all available witnesses and thoroughly investigated case to best of his ability. *Prince v State* (1982, *Tex App 5th Dist*) 638 SW2d 550, petition for discretionary review gr (Nov 24, 1982) and revd on other gnds (*Tex Crim*) 754 SW2d 155, motion for rehearing on PDR granted (Jun 26, 1985) and motion for rehearing on PDR dismd (Jun 29, 1988).

Defendant charged with solicitation of murder for hire was not entitled to either transcript of recorded conversation with undercover agent, as such was interpretation of original tape and thereby work product of state, or to examine notes of recording agent relative to his recollection of taped conversation. *Johnson v State* (1983, *Tex Crim*) 650 SW2d 784.

In prosecution for rape, failure to grant defendant's request for police officer's report did not amount to suppression of evidence where statements in officer's report were not exculpatory, material or admissible. *Iness v State* (1980, *Tex Crim*) 606 SW2d 306.

In rape prosecution in which police officer, testifying on direct as to chain of evidence, stated on cross-examination that he had prepared investigation report of incident, trial court's denial of defendant's motion to produce report for use in cross-examination constituted harmless error, where officer had previously testified in pretrial hearing that he had given report to second officer who in turn testified that report contained inventory of evidence seized but that he had been unable to locate it, and where prosecutor testified that he had never seen report. *Patterson v State* (1980, *Tex Crim*) 598 SW2d 265.

At hearing out of presence of jury to determine voluntariness of defendant's confessions, it was error to deny request of defendant for copy of prosecution report prepared by police officer even though officer had not used report to refresh his memory; however, it was not reversible error since report was tendered to defense counsel prior to closing of evidence and he had opportunity to interview officer after reading report. *Myre v State* (*Tex Crim*) 545 SW2d 820.

See *Holloway v State* (*Tex Crim*) 525 SW2d 165, § 4[b].

See *Howard v State* (*Tex Crim*) 505 SW2d 306, § 9[c].

Defendant's right to discovery of police investigation reports was doubtful where officer who made reports had died prior to trial and their contents were not brought out at trial in any way. *Gutierrez v State* (*Tex Crim*) 502 SW2d 746.

Accused in murder prosecution was not entitled to work product of police or sheriff's department. *Powers v State* (*Tex Crim*) 492 SW2d 274.

Accused has no absolute right to pretrial inspection of offense report; thus, accused could not complain that his counsel was not permitted to see copy of such report until 18 days prior to trial. *Baldwin v State* (*Tex Crim*) 490 SW2d 583.

Accused in prosecution for receiving stolen property was not entitled to pretrial discovery of police reports. *Bradshaw v*

*State (Tex Crim) 482 SW2d 233.*

It was not error to deny defendant's request for discovery of criminal records in possession of prosecutor regarding state's witnesses where there was no showing that prosecutor had any "criminal records" regarding such witnesses in his possession. *Thomas v State (Tex Crim) 482 SW2d 218.*

Trial court did not err in overruling motion to direct prosecutor to furnish, for inspection and copying, any and all prior felony criminal records of homicide victim, where there was no showing that prosecutor possessed copy of such records. *Elliott v State (Tex Crim) 475 SW2d 239.*

Defendant was not entitled to pretrial production of criminal records of state witnesses or of jurors, particularly where district attorney stated that he had no knowledge of any such records. *Garcia v State (Tex Crim) 454 SW2d 400.*

Accused was not entitled to inspection of reports made by police officers who did not testify at trial. *Hart v State (Tex Crim) 447 SW2d 944.*

Police officer's reports were not discoverable even when used to refresh witness recollection during pretrial identification hearing absent allegation they contained information tending to exculpate defendant. *Coleman v State (1983, Tex App Tyler) 651 SW2d 846.*

Refusal to require state to produce police offense report to which officer testifying at trial gave "input," but which was made by another officer, was not prejudicial error or denial of due process under "Gaskin Rule" "use before jury rule," or "Brady Rule" where report was not a report or statement made by witness, substantially all evidence in report was developed during trial, state's witness did not testify from report or use it to refresh his memory, and state did not use report before jury for any purpose so as to bring its contents into issue. *Epperson v State (1983, Tex App Tyler) 650 SW2d 110.*

Capital homicide defendant was not entitled to pretrial discovery of summaries of any statements given to agents of Commonwealth by persons Commonwealth intended to call as witnesses. *Bunch v Commonwealth (1983) 225 Va 423, 304 SE2d 271, cert den (US) 78 L Ed 2d 352, 104 S Ct 414, reh den 464 US 1064, 79 L Ed 2d 206, 104 S Ct 750.*

Defendant was not entitled to production of detective's investigative report. *State v Music, 79 Wash 2d 699, 489 P2d 159.*

Neither prejudicial error nor abuse of discretion occurred when trial court refused to grant defendant's motion, prior to trial, for production by state of copies of statements of witnesses, where only statements held by state were police officers' reports and statement of complaining witness, victim of robbery; defendants' counsel were permitted to interview victim, and discrepancies in statements given by witnesses were fully explored in cross-examination. *State v Beard, 74 Wash 2d 335, 444 P2d 651.*

In prosecution for obstructing police officer, trial court did not abuse its discretion in denying discovery of police department's internal investigation files. *Seattle v Apodaca (1977) 18 Wash App 802, 572 P2d 732.*

Criminal defendant was not entitled to disclosure of witness' FBI rap sheet where state had disclosed all of witness' convictions of which it had knowledge and where defense counsel was allowed opportunity to question witness prior to trial. *State v Upton, 16 Wash App 195, 556 P2d 239.*

Refusal to require disclosure of police reports and statements made by witnesses to investigative officers before trial was within discretion of trial court where no exceptional circumstances were shown. *State v Audia (1983, W Va) 301 SE2d 199, cert den (US) 78 L Ed 2d 307, 104 S Ct 338.*

In murder trial, reversible error occurred where court refused to allow defendant to inspect, for purposes of cross-examination, report used by state's chief investigating officer to refresh his recollection the night before his testimony. *State v Helmick* (1982, W Va) 286 SE2d 245.

Defense counsel was entitled to inspect report from which state trooper testified when called as witness for state. *State v Cokeley* (W Va) 226 SE2d 40.

Defendant was entitled to inspection of police report where police witness had testified from notes used to refresh his recollection; defense would be entitled to inspect police report encompassing additional information which was not subject of direct examination, unless judge determined in in camera proceeding that material was in no way relevant to defendant's case and disclosure of material would endanger police activities in future. *State v Dudick* (W Va) 213 SE2d 458.

There was no error in denying right to pretrial discovery of prosecution's evidence or of deputy sheriff's notes, which he made on night of crime of indecent behavior with child when sheriff questioned parties involved. *Ramer v State*, 40 Wis 2d 79, 161 NW2d 209.

Traffic citations fell within statute authorizing inspection of official property and records, and defendant who was issued traffic citation had absolute right to inspect not only his own citation but all other citations issued by same policeman for 1 year period immediately preceding, in absence of any showing by police chief, who was responsible custodian, that such inspection would be harmful to public interest. *Beckon v Emery*, 36 Wis 2d 510, 153 NW2d 501.

[\*18] Prosecuting attorney's notes, memoranda, file, or "work product"

Either explicitly or by implication supporting the view that an accused is not entitled to inspect notes or memoranda made by the prosecuting attorney or his representatives in the preparation of the case, the court in some cases has refused to permit the defendant to inspect such papers.

For other cases wherein notes made by the prosecuting attorney in the preparation of the case were also held not producible for inspection by the defendant, see *Bailey v State* (1931) 24 Ala App 339, 135 So 407, and *People v Salsbury* (1903) 134 Mich 537, 96 NW 936, both supra § 9[c], footnote 1.

Thus, the denial of an order requiring the prosecution to permit the defendant's attorney to examine certain private notes and memoranda of questions asked of and answers made by the defendant a short time after the shooting was held not error in *People v Bermijo* (1935) 2 Cal 2d 270, 40 P2d 823, the court pointing out that the memoranda sought to be examined were not a statement of the defendant nor were they signed by him, but were simply notes made by the district attorney of questions asked of the defendant and answers given thereto.

Holding that personal notes made by the prosecuting attorney containing the questions which he planned to ask a witness were not subject to inspection upon the demand of the defense, the court in *People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694, rejected the defendant's contention that the trial court committed error in permitting a prosecution witness to testify without first supplying the defense with a copy of a writing containing the questions to be asked the witness in accordance with the demand thereof as previously made by the defense at the trial.

In *Hopper v People* (1963) 152 Colo 405, 382 P2d 540, it was held that the defendant's request for production of the prosecuting attorney's worksheets or trial notes made in preparation for the trial was properly denied, although such notes might have been made on the basis of oral statements given by a prosecution witness, the court stating that the worksheets of the district attorney made in preparation for the trial of a criminal case do not come within the coverage of the rule of criminal procedure authorizing the production of statements of a prosecution witness for use by the

defense in the cross-examination of the witness.

Where the defendant, after having been furnished with a carbon copy of a statement of the arresting officer relating to the charge against him, requested during the trial permission to inspect the original of the statement, but the prosecuting attorney objected to the request on the ground that the back of the original sheet contained handwritten notes made by him and that such notes were not a verbatim account of his interview with the arresting officer but were his own work product, it was held in *Campbell v United States (1961, Mun Ct App Dist Col) 174 A2d 87*, a prosecution under the law of the District of Columbia for carrying a pistol without a license, that the trial court properly denied the defendant access to the original document. Noting that the carbon copy was an exact duplicate of the officer's statement in the possession of the prosecuting attorney, and pointing out that the handwritten notes on the original could in no way be called a record of the officer's statement, but were memoranda which would aid the prosecution in preparation of its case, the court said that not even the most liberal discovery theories could justify unwarranted inquiries into the files and mental impressions of an attorney.

See also *State v Kelton (1957, Mo) 299 SW2d 493*, supra § 12, wherein the court upheld the denial of the production of a transcript of questions and answers taken at an interrogation of the defendant by the prosecuting attorney.

Where the trial court denied the defendant's pretrial request for inspection of "tape recordings, written statements, and notes compiled by law enforcement authorities of questions and answers propounded to the defendant," the court in *State v Superior Court (1965, NH) 208 A2d 832, 7 ALR3d 1*, noting that the nature of the notes and recordings did not appear, held that notes personally compiled by law enforcement authorities in the course of their investigation, even if they include notes of conversations with the accused, constitute the work product of the prosecution and are privileged from pretrial discovery. The court added, however, that the trial court had the power in its discretion to order, if required by justice, discovery and inspection of any written confession or statement made by the defendant, or any recording or stenographic notes thereof, whether such confession or statement was signed by the defendant or not; and that if the trial court's denial of the defendant's request for inspection was based solely on an assumed lack of power to order such discovery, it should reconsider its action in the light of the present opinion.

In *Commonwealth v Brown (1894) 90 Va 671, 19 SE 447*, it was held not error to refuse to compel the prosecuting attorney to furnish the defendant with certain stenographic notes of the evidence taken before the examining magistrate. Pointing out that the notes were taken at the instance of the prosecuting attorney for his own use and at his own expense by a private stenographer, the court said that in such case the defendant had no more right to them than to any other private property of the prosecuting attorney.

While not specifically dealing with notes or memoranda of the prosecuting attorney, the court in the following cases also refused to permit the defendant to inspect the particular document or material in question<sup>155</sup> on the ground, inter alia, that such document or material constituted the prosecuting attorney's "work product," or was a part of his file or his work papers.

## ARKANSAS

*Edens v State (1962) 235 Ark 178, 359 SW2d 432*, cert den *371 US 968, 9 L ed 2d 538, 83 S Ct 551*, supra § 16[a] (statements of witnesses)

## CONNECTICUT

*State v Marzbanian (1963) 2 Conn Cir 312, 198 A2d 721*, certif den (Conn) *197 A2d 944*, supra § 13[c] (statements of defendant)

## FLORIDA

*Peel v State* (1963, Fla App) 154 So 2d 910, supra § 11[c] (tape recordings of conversations between defendant, accomplice, and others)

## ILLINOIS

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108, infra § 19 (record of preliminary hearing)

## INDIANA

*Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, supra § 17 (police reports)

## KANSAS

*State v Furthmyer* (1929) 128 Kan 317, 277 P 1019, supra § 13[c] (statements of defendant and witness)  
*State v Hill* (1964) 193 Kan 512, 394 P2d 106, supra § 17 (police report containing statements of witness)

## NEW JERSEY

*State v Tune* (1953) 13 NJ 203, 98 A2d 881, supra § 16[a] (statements of prospective witnesses)  
*State v Bunk* (1949, NJ County Ct) 63 A2d 842, supra § 13[b] (confessions, investigation reports, and statements of witnesses)

## NEW YORK

*People v Giles* (1961) 31 Misc 2d 354, 220 NYS2d 905, supra § 16[a] (statements, transcripts of interviews, and memoranda of conversations of witnesses)

The view that a document or material which constitutes the prosecuting attorney's "work product" or which is a part of his file or his work papers is not subject to inspection by the defense was also taken in a number of other cases wherein the court held or said that --

-- the "work product" of the prosecuting attorney was not producible for inspection by the defense. *State v Colvin* (1957) 81 Ariz 388, 307 P2d 98, supra § 7.

-- information disclosed to a state attorney for the purpose of enabling him to perform the duties of the office is privileged upon grounds of public policy. *State v Zimmaruk* (1941) 128 Conn 124, 20 A2d 613; *State v Roy* (1962) 23 Conn Supp 342, 183 A2d 291; *State v Salvatore* (1962) 23 Conn Supp 459, 184 A2d 551.

-- the defendant has no absolute right to examine a prosecution witness' statements made in confidence to a prosecuting officer. *Fuller v United States* (1949, Mun Ct App Dist Col) 65 A2d 589.

-- the defendant in a criminal case is not entitled to inspection of statements of a prosecution witness which were taken by a prosecution officer in preparation for trial. *McAden v State* (1945) 155 Fla 523, 21 So 2d 33, cert den 326 US 723, 90 L ed 429, 66 S Ct 28; *Johns v State* (1946) 157 Fla 18, 24 So 2d 708; *Raulerson v State* (1958, Fla) 102 So 2d 281; *Urga v State* (1958, Fla App) 104 So 2d 43; *Bedami v State* (1959, Fla App) 112 So 2d 284, cert den 361 US 883, 4 L ed 2d 119, 80 S Ct 153; *Jackman v State* (1962, Fla App) 140 So 2d 627.

-- statements of witnesses reduced to writing by the prosecuting attorney for his own use in the preparation of the case were not producible. *State v Laird* (1909) 79 Kan 681, 100 P 637.

-- an accused is not entitled to inspection of evidence that has been reduced to writing by the prosecuting attorney for his convenience. *State v Williams* (1947) 211 La 782, 30 So 2d 834; *State v Haddad* (1952) 221 La 337, 59 So 2d 411.

-- a statement of a prosecution witness which constitutes the prosecuting attorney's work product is not producible for use by the defense. *State v Aubuchon* (1964, Mo) 381 SW2d 807 (by implication).

-- where a prosecution witness was examined by the prosecuting attorney and his statement was reduced to writing for the convenience of the prosecuting attorney and in the preparation of the case, such private memoranda of the prosecuting attorney were not subject to inspection by the defense. *Dinsmore v State* (1901) 61 Neb 418, 85 NW 445.

-- any statements in the prosecuting attorney's file were nothing more than memoranda or the work product of the attorney which the defendant had no right to inspect. *Erving v State* (1962) 174 Neb 90, 116 NW2d 7, cert den 375 US 876, 11 L ed 2d 121, 84 S Ct 151.

-- a worksheet or file of an adverse party in a criminal case will not ordinarily be made available to the other party. *People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698.

-- a prosecution witness' statements obtained by the prosecuting attorney for his use in the prosecution of the defendant are not producible for use by the defense. *State v Rhoads* (1910) 81 Ohio St 397, 91 NE 186, 27 LRA NS 558; *State v Strain* (1948) 84 Ohio App 229, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 10

*State v Miller* (1961, App) 88 Ohio L Abs 533, 176 NE2d 296, app dismd 172 Ohio St 554, 18 Ohio Ops 2d 93, 179 NE2d 53.

-- a prosecution witness' statement which constitutes a private memorandum of the prosecuting attorney need not be produced for inspection by the defendant. *State v Brake* (1921) 99 Or 310, 195 P 583.

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On the other hand, although recognizing that the impressions, observations, and opinions which an attorney has recorded and transferred to his file as a product of his investigation of a case in preparation for trial are a "work product" and therefore are protected from discovery processes, the court in *State ex rel. Polley v Superior Court of Santa Cruz County* (1956) 81 Ariz 127, 302 P2d 263, supra § 13[a], in upholding the trial court's order requiring the prosecution to produce a stenographic transcript of statements made by the defendant to the county attorney, rejected the prosecution's contention that the requested statements were a part of the "work product" of the attorney.

And in *State ex rel. Helm v Superior Court of Cochise County* (1961) 90 Ariz 133, 367 P2d 6, infra § 21[e], the court, in upholding an order requiring the prosecution to produce for pretrial inspection by the defendant a medical report of the results of a blood alcohol test, said that the present case did not involve an attempt to discover the "work product" of

the prosecution.

To the same effect is *State v Healey (1965, NH) 210 A2d 486*, supra § 8, wherein the court held that medical reports of a hospital relating to the defendant's confinement for observation as to his sanity could not be classified as the work product of the prosecution.

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See *Rogers v State (1982, Ala App) 417 So 2d 241*, § 13[d].

See *Thigpen v State (1977, Ala App) 355 So 2d 392*, affd (Ala) *355 So 2d 400*, § 16[a].

In first-degree murder prosecution arising from shooting death of employer, discovery rule was not violated even though defendant was not informed that police report disclosed by state did not exactly reflect eyewitness' understanding of events; however, discovery rule was violated where prosecutor did not disclose cryptic notes he took while interviewing eyewitness prior to trial, but that error was harmless where notes contained nothing not substantially disclosed prior to trial. *State v Jessen (1981) 130 Ariz 1, 633 P2d 410*.

See *State ex rel. Corbin v Superior Court of Maricopa County, 103 Ariz 465, 445 P2d 441*, § 11[a].

Trial court properly refused request of defendant that state turn over to him statement taken from 1 of its witnesses, as such statement was part of prosecuting attorney's "work papers." *Fisher v State, 241 Ark 545, 408 SW2d 894*, cert den *389 US 821, 19 L Ed 2d 73, 88 S Ct 43*.

Accused was not entitled to inspect prosecutor's file or records regarding prospective jurors. *People v Brawley, 1 Cal 3d 277, 82 Cal Rptr 161, 461 P2d 361*.

In prosecution for rape and kidnapping, trial court erred in denying defense motion for discovery of prosecutor's notes of interview with rape victim on ground that notes were attorney's work product where record indicated notes were simply summary of statements of rape victim of a nonderivative or noninterpretive nature. *People v Williams (1979, 2d Dist) 93 Cal App 3d 40, 155 Cal Rptr 414*.

See *Robinson v Superior Court of Los Angeles County (1978) 76 Cal App 3d 968, 143 Cal Rptr 328*, § 16[a].

In criminal proceeding, discovery by defendant of oral and written statements made by any witness to any inspector or attorney of district attorney's office was not prevented by privilege against disclosure of attorney's work product, where, even though statements sought to be discovered were work-product, there was no statutory or case authority shielding them from discovery. *Craig v Superior Court in and for Alameda County, 54 Cal App 3d 416, 126 Cal Rptr 565*.

In prosecution for lewd and lascivious acts on child, prosecution's file containing results of interviews deputy district attorney had had with witnesses concerning credibility of children involved did not constitute work product where record established that deputy talked to witnesses because he was asked to do so by defense, he acted on information supplied by defense and he interviewed witnesses long before cause was set for trial; in addition, denial of discovery would unfairly prejudice trial preparation of defense. *People v Moore, 50 Cal App 3d 989, 123 Cal Rptr 837*.

Notes made by district attorney of an interview with prosecuting witness, which notes were intended by district attorney to guide him in direct examination of witness, were "work sheets" made in preparation for trial, and court did not err in refusing to order district attorney to produce such notes for inspection by defendant. *Rapue v People (Colo) 466 P2d 925*.

Defendant was not entitled to pretrial inspection of state's file in order to determine for himself whether or not any material therein was exculpatory. *State v. Milardo*, 6 Conn. Cir. Ct. 430, 274 A.2d 890 (App. Div. 1970).

See *Robertson v State (Fla App)* 262 So 2d 692, § 16[a].

See *Dixon v State (Fla App)* 261 So 2d 205, § 16[a].

Trial court order requiring state, in prosecution for making and uttering worthless check, to provide defendant not only with copies of all checks passing between defendant and victim, but also those passed between defendant and victim's wife, and also requiring state to make available for copying all notes made of interviews with witnesses, and all written, stenographically recorded, or otherwise recorded notes in possession of state, was not authorized by applicable rules; such order would be appropriate and meet requirements of rules if limited to all checks passing between defendant and victim prior to date of check giving rise to proceedings, and statements or alleged confessions of defendant, whether signed or unsigned and whether written, stenographically recorded, or otherwise recorded. *State v O'Steen (Fla App)* 213 So 2d 751.

See *State v McCall (Fla App)* 186 So 2d 324.

In prosecution charging husband with murdering his wife, trial court erred by refusing to conduct in-camera inspection of prosecutor's file following filing of four-page pretrial discovery motion, which included general request for Brady material, but error was nonprejudicial. State could have avoided necessity for in-camera inspection by opening State's files to defendant without judge's examination, but there was no requirement that prosecutor do so. *Reed v State (1982)* 249 Ga 52, 287 SE2d 205.

See *Wilson v State (1980)* 246 Ga 62, 268 SE2d 895, § 11.

In prosecution for murder and assault, trial court did not err in failing to require state to produce work product of district attorney, address and telephone numbers of state's witnesses, in camera inspection of all reports, memoranda and documents in files of all law enforcement officers, and names and addresses of any other persons with knowledge of facts, as requested in defendant's "notice to produce." *Natson v State (1978)* 242 Ga 618, 250 SE2d 420, cert den (US) 60 L Ed 2d 399, 99 S Ct 2036.

Trial court did not err in denying defendant's motion for in camera inspection of district attorney's files for discovery purposes in armed robbery prosecution where there was no showing that lack of information impaired defense. *Gravitt v State (1977)* 239 Ga 709, 239 SE2d 149.

Defense counsel's motion for an in camera inspection of district attorney's file prior to trial in order to discover evidence favorable to defendant about background of state's witness was not erroneously denied, where, district attorney had provided defense counsel with copy of record of previous trial of state's witness, which incorporated everything state had on such witness, and where defense counsel had adduced lengthy revelation of such witness' background of criminal activity on cross examination; although defendant had no right to inspect prosecuting attorney's file before trial, district attorney was obliged to disclose evidence that could be helpful to defendant. *Strong v State*, 232 Ga 294, 206 SE2d 461.

Motion by accused for documents, statements, memoranda, reports, and all similar matters in possession of prosecution relating to subject matter of case amounted, in effect, to request to inspect file of prosecutor and would therefore be denied. *White v State (Ga)* 196 SE2d 849, app dismd 414 US 886, 38 L Ed 2d 134, 94 S Ct 222, reh den (US) 38 L Ed 2d 491, 94 S Ct 607.

Defendant who, prior to trial, could point to nothing materially exculpatory which had been suppressed had no right to discovery under Brady principle, and trial court did not err in denying defendant's motion for discovery without making an in camera review to determine whether state's files contained any exculpatory or other evidence which should be disclosed. *Baltimore v State* (1983) 165 Ga App 741, 302 SE2d 427.

Defendant charged with murdering his father had no right to pretrial discovery of police reports and investigation reports made in course of preparing case against him, nor could defendant obtain copies of statement of witnesses in prosecutor's files. *Stanley v State* (1980) 153 Ga App 42, 264 SE2d 533.

See *Simmons v State* (1979) 152 Ga App 643, 263 SE2d 522, § 7.

Accused had no right to have state's file. *Hamilton v State* (1978) 146 Ga App 884, 247 SE2d 551.

Prosecution records showing how persons named on jury panel voted in past on civil and criminal cases were not discoverable as "exculpatory evidence" within meaning of *Brady v Maryland*. *Toole v State* (1978) 146 Ga App 305, 246 SE2d 338.

Trial court did not abuse discretion in dismissing motion to compel state to disclose exculpatory matters where prosecution informed court that it had no exculpatory evidence in its possession and did not know of existence of any such evidence and where trial court called recess and conducted in camera inspection of state's entire file to determine whether any exculpatory evidence existed. *Barnes v State* (1978) 145 Ga App 38, 243 SE2d 302.

Prosecution was not required to open its files for general inspection or for pre-trial discovery. *Collins v State* (1977) 143 Ga App 583, 239 SE2d 232, overruled on other grounds by *Plemons v State* (1980) 155 Ga App 447, 270 SE2d 836 (setting forth criteria and procedures for in camera inspection of exculpatory material where defendant's counsel is not granted opportunity to review state's files).

See *People v Szabo* (1983) 94 Ill 2d 327, 68 Ill Dec 935, 447 NE2d 193, § 16[c].

Handwritten notes made by assistant State's Attorney during her initial interview with woman complaining of rape constituted work product exempt from pretrial discovery. *People v Lane* (1982) 106 Ill App 3d 793, 62 Ill Dec 678, 436 NE2d 704.

See *People v Stevens* (1981) 102 Ill App 3d 773, 58 Ill Dec 389, 430 NE2d 331, § 9[f].

See *People v Manley*, 19 Ill App 3d 365, 311 NE2d 593, supra § 11[d].

Trial court abused discretion by ordering prosecutor to make pretrial disclosure, in "Joint Report of Trial Readiness," of, inter alia, each witness' expected testimony with respect to each element of each offense charged, whether state would use prior criminal record of defendant, and whether state would use prior acts or convictions as evidence of intent, knowledge, or notice, since, though scope of discovery permitted in criminal cases is increasing, order significantly encroached on protection extended to work product of attorneys. *State ex rel. Meyers v Tippecanoe Superior Court* (1982, Ind) 438 NE2d 989.

Criminal defendant's right of discovery includes right to names of witnesses who will be used to support prosecution's case. *Ortez v State* (Ind App) 333 NE2d 838.

Trial judge, in prosecution for arson and manslaughter, properly denied defendant's request to examine prosecutor's transcription of tape recordings of notes and memoranda of his investigation where judge examined this transcription and determined that it contained only privileged entries which were not properly discoverable. *Hendley v*

*Commonwealth* (1978, Ky) 573 SW2d 662.

In prosecution for first-degree murder and aggravated rape, trial judge did not err in failing to order state to comply with defendant's request to discover entire prosecution file, including names of all witnesses state intended to use at trial, where state statute did not require State to allow defendant to inspect entire file, defendant has not usually been held to be entitled to names of state's witnesses, and mere chance that full inspection would reveal Brady material did not justify fishing expedition through state's file. *State v Loyd* (1982, La) 425 So 2d 710.

State's failure to furnish pre-trial discovery of prosecutor's file and of written statements of witnesses did not, in absence of showing that exculpatory evidence was withheld, afford ground for reversal. *State v Taylor* (La) 324 So 2d 425.

See *State v Thomas* (La) 290 So 2d 317, § 8.

See *State v Gray* (La) 286 So 2d 644, § 4[a].

In prosecution for drug-related offenses, trial judge did not abuse his discretion when he denied defendant's motion for information compiled by district attorney's staff for their own use about conviction record of juries on which venire members had sat, where motion was not supported by affidavit as required by state rule; additionally prosecutor's staff's "work product" could be protected from discovery. *Commonwealth v Barber* (1982) 14 Mass App 1008, 441 NE2d 763, app den 388 Mass 1101, 445 NE2d 156, habeas corpus proceeding (CA1 Mass) 772 F2d 982, different results reached on reh, en banc (CA1) 772 F2d 982, 19 Fed Rules Evid Serv 215 and cert den 475 US 1050, 89 L Ed 2d 580, 106 S Ct 1272.

Defendant had no constitutional or statutory right to see jury dossiers compiled by prosecutor from public records. *People v McIntosh*, 400 Mich 1, 252 NW2d 779.

Accused has right to discover prosecutor's dossier regarding prospective jurors upon request, but such right is subject to limitations (1) that defendant must also reveal his own investigative report regarding jurors, and (2) that if prosecutor believes that his file contains materials protected under "work product" doctrine, he may request in camera inspection and determination by trial judge. *People v Aldridge*, 47 Mich App 639, 209 NW2d 796 (citing annotation).

Trial court did not err in refusing to force state to disclose any deal or promise it made with codefendant who testified for state where there was no evidence in record to support contention that codefendant's testimony implicating defendant was result of any promise of leniency by any representative of state or by anyone else. *Nealy v State* (1978, Miss) 354 So 2d 788.

Defendant's request seeking names and addresses of three potential witnesses who were unable to identify him at a "lineup" was granted, since failure to identify defendant as person who perpetrated crime is evidence that is exculpatory in nature, and notwithstanding that People maintain that they intend to call witnesses at trial and therefore names and addresses need not be disclosed, possibility does exist that People may choose not to produce any of witnesses who are unable to identify defendant, and this would deprive him of his constitutional right of confrontation. *People v Anderwkavich* (1982) 117 Misc 2d 218, 457 NYS2d 718.

In prosecution for violating town zoning ordinance defendants were entitled to discover names and addresses of witnesses. *People v Wayman* (Misc) 371 NYS2d 791.

See *People v Rice*, 76 Misc 2d 632, 351 NYS2d 888, § 11[m].

Names and addresses of prospective state witnesses were not subject to pretrial discovery, particularly where defendant made no showing of materiality and reasonableness of such request. *People v Hvizd*, 70 Misc 2d 654, 334 NYS2d 534.

Worksheets and files of adverse party in criminal case will not ordinarily be made available to other party. *People v McDonald*, 59 Misc 2d 311, 298 NYS2d 625.

District attorney's notes of statements of witnesses are not proper subject for discovery and inspection. *People v Powell*, 49 Misc 2d 624, 268 NYS2d 380.

In camera hearing was required to determine whether prosecutor's notes of interviews with prosecution witnesses contained statements of those witnesses that related to subject matter of their testimony, and defense was entitled to discover all prior statements of prosecution witnesses relating to subject matter of their testimony even in face of "work product" objection. *People v Jones* (1983, 4th Dept) 91 App Div 2d 1175, 459 NYS2d 144, later op (4th Dept) 96 App Div 2d 1147, 468 NYS2d 93.

In prosecution for sexual abuse in first degree, where defendant's attorney moved for order directing people to inform defendant of any previous criminal, vicious or immoral acts which they intended to use in cross-examination if defendant should take stand, prosecution was under no duty to open its file to defendant in absence of any particularization in defendant's oral motion for information concerning prior "bad acts." *People v Trivison* (1977) 59 App Div 2d 404, 400 NYS2d 188.

In prosecution for misdemeanor possession of weapon, refusal by trial court after in camera inspection to turn over notes prosecuting attorney may have made of statements of police officer witness was error where it was conceded that certain statements should have been turned over prior to cross-examination and proof of guilt in case was not overwhelming. *People v Flores* (1977) 57 App Div 2d 783, 394 NYS2d 670.

See *People v Boone* (App Div) 370 NYS2d 613, § 4[b].

Trial court properly denied application of defendant charged with selling dangerous drug for order directing district attorney to furnish all records, memoranda, or notes relating to services of all informants, since defendant knew name of informant and identity of individual to whom defendant allegedly sold drug; moreover, to be entitled to any additional information from prosecution file there must be demonstration that it exists and is material and necessary for defense, and there was nothing in instant record to demonstrate that file contained any such evidence. *People v Carter*, 33 App Div 2d 659, 305 NYS2d 384.

In murder prosecution, defendant was not entitled to new trial based on trial court's denial of portion of his pretrial discovery motion and State's failure to provide certain requested information, since there is no common-law right to discovery in criminal cases and categories of information discoverable are those contained within state statute, defendant was not entitled to list of State's witnesses nor their statements under statute, and defendant's motion for discovery of total and complete investigative files of all law-enforcement agencies which took part in investigation was properly denied as such files constituted work product of said law-enforcement agencies and were not open to discovery. *State v Alston* (1983) 307 NC 321, 298 SE2d 631.

Where investigating agent interviewed defendant and made notes but no written statement was taken, notes constituted work product and were not discoverable. *Curtis v State* (Okla Crim) 518 P2d 1288.

See *Trowbridge v State* (Okla Crim) 502 P2d 495, supra § 16[a].

Pretrial inspection of FBI "rap sheet" of homicide victim was denied, where district attorney denied having such in his possession, or that such would be used in evidence at defendant's trial, and because such report was more in nature of work product of prosecution rather than technical report containing information otherwise unavailable to defendant. *Doakes v District Court of Oklahoma County* (Okla Crim) 447 P2d 461.

See *State ex rel. Dooley v Connall (Or)* 475 P2d 582, § 4[b].

In prosecution for murder, trial court erred in refusing to allow defendant pretrial discovery of investigatory notes taken by "prosecuting officer" when interviewing state witnesses, since portions of notes containing verbatim or substantially verbatim statements relevant to case should be available so as to enable defendant to present argument concerning which notes could have been used by defendant. *Commonwealth v Walters (1982)* 303 Pa Super 203, 449 A2d 649.

Trial court erred in refusing to order production of notes taken by assistant district attorney of interview with witnesses. *Commonwealth v Billig (1979, Pa Super)* 399 A2d 735.

Defendant was not entitled to examine investigation report used by prosecuting attorney in his selection of jury in absence of showing of exceptional circumstances. *Commonwealth v Galloway (Pa Super)* 352 A2d 518.

See *Com. v Foster, 219 Pa Super* 127, 280 A2d 602, § 27.

It was error for trial court to require state to open its file to defendant for unlimited discovery. *State v Smart (1980)* 274 SC 303, 262 SE2d 911, appeal after remand 278 SC 515, 299 SE2d 686, cert den 460 US 1088, 76 L Ed 2d 353, 103 S Ct 1784, habeas corpus proceeding (DC SC) 677 F Supp 414, affd (CA4 SC) 856 F2d 609, different results reached on reh, en banc (CA4 SC) 873 F2d 1558, cert den 493 US 867, 107 L Ed 2d 144, 110 S Ct 189.

Trial court did not commit fundamental error by failing to require state to disclose evidence concerning "misidentification" contained in prosecutor's file where review of record and police offense report showed no favorable or material evidence was withheld. *Jackson v State (Tex Crim)* 548 SW2d 901.

Discovery statute did not allow broad exploration of prosecution files for exculpatory or mitigating evidence where there was no showing that matters sought to be discovered were material or that items sought were in possession of prosecution and were being withheld. *Mott v State (Tex Crim)* 543 SW2d 623.

See *Smith v State (Tex Crim)* 468 SW2d 828, § 7.

See *Smith v State (Tex Crim)* 455 SW2d 748, § 16[a].

See *Smith v State (Tex Crim)* 409 SW2d 408, cert den 389 US 822, 19 L Ed 2d 73, 88 S Ct 45 § 7.

In prosecution for armed robbery, defendant was not entitled to discovery of names, telephone numbers, and addresses of all persons known to prosecution or its investigators having information about charges against defendant, where single argument advanced by defendant in support of discovery was that requested information would enable defense to search for potential exculpatory evidence possibly overlooked or not fully developed by State, trial court ordered prosecution to disclose all exculpatory evidence, and list of prosecution's witnesses was made available to defendant; trial court did not abuse discretion in refusing discovery request. *State v Dye (1982, W Va)* 298 SE2d 898.

[\*19] Transcript of testimony given at preliminary hearing

In some cases the court refused to permit the defendant to inspect a transcript or record of the testimony taken at the preliminary hearing of the case which was in the possession of the prosecution.

In *People v Murphy (1952)* 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US

865, 100 L ed 767, 76 S Ct 108, it was held not error for the trial court to deny the defendant's motion to require the prosecuting attorney to produce a record of the preliminary hearing before the police magistrate, which the defendant believed to be in the possession of the prosecuting officer. The court said that a defendant has no inherent right to demand information which he believes may possibly be in the personal files of the prosecuting attorney; and that in any event such motion is addressed to the sound discretion of the court, and only where it is made to appear that the defendant cannot properly prepare his defense "without a bill of particulars will the court require the prosecution to furnish one."

In *State v Gloyd* (1938) 148 Kan 706, 84 P2d 966, it was held not error for the trial court to refuse to order the prosecuting attorney to deliver to the defendant a transcript of the testimony taken at the preliminary hearing. The court rejected the defendant's argument that because the prosecuting attorney had the testimony transcribed by a court reporter, the transcript was an official document.

In *Territory v McFarlane* (1894) 7 NM 421, 37 P 1111, it was held not error to deny the defendant's motion, filed at the commencement of the trial, for an order requiring the prosecution to produce, for the inspection by the defendant at the trial, a transcript of the testimony taken at the preliminary hearing before the justice of the peace, the court stating that "we know of no statute requiring the production of the testimony on preliminary hearing for the inspection of the defendant."

See also *Commonwealth v Brown* (1894) 90 Va 671, 19 SE 447, supra § 18, wherein the court upheld the refusal to compel the prosecuting attorney to furnish the defendant with certain stenographic notes of the evidence taken before the examining magistrate.

Attention is also called to *State v Herman* (1935) 219 Wis 267, 262 NW 718, supra § 3 (upholding the denial of inspection of a transcript of the testimony given at a so-called John Doe hearing on a complaint which was related to the present prosecution).

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On the other hand, it has been held in California cases that the defendant is entitled to a transcript of the evidence taken before the committing magistrate under § 870 of the California Penal Code.n156 *People v Pierce* (1939) 14 Cal 2d 639, 96 P2d 784; *People v Roberts* (1953) 40 Cal 2d 483, 254 P2d 501; *People v Gilbert* (1938) 26 Cal App 2d 1, 78 P2d 770; *People v Yant* (1938) 26 Cal App 2d 725, 80 P2d 506; *People v Corica* (1942) 55 Cal App 2d 130, 130 P2d 164; *People v Jones* (1943) 61 Cal App 2d 608, 143 P2d 726, app dismd and cert den 323 US 665, 89 L ed 541, 65 S Ct 39.

And in *Jackman v State* (1962, Fla App) 140 So 2d 627, it was also recognized that a defendant is entitled to inspect a transcript of statements of prosecution witnesses taken by the prosecution before a magistrate.n157

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In prosecution for shooting, defendant's contention that state suppressed preliminary hearing testimony regarding victim's chest wound, thus suppressing evidence favorable to defendant, was unsupported where record showed that defendant was represented by same counsel at both preliminary hearing and trial and where preliminary hearing transcript was public record, thus as available to defendant and his counsel as to prosecutors. *De Berry v Wolff* (CA8 Neb) 513 F2d 1336.

In murder prosecution, refusing demand for production of all material and information held by prosecution, but requiring production of all statements, reports, notes, and charts of all witnesses who testified at preliminary hearing, as

well as alleged confession of defendant, was proper. *Sanders v State*, 278 Ala 453, 179 So 2d 35.

Defendant's motion requesting court to require state to produce grand jury minutes and testimony was properly denied where no transcription or other record of grand jury proceedings was kept. *Steward v State (Ala App)* 314 So 2d 313, writ denied 314 So 2d 317.

Under California law, the accused had right to examine transcript of preliminary hearing prior to trial and to object to its introduction in evidence. *U. S. ex rel. Machado v. Wilkins*, 351 F.2d 892 (2d Cir. 1965) (applying California law).

See *Cummings v State*, 226 Ga 46, 172 SE2d 395, § 17.

Georgia law does not provide for furnishing to accused abstract of evidence made at committal hearing. *Brown v State*, 223 Ga 76, 153 SE2d 709.

It was not error for trial judge to require production of preliminary-hearing transcript only if one existed where defendant did not establish that court reporter was present at preliminary hearing to record proceeding and where defendant was supplied with information concerning identification made at hearing and where he failed to demonstrate that there existed any notes or recorded recollections of testimony given at hearing and where there was no indication that state withheld any evidence favorable to him; nor was it error for state to fail to produce photographs viewed by victim and information concerning viewing of suspects on closed-circuit television where defendant made no claim that he was present at television viewing and where defendant failed to establish possibility that his picture was in possession of police at time victim viewed photographs. *People v Camel*, 59 Ill 2d 422, 322 NE2d 36.

Assignment of error charging that defendant, convicted of robbery, was denied copy of transcript of preliminary hearing overruled where no demand was made on court but only on court reporter, where no prejudice was shown, and where state procedure did not require preliminary hearing or that transcript be taken. *State v Maxwell (Mo)* 400 SW2d 156.

Defendant had right to minutes of preliminary hearing regardless of nature or quantum of proof against him, and since availability of transcript of minutes is fundamental constitutional right, where minutes no longer existed, indictment was dismissed. *People ex rel. Hairston v Adult Detention Center*, 76 Misc 2d 1010, 352 NYS2d 326.

Defendant in prosecution for felonious possession of weapon was entitled to preliminary hearing minutes relating to crime allegedly committed. *People v Colon*, 43 App Div 2d 676, 350 NYS2d 141.

[\*20] Transcript or report of coroner's inquestn158

In some cases the defendant was permitted to inspect the coroner's report or a transcript of the testimony taken at the coroner's inquest which was in the possession of the prosecution.

In *State v Hinkley (1910)* 81 Kan 838, 106 P 1088, it was held that the defendant was entitled to inspect before trial a transcript of the testimony taken at the coroner's inquest, which was then in the possession of the prosecution. Noting that the transcript in question was a record which the law required to be filed in the office of the county clerk and which the defendant had as much right to examine as counsel for the prosecution, and pointing out that for some reason it had never been filed with the county clerk but remained in the possession of the prosecuting attorney, the court said that it was doubtful if any excuse could be urged for depriving the defendant of the right to inspect such a record, unless it was founded in the mistaken notion of the rights of a person accused of crime and the relations which the prosecution bore toward such a person.

In *People v Giles (1961)* 31 Misc 2d 354, 220 NYS2d 905, wherein the defendant was charged with murder on a short-form indictment, the court, without elaborating, held that "in fairness to the defendant he should be entitled to a

*reasonable* examination as to coroner's reports and other medical reports" (which were apparently in the possession of the prosecution).

See also *Mohler v Commonwealth* (1922) 132 Va 713, 111 SE 454, supra § 9[e], holding that under the circumstances of the case a transcript of the evidence taken at the coroner's inquest should be produced by the prosecution for inspection by the defendant.

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On the other hand, the denial of the defendant's request, made during the trial, for an order requiring the prosecution to deliver to the defendant a copy of a transcript of the testimony taken at the coroner's inquest on the afternoon of the homicide involved was held not error in *State v Hooper* (1934) 140 Kan 481, 37 P2d 52, where it appeared that the coroner's inquest was not completed and no verdict was returned by the coroner's jury, and that the transcript sought by the defendant was not taken by the order or at the request of the coroner, but was taken by an attorney who, acting for the county attorney in his absence, asked a stenographer to take down the testimony at the coroner's inquest, which was later transcribed and delivered to the county attorney. The court pointed out that the document in question was not an official document nor a part of any court record.

[\*21] Medical, psychiatric, or hospital report or record

[\*21a] Generally

In at least one New Jersey case it was held that "the State's objective documents, such as autopsy reports, hospital reports and other scientific and laboratory reports, including chemical analyses, blood tests, etc.," should be produced for inspection by the defense, at least where there is no showing by the state that its prosecution would be improperly hampered. See *State v Cook* (1965) 43 NJ 560, 206 A2d 359, supra § 11[g].

And in the following New York cases the defendant was permitted to inspect medical reports or hospital records concerning the case which were either in the possession or under the control of the prosecution.

Attention is also called to *Powell v Wiman* (1961, CA5 Ala) 287 F2d 275, later app 293 F2d 605, supra § 4[b], wherein it was held that the state's refusal to disclose a psychiatrist's report or other information tending to show the insanity of an accomplice who had testified for the state was a denial of the defendant's right to due process under the circumstances of the case.

In *People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, the court, concluding that "physical objects, documents, hospital reports, chemical analyses, blood tests and related reports" may be made available to a defendant in the discretion of the court before trial, granted the defendant's motion for permission to inspect hospital records concerning treatment of the victim of the alleged offense before his death, and certain portions of a medical examiner's autopsy report with respect to his findings and conclusions as to the cause of death (which documents and papers appeared to be either in the possession or under the control of the prosecution). The court said that to grant a request of inspection, it need only appear that the requested material is relevant, competent, and outside any exclusionary rule.

Similarly, in *People v Wilson* (1959) 17 Misc 2d 349, 183 NYS2d 669, the defendant's motion for discovery of any "charts, bed records, hospital records and all clinical records" of a certain hospital relating to the care and treatment of the victim of the alleged homicide was granted, where the affidavit in support of the motion alleged that such records were either in the possession or under the control of the district attorney. The court pointed out that the granting of the motion did not require the prosecuting attorney to disclose evidential facts prior to trial, and that the requested records, or at least portions of them, were admissible in evidence.

Medical reports which were apparently in the possession of the prosecution were also held producible for inspection by the defense in *People v Giles (1961) 31 Misc 2d 354, 220 NYS 2d 905, supra* § 20.

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On the other hand, in *State v Superior Court (1965, NH) 208 A2d 832, 7 ALR3d 1, supra* § 3, it was held that laboratory and chemical reports made as a part of the state's investigation were not subject to pretrial discovery.

And the trial court's refusal to require the prosecuting attorney to produce, for inspection by the defense, reports of certain named doctors was upheld in *Freeman v State (1958) 166 Tex Crim 626, 317 SW2d 726, supra* § 13[c].

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Denial of motion for production of hospital records was not error in murder prosecution where request for such records was part of general demand for production of information held by prosecution, where production as to statements made at preliminary hearing was granted. *Sanders v State, 278 Ala 453, 179 So 2d 35.*

See *People v Wilken (1980) 89 Ill App 3d 1124, 45 Ill Dec 489, 412 NE2d 1071, § 17.*

See *State v Morton (1979, Me) 397 A2d 171, § 11.*

In homicide prosecution trial court properly denied defendant's motion for discovery of psychiatric records of hospital relating to key prosecution witness' possible treatment there where material was as accessible to defendant as to attorney for state. *State v Heald (1978, Me) 393 A2d 537.*

Defendant had no constitutional or statutory right to see jury dossiers compiled by prosecutor from public records. *People v McIntosh, 400 Mich 1, 252 NW2d 779.*

Trial court did not err in denying motion for production of psychiatric report on chief prosecution witness where defense knew of such reports but didn't subpoena doctors for purpose of offering reports in evidence, and where witness himself testified as to his homicidal compulsions and that he had been committed to hospital as manic-depressive. *People v McGath, 31 Mich App 351, 187 NW2d 904.*

Defendant charged with conspiracy to commit first-degree robbery was properly denied, based on confidentiality, pretrial discovery of results of polygraph examination and mental examination of coconspirator who testified for prosecution. *State v Moore (1982, Mo App) 642 SW2d 917.*

In prosecution for rape, trial court properly denied defendants' motion to compel state to disclose records that it had obtained with consent of prosecutrix from methadone clinic at which prosecutrix was being treated at time of incident, where defendants failed to follow proper procedure to obtain such records; additionally, defendants received all information that court could have ordered to be disclosed. *State v Walker (1982, Mo App) 639 SW2d 854.*

Criminal defendant was not entitled to reports of psychiatric examinations of his accomplices. *State v Doepke (Mo App) 536 SW2d 950.*

See *State v Williams, 183 Neb 257, 159 NW2d 549, § 17.*

Defendant was entitled to discovery of medical reports and records and police reports by prosecutor's office and pretrial intervention coordinator, where he had been denied admission to pretrial intervention program but was not informed as to what reports were relied upon in rejecting him, and where his motion for discovery was limited to materials contained in his own file and presumably considered by program coordinator. Alleged inconvenience of duplicating materials in defendant's file did not justify refusal to provide access to these materials. *State v Barath (1979) 169 NJ Super 181, 404 A2d 373, § 21[a]*.

Criminal defendant is entitled to discovery and inspection of psychiatric, psychological and medical records of complaining witness which contain information which may have some bearing on witness' credibility and on his ability to perceive events in issue, to remember such happenings and to recount facts concerning the same; people may not in any criminal case withhold evidence which could conceivably disprove or tend to disprove defendant's guilt and, moreover, hospital records containing history of witness' mental illness, confinement and treatment may even be admitted as evidence-in-chief as an aid to jury assessment for credibility of that witness. *People v Acklin (1980) 102 Misc 2d 596, 424 NYS2d 633*.

In burglary and petit larceny prosecution, defendant was entitled to discovery of complainant's medical records where complainant suffered from long-standing, ongoing mental condition, complainant was sole eyewitness to crime, and where such mental condition could effect accuracy, perception and comprehension of complainant's testimony; however, defendant was not entitled to pretrial psychiatric examination of complainant absent substantial showing of need and justification. *People v Lowe (1978) 96 Misc 2d 33, 408 NYS2d 873*.

See *People v Player, 80 Misc 2d 177, 362 NYS2d 773, § 11[m]*.

Defense request for any hospital records or physicians' reports concerning injuries allegedly sustained by complainant and for any statements, notes, or memoranda, sworn or unsworn, made by any defendant or witnesses was too broad; in view of failure of defense to show existence, materiality, and competency of matters sought to be disclosed, relief was denied. *People v Johnston, 55 Misc 2d 185, 285 NYS2d 243*.

Considering "relatively lengthy period of time" between accident and death of decedent (17 days) and medical issue raised as to causal relationship, court found that defendant alleged sufficient facts to warrant examination of hospital record for submission to medical expert in advance of trial. *People v Christiano, 53 Misc 2d 433, 278 NYS2d 696*.

Fact that state conducted additional test on medical samples obtained in rape case without defendant's knowledge was not a disclosure violation when the results of test were made known to defense counsel the day after state learned of results. *Gregg v State (1983, Okla Crim) 662 P2d 1385*.

In murder prosecution, state's failure under court order to produce medical records or witness who testified against defendant and who had history of drug abuse and psychological problems, did not require reversal where there was strong circumstantial evidence of guilt and it could not be said as matter of law that medical records would have been outcome-determinative in case. *Marshall v State (1980, SD) 305 NW2d 838*.

Defendant in prosecution for burglary and assault and battery was entitled to have trial court make in camera inspection of medical and hospital records of prosecutrix where she had been treated repeatedly for emotional disturbances of psychotic proportions and mental condition of prosecuting victim may have had direct bearing on credibility of her testimony. *State v Brown (1977, Tenn) 552 SW2d 383*.

Trial court erred in not allowing defendant use of psychiatric report made by F. B. I. agent during trial, but error was harmless when witness' testimony was entirely consistent with prior statement and almost all information contained in statement was developed during trial. *Ogle v State (Tex Crim) 548 SW2d 360*.

Trial court properly denied defendant's motion for disclosure of psychiatric reports concerning mental health of informant where reports contained no information material to preparation of defense. *State v Kasper* (1979) 137 Vt 184, 404 A2d 85.

While under some circumstances child welfare agency records of complaining witness in criminal case might be obtained by proper application to juvenile court, trial court did not err in refusing request of defendant charged with having sexual intercourse with a child to inspect records of complaining witness' general guardian, a licensed child welfare agency, pertaining to mental condition of complaining witness, nor did court err in denying motion to require state to turn over whatever records it might have concerning mental condition of witness. *State v Miller*, 35 Wis 2d 454, 151 NW2d 157.

State was required to advise defendant of fact that witness had been previously been hypnotized and to make all statements and proceedings relative thereto available to defendant on request. This requirement goes beyond those concerning discoverable materials for purposes of impeachment, and discoverable statement of witnesses under state discovery rules. *Gee v State* (1983, Wyo) 662 P2d 103.

[\*21b] Report of autopsy or post-mortem examination 159

In a number of cases the defendant was permitted to inspect a report of the autopsy performed on the body of the victim of the alleged homicide, which report appeared to be either in the possession or under the control of the prosecution.

The view that ordinarily an accused is entitled to inspection of an autopsy report in the possession of the prosecution was also taken in *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, supra § 8, *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3, and *State v Cook* (1965) 43 NJ 560, 206 A2d 359, supra § 11[g].

An order granting the defendant's pretrial motion for permission to inspect the record of a medical examiner containing his findings as to the autopsy performed on the body of the victim of the alleged homicide was upheld as proper in *Silver v Sobel* (1958) 7 App Div 2d 728, 180 NYS2d 699. Noting that the trial court had power to grant a motion for inspection of documents in the possession of the prosecution which were admissible in evidence on the trial, the court said that since the findings contained in the autopsy report were admissible in evidence, the granting of the motion in question was within the discretion of the trial court.

Where a defendant was indicted for manslaughter on the charge that she had caused the death of a pregnant female by administering a liquid solution of creosol and soap, it was held in *People v Munoz* (1960) 11 App Div 2d 79, 202 NYS2d 743, affd 9 NY2d 638, 210 NYS2d 533, 172 NE2d 291, that in a case of this kind the trial court in the exercise of a proper discretion should have granted the defendant an inspection of the autopsy findings. (However, the trial court's failure to do so was held not so prejudicial as to require a new trial.)

See also *People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, supra § 21[a], wherein the court permitted the defendant to inspect certain portions of a medical examiner's autopsy report.

In *People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222, the defendant's motion for permission to inspect the medical examiner's autopsy report, which was in the possession of the prosecution, was granted, the court stating that although the moving papers failed to meet the standard requiring that the cause of death be an issue, the motion was nevertheless granted in the exercise of its discretion in view of the fact that the findings contained in the autopsy report were admissible in evidence.

In *People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827, a prosecution for murder, the court, being satisfied from the facts that a medical examiner's autopsy report on the victim of the alleged homicide might be material in determining the issue of self-defense raised by the defendant, directed in the exercise of its discretion that the district attorney should

furnish the defendant's counsel with a transcript of the report.

In *People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, the court, stating that the autopsy report, while not necessarily open to public inspection, is a record made by a public official for a public purpose and filed in a public office, and therefore is admissible in evidence, held that a copy of the report of an autopsy performed on the body of the victim of the alleged homicide should be produced for inspection by the defendant prior to trial, in the absence of special circumstances warranting a denial as to any portion thereof. (The court's discussion was based on the assumption that the requested report was in the possession or under the control of the prosecution.)

In *State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, the court, sustaining an order requiring the prosecuting attorney to produce all reports of an autopsy performed upon the victim of the alleged homicide, on the ground that there was no abuse of discretion in the trial court's ruling, rejected the prosecution's contention that in view of the statute providing that reports and records of autopsies or post-mortem examinations should be "confidential," except to the prosecuting attorney, law enforcement agencies having jurisdiction, and the state department of labor and industries where it has requested the autopsy, the autopsy report was privilege and beyond the process of the court. Noting that the use of the word "confidential" did not necessarily show that it was the legislative intention that this word should have the same import as the word "privileged," and stating that the intention of the legislature to place the autopsy report in a class which was not subject to judicial inquiry or process could not be determined by the word "confidential" as used alone in the statute relied on by the prosecution, and that the legislative intent must be gleaned from an examination of the enactment in its entirety, the court concluded that in view of another section of the statute providing that "any party by showing just cause may petition the court to have autopsy made and results thereof made known to said party at his own expense," the right to an autopsy was lodged within the discretion of the trial court. As to *State v Petersen* (1955) 47 Wash 2d 836, 289 P2d 1013, wherein the court, in passing on the question whether the lower court had the authority to enter an order permanently abating the criminal proceeding for the reason that the prosecution had not complied with an order requiring it to furnish to the defendant a copy of an autopsy report, indicated that the autopsy report was not amenable to court process, the court in the Thompson Case said that in the Petersen Case "our observations relative to autopsies were not necessary to the result and were therefore dictum and may be disregarded."

See also *State v Olsen* (1959) 54 Wash 2d 272, 340 P2d 171, wherein the court, in upholding an order requiring a coroner to deliver to the defendant a copy of the report of an autopsy performed on the victim of the alleged homicide, said that insofar as the state was concerned the question under consideration was answered by the decision in *State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, supra, in which case "we held that it was within the discretion of the trial court to determine whether the alleged criminal defendant. . . should be entitled to a copy of an autopsy report."

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In the following cases, on the other hand, the court refused to permit the defendant to inspect the report of an autopsy or post-mortem examination which appeared to be either in the possession or under the control of the prosecution.

For other cases wherein the court refused to permit the defendant to inspect an autopsy report which was in the possession of the prosecution, see *Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, supra § 3, *Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, supra § 5[a], *Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, supra § 5[a], and *Pinana v State* (1960) 76 Nev 274, 352 P2d 824, supra § 5[a].

In *State v Huff* (1954) 14 NJ 240, 102 A2d 8, the refusal to permit the defendant to have a copy of the report of an autopsy performed on the body of the victim of the alleged homicide was upheld, the court stating that the matter was within the sound judicial discretion of the trial court, and that the record showed no abuse warranting a conclusion to the contrary.

An order granting the defendant's request for the pretrial production of statements and memoranda of the post-mortem examination of the victim of the alleged homicide and all reports and information made or given to the district attorney with reference to any chemical analysis or examination of the organs or parts of the victim was set aside by a writ of prohibition in *People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, supra § 10[a], on the ground that such documents would not have been admissible in evidence.

In *People v English* (1940) 175 Misc 751, 24 NYS2d 207, the court refused to permit the defendant to inspect a medical examiner's report to the district attorney relating to the death of the victim of the alleged homicide. Relying on *People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, supra, the court said that it had no power to require a prosecuting attorney to reveal to a defendant memoranda prepared by his medical experts following a post-mortem examination of the victim of a homicide. Holding to the same effect are *Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843, and *People v Jordan* (1953, Gen Sess) 128 NYS2d 457.

In *People v Cox* (1960) 24 Misc 2d 998, 202 NYS2d 607, wherein the defendant was charged with criminal negligence in the operation of a motor vehicle resulting in the death of a person, the court denied the defendant's motion for permission to obtain a copy of the report of a medical examiner with respect to the cause of the death of the victim. Stating that for the court to exercise its discretion and to grant an inspection of the medical examiner's report, it must be shown that there is an issue respecting the cause of death, the court pointed out that nothing in the defendant's papers indicated that any issue would be made at the trial respecting the cause of the death of the victim of the charged offense.

The view that an autopsy report in the possession of the prosecution is not ordinarily subject to inspection by the defense was also apparently taken in *State v Collett* (1944, App) 44 Ohio L Abs 225, 58 NE2d 417, app dismd 144 Ohio St 639, 30 Ohio Ops 236, 60 NE2d 170, wherein the defendant, on appeal from a judgment of conviction for murder, contended that it was error for the trial court to refuse to require the prosecution to permit the defendant to examine a copy of "what is termed the report of the Coroner" of the county, and the court, pointing out that the coroner had held no inquest respecting the deaths of the victims of the alleged murder nor did he have any official connection with the autopsies, which were conducted by a physician employed by the prosecuting attorney, said that "[i]nasmuch as there was no coroner's report, it could not have been erroneous to deny the request of the defendant that the doctor privately employed by the State should turn over his report to the defendant."

The refusal to permit the defendant to examine, prior to trial, an autopsy report which was in the possession of the prosecution was held not error in *State v Payne* (1946) 25 Wash 2d 407, 171 P2d 227, adhered to on reh 25 Wash 2d 418, 175 P2d 494, the court noting that the prosecution is not required to submit its evidence to defense counsel; that the accused is not, as a matter of right, entitled to have, for inspection before trial, evidence which is in the possession of the prosecution; and that such matter is peculiarly within the trial court's discretion, which will not be disturbed on review unless there is a manifest abuse of discretion.

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Failure of court to order production of autopsy report conducted on body of murder victim was not prejudicial to accused since report did not give place, manner, or time of death, and only useful item therein was result of blood alcohol test which information defendant used to best advantage in effort to establish alibi defense. *State v Ford*, 108 Ariz 404, 499 P2d 699, cert den 409 US 1128, 35 L Ed 2d 261, 93 S Ct 950.

Denial of autopsy report did not so impair defense that defendant was denied fair trial, despite defendant's contention that report would have shown that wound causing death of decedent might have been self-inflicted and was not result of criminal agency, where medical examiner testified at trial and could have given any evidence that autopsy report would have shown. *Zirkle v State*, 235 Ga 289, 219 SE2d 389.

Court did not err in murder trial in refusing access to defendant of "medical report concerning the results of the physical examination of the deceased." *Jones v State*, 224 Ga 283, 161 SE2d 302, vacated on other grounds 393 US 21, 21 L Ed 2d 23, 89 S Ct 51.

Voluntary manslaughter conviction would be reversed where prosecutor failed to comply with pretrial demand for discovery of pathologist's report, and where trial court erroneously instructed pathologist that he could not read from his report "but any testimony you give will have to be from your recollection and if you can't recollect, then you can't give it"; on remand pathologist's testimony would be excluded and suppressed unless district attorney fully complied with discovery provisions. *Tanner v State* (1981) 160 Ga App 266, 287 SE2d 268.

Fundamental fairness required state to produce autopsy report in murder prosecution, so that defendant could prepare to meet its findings in orderly and effectual fashion. *State v Eads* (Iowa) 166 NW2d 766 (citing annotation).

See *State v Hodges* (1977, La) 349 So 2d 250, cert den (US) 55 L Ed 2d 779, 98 S Ct 1262, § 25[b].

Defendant's conviction of first-degree murder would be reversed and remanded where prosecution failed to disclose results of physician's examination of bodies of victims showing wounds in stomach and chest and not in back, together with knowledge of deputy sheriff as to ballistic report and chemical tests leading to his belief that defendant did not fire weapon used in killings. *State v Hurd* (Mo App) 520 SW2d 158.

It was error to deny defendant's request for discovery of reports of examination and scientific tests relating to blood and hair found in station wagon in which murder victim was found, such scientific evidence being of particular importance in case because it tended to disprove any theory of accidental death. *State v Davis*, 185 Neb 433, 176 NW2d 657.

Claim that state failed to produce for defendant's use before trial copies of autopsy reports, X-rays, and photographs was patently without substance where (1) photographs were delivered to defendant's trial counsel before trial, (2) X-rays taken of victim were lost or misplaced by doctor before trial and could not be produced, and (3) defense counsel did not move for production of items before trial. *Peoples v State* (Nev) 423 P2d 883, cert den 389 US 866, 19 L Ed 2d 138, 88 S Ct 132.

Denial of pretrial motion to examine scientific reports (not offered in evidence by state), including reports of blood alcohol test, barbiturate tests, autopsy, and ballistics test, was not prejudicial error where prosecutor did show defense counsel blood alcohol and barbiturate reports during trial, and defense motion before presenting defense case did not include request for autopsy. *Mears v State* (Nev) 422 P2d 230, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 124, reh den 389 US 945, 19 L Ed 2d 303, 88 S Ct 299.

Motion for discovery of autopsy report was denied. *People v Cusano*, 63 Misc 2d 906, 313 NYS2d 833.

District attorney directed to supply each defendant in murder prosecution with copy of report of autopsy performed on body of deceased. *People v Matera*, 52 Misc 2d 674, 276 NYS2d 776.

In prosecution for murder and for conspiracy to murder, state's failure to turn over medical examiner's report upon defendant's request did not require reversal where report was minimally probative and not material and record did not indicate whether prosecutor deliberately suppressed or merely neglected to produce report. *State v Gazerro* (1980, RI) 420 A2d 816.

Although defendant in murder trial had statutory right to copy of autopsy reports, denial of motion for copy was harmless error where order recited that motion was taken under advisement for 5 days, autopsy report was never introduced into evidence, and the doctor who performed autopsy was witness for state and was cross-examined by

defendant. *Tate v State (Tenn)* 413 SW2d 366.

Trial court did not err in refusing to grant request of defendant in murder trial for copy of autopsy report. *Hackathorn v State (Tex Crim)* 422 SW2d 920.

[\*21c] Report of examination of rape victim

In the following cases the court refused to permit the defense to examine the report of an examination of the victim of the alleged rape, which report appeared to be in the possession of the prosecution.

Where the victim of the alleged rape testified on direct examination that the defendant had had an emission during the rape, and on cross-examination that on the night of the rape she was taken to a hospital and was examined by a doctor and that the doctor gave a written report of her condition to the police, and thereupon the defendant's attorney requested the production of the doctor's report, it was held in *People v Harrison (1962)* 25 Ill 2d 407, 185 NE 2d 244, that under the circumstances it was not error for the trial court to refuse to order the production of the report. The court pointed out that there was no testimony as to the contents of the report and therefore its production could not have been used to show prior inconsistent statements of any witness; and that, at most, the report might have cast doubt upon the prosecutrix's testimony that the defendant had had an emission, but such a discrepancy would not have sufficed to give rise to a reasonable doubt as to the defendant's guilt.

The defendant's pretrial motion, in a prosecution for rape, for the production of the medical report made after an examination of the prosecutrix which allegedly established that there was a "penetration" was denied in *Commonwealth v Honeywell (1963)* 32 Pa D & C2d 491, 53 Luzerne Leg Reg R 257. Pointing out that the defendant should know whether or not there was a "penetration," and that, therefore, the denial of the motion for production did not result in a denial to the defendant of anything which he needed in the ascertainment of truth, the court distinguished the present case from those where physical items which had been examined previously by experts for the Commonwealth had been required to be made available to the defense for independent inspection by experts of its choice. The court said that such broad discovery as was sought by the defendant in the present case was neither reasonable nor logical, nor based on any legal precedent.

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In prosecution for taking indecent liberties with child, defendant was improperly denied discovery of tests made of child, and of her clothing, for blood or spermatozoa. *People v Flowers, 51 Ill 2d 25, 281 NE2d 299.*

See *State v Sanders (1980)* 227 Kan 892, 610 P2d 633, § 8.

If existence of report of physician who performed pelvic examination on victim of sexual assault was known to district attorney, he had obligation to inform defendant if he intended to use report at trial or if report was exculpatory. *State v Arnaud (1982, La)* 412 So 2d 1013.

Accused is not entitled to pretrial inspection of evidence upon which prosecution relies for conviction; thus, trial court did not err in refusing to permit inspection of clothing of rape victim, nor in denying request for results of tests performed thereon. *State v Edgecombe (La)* 275 So 2d 740, cert den (US) 38 L Ed 2d 482, 94 S Ct 591.

Denial of prayer for proces-verbal of coroner, showing results of examinations and tests upon rape victim and defendant, was not error where trial judge during trial gave defense counsel opportunity to review coroner's report of all tests and examinations made on victim and defendant, and defense counsel at that time made no complaint or showing that his failure to have documents before trial was prejudicial. *State v Brown, 249 La 235, 186 So 2d 576.*

In rape prosecution defendant could not compel production of notes, written by gynecology resident as they interviewed prosecutrix immediately after her alleged rape and which investigating officer later took to the witness stand with him, where officer never read or referred to notes during his testimony. *State v Jackson* (1981) 302 NC 101, 273 SE2d 666.

See *Shapard v State* (Okla Crim) 437 P2d 565, § 9[a].

Defense had no right to inspect medical reports about condition of two rape victims where neither act of sexual intercourse was disputed issue at trial, defense being based solely on consent and insanity issues. *Whitchurch v State* (1983, Tex Crim) 650 SW2d 422.

See *State v Stanislawski*, 62 Wis 2d 730, 216 NW2d 8, § 8.

[\*21d] Report of examination of defendantn160

In some cases the report of an examination or observation of the defendant as to his sanity or mental condition which appeared to be in the possession of the prosecution was held producible for inspection by the defense.

#### NEW HAMPSHIRE

*State v Healey* (1965, NH) 210 A2d 486, supra § 8

#### NEW JERSEY

*State v Cook* (1965) 43 NJ 560, 206 A2d 359, supra § 11[g]

*State v Whitlow* (1965) 45 NJ 3, 210 A2d 763, infra

#### NEW YORK

*People v McElroy* (1955) 285 App Div 846, 136 NYS2d 693, supra § 9[d]

In *State v Whitlow* (1965) 45 NJ 3, 210 A2d 763, wherein the defendant, indicted for murder, entered a plea of not guilty on the grounds that he was insane at the time of the commission of the alleged offense and that he was mentally incompetent to stand trial, the court, in upholding an order directing the defendant to submit to a mental examination by the prosecution's psychiatrists, held that on demand the defendant was entitled to copies of the prosecution's psychiatric examination reports, subject to his delivery to the prosecution of copies of reports made by psychiatrists of his own selection.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect the report of a medical or psychiatric examination of the defendant which appeared to be in the possession of the prosecution.

In *Linder v State* (1953) 156 Neb 504, 56 NW2d 734, it was held that the trial court did not abuse its discretion in denying the defendant's motions for the production of the results of a medical examination of the defendant, the court pointing out that the defendant had been advised of the contents of the report of the medical examination, and his

counsel had information as to this matter a considerable time before the motions were made; and that the defendant did not undertake to secure the report by calling witnesses who had or might have had a knowledge of its contents, and "he did nothing save demand its production." The court noted that the defense counsel in a criminal prosecution has no right to inspect or compel the production of evidence in the possession of the prosecution unless a valid reason exists for so doing; that the defendant has no inherent right to invoke such means of examining the prosecution's evidence merely in the hope that something may be uncovered which would aid his defense; and that in the administration of such rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon.

In *State v Bunk* (1949, NJ County Ct) 63 A2d 842, the defendant's motion for permission to inspect the reports of medical examinations of the defendant which were made by physicians engaged by the prosecution was denied, the court holding that the motion was premature, since counsel for the defendant had not yet had their client examined and consequently there was nothing before the court to indicate that the defendant would advance the defense of insanity or make the contention that he was mentally incompetent to stand trial.

The denial of the defendant's request, made during the progress of the trial, for permission to inspect a report of psychiatrists who were employed by the prosecution to examine the defendant to ascertain whether he was sane and capable of standing trial was held not error in *Commonwealth v Wable* (1955) 382 Pa 80, 114 A2d 334, the court noting that the general rule is that the accused has no right to pretrial inspection or disclosure of evidence in the possession of the prosecution.

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Allegation that defense counsel was denied use of examination and report of 1 of several doctors who examined mental condition of defendant was without merit where (1) doctor's report of his examination was introduced in record, (2) with consent of defendant a second lunacy commission was appointed to examine defendant and make formal findings, and (3) at time of trial it was agreed that doctor would not be summoned or used as witness in case. *State v Gregoire*, 249 La 890, 192 So 2d 114, app dismd and cert den 389 US 154, 19 L Ed 2d 354, 88 S Ct 339.

It was not error under Maine Rule of Criminal Procedure 16 for state to fail to turn over certain psychological testing data gathered by state in its evaluation of defendant at state hospital where qualified psychiatrist who testified for defendant was informed that test had been performed, he was familiar with test and knew results existed although he was not actually given results, he did not hesitate to make his diagnosis without results and where defendant at no time prior to trial requested further discovery to secure test results. *State v Buzynski (Me)* 330 A2d 422.

Hospital records and reports concerning accused in murder trial who was civilly committed to state mental hospital on initiation of defense counsel should be available in advance of trial to both prosecution and defense, since commitment was to public institution by court order for essentially public purpose, no matter who commenced it. *State v Gosser*, 50 NJ 438, 236 A2d 377.

Refusal of trial court to allow defense counsel to see psychiatric and diagnostic records and reports which were in possession of psychiatrist who was state's rebuttal witness, although error, was not reversible error where purpose for sending defendant to hospital for diagnosis was to determine if he knew difference between right and wrong and could assist in his own defense while defendant's apparent defense was one of temporary insanity at time of commission of crime and record indicated that reports would have shed little light on defendant's sanity at time of commission of crime. *Maloy v State (Okla Crim)* 543 P2d 755.

Denial of request for report from state hospital concerning defendant's mental condition was not error where (1) report was at one time in court file and was "evidently" examined prior to trial by defendant's retained counsel, (2) no question concerning absence of report from file was raised until after trial of case had commenced, and then only request was

that report be restored to file, (3) request was not pressed after attorney general suggested that report would only become material if defendant -- who did not testify -- were to take witness stand and needed it in his defense, and (4) no defense based on defendant's mental condition was made, nor was report mentioned again during trial. *Sneed v State (Tenn) 423 SW2d 857*.

Under state rule of criminal procedure, defendant in murder prosecution was entitled to statements he made to hospital staff members while undergoing mental examination and to background reports indicating his competency to stand trial in order to assist counsel in determining whether to plead present insanity. *Covey v State (Tenn Crim) 504 SW2d 387*.

[\*21e] Blood test report

In some cases the defendant was permitted to inspect the report of a blood test taken of him or the victim of the alleged offense which was in the possession of the prosecution.

An order requiring the prosecution to produce before trial, for inspection by the defendant, a medical report of the results of a blood alcohol test taken of him was upheld in *State ex rel. Helm v Superior Court of Cochise County (1961) 90 Ariz 133, 367 P2d 6*, involving a prosecution for manslaughter and driving a motor vehicle while intoxicated. Stating that Rule 195 of the Arizona Rules of Criminal Procedure, providing for discovery and inspection of certain documents and tangible objects,<sup>n161</sup> does not operate to divest a trial court of the power to order discovery of items which are not within the coverage of the rule but are necessary, in the opinion of such court, to the proper preparation of the defendant's case, and that notwithstanding the limitations of Rule 195, a trial court has a residuum of inherent power to order production and inspection when essential to the due administration of justice, the court concluded that under the circumstances of the case there was no abuse of discretion in ordering the production of the medical report in question. The court pointed out that the report constituted the only source from which information respecting the defendant's intoxication at the time of the alleged crimes might be obtained; that the defendant would be able to inspect the report if produced by the prosecution at the trial, and there had been presented no sound reason for denying him the same opportunity before trial; that the case did not involve an attempt to discover the "work product" of the prosecution, nor could inspection of the report afford the defendant an opportunity for fabrication of evidence contradicting its contents; and that the defendant's knowledge of the report was essential to the adequate preparation of his defense.

The view that in a proper case the report of a blood test taken of a defendant or any other person may be produced for inspection by the defense was also taken in *Brenard v Superior Court of Sacramento County (1959) 172 Cal App 2d 314, 341 P2d 743*, supra § 5[a], *State v Cook (1965) 43 NJ 560, 206 A2d 359*, supra § 11[g], and *People v Preston (1958) 13 Misc 2d 802, 176 NYS2d 542*, supra § 21[a].

In *People v Lowe (1955) 285 App Div 207, 136 NYS2d 454*, a prosecution for criminal negligence for killing a pedestrian in the operation of an automobile, it was held that where it could be inferred from the prosecuting attorney's opening statement that the prosecution intended to produce evidence of intoxication, the defendant's motion, made at the close of the opening statement, for permission to obtain the results of a chemical blood test taken to determine the alcohol content of his blood should have been granted.

An order requiring the prosecution to produce reports of any examination made of blood samples of the defendant and the victim of the alleged murder was also upheld in *State v Thompson (1959) 54 Wash 2d 100, 338 P2d 319*, supra § 10[b].

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In the following cases, on the other hand, the court refused to permit the defendant to inspect the report of a blood test taken of him or another person.

## DELAWARE

*State v Thompson* (1957) 50 Del 456, 134 A2d 266

*State v Hutchins* (1957) 51 Del 100, 138 A2d 342, both supra § 11[b]

See also *State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b] (apparently recognizing that blood test report is not subject to inspection).

## NEVADA

*Pinana v State* (1960) 76 Nev 274, 352 P2d 824, supra § 5[a]

## OHIO

*State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, infra

Stating that the analogy between a report of a chemical blood test voluntarily submitted to by a defendant and a written statement or confession made by him is a peculiarly close one, and noting that the granting or denying of a defendant's request for permission to inspect a confession is within the discretion of the trial court, the court in *State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, denied the defendant's request for an order requiring the prosecuting attorney to produce, for his inspection, the hospital report concerning a blood test taken of him. Pointing out that the prosecuting attorney had informed defense counsel of the percentage of ethyl alcohol as shown by the chemical test of the defendant's blood, and that at the time the prosecution took a sample of blood from the defendant, the defendant could also have had a sample taken and tested for his own use, inasmuch as the blood was taken and tested at a local hospital, the court said that under the circumstances the denial of the request for inspection of the blood test report did not result in a disadvantage to the defendant in the preparation of the defense or a denial to him of any opportunity which he did not have in the preparation of evidence.

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See *State v Madigan* (1982) 249 Ga 571, 292 SE2d 406, on remand 163 Ga App 460, 295 SE2d 236 and (ovrld by *Law v State*, 251 Ga 525, 307 SE2d 904), § 7.

Although prosecution delayed until after commencement of trial disclosing to defendant convicted of aggravated battery and involuntary manslaughter that victim's mother who was witness for state was charged with child neglect and that photo of victim's brother, who testified he and victim had been beaten by defendant prior to victim's death, allegedly showed brother's eye was not swollen, any prejudice to defendant from such delayed disclosure of evidence was not so material as to deny defendant fair trial, where testimony of mother was corroborated by testimony of brother and stood uncontested by defendant, where delayed evidence with respect to mother and brother could have had only a minimal affect on their credibility, and where defendant had opportunity to present delayed evidence to court for its consideration before end of defendant's trial. *People v Parker* (1980) 90 Ill App 3d 1052, 46 Ill Dec 468, 414 NE2d 190.

Defendants in murder prosecution were not entitled to blood test information from analysis of blood stains found on broken bottle and shoes of one defendant where prosecution made analysis available as soon as it was received and defendants did not object to commencement of trial without such information. *People v Curtis* (1977) 48 Ill App 3d 375,

6 Ill Dec 399, 362 NE2d 1319.

See *People v Robinson*, 13 Ill App 3d 506, 301 NE2d 55, § 6[b].

In prosecution for manslaughter, trial court erred in denying motion at trial by defense to introduce unauthenticated report of chemical analysis of alcoholic content of victim's blood or to continue trial until chemist was subpoenaed, where report was material to defense of self defense, and where prosecutor failed to make voluntary disclosure of report prior to trial. *Pennington v Commonwealth* (1978, Ky App) 577 SW2d 19.

Failure of prosecution to produce results of analysis of decedent's blood and urine which was conducted during autopsy would result in remand to trial court for evidentiary hearing to determine harm resulting from nonproduction of test results where presence of morphine in blood of victim, who died from swelling in brain after being in fight with defendant, could be favorable to defendant, and such finding would require new trial. *People v Drake* (Mich App) 236 NW2d 537.

See *State v Williams*, 183 Neb 257, 159 NW2d 549, § 17.

See *Mears v State* (Nev) 422 P2d 230, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 124, reh den 389 US 945, 19 L Ed 2d 303, 88 S Ct 299, § 21[b].

No suppression of evidence resulted from prosecution's failure to inform defendant, who was convicted of driving while intoxicated, until day of his trial about laboratory statement relating to improper seal on sample of his blood taken on day of his arrest nearly eight days earlier where defendant already knew of statement, and delay in disclosure did not justify new trial where at hearing on defendant's motion to suppress results of test there was evidence that improper seal did not affect blood sample, so that there was no exculpatory evidence for defendant to discover, had he sought to do so, or for prosecution to disclose. *State v Watson* (1980, NH) 424 A2d 417.

In prosecution for murder, failure of state to provide defendant with written copies of blood test results and failure to make specimens available for independent testing by defense was not prejudicial error where defense was aware of test results, and where defendant had admitted shooting victim; there was no factual basis in record showing state did not comply with trial court's order to produce and permit defendant to inspect ballistics and fingerprint reports on gun and bullet where defendant did not make such request of state. *State v Quintana* (App) 86 NM 666, 526 P2d 808, cert den 86 NM 656, 526 P2d 798.

Defendant had right to discovery of results of blood alcohol test and also had right to have his own physician examine original blood sample and test it at police laboratory under supervision of representative of police department; however, use of results of such separate test at trial would be dependent upon medical and scientific proof by defendant that alcoholic content in blood had not been dissipated by time, storage, temperature, and other circumstances, and that condition remained unchanged during interval between time of withdrawal of blood and reanalysis thereof. *People v Seaman*, 64 Misc 2d 684, 315 NYS2d 743.

See *People v Blair*, 64 Misc 2d 519, 315 NYS2d 179, § 13[a].

In murder prosecution, inspection allowed of results of blood test. *People v Powell*, 49 Misc 2d 624, 268 NYS2d 380.

Pretrial inspection of results of police laboratory tests of defendant's blood, hair, and saliva was not authorized by Oregon discovery statute. *State v Little* (Or) 431 P2d 810.

Trial court did not err in refusing to furnish defendant with copies of medical reports and results of blood and urine tests in view of circumstances, including fact that court's order contained inherent invitation to defendant to renew his motion

and present a more adequate showing of necessity. *State v Boehme*, 71 Wash 2d 621, 430 P2d 527, cert den 390 US 1013, 20 L Ed 2d 164, 88 S Ct 1259.

Although in criminal prosecution in order for destruction of evidence to result in suppression, defense must show disposed-of evidence was clearly material to issue of guilt or innocence, state's failure to present evidence disputing rebuttable presumption of materiality of ampoule used in breathalyzer test of percentage of alcohol in defendant's blood warranted suppression of test results even though defendant failed to make motion within three days of test for scientific testing of ampoule. *State v Raduege* (1980, App) 100 Wis 2d 27, 301 NW2d 259.

[\*22] Report of examination, experiment, test, or analysis of nonmedical nature

[\*22a] Generally

In some cases the report of an examination, analysis, or test of physical evidence or other relevant material was held producible for inspection by the defense.

In *Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130, it was held that the defendant was entitled to production of any report received by the prosecution from the state criminal investigation bureau concerning materials observed on or removed from the defendant's shoes, where the prosecution would contend that the victim of the alleged homicide had met his death as a result of being kicked in the head by the defendant, and, accordingly, one of the material issues at the trial would be whether the defendant had done so. Pointing out that when the defendant was arrested he was wearing the same shoes he was wearing at the time of the altercation with the victim, and that the shoes were taken from the defendant by the sheriff and transferred to the state criminal investigation bureau, where they were submitted to a laboratory analysis by removal of any material deposited on the shoes, and noting the defendant's allegation that it would be impossible for the defense to ascertain the condition of the shoes prior to the analysis except from the report, and that if it was shown that the shoes did not contain any hair or flesh it would tend to prove that the defendant did not kick the victim, the court said that although the report was not evidence and would not ordinarily be admissible at the trial, nevertheless, since it was the only source of information from which the defense could discover what evidence the shoes afforded, it might be most difficult for the defendant to properly prepare for trial unless the defense was allowed to see the report.

The rule that in a proper case a defendant may inspect before trial reports of an examination by state officers of "real evidence" was also recognized in *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838, and *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755.

See also *State v Cook* (1965) 43 NJ 560, 206 A2d 359, supra § 11[g], holding that "the State's objective documents, such as . . . scientific and laboratory reports, including chemical analyses, blood tests, etc.," should be produced for inspection by the defense at least where there is no showing by the state that its prosecution would be improperly hampered.

Where the prosecution was in possession of a report from the FBI showing the results of a laboratory analysis of a coat belonging to the defendant and a button allegedly torn off the coat at the time of the alleged offense, and where the results of the analysis tended to show that the button did not come from the coat, the court in *People v Whitmore* (1965) 45 Misc 2d 506, 257 NYS2d 787, setting aside a verdict of guilty and granting a new trial, held that the prosecution's failure to disclose the laboratory report to the defendant was a violation of its obligation to reveal information that might be usable by an accused, notwithstanding that the prosecution had not produced the report in the honest belief that it was not admissible in evidence and was probative of nothing. Noting that the prosecution has a duty to disclose evidence which may reasonably be considered admissible and usable to the defense, and that the prosecution's failure to reveal information that may be usable by an accused may be a denial of the fairness required under the due process clause of the constitution, the court said that when there is substantial room for doubt the prosecution is not to decide for

the court what is admissible or what is useful to the defense, and that irrespective of the positive probative force of the undisclosed report in the present case and notwithstanding what effect it might have (if admissible) in favoring the defense, the prosecution should make information of this kind available to the defendant for whatever purpose he might use it.

In *State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610, wherein the defendant was charged with murder in that he ran over and killed a child while driving an automobile, the court held that the defendant's pretrial motion for permission to inspect the report of an analysis of scrapings taken from his automobile, which report was then in possession of the prosecuting attorney, was properly granted where the only substantive evidence against the defendant was his own admission that he had passed the fatal point about the time of the tragedy, and the requested report was the only source of information from which the defense could discover what evidence the automobile afforded. Noting that the testimony as to the result of the analysis of scrapings taken from the defendant's automobile constituted the very essence of the identification of the defendant with the tragedy, and pointing out that if the defendant knew what the report of the analysis contained, he might completely alter his defense plans, and that until he had been advised that he had been definitely connected with the fatality, his position as to his defense was one of speculation and surmise, the court concluded that to require the defendant to wait until the day of trial and approach the bar of justice in doubt as to his positive connection with the tragedy would be most unfair.

In *Layman v State* (1960, Okla Crim) 355 P2d 444, wherein the defendants were charged with obtaining money from the state by false pretenses in connection with the construction of a state highway, it was held that the defendants were entitled to pretrial inspection and examination of reports of a professional engineer who had been employed by the prosecution to make numerous tests as to the adequacy and sufficiency of the highway construction work. Pointing out that the prosecution's case depended almost entirely upon the report in question, and noting that the defendants did not ask the prosecution to turn over to them all of its evidence, but sought only the production of a highly technical report of an investigation conducted scientifically over a long period of time, the court said that the determinative point in the present case was that the report sought by the defendants was highly voluminous and specialized, and was the essence of the prosecution's case. The court recognized the following rules: (1) A defendant has no absolute right to pretrial inspection of a report in the possession of the prosecution and has no inherent right to examination of the prosecution's evidence; (2) Where an application for pretrial inspection of technical reports is made, the trial court has a broad judicial discretion to grant or deny it; (3) A request for pretrial inspection must be determined by the facts of each case.

An order requiring the prosecution to produce reports of any examination made of the clothing and personal effects of the defendant and the victim of the alleged murder was also upheld in *State v Thompson* (1959) 54 Wash 2d 100, 338 P2d 319, supra § 10[b].

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In the following cases, on the other hand, the court refused to permit the defendant to inspect the report of a test or analysis of physical evidence.

In *Kinder v Commonwealth* (1955, Ky) 279 SW2d 782, supra § 3, the court upheld an order denying the defendant's pretrial motion to compel the prosecution to produce a report relating to the results of paraffin tests taken of the defendant and codefendants.

In a prosecution for illegal selling of a narcotic drug, the defendant's pretrial motion for permission to inspect the laboratory analysis and report concerning the alleged narcotic in question was denied in *People v Perrell* (1965) 47 Misc 2d 1024, 263 NYS2d 640, the court stating that the laboratory analysis made by the prosecution and the report of the police chemist were items of evidence to be relied upon by the prosecution, and were not the proper subject of a discovery and inspection.

Where, in a prosecution for safebreaking and other offenses, the FBI conducted a laboratory examination of the dial of the safe involved in the case and a tapering punch allegedly used by the defendants, and the FBI agent who conducted such examination testified for the prosecution at the trial, the court in *State v Hamilton (1965) 264 NC 277, 141 SE2d 506*, held that there was no error in denying the defendants' motion for permission to inspect before trial FBI reports and notes (apparently relating to the examination of the safe dial and punch). The court pointed out that the defendants had not asserted that access to the requested documents was necessary for the preparation of their defense; that defense counsel declined to cross-examine the FBI agent; and that, moreover, the defendants did not cite any authority in support of this assignment of error.

In *May v State (1935) 129 Tex Crim 2, 83 SW2d 338*, a prosecution for homicide, the denial of the defendant's pretrial motion for the production of certain substances taken from the defendant's truck, on which blood was found, and the result of a laboratory test conducted on such substances was held not error, the court pointing out that at the time of the motion the district attorney informed the defendant's counsel that an analysis by a chemist of the substances in question showed that the blood found thereon was human blood, and at the trial the chemist testified to the same effect; that the defendant's truck from which the specimens were taken had been in the possession of the defendant from the time of his arrest until the time of the trial and there were many other bloodstains on the truck, and hence the defendant could have secured specimens from it and had an analysis made by chemists; and that the substances taken from the truck by the prosecution were produced in evidence at the time of the trial, and the defendant and his counsel then had the opportunity to examine them.

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Motion by defendant in murder trial that he be allowed to inspect "any written evidence, physical evidence, scientific reports or other tangible evidence and the weapon, if any," if such evidence was to be used at trial, was properly overruled. *McCants v State, 282 Ala 397, 211 So 2d 877*.

See *Rogers v State (1982, Ala App) 417 So 2d 241, § 13[d]*.

There was no prejudice to defendant as result of alleged failure to comply with defendant's motion for discovery regarding any reports or statements of experts, where prosecuting attorney furnished name and address of expert who would be called to testify about laboratory tests, which showed that samples tested were in fact marijuana, where, prior to trial, prosecuting attorney made his entire file available to defense counsel who examined it, and where lab technician who was named in response to discovery motion was called as witness at trial and was made subject to cross-examination. *Fisk v State (1982) 5 Ark App 5, 631 SW2d 626*.

In prosecution for willfully and unlawfully using and being under influence of controlled substance, defendant was entitled to prompt discovery of all information bearing on possible identity of controlled substance involved that prosecution possessed. *Ross v Municipal Court of Los Angeles Judicial District of Los Angeles County, 49 Cal App 3d 575, 122 Cal Rptr 807*.

See *Wanzer v State, 232 Ga 523, 207 SE2d 466, § 8*.

In prosecution for arson, trial court erred in allowing state to present testimony concerning results of scientific tests conducted by private firm showing presence of volatile accelerant in carpet samples taken from house subsequent to fire, inasmuch as state failed to comply with defendant's written request for copies of scientific reports in its possession, and state could not avoid use of documentary recording of test results by calling instead actual experts who performed tests and thereafter contending that defense was not entitled to documentation of test results because state did not use them, since this would have been direct circumvention of provisions of state discovery statute. *Metts v State (1982) 162*

*Ga App 641, 291 SE2d 405.*

Prosecution was not required to supply defense with expert drug analyst's work product which went into final report where report was given to defense. *Hartline v State (1982) 161 Ga App 847, 288 SE2d 902.*

Defense in cocaine-sale prosecution received "complete copy of any written scientific reports in the possession of the prosecution in its case-in-chief or in rebuttal" when it received report which simply concluded that seized substances were cocaine. Defendant's rights in pretrial discovery did not extend to "a complete and detailed accounting to the defense of all police investigatory work on a case," or to a detailed description of all analytical work performed by the crime lab. *Sears v State (1982) 161 Ga App 515, 288 SE2d 757.*

Under Georgia's new discovery statute requiring pretrial production of "complete copy of any written scientific reports," defendant charged with possession of controlled substances was entitled to copy of State Crime Lab report, which, although it contained conclusions, allowed defendant to know what evidence state had to present against him; statute did not mandate that entire written work materials of State Crime Lab be included with that report. *Hartley v State (1981) 159 Ga App 157, 282 SE2d 684.*

Trial court's order requiring disclosure to defendant in criminal prosecution of all prosecutor's reports of tests or examinations and also requiring submission of prosecutor's file for in camera inspection that was to be followed by further disclosure to defendant of any evidence in file that was exculpatory in nature or that would "aid in the orderly administration of justice" was appropriate response to defendant's discovery motion. *Tankersley v State (1980) 155 Ga App 917, 273 SE2d 862.*

In prosecution for burglary, defendant's notice to produce requesting any and all photographs, charts, fingerprint cards, latent fingerprints, molds or casts of fingerprints and tire tracks, as well as results, reports and summaries of any forensic, scientific or other tests, examination or studies of any tangible items made in connection with case against defendant, was properly denied. Although state statute permits defendant to obtain tangible evidence, notice to produce does not include material not in state's possession and defendant failed to show that state was in possession of said items, failed to request in camera inspection of state's file to determine presence of exculpatory material and failed to meet burden of showing how case was materially prejudiced by denial of motion. *Patterson v State (1980) 154 Ga App 877, 270 SE2d 86.*

Failure of prosecution to disclose report from state crime laboratory expert that product introduced into evidence, of which defendant had large quantity, contained component not found at scene of crime did not amount to denial of due process where there was doubt whether such report was exculpatory at all, and if so, it was only minutely exculpatory. *Parker v State (1978) 145 Ga App 205, 243 SE2d 580.*

Fourteen-year-old defendant in murder trial was not deprived of any right because he failed to receive notes apparently consisting of "mere numerical jottings" made by police technicians when they performed scientific tests on evidence procured during police investigation of crime. *People v Hester, 39 Ill 2d 489, 237 NE2d 466.*

In prosecution for cocaine delivery, State's noncompliance with discovery of witness' notes was harmless error where defendant did not immediately object to witness' use of notes nor ask for continuance to permit his review of notes, but rather waited until he filed his post-trial motion to object to testimony, and where defendant was given opportunity to extensively cross-examine witness in regard to notes. *People v Olson (1978) 59 Ill App 3d 643, 16 Ill Dec 660, 375 NE2d 533.*

See *People v Griffith (1978) 56 Ill App 3d 747, 14 Ill Dec 393, 372 NE2d 404, § 9[a].*

Rule providing for discovery of reports or statements of experts making reports did not require drafting of explanatory

statement describing procedures by which tests were made. *People v Hummel*, 38 Ill App 3d 233, 347 NE2d 305.

In prosecution for burning his own house with intent to defraud his insurer, defendant was not prejudiced by failure of state to timely supply lab report made upon alleged contents of jugs found on night of fire in closet in which one of fires had originated, where defendant received this report 77 days before trial. *People v McAleer*, 34 Ill App 3d 821, 341 NE2d 72.

Trial court in murder prosecution properly ordered production of FBI report of analysis of items of physical evidence, including clothing, samples of hair, scrapings from hands and fingernails of both defendant and victim, and fingerprints taken from victim's apartment. *State v Eads (Iowa)* 166 NW2d 766 (citing annotation).

Defendant charged with operation of motor vehicle while intoxicated is entitled, under applicable statute, to result of chemical test taken at direction of officer, but he was not entitled to work sheets or fluid sample used in such test. *State v Johnson (Iowa)* 145 NW2d 8.

Defendant was not entitled to pretrial discovery of tangible objects to be introduced by prosecution, or to results of tests performed upon such items. *State v Drew (1978, La)* 360 So 2d 500.

Where witness misidentified defendant at line up and where such issue was first raised by defense counsel on cross-examination and where witnesses' misidentification was clearly before jury, state was not required to produce identification slip signed by witness when he viewed line up. *State v Flowers (La)* 337 So 2d 469.

Trial court did not err in denying defendant's request for discovery of oral inculpatory statements, written unsigned inculpatory statements, paraphrased inculpatory statements in police or district attorney's files, laboratory reports and list of physical evidence in possession of state. *State v Sears (La)* 298 So 2d 814.

See *State v Frezal (La)* 278 So 2d 64, § 13[d].

Where state furnished defense with copy of "Report of the Crime Laboratory" indicating positive result for cocaine and sample of contraband for independent testing, trial court properly refused to permit further discovery of analytical methods of state's chemists. *State v Martinez (1983, La App)* 432 So 2d 1201, cert den (La) 435 So 2d 439.

State's failure to furnish laboratory drug analysis report to substitute counsel in response to renewed discovery motion was not a failure to respond properly to discovery motion which would bar testimony by state's expert criminalist relating to laboratory analysis when state had furnished report to counsel's predecessor and counsel had been given a 15 day delay to permit familiarization with contents of record. *State v McDonald (1983, La App)* 430 So 2d 151.

Even though prosecution failed to comply with state rule of criminal procedure requiring disclosure to defendant in criminal prosecution of summary of statement by prosecution witness relating to defendant's identity as perpetrator of crime made by witness after preindictment voice identification proceeding, trial court's admission in evidence of witness' identification testimony was not reversible error for such evidence was essentially cumulative. *State v Furrow (1981, Me)* 424 A2d 694.

Rape defendant identified by bloodhound was properly denied access to examination and analysis lying behind FBI report of conclusions of examination of physical evidence where defense counsel was given copy of report he requested under discovery rules, and where further information regarding merits of examination and analysis could be developed by cross-examination or by defendant's own investigative efforts. *Roberts v State (1982)* 53 Md App 257, 452 A2d 1271, affd 298 Md 261, 469 A2d 442.

In prosecution for delivery of cocaine, defendant was not prejudiced by admission of report of police technician

regarding analysis of alleged cocaine, notwithstanding prosecutor's five-day delay in furnishing report to defendant in violation of statute requiring "immediate" production, where defendant received report on April 19 and preliminary examination was not held until May 11. *People v Anderson* (1979) 88 Mich App 513, 276 NW2d 924.

See *Murphree v State* (Miss) 228 So 2d 599, § 4[b].

Defendant charged with illegal sale of stimulant drug was not prejudiced by trial court's refusal to permit inspection and copying of laboratory report, chemical tests, and other processes by which powder seized from him by police was examined, where cross-examination of criminologist who analyzed powder did not indicate that counsel was in any way handicapped in making such cross-examination, or that defendant suffered from lack of preparation by counsel therefor. *State v Yates* (Mo) 442 SW2d 21.

See *State v Flenoid* (1978, Mo App) 572 SW2d 179, § 6[a].

In prosecution for, inter alia, possession of marijuana, trial court properly allowed admission of laboratory report indicating that seized vegetation was marijuana, notwithstanding that defense counsel had not been supplied with copy of report, where counsel submitted discovery request to court clerk rather than prosecutor, and court offered defense counsel additional time to analyze vegetation by continuing trial to later date. *State v Malsbury* (1982) 186 NJ Super 91, 451 A2d 421.

Defendant in prosecution for conspiracy to operate lottery was not entitled to discovery of results of spectrographic study of voice exemplar where state did not offer any findings of study into evidence, no scientific basis for introduction of spectrographic test results had been placed in record, and state's failure to offer results was not proper subject of comment. *State v Perez* (1977) 150 NJ Super 166, 375 A2d 277.

Failure of prosecution to timely disclose to defense attorney that samples of defendant's hair were being tested did not require reversal, where record did not show if there were any test results or, if there were, what the tests showed, and speculation that there may have been test results and that results may have been exculpatory did not establish nondisclosure of exculpatory evidence. *State v Martinez* (1982, App) 98 NM 27, 644 P2d 541, cert den 98 NM 336, 648 P2d 794.

In prosecution for driving while intoxicated, trial court would deny defendant's motion seeking production of original ampule used in breathalyzer test and reference ampule used in administering test, since ampules were not material to defense in light of New York's strict decisional law requirements for introduction of breathalyzer results into evidence. *People v Amidon* (1980) 102 Misc 2d 850, 427 NYS2d 727.

See *People v Goetz*, 77 Misc 2d 319, 352 NYS2d 829, § 25[d].

Accused, charged with driving while intoxicated, was entitled to discovery of portion of police report relating to physical tests performed by him at request of police, such as walking, turning, touching finger to nose, etc. *People v Lawrence*, 74 Misc 2d 1019, 346 NYS2d 330.

Accused in manslaughter and negligent homicide prosecution was entitled to discovery of such properties in possession of prosecution as were illustrative of physical facts concerning automobile accident and which were incapable of damage or alteration, including such items as photographs, blood test, and measurements of skid marks, and also accident investigators' reports other than those in which prosecution's theories and thought processes might be expressed. *People v Inness*, 69 Misc 2d 429, 326 NYS2d 669.

In prosecution for possession and sale of dangerous drug, defendant was entitled to discovery of all reports and documents concerning any and all scientific tests and experiments which were made in connection with case and which

were within possession of district attorney, and it was not necessary that he make showing of materiality or reasonableness with respect to such documents. *People v Johnson*, 68 Misc 2d 708, 327 NYS2d 690.

Laboratory analysis and report of police chemist are items of evidence to be relied upon by prosecution and are not proper subject of discovery and inspection. *People v McDonald*, 59 Misc 2d 311, 298 NYS2d 625.

In prosecution for possession and sale of dangerous drugs, defendant's motion for order to examine, inspect, or copy charts, records, or chemical reports concerning dangerous drug allegedly sold and possessed by defendant, was denied. *People v Ricci*, 59 Misc 2d 259, 298 NYS2d 637.

Opinions of expert witnesses, where they will "in no way prejudice anyone," should be made available to all parties involved in criminal action; court authorized assigned counsel in manslaughter case to hire experts and specifically directed that findings of such experts be made available to codefendant. *People v Carnrite*, 55 Misc 2d 1087, 287 NYS2d 571.

Inspection of certain independent scientific reports and certain physical evidence which cannot be adequately examined at trial because of need for scientific examination and expert testimony prior thereto, recognized in *People v Bradford*, 54 Misc 2d 54, 281 NYS2d 480.

Defendant accused of murder by strangling with piece of bed sheeting not entitled to reports of examination or analyses of such sheeting where medical examiner stated that he ordered no reports, examinations, or analyses. *Widziewicz v Golding*, 52 Misc 2d 837, 277 NYS2d 62.

Inspection allowed of results of investigations of cars evidently involved in homicide and fabric tests. *People v Powell*, 49 Misc 2d 624, 268 NYS2d 380.

In prosecution for criminal sale of controlled substance, where defense counsel during cross-examination of people's witness, a forensic chemist, requested production of witnesses' notes in which he had recorded results of chemical tests about which he had testified, court's refusal to direct production of notes was error. *People v Strong* (1977) 60 App Div 2d 792, 400 NYS2d 661.

Prosecutor's failure to give arson defendant FBI laboratory report which contained exculpatory evidence showing that defendant's clothing seized at time of arrest contained no presence of flammable accelerants required reversal of defendant's conviction where report was in prosecutor's possession before trial, prosecutor had agreed to comply with defendant's voluntary discovery request, and defendant had no notice prosecutor had report or had failed to comply with discovery agreement. *State v Jones* (1978) 296 NC 75, 248 SE2d 858.

Allowance or overruling of various discovery motions in criminal case rests in discretion of trial court and only in clear cases of abuse will exercise of that discretion be disturbed; thus where neutron activation test was administered to defendant to determine whether or not he had fired a gun, there was no absolute right of defendant to discover results of such test, and in light of counsel's comprehensive cross-examination of state's expert witness with regard to test, there was no abuse of discretion in denying discovery. *State v Kassow*, 28 Ohio St 2d 141, 57 Ohio Ops 2d 390, 277 NE2d 435, vacated as to imposition of death penalty, 408 US 939, 33 L Ed 2d 762, 92 S Ct 2876.

Failure of prosecution to have informed defense of neutron activation analysis test for presence of chemical residue on hands which would indicate that individual had fired gun, which had been given to defendant, was not improper where defense counsel had not made any request for discovery of tests and where prosecutor asserted that he did not know test had been given until officer testified on stand that test had been given; trial court properly refused to allow defense counsel to argue concerning test to jury where jury was never informed that test result was negative and where defense, despite guarantee of cooperation from court, made no attempt to introduce evidence of test. *Commonwealth v Jones*

(1981) 285 Pa Super 112, 426 A2d 1167.

In rape prosecution in which state medical examiner ran test to determine if any foreign hair remained on prosecutrix, trial court properly denied motion for new trial based upon state's failure to furnish test results to defense, since test was neither inculpatory nor exculpatory as no hair samples were found, and since state had no obligation to furnish such evidence in that evidence was equally available to defendant. *State v Cox* (1980, SC) 266 SE2d 784.

Defendant charged with robbery was denied inspection of technical reports of tests made by police on pistol and shells removed from his person on date of his arrest. *Bosley v State* (Tenn) 401 SW2d 770.

See *Latham v State* (1978, Tenn Crim) 560 SW2d 410, § 25[d].

It was not error to deny defendant's motion for production of chemical analysis information despite defendant's contention that this denial precluded proper preparation for cross-examination of state's expert witness who identified substance involved as heroin. *Smith v State* (Tenn Crim) 517 SW2d 757.

It was not error to deny defendant's pre-trial motion for inspection of test results in prosecution for selling of heroin where substance allegedly sold by defendant had been destroyed in process of testing; methods of analysis of drugs, particularly heroin, are so standardized that defendant was not seriously inhibited in his defense by such refusal where any qualified expert in that field could have thoroughly cross-examined State's witness on nature of test made and manner in which they were performed. *Carroll v State* (Tenn Crim) 517 SW2d 13.

See *Alba v State* (Tex Crim) 492 SW2d 555, § 11[m].

There was no violation of state disclosure statute sufficient to warrant reversal of convictions for burglary and rape where tests conducted at scene, to determine whether person standing on stairs outside of complainant's apartment could see into living room, were of exceptionally commonplace variety, that was, merely standing in place suggested by witnesses to see if they were able to observe what they claimed to have observed at that location. *State v Mounsey* (1982) 31 Wash App 511, 643 P2d 892.

See *State v Stewart*, 56 Wis 2d 278, 201 NW2d 754, § 11[k].

[\*22b] Ballistic report

In a number of cases the court refused to permit the defendant to inspect a ballistic report prepared for the prosecution.

For other cases wherein the court also refused to permit inspection of a ballistic report, see *Ezzell v State* (1956, Fla) 88 So 2d 280, supra § 11[c], and *Kinder v Commonwealth* (1955, Ky) 279 SW2d 782, supra § 3.

The denial of the defendant's motion to obtain a copy of the report of the ballistics bureau of a police department with respect to a certain bullet or bullets found in the body of the alleged murder victim was also upheld as proper in *Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843.

In *People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, it was held that the defendant was not entitled to inspection of a ballistics report prepared by an expert for the prosecution. The court noted that while such a report may be subject to inspection at the trial for the purpose of cross-examination of the expert if he testifies, it is not itself admissible evidence; and that even in a civil case such material prepared by one party for litigation is not obtainable by the other party in advance of trial, unless exceptional circumstances to avoid an injustice are shown.

The defendant's motion for production of a copy of the ballistic report concerning the weapon allegedly used in the

commission of the offense was denied in *People v Jordan* (1953, *Gen Sess*) 128 NYS2d 457, on the ground that such report would not be admissible as evidence on the trial.

In *Commonwealth v Capps* (1955) 382 Pa 72, 114 A2d 338, the court, upholding the denial of the defendant's request for permission to inspect the finding of a police ballistics expert, said that since the defendant admitted that he had shot and killed the victim, the defendant's argument relating to the refusal to produce the report was wholly without merit.

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See also *Barbee v Warden, Maryland Penitentiary* (1964, CA4 Md) 331 F2d 842, supra § 6[a], wherein a writ of habeas corpus was granted to the petitioner, who had been convicted in a Maryland state court, for the reason that the prosecution withheld reports of ballistics and fingerprint tests which cast grave doubt upon the petitioner's involvement in the shooting in question.

On the other hand, see *McMullen v Maxwell* (1965) 3 Ohio St 2d 160, 32 Ohio Ops 2d 150, 209 NE2d 449, supra § 4[b], wherein the prosecution's failure to disclose the results of ballistic tests was held violative of the accused's right to due process of law.

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See *People v Taylor* (1982) 107 Ill App 3d 1019, 63 Ill Dec 634, 438 NE2d 565, § 25[b].

Failure of government to supply defendant ballistic report and casings which had not been tested did not result in error in admission of other evidence where totality of evidence left no doubt as to identity of weapon used in crime. *Brewster v Commonwealth* (1978, Ky) 568 SW2d 232.

In first-degree murder and attempted-murder prosecution, trial court order compelling state to respond to defendant's motion for bill of particulars would be rescinded and set aside insofar as it ordered state: (1) to "run rap sheets," i.e., to search for and produce arrest and conviction records as far as they existed for all "lay" prosecution witnesses; (2) to produce names and addresses of prosecution witness; (3) to specify precise location of defendant within house at time of alleged crime; (4) to specify number and location of bullet holes found at crime scene; (5) to give number of spent pellets found at crime scene; and (6) to give precise locations and number of spent castings and cartridges found at crime scene. *State v Hines* (1982, La App) 422 So 2d 1297.

See *State v Hurd* (Mo App) 520 SW2d 158, § 21[b].

See *Mears v State* (Nev) 422 P2d 230, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 124, reh den 389 US 945, 19 L Ed 2d 303, 88 S Ct 299 § 21[b].

See *State v Quintana* (App) 86 NM 666, 526 P2d 808, cert den 86 NM 656, 526 P2d 798, § 21[e].

See *People v Torres*, 77 Misc 2d 13, 352 NYS2d 101, § 11[m].

In prosecution for murder, trial court did not abuse discretion in failing to exclude evidence of ballistics test which prosecution did not disclose to defendant, notwithstanding that nondisclosure violated discovery statute, since trial court had option of sanctions to impose, and sanction of declaring recess and giving defendant's attorney opportunity to question witness was proper alternative. *State v Mayo* (1979) 40 NC App 626, 253 SE2d 276.

Defendant in murder prosecution was entitled to pretrial inspection of ballistics report in possession of prosecutor. *Hamm v State (Okla Crim) 516 P2d 825.*

Prosecution was not required to furnish defendant in manslaughter prosecution with information of prosecution's firearms expert that was favorable to defendant where defendant knew expert had conducted tests with death weapon but failed to request any information from expert though he had opportunity to do so, and where defendant also failed to conduct his own tests on weapon; under such circumstances prosecution's withholding of information from its expert did not entitle defendant to new trial after his conviction where it appeared from record that withheld information would not have created reasonable doubt about defendant's guilt. *State v Penland (1981, SC) 273 SE2d 765.*

See *Losoya v State (1982, Tex App 4th Dist) 636 SW2d 566, § 25[b].*

In murder prosecution in which ballistics report was tendered to defense counsel only after pistol and slugs from deceased's body had been introduced into evidence, new trial was not required, notwithstanding defense counsel's statement that he would have objected to admission into evidence of pistol and slugs had he known that report was inconclusive, where no discovery request had been made, where defendant had admitted to other witnesses that she had shot deceased, and where contents of report were not material in that report raised no reasonable doubt which did not otherwise exist. *Boles v State (1980, Tex Crim) 598 SW2d 274.*

[\*22c] Handwriting expert's report

In the following cases the court refused to permit the defendant to inspect a handwriting expert's report.

In *People v Sauer (1958) 163 Cal App 2d 740, 329 P2d 962, cert den 359 US 973, 3 L ed 2d 839, 79 S Ct 888, supra § 6[a]*, the defendant's contention that the trial court abused its discretion in not permitting him to inspect before trial a handwriting expert's report was held not sustainable under the circumstances.

The trial court's refusal to permit the defendant to inspect the report of a handwriting expert was also held not error in *People v Dinan (1962) 15 App Div 2d 786, 224 NYS2d 624, affd 11 NY2d 350, 229 NYS2d 406, 183 NE2d 689, and on other grounds 11 NY2d 1057, 230 NYS2d 212, 184 NE2d 184, cert den 371 US 877, 9 L ed 2d 115, 83 S Ct 146*, the court pointing that there was nothing in the report which was inconsistent with the testimony of the witnesses on the trial or which could be helpful to the defense in the cross-examination of the witnesses.

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Failure of prosecution in forgery case to comply with mandatory statute regarding submission of handwriting samples to jury for purpose of comparison before defendant announced himself ready for trial was reversible error where defendant made motion for disclosure of handwriting analysis and where failure to comply with statute involved only evidence connecting defendant to offense. *Henderson v State (1978) 145 Ga App 597, 244 SE2d 136.*

Failure of state, in prosecution for attempting to obtain narcotics by uttering forged prescription, to produce forged prescription taken from defendant at time of arrest so that it could be submitted to handwriting expert for analysis, did not constitute error where state did not assert that defendant wrote prescription but only that he uttered it, knowing it to be fraudulent. *Barnes v State (1978) 145 Ga App 38, 243 SE2d 302.*

[\*22d] Results of lie detector test

In at least one case the results of a lie detector test were held producible for inspection by the defendant. Thus, where a physician was charged with rape allegedly committed under circumstances where the victim was prevented from

resisting because of an intoxicating narcotic or anesthetic substance administered to her, and where shortly after the complaining witness made her report to the police, she was given a lie detector test, and subsequent to such test the police recorded the defendant's conversations with the complaining witness, it was held in *Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291, that the defendant was entitled to examine the results of the lie detector test given to the complaining witness. Pointing out that the results of the test might be very important in determining whether the accusatory stage had been reached at the time the police recorded the defendant's conversations with the complaining witness, and that if an examination of the results raised some doubt concerning the veracity of the complaining witness' report to the police, it would tend to show that the conversations between her and the defendant were recorded during the investigatory stage of the case, the court concluded that since the results of the test appeared to be the main objective information available to the defendant on the police officers' state of mind at the time the conversations were recorded, it would be difficult for the defendant to properly prepare for trial without them, and consequently justice required that they should be produced for his inspection. The court said that inadmissibility of the results in evidence was no bar to discovery, and that it was difficult to make a distinction between the defendant's right to discover a prosecution expert's opinion based on an evaluation of physical evidence and the defendant's right to discover such an opinion based on an evaluation of physical responses recorded on a machine.

In the following cases, on the other hand, the court refused to permit the defendant to inspect the results of a lie detector test.

In *State v McGee* (1962) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75, the denial of the defendant's motion to inspect the results of a lie detector test given to an alleged accomplice was held proper, because such results were not and could not be evidence in themselves.

The results of polygraph tests were also held not producible for inspection by the defense in *State v Thompson* (1957) 50 Del 456, 134 A2d 266, supra § 11[b]. See also *State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b], apparently recognizing that the results of polygraph tests are not subject to inspection.

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Defendant charged with rape was not entitled to results of polygraph tests given by police to complaining witness. *Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838.

Where circumstances were such that owner of credit card underwent police polygraph examination during investigation into wino's use of card to purchase color television and stereo, wino facing forgery and grand theft charges was entitled to pretrial discovery of record of polygraph examination if judge determined record contained exculpatory matter. *People v Lucero* (1980, Colo App) 623 P2d 424.

See *Downs v. Austin*, 522 So. 2d 931 (Fla. Dist. Ct. App. 1st Dist. 1988), § 9[d].

In prosecution for rape, defendant was not entitled to inspect results of lie detector test given to victim, which test was in possession of prosecution, despite defense contention that such evidence would be favorable to defendant. *Nations v State*, 234 Ga 709, 217 SE2d 287.

In prosecution for kidnapping and rape, defendant was not entitled to pretrial discovery of results of lie-detector test given to prosecutrix. *Zupp v State* (Ind) 283 NE2d 540.

Defendant in murder prosecution was not entitled to inspect results of polygraph test given to uncle of defendant who died before trial where such statements would not have been admissible under any exception to hearsay rule and their admissibility would not have been enhanced because they were made in course of polygraph examination.

*Commonwealth v Chase* (1977) 372 Mass 736, 363 NE2d 1105.

Defendant charged with rape had no right to disclosure of results of polygraph examinations administered to complainant and other prosecution witnesses where state law characterized such tests as unreliable evidence, and results were inadmissible even under stipulation. *State v Greer* (1981, Mo App) 616 SW2d 82.

In murder prosecution, state was duty bound to furnish polygraph evidence that may have been exculpatory to defendant even though such evidence may not have been admissible at trial. *State v Christopher* (1977) 149 NJ Super 269, 373 A2d 705.

See *State v Bodenschatz* (1983) 62 Or App 606, 662 P2d 1, petition den 295 Or 446, 668 P2d 382, § 8.

In prosecution for third degree murder and weapon violation, defendant was not entitled to polygraph testing data relating to prosecution witness who first stated defendant was not involved in crime charged, who agreed to take polygraph test which indicated that he was untruthful, and who then gave second statement implicating defendant, where copies of two statements were supplied to defense counsel. *Commonwealth v Aye* (1980, Pa Super) 418 A2d 767.

[\*22e] Fingerprints; photograph of fingerprints; report of fingerprint examination

In some cases photographs of fingerprints or reports of fingerprint tests were held producible for inspection by the defendant.

In *Barbee v Warden, Maryland Penitentiary* (1964, CA4 Md) 331 F2d 842, supra § 6[a], a writ of habeas corpus was granted to the petitioner, who was convicted in a Maryland state court, for the reason that the prosecution withheld reports of ballistics and fingerprint tests which cast grave doubt upon the petitioner's involvement in the shooting in question.

An order directing the district attorney to furnish to the defendant photographs of all fingerprints found on the pistol allegedly used in the commission of the charged crime was granted in *People v Terzani* (1933) 149 Misc 818, 269 NYS 620, where the defendant's moving affidavit alleged that he, together with many other persons, had attended the meeting at which the homicide in question took place and had actually seen another person fire the shot that killed the victim, and that he had immediately made complaint thereof and pointed out the place of concealment of the pistol. Noting that the motion assumed that fingerprint impressions had been obtained from the pistol, but that the prosecution had neither denied nor admitted such to be the case, and stating that if fingerprint impressions had been obtained from the pistol, they would be a decisive factor in determining who had fired the shot that killed the victim, the court concluded that since the defendant was entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence, justice demanded that the present application for such inspection be granted.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect fingerprints, photographs of fingerprints, or reports of fingerprint examinations.

In *State v Thompson* (1957) 50 Del 456, 134 A2d 266, supra § 11[b], it was held that the defendant was not entitled to inspection of the results of fingerprint examinations which were in the possession of the prosecution. See also *State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b], apparently recognizing that the results of fingerprint examinations are not subject to inspection.

The denial of the defendant's motion for an order requiring the prosecution to produce, for inspection by the defense, all

fingerprints taken by the prosecution at the cottage of the alleged murder victim was also upheld in *Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, supra § 5[a].

In *People v Jordan* (1953, Gen Sess) 128 NYS2d 457, the defendant's motion for production of a report of the fingerprint markings found upon the weapon allegedly used in the commission of the offense was denied on the ground that such report would not be admissible as evidence on the trial.

In *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, it was held (in a per curiam opinion) that the prosecuting attorney should not, before trial, be required to make available for examination and inspection by the defendant photographs of fingerprints, if any, found on the weapon allegedly used in the commission of the crime charged against the defendant. In a concurring opinion, it was stated that an accused is entitled to examine the prosecution's exhibits which are reasonably associated with the theory of guilt and of which he probably may be unaware, but that where an exhibit is one of which the accused is entirely cognizant and he already knows whether it could or could not be an item of incrimination against him, he is not entitled to its inspection if such inspection would hamper the Commonwealth in proceeding with its case. It was pointed out, in the same opinion, that the defendant in the present case was the one person who knew whether she had used the weapon or not, and that she was therefore not being denied anything which she would need in the ascertainment of the truth.

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Trial court did not commit reversible error in denying motions of defendant in murder prosecution to require prosecution to produce fingerprints; clothes or materials from which fingerprints were taken; notes, memoranda, and reports of investigator; tape, record, or other recordings of conversations or statements to investigating officers by other persons; written statement, note, or memoranda purporting to be statement by defendant to investigating officers; letters, writings, communications from defendant to his wife, and vice versa; things seized under search warrant pertaining to defendant or to this case; and 2 diamond rings or parts of rings shown to defendant by investigating officer, where request by defendant was simply for defendant's use in preparation of defense, and it did not appear that statements were sought by defendant for purpose of impeachment. *Smith v State*, 282 Ala 268, 210 So 2d 826.

In homicide prosecution, it was reversible error to deny discovery of identity of experts to whom prosecution had shown bloody palm print found on decedent's bed sheet and whose opinion was that maker of print couldn't be identified, where print was most significant evidence in case, experts had testified that print was or was not defendant's but no evidence was presented that print could not be identified, and prosecutor argued to jury that People's experts were better qualified than defendant's. *People v Johnson*, 38 Cal App 3d 228, 113 Cal Rptr 303.

In prosecution for burglary, rape, aggravated sodomy and armed robbery, trial court did not err in refusing to grant new trial based on state's failure to disclose sheriff department's failure to comply with state crime laboratory's request for copies of rape victim's fingerprints for elimination purposes, notwithstanding fact fingerprints lifted from victim's nightstand next to her bed had been determined by state crime laboratory not to have been left by accused. *Lingerfelt v State* (1978) 147 Ga App 371, 249 SE2d 100.

Denial of defense request, 15 minutes prior to trial, that prosecutor produce "any and all items on which state contends defendant's fingerprints were found at scene of alleged burglary," was not denial of Brady rights where defense did not request court to make in camera inspection of state's file to determine if there was anything in it favorable to defense, there being no law requiring discovery per se in criminal cases or giving accused right to inspect state's file, and where defense did not demonstrate that such evidence, some of which was not readily available when requested, was suppressed or that it was material and favorable to accused. *Tippins v State* (1978) 146 Ga App 448, 246 SE2d 458.

Reversible error occurred in homicide prosecution where state's case rested entirely upon circumstantial evidence that

unseen defendant shot.22 caliber bullet through open window striking victim in head, but state failed to comply with pretrial discovery request by concealing until time of trial fingerprint expert's exhibits linking defendant to suspected murder weapon. *State v Davis (1981, La) 399 So 2d 1168*.

Harmless error occurred in prosecution for receiving stolen goods where, despite defense discovery request for results of scientific tests, prosecution concealed from defense discovery of accused's fingerprint on stolen property until such evidence was used on redirect examination. *State v Pool (1978, La) 361 So 2d 1202*.

See *State v Chase (La) 327 So 2d 391*.

Fingerprint evidence was admissible despite failure of prosecution to make written response to defendant's motion for discovery, where defendant made no motion for continuance on grounds of state's failure to comply with discovery order and fingerprint evidence was disclosed and was available for defendant's inspection at preliminary hearing approximately three and one-half months prior to trial. *State v White (1983, La App) 430 So 2d 171*, cert den (La) 433 So 2d 1055 and cert den (La) 433 So 2d 1055.

In prosecution for first-degree murder, prosecution did not violate discovery rule by failing to provide defendant with negative of fingerprint introduced in evidence where defendant was provided with envelope bearing original fingerprint, photographs developed from negative, defendant's known fingerprints, and identification results reached by State's expert, and rule requiring disclosure of exculpatory evidence was not violated since, as both State's and defendant's experts initially incorrectly identified fingerprint as defendant's, negative was inculpatory rather than exculpatory evidence, but discovery rule was violated by prosecutor's failure to disclose statements of private detectives who investigated murder, since, whether or not statements were material, and despite prosecutor's subsequent decision not to use detectives' testimony at trial, rule required disclosure in that detectives had been listed as prospective state witnesses. *State v Caldwell (1982, Minn) 322 NW2d 574*.

In prosecution for third-degree murder, defendant was not prejudiced by state's inadvertent failure to disclose report of fingerprint examination before trial as required by statute, where prosecutor furnished defense counsel with report as soon as error was discovered, defense counsel made complete cross-examination of expert who testified as to report, was allowed to remove report for examination by own expert and declined court's offer of additional time in which to obtain expert to testify on defendant's behalf. *State v Morgan (1980, Minn) 296 NW2d 397*.

See *State v Williams, 183 Neb 257, 159 NW2d 549, § 17*.

See *State v Quintana (App) 86 NM 666, 526 P2d 808*, cert den 86 NM 656, 526 P2d 798, § 21[e].

In murder prosecution, inspection allowed of results of fingerprints. *People v Powell, 49 Misc 2d 624, 268 NYS2d 380*.

Under discovery order state had no duty to submit second fingerprint comparison to defendant where comparison did not exist prior to trial; where state was only required to submit this comparison to defendant promptly following decision to use comparison, its action in that respect amounted to substantial compliance with discovery order. *State v Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977)*.

See *State v Hockings, 29 Or App 139, 562 P2d 587, § 11[m]*.

Defendant was entitled to inspection of fingerprint tab taken from scene of crime, handwriting exemplar involved in crime, and other physical items of evidence. *State v Sahlie (SD) 245 NW2d 476*.

Error occurred in burglary prosecution where defense requested discovery of any real evidence in possession of police or prosecutor's office which was in any way material to guilt or innocence of accused, and where state was allowed to

introduce evidence of accused's palm print which matched undisclosed print lifted from trophy at scene of burglary; although state's contention that it was unaware of existence of print until trial was in progress was untenable, since prosecutor had obligation to investigate case before going to trial, error was harmless where accused was arrested at burglary scene and also testified, admitting his presence, while contending it was under innocent circumstances. *Hollowell v State* (1978, *Tex Crim*) 571 SW2d 179.

[\*23] Photograph or slide of person or place or other objects; motion picture 162

In some cases an accused was permitted to inspect photographs, slides, or motion pictures in the possession of the prosecution which related to a person or a place or other objects.

Where, in a prosecution for robbery and other felonies, the robbery victim was unable to identify the defendant as the robber when certain pictures of the defendant were exhibited to him, but when he subsequently had a personal view of the defendant, he positively identified the defendant as the robber, it was held in *Norton v Superior Court of San Diego County* (1959) 173 Cal App 2d 133, 343 P2d 139, that the defendant was entitled to an order for pretrial production and inspection of his photographs which were shown to the victim. Noting that absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the prosecution has no interest in denying the accused access to all evidence that can throw light on issues in a case, and that to deny flatly any right of production on the ground that an imbalance would be created between the advantages of the prosecution and the defense would be to lose sight of the true purpose of a criminal trial, the court said that in the present case it was shown that in defense of the case the defendant might legitimately have reason to use the photographs in question.

In *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3, it was held that the defendant was entitled to pretrial inspection of any photographs, movies, and photographic or specimen slides taken or made as a part of the autopsy performed on the body of the victim of the alleged murder.

In *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, infra § 25[a], the court upheld an order requiring the prosecution to produce, for inspection by the defense, photographs of the place of the alleged murder which had been taken by the prosecuting attorney or his representatives subsequent to the offense.

For a case wherein inspection of a photograph of the victim of the alleged homicide was permitted during the trial where it was used by the prosecuting attorney in his examination of a witness, see *Bailey v State* (1963, *Tex Crim*) 365 SW2d 170, supra § 9[c], footnote 19.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect photographs of the kind under consideration which were in the possession of the prosecution.

For other cases wherein the court denied inspection of photographs, see *Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, supra § 5[a]; *Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, supra § 5[a]; *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, supra § 8.

In *People v Leahey* (1960) 26 Misc 2d 438, 207 NYS2d 619, the defendant's pretrial motion for discovery of photographs taken by investigators during their interrogation of the defendant was denied, the court concluding that justice did not require the photographs to be made available to defense counsel at this stage of the proceedings.

In *Bass v State* (1950) 191 Tenn 259, 231 SW2d 707, wherein the defendant, on appeal from a judgment of conviction,

assigned error on the ground, inter alia, that he and his counsel were not permitted to see certain pictures introduced by the prosecution until they were presented at the trial of the case, the court held that neither the defendant nor his counsel had any right, before the trial, to demand of the prosecution the pictures which were offered in evidence.

The defendant's assignment of error in that certain pictures were introduced in evidence before the defendant had had an opportunity to examine them prior to trial in order to properly prepare his defense was also rejected in *Pettigrew v State* (1956) 163 Tex Crim 194, 289 SW2d 935, the court holding that there was no authority requiring the prosecution to furnish the defendant, before trial, with copies of pictures it intended to introduce against him.

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The denial of the defendant's pretrial motion for production of motion pictures taken at the time he was engaged in conversation with the widow of the alleged murder victim was upheld in *State v Spica* (1965, Mo) 389 SW2d 35, supra § 3.

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In prosecution for various drug-related offenses, trial court did not abuse discretion in denying defendants' motions for mistrial and new trial based, inter alia, on alleged prosecutorial misconduct in failing to make pretrial disclosure of allegedly exculpatory photograph of one defendant. *United States v Wentz* (1982, CA8 ND) 686 F2d 653.

See *Thigpen v State* (1977, Ala App) 355 So 2d 392, affd (Ala) 355 So 2d 400, § 16[a].

In murder prosecution it was not error for court to deny defendant's request that picture be produced where there was no allegation that prosecution suppressed evidence favorable to defendant. *State v Thomas*, 110 Ariz 120, 515 P2d 865.

Although prosecution's delay in furnishing to defendant, convicted of attempted jail escape, adequate description of photographs of jail cell area taken immediately after escape attempt constituted noncompliance with discovery order issued in response to defendant's discovery motion, such nondisclosure did not warrant reversal of defendant's conviction where inadequacy of photographs' description appeared to have been oversight, evidence in form of those photographs was cumulative of testimony already given, and no prejudice to defendant otherwise appeared in record. *People v Schlegel* (1980, Colo App) 622 P2d 98.

Prosecutor's three-month delay in complying with discovery order to produce photographs of dismemberment-homicide crime scene until three days before trial did not prejudice defendants where defense counsel was afforded sufficient time by way of continuance to utilize photographs in best way he saw fit. *Gray v State* (1981, Del Sup) 441 A2d 209.

Photographs from which witness made out-of-court identification should be preserved and made available to defense counsel at trial so that possibility of prejudice may be revealed and out-of-court identification may be impugned. *Reed v State* (Del) 281 A2d 142.

In prosecution for assault with intent to kill and weapons violation, new trial was not required by government's failure to disclose photographic evidence where defendant failed to request disclosure. *Mangrum v United States* (1980, Dist Col App) 418 A2d 1071, cert den (US) 66 L Ed 2d 2986, 101 S Ct 539.

In prosecution for armed robbery and assault with dangerous weapon, where defendant was identified by victim, in part, from photographs, there was no duty on government to preserve photographic arrays from which no identification was made; there was, however, duty to preserve, and defendant had right to discover, all photographic arrays from which

identification was made. *Washington v United States* (1977, *Dist Col App*) 377 A2d 1348.

Defendant in murder prosecution was not entitled to new trial on ground that state had violated applicable rule of criminal procedure by failing to produce photograph of defendant before introducing it in evidence where state had not obtained photograph until day of trial and where trial court obtained admission from defendant that photograph was picture of him. *King v State* (1978, *Fla App D3*) 355 So 2d 831.

Denial of motion for discovery and inspection by defendant in murder trial of certain photographs of body of deceased was not error, since no Georgia statute or rule of practice allows such inspection. *Bryan v State*, 224 Ga 389, 162 SE2d 349.

State court committed no reversible error in failing to require prosecution to produce photograph used in pretrial identification procedure where district attorney submitted all photographs and composites in his possession, photograph was mug shot in files of police, and district attorney offered to tell defendant's counsel how copy could be acquired but counsel was not interested. *Foote v State*, 141 Ga App 18, 232 SE2d 366.

See *People v Camel*, 59 Ill 2d 422, 322 NE2d 36, § 19.

Trial court did not err in denying pretrial inspection of photograph of murder victim where cause of death was fully established by competent evidence, and photographs were actually introduced at trial. *People v Farnsley*, 53 Ill 2d 537, 293 NE2d 600.

Unless photographs are favorable to accused, they are not automatically discoverable, save and except where prosecution intends to use them at trial, or where they are obtained from accused himself. *People v Newbury*, 53 Ill 2d 228, 290 NE2d 592.

Two defendants charged with armed robbery of three girls at gunpoint should have been allowed to examine before trial photograph of one defendant given by girl to police, but fact that photograph was first produced at trial required neither suppression nor reversal where defendants were given opportunity to cross-examine witnesses regarding circumstances surrounding receipt of photo. *People v Moore* (1983) 115 Ill App 3d 266, 71 Ill Dec 167, 450 NE2d 855.

In prosecution for armed robbery and armed violence, defendant's right to discovery was not violated by State's failure to turn over composite drawings and photographs used in several pre-trial photographic showups, where composite drawings and photographs were not used by State at trial, they were neither obtained from nor did they belong to defendant, there was no indication in record that evidence would have been favorable to defendant, and under state discovery rules photos were not automatically discoverable by defendant unless prosecution intended to use them at trial, they were obtained from or belonged to defendant, or were favorable to defense. *People v Son* (1982) 111 Ill App 3d 273, 66 Ill Dec 952, 443 NE2d 1115.

Harmless error occurred in aggravated-battery and armed-robbery prosecution through introduction into evidence of photograph depicting victim's injuries where photograph was not produced pursuant to pretrial discovery order, but neither the surprise nor prejudice was demonstrated on appeal by record which did not include photograph in question. *People v Sakalas* (1980) 85 Ill App 3d 59, 40 Ill Dec 29, 405 NE2d 1121.

Defendant was not entitled to production of photographs in state's possession under defendant's pretrial discovery motion where photographs did not belong to defendant, state did not intend to use photographs at trial but only used them to impeach after witness made statements believed to be untrue, and photographs were not favorable to defense. *People v Molsby* (1978) 66 Ill App 3d 647, 23 Ill Dec 309, 383 NE2d 1336.

See *People v Rosa* (1977) 49 Ill App 3d 608, 7 Ill Dec 228, 364 NE2d 389, § 27[b].

See *People v Lighting*, 83 Ill App 2d 430, 228 NE2d 104, § 17.

Failure of prosecution to turn over to pro se defendant pursuant to discovery requests photographs shown to assault victim by police did not violate due process where no positive identification resulted from display and where, as a result, no record was kept by police concerning which photographs were shown to victim in identification process. *Owen v State* (1978, Ind) 381 NE2d 1235.

Trial court erred in denying defendant's motion for production of picture display used by police in out-of-court identification procedure, where photographs sought were clearly designated by defendant and were material to defense. *Rowe v State* (Ind) 314 NE2d 745.

Defendant in robbery prosecution was not entitled to production of mug shots taken of defendant and his companions after arrest since mug shots would not have in any way proved exculpatory. *State v Williams* (1977, La) 349 So 2d 286.

It was not error to deny defendant's motion to inspect photographs, charts and diagrams of scene of crime in possession of district attorney's office where defendants had been allowed to visit scene of crime and were thus able to have available to them things they requested. *State v Nix* (La) 327 So 2d 301.

Denial of accused's request for pretrial inspection of photographs taken by wall camera triggered by victims during robbery, which photographs were direct evidence of commission of crime, was proper. *State v Martin* (La) 304 So 2d 328.

See *State v Frezal* (La) 278 So 2d 64, § 13[d].

Trial court properly refused to grant request for pretrial discovery of copies of photographs and other photographic evidence. *State v Finley* (La) 275 So 2d 762.

Police were not required to make available to defendant motion pictures taken of accused committing crime. *State v Dickson*, 248 La 500, 180 So 2d 403.

Although photographs depicting bullet hole in wall between defendant's home and adjacent apartment were discoverable pursuant to discovery order, defendant failed to show that state's non-compliance with order caused prejudice to defendant sufficient to deprive him of fair trial where, inter alia, state withdrew its offer to place photographs in evidence, defendant had full access to bullet hole, was aware that police had inspected hole, and had ample time to make his own measurements, and where there was no evidence of bad faith on part of state. *State v LeClair* (1978, Me) 382 A2d 30.

Court properly denied defendant's motion to examine all photographs, other than that of defendant, which were shown to identifying witnesses by police. *Commonwealth v Gibson* (Mass) 255 NE2d 742, cert den 400 US 837, 27 L Ed 2d 70, 91 S Ct 75.

In prosecution for rape, prosecution was not required to produce mug photograph selected by victims, where victims did not claim that photograph was of one of their assailants, but claimed only that it resembled one of them, there was no allegation that person in photograph did not resemble defendant, and there was no allegation that mug books contained defendant's picture which victims failed to identify. *Commonwealth v Walker* (1982) 14 Mass App 544, 441 NE2d 261, app den 388 Mass 1102, 445 NE2d 156.

It was not error to fail to require prosecuting attorney to produce all photographs shown to victim and to witnesses; it was sufficient to provide group of eleven photographs shown to victim and later shown to five other witnesses which

ultimately resulted in identification of defendant. *Commonwealth v Clark (Mass App) 334 NE2d 68.*

Accused was entitled to inspection of original "parts book," or photographs of pages thereof, or copies of films used to identify tractor parts alleged to have been embezzled. *Sisk v State (Miss) 260 So 2d 485.*

Question of whether or not to compel discovery of certain photographs taken by prosecution was within trial court's discretion, and where evidence of defendant's guilt was overwhelming there was no reversible error in failure to require that they be produced. *McCraw v State (Miss) 260 So 2d 457.*

Trial judge in murder prosecution should have granted defendant right to inspect photographs, confessions, and other tangible evidence, although, under circumstances, denial of right of inspection was not prejudicial. *Armstrong v State (Miss) 214 So 2d 589.*

Notwithstanding state's duty in criminal prosecution to disclose to defendant on request any exculpatory evidence, defendant's rights were not prejudiced by state's failure to relinquish to defendant in rape prosecution photograph of lineup in which another person was identified as perpetrator of rape committed on same date as one involved in defendant's prosecution, where prosecutrix identified exhibit as photograph depicting lineup she viewed in which she identified defendant as her assailant and where photograph sought by defendant apparently was photograph of lineup viewed by someone other than victim he attacked. *State v Berry (1980, Mo) 609 SW2d 948.*

Theft defendant was not prejudiced by failure of prosecution to give discovery of photographs, including picture of defendant, which had been shown to theft victim and witness by police prior to lineup in which defendant was also identified, and which were not preserved by police, since (1) police are not required to retain photographs for eventuality of trial, (2) photographs were not introduced at trial and did not relate to offense charged, and so were not encompassed by discovery rule, (3) there was no surprise to defendant, in that both victim and witness referred to photographs at pretrial suppression hearing and policeman gave no testimony at pretrial as to use because not asked, (4) no basis existed for presumption that photographs were impermissibly suggestive and defendant made no attempt to determine whether display or content of photographs or police procedure were in fact suggestive, (5) defendant failed to make objection that discovery was violated until conclusion of full direct testimony, and (6) no due process rights of defendant were violated in that lineup produced reliable identification, presumption of undue suggestiveness of photographs did not exist, and brief spans of observation of thief by victim and witness were matter of witness credibility and did not render basis of identification unreliable as matter of law. *State v Lewis (1982, Mo App) 637 SW2d 421.*

In prosecution for murder in which victim's death was caused by multiple stab wounds, defendant's motion for discovery of photographs of scene and of corpse was properly granted where defendant argued that photographs were necessary to enable experts to make blood spatter analysis which might have bearing on manner and violence with which murder was committed. *People v Coleates (Misc) 376 NYS2d 374.*

Even though photographs requested to be discovered and inspected by defendant depicted acts of devious sexual intercourse which would be considered obscene, defendant's motion would not be vacated where photographs involved formed the basis of indictment of defendant. *People v Hageman, 90 Misc 2d 119, 393 NYS2d 893.*

See *People v Player, 80 Misc 2d 177, 362 NYS2d 773, § 11[m].*

Accused may employ motion for discovery to ascertain whether or not any witness viewed photographs or drawings in making identification prior to trial. *People v Abraham, 74 Misc 2d 544, 344 NYS2d 792.*

Motion to direct district attorney to furnish defense counsel with copies of photographs taken in connection with charges contained in indictment was denied. *People v Cusano, 63 Misc 2d 906, 313 NYS2d 833.*

Defendant was not entitled to pretrial inspection of closed-circuit television film of certain of his activities during time prior to his arrest, where prosecution agreed to full disclosure of film at trial. *People v Serour*, 63 Misc 2d 852, 313 NYS2d 621.

Although better practice dictated that photographs used in pretrial identification procedures should be subject to inspection and disclosure by defendant, refusal to permit such discovery was harmless error where it did not deny defendant right to effective cross examination. *State v. Legette*, 292 N.C. 44, 231 S.E.2d 896 (1977).

In prosecution for first-degree manslaughter, all photographs, not just those described as autopsy photographs, were to be produced by prosecution, even though not ordered by court to do so and even though defendant had not initiated discovery. *State v Stevens (ND)* 238 NW2d 251.

In obscenity prosecution, accused was entitled to discovery of allegedly obscene movie which he was charged with having exhibited, in order to have it seen and examined by experts whom he intended to call as witnesses. *Melton v State (Okla Crim)* 512 P2d 204.

See *Doakes v District Court of Oklahoma County (Okla Crim)* 447 P2d 461, § 17.

Defendant was not entitled to production of police photo or array of photographs and line-up summary sheet where court found that line-up was proper and where defendant had access to line-up sheet and police photograph at suppression hearing. *Commonwealth v Spann (Pa)* 340 A2d 862.

In prosecution for housebreaking, grand larceny and safecracking, state's failure to disclose existence of roll of film which cast serious doubt on credibility of state's only witness who implicated defendant was ground for new trial. *State v Goodson (1981, SC)* 277 SE2d 602.

In prosecution for murder, state's failure to inform defendant, who had filed discovery motion, about photograph of him which state introduced at trial was error, but was harmless error. *State v Turnbill (1982, Tenn Crim)* 640 SW2d 40.

State was not required to furnish photographs taken of truck in which defendant was alleged to have committed assault and battery with intent to commit rape. *Conboy v State (Tenn Crim)* 455 SW2d 605.

Photograph, which was taken at police station on morning that defendant was arrested and which showed injury to defendant's eye, was nondisclosed evidentiary material pertinent to defense of defendant, where picture would have been persuasive evidence to corroborate testimony of defendant, which raised issues of self-defense and sudden passion arising from adequate cause with respect to fight in which victim was stabbed. *Ball v State (1982, Tex App 11th Dist)* 631 SW2d 809, review ref.

Defendant's motion to inspect any photographs, fingerprints, or other physical evidence gathered at scene of crime, denied after court conducted hearing to determine if there was anything in requested materials which was beneficial to defendant. *Hendrix v State (Tex Crim)* 474 SW2d 230.

Where rape prosecutrix testified on cross-examination that she could recognize photograph of defendant which she had selected during photographic identification, and defendant thereupon demanded photograph, trial court did not err in overruling such request, since prosecutor denied having photograph in his possession. *Daniels v State (Tex Crim)* 464 SW2d 368.

Where witness identified defendant in court as being person he saw at crime scene, state's inability to produce set of photographs used when witness identified defendant to police had no adverse effect on admissibility of identification

testimony. *Davis v State* (1983, *Tex App Fort Worth*) 649 SW2d 380, review ref.

[\*24] Written material used or directly involved in commission of offense; writing to be used for comparison of handwriting

[\*24a] Generally

In some cases the defendant was permitted to inspect documents, papers, or other written materials which had been used or directly involved in the commission of the offense charged against him.

Where a city treasurer was accused of withholding funds from his successor in office, and where his books had been seized by the state's attorney, the court in *People v Gerold* (1914) 265 Ill 448, 107 NE 165, held that it was error for the trial court to deny the defendant's motion for permission to examine the seized books before they were actually introduced in evidence. The motion for inspection stated that the accounts upon which the charge against the defendant was made were complicated and would require investigation, and that the defendant would not have an opportunity to properly investigate all these matters if he had to wait until they were introduced in evidence. The court noted that the whole theory of law as to the trial of one accused of crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial.

See also *Cramer v State* (1944) 145 Neb 88, 15 NW2d 323, where the court, in upholding the denial of the defendant's application to inspect "the purported confession and other statements and documents" in the possession of the prosecution, said that when a prosecution is based upon a written instrument, as in a forgery case, the defendant is entitled to inspect and make copies of such instrument under such conditions as the trial court may prescribe, and that if a prosecution is based upon the correctness or incorrectness of certain records, such as is often the case in a prosecution for embezzlement, the examination of such records by the defendant should be granted; but that as to all statements and documents not admissible in evidence in chief, which were obtained for impeachment or other purposes not going to the merits, the defendant had no basis for demanding an inspection of them.

In *State v Winne* (1953) 27 NJ Super 304, 99 A2d 368, wherein the defendant was charged with wilfully neglecting and omitting to perform his duty as county prosecutor, it was held proper to grant an order permitting the defendant to inspect and copy "all papers, documents, correspondence, books and all other records which were part of the files" of the prosecuting attorney's office at the time the defendant was replaced, the court pointing out that the indictment covered a period of 6 years, during which thousands of matters were handled by the defendant and his staff, and that it seemed unlikely that the defendant recalled exactly what steps had been taken by his office with reference to every matter charged in the indictment. Observing that the present case was similar to a case where a city treasurer, indicted for embezzlement, was given permission to examine before trial the account books of his office which had been seized by the prosecution, the court said that the papers sought by the defendant in the present case were not the work product of the prosecution, comparable to the confession or the signed statements of witnesses, and that the papers had not even been ferreted out or collected by the prosecution. The court noted that the exercise of the power to afford a defendant an opportunity to inspect documents controlled by his opponent rests in the sound discretion of the trial court in which the cause is pending.

In *People v Radeloff* (1931) 140 Misc 690, 252 NYS 290, a prosecution for extortion, the court granted the defendant's motion for an order directing the district attorney to furnish defendant photostatic copies of certain documents upon which the present prosecution was based.

Concluding that the court in a criminal case has the power to compel an inspection of evidence, either by virtue of its inherent power to further justice or by virtue of a process of analogy to the civil procedure, the court in *State ex rel. Wagner v Circuit Court of Minnehaha County* (1932) 60 SD 115, 244 NW 100, a prosecution for obtaining money under false pretenses in connection with certain construction work for a county, held that it was within the power of the lower

court to grant the defendant's motion to compel the prosecuting attorney to permit him to inspect field notes and drawings made by the county engineer in charge of the construction work in question. Noting that it was generally held that before a court can compel an inspection, the documents sought must be evidential in character, the court pointed out that the field notes and drawings in question were something more than mere memoranda or notes collected by the prosecution in the preparation of the case; that they were the original figures and data upon which estimates, in part at least, had been made and furnished; and that, in reliance upon such estimates, one of the defendants, who was county highway superintendent, had allowed partial payments to be made to the construction company.

The view that documents or papers which are the "subject" of the charge or the "very essence" of the case, or which form the "basis" of the charge, may be required to be produced for inspection by the defense was also recognized in other cases.

#### NEW HAMPSHIRE

*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, supra § 8

#### NEW YORK

*People v Carothers* (1960) 24 Misc 2d 734, 203 NYS2d 512 (stating that pretrial inspection may be granted where the defendant's statements are involved in the subject matter of the charge against him, as in a forgery indictment or an extortion case)

#### NORTH CAROLINA

*State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, supra § 17

#### OKLAHOMA

*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610  
*Application of Killion* (1959, Okla Crim) 338 P2d 168, both supra § 3

See also *State v Shouse* (1965, Fla App) 177 So 2d 724, supra § 11[c], wherein the court upheld, under the relevant Florida statute, an order for the production of all documents and legal papers which the prosecution intended to use at the trial in a prosecution for embezzlement.

Attention is also called to *State v Huff* (1961) 157 Me 269, 171 A2d 210, an embezzlement prosecution of a town treasurer for drawing checks payable to himself upon a bank account in which town funds were maintained, wherein an auditor testified for the prosecution as to the treasurer's receipts and his bank deposits for certain fiscal years, and the court, in granting an order for new trial on appeal from a judgment of conviction, said that where an expert is permitted to summarize information contained in voluminous records containing intricate details, the records which form the basis of the summary should be in court or at least available to the opposing party for inspection.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect documents, papers, or

other written material of the kind under consideration.

See also *Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587, involving a prosecution for burning to defraud an insurer, where the court, noting that the right of inspection of the prosecution's evidence by a defendant is non-existent in the absence of a statute to the contrary, upheld the denial of the defendant's pretrial motion for an order requiring the prosecution to return to him his company's books showing his financial condition which had previously been surrendered to the district attorney.

In a prosecution for violation of gambling laws, a lottery ticket purchased by a confidential informant was held not producible for inspection by the defendant in *Miami v Jones* (1964, Fla App) 165 So 2d 775, supra § 11[c].

In *People v Kuberacki* (1944) 310 Mich 162, 16 NW2d 703, wherein the defendant was charged with the crime of accepting a bribe to influence his official action as a city councilman in awarding a contract for parking meters on the streets of the city, the court, without discussion, held that the trial court did not commit error in refusing to compel the prosecution to produce the books and records of the successful bidder for the parking-meter contract.

And see *State v Colson* (1930) 325 Mo 510, 30 SW2d 59, supra § 6[b], involving a prosecution for embezzlement, wherein the court upheld the denial of the defendant's request during the trial for sufficient time to examine a mass of papers relating to the charge.

In *Hameyer v State* (1947) 148 Neb 798, 29 NW2d 458, a prosecution for obtaining money by false pretenses respecting resale of an oil and gas lease, it was held that there was no abuse of discretion in denying the defendant's pretrial motion for permission to inspect the lease in question. Stating that the rule that if a prosecution is based upon the correctness or incorrectness of certain records, such as is often the case in a prosecution for embezzlement, the examination of such records by the defendant should be granted "is reasonable but discretionary and should be enforced when the ends of justice require it," the court, in concluding that the trial court in the present case did not abuse its discretion, pointed out that the motion for inspection was not supported by affidavits, and that from the record it could not be said that the motion was supported by any other kind of evidence; and that there was nothing in the transcript or the bill of exceptions to show that the defendant was prejudiced by the failure of the trial court to order an inspection of the lease.

In *Commonwealth v Pearlman* (1937) 126 Pa Super 461, 191 A 365, a prosecution for the making and publishing of a fraudulent written instrument known as a "recognizance bail bond," it was held proper for the trial court to refuse to direct the district attorney to produce certain bonds which might tend to incriminate the defendant's accomplices who were not on trial.

In a prosecution for violation of the "numbers" statutes, the defendant's request for permission to examine papers seized at the time of a raid upon the place allegedly used in the commission of the offense was denied in *State v Tabet* (1951) 136 W Va 239, 67 SE2d 326, supra § 9[c], footnote 1.

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Cash receipt and bill of sale were properly excluded from evidence in prosecution for theft of compressor where state's attorney breached continuing duty to disclose to defendant existence of such documents, but receipt and bill of sale were thereafter properly introduced as impeachment evidence where defendant took stand and blatantly contended sale took place at time different from that reflected in documents containing his signature, in effort to exculpate himself. *State v Strickland* (1981, La) 398 So 2d 1062.

Defendant may photocopy alleged gambling records and verify their authenticity by reasonable inspection of original documents under police supervision. *People v Spadaro*, 51 Misc 2d 604, 273 NYS2d 587.

See *State v Sahlie* (SD) 245 NW2d 476, § 22[e].

Record failed to show any manifest abuse of discretion in refusing to order further production of records of employer, victim of embezzlement, where trial court made available to defendant all records of employer in possession of prosecuting attorney when state filed information, and, 2 days after trial began, court granted defendant recess from Thursday afternoon to Monday morning with stipulation that defendant and counsel be allowed to look through company's records at its office. *State v White*, 74 Wash 2d 386, 444 P2d 661.

[\*24b]      Forgery cases

In at least one case involving a prosecution for forgery the defendant was permitted to inspect papers which had allegedly been forged by the defendant. Thus, in *State v Lewis* (1929, CP) 27 Ohio NP NS 460, it was held that the defendant who was accused of the forgery of certain papers was entitled to a pretrial inspection of such papers to enable her to prepare her defense to the charge of the prosecution.

And in another case involving forgery and other offenses the defendant was permitted to inspect not only those documents which were the subject of the forgery charge, but also other documents which might be used by handwriting experts as standards of comparison. Thus, in *People v Calandrillo* (1961) 29 Misc 2d 491, 215 NYS2d 361, a prosecution for forgery and other offenses in connection with irregularities committed in the handling of examination papers of candidates for police positions, the court, stating that the granting or denial of a motion for discovery must be left to the sound judgment of the court in the light of all the circumstances and according to a real sense of the justice of the cause, held that the defendant's motion for discovery of "the papers which were allegedly forged, the standards of comparison, the papers which were allegedly executed by the defendant, the specimens used by the handwriting experts called by the prosecutor and all other written and printed documents concerning which testimony was given before the Grand Jury," should be granted to the extent of discovery of (1) the examination papers of police officers whose answer sheets the defendant was alleged to have forged, (2) the samples of handwriting of such police officers, which might be used as standards of comparison to enable an expert to reach an opinion as to whether or not the answer sheets were forged or genuine, and (3) the samples of the defendant's own handwriting, which might also be used as standards of comparison to enable an expert to reach an opinion as to whether the defendant had forged the answer sheets. As to other papers the production of which was denied, the court observed that the defendant could not have such material which would serve no useful purpose except to enable him to pry into the prosecution's case.

The view that in a case of forgery the defendant may be allowed to inspect and copy the allegedly forged instruments and other documents of handwriting which the prosecution expects to offer in evidence, so that the defendant will be able to prepare his defense, was also recognized in *State v Major* (1950, CP) 60 Ohio L Abs 271, 101 NE2d 397.

It should also be noted that most of the cases referred to in § 24[a], supra, recognize, either explicitly or by implication, the rule that in a case of forgery the defendant may be permitted to inspect the allegedly forged instruments.

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In the following cases, on the other hand, the court upheld the refusal to permit the defendant to inspect an instrument allegedly forged by the defendant.

In *Marshall v State* (1927) 116 Neb 45, 215 NW 564, a prosecution for forgery of notes, it was held that there was no abuse of discretion in denying the defendant's application for permission to inspect certain books and papers, including the allegedly forged notes. The court noted that under the provision, in the Nebraska civil statute, for discovery and inspection of documents or books, it was left to the discretion of the trial court whether to enter an order directing a

party to allow the adverse party to inspect documents or books in his possession.n163

Holding that the relator, who pleaded guilty and was convicted of a charge of forgery, was not entitled as a matter of right to inspection (apparently before or during his trial) of the check he had forged, the court in *People ex rel. Kennedy v Hunt* (1939) 257 App Div 1039, 13 NYS2d 816, upheld the dismissal of a writ of habeas corpus issued on behalf of the relator. Holding to the same effect is *People ex rel. Kennedy v Hunt* (1939, Co Ct) 21 NYS2d 304, affd 259 App Div 970, 20 NYS2d 1012, app den 259 App Div 981, 21 NYS2d 393 (a new proceeding for a writ of habeas corpus instituted by the same relator as in the other case).

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See *State v O'Steen* (Fla App) 213 So 2d 751, § 18.

[\*25] Physical or tangible objects used or directly involved in commission of offense

[\*25a] Generally

In a number of cases the defendant was permitted to inspect a physical or tangible object which was used or directly involved in the commission of the offense charged against him.

#### ARIZONA

*State v Fowler*, 101 Ariz 561, 422 P2d 125 (knife)

The defendant's application for an order permitting him to inspect and photograph a piece of glass in the custody of the prosecution was granted in *United States v Rich* (1922) 6 Alaska 670, where the prosecution intended to use the glass against the defendant at the trial, apparently to establish that the glass had been found near the scene of the crime charged against the defendant and that the fingerprints of the defendant were imprinted thereon. The court observed that the request to photograph the fingerprints on the glass in order that the defendant might have them examined by experts of his own choice seemed entirely reasonable; that the defendant could not have a fair trial without having reasonable opportunity to show by expert testimony that the fingerprints were not made by him; and that if the present application was refused, and if an expert for the prosecution should testify at the trial that the fingerprints were the defendant's, the defendant would then be entitled to a continuance of the hearing until he could have opportunity to refute such evidence, by expert or other testimony.

In *State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887, involving a prosecution for murder, an order requiring the prosecution to produce certain tangible physical objects such as pistols, a lead slug taken from the body of the victim, a shirt, car keys, etc., was upheld. In concluding that the order was so necessary to the due administration of justice as to fall within the scope of the inherent powers of the trial court, the court pointed out that the order expressly prescribed safeguards against any possible substitution or trickery; that the defendant was entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence; and that the request for the inspection was not merely "a fishing expedition to see what may turn up." The court followed the rule that the defendant is not as a matter of right entitled to pretrial inspection of evidence in the possession of the prosecution, and such inspection is a matter peculiarly within the discretion of the trial court.

The view that in a proper case a defendant may inspect "real evidence" in advance of trial was also recognized in *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838, and *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755.

In *State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b], the court granted the defendants' motion for production of the automobile in which they were located at the time of the death of the victim of the alleged murder.

An order granting an inspection of various items which were either used or otherwise directly involved in the commission of the alleged murder was also upheld in *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3.

In *People v Schemnitzer* (1931) 142 Misc 16, 254 NYS 480, the court, without any discussion, granted the defendant's motion for permission to examine the pistols, revolvers, bullets, automobile, and other materials and things which were alleged to have been used in the commission of the murder charged against the defendant, and also held that the defendant might have the assistance of a ballistic expert in making such examination.

Where, in a prosecution for abortion on an indictment charging that the abortion was committed by the use of certain instruments and substances, the defendant moved for permission to examine, photograph, and test the instruments and substances which were allegedly used to procure the abortion, alleging that a determination of whether the instruments and substances were capable of procuring a miscarriage was of vital importance in the preparation of the defense, and that if an opportunity of inspecting the instruments and substances was denied, the defendant would be denied material evidence for his defense and accordingly a failure of justice might result, the court in *People v Miller* (1964) 42 Misc 2d 794, 248 NYS2d 1018, held that in the interest of justice and in the exercise of its discretion, the motion for discovery and inspection should be granted to the limited extent of permitting the defendant to visually examine the instruments and substances. Noting that the earlier decisions of the courts had exhibited a more liberal tendency to grant discovery and inspection where the requested exhibit was one that might be received in evidence or was the subject of the charge or where a failure of justice might result, and stating that it would be difficult to enunciate a particular and definitive concept or controlling criteria applicable to all cases, and the primary consideration in each case was justice which would serve the accused and not prejudice the rights of the prosecution, the court said that there was no logical reason nor any purpose served in denying to a defendant inspection and discovery of physical items of evidence not subject to damage or alteration; that where there is evidence in the possession of the prosecution which is of such a nature that it may require lengthy inspection and examination by experts to determine whether it is favorable to the accused, the court will afford to the accused an adequate opportunity, in advance of trial, to examine the evidence in the interest of justice and to avoid delay at the trial; and that such a policy is also applicable to cases in which the opportunity for the inspection and examination by the defendant of the prosecution evidence at the trial would be inadequate.

See also *State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, supra § 17, wherein the court apparently recognized that a defendant may be permitted to inspect articles which form the "basis" of the charge against him.

And see *State v Bostic* (1961) 115 Ohio App 214, 20 Ohio Ops 2d 301, 184 NE2d 597, app dismd 173 Ohio St 176, 18 Ohio Ops 2d 441, 180 NE2d 582, where the court, in holding that the denial of the defendant's motions, one of which was made prior to the trial and the other during the trial, to inspect the safe which he was alleged to have burglarized was not error where shortly after the alleged offense and sometime before his pretrial motion for inspection, the safe was returned by the police to its corporate owner and then was repaired and was being used by the home office of the owner in another county, said that if the safe had been in the hands of the prosecution at the time of the pretrial motion or at any time during the trial of the case, it would have been proper to ask the trial court for an order permitting an examination of the safe, and the defendant should then have had an opportunity to inspect such prospective evidence.

In *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, the court, without discussion, refused to grant a writ of prohibition restraining the enforcement of an order of the lower court permitting an accused to inspect (1) the revolver allegedly used in the commission of the charged murder, (2) the place of the alleged offense, which the prosecution had taken possession of, (3) furniture, rugs, clothing, and broken glass which had been removed or taken by the prosecution

from the place of the alleged offense, and (4) photographs of the place of the alleged offense which had been taken by the prosecuting attorney or his representatives subsequently to the offense. In the concurring opinion of a justice, it was said: "It is the rule in this State that a defendant in a criminal case has no absolute right to examine and inspect, prior to trial, evidence in the possession of the Commonwealth. . . . However, a trial court having jurisdiction of an alleged offender possesses discretionary power to permit a defendant, in appropriate circumstances, to examine and inspect in advance of trial physical or documentary evidence in the hands of the prosecution."

In *Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120, wherein the defendant was indicted for assault and battery and for failure to stop his motor vehicle at the scene of the accident, the court granted the defendant's petition for permission to examine and experiment with, in advance of trial, a side-view mirror found at the scene of the alleged offense, dirt samples taken from the defendant's car, and the victim's clothing, where it appeared that these articles had been sent to the Federal Bureau of Investigation for tests and had been returned by it to the district attorney, and that the prosecution intended to offer expert testimony as to the results of the tests conducted on these articles. Noting the rule that the court possesses discretionary power to permit a defendant, in appropriate circumstances, to examine and inspect in advance of trial physical or documentary evidence in the hands of the prosecution, the court, in concluding that the present case presented appropriate circumstances for such examination and inspection in advance of trial, said that where the prosecution intended to offer expert testimony to the effect that the side-view mirror in question came from the defendant's car, the defendant was entitled to meet it, if he could, with expert rebuttal testimony, and that such testimony could only be obtained if the defendant's expert had the opportunity to examine and test the articles.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect a physical or tangible object which was used or directly involved in the commission of the offense charged against him.

In *State v Dowdy* (1950) 217 La 773, 47 So 2d 496, cert den 340 US 856, 95 L ed 627, 71 S Ct 75, the denial of the defendant's motion for a subpoena for an inspection of a fuse, dynamite caps, and clothing belonging to the victim, who died as a result of a dynamite explosion, was upheld, the court stating that the defendant was not entitled to an inspection of such articles as a matter of right, but the application for it was a matter addressed to the discretion of the trial judge, whose ruling would be set aside only upon a showing of gross abuse of discretion.

The denial of the defendant's pretrial motion for permission to examine the blunt instrument allegedly used in the commission of the crime charged against the defendant was upheld in *State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, the court concluding that there was no showing of a real necessity for the defendant to inspect the instrument in order to be able to prepare his defense.

In *Hanes v State* (1960) 170 Tex Crim 394, 341 SW2d 428, the denial of the defendant's motion for an order requiring the prosecution to produce at the trial the metal door of the building which the defendant was charged with having attempted to burglarize was upheld on the ground that no abuse of discretion was shown. Noting that there was no rule requiring a trial court to order the prosecution to produce certain evidence at the trial of a criminal case, the court said that the entry of any such order as requested by the defendant would be within the sound discretion of the trial judge.

For other cases wherein the court also refused to permit the defendant to inspect a physical or tangible object of the kind under consideration, see the following:

*State v Colvin* (1957) 81 Ariz 388, 307 P2d 98, supra § 7

COLORADO

*Walker v People* (1952) 126 Colo 135, 248 P2d 287, supra § 3

#### GEORGIA

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, supra § 3

#### MASSACHUSETTS

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, supra § 3  
*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, supra § 5[a]  
*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE 2d 814, supra § 5[a]

#### NEW YORK

*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, supra § 7

#### TEXAS

*May v State* (1935) 129 Tex Crim 2, 83 SW2d 338, supra § 22[a]

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Where defendant, who was charged with shooting his wife, claimed that fatal shot was fired in struggle with intruder who had gotten into house, but where testimony of police investigator indicated that defendant's own kitchen knife had been used to cut masking tape around broken pane in door glass, trial court did not err in denying motion for discovery and examination of knife, since defendant was familiar therewith, and knife itself was never offered in evidence. *Knight v State*, 50 Ala App 39, 276 So 2d 624, cert den 290 Ala 368, 276 So 2d 628.

In prosecution for burglary of restaurant, state's failure to make available to defendant physical items from which fingerprints were taken did not violate state's duty to disclose evidence favorable to defense, where items were no longer in possession of prosecution, where state did preserve and make available all prints which had been taken, and where placement and direction of prints was not relevant or material to defense. *Wyrick v State* (1979, Alaska) 590 P2d 46.

Arson suspect was denied due process where his defense was prejudiced by negligent destruction of evidence seized by police and inadvertently destroyed and where tests were not made which could have been made to determine whether exculpatory evidence could have been developed from seized property. *State v Hannah* (1978) 120 Ariz 1, 583 P2d 888.

Defendant who failed to pursue discovery rules before trial waived any claim of right to examine stolen violin for purpose of contesting value. *State v Raffaele*, 113 Ariz 259, 550 P2d 1060.

During prosecution for possession of marijuana and heroin, where accused was originally arrested for traffic offense and

car was searched disclosing it to be stolen and drugs were found in handbag on floorboard of car, state's failure to disclose woman's name found inside handbag did not violate disclosure principles announced in *Brady v Maryland*; accused's contention that woman might provide evidence favorable to him was purely conjecture. *Jones v State (1978)* 146 Ga App 522, 246 SE2d 509.

In prosecution for misdemeanor theft by taking, trial court did not err in denying defendant's motion, filed four days before trial, for examination of items allegedly stolen by him and to have such items sent to state crime lab to be tested for latent fingerprints, where there was no provision in state law for discovery in criminal cases, state had no burden of having evidence sent to crime lab, and state had interest in protecting evidence and its chain of custody for use at trial; furthermore evidence was not exculpatory or material, noncumulative and favorable to defense nor was it concealed from defendant. *Thompson v State (1977)* 142 Ga App 888, 237 SE2d 419, revd on other grounds 240 Ga 296, 240 SE2d 87.

Where officer had testified that some items seized were not stolen and were returned to defendant, subsequent motion to produce copy of inventory of items seized from defendant was properly denied as jury had been apprised of that information. *Carver v State*, 137 Ga App 240, 223 SE2d 275.

Trial court has inherent authority, in appropriate cases, to order pretrial discovery of items of physical evidence which prosecution will introduce at trial. *People v Endress*, 106 Ill App 2d 217, 245 NE2d 26.

Defendant charged with murder was properly granted order requiring state to produce certain physical evidence seized by state following alleged crime, including wristwatches of both defendant and deceased, bed linen, and whiskey bottle and cap therefrom. *State v Eads (Iowa)* 166 NW2d 766 (citing annotation).

See *State v Drew (1978, La)* 360 So 2d 500, § 22[a].

In prosecution for murder, denial by trial court of defendant's request, made on day of trial and without specifically stating necessity and purpose of pre-trial inspection, for inspection of alleged murder weapon was not denial of due process where weapon was introduced at trial by state and defendant was able to inspect it and use it in presenting his case. *State v Howard (La)* 325 So 2d 812.

See *State v Sears (La)* 298 So 2d 814, § 22[a].

See *State v Frezal (La)* 278 So 2d 64, § 13[d].

Defendant was not entitled to order requiring state to produce gun and holster which were involved in commission of robbery where such articles were not in possession of state, and where there was testimony that investigating officers were unable to secure fingerprints therefrom. *State v Emery (Me)* 304 A2d 908.

In prosecution for stealing more than \$50, trial court erred in admitting into evidence stolen merchandise where it had not been made available to defense counsel for inspection prior to trial as requested by defendant. *State v Davis (1977, Mo)* 556 SW2d 45.

See *State v Williams*, 183 Neb 257, 159 NW2d 549, § 17.

Defendant charged with breaking and entering public telephone pay station could not as matter of right obtain inspection of items of physical evidence in possession of state, and refusal of inspection was not error without establishment of valid reason for inspection. *State v McCreary*, 179 Neb 589, 139 NW2d 362, cert den 384 US 979, 16 L Ed 2d 689, 86 S Ct 1877.

Failure of state to produce inhaler allegedly used by defendant to administer ether prior to strangling wife did not require dismissal of action where record indicated that inhaler was lost or disposed of after apparent determination that it had no evidentiary value. Even if state did breach duty to defendant by not producing inhaler, the inhaler was not "material" evidence since it would not have created a reasonable doubt of defendant's guilt that did not otherwise exist. *State v Johnson (1983) 99 NM 682, 662 P2d 1349.*

Prosecutor's late disclosure of photograph of knife, during defendant's trial for criminal possession of weapon in third degree, did not require reversal, where defendant had opportunity to recall photographer, but chose not to. McKinney's Penal Law § 265.02(1). *People v. Barney, 743 N.Y.S.2d 793 (App. Div. 4th Dep't 2002).*

In prosecution for larceny of vehicle which accused had fled upon seeing police officer, in which defense made discovery demand for all "property obtained from defendant," defendant was entitled to disclosure and availability for inspection of vehicle in question, since it was obtained from defendant despite his flight from officer; moreover prosecution's disclosure of make, year, and registration number of vehicle was insufficient to comply with discovery requirements. *People v Brown (1980) 104 Misc 2d 157, 427 NYS2d 722.*

In prosecution for obscenity involving movie films, defendants' motion to require the people to furnish all prints of film which had been seized, so that defendants' experts might examine them for purpose of testifying at trial, granted in part and denied in part, court directing district attorney to permit defendants' experts to examine films under supervision of district attorney's office at mutually agreeable time and thus permitting defendants to adequately prepare for trial while at same time insuring that films would remain in custody of district attorney. *People v Steinberg, 60 Misc 2d 1041, 304 NYS2d 858.*

Breath sample trapped inside ampule was not tangible object within meaning of discovery statute; thus, breathalyzer ampule was not subject to discovery under statute. *State v Simpson (1979) 40 Or App 83, 594 P2d 425.*

Trial court properly denied defendant's motion to dismiss rape and kidnapping charges based on fact that police had destroyed pipe found on codefendant, allegedly containing small amount of marijuana, which defendant claimed would reveal victim's fingerprints, thus supporting his claim that victim accompanied him voluntarily for purpose of smoking marijuana, where defendant failed to show that identifiable prints were likely to remain on pipe. *State v Kiser (1977) 31 Or App 29, 569 P2d 681.*

See *State v Sahlie (SD) 245 NW2d 476, § 22[e].*

See *Moody v State (Tex Crim) 413 SW2d 109.*

In theft prosecution, police's disposal of physical evidence prior to trial by returning evidence to owner did not deprive accused of right to due process where evidence was immaterial to conviction. *State v Christopher (1978, Wash App) 583 P2d 638.*

See *State v Stewart, 56 Wis 2d 278, 201 NW2d 754, § 11[k].*

[\*25b] Gun, bullet, or shell

In some cases the defendant was permitted to inspect a gun and bullets which were allegedly used in the commission of the offense charged against him.

In *State v Bunk (1949, NJ County Ct) 63 A2d 842*, it was held that the defendant's request to examine certain revolvers and bullets which were allegedly used in the commission of the murder charged against him should be allowed under proper safeguarding restrictions. The court noted that where objects or writings sought by a defendant were directly

involved in the commission of the alleged crime, the present-day trend appears to be toward liberality in the granting of inspection.

In *Application of Hughes (1943) 181 Misc 668, 41 NYS2d 843*, it was held that it was within the discretion of the court to grant an order requiring the production of the gun used in the commission of the alleged murder and bullets found in the body of the victim. Noting that the items in question were evidence in the case, and pointing out that the defendant's experts would be permitted to examine the gun and bullets and to testify to their opinion in regard thereto if they were offered in evidence, the court said that there was no good reason why in a proper case the courts of criminal jurisdiction, in the exercise of sound discretion, should not be permitted to make available to a defendant before trial by discovery and inspection legal evidence in the possession of the prosecuting attorney.

In *People v Courtney (1963) 40 Misc 2d 541, 243 NYS2d 457*, it was held that a defendant who is charged with having committed a murder with a pistol should, in the discretion of the court, ordinarily be permitted to have the gun and bullets inspected by an expert of his selection under conditions protective of the rights of both parties, the court stating that the gun and bullets are evidence and fall within the rule for inspection of things or documents in the possession of an adverse party.

For other cases wherein the court also permitted the defendant to inspect a gun or bullets or shells which were allegedly used or otherwise involved in the commission of the offense charged against him, see the following:

#### ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County (1954) 78 Ariz 74, 275 P2d 887, supra § 25[a]*

#### DELAWARE

*State v Winsett (1964, Del) 200 A2d 237, supra § 11[b]*

#### NEW HAMPSHIRE

*State v Superior Court (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3*

#### NEW YORK

*People v Schemnitzer (1931) 142 Misc 16, 254 NYS 480, supra § 25[a]*

#### PENNSYLVANIA

*Petition of Di Joseph (1958) 394 Pa 19, 145 A2d 187, supra § 25[a]*

Attention is also called to *United States ex rel. Almeida v Baldi (1952, CA3 Pa) 195 F2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L ed 1341, 73 S Ct 639, reh den 345 US 946, 97 L ed 1371, 73 S Ct 828*, a habeas corpus proceeding, wherein it was held that the petitioner, who was convicted of murder in a state court, was deprived of due process of law where the prosecution had deliberately suppressed evidence, including a certain bullet, tending to show that the petitioner did not fire the fatal shot.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect a gun allegedly used in the commission of the offense charged against him.

Where the trial court, in the course of a trial for murder, refused the request of the defendant's counsel to require the prosecution to produce the murder weapon (a shotgun), the court in *Garrett v State (1958) 268 Ala 299, 105 So 2d 541*, held that "there was no error in the court's refusal, and before the evidence was concluded, it was introduced."

Where the defendant moved for an order directing the district attorney to allow him to examine and photograph the pistol allegedly used in the commission of the murder charged against the defendant, and the defendant's moving papers were based on several newspaper articles which, in substance, stated that fingerprint impressions of the defendant had been found on the pistol, the court in *People v Gatti (1938) 167 Misc 545, 4 NYS2d 130*, held that since the motion was based on mere surmise and conjecture that the gun was supposed to have fingerprints of the defendant his present motion must be denied with leave to renew, if he was so advised, upon proof of a proper basis for his request, at which time the merits of the motion might be directly passed upon by the court. Pointing out that what was particularly lacking in the present case was a substantial showing that the pistol sought to be inspected contained any material evidence, outside its general character as a weapon, of any fingerprints, the court said that such motions as the present one must always be addressed to the court's sound discretion on a proper showing of facts which would warrant its exercise. Noting that if there were any imprints on the pistol, the defendant should have the right to show that they were not his, the court added that if there were fingerprints on the pistol in the present case and they tended to show that the defendant was not guilty of the offense charged, an examination of them ought to be allowed to the defense for very obvious reasons of justice, unless in doing so a fair prosecution of the case would be impaired or prejudiced. The court relied on the following rules: the accused has no right to inspection or disclosure of evidence in the possession of the prosecution, and courts ought not to lend their aid when satisfied that a demand for inspection is merely for exploratory purposes; the defense has no right to go upon a tour of investigation in the hope that it would find something which would aid the defendant, but when it does appear that there is evidence in the possession or under the control of the prosecution which is favorable to the defendant, a right sense of justice demands that it should be made available to the defense, unless there are strong reasons otherwise; in the absence of specific statutory procedure and practice or legal precedents to the contrary, this class of motions for discovery and inspection must be left to the sound judgment of the court in the light of all the circumstances and according to a real sense of the justice of the cause.

For other cases wherein the court also refused to permit the defendant to inspect a gun or bullets or shells which were allegedly used or otherwise directly involved in the commission of the offense charged against him, see the following:

#### KENTUCKY

*Kinder v Commonwealth (1955, Ky) 279 SW2d 782, supra § 3*

#### MASSACHUSETTS

*Commonwealth v Jordan (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, supra § 3*

#### MONTANA

*State ex rel. Keast v District Court of Fourth Judicial Dist. (1959) 135 Mont 545, 342 P2d 1071, supra § 3*

## PENNSYLVANIA

*Commonwealth v Zayac (1954) 2 Pa D & C2d 646; Commonwealth v Graham (1955) 42 Del Co 313, both supra § 5[a]*

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In murder prosecution, defendant was entitled to have access to bullet taken from murder victim, as well as bullet known to have been fired from defendant's weapon for purposes of comparison by expert, where defendant's gun was not available and state witness had testified that both bullets had been fired from same weapon. *White v Maggio (1977, CA5 La) 556 F2d 1352.*

Motion by defendant in murder trial that he be allowed to inspect "any written evidence, physical evidence, scientific reports or other tangible evidence and the weapon, if any," if such evidence was to be used at trial, was properly overruled. *McCants v State, 282 Ala 397, 211 So 2d 877.*

Denial of motion for discovery and inspection, by defendant in murder trial, of 16-gauge shotgun, revolver removed from body of deceased, and 2 green shotgun shells, was not error, since no Georgia statute or rule of practice allows such inspection. *Bryan v State, 224 Ga 389, 162 SE2d 349.*

Defendant was not entitled to reversal of second degree murder conviction, although package containing murder weapon, .38 caliber slug, two spent cartridges and victim's clothing was lost during shipment to FBI laboratory in Washington, D. C., where evidence was lost through no fault of state and where there was no showing that defendant was prejudiced by loss of evidence. *State v Ward (1977) 98 Idaho 571, 569 P2d 916.*

Murder and attempted murder defendant's due process rights were not violated by state's failure to preserve and produce gun and cartridges used in crimes, which were erroneously destroyed pursuant to routine police procedures, where defendant failed to show how items were material or favorable to defense in that defendant's purported theory that second gun was involved was contradicted by testimony of defendant and one victim, no other evidence supported theory that destroyed gun was not defendant's gun, and defendant made no pretrial request to examine or test gun and showed no interest in gun until discovered it had been destroyed, nor were defendant's due process rights violated by state failure to disclose existence of ballistics report prior to trial, since defendant was given copy of report at trial and allowed to examine firearms examiner in chambers, state did not use report at trial, and defendant made no showing that noncommittal or neutral report was favorable to defendant. *People v Taylor (1982) 107 Ill App 3d 1019, 63 Ill Dec 634, 438 NE2d 565.*

See *People v Baxtrom (1978) 61 Ill App 3d 546, 18 Ill Dec 718, 378 NE2d 182, § 11[d].*

Revolver found on floor of abandoned automobile which was identified as belonging to robbers should have been revealed to defendant before trial for inspection as requested, where prosecution intended to offer it in evidence; tangible objects which prosecution intends to offer should be subject to inspection, if requested, where no "overriding considerations" are present. *People v Tribbett (Ill App) 232 NE2d 523.*

Defendant in murder prosecution was not entitled to pretrial examination of murder weapon to determine whether pistol had hair trigger where, inter alia, no request was made in trial court for testing by expert; furthermore, oral inculpatory statements made by defendant were not subject to pretrial discovery and same was true of coroner's report to district attorney since such report formed part of prosecutor's private file not subject to discovery. *State v Hodges (1977, La)*

349 So 2d 250, cert den (US) 55 L Ed 2d 779, 98 S Ct 1262.

In murder prosecution, defendant was not entitled to pretrial examination of bullets recovered by police in their investigation where bullets were not badly damaged, permitting quick comparison under dual microscope at trial, where defendant made no request for examination at trial, and where guilt of defendant was established by eyewitness testimony. *State v White (La)* 321 So 2d 491.

In armed robbery prosecution against wife who was found shortly after robbery seated as passenger in husband/robber's automobile, with theft money concealed in her bra, trial judge improperly permitted impeachment of defendants with evidence that bullets were found in wife's purse after her arrest where evidence was not revealed pursuant to pretrial discovery order; defendant had right as matter of fundamental fairness to rely on prosecutor's statements of its expected evidence, and appropriate sanction should have been to suppress evidence for both prosecution's case in chief and for impeachment. *People v Turner (1982)* 120 Mich App 23, 328 NW2d 5.

In murder prosecution, court did not abuse discretion in denying defendant's discovery request for revolver and shells used in shooting where both items had been handled extensively, as request was made three months after murder and it was speculative if fingerprint or cosmetic test would have been productive, and where there was no showing that denial of motion rendered defendant's trial unfair. *State v Whiteaker (Mo)* 499 SW2d 412, 63 ALR3d 1281, cert den 415 US 949, 39 L Ed 2d 565, 94 S Ct 1472.

Trial judge did not err in refusing to declare mistrial when, in response to defendant's motion for mistrial or, in the alternative, to strike testimony of ballistics expert concerning his examination of .45 caliber cartridge which had been given to him by police detective on ground that cartridge, which had been returned to police officer was not available for defendant's inspection, trial judge struck the testimony and instructed the jury to disregard it. Defendant did not question the wording of the instruction to disregard the testimony, which was sufficient to prevent any possible prejudice, and jury was presumed to have followed the instruction. *State v Glidden (1983, NH)* 459 A2d 1136.

Pretrial inspection of .32 caliber revolver, the reported death weapon, and a knife found at scene of crime, and all reports and results of fingerprint tests, if any, made on such weapons, was granted. *Doakes v District Court of Oklahoma County (Okla Crim)* 447 P2d 461.

In prosecution for attempted murder of police officer, defendant was not entitled to production of police officer's service revolvers for examination and testing under statute requiring production for examination by defendant in criminal case of "tangible objects" only when "district attorney intends to offer evidence at trial" or when such objects "were obtained from or belong to defendant" where state's attorney had informed trial court that state did not intend to offer these two guns in evidence and they were not obtained from and did not belong to defendant; nor was defendant entitled to production under rule in Brady where guns were not clearly "favorable" to defendant and "material" to his guilt or innocence; however should scientific tests be made by state which disclosed that bullet fragments were fired by one of service revolvers, state would have affirmative duty to disclose results to defendant, both under Brady and also under state statute. *State v Koennecke (Or)* 545 P2d 127 (citing annotation).

Defendant charged with robbery was denied inspection of pistol and shells removed from his person on date of his arrest. *Bosley v State (Tenn)* 401 SW2d 770.

In prosecution for aiding and abetting assault with intent to commit armed robbery, defendant was not entitled to inspect pistol and it was properly admitted into evidence, even though state had neglected or failed to produce weapon for defendant's inspection, in absence of oral or written motion to inspect as required by statute. *Anglin v State (1977, Tenn Crim)* 553 SW2d 616.

Defendant in murder prosecution was not entitled to pretrial examination of bullet which killed victim. *Fox v State*

(*Tenn Crim*) 441 SW2d 491.

In murder prosecution, defendant was not denied due process by suppression of evidence regarding trajectory and deflection of bullet testified to by state witness since, though certain information used as basis for witness' conclusions had been left out of ballistics report, there was no indication witness intended to suppress information or that prosecution was aware of it, prosecution had provided defendant with copy of ballistics report pursuant to discovery request, defendant failed to move to allow own expert to examine bullet despite fact that conclusions of state witness were contained in report, evidence was disclosed at trial and defendant could have secured due process rights by moving for continuance, and defendant did not show that earlier receipt of information would have advanced defense or materially affected determination of guilt. *Losoya v State* (1982, *Tex App 4th Dist*) 636 SW2d 566.

[\*25c] Clothing

In some cases the defendant was permitted to inspect certain clothing which was evidently involved in the commission of the offense charged against him.

In *People v Roldan* (1964) 42 Misc 2d 501, 248 NYS2d 408, it was held that the defendant was entitled to the opportunity, prior to trial, to conduct a chemical analysis or any other scientific test of the clothing which he was wearing at the time of his arrest, if it appeared that the clothing had been confiscated by the prosecuting attorney. The court took the view that where there is evidence in the hands of the prosecution which is of such a nature as to require lengthy examination by experts to determine whether it is favorable to the defendant, the court will afford to the defendant an adequate opportunity, prior to trial, to examine the evidence, in the interest of justice and to avoid delay at the trial.

An order requiring the prosecution to produce, for inspection by the defense, certain clothing which was evidently involved in the commission of the alleged offense was also granted or upheld in the following cases:

#### ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887, supra § 25[a]

#### NEW HAMPSHIRE

*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3

#### PENNSYLVANIA

*Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, supra § 25[a]

*Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120, supra § 25[a]

And in *People v Hoffman* (1965) 32 Ill 2d 96, 203 NE2d 873, supra § 4[b], a judgment of conviction for murder was reversed, on the ground of a violation of due process, where the prosecution refused, upon demand, a pair of men's shorts which were evidently involved in the commission of the crime.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect certain clothing which was evidently involved in the commission of the offense charged against him.

#### GEORGIA

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, supra § 3

#### KENTUCKY

*Wendling v Commonwealth* (1911) 143 Ky 587, 137 SW 205, supra § 3

#### LOUISIANA

*State v Dowdy* (1950) 217 La 773, 47 So 2d 496, cert den 340 US 856, 95 L ed 627, 71 S Ct 75, supra § 25[a]

#### MONTANA

*State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, supra § 3

And in a prosecution for rape, the denial of the defendant's motion, made first prior to the trial and again during the trial, to have the prosecutrix's undergarments worn at the time of the alleged offense sent to a laboratory for examination as to stains or evidence of ravishment and to have a report of such examination sent to the trial court and the defendant's counsel, was upheld in *State v Allen* (1924) 128 Wash 217, 222 P 502, on the ground that there was no abuse of discretion in the trial court's ruling. The court pointed out that the defendant had not made a request to place the garments at his disposal so that he could have them microscopically examined by his own experts; that the prosecution's own expert did not testify nor did the prosecution claim that the stains upon the garments were seminal, but the prosecution simply introduced them for the purpose of showing what their condition was at the time of their removal from the person of the prosecutrix; and that the most favorable circumstance to the defendant that could arise from an examination of the garments would be to establish that they were without seminal stains, but since the prosecution made no claim that the garments had such stains upon them, it would seem that the defendant had the benefit of the fact as the evidence stood. The court said that under all circumstances the granting or refusing to grant such an order must rest in the discretion of the trial judge, to be reviewed only for manifest abuse.

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See *Smith v State*, 282 Ala 268, 210 So 2d 826, supra § 22[e].

See *State v Ward* (1977) 98 Idaho 571, 569 P2d 916, § 25[b].

Wife's voluntary manslaughter conviction, which resulted from shooting death of her husband, was reversed where defense contended that pregnant wife shot in self-defense after repeated beatings, and where state failed to produce pursuant to discovery request a torn lady's sweatshirt which was taken into police inventory and which was material evidence in that it corroborated defendant's testimony of struggle. *People v Bennett* (1980) 82 Ill App 3d 225, 37 Ill Dec 648, 402 NE2d 650.

In prosecution for rape, deviate sexual assault and unlawful restraint, where prosecutor saw complainant's panties before she testified for first time but did not disclose their existence to defense counsel until 2 days later through indirect means of complainant's redirect examination testimony, where complainant testified that defendant had ripped panties when he removed them during course of sexual attack, but where condition of panties tended to negate element of force, and hence guilt of accused as to offense of rape, supreme court rule requiring disclosure to defense counsel of favorable evidence was violated and such error was not harmless. *People v Loftis (1977) 55 Ill App 3d 456, 13 Ill Dec 133, 370 NE2d 1160.*

Defendants were denied due process of law by prosecution's suppression of shoe, despite court order which required production of all physical evidence in state's possession that was favorable to defendants and which pertained to case, where shoe, which was found under window of burglarized apartment and which was not defendant's size, could conceivably produce evidence or clues that would substantiate defendants' claim that they were not at scene of crime. *People v Nichols, 27 Ill App 3d 372, 327 NE2d 186 (citing annotation).*

It was not error to deny defendant's post-trial motion to require prosecution to produce defendant's street clothes where defendant's counsel was aware of existence of clothes at time of trial but had made no motion to produce them and where clothing's cleanliness had little probative value since, it was not inspected until morning after defendant's arrest and since defendant could have stayed clean even if he were not in standing position. *Johnson v State (Ind) 319 NE2d 126.*

In prosecution for aggravated rape, trial court erred in refusing to grant defendant's motion to examine and test clothing taken from victim and defendant soon after crime where victim's clothing was stained with blood and semen and defendant's pants and shirt showed semen residue and where, had defendant's experts been allowed to test semen stains on victim's clothing, it was possible that they might have discovered that they did not match defendant's secretion or blood groupings. *State v Gray (1977, La) 351 So 2d 448.*

Prosecutor suppressed exculpatory evidence where it failed to produce red shirt found by sheriff near area where defendant was arrested where, since identification was critical in case, introduction of shirt defendant claimed he was wearing on day in question could have been favorable to his defense by bolstering credibility of his alibi witnesses and supporting contention that he was elsewhere at time offense took place. *People v McCartney (1975) 60 Mich App 620, 231 NW2d 472, later app 72 Mich App 580, 250 NW2d 135.*

Prosecutor should have made ski hat containing human hairs, 2 buttons and piece of cloth material, allegedly left behind by defendant during burglary, available to defendant, if they existed, upon request, without requiring defendant to obtain subpoena. *People v Dee, 44 App Div 2d 721, 355 NYS2d 13.*

In sexual abuse prosecution in which defense trial strategy was that alluringly attired complainant consented to defendant's advances, prosecutor committed reversible error in failing to disclose possession of dress worn by complainant and photograph depicting dress's length and torn condition. *State v Dickerson (1978) 36 Or App 479, 584 P2d 787.*

In prosecution for rape, defendant failed to show any prejudice to his case by failure of state to produce all garments worn by complaining witness on night of incident where defense counsel had opportunity to examine pair of slacks worn by complaining witness and other clothes worn by her had been laundered before defendant's request and where, having limited wardrobe, she could not give these articles to state except by divesting herself of clothing, including shoes. *State v Long (Vi) 349 A2d 232.*

Defendant in homicide prosecution was entitled to discovery of clothing, blankets and other materials found at scene of crime where there was reasonable possibility that evidence was material to guilt or innocence and favorable to defendant and destruction of such evidence before trial warranted dismissal. *State v Wright, 87 Wash 2d 783, 557 P2d*

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[\*25d]     Liquor; narcotic

In some cases involving a prosecution for illegal possession or transportation of liquor, the defendant was permitted to inspect the liquor allegedly involved in the case and seized by the prosecution.

See also *State v Bramhall (1913) 134 La 1, 63 So 603*, where the court, affirming a judgment of conviction for selling intoxicants without a license, held that if the defendant's request that the prosecution should furnish him a sample of the liquor allegedly sold by the defendant, in order that he might have it analyzed, had been made in a sincere effort to establish the truth, a refusal of the request would have been error, since the guilt or innocence of the defendant depended upon whether the liquor was intoxicating or not, but that where it appeared that the defendant had sold a liquor manufactured by a brewery and had quantities of the same kind on hand or could easily have obtained some, his request for a sample from the prosecution was "but a trifling with the [trial] court."

In *State v Lowery (1926) 160 La 811, 107 So 583*, a prosecution for illegal transportation of intoxicating liquor, it was held error for the trial judge to deny the defendant's request for the production of the alleged intoxicating liquor involved so that he might have it analyzed in order to determine its alcoholic content. The court pointed out that the alleged whisky was in the possession of the prosecution, and no valid reason had been given why it could not have been produced in open court when the motion for its production was filed; and that in such a proceeding the prosecution's case could not have been injured, in view of the fact that if the liquid was actually whisky, an analysis by the defendant would have confirmed such fact, and, on the other hand, if an analysis showed that the alleged intoxicant was not whisky, such showing was an essential element of the defendant's defense.

In *State v Naething (1927) 318 Mo 531, 300 SW 829*, wherein the defendant was charged with possession of intoxicating liquors, it was held error to deny the defendant's motion to examine, inspect, and take for analysis samples of the alleged intoxicating liquors which were found in his home and seized under a search warrant. Noting that the defendant's right to such an inspection was supported by cases from other jurisdictions which were cited by the defendant, the court rejected the contention that the defendant's motion did not state for what purpose he desired the items in question. Pointing out that the defendant's motion asked for samples and an opportunity to inspect and examine the liquor because "defendant cannot safely proceed to trial unless and until he has said information," the court said that the clearly implied purpose of the motion was to enable the defendant to examine and test the liquor in order that he might produce, upon the trial, proof that the liquor was not intoxicating; and that the defendant was not foreclosed from offering proof on this issue at variance with evidence offered by the state.

See also *Enochs v State (1945) 81 Okla Crim 111, 161 P2d 87*, a prosecution for unlawful possession of intoxicating liquor, wherein the court, in holding that a judgment of conviction was properly supported by competent evidence, said, "If counsel for defendant had requested the [trial] court to produce the alleged intoxicants for examination, or for inspection of the court, it would have been perfectly proper for the court to have required the liquor to have been brought into the court room for his examination."

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In other cases, however, the court, holding that the prosecution was not required to produce the liquor allegedly involved in the case before a conviction might be had for unlawful possession of intoxicating liquor, upheld the trial court's denial of the defendant's request for production of such liquor.

Where, in a prosecution for unlawful possession of intoxicating liquor, the trial court sustained the defendant's demurrer to the evidence of the prosecution for the reason, among other things, that the intoxicating liquor set forth in the

information had not been produced as requested by the defendant, the court in *State v Gragg (1941) 71 Okla Crim 213, 110 P2d 321*, an appeal by the prosecution from an order discharging the defendant, held that it was error to sustain the defendant's demurrer to the prosecution's evidence, since the prosecution was not bound to produce the original liquor in court in order to sustain the allegation that the defendant was in possession of intoxicating liquor. The court said, in its syllabus of the case, "Where one is charged with the unlawful possession of intoxicating liquor, it is not necessary for the State to produce the identical liquor as alleged in the information, before a conviction may be had for the unlawful possession. This is a question of fact to be decided by the court or jury."

In *Byrd v State (1950) 91 Okla Crim 433, 219 P2d 1027*, a prosecution for unlawful possession of intoxicating liquor, the defendant's contention that it was error for the trial court to deny his request for the production of the seized liquor was denied, the court entirely relying on the decision in *State v Gragg (1941) 71 Okla Crim 213, 110 P2d 321*, supra.

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The denial of the defendant's motion for production of the liquor allegedly involved in the case was upheld in *State v Thomas (1928) 167 La 386, 119 So 401*, supra § 7, for the reason that at the time of the motion the liquor was not in the possession or under the control of the prosecution, but had been turned over to the federal authorities.

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On the other hand, a prosecution for possession of narcotic drugs, the defendant's pretrial motion for the production of one of the capsules seized from the defendant by police officers, in order that the defendant could have a chemical analysis of the capsule, was held properly denied in *Lander v State (1958) 238 Ind 680, 154 NE2d 507*. Noting that production of papers in a criminal case was statutory in Indiana, and not an absolute right, and that what the defendant was attempting in the present case was to assert an equitable right of discovery not based upon any statute, the court said that if the rules of criminal procedure were to be changed to permit a discovery of this nature, it should be done by statute or by rule of the Indiana Supreme Court, so that a trial court might feel safe in ruling upon such a motion on the basis of the law of Indiana as it existed at the time of the ruling. The court added that if the defendant was of the opinion that a doctor who testified for the prosecution as to the contents of the capsules was incompetent or had perjured himself, the defendant could have moved for a chemical analysis of one of the capsules after they were introduced in evidence; and that there was not the slightest shadow cast upon the credibility of this witness as an expert or an impartial witness.

In a prosecution for illegal selling of a narcotic drug, the defendant's pretrial motion for permission to inspect the alleged narcotic in question was granted in *People v Perrell (1965) 47 Misc 2d 1024, 263 NYS2d 640*, on the condition that the inspection and chemical analysis of the alleged narcotic by the defense should be conducted under the supervision and on the premises of the police laboratory. Stating that the granting of such a motion is discretionary when the interests of justice will be served, the court pointed out that the determination of the chemical composition of the substance purported to be a narcotic might determine the outcome of the case.

The defendant's pretrial motion for permission to inspect and analyze the items seized by the police in connection with the case was also held properly denied in *Dagley v State (1965, Tex Crim) 394 SW2d 179*, a prosecution for the unlawful possession of narcotic paraphernalia. Noting that there was no statutory provision for pretrial inspection of evidence in the possession of the prosecution, the court followed the rule that an accused is not entitled to a pretrial inspection of his confession or other exhibits in the possession of the prosecution.

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In prosecution for selling marijuana, denial of defendant's motion to be furnished with sample of allegedly prohibited substance that was offered against him at trial so that he could have its qualities researched by scientists of his choosing amounted to denial of due process. *Warren v State*, 292 Ala 71, 288 So 2d 826.

In prosecution for unauthorized possession of drugs in penal institution, based on finding of balloon of heroin between defendant's shorts and pants when he was searched on his return from work furlough leave, no violation of due process occurred when prosecution failed to comply with discovery order granting defendant's request to view pants and shorts. Compliance with order was impossible in part since prior to issuance of discovery order, pants had been washed and comingled with other prison clothing and defendant failed to show that shorts were ever within law enforcement custody and/or lost or destroyed because of law enforcement action or inaction. *People v Carrasco* (1981, 5th Dist) 118 Cal App 3d 936, 173 Cal Rptr 688.

Defendant charged with possession of marijuana has, upon motion timely made, right to have it examined independently in state laboratory under control and supervision of state unless valid reason to the contrary exists. *Patterson v State* (Ga) 232 SE2d 233.

Defendant was entitled to have expert of his own choosing analyze alleged controlled substance where request for analysis was filed three months after indictment, just over month after denial of motion to suppress substance, and more than one month before trial was held. *Gilliland v State* (1977) 142 Ga App 374, 235 SE2d 780.

Defendant was not entitled to access to sample of alleged marijuana for testing and use of state crime lab absent showing that denial of such access so impaired defense that defendant was denied a fair trial. *Herrin v State*, 138 Ga App 729, 227 SE2d 498.

Defendant was not entitled to sample of seized substance alleged to be marijuana in order to conduct independent scientific inspection absent showing that evidence sought was favorable to accused. *Mobley v State*, 130 Ga App 80, 202 SE2d 465.

In prosecution for possession of controlled substance, where State unnecessarily and presumably intentionally destroyed alleged contraband without giving defendant opportunity for his own testing or protection of court-imposed safeguards, trial court committed reversible error in admitting evidence of results of *State's test*. *People v Dodsworth* (1978) 60 Ill App 3d 207, 17 Ill Dec 450, 376 NE2d 449.

Whenever accused seeks by timely motion sample of allegedly controlled substance, so that it can be subjected to independent testing under appropriate safeguards as may be deemed necessary by trial court, heavy burden devolves upon state either to produce testable sample or to prove by clear and convincing evidence that destruction of all of the substance in its possession was necessary. *People v Taylor* (1977) 54 Ill App 3d 454, 12 Ill Dec 76, 369 NE2d 573.

In prosecution charging conspiracy to deal in narcotics, motion to compel discovery of supposed contraband by obtaining samples for purpose of independent testing was properly denied, where defense had been furnished results of laboratory testing with sufficient time for defense witness to examine those results prior to trial, and where defendants made no effort to affirmatively demonstrate that sample was material or that independent analysis of a sample would have exculpated them. *Everroad v State* (1982, Ind) 442 NE2d 994.

In prosecution for selling single "hit" of LSD, due process was not violated merely because of state's destruction of LSD during police testing procedures. *Schwartz v State* (1978, Ind App) 379 NE2d 480.

In prosecution for possession or sale of prohibited substance, defendant is entitled to small amount of drug for independent, pretrial inspection where a sufficient amount of the evidence exists; guidelines should be fixed, if

necessary, to control time, place and manner of inspection. *State v Hopkins (1977, La) 351 So 2d 474.*

Although defendants in prosecution for distribution of heroin should be granted right to independent scientific examination of contraband drug in state's possession, defense counsel was not entitled to examine drug where he sought only right to go and look at evidence, not necessarily to take chemical analysis and there was no showing that such action would affect defendant's guilt or innocence. *State v Jones (1977, La) 345 So 2d 1161.*

Where there was sufficient quantity of narcotic substances so that no practical problems would be presented if defendant were permitted to have a portion for examination by independent expert, pretrial examination would be ordered, with trial judge to set appropriate guidelines. *State v Migliore, 261 La 722, 260 So 2d 682.*

In prosecution for unlawful sale or possession of drugs in which motion is made for pretrial discovery and inspection of allegedly illegal substance and for independent analysis thereof, accused should support motion with affidavit tending to show reasonableness and feasibility of independent analysis and state should then file counteraffidavit identifying disputed issues of fact, if any; thereafter, trial court should approach problem with disposition to permit independent analysis if such is reasonable and practicable, but court may decline or order sample released by state and require that requested analysis be performed at state's expense and under its supervision. Moreover, where quantity of substance is not sufficient to permit testing and still leave enough for evidence at trial, court may decline to order any independent analysis whatsoever. *State v Cloutier (Me) 302 A2d 84.*

In prosecution for unlawful possession of heroin, question of whether defendant had right to conduct independent scientific examination of alleged heroin was matter for trial court's discretion. *People v Bell (1977) 74 Mich App 270, 253 NW2d 726.*

Defendant charged with possession of marijuana was entitled to have portion of substance found in his car and alleged to be marijuana given to him by state in order that he could have such sample analyzed by chemist of his own choosing. *Jackson v State (Miss) 243 So 2d 396, affd 261 So 2d 126.*

In prosecution for possession and sale of dangerous drug, defendant's request for physical inspection and scientific testing of items of evidence by experts was reasonable and necessary for preparation of his defense. *People v Spencer, 79 Misc 2d 72, 361 NYS2d 240.*

Although no drug had been shown to have been seized or tested, defendant charged with selling dangerous drug would, under statute, be entitled to reports and documents concerning tests and experiments made on substance; however, he could not obtain sample for his own tests until after substance was received in evidence, since it should not be tampered with or altered prior to exposure to jury for determination whether it was dangerous drug. *People v Goetz, 77 Misc 2d 319, 352 NYS2d 829.*

In prosecution for possession and sale of marijuana, substance alleged to be marijuana was tangible piece of evidence which ought not to be tampered with or altered in size, shape, or weight until its introduction in evidence, and furthermore, weight of substance could well determine outcome of case insofar as degree of crime was concerned; consequently defendant's motion for order allowing independent chemical analysis of substance was granted to limited extent of permitting defendant, or her expert, to visually examine substance, and, under supervision of prosecution or law enforcement agency, to physically weight substance. *People v McDonald, 59 Misc 2d 311, 298 NYS2d 625.*

In prosecution for possession of dangerous drug, where defendant's guilt or innocence hung exclusively on nature and amount of substance in question, it was error to deny defendant discovery to permit him to conduct his own test with respect to allegedly dangerous drug on which indictment was based. *People v White 40 NY2d 797, 290 NYS2d 405, 358 NE2d 1031.*

Denial of defendant's applications before trial and at trial for opportunity to have independent expert weigh narcotics was error, at least as to pretrial application, especially as claimed weight was so close to statutory minimum. *People v Moore* (1977) 60 App Div 2d 477, 400 NYS2d 526.

In prosecution for possession with intent to deliver or delivery of marijuana, trial court erred by refusing defendant's request to have an independent expert examine the substances in question; case would be remanded to allow defendants' experts to conduct an independent examination of substances, and if substances were marijuana trial verdict would remain, but if not new trial would be granted. *Commonwealth v Arenella* (1982, Pa Super) 452 A2d 243.

Pretrial discovery request by defense in prosecution for delivery of marijuana to undercover police officer, for quantity of alleged contraband for independent testing was properly denied based on overbreadth where no expert witness was identified and no outline of circumstances and conditions under which proposed test would be performed. *State v Faraone* (1981, RI) 425 A2d 523.

Indigent defendant charged with five counts of distributing marijuana to undercover police agent was entitled to sample of alleged marijuana for testing and to independent expert to evaluate substance, although such expert need not be of defendant's choosing. *State v Hanson* (1979, SD) 278 NW2d 198.

State statute permitting defendant to "inspect" objects belonging to him but in possession of prosecution was enacted to meet demands of due process, and required that one defendant in drug prosecution be supplied with sample of drug specimen forming basis of prosecution in order to conduct independent scientific analysis of such specimen; however, another defendant's conviction would not be reversed for failure of prosecution to give defendant sample of controlled substance in order to analyze it where defendant's motion was not made, if made at all, until day of trial. *State v Gaddis* (Tenn) 530 SW2d 64 (citing annotation).

See *State v Christmas* (Tenn) 529 SW2d 717, § 6[b].

In prosecution for possession of controlled substance, defendant's motion made 5 1/2 months after indictment, requiring state to furnish specimen sample of alleged marijuana or drug in order that independent examination could be made, should have been granted where trial was not commenced until 44 days after defendant's motion and thus motion was made in ample time so as not to cause postponement or continuance of final hearing. *State v Stephens* (Tenn) 529 SW2d 712.

In prosecution for possession of controlled substance with intent to sell, reversible error occurred where state refused to provide defendant with sample of contraband and papers seized at time of his arrest pursuant to pretrial discovery request; error was compounded when trial court refused to grant continuance for compliance with defendant's discovery motion. *State v Benson* (1983, Tenn Crim) 645 SW2d 423.

In prosecution for selling a controlled substance, LSD, although state was not required to allow defense counsel to inspect and duplicate tests, graphs, charts, photographs, records and other documents or tangible objects used in analysis of alleged controlled substance by state toxicologist, trial court erred in not requiring state to comply with statute by permitting defendant to inspect alleged controlled substance and to have independent analysis made by expert of his own choosing. *Latham v State* (1978, Tenn Crim) 560 SW2d 410.

Defendant in prosecution for sale of drugs was not entitled to have alleged LSD analyzed by independent testing where laboratory selected by defendant was not permitted under federal law to possess any controlled substances and defendant refused to select any other laboratory that would have been qualified to receive drugs. *Bryant v State* (1977, Tenn Crim) 549 SW2d 956.

Defense discovery request for "any tangible object, written statement, report, or any other type of evidence that would

be favorable to defendant in preparation of his defense" was insufficient to constitute request for independent chemical analysis of suspected drug. *Mendoza v State* (1979, *Tex Crim*) 583 SW2d 396.

Failure to grant defendant's discovery motion for independent chemical analysis of alleged marijuana was reversible error; and defendant's failure to request that representative of state be present at all times during analysis was irrelevant where statute required that trial court set time and place for inspection and determine manner in which it would be conducted. *Terrell v State* (*Tex Crim*) 521 SW2d 618.

Motion to examine and conduct chemical analysis of narcotic paraphernalia for traces of heroin was properly denied where there was no trace of heroin remaining on narcotic paraphernalia after analysis by police chemist. *Montes v State* (*Tex Crim*) 503 SW2d 241.

In prosecution for possession of LSD, defendant was entitled not only to visually inspect drugs which state intended to introduce into evidence, but also to have such drugs examined and tested by expert of defendant's choosing, under appropriate safeguards. *Detmering v State* (*Tex Crim*) 481 SW2d 863.

In prosecution for possession of marijuana, it was error for court to deny defendant's motion for production of portion of substance allegedly purchased from him, where defendant wished to have substance analyzed by his own expert. *State v Harr* (*W Va*) 194 SE2d 652.

In prosecution for possession of marijuana, accused was entitled to examine under proper supervision, portion of substance taken from him in order to determine whether it was actually illegal portion of cannabis plant, and it was error to deny his motion for such permission. *State v Smith* (*W Va*) 193 SE2d 550.

[\*26] Body, part thereof, or specimen therefrom

In some cases the court permitted the defendant to inspect parts or organs of the body of a human being or specimens and samples removed therefrom.

Where an autopsy surgeon testified at the preliminary examination of the case that the death of the victim of the alleged murder was due to shock as the result of a whipping or beating of him, it was held in *Schindler v Superior Court of Madera County* (1958) 161 Cal App 2d 513, 327 P2d 68, disapproved on another point in *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571, that the defendant was entitled to an order for pretrial inspection of specimens and samples taken by the autopsy surgeon from the body of the victim. The court noted that an independent examination of such specimens by another qualified pathologist might indicate that the death of the victim was not due to the blows received, or at least might tend to refute the conclusion reached by the autopsy surgeon.

The view that in a proper case an accused has the right to inspect the corpse of the victim of the offense charged against him was also taken in *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, supra § 8.

In *State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3, it was held that the defendant was entitled to inspect before trial specimens of hair taken from his person and "parts" or "contents" of the corpse of the victim of the alleged murder.

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In the following cases, on the other hand, the court refused to permit the defendant to inspect parts, organs, or tissue of a human body or certain other specimens removed therefrom.

## COLORADO

*Massie v People* (1927) 82 Colo 205, 258 P 226, infra  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287, supra § 3

## MASSACHUSETTS

*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950  
*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, both supra § 5[a]

## MONTANA

*State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, supra § 3

## NEBRASKA

*Parker v State* (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775, supra § 5[a]

Where a defendant, accused of poisoning his wife, moved before trial for inspection and examination of the internal organs of the wife, the court in *Massie v People* (1927) 82 Colo 205, 258 P 226, upholding the denial of the motion, said: "If, under any circumstances, the motion was good its allowance seems clearly discretionary, reviewable only for gross abuse and none such is disclosed. It is clear from the record that at the time of the hearing on the motion the defense was apprised of the position of the prosecution and its claim of evidence of poisoning, yet it was not alleged that a further examination would in fact refute that claim, or that the movers so believed, or that they were doubtful on the subject."

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Defendant charged with second degree murder was not denied due process of law by reason of funeral and subsequent cremation of victim's body before independent post mortem could be conducted at defendant's request by his own independent experts, since pretrial discovery is not required by due process, victim's body was never in possession of prosecution, and record was devoid of facts indicating that coroner turned body over to victim's parents to forestall or prevent examination by defendant. *People v Vick*, 11 Cal App 3d 1058, 90 Cal Rptr 236.

Indictment charging defendant with sodomy, robbery, sexual abuse, and criminal possession of weapon would be dismissed, where police unaccountably failed to preserve for testing samples of blood of perpetrator of crimes charged in indictment. *People v McCann* (1982) 115 Misc 2d 1025, 455 NYS2d 212.

In prosecution for driving while intoxicated, defendant had right, pursuant to pretrial discovery motion, to portion of his blood sample in sufficient quantity as to enable defendant's expert to perform independent test, but such portion of sample must not be so large as to chemically alter or modify remainder to be retained by prosecution. *People v North* (1978) 96 Misc 2d 637, 409 NYS2d 482.

Bodily substances (blood, hair, and saliva) obtained from defendant by police before trial were not material to defense

and therefore not discoverable, since same bodily substances could have been obtained from defendant by his counsel at time discovery motion was made. *State v Little (Or) 431 P2d 810*.

Skull which had been disposed of after completion of examination by state medical examiner was not discoverable where state did not intend to offer it in evidence and where defendant failed to establish that examination of skull would be material and favorable to defense. *State v Oliverez (1978) 34 Or App 417, 578 P2d 502*.

[\*27] Other kinds or types of evidence

[\*27a] Documentary

The defendant's right to inspection of documentary evidence not specified heretofore has been considered in the following cases.

On the other hand, the trial judge's refusal to order the prosecution to produce the search warrant under which the defendant's premises had been searched was held not error in *State v Thurston (1946) 210 La 797, 28 So 2d 274*, the court pointing out that no legal reason had been shown for the production of the search warrant nor had any issue been presented because of the failure to produce it on the trial.

The defendant's motion for permission to inspect a search warrant and the papers upon which the warrant was based (it appearing that such warrant and papers were in the possession of the arresting officer) was granted in *People v Kelly (1962) 33 Misc 2d 1083, 227 NYS2d 884*, the court stating that in the absence of legislation to the contrary, it would entertain "a motion upon proper notice by a defendant to inspect search warrants, affidavits, returns, etc. of any warrant" which originated out of it.

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In *Spicer v State (1914) 188 Ala 9, 65 So 972*, the court, in reversing a judgment of conviction on other grounds, held that there was no error in the trial court's refusal to require the prosecuting attorney to turn over to the defendant's counsel a certain slip of paper on which the defendant had written his name. Pointing out that the paper was not offered in evidence, the court said that the defendant had no right to see it.

The denial of the production of a copy of a telegram which contained a statement of a certain prosecution witness and which was in the possession of the district attorney was held not error in *Kirpatrick v State (1919) 85 Tex Crim 172, 211 SW 230*, the court pointing out that "it was not claimed that there were any witnesses present who could identify said copy or in any way relieve its contents from being wholly hearsay and secondary," and that the copy in question was not an original paper.

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Motion by defendant in murder trial that he be allowed to inspect "any written evidence, physical evidence, scientific reports or other tangible evidence and the weapon, if any," if such evidence was to be used at trial, was properly overruled. *McCants v State, 282 Ala 397, 211 So 2d 877*.

First degree robbery defendant had no right to discover prior trial criminal records of, or immunity promised to, any of state's witnesses, including accomplices, nor did he have right as indigent to free transcript of co-defendant's trial. *Mardis v State (1982, Ala App) 423 So 2d 331*.

Defendant in homicide prosecution in which self-defense was raised was not entitled to inspect decedent's prison record where the prison record was not relevant to the issue of the decedent's reputation or to any issue in the case even though the file might have been useful in supplying leads for gathering further evidence. *Evans v State (Ala App) 338 So 2d 1033*.

Trial court did not err in denying motion to produce writing signed by defendant in which he waived right to have counsel present at lineup, where at trial defendant testified freely that he signed waiver, and where defendant's attorney had ample opportunity to examine waiver before it was introduced in evidence. *Henry v State (Ala App) 239 So 2d 318*.

In prosecution for murder and assault with deadly weapon based on death of 14 year old junior high school student, where defendant asserted defense of self-defense, and where defendant filed motion for disclosure of deceased victim's school records, trial court should have held in camera inspection in presence of counsel to determine whether there was anything in records germane to issues involved and should have limited defendant's access to materials in victim's records which would be relevant to self defense issue, incidents involving victim's aggressiveness or assaultive tendencies. *State v Birdsall (1977, App) 116 Ariz 196, 568 P2d 1094*.

In prosecution of 2 deputy sheriffs, one of them black and the other white, arising out of alleged inhuman detention of juvenile in their patrol car in violation of statute prohibiting "wilful inhumanity or oppression toward a prisoner," in which defendants claimed discriminatory enforcement of statute against them (the black because of his color and the white because he was the black's partner in the incident), defendants were entitled to discovery, from prosecutor, of statistical summary of sheriff's department records for preceding 14 years that might show different policies toward black and white officers with regard to prosecuting, as distinguished from merely disciplining, them for such offenses. Defendants' supporting declarations, specifying instances of similar but more serious offenses by 9 white officers who were not prosecuted, established plausible justification for discovery, and data sought, unobtainable through defendants' own efforts and limited to statistical summaries, avoided possibility of impairing confidentiality of sensitive information irrelevant to their actual defense. *Griffin v Municipal Court 4 Desert Judicial Dist. (1977) 20 Cal 3d 300, 142 Cal Rptr 286, 571 P2d 997*.

Criminal defendant was entitled to discovery of criminal charges currently pending against prosecution witnesses anywhere in state, such evidence being material to a witness' motivation in testifying even where no express promises of leniency or immunity had been made, and a list of charges currently pending against prosecution witnesses being easily compilable from information readily available to the district attorney while there was no similarly expedient method by which defense counsel could obtain information through his own efforts. However, denial of discovery by court or noncompliance by prosecution would not be reversible error per se, and since appellate court could not determine from the record whether compliance with defendant's request would have revealed any pending charges, and thus could not say that prejudice did or did not exist, cause would be remanded with directions to order prosecutor to furnish list of any criminal charges pending against any prosecution witnesses at time of trial, and, if no such charges were then pending, to reinstate original judgment and sentence, but, if such charges were pending, to evaluate the materiality of this new evidence in light of the whole record and determine whether to grant defendant a new trial. *People v Coyer (1983, 1st Dist) 142 Cal App 3d 839, 191 Cal Rptr 376*.

Defendant charged with possession of PCP for sale was not entitled to pretrial discovery of home addresses of two arresting police officers, such request made on the ground that defense should be allowed to investigate the officers' reputations in their home communities for possible impeachment purposes. *People v Lewis (1982, 2d Dist) 133 Cal App 3d 317, 184 Cal Rptr 31*.

In prosecution for bookmaking offenses of persons involved in operating neighborhood restaurants and bars, trial court did not abuse discretion by denying defense motion for discovery of documentary evidence, allegedly possessed by the prosecution, to show discriminatory law enforcement, where defendant did not make prima facie showing of selected prosecution based solely upon geographic or socio-economic factors. Although it was not necessary that the "class"

involved be one against which there has been traditional or historic discrimination, naked allegation that defendants were members of class of local neighborhood bars did not give rise to rational inference of selective law enforcement based on condemned invidious criteria. *Perakis v Superior Court of Santa Clara County (1979, 1st Dist) 99 Cal App 3d 730, 160 Cal Rptr 445.*

It was error for trial court to deny defendant's request for disclosure of juvenile witness' "rap sheet," but error was harmless where there was no showing that witness had "rap sheet" and where witness' testimony was self-incriminatory. *Re B. (1978) 82 Cal App 3d 106, 146 Cal Rptr 828.*

In prosecution for drug offenses, battery on two peace officers, and resisting arrest, trial court committed no abuse of discretion in denying accused's pretrial motion for discovery of "All crime reports or arrest reports filed by either of the officers. . . in which the principal complaint against the suspect was [battery, resisting arrest,] or some other act of aggression against or resistance to said officers, within the last 10 years." Though such reports were sufficiently identified, and accused in his supporting declaration referring to officers' propensity for violence or ethnic or racial prejudice, satisfied requirement of plausible justification for them to support his defense to battery and resisting arrest charge, burden on prosecution in producing such reports would have been excessive; moreover, compared with "All records involving all persons who [had] at any time filed complaints" against officers, as to which trial court had already granted accused's motion for discovery, usefulness to him of crime and arrest reports would have been highly speculative. *Lemelle v Superior Court of Orange County (1978) 77 Cal App 3d 148, 143 Cal Rptr 450.*

In prosecution for escape from lawful custody, trial court did not abuse its discretion in granting prosecution's motion to quash subpoena for personnel and unit files on two sheriff's officers involved in alleged threats to defendants, where record indicated that discovery was initiated after prosecution rested and after more than week of trial; where two officers whose files were sought were not on people's witness list, but were known to defendants and on their witness list from inception of trial; and where defendants failed to show how requested material, at that time, would be relevant either as admissible evidence or as information that would assist defendants in preparing their defense. *People v Condley (1977) 69 Cal App 3d 999, 138 Cal Rptr 515.*

Court did not abuse its discretion in denying request for production of complete personnel files of all prison staff members and inmate files of all prisoners that each side was considering calling to testify where request was not sufficiently specific and there was legitimate public interest in protecting against wholesale disclosure of matters requested. *People v Gauden, 36 Cal App 3d 942, 111 Cal Rptr 803.*

See *State v Carrione (1982) 188 Conn 681, 453 A2d 1137, cert den (US) 76 L Ed 2d 347, 103 S Ct 1775, § 9[b].*

In prosecution for criminal mischief in third degree, state was not compelled to disclose records of all prior misdemeanor convictions of every prosecution witness after each witness had testified on direct examination at trial. *State v Melton (1979) 36 Conn Supp 89, 411 A2d 948.*

Trial court erred in summarily denying motion for discovery of several items connected with radar equipment employed to measure defendant's speed at time of his arrest, since denial of motion seriously impeded defendant in preparation of his case, and granting thereof would not have prejudiced state's case in any way. *State v Anonymous, 6 Conn Cir 560, 279 A2d 738.*

Fifth Amendment due process principles required government to make pretrial disclosure, upon defense request, of all impeachable convictions of which it had knowledge, and United States Attorney's office would be deemed to know all prior convictions of government witnesses which happen to be listed in FBI wrap sheets for purposes of such disclosure rules. *Lewis v United States (1979, Dist Col App) 408 A2d 303* (opinion includes prescription for in camera method of trial court consideration of prior juvenile delinquency adjudications against witness).

Defendants charged with assault on police officers were not entitled to discovery and inspection of all complaints alleging misconduct against police officer victims, or supporting documents, reports, and results of any investigations in connection with any complaints against officers in question. *United States v Akers* (1977, Dist Col App) 374 A2d 874.

Failure to permit discovery of arresting officer's personnel file to determine existence or lack of any complaints for harassment or brutality which might be relevant to proving self-defense in prosecution for existing arrest was not prejudicial when personnel file contained no relevant information which, but for the erroneous ruling of not previously compelling discovery, would likely have produced a different result. *Ivester v State* (1983, Fla) 440 So 2d 352.

Denial of defendant's request to discover entire prison files on prosecution witnesses, including, inter alia, disciplinary reports and parole board investigations, was proper where defense was provided criminal records of witnesses and other materials deemed exculpatory by two judges who independently searched records; prosecution had no obligation to disclose matters to be used to impeach defense witnesses. *Jordan v State* (1981) 247 Ga 328, 276 SE2d 224.

In murder prosecution, defendant was not entitled to have arrest records of all state's witnesses furnished or information from persons interviewed by state but not called as witnesses, where information sought was not exculpatory. *Peppers v State* (1977) 239 Ga 198, 236 SE2d 360.

See *Cummings v State*, 226 Ga 46, 172 SE2d 395, § 17.

The state was not required in robbery prosecution to provide defendant with copies of photographs of injuries to victim, only to permit defendant to inspect and copy photographs. West's *Ga.Code Ann. § 17-16-4(a)(3)*. *Banks v. State*, 605 S.E.2d 47 (Ga. Ct. App. 2004).

State's failure to disclose pretrial agreement with accomplice's attorney was not error where accomplice testified that he was not aware of any agreement, which testimony was corroborated, in part, by assistant district attorney, and where issue became moot when assistant district attorney testified before jury as to existence and terms of pretrial agreement. *Griner v State* (1982) 162 Ga App 207, 291 SE2d 76.

Defendant charged with robbery did not have statutory right to discover addresses in addition to names of witnesses that had been furnished to him by prosecution. *Campbell v State* (1979) 149 Ga App 299, 254 SE2d 389.

In prosecution for fraud in obtaining public assistance and food stamps, additional evidence of amount fraudulently obtained by defendant could not be considered in assessing punishment where such evidence was not made known to defendant prior to trial. *Gill v State* (1977) 141 Ga App 823, 234 SE2d 665.

See *State v Arnold* (1983) 66 Hawaii 175, 657 P2d 1052, § 4[b].

In residential burglary prosecution based on testimony of female accomplice who had been involuntarily committed less than two years before offenses occurred, trial court could not reasonably conclude, from absence of information regarding witness' diagnosis, treatment, or release, that mental history of witness was irrelevant and immaterial for impeachment purposes, and defendant's motion to discover that history should have been granted through in camera hearing in presence of counsel for state and defendant. *People v Dace* (1983) 114 Ill App 3d 908, 70 Ill Dec 684, 449 NE2d 1031, affd 104 Ill 2d 96, 83 Ill Dec 573, 470 NE2d 993.

Although juvenile records of four potential state witnesses were discoverable under court rules pertaining to discovery in criminal cases, defendant did not have unqualified right to examine entire file; thus, trial judge correctly conducted in camera inspection of documents and disclosed all information contained therein pertinent to defense. *People v Clark* (1977) 55 Ill App 3d 379, 13 Ill Dec 84, 370 NE2d 1111.

Refusal of state to produce gas station receipt or identify gas station operator as rebuttal witness in response to defendant's motion for pre-trial discovery, were proper where production of receipt was refused because defendant refused to provide handwriting exemplar to compare with signature on receipt and state was not required to inform defendant that gas station operator might be called as rebuttal witness until intent was formed to call him which was done after alibi defense was presented. *People v Stinson*, 37 Ill App 3d 229, 345 NE2d 751.

In prosecution for murder of fellow prison inmate, defendant's request for personnel files was of dragnet variety and thus properly denied. *State v Wycoff* (1977, Iowa) 255 NW2d 116.

Where, by stipulation of state and defendant, lie detector test data were admissible, trial court did not err in refusing to require state to produce tape of polygraph, since tape was not in possession of state, but of polygraph expert in another city, and it was as available to defendant there as it was to state. *State v Galloway* (Iowa) 187 NW2d 725.

In prosecution for conspiracy to commit arson, failure of state to turn over newly discovered fire department records at earlier date did not require new trial, where records turned up under very unusual circumstances after both state and defense attorneys had diligently searched fire department files, there was no bad faith exhibited by prosecutor and where he did not knowingly withhold records. *State v Wolf* (1982) 7 Kan App 2d 398, 643 P2d 1101.

See *State v Henderson* (1978, La) 362 So 2d 1358, § 16[a].

State did not violate court order requiring furnishing to defendant of transcript of all tape recorded conversations before trial where officer had destroyed recording after being informed that it was inadmissible in evidence at trial. *State v Roche* (La) 341 So 2d 348.

Defendant suffered no prejudice as result of trial judge's rulings denying motion for production of tape recordings of police radio communications and request of issuance of subpoena duces tecum for tapes where defense counsel was given opportunity to hear tapes at in camera inspection and counsel had full opportunity to hear contents of conversation of police officers and to make use of this information at trial. *State v Perique* (La) 340 So 2d 1369.

It was not error to permit state to question defendant concerning prior conviction after state had failed to furnish defendant with copy of any record of his criminal arrests and convictions in their possession or custody or to make any reply to discovery item requesting such record when state did not possess rap sheet on defendant, defense counsel was aware of the prior conviction, and there was no claim by defense counsel that had he received a copy of defendant's record prior to trial, he would have undertaken a different defense strategy. *State v White* (1983, La App) 430 So 2d 174.

See *State v Morton* (1979, Me) 397 A2d 171, § 11.

Though defendant was entitled to discover names of Commonwealth's witnesses and, under direction of court, was entitled to access to their criminal records, prosecution had no affirmative duty to collect and assemble records; defendant's pre-trial motion seeking production of criminal and probation records of prospective witnesses was properly denied where records in county courthouse were at all times available to defendant. *Commonwealth v Adams* (1978) 374 Mass 722, 375 NE2d 681.

See *People v Aldridge*, 47 Mich App 639, 209 NW2d 796 (citing annotation), supra § 18.

Defendant charged with murder under multiple offender statute was not entitled to discover records as to number of multiple offenders actually sentenced as such in county in past 20 years where discovery sought would not have promoted any proper purpose relative to issue of appropriate punishment. *State v Jennings*, 126 NJ Super 70, 312 A2d 864, certif den 60 NJ 512, 291 A2d 374.

Defendant was properly permitted discovery of probation intake records of juvenile, in spite of statutory provisions regarding confidentiality of such records, where public policies of protecting juveniles and encouraging diversion from Family Court proceedings were overcome by criminal defendant's right to obtain those records as exculpatory evidence under his Sixth Amendment rights of compulsory process and confrontation. *People v Price (1979) 100 Misc 2d 372, 419 NYS2d 415.*

Having found that Brady discovery material exists in grand jury minutes with respect to inconsistent testimony of complaining witness and having found that no issue of security was involved, court would direct district attorney to produce that portion of complainant's designated testimony for defendant's immediate inspection. *People v Alamo, 89 Misc 2d 246, 391 NYS2d 314.*

Where bail jumping by defendant might have caused delay contributing to loss of notes of preliminary hearing, but grand jury testimony was available, there was no need for another hearing and another set of minutes for purpose of eliciting potential impeachment testimony, but district attorney would be required to turn over to defendant, prior to trial, all grand jury testimony, all police records and all of prosecutor's own records relating to statements of witnesses in case. *People v Aviles, 89 Misc 2d 1, 391 NYS2d 303.*

In murder prosecution, defendant was permitted to inspect correspondence, letters, notes, particularly those seized allegedly pursuant to search warrant, which were specified in defendant's motion for inspection, but nature of which is not shown in opinion. *People v Powell, 49 Misc 2d 624, 268 NYS2d 380.*

In prosecution for murder, burglary and possession of dangerous instrument, trial court erred in refusing to order disclosure from prosecutor of any correspondence between prosecutor's office and parole board concerning principal prosecution witness who was serving sentence imposed on plea of guilty to manslaughter stemming from participation as defendant's accomplice, since such correspondence might show understanding between witness and prosecution of leniency in return for testimony. *People v Cwikla (1979) 46 NY2d 434, 414 NYS2d 102, 386 NE2d 1070.*

In drug prosecution, trial court did not err in denying defendant's request for full disclosure of partially redacted search warrant and supporting testimony, since disclosure would have jeopardized safety and anonymity of confidential informant. *People v. Hunt, 227 A.D.2d 568, 643 N.Y.S.2d 175 (2d Dep't 1996).*

Copies of several orders authorizing use of electronic eavesdropping devices, with supporting affidavit upon which they were made, should be made available to defendant in abortion trial before rehearing. *People v Miller, 28 App Div 2d 1205, 285 NYS2d 495.*

Trial court erred in refusing to permit defendant in abortion prosecution to inspect wiretap order and supporting affidavit at hearing on motion to controvert search warrant which was based on fruits of wiretap order. *People v Mendez, 28 App Div 2d 727, 281 NYS2d 608.*

Denial of defendants' application to examine order authorizing interception of telephone conversations and supporting papers was error, requiring not reversal of convictions, but remand of action to trial court for hearing. *People v Fino, 27 App Div 2d 689, 277 NYS2d 276.*

Statute limiting discovery to documentary evidence and reports of expert witnesses to be used in trial would not include tape recording of telephone conversations between defendant and his alleged co-conspirators where state did not attempt to offer tape into evidence, there was nothing to indicate that it could have been authenticated sufficiently to permit its introduction and there was nothing to indicate that court could conclude there was anything exculpatory in tape. *State v Branch (1975) 288 NC 514, 220 SE2d 495, cert den 433 US 907, 53 L Ed 2d 1091, 97 S Ct 2971.*

In prosecution for second-degree burglary, defendant was entitled to new trial, where all evidence linking defendant to crime came from testimony of purported accomplice in burglary, accomplice had entered into use immunity agreement with prosecutor, prosecutor failed to disclose to defendant a reasonable time prior to trial terms and conditions of agreement with witness in violation of his statutory pre-trial disclosure duty, and defendant was prejudiced thereby in that failure of prosecution to provide notice coupled with its failure to dispute at trial accomplice's denials that such immunity existed allowed accomplice's credibility to remain unchallenged. *State v Morgan (1983) 60 NC App 614, 299 SE2d 823.*

In prosecution for obtaining property by false pretenses and corporate malfeasance, there was error in state's failure to disclose all documents it intended to use at trial, even though state did not offer documents in evidence but merely used them on cross-examination, where primary effect of state's improper nondisclosure was to deny defendant meaningful opportunity to prepare his defense. *State v Hill (1980) 45 NC App 136, 263 SE2d 14.*

In prosecution for drug violations, it was not reversible error for trial court to deny defendant's request to produce expense accounts of police officers who bought drugs from defendant. *Commonwealth v Banks, 228 Pa Super 308, 323 A2d 780.*

Prosecution was not required to disclose jury investigation report to defendant, which report was secured and paid for by district attorney's office and used by it as aid in jury selection process. *Com. v Foster, 219 Pa Super 127, 280 A2d 602.*

If there has been surreptitious interception of defendant's attorney-client communications, trial court should grant broad discovery of logs, summaries, reports, recordings and transcripts of intercepted communications and refusal by government agency or agent to disclose that information would result in dismissal of charges. *Re Kozak (1977, SD) 256 NW2d 717.*

Trial court did not abuse discretion in denying defendant's further request, in prosecution for second degree manslaughter committed while operating motor vehicle under influence of intoxicating liquor, that state be required to provide defendant with "information and explanation in detail" of any evidence or information, items or exhibits, or tests or examinations relating in any way to offense of exculpatory nature, both as to commission of offense or any part thereof, or bearing upon defendant's innocence, guilt, or character, or of impeaching nature, where court had already granted discovery order described as "liberal in the extreme," giving defendant access to state's work product, names and statements of all persons interviewed, names of all witnesses, photographs, reports and memoranda, and, in effect, opening state's file for inspection without regard to materiality or relevancy. *State v Wade (SD) 159 NW2d 396.*

Robbery defendant had no right to pretrial discovery of list of descriptions of robber given by complainant, absent showing such list was in existence or in possession of State. *Mosely v State (1981, Tex App 1st Dist) 627 SW2d 770.*

Defendant in prosecution for sale of heroin was not entitled to copy of mail receipt records maintained by state laboratory which received heroin samples in mail where state witness did not bring receipts to trial or testify from them and attention of witness was never directed to receipts during examination. *Mendoza v State (1977, Tex Crim) 552 SW2d 444.*

Request for copy of transcript of insanity proceeding which resulted in defendant's commitment to state hospital could not be raised as issue for first time on appeal, where court failed to rule on request and where it did not appear that failure to grant request in any way affected defendant's right to fair trial. *State v Little, 19 Utah 2d 53, 426 P2d 4.*

[\*27b] Nondocumentary

In a prosecution for speeding the radar equipment which had provided a speed reading to be used as evidence against

the defendant was held producible for inspection by the defense in *State v Fay (1963) 2 Conn Cir 369, 199 A2d 358*, supra § 12.

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In prosecution for drunken driving, court properly ordered police to turn over perchlorate tube with its contents which police had used in making blood-alcohol test to determine defendant's asserted intoxication so that defense might conduct further tests. *City of Rogers v Municipal Court of Rogers (Ark) 531 SW2d 257*.

Defendant charged in municipal court with various criminal offenses was not entitled to order authorizing him to depose police officers involved in various charges where defendant failed to establish, as required by statute, that police officers were about to leave state or were unlikely to attend trial. *People v Municipal Court for Pasadena Judicial Dist. (1978) 20 Cal 3d 523, 143 Cal Rptr 609, 574 P2d 425*.

In prosecution for arson and insurance fraud arising out of burning of motor home, defendant was not denied due process by failure of prosecution to timely produce tape recording of conversation between defendant and representative of insurance broker who appeared as prosecution witness where tape was discovered by prosecution during presentation of defense, where defense counsel was immediately notified and permitted to hear recording, where prosecutor stated he would not offer tape in evidence as it was prejudicial to defense, where court gave defense opportunity to use tape before it rested, and where defendant made no factual showing of any specific matter that could have been of benefit to him in either cross-examination of insurance representative or in his defense. *People v Foster (1981, 2d Dist) 114 Cal App 3d 421, 170 Cal Rptr 597*.

In prosecutions of parents for refusing to send their children to public schools, trial court abused its discretion in denying defendants continuance and further discovery on their defense of invidious law enforcement, where defendants had offered to prove that they had been prosecuted because of their earlier exercise of legitimate political expression in protesting segregation policies, not for their prominence in parent strike, and where people's initial reply to earlier discovery order limited to particular school attended by defendants' children admitting that parents of only two other children out of 28 whose parents had similarly violated compulsory education law had been prosecuted had later been revised to indicate that parents of 25 of those 28 children were not actually in violation. *People v Serna (1977) 71 Cal App 3d 229, 139 Cal Rptr 426*.

In prosecution for rape, prosecutor was not required to disclose that victim was pregnant, where information would not have led to discovery of material information not already known to defendant, where defendant had no basis for his contention that victim may have been lying about being pregnant, and where victim's statement would not have led to other information useful for impeachment. *People v Gallegos (1982, Colo) 644 P2d 920*.

In murder trial, trial court properly suppressed all testimony relating to defendant's severed fingertip where: (1) fingertip and evidence obtained therefrom were critical to proof of guilt or innocence; (2) fingertip had been knowingly destroyed but without malevolent purpose; (3) fingertip could have been preserved for further testing; and, (4) its destruction barred defendant from fully presenting his theory of defense. *People v Morgan (1980, Colo) 606 P2d 1296*.

In prosecution for tampering with witness prior to liquor license revocation hearing, failure of district attorney to produce travel voucher and beer keg pursuant to court order was not ground for reversal where evidence was cumulative, beer keg was not admitted and defendant suffered no prejudice. *People v Hower (1981, Colo App) 626 P2d 734*.

Although in murder prosecution in which defendant relied on alibi defense state failed to disclose identity of one of its witnesses before that witness testified, there was no violation of defendant's right under rule relating to state's obligation

on notice of defendant's intent to assert alibi defense that it advise defendant within reasonable time of any witness state intended to call to refute alibi defense, where witness' testimony was offered to impeach credibility of defendant and two of his defense witnesses rather than as "rebuttal" to defendant's alibi defense. *People v Muniz* (1980, Colo App) 622 P2d 100.

In prosecution for extortion in which defendant filed demand under applicable state discovery rule for disclosure of names of any policemen who had overheard defendant's allegedly extortionate phone call, state had no duty to disclose to defendant such information where state did not have that information in its possession, and where defendant had same opportunity to obtain such information from policemen involved in case as did state. *State v Counce* (1981, Fla App D4) 392 So 2d 1029.

Defendant was precluded from presenting alleged error on part of trial court in entry of its order denying defense counsel's pretrial motion for discovery seeking criminal records of the victim where record was totally devoid of testimony upon which motion was based and where during trial victim testified on cross-examination that he had two traffic convictions and that he was placed on probation for felony but adjudication of guilt was withheld. *Comer v State* (Fla App) 318 So 2d 419.

Refusal to order production of tape recording of statement by state witness was not error. *Williams v State*, 222 Ga 208, 149 SE2d 449, cert den 385 US 887, 17 L Ed 2d 115, 87 S Ct 184.

In rape prosecution, trial court did not err by refusing to impose sanctions on prosecution for failing to preserve samples of seminal fluid which had been extracted by physician to verify fact of intercourse, where state had no facilities to perform test desired by defendant to determine blood type, where such test must be made quite soon after specimen is obtained if test is to be reliable, and where tests are often inconclusive. *State v Smoot* (1978) 99 Idaho 855, 590 P2d 1001.

Since there is no requirement in criminal prosecution that prior to preliminary hearing state must disclose substance of evidence it intends to present or identity any of its witnesses, state was not obligated to disclose to defendant in murder prosecution before his preliminary hearing identify of witnesses state intended to call at defendant's trial or to produce those witnesses at defendant's preliminary hearing so that their competency or lack thereof could be determined, particularly where there was no showing that either such witnesses were under control of state or that defendant could not have insured their presence at preliminary hearing by having subpoenas served on them. *People v Blackman* (1980) 91 Ill App 3d 130, 46 Ill Dec 524, 414 NE2d 246.

In prosecution for commercial bribery based upon alleged attempts of defendant to induce insurance company property adjuster to inflate amount of fire loss for building, defendant was entitled to discovery of tape recordings of conversations between defendant and adjuster where tapes contained specific statement by defendant that adjuster would not be required to raise estimate, as well as several other exculpatory statements. *People v Cauthen* (1977) 51 Ill App 3d 516, 9 Ill Dec 526, 366 NE2d 1037.

In armed robbery prosecution, it was within discretion of trial court to order production of composite drawing of robbery suspect at trial for purpose of showing that, although drawing resembled defendant, he was not identified by witness who viewed drawing as person committing robbery. *People v Rosa* (1977) 49 Ill App 3d 608, 7 Ill Dec 228, 364 NE2d 389.

See *People v Stinson*, 37 Ill App 3d 229, 345 NE2d 751, § 27[a].

In criminal prosecution, prosecution has duty of disclosing execution of agreement made with prosecution witness. *Rufer v State* (1980, Ind) 413 NE2d 880.

Defendant in murder prosecution was entitled to information with respect to any promises or assurances made to prosecution witness to secure his testimony but he was not entitled to full freedom of choice as to methodology by which to obtain such information. *State v King (1977, Iowa) 256 NW2d 1.*

Trial court did not err in denying motion for production of beer can found at scene of crime, where only reason defendant gave for wanting can was to have it examined to ascertain that his prints were not there and state disclosed to defense counsel that it had discarded idea of using can as evidence since report showed that defendant's fingerprints were not on can. *State v Sheffey (Iowa) 250 NW2d 51.*

Refusal of trial court to permit defense counsel to examine juvenile records of prosecution witness who was informant, although error, was not prejudicial where in course of his testimony witness admitted that he was drug user and drug seller, that he was active participant in robbery, and that he had been granted immunity from prosecution and where evidence of defendant's guilt was overwhelming. *State v Deffenbaugh (Kan) 536 P2d 1030.*

Defendant in robbery prosecution had right to inspect composite drawing of robbery suspect prior to trial. *State v Brown, 220 Kan 684, 556 P2d 443.*

When undercover police officer was only witness to sale of marijuana by defendant, defendant's Sixth Amendment right to confront and cross-examine material witness entitled defendant to pretrial discovery of witness' address, with suppression of testimony as legitimate sanction for nondisclosure, to allow defense opportunity to run background check so it would be prepared to test witness' reputation for truth and veracity in community. *State v Burgoon (1980) 4 Kan App 2d 485, 609 P2d 194* (citing annotation).

Where defendant was charged in four counts with capital murder following shooting death of his wife's lover and three eyewitnesses, due process entitled the defense to pretrial notice of aggravating circumstances the prosecution intended to rely on in seeking death penalty; however, trial court properly denied defense motion to arrest judgment, based on argument the indictment was defective for failing to set forth the aggravating circumstances, where defense counsel did not say he was unaware of aggravating circumstances and did not file bill of particulars seeking discovery. *State v Martin (1979, La) 376 So 2d 300.*

Police were not required to make available to defendant tape recording made while accused was in act of committing crime. *State v Dickson, 248 La 500, 180 So 2d 403.*

In prosecution for armed robbery, prosecution's belated disclosure to defendant of statement of officer who identified defendant as one of four suspects he had seen fleeing from scene of crime did not constitute impermissible suppression of material evidence favorable to defendant that had affect of denying him fair trial where another eyewitness at scene of crime identified defendant as perpetrator thereof and where timely disclosure of statement would not have presented defendants with opportunity to prepare and present his case in such manner as to create reasonable doubt of defendant's guilt that would not otherwise have existed. *Commonwealth v Redding (1980) 382 Mass 154, 414 NE2d 347.*

In murder prosecution, defendant was not entitled to disclosure of evidence that two brown bags, in addition to bag containing murder weapon, had been found in vehicle used by suspected murderer where knowledge of existence of second bag would have been neither exculpatory nor would it have resulted in significantly sufficient possibility of different verdict to justify retrial. *Commonwealth v Pisa (1977) 372 Mass 590, 363 NE2d 245.*

Defendant in prosecution for sale of heroin was not denied fundamental fairness nor impaired in preparing his defense as result of prosecution's failure to disclose before his trial that undercover officer to whom he made heroin sale was equipped with wireless microphone, where evidence defendant might otherwise obtained from prosecution would not have been beneficial to him, and where on discovery that officer had been equipped with wireless microphone, trial court permitted defendant to reopen his proofs to impeach officer. *People v Bailey (1980) 101 Mich App 144, 300*

NW2d 474.

It is duty of prosecutor to disclose any bargain made with any witness in exchange for his or her testimony. *People v Bryant* (1977) 77 Mich App 108, 258 NW2d 162.

Prosecutor did not err in failing to disclose fact that chief prosecution witness had been promised "new identity" in return for testifying, where reason for witness' wanting new identity had nothing to do with defendant or defendant's case. *State v Breest* (1978, NH) 387 A2d 643.

Discovery relating to contents of intercepted communications and derivative evidence in pretrial setting is recognized under New Jersey wiretapping law, and touchstones for according such discovery are "interests of justice" and "good cause"; however, disclosure of contents of intercepted communications should not be uncritical or promiscuous or without court superintendence, and where specific grounds for objection are demonstrated by state, protective order should issue. *State v Braeunig*, 122 NJ Super 319, 300 A2d 346.

Defendant's application for names of potential prosecution witnesses granted subject to right of prosecution to move to reargue application if there should be compelling circumstances indicating that any witnesses might be tampered with or threatened, or that other compelling reasons existed for nondisclosure. *People v Barnes*, 74 Misc 2d 743, 344 NYS2d 475.

Motion to direct the people to furnish defendants with list of witnesses to be called in obscenity prosecution was denied in court's discretion as beyond scope of permissible pretrial discovery. *People v Steinberg*, 60 Misc 2d 1041, 304 NYS2d 858.

Motion to inspect coat and piece of brass rod found on premises of convent, where defendant allegedly assaulted sisters, denied. *People v Bradford*, 54 Misc 2d 54, 281 NYS2d 480.

The name of the recorder of alleged gambling records, discovered through police investigation, is improper subject of discovery and inspection. *People v Spadaro*, 51 Misc 2d 604, 273 NYS2d 587.

State was not guilty of improperly withholding evidence from defendant, convicted of murder and other crimes, on ground that state had allegedly withheld identity of certain witnesses who could offer material and exculpatory evidence, where defendant was certainly aware of identity of one of witnesses who was murder victim's mother and who testified at defendant's trial, where appeal witnesses could only offer vague descriptions of individuals whom they observed fleeing from scene of crime, and where prosecutor was not obliged to disclose identity of other witness whose testimony before grand jury inculpated defendant. *People v King* (1981, 2d Dept) 79 App Div 2d 992, 434 NYS2d 462.

Promise of leniency or other consideration held out to self-confessed criminal for his cooperation bears upon his credibility as witness and must be disclosed by prosecution. *People v Davis* (1977) 57 App Div 2d 1013, 394 NYS2d 486.

Trial court properly determined that defendant was not prejudiced by failure of prosecutor to advise defendant of names, addresses and criminal records of witnesses after proper discovery requests, where in most instances prosecutor did not have such information, but orally communicated information to defendant as it was acquired. *State v Bell*, 48 Ohio St 2d 270, 2 Ohio Ops 3d 427, 358 NE2d 556.

Where evidence demonstrated that meaningful analysis of breathalyzer test apparatus would have been possible and that an error could have occurred in initial administration of breathalyzer examination, state was required to allow discovery of test apparatus and failure to produce apparatus warranted suppression of test results. *State v Michener* (Or App) 550 P2d 449.

Trial court did not err in refusing to compel state to reveal name and whereabouts of 2 anonymous parties who shared reward money paid for information leading to arrest and conviction of defendants on charge of killing police officer. *West v State (Tenn Crim) 466 SW2d 524* (citing annotation).

## FOOTNOTES

n1 This annotation supersedes *52 ALR 207*.

n2 The subject under annotation is controlled or affected by statutes or court rules in some jurisdictions but statutory law is not treated herein except as reflected in reported cases within the scope of this annotation.

n3 The term "state court" as used here includes municipal or local courts of the District of Columbia and territories of the United States, as distinguished from District Courts of the United States located therein.

n4 The accused's right to, and the prosecution's privilege against, disclosure of the identity of an informer are discussed in *76 A.L.R.2d 262*.

n5 The right to discovery or inspection may sometimes be confused with the right to a bill of particulars, although the two procedures are theoretically distinct. As to the right to particulars, see *5 A.L.R.2d 444*. As to the right of defense counsel to compel the prosecuting attorney to disclose information as to prospective jurors, see *78 A.L.R.2d 309*.

n6 As an example of a case dealing with this question, see *State v District Court of Delaware County (1962) 253 Iowa 903, 114 NW2d 317*.

n7 As an example of a case dealing with this question, see *McGuff v State (1889) 88 Ala 147, 7 So 35*.

n8 Some cases dealing with an accused's right to inspect the place of the alleged offense are referred to herein by way of illustration, in the situation where such place was under the possession or control of the prosecution and the court treated the issue in terms of the accused's right to inspection of writings or articles.

n9 As illustrative of cases excluded in this respect, see the following:

### CALIFORNIA

*People v Jordan (1955) 45 Cal 2d 697, 290 P2d 484* (involving private notes used by an expert witness for the prosecution in the course of various tests conducted by him as to certain physical evidence)

### LOUISIANA

*State v Wilde (1948) 214 La 453, 38 So 2d 72, cert den 337 US 932, 93 L ed 1739, 69 S Ct 1484, reh den 338 US 842, 94 L ed 515, 70 S Ct 29* (involving papers, books, and records connected with the present prosecution for forgery which were in the possession of a third party)

### MISSOURI

*State ex rel. Phelps v McQueen (1956, Mo) 296 SW2d 85* (involving books, papers, and documents which were

in the possession of private corporations and their officers).

n10 As illustrative of cases excluded in this respect, see the following:

#### ALABAMA

*Parsons v State (1948) 251 Ala 467, 38 So 2d 209* (holding that the defendant's motion to request the Attorney General of the United States to release certain evidence concerning the present prosecution which was in the custody of the Department of Justice should have been granted)

#### COLORADO

*Corbett v People (1963) 153 Colo 457, 387 P2d 409, reh den 377 US 939, 12 L ed 2d 302, 84 S Ct 1346* (holding that the defendant had no right to examine an FBI investigative report in preparation for trial)

#### MISSISSIPPI

*Eaton v State (1932) 163 Miss 130, 140 So 729* (upholding the denial of the defendant's application for a subpoena duces tecum to have a United States attorney produce the transcribed notes of testimony taken by him on an investigation of the crime charged against the defendant).

n11 For illustrative cases excluded in this respect, see the Alabama cases referred to in § 9[c], *infra*, footnote 20.

n12 These questions are covered by a separate annotation. See 7 A.L.R.3d 174.

n13 For an annotation on the question whether mandamus or prohibition is available to compel or to prevent discovery proceedings in civil actions, see 95 A.L.R.2d 1229.

n14 See also the annotations referred to in § 1[a], *supra*.

n15 § 3, *infra*.

n16 § 3, *infra*.

n17 § 5[a], *infra*.

n18 § 8, *infra*.

n19 § 10[a], *infra*.

n20 § 8, *infra*.

n21 § 8, *infra*.

n22 § 4[a], *infra*.

n23 § 4[b], *infra*.

n24 §§ 13-27, *infra*.

n25 § 16, *infra*.

n26 § 17, *infra*.

n27 §§ 24, 25, *infra*.

n28 § 18, *infra*.

n29 § 11, *infra*.

n30 § 11[a], *infra*.

n31 § 11[e], *infra*.

n32 § 11[b], *infra*.

n33 § 12, *infra*.

n34 § 12, *infra*.

n35 An exception is recognized by a case holding that suppression by the state of material evidence exculpatory to the accused is a violation of due process even in the absence of a request for disclosure of such evidence. See *United States ex rel. Meers v Wilkins* (1964, CA2 NY) 326 F2d 135, *infra* § 6[a].

n36 § 6, *infra*.

n37 § 5[b], *infra*.

n38 § 6[a], *infra*.

n39 § 7, *infra*.

n40 § 7, *infra*.

n41 §§ 9[a-e], *infra*.

n42 § 9[b], *infra*.

n43 § 9[c], *infra*.

n44 § 9[c], *infra*.

n45 There may be some danger of a reaction in the other direction, that is, toward a less liberal rule, or the maintenance of the present restrictions, as a result of the feeling in some members of the public (and judiciary) that recent developments in the criminal law have given the accused unfair advantages and have crippled the agents of law enforcement.

n46 For an interesting presentation of the thesis that the trend of the development of criminal law and procedure tends to grossly favor the prosecution rather than, as is frequently alleged, the accused, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*. 69 *Yale LJ* 1149.

n47 For an excellent discussion of the considerations for and against liberalization of criminal discovery,

see Louisell, *Criminal Discovery: Dilemma Real or Apparent*. 49 *Cal L Rev* 56, March 1961.

n48 Louisell, 49 *Cal L Rev* 56, 60, contains a useful treatment of the various procedural sources of information, other than pretrial discovery, open to the accused.

n49 In some of these cases the court, in recognizing the rule as stated above, spoke of inspection or disclosure "before trial," without indicating whether the rule was equally applicable to inspection or disclosure during trial. These cases are included in the above list with the parenthetical notation "before trial."

n50 In 1961, subsequent to this decision, a statute was enacted in Vermont authorizing the court to permit the defendant to inspect the books, papers, documents, statements, or other objects, obtained from or belonging to the defendant. See § 11[i], *infra*.

n51 *Am. Jur. 2d, Criminal Law* § 225; 33 *A.L.R.2d* 1421. For a discussion of the effect of this rule on the defendant's right to disclosure and inspection of evidence in the hands of the state, see "Suppression of evidence favorable to an accused," by Justice James M. Carter in 34 *FRD* 87.

n52 The cases dealing with this situation are illustrated in the text *infra*.

n53 See 33 *A.L.R.2d* 1421.

n54 For cases recognizing the rule under consideration, but holding that there was no showing of a suppression of material evidence favorable to the accused, see, for example, the following:

#### SUPREME COURT

*Woollomes v Heinze* (1952, CA9 Cal) 198 *F2d* 577, cert den 344 *US* 929, 97 *L ed* 715, 73 *S Ct* 499  
*Application of Landeros* (1957, DC NJ) 154 *F Supp* 183  
*United States ex rel. Wade v Jackson* (1957, DC NY) 153 *F Supp* 781, app dismd (CA2) 256 *F2d* 7, cert den 357 *US* 908, 2 *L ed* 2d 1158, 78 *S Ct* 1152, disapproved on other grounds *United States ex rel. Daniel v Wilkins* (1961, CA2 NY) 292 *F2d* 348, cert den 372 *US* 917, 9 *L ed* 2d 723, 83 *S Ct* 731, reh den 372 *US* 950, 9 *L ed* 2d 975, 83 *S Ct* 938

#### CALIFORNIA

*People v Mort* (1963) 214 *Cal App 2d* 596, 29 *Cal Rptr* 650

#### NEW MEXICO

*State v Morris* (1961) 69 *NM* 244, 365 *P2d* 668

#### NEW YORK

*People v Fisher* (1958) 23 *Misc 2d* 391, 192 *NYS2d* 741.

n55 In some cases the court, in recognizing the rule as stated above, indicated that the trial court's discretion exists only where the particular document or object sought to be inspected is admissible as evidence. These

cases are included in the above list with the parenthetical notation "admissible evidence only."

n56 In *Battalino v People* (1948) 118 Colo 587, 199 P2d 897 (a case not within the scope of this annotation because involving the defendant's request for inspection of a prosecution witness' statements during the course of trial for impeachment purposes), the court, in upholding the denial of the defendant's request, noted that "the granting or refusal of the accused's request for inspection of written statements of a witness for the prosecution has been held to lie in the discretion of the trial court." (Emphasis added.) And in *Struna v People* (1950) 121 Colo 348, 215 P2d 905 (a case likewise not within the scope of this annotation because involving the defendant's request for inspection of a prosecution witness' statements during the course of trial for impeachment purposes), the court, also upholding the denial of the defendant's request, said that in the *Battalino Case* (1948) 118 Colo 587, 199 P2d 897, supra, "we pointed out that the question of the right of counsel for the defense to inspect documents in the possession of the district attorney lies within the discretion of the court." (Emphasis added.) However, in the subsequent decision in *Walker v People* (1952) 126 Colo 135, 248 P2d 287, supra § 3, the court, following the view that in the absence of statute, the defendant in a criminal case has no right to inspect evidence in the possession of the prosecution prior to the time such evidence is offered in evidence, said (1) that the discussion in the *Battalino* and *Struna* Cases relative to the law of pretrial discovery was not necessary to a determination of the questions presented by the records therein, and (2) that the statement in the *Battalino* Case reading, "The granting or refusal of the accused's request for inspection of written statements of a witness for the prosecution has been held to lie in the discretion of the trial court," could not be construed "as an expression of opinion by this court, notwithstanding that it was apparently so taken in the *Struna* case, supra, in which the *Battalino* case only, is cited as authority." In this connection, attention is also called to *Massie v People* (1927) 82 Colo 205, 258 P 226, infra § 26, wherein the court used language tending to support the view that whether to grant or deny a defendant the right to inspect evidence in the possession of the prosecution lies within the discretion of the trial court.

n57 The defendant's burden of showing a proper cause for inspection and of designating specific evidence sought is separately discussed in § 7, infra.

n58 Propriety of discovery interrogatories calling for continuing answers. 88 A.L.R.2d 657.

n59 The question whether, in order to be granted an inspection, the defendant is required to show admissibility of the requested evidence is separately treated in § 10[a], infra.

n60 *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428; *Brenard v Superior Court of Sacramento County* (1959) 172 Cal App 2d 314, 341 P2d 743, supra § 5[a]; *People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, infra.

n61 *State ex rel. Keast v District Court of Fourth Judicial Dist.* (1959) 135 Mont 545, 342 P2d 1071, supra § 3.

n62 *Rosier v People* (1952) 126 Colo 82, 247 P2d 448, infra.

n63

## ARIZONA

*State v Wallace* (1965) 97 Ariz 296, 399 P2d 909, infra § 17

## MISSOURI

*State v Gilliam (1961, Mo) 351 SW 2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, infra*  
*State v Hale (1963, Mo) 371 SW2d 249, infra § 9[c], footnote 11*

#### NEW YORK

*People v Martinez (1959) 15 Misc 2d 821, 183 NYS2d 588, infra*

#### TENNESSEE

*Anderson v State (1960) 207 Tenn 486, 341 SW2d 385, infra*

See also § 8, *infra*, for the general rule that evidence, to be producible for inspection by the defendant, must be relevant to the case.

n64 *Rosier v People (1952) 126 Colo 82, 247 P2d 448, infra; State v Brown (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]; State v Gilliam (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, infra; State v Hale (1963, Mo) 371 SW2d 249, infra § 9[c], footnote 11; State v Aubuchon (1964, Mo) 381 SW2d 807, infra § 16[a].* See also § 8, *infra*, for the general rule that evidence, to be producible for inspection by the defendant, must be material to the case.

n65

#### MICHIGAN

*People v Johnson (1959) 356 Mich 619, 97 NW2d 739, infra § 13[a]*

*People v Maranian (1960) 359 Mich 361, 102 NW2d 568, infra § 16[a]*

#### NEW JERSEY

*State v Tune (1953) 13 NJ 203, 98 A2d 881, infra § 13[b]*

#### NEW YORK

*People v Skoyec (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[b]*

#### NORTH CAROLINA

*State v Goldberg (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra § 17*

#### WASHINGTON

*State v Morrison (1933) 175 Wash 656, 27 P2d 1065, supra § 5[a].*

n66

#### ARIZONA

*State v Wallace* (1965) 97 Ariz 296, 399 P2d 909, infra § 17

#### CALIFORNIA

*Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130, infra § 16[a]

#### CONNECTICUT

*State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, infra § 16[a]

#### MISSOURI

*State v Fitzgerald* (1895) 130 Mo 407, 382 SW 1113, infra § 13[b]

*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, infra

#### NEBRASKA

*Linder v State* (1953) 156 Neb 504, 56 NW2d 734, infra § 21[d]

#### PENNSYLVANIA

*Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, supra § 5[a]

*Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59, infra § 13[b]

#### TENNESSEE

*Anderson v State* (1960) 207 Tenn 486, 341 SW2d 385, infra.

n67 *People v Cooper* (1960) 53 Cal 2d 755, 3 Cal Rptr 148, 349 P2d 964, infra; *People v Lane* (1961) 56 Cal 2d 773, 16 Cal Rptr 801, 366 P2d 57, infra; *People v Terry* (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446, infra; *People v Curry* (1961) 192 Cal App 2d 664, 13 Cal Rptr 596, infra; *People v Valdez* (1962) 203 Cal App 2d 559, 21 Cal Rptr 764; *People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, infra; *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838; *People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755.

n68 *People v Gatti* (1938) 167 Misc 545, 4 NYSid 130, infra § 25[b]; *People v Leahey* (1960) 26 Misc 2d 438, 207 NYS 2d 619, infra § 13[b].

n69 *State v McDonald* (1938) 342 Mo 998, 119 SW2d 286; *State v Garton* (1963, Mo) 371 SW2d 283; *State*

*v Simon (1964, Mo) 375 SW2d 102; State v Aubuchon (1964, Mo) 381 SW2d 807; People v Calandrillo (1961) 29 Misc 2d 491, 215 NYS2d 361.*

n70

#### ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County (1954) 78 Ariz 74, 275 P2d 887*  
*State v Wallace (1965) 97 Ariz 296, 399 P2d 909*

#### CALIFORNIA

*Walker v Superior Court of Mendocino County (1957) 155 Cal App 2d 134, 317 P2d 130, infra § 16[a]*

#### IOWA

See *State v Kelly (1958) 249 Iowa 1219, 91 NW2d 562*  
*State v Stump (1963) 254 Iowa 1181, 119 NW2d 210, cert den 375 US 853, 11 L ed 2d 80, 84 S Ct 113, both*  
*infra*

#### LOUISIANA

*State v Lee (1932) 173 La 966, 139 So 302, infra § 16[a]*

#### MISSOURI

*State v Brown (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]*

#### MONTANA

*State ex rel. Keast v District Court of Fourth Judicial Dist. (1959) 135 Mont 545, 342 P2d 1071, supra § 3*

#### NEBRASKA

*Cramer v State (1944) 145 Neb 88, 15 NW2d 323, supra § 3*  
*Linder v State (1953) 156 Neb 504, 56 NW2d 734, infra § 21[d]*

#### NEW YORK

*People v Marshall (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698,*  
*infra*  
*People v Wargo (1933) 149 Misc 461, 268 NYS 400, infra § 15[a]*  
*People v Gatti (1938) 167 Misc 545, 4 NYS2d 130, infra § 25[b]*

## NORTH CAROLINA

*State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra § 17

## OKLAHOMA

*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610

*Application of Killion* (1959, Okla Crim) 338 P2d 168

*Layman v State* (1960, Okla Crim) 355 P2d 444

*Melchor v State* (1965, Okla Crim) 404 P2d 63, supra § 3.

n71 *People v Cooper* (1960) 53 Cal 2d 755, 3 Cal Rptr 148, 349 P2d 964, infra; *People v Terry* (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446, infra; *People v Curry* (1961) 192 Cal App 2d 664, 13 Cal Rptr 596, infra; *Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838.

n72 *State v Brown* (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]; *State v Tune* (1953) 13 NJ 203, 98 A2d 881, infra § 13[b].

n73 *People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130, infra § 25[b].

n74 *Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, supra § 5[a].

n75 *People v Riser* (1956) 47 Cal 2d 566, 305 P2d 1, cert den 353 US 930, 1 L ed 2d 724, 77 S Ct 721, app dismd 358 US 646, 3 L ed 2d 568, 79 S Ct 537 (disapproved on other grounds *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428, and also disapproved on other grounds *People v Morse* (1964) 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33); *People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428; *Norton v Superior Court of San Diego County* (1959) 173 Cal App 2d 133, 343 P2d 13

*People v Norman* (1960) 177 Cal App 2d 59, 1 Cal Rptr 699, cert den 364 US 820, 5 L ed 2d 51, 81 S Ct 56; *People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694; *People v Preston* (1958) 13 Misc 2d 802, 176 NYS 2d 542; *People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827. In *People v Silberstein* (1958) 159 Cal App 2d Supp 848, 323 P2d 591, it was said that the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and that to deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of criminal trial.

n76 *People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY2d 823, 188 NYS2d 213, 159 NE2d 698, supra § 7; *People v Wargo* (1933) 149 Misc 461, 268 NYS 400, infra § 15[a]; *People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130, infra § 25[b]; *People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[a]; *People v Whitmore* (1965) 45 Misc 2d 506, 257 NYS2d 787, infra § 22[a]. See also *Griffin v United States* (1950) 87 App DC 172, 183 F2d 990, wherein the court, in holding that the defendant, who was convicted of murder in the District Court for the District of Columbia, was entitled to a new trial where certain information tending to exculpate the defendant was not disclosed by the prosecution to the defense, said that the prosecution should disclose evidence that may reasonably be considered admissible and useful to the defense, and that when there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or useful for

the defense. (Apparently the law of the District of Columbia was applied.) Holding to the same effect is *People v Whitmore* (1965) 45 Misc 2d 506, 257 NYS2d 787, infra § 22[a]. And see *Strosnider v Warden of Maryland Penitentiary* (1962) 228 Md 663, 180 A2d 854, wherein it was held that the suppression by the prosecution of evidence tending to exculpate the accused was a ground for relief under the Maryland Post Conviction Procedure Act.

n77

#### ILLINOIS

See *People v Gerold* (1914) 265 Ill 448, 107 NE 165, infra § 24[a]

#### NEW HAMPSHIRE

*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, infra

#### NEW YORK

*People v Roldan* (1964) 42 Misc 2d 501, 248 NYS2d 408, infra § 25[c]

*People v Miller* (1964) 42 Misc 2d 794, 248 NYS 2d 1018, infra this section and infra § 25[a]

#### OKLAHOMA

*Layman v State* (1960, Okla Crim) 355 P2d 444, infra § 22[a].

n78 *State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403; *State v Healey* (1965, NH) 210 A2d 486, both infra.

n79 *Pinana v State* (1960) 76 Nev 274, 352 P2d 824, supra § 5[a].

n80 *State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, supra § 3.

n81

#### ALASKA

*United States v Rich* (1922) 6 Alaska 670, infra § 25[a]

#### CALIFORNIA

*Cash v Superior Court of Santa Clara County* (1959) 53 Cal 2d 72, 346 P2d 407, infra § 14

*People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694

#### MISSOURI

*State v Aubuchon* (1964, Mo) 381 SW2d 807, infra § 16[a]  
*State v Spica* (1965, Mo) 389 SW2d 35, supra § 3

## NEVADA

*Pinana v State* (1960) 76 Nev 274, 352 P2d 824, supra § 5[a]

## NEW YORK

*People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599, infra § 13[a]

## PENNSYLVANIA

*Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59.

n82

## ARIZONA

*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887  
*State ex rel. Polley v Superior Court of Santa Cruz County* (1956) 81 Ariz 127, 302 P2d 263  
*State ex rel. Helm v Superior Court of Cochise County* (1961) 90 Ariz 133, 367 P2d 6

## CALIFORNIA

*Powell v Superior Court of Los Angeles County* (1957) 48 Cal 2d 704, 312 P2d 698, infra § 13[a]  
*People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102, infra  
*Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291, infra § 22[d]

## MICHIGAN

*People v Johnson* (1959) 356 Mich 619, 97 NW2d 739  
*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568

## NEBRASKA

*Hameyer v State* (1947) 148 Neb 798, 29 NW2d 458, infra § 24[a]

## NEW HAMPSHIRE

*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, infra  
*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, supra § 3

*State v Healey (1965, NH) 210 A2d 486, infra*

#### NEW JERSEY

*State v Cicienia (1951) 6 NJ 296, 78 A2d 568 cert den 350 US 925, 100 L ed 809, 76 S Ct 215, infra § 13[b]*

#### NEW YORK

*People v Terzani (1933) 149 Misc 818, 269 NYS 620, infra § 22[e]*

*People v Rogas (1936) 158 Misc 567, 287 NYS 1005, infra § 13[a]*

*People v Leahey (1960) 26 Misc 2d 438, 207 NYS2d 619, infra § 13[b]*

*People v Calandrillo (1961) 29 Misc 2d 491, 215 NYS2d 361, infra § 24[b]*

*People v Calandrillo (1961) 29 Misc 2d 495, 215 NYS2d 364, supra § 5[a]*

*People v Miller (1964) 42 Misc 2d 794, 248 NYS2d 1018, infra this section and infra § 25[a]*

#### OHIO

*State v Hill (1963, CP) 23 Ohio Ops 2d 255, 91 Ohio L Abs 125, 191 NE2d 235, infra § 13[a]*

#### OKLAHOMA

*State ex rel. Sadler v Lackey (1957, Okla Crim) 319 P2d 610, supra § 5[a]*

*Application of Killion (1959, Okla Crim) 338 P2d 168, supra § 5[a]*

*Bell v Webb (1961, Okla Crim) 365 P2d 399, infra § 13[b]*

#### PENNSYLVANIA

*Commonwealth v Kotch (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59.*

n83

#### CALIFORNIA

*People v Tarantino (1955) 45 Cal 2d 590, 290 P2d 505, infra § 14*

*People v Burch (1961) 196 Cal App 2d 754, 17 Cal Rptr 102*

*People v Darnold (1963) 219 Cal App 2d 561, 33 Cal Rptr 369, cert den 376 US 927, 11 L ed 2d 623, 84 S Ct 694, both infra*

#### FLORIDA

*Miami v Jones (1964, Fla App) 165 So 2d 775, infra § 11[c]*

## MICHIGAN

*People v Fleisher* (1948) 322 Mich 474, 34 NW2d 15, infra

## MISSOURI

*State v Hinojosa* (1951, Mo) 242 SW2d 1, infra

*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, supra § 7

## NEW YORK

*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, supra § 7

*People v Cox* (1960) 24 Misc 2d 998, 202 NYS2d 607, infra § 21[b].

n84

## CALIFORNIA

*People v Wilkins* (1955) 135 Cal App 2d 371, 287 P2d 555, infra § 17

## COLORADO

*Rosier v People* (1952) 126 Colo 82, 247 P2d 448, supra § 7

## FLORIDA

*Miami v Jones* (1964, Fla App) 165 So 2d 775, infra § 11[c]

## HAWAII

*State v Hashimoto* (1962) 46 Hawaii 183, 377 P2d 728, infra § 13[b]

## LOUISIANA

*State v Michel* (1954) 225 La 1040, 74 So 2d 207, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144, infra § 17

## MISSOURI

*State ex rel. Page v Terte* (1930) 324 Mo 925, 25 SW2d 459, infra § 12

*State v Brown* (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]

*State v Hinojosa* (1951, Mo) 242 SW2d 1, infra

*State v Gilliam (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, supra § 7*  
*State v Aubuchon (1964, Mo) 381 SW2d 807, infra § 16[a]*

#### NEW HAMPSHIRE

*State ex rel. Regan v Superior Court (1959) 102 NH 224, 153 A2d 403, infra.*

n85 § 4[b], supra.

n86

#### ALABAMA

*Garrett v State (1958) 268 Ala 299, 105 So 2d 541, infra § 25[b]*  
*Bailey v State (1931) 24 Ala App 339, 135 So 407, infra § 9[c], footnote 1*

#### ARIZONA

*Cochrane v State (1936) 48 Ariz 124, 59 P2d 658, disapproved on another ground Kinsey v State (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3, infra § 9[c], footnote 1*  
*State v Wallace (1965) 97 Ariz 296, 399 P2d 909, infra § 17*

#### CALIFORNIA

*People v Cartier (1959) 51 Cal 2d 590, 335 P2d 114, infra § 13[a]*  
*People v Terry (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446, supra § 7*  
*People v Chapin (1956) 145 Cal App 2d 740, 303 P2d 365, infra § 17*  
*McAllister v Superior Court of San Diego County (1958) 165 Cal App 2d 297, 331 P2d 654, infra § 13[a]*  
*People v Cathey (1960) 186 Cal App 2d 217, 8 Cal Rptr 694, infra § 18*  
*People v Carella (1961) 191 Cal App 2d 115, 12 Cal Rptr 446, supra § 7*  
*People v Wilson (1963) 222 Cal App 2d 616, 35 Cal Rptr 280, supra § 6[b]*

#### COLORADO

*Silliman v People (1945) 114 Colo 130, 162 P2d 793, infra § 9[c], footnote 12*

#### GEORGIA

*Bass v State (1958) 98 Ga App 570, 106 SE2d 845, cert den 359 US 969, 3 L ed 2d 836, 79 S Ct 882, infra § 16[a]*

#### ILLINOIS

*People v Harrison* (1962) 25 Ill 2d 407, 185 NE2d 244, infra § 21[c]  
*People v Bailey* (1965) 56 Ill App 2d 261, 205 NE2d 756, infra § 16[a]

#### INDIANA

*Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, infra § 17

#### LOUISIANA

*State v Bankston* (1928) 165 La 1082, 116 So 565, infra § 16[b]  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411, infra § 13[d]

#### MICHIGAN

*People v Salsbury* (1903) 134 Mich 537, 96 NW 936, infra § 9[c], footnote 1

#### MISSISSIPPI

*Bellew v State* (1958) 238 Miss 734, 106 So 2d 146, cert den and app dismd 360 US 473, 3 L ed 2d 1531, 79 S Ct 1430, reh den 361 US 858, 4 L ed 2d 96, 80 S Ct 43, infra § 16[a]

#### MISSOURI

*State v Hancock* (1937) 340 Mo 918, 104 SW2d 241, infra § 13[c]  
*State v Gillman* (1962, Mo) 354 SW2d 843, infra § 9[c], footnote 2  
*State v Hale* (1963, Mo) 371 SW2d 249, infra § 9[c], footnote 11

#### NEBRASKA

*Reizenstein v State* (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265, infra § 9[c], footnote 11

#### NEW YORK

*People v Buchalter* (1942) 289 NY 244, 45 NE2d 425, infra § 17

#### OHIO

*State v Strain* (1948) 84 Ohio App 229, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109, infra § 9[c], footnote 11  
*State v Thomasson* (1950, App) 46 Ohio Ops 402, 58 Ohio L Abs 402, 97 NE2d 42, infra § 13[c]

## PENNSYLVANIA

*Commonwealth v Wable* (1955) 382 Pa 80, 114 A2d 334, infra § 21[d]  
*Commonwealth v Butler* (1961) 405 Pa 36, 173 A2d 468, cert den 368 US 945, 7 L ed 2d 341, 82 S Ct 384, reh den 368 US 972, 7 L ed 2d 402, 82 S Ct 450, infra § 9[c], footnote 13

## TEXAS

*Davis v State* (1925) 99 Tex Crim 517, 270 SW 1022, infra § 13[c]  
*St. Clair v State* (1926) 104 Tex Crim 423, 284 SW 571, infra § 13[c]  
*Pierce v State* (1928) 109 Tex Crim 503, 5 SW2d 516, infra § 13[c]  
*Artell v State* (1963, Tex Crim) 372 SW 2d 944, cert den 375 US 951, 11 L ed 2d 312, 84 S Ct 439, infra § 9[c], footnote 11  
*Saldana v State* (1964, Tex Crim) 383 SW 2d 599, infra § 16[a]

## WASHINGTON

*State v Gilman* (1963) 63 Wash 2d 7, 385 P2d 369, supra § 5[a]

## WEST VIRGINIA

*State v Painter* (1950) 135 W Va 106, 63 SE2d 86, infra § 9[c], footnote 11  
*State v Tabet* (1951) 136 W Va 239, 67 SE2d 326, infra § 9[c], footnote 1.

n87

## ALABAMA

*Spicer v State* (1914) 188 Ala 9, 65 So 972

## ARIZONA

*State ex rel. Helm v Superior Court of Cochise County* (1961) 90 Ariz 133, 367 P2d 6

## COLORADO

*Silliman v People* (1945) 114 Colo 130, 162 P2d 793  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287  
*Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587

## FLORIDA

*Williams v State (1954, Fla) 74 So 2d 797*

#### GEORGIA

*Walker v State (1959) 215 Ga 128, 109 SE2d 748, 927*

#### ILLINOIS

*People v Turner (1963) 29 Ill 2d 379, 194 NE2d 349*

#### KANSAS

*State v Furthmyer (1929) 128 Kan 317, 277 P 1019*

#### KENTUCKY

*Wendling v Commonwealth (1911) 143 Ky 587, 137 SW 205*

#### LOUISIANA

*State v Bankston (1928) 165 La 1082, 116 So 565*

*State v Lee (1932) 173 La 966, 139 So 302*

*State v Dallao (1937) 187 La 392, 175 So 4, app dismd and cert den 302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51, reh den 302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139*

*State v Michel (1954) 225 La 1040, 74 So 2d 207, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144*

*State v Paillet (1964) 243 La 483, 165 So 2d 294*

#### OHIO

*State v Yeoman (1925) 112 Ohio St 214, 147 NE 3*

*State v Sharp (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE2d 684*

*Dayton v Thomas (1963) 118 Ohio App 165, 25 Ohio Ops 2d 19, 193 NE2d 521, app dismd 175 Ohio St 179, 23 Ohio Ops 2d 462, 191 NE2d 806*

*State v Hahn (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75*

#### PENNSYLVANIA

*Commonwealth v Butler (1961) 405 Pa 36, 173 A2d 468, cert den 368 US 945, 7 L ed 2d 341, 82 S Ct 384, reh den 368 US 972, 7 L ed 2d 402, 82 S Ct 450*

## TEXAS

*Davis v State* (1925) 99 Tex Crim 517, 270 SW 1022

*Sanchez v State* (1950) 155 Tex Crim 364, 235 SW2d 149

*Lopez v State* (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213.

n88 In *People v McHugh* (1964) 20 App Div 2d 770, 247 NYS2d 839, it was held error for the trial court "to refuse to permit the defense to inspect those portions of defendant's statements not offered in evidence by the People unless the defense introduced them in evidence." The court said that the defendant was entitled to inspect the statements unconditionally.

n89 Where a prosecution witness was placed upon the stand for the purpose of proving a confession allegedly made by the defendant, and during the course of his testimony it was revealed that such confession had been taken down by a stenographer, and defense counsel thereupon requested the production of the stenographer's report of the confession for the purpose of examination and use by them if it contained anything in favor of the defense, it was held in *State v Murphy* (1923) 154 La 190, 97 So 397, that the defense's request for production should be granted, regardless of whether the requested report of the confession was correct or incorrect. The court said that the report was certainly very relevant as to the nature and circumstances of the confession; that the prosecution should not be permitted to say whether the report was correct or not, but the correctness thereof should be determined by the trial court and the jury, if it had gone to them; that it would be for the defense to determine whether it would use the report, and for the jury to decide its effect; and that the report should be produced especially because "no one else was present at the time or produced as witnesses save those for the state." Where shortly after the commission of the alleged offense, the district attorney, the county attorney, and the sheriff had an interview with the defendant, and during such interview the defendant had allegedly made a confession and the county attorney had made a tape recording of the interview, and at the trial of the defendant the sheriff had testified to the alleged confession, stating that he remembered the details of the confession although he conceded that he could not remember every item, it was held in *Sanders v State* (1959) 237 Miss 772, 115 So 2d 145, that under the circumstances of the case the defense was entitled to inspect and hear the recording of the interview in order that the defendant might use it in the cross-examination of the sheriff and possibly as direct evidence. Noting that where a prosecution introduces a part only of a statement, the defendant is entitled to prove the remainder or any part thereof which is explanatory of or connected with the part offered by the prosecution, the court said the defendant was entitled to examine and put in evidence all that had been said to and by him at the time of the interview insofar as it had a bearing upon the subject of the controversy. In *Sprinkle v State* (1925) 137 Miss 731, 102 So 844, a prosecution for murder, the denial of the defendant's request for permission to see a dying declaration of the victim of the homicide was held error under the circumstances, it appearing that the dying declaration was made to the district attorney, was taken down in shorthand by a stenographer, and was transcribed; that at the trial the district attorney testified to the dying declaration and also stated that he had the transcription in his pocket; that on cross-examination he was asked by the defendant's attorney if the victim's statement was not elicited by leading questions, and he replied in the negative; that the defendant's attorney thereupon requested the district attorney to let him see the written declaration and also asked the court to compel the district attorney to allow him to see the statement, which motion was overruled; that subsequently the stenographer who took down and transcribed the dying declaration testified that it was correctly taken down and transcribed, and thereupon the defendant again asked the court to require the district attorney to furnish him the written declaration, which motion was again overruled. Stating that the statement in question was not a private paper in the ordinary sense belonging to the district attorney, but was procured in his official capacity for the purpose of aiding him in the prosecution of the defendant, and noting that although the statement in question was not a public document or record in the usual sense, it had a

bearing on the question of the guilt of the defendant, and that with this paper before him the defendant's attorney might have been able to convince the jury that the testimony of the district attorney was inaccurate in some material respects, the court concluded that the trial court should have sustained the motion for inspection of the statement and allowed the defendant's attorney to examine it "for use in cross-examination as well as evidence if competent and relevant." See also *Williams v State* (1954, Fla) 74 So 2d 797, *infra*, where the court said, by way of dictum, that if a statement made by the defendant is introduced into evidence through a prosecution witness it should be made available to the defense for use in cross-examination. And see *Sanchez v State* (1950) 155 Tex Crim 364, 235 SW2d 149, where it was held that the defendant was entitled to inspect his confession when it was placed in the hands of a prosecution witness and the witness testified that it had refreshed his memory.

n90 In *Cochrane v State* (1936) 48 Ariz 124, 59 P2d 658, disapproved on other grounds *Kinsey v State* (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3, *infra*, the defendant was denied the right to inspect the transcript of his confession although a prosecution witness had testified to the confession. In *State v Hale* (1963, Mo) 371 SW2d 249, wherein a police officer stated on cross-examination that an official police report had been prepared in connection with the case and that he had read the report on the previous day at the police headquarters, and defense counsel thereupon asked the officer to produce the report in court, the court, upholding the denial of the defendant's request for production of the report, pointed out that there had been no showing as to the contents, materiality, or relevancy of the report, nor was it shown that the report would have impeached the officer. In *Reizenstein v State* (1958) 165 Neb 865, 87 NW2d 560, *mod* on other grounds and *reh den* 166 Neb 450, 89 NW2d 265, wherein it appeared that the prosecution called at the trial certain witnesses who had been present when the defendant made a statement, that the witnesses had refreshed their recollection from the statement as to what the defendant had said, and that the defendant's counsel thereupon requested the production of the statement for the purpose of cross-examination, it was held that there was no error in denying the defendant's request for the production of the statement. Noting that in a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements, and other documentary evidence for the inspection of the defendant's counsel before the trial, and that error may be predicated only for an abuse of such discretion, the court said that no reason was apparent why the same rule should not apply during the trial. In *State v Strain* (1948) 84 Ohio App 229, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109, wherein it appeared that the defendant had made a confession to a police officer and such confession was taken down in shorthand and was later transcribed, but was not signed by him, that at the trial the police officer testified fully concerning the confession, admitting that he had previously refreshed his recollection from his written memoranda, and that thereupon the defense interposed a motion for an order requiring the prosecuting attorney to deliver to the defendant a copy of the transcript which contained all of the alleged confession, the court held that there was no error in denying the defendant's motion. The court pointed out that the transcript in question was not a written confession signed by the defendant and was therefore not competent as evidence; that the police officer in testifying did not use any transcript or any other paper while on the witness stand to refresh his recollection; and that the papers from which the officer refreshed his recollection were not evidence but were merely memoranda obtained for the use of the prosecuting attorney. See also *State v Cope* (1946) 78 Ohio App 429, 34 Ohio Ops 171, 46 Ohio L Abs 528, 67 NE2d 912, wherein it was held that the trial court's refusal to make available to defense counsel a copy of a typewritten statement signed by the defendant and given to a detective was not error where it appeared that the statement in question was examined by the detective several days prior to the trial, but was not used by him to refresh his memory while on the witness stand, and that the statement was afterward produced in court and introduced into evidence, and ample opportunity was given to defense counsel to recall the detective and examine him in regard to the contents of the statement. The trial court's refusal to permit production, for the purpose of cross-examination of a police officer, of an offense report which the officer had read sometime before the trial to refresh his memory was also held not error in *Artell v State* (1963, Tex Crim) 372 SW2d 944, *cert den* 375 US 951, 11 L ed 2d 312, 84 S Ct 439, the court stating that a report made by a person other than the witness on the stand should not be made available for the purpose of cross-examination of the witness. In *State v Painter* (1950) 135 W Va 106, 63 SE2d 86, where the prosecution in cross-examining a police officer was permitted, over the objection of the defendant, to elicit

information with respect to a prior report made by the officer, and the defendant assigned as error the refusal of the trial court to require the prosecuting attorney to show his counsel the officer's report, the court held, "This assignment of error is so insubstantial as to require no discussion, and we dismiss it by saying that no error appears in the action of the trial court in that particular."

n91 Where police officers were interrogated, upon direct examination, with reference to the circumstances under which the defendant had made an oral confession prior to a written one, and were permitted to testify in detail as to the oral confession, and thereupon the defendant's counsel, before cross-examining the officers with reference to the oral confession, moved for permission to examine the written confession, it was held in *Silliman v People (1945) 114 Colo 130, 162 P2d 793*, that a denial of the motion was not violative of the defendant's rights. Following the rule that in the absence of statute the defendant has no right to inspect evidence in the possession of the prosecution prior to the time it is actually offered in evidence, and pointing out that during the examination of the officers no question was asked as to the contents of the written confession, which was not offered in evidence until just before the prosecution rested its case, and that the written confession could be retained by the prosecution until such time as it desired to make use thereof, the court said that until the prosecution saw fit to offer the written confession, the defendant had no right to examine and inspect it.

n92 In *Commonwealth v Butler (1961) 405 Pa 36, 173 A2d 468*, cert den *368 US 945, 7 L ed 2d 341, 82 S Ct 384*, reh den *368 US 972, 7 L ed 2d 402, 82 S Ct 450*, it was held that where a statement given by the defendant to the authorities immediately following his arrest was identified during the trial, but not offered in evidence, and defense counsel, at this point, requested the opportunity to examine it, it was proper for the trial court to deny the request and rule that when, and if, it was offered in evidence, counsel would then have the right to examine it.

n93 In *People v Miller (1931) 257 NY 54, 177 NE 306*, it was held error to deny the defendant's request, made after the close of the prosecution's case, for permission to inspect letters which were found in the room of the victim of the alleged murder and which were marked for identification in court, but were not offered in evidence. Pointing out that the letters were not the private memoranda of the prosecuting officer, but were the belongings of the murder victim, found in her room and identified in court, the court said that a refusal to direct the inspection of the letters at any stage of the trial was error, whereby the defendant would be aggrieved if there was a reasonable possibility that it had an effect upon the jury.

n94 Since questions as to the defendant's right to inspection of a prosecution witness' statement for purposes of cross-examination or impeachment of such witness are not within the scope of the present annotation (see § 1[a], supra), the treatment here does not purport to include cases dealing with the question whether the defendant is entitled to inspection, for purposes of cross-examination or impeachment, of a statement of a prosecution witness which has been used by the prosecuting attorney during the trial in his examination of the witness.

n95 In *Williams v State (1954, Fla) 74 So 2d 797*, it was held that where the prosecution attempted to impeach the defendant's credibility on his cross-examination by reading, in the presence of the jury, an extrajudicial statement purportedly made by him before certain assistant state's attorneys and police officers, defense counsel was entitled to examine such statement. The court noted that if such a statement had been admitted into evidence, it would have been available to defense counsel in its entirety, so that if the damaging admissions had been qualified in any way by the defendant in the balance of the statement, and brought into harmony with his testimony at the trial, this fact could have been brought out upon redirect examination; that if the statement had been introduced through a witness for the prosecution it should have been made available to defense counsel for use in cross-examination; and that if the statement had been used to refresh the recollection of the defendant while testifying as a witness, it should have been shown to his counsel on demand, even though not introduced in evidence. Where, on cross-examination of the defendants, the prosecuting attorney read from a written statement allegedly made by them, and, for impeachment purposes, inquired of them if they had not been asked a certain question to which they had made specific answers, and at the conclusion of the

cross-examination, counsel for the defendants asked the privilege of examining the document in order that he might further examine the defendants, it was held in *People v Borella* (1935) 362 Ill 218, 199 NE 113, that it was error to deny the defense's request for examination of the document. In *Meadors v Commonwealth* (1940) 281 Ky 622, 136 SW2d 1066, it was held that where the prosecuting attorney used on cross-examination certain statements made by the defendant, the defendant or his counsel should be given the right to inspect and use a transcript of any writing used in the cross-examination. See also *People v Reger* (1961) 13 App Div 2d 63, 213 NYS2d 298, where the court, in holding that it was error under the circumstances to permit the use of a tape recording by the prosecuting attorney during the cross-examination of the defendant, although the prosecuting attorney alleged that his purpose for such use of the recording was to refresh the recollection of the defendant, noted that the writing or document which revives a present recollection is not evidence and may not be shown to the jury by the party using it, but that opposing counsel has a right to inspect it and use it to test the credibility of the witness. Where the prosecuting attorney cross-examined the defendant in relation to a purported written statement, confession, or admission made by him and taken in connection with a coroner's inquest, it was held in *State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE2d 684, that it was the duty of the trial court to order, on motion by the defense, the submission of such statement, confession, or admission to defense counsel for his inspection, the court relying on the rule that the defendant in a criminal case is not entitled to see and examine, before trial, a written statement, admission, or confession allegedly made by him, but if the prosecuting attorney, after proof that the confession in his possession was signed by the defendant, should offer it as evidence tending to establish proof of guilt or should examine a witness in relation thereto, it was the duty of the trial court to submit, upon demand, such confession to the defense for its inspection. See also *State v Yeoman* (1925) 112 Ohio St 214, 147 NE 3, wherein the court recognized the rule that if the prosecuting attorney, after proof that a confession in his possession was signed by the defendant, should examine a witness in relation to the confession, the defendant's counsel could then make a demand for the confession and would be entitled to inspect it. And in *State v Clark* (1930) 156 Wash 543, 287 P 18, the court, in upholding the denial of the production of the defendant's statement, pointed out that the prosecution did not make any use of the statement on the trial of the defendant.

n96 Where, during the cross-examination of a witness for the defense, the prosecuting attorney used a transcript of a conversation between the witness and the sheriff which was taken down by a stenographer, the court in *People v Carter* (1957) 48 Cal 2d 737, 312 P2d 665, held that it was error to deny the defendant's request to inspect the transcript used by the prosecuting attorney. The court said that the rule that the defendant in a criminal case can compel production when it becomes clear during the course of a trial that the prosecution has in its possession relevant and material evidence that is not confidential is applicable to a statement which the prosecution has used in impeaching the defendant's witness and which the defendant seeks to inspect for the purpose of rehabilitation. Noting that the prosecuting attorney might read to the jury extracts from the transcript selected with an eye to putting the witness in the worst possible light by emphasizing the gap between his prior statement and his present testimony, the court commented that it was clearly unfair to deny the defendant an opportunity to show that the extracts had been taken out of context and that when they were read with other parts of the statement the alleged inconsistency would disappear. The rule that the defendant is entitled to see statements of witnesses where they are used by the prosecution at the trial was also recognized in *Jackman v State* (1962, Fla App) 140 So 2d 627. In *State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE2d 684, it was held that where a defense witness was cross-examined by the prosecuting attorney and asked questions relating to her purported written statement taken in connection with a coroner's inquest, and some of the questions and answers were exhibited and read verbatim from a transcript of her statement in the presence of the jury, defense counsel, on motion, was entitled to see and examine such statement. The court distinguished *State v Rhoads* (1910) 81 Ohio St 397, 91 NE 186, 27 LRA NS 558, wherein it was held that the defendant was not entitled to inspection of the transcript of a statement of a prosecution witness which had been used by the prosecuting attorney to refresh the memory of the witness. As ground for the distinction the court pointed out that in the Rhoads Case the statement in question was not read to lay the groundwork for possible impeachment of a defense witness on cross-examination, but was referred to by the prosecuting attorney to frame questions to

be propounded to a state witness on re-examination. Where, on cross-examination of a defense witness and in the presence and hearing of the jury, the prosecuting attorney exhibited to the witness a written statement given by him to the assistant state's attorney, and then proceeded to read portions of the statement and asked the witness if he had not made such statement, it was held in *Walton v State* (1965, *Tex Crim*) 386 SW2d 805, that the defendant was entitled, upon proper and timely request, to examine the statement of the witness used by the prosecuting attorney. The court noted that reversal would result, without any showing of injury, for denial of the defendant's timely request that he be permitted to inspect any document, instrument, or statement which was used in some way before the jury so as to make its contents an issue, such as where used by a witness to refresh his memory, or exhibited or read from, or used to question the witness in the jury's presence. In *Board v State* (1933) 122 *Tex Crim* 487, 56 SW2d 464, wherein it appeared that during the cross-examination of a defense witness the prosecuting attorney exhibited to the witness a prior written statement made by him, had it identified by him, and read portions thereof in the presence of the jury and asked questions relevant thereto, it was held error to deny the defendant's request for the production of the statement in its entirety at the time of the redirect examination of the witness. Noting that although the writing called for by the defendant was not a public document and not open to inspection of the defendant as a matter of right, such paper became subject to the defendant's demand for production when used before the jury by the prosecution in some way so as to make its contents an issue, the court, pointing out that the prosecution had asked questions relevant to the statement and had exhibited it by reading therefrom in the presence of the jury, said that such fact was equivalent to an introduction of that portion of the statement which the prosecuting attorney had read before the jury, and that under the circumstances the defendant had a right to examine the statement and introduce any of its contents tending to explain or qualify the portions read to the witness. Holding to the same effect is *Rutledge v State* (1923) 94 *Tex Crim* 231, 250 SW 698. See also *Sewell v State* (1963, *Tex Crim*) 367 SW2d 349, where the court, in rejecting the defendant's contention that his conviction should be reversed because the trial judge denied his request for the production of an offense report which had been used by a police officer in refreshing his memory before testifying for the prosecution, said that the failure to produce a prior statement of a witness which has not been used in some way before the jury will not result in reversal unless injury is shown or the defendant is deprived of the opportunity to show injury, but that where a statement or document which is used in some way before the jury so as to make its contents an issue, such as where used by a witness to refresh his memory, or exhibited or read from, or used to question the witness in the jury's presence, is not produced, on demand, for use by the defense, reversal will result without any showing of injury. The Texas rule that the defendant is entitled to inspection of a statement or document which has been used in some way by the prosecution before the jury so as to make its contents an issue was also recognized in *Tinker v State* (1923) 95 *Tex Crim* 143, 253 SW 531, *St. Clair v State* (1926) 104 *Tex Crim* 423, 284 SW 571, and *Erwin v State* (1961) 171 *Tex Crim* 323, 350 SW 2d 199.

n97 The trial court's refusal to permit defense counsel to examine an FBI record of alleged prior convictions of the defendant, which had been used by the prosecuting attorney upon cross-examination to refresh the recollection of the defendant as to his prior convictions, was held error in *People v Brown* (1956) 2 *App Div* 2d 202, 153 *NYS2d* 744, the court stating that the rule that the opposing counsel has the right to inspect a writing used by a witness to revive his recollection is applicable not only where the recollection of the witness is refreshed upon direct examination but also where a recollection is refreshed upon cross-examination.

n98 In *Bailey v State* (1963, *Tex Crim*) 365 SW2d 170, wherein it appeared that while a police officer was testifying on direct examination, the prosecuting attorney exhibited to him a certain document marked for identification as a state's exhibit, and the officer testified that the exhibit was a photograph of the victim of the alleged homicide lying on the kitchen floor in his house, and that after the prosecuting attorney had concluded his direct examination of the officer, counsel for the defendant requested permission to see the photograph for the purpose of identification and for cross-examination of the officer, it was held that the trial court committed error in refusing the defendant's request. Pointing out that when the exhibit was used by the prosecuting attorney before the jury in questioning the officer, its contents became an issue in the case, the court noted the rule that it

is reversible error to deny the demand of an accused for the production of any statement or document which has been used in some way before the jury whereby its contents have become an issue. The contention that because the officer did not use the exhibit to refresh his memory but only identified it, the defendant was not entitled to see and examine the exhibit, was rejected, the court pointing out that when the photograph was exhibited to the officer before the jury and he was questioned relative thereto its contents became an issue and the defendant then had the right to see and examine it.

n99 Where the prosecuting attorney was allowed to use a transcript of the testimony of a defense witness, which had been taken by and before the prosecuting attorney in his office some time prior to the trial, it was held in *Smith v State* (1957, Fla) 95 So 2d 525, that it was error not to permit the witness and the defendant's counsel to inspect the transcript before it was used by the prosecuting attorney. The testimony of a witness given before a state's attorney was said to fall in the same category as testimony taken before a committing magistrate, so that a transcript of the testimony taken before the state's attorney was not a paper or memorandum of private and unofficial nature. Where, on cross-examination of the defendant, the prosecuting attorney referred to a statement apparently furnished by the Federal Bureau of Investigation of the criminal record of the defendant, and thereupon the defendant's counsel requested permission to see and examine the document, the court in *State v Stephens* (1949) 168 Kan 5, 209 P2d 924, holding that it was error to refuse the request for examination of the document, said that the defendant's counsel should have been permitted to examine the document before it was shown to the defendant and any questions asked. In this connection, it should be noted that the discussion here is limited to the right of the defense, as distinguished from the right of a particular defense witness as such, to inspect a document or paper which is used by the prosecution during the trial. Accordingly, the treatment here does not purport to include cases dealing with the distinct question whether before a writing is to be used by the prosecution in its cross-examination of a defense witness (including the defendant as a witness) such writing must be shown to the witness for his inspection. As illustrative of cases excluded in this respect, see the following: Where the defendant's written statement made to a police officer and signed by him was admitted in evidence for the purpose of impeaching the defendant after it had been used by the prosecuting attorney in the cross-examination of the defendant, the court in *Washington v State* (1959) 269 Ala 146, 112 So 2d 179, concluding that the defendant was entitled to examine the statement before being questioned on the cross-examination concerning its contents, held that since the defendant was not permitted to see the statement in order to refresh his memory or to explain any inconsistency, the admission of the statement in evidence was error under the circumstances. The court noted that a witness is not bound to answer as to matters reduced to writing by himself or another and subscribed by him until after the writing has been produced and read or shown to him, and that if a statement written or signed by a witness or prior sworn testimony of a witness is to be introduced in evidence to impeach the witness, the statement must first be shown to the witness in order to allow him to refresh his memory and to explain any inconsistency. In *Dunn v State* (1964) 277 Ala 39, 166 So 2d 878, the court, noting that the rule had long been established in Alabama that a witness should not be required to answer as to matters reduced to writing by himself or another and subscribed by him until after the writing has been produced and read or shown to him, held that it was error for the trial court to deny the request of defense counsel to produce for examination by the defendant a statement signed by him from which he was being questioned by the prosecuting attorney during the course of his cross-examination. See also, as holding to the same effect, *Manning v State* (1928) 217 Ala 357, 116 So 360, *Kennedy v State* (1940) 240 Ala 89, 196 So 884, and *Moore v State* (1957) 39 Ala App 235, 97 So 2d 166. In *Parker v State* (1957) 266 Ala 63, 94 So 2d 209, it was held that although the document in question was not first shown to the defendant, there was no error in the trial court's permitting the prosecuting attorney to cross-examine from a paper that purported to be a written transcription of a tape-recorded statement made by the defendant to the police soon after the commission of the alleged offense, the court pointing out that the writing used by the prosecuting attorney was not a signed statement or sworn testimony given by the defendant, nor was it later introduced in evidence for the purpose of impeaching the witness.

n100 In *Bailey v State* (1931) 24 Ala App 339, 135 So 407, it was held that although during the

cross-examination of a witness for the defendant, the prosecuting attorney referred to "grand jury notes" in his possession in propounding questions to the witness, he was under no duty to turn such notes over to the defendant's counsel for inspection. The court said that the prosecuting attorney had the right to refer to such private memoranda in formulating questions on cross-examination of a defense witness; that the nature and character of the notes were such that the prosecuting attorney was under no duty to submit them to the defendant's counsel; and that, moreover, the point involved was legally within the discretion of the trial judge. In *Cochrane v State* (1936) 48 Ariz 124, 59 P2d 658, wherein it appeared that the defendant's confession made to the county attorney was taken down stenographically and transcribed, and the transcription was used as a memorandum by the county attorney in questioning a witness who had testified as to what the confession was, the court held that the defendant was not entitled to a copy of the transcript of the confession for use in the cross-examination of the witness. Noting that there was no effort to refresh the memory of the witness on the stand by the transcript, but it was merely used by the prosecuting attorney for the purpose of advising him what questions he should ask the witness, the court said that the law nowhere provides for the taking stenographically of confessions of defendant, and if it is done the notes are not evidence, although they may be used to refresh the memory of the stenographer in testifying to the confession, or by the county attorney as a memorandum in questioning persons who heard the confession, but they have no probative value whatever but are merely the private papers of the person or persons who take the pains and trouble of making them. It should be noted, however, that part of the opinion expressed in the last sentence above was disapproved in *Kinsey v State* (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3 (a case not within the scope of the present annotation), wherein the court, in holding that memoranda of the defendant's statements made by a witness who had actually heard the statements were admissible in evidence where the witness testified to the accuracy of the memoranda, said that the holding in the *Cochrane* Case to the effect that memoranda of the defendant's confession were not evidence and did not have any probative value should not be followed insofar as it was in conflict with any conclusion reached in the present case. In *People v Salsbury* (1903) 134 Mich 537, 96 NW 936, wherein it appeared that the prosecuting attorney had in his possession notes of testimony taken before the grand jury, and from such notes he put questions to defense witnesses, but refused to exhibit them to the defendant's counsel, the court, pointing out that the notes in question were not of the character of a deposition or private writing, held that it was not necessary to show those notes either to the witnesses or defense counsel. In *Robinson v State* (1899, Tex Crim) 49 SW 386, it was held that where the prosecution attorney asked a reluctant witness leading questions by reading from a paper in his hand, there was no error in refusing to permit defense counsel to see the paper. The court said that where a witness on either side shows a reluctance to testify, the party who places him on the stand can ask him leading questions, and the fact that counsel asks questions by reading from a statement or memorandum does not change the rule. In *State v Tabet* (1951) 136 W Va 239, 67 SE2d 326, a prosecution for violation of the "numbers" statutes, wherein it appeared that during the course of the trial a police officer testified that when a raid was made at the place allegedly used by the defendant in the commission of the charged offense, he found some papers in that place, which were not identified in the record at that time, and he was then asked to examine an envelope presented to him and to see if its contents were those papers seized in that raid, and thereupon the defendant's counsel asked the court to grant permission to examine the contents of the envelope, but the request was denied on the ground that the prosecuting attorney had informed the trial court that the envelope had not been, and would not be, tendered in evidence, the court, upholding the ruling of the trial court, held that since the envelope with its contents was not introduced into the evidence, the prosecution could not be required to present it to the defendant for inspection.

n101 In *State v Gillman* (1962, Mo) 354 SW2d 843, it appeared that when the prosecuting attorney handed to a witness on the stand a state's exhibit which had been marked for identification and asked him to identify it, the defendant's attorney objected and requested permission to see the exhibit before it was handed to the witness, but the trial court overruled the objection, stating that the exhibit was not then being offered but was being identified. Noting that after the exhibit was identified by the witness, it was then shown to the defendant's attorney, and thereafter was offered in evidence and admitted, the court held that there was no abuse of the trial court's discretion in refusing to allow the defendant's attorney to see the exhibit before it was handed to the

witness for identification.

n102 For a later California case apparently taking a contrary view, see *People v Carter (1957) 48 Cal 2d 737, 312 P2d 665*, supra.

n103 Where, during the cross-examination of a witness for the defense, the prosecuting attorney used an unsigned and unapproved report made by a third person of statements of the witness which were contradictory of the witness' testimony given at the trial, it was held in *People v Singh (1934) 136 Cal App 233, 28 P2d 416*, that there was no error in refusing to compel the prosecution to submit the documents to the defendant's attorney for inspection. The court noted that extrajudicial statements made by a third party without the signature or approval of the witness are not themselves evidence with which to impeach him. Where, in asking the defendant questions for impeachment purposes, the prosecuting attorney used a typed statement which had previously been made by the defendant and taken down by a stenographer, but had not been signed by the defendant, and thereupon defense counsel requested that he or the defendant be allowed to examine the paper before any questions were propounded, it was held in *People v Sherman (1950) 97 Cal App 2d 245, 217 P2d 715*, that the refusal to submit the statement for inspection by the defense was not error. The court relied on *People v Singh (1934) 136 Cal App 233, 28 P2d 416*, supra. The failure of the prosecution to hand the defendant his prior statements for examination before they were read in court to impeach him was held not error in *People v Bjornsen (1947) 79 Cal App 2d 519, 180 P2d 443*, where it appeared that the defendant did not ask for such examination of the statements and that the statements were not signed by him. The court noted that the rule that written statements must be shown to a witness before any question is put to him concerning them applies only to written statements signed by the witness, and not to unsigned memoranda or statements made by other persons. In *People v Meadows (1930) 108 Cal App 67, 291 P 226*, it was held not error for the trial court to refuse to require the prosecution to furnish the defendant with a copy of a typewritten transcription of shorthand notes made by a stenographer at an interview between the defendant and the district attorney, even though the typewritten transcription was used by the district attorney in propounding questions to the stenographer in an effort to impeach the testimony of the defendant as to certain alleged statements made by him at the interview. In *People v Haughey (1926) 79 Cal App 541, 250 P 406*, wherein a police officer testified, to impeach the defendant, from his recollection of the defendant's oral statements made to him, the court, in rejecting the defendant's contention that no proper foundation for the impeachment was laid, held that even though the defendant's oral statements were taken down in writing by the officer, the prosecution was not required to produce such writing as the foundation for the impeachment, since it was neither signed nor approved by the defendant.

n104 It should be noted that admissibility in evidence is not a prerequisite to discovery under the influential Federal Rules of Civil Procedure. See *Am. Jur. 2d, Depositions and Discovery § 158*.

n105 In some earlier California cases a contrary view was taken. See, for example, *People v Santora (1942) 51 Cal App 2d 707, 125 P2d 606*, infra § 17. A contrary view was also apparently taken in *Schindler v Superior Court of Madera County (1958) 161 Cal App 2d 513, 327 P2d 68*, infra § 16[h]. But this case was disapproved in *People v Garner (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680*, cert den *370 US 929, 8 L ed 2d 508, 82 S Ct 1571*, infra § 16[h].

n106 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with whether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, infra.

n107 The Arizona Rule referred to above is not the exclusive authority for discovery and inspection, since documents or objects which are not subject to inspection under this rule may still be produced for inspection by the defense under the inherent residual power of the court to permit discovery when necessary in the due administration of justice. See *State ex rel. Polley v Superior Court of Santa Cruz County (1956) 81 Ariz 127, 302*

*P2d 263*, infra § 13[a]; *State ex rel. Helm v Superior Court of Cochise County (1961) 90 Ariz 133, 367 P2d 6*, infra § 21[e]; *State v McGee (1962) 91 Ariz 101, 370 P2d 261*, cert den *371 US 844, 9 L ed 2d 79, 83 S Ct 75*, infra § 13[b]; *State v Wallace (1965) 97 Ariz 296, 399 P2d 909*, infra § 17.

n108 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, infra.

n109 The 1965 amendment has boradened the scope of discovery, extending it to such items as written reports of autopsies, ballistics tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, and written reports of physical or mental examination of the defendant or the alleged victim by a physician, dentist, or psychologist made in connection with the particular case.

n110 In Delaware pretrial discovery by a defendant in a criminal case is limited to matters which are discoverable under the rule referred to above. *State v Winsett (1964, Del) 200 A2d 237*. Holding to the same effect by implication is *State v Thompson (1957) 50 Del 456, 134 A2d 266*, infra.

n111 Rule 17 relates to the form and issuance of a subpoena, and subsection (c) thereof provides that the court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at the time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected and copied by the parties and their attorneys.

n112 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, infra.

n113 The primary purpose of the Florida statute above is to furnish a defendant with information that will enable him to better prepare his defense. *Perez v State (1955, Fla) 81 So 2d 201; Belger v State (1965, Fla App) 171 So 2d 574*. In 1963 Florida adopted another statute (§ 925.05) providing that where a person is charged with an offense, upon motion of such person, the court shall order the prosecuting attorney to permit him to inspect written or recorded statements or confessions made by him, whether signed or unsigned. This statute, however, is not involved or discussed in any of the following cases.

n114 Subsequent to this decision Florida adopted a statute authorizing discovery of a defendant's confessions or statements. See footnote 12, supra.

n115 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, infra.

n116 This provision was repealed in 1963. However, an analogous, although not identical, provision may be found in Chapter 38 § 114-10, of the 1963 Illinois Revised Statutes.

n117 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, infra.

n118 The main objectives of Rule 728 are to assist the defendant in preparing his defense, and to protect him from surprise. *Mayson v State (1965) 238 Md 283, 208 A2d 599*.

n119 It should be noted that this annotation does not purport to treat statutory law except to the extent that it

is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n120 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n121 In concluding that under the circumstances its judicial discretion must be exercised by denying to the defendant the opportunity to inspect the statements, the court in the Echevarria Case above relied on *State v Tune (1953) 13 NJ 203, 98 A2d 881*, *infra* § 13[b] (a case decided prior to the adoption of New Jersey Rule 3:5-11). It should be noted, however, that at least part of the holding in the Tune Case was in conflict with the holding in *State v Johnson (1958) 28 NJ 133, 145 A2d 313*, *supra*.

n122 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n123 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n124 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n125 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n126 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n127 It should be noted that this annotation does not purport to treat statutory law except to the extent that it is reflected in reported cases within the scope of the annotation. For cases dealing with wether statutes or rules authorizing discovery in civil proceedings are applicable in criminal cases, see § 12, *infra*.

n128 For cases involving specific provisions for discovery in Missouri criminal proceedings, see § 11[f], *supra*.

n129 It should be noted that subsequently to the Cala and Regedanz Cases above it seems to have been settled in Ohio that the Ohio Code of Civil Procedure providing for inspection of books and documents is not applicable to criminal cases. See *State v Corkran (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437*, *supra*.

n130 The treatment here includes transcriptions or recordings of conversations had by an accused after the alleged offense.

n131 As to whether the refusal to permit an accused to inspect his confession before trial or the suppression by the prosecution of his statement violates his constitutional rights, see § 4, *supra*.

n132 This rule is treated in § 11[a], *supra*.

n133 In this case the prosecuting attorney's refusal to exhibit to the defendant's attorney written statements alleged to have been made by the defendant was held not error, the court stating that the defendant's own statement was of no conceivable value to him, and that he must have known what was contained therein.

n134 The treatment here includes transcriptions or recordings of conversations had by an accused after the alleged offense.

n135 It should be noted that while the stated reason for the production of the defendant's statements in this case was that an inspection was necessary in order that the mental condition of the defendant at the time the statements were made might be determined, this fact was not taken into consideration by the court in upholding the denial of the motion. In this connection, compare this case with *Cramer v State (Neb) infra*.

n136 As to the New Jersey statutory rule, subsequently adopted, see § 11[g], *supra*.

n137 It should be noted that the holding in the Tune Case above that a defendant is not entitled to inspection of his confession merely because he may not recall its contents is in conflict with, at least to some extent, the later decision in *State v Johnson (1958) 28 NJ 133, 145 A2d 313*, *supra* § 11[g], wherein it was held that the fact that a defendant does not recall his statement with sufficient detail to satisfy his counsel that he cannot fairly go to trial without it entitles him to an inspection of the statement in the absence of a showing by the state that inspection will improperly hamper the prosecution.

n138 The court referred to *People v Quarles (1964) 44 Misc 2d 955, 255 NYS2d 599*, and *People v Abbatiello (1965) 46 Misc 2d 148, 259 NYS2d 203*, both *supra* § 13[a].

n139 The treatment here includes transcriptions or recordings of conversations had by an accused after the alleged offense.

n140 It should be noted that subsequent to the Kupis Case above, Delaware adopted a statute permitting inspection by the defendant of his confession or statement. See § 11[b], *supra*.

n141 It should be noted that subsequent to the Witham Case above, Tennessee adopted a statute permitting inspection by the defense of confessions or admission against interest made by a person charged with a crime. See § 11[h], *supra*.

n142 The treatment here includes transcriptions or recordings of conversations had by an accused after the alleged offense.

n143 In view of the Louisiana decisions discussed in the text above, the following earlier Louisiana decision may be considered as no longer authoritative in this jurisdiction to the extent that it is contrary to the others. In *State v Dallao (1937) 187 La 392, 175 So 4*, app dismd and cert den *302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51*, reh den *302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139*, it was held not error for the trial judge to refuse to permit the defendant to inspect statements, reports, confessions, and documents alleged to be in the possession of the police department. The court said that so far as the documents called for were public in character, the defendant was not entitled to their inspection until they had been used in open court, and in so far as they were of a private nature, he was not entitled to their inspection until they were offered in evidence.

n144 The accused's documents, books, or papers which were used or directly involved in the commission of the alleged offense are separately treated in § 24, *infra*.

n145 Treated here are letters either written to or received by an accused.

n146 The accused's documents, books, or papers which were used or directly involved in the commission of

the alleged offense are separately treated in § 24, *infra*.

n147 Cases dealing with a report made by a police or investigating officer in connection with the case are separately treated in § 17, *infra*.

n148 It should be noted that the discussion here does not purport to cover the question whether a defendant is entitled to inspect a statement of a prosecution witness for purposes of cross-examination or impeachment, since this question is treated in a separate annotation. See 7 A.L.R.3d 181.

n149 The view that ordinarily an accused is entitled to inspect statements of a prosecution witness was taken in *State v Tippett (1927) 317 Mo 319, 296 SW 132*, where the court, in holding that the defendant had a right to inspect a statement previously made by a prosecution witness, observed that the general rule denying the inspection of documents in the hands of an adverse party had been greatly relaxed in modern cases; that the cases seemed to hold that it is a matter of indifference whether the requested document may be of actual benefit to the party filing the motion to inspect; that if from the motion the document may be material, the right of inspection obtains; and that in the present case the motion showed that the statement might be material. However, this case was overruled in *State ex rel. Missouri P.R. Co. v Hall (1930) 325 Mo 102, 27 SW2d 1027* (a case not within the scope of this annotation because involving a plaintiff's motion for discovery in a civil case), wherein the court, in holding that the trial court exceeded its jurisdiction in granting the plaintiff's motion for discovery in the case, adopted the view that ordinarily the defendant in a criminal case is not entitled to inspection of documents in the possession of the prosecution.

n150 Such statements as described above are distinguished from statements of witnesses taken before a magistrate. See *Jackman v State (1962, Fla App) 140 So 2d 627*, *infra* § 19.

n151 Cases dealing with a report made by a police or investigating officer in connection with the case are separately treated in § 17, *infra*.

n152 Cases dealing with a report made by a police or investigating officer in connection with the case are separately treated in § 17, *infra*.

n153 Since the discussion here is based on the assumption that a particular police report, police record, or investigation file sought by the defense is in the possession or under the control of the prosecution at the time of the request for its production, cases wherein such a report or document was not shown to be in the possession or under the control of the prosecution are beyond the scope of this annotation. As illustrative of cases excluded, see *Commonwealth v Friday (1952) 171 Pa Super 397, 90 A2d 856*, wherein the denial of the defendant's request for production of the entire file of records and papers relating to the present case lodged in certain barracks of the state police was upheld on the ground that the prosecuting attorney did not have custody or control of reports of investigations made by the state police and could not, without the consent of the police commissioner, produce them or reveal their contents. Likewise excluded are cases dealing with the accused's right to inspection of an FBI investigation report which was not shown to have been released to the prosecution prior to the request for its production. For examples of such cases, see § 1[a], footnote 10.

n154 In this connection, it should be noted that questions as to the defendant's right to inspect a statement of a prosecution witness for purposes of cross-examination or impeachment are not within the scope of this annotation.

n155 The particular document or material involved in each case is described in parentheses after the citation of the case.

n156 This statute provides: "The magistrate or his clerk must keep the depositions taken on the information or the examination, until they are returned to the proper court; and must not permit them to be examined or

copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney-general, district attorney, or other prosecuting attorney, and the defendant and his counsel; provided however, upon demand by defendant or his attorney the magistrate must order a transcript of the depositions taken on the information, or on the examination, to be immediately furnished said defendant or his attorney. . . ."

n157 In this connection, attention is called to § 902.11 of the Florida statutes (this provision was not referred to in the Jackman Case above), which provides that if the testimony of witnesses at a preliminary examination is reduced to writing at the request of the prosecuting attorney, a copy of such testimony shall be furnished free of cost to the defendant or his counsel.

n158 It should be noted that cases wherein a transcript or report of the coroner's inquest was not shown to be in the possession or under the control of the prosecution are not within the scope of this annotation. As illustrative of cases excluded, see the following: In *Daly v Dimock* (1887) 55 Conn 579, 12 A 405, it was held that the defendant had a right to inspect all the papers composing a coroner's return after it had been filed with the clerk of the Superior Court, including all the testimony of witnesses examined before him. In *Poyner v Commonwealth* (1938) 274 Ky 813, 120 SW2d 649, it was held that the statute providing that the coroner should commit to writing the substance of evidence taken at an inquest and return it to the office of the clerk of the Circuit Court of the county did not require that the testimony so taken at the inquest should be furnished to the accused.

n159 Since the discussion here is based on the assumption that the report of an autopsy or post-mortem examination sought by the defendant is in the possession or under the control of the prosecution, cases wherein such a report was not shown to be in the possession or under the control of the prosecution are beyond the scope of this annotation. As illustrative of cases excluded, see the following: In *Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130, the court, stating that an autopsy report is a record that the coroner is required to keep and is therefore a public record which a citizen may inspect, held that the defendant was entitled to receive, prior to trial, a copy of a report concerning the autopsy performed on the body of the victim of the homicide which was in the possession of the coroner, where the defendant's request for such a copy was previously denied by the coroner. In *Schindler v Superior Court of Madera County* (1958) 161 Cal App 2d 513, 327 P2d 68, disapproved on another point in *People v Garner* (1961) 57 Cal 2d 135, 18 Cal Rptr 40, 367 P2d 680, cert den 370 US 929, 8 L ed 2d 508, 82 S Ct 1571, the defendant's motion for an order allowing him to inspect a report of the autopsy performed on the victim of the homicide was held properly denied, since the defendant did not first make a request of the coroner for such inspection. The court said that, presumably, if such request had been made of the coroner, it would have been granted, and that without first making such a request, the defendant's motion to inspect should be denied.

n160 It should be noted that cases wherein a report of the kind under consideration was not shown to be in the possession or under the control of the prosecution are not within the scope of this annotation. As illustrative of cases excluded, see *People v Saccoia* (1934) 268 Mich 132, 255 NW 738, wherein it was held that reports relating to an examination into the sanity of an accused and made by a psychopathic clinic or a sanity commission which was a public body authorized by statute to be created by a court to aid in the performance of its public functions were subject to inspection by the accused.

n161 Arizona Rule 195 referred to above is treated in § 11[a], supra.

n162 Cases involving a photograph of fingerprints are treated in § 22[e], supra.

n163 The holding in the Marshall Case above that the Nebraska civil statute providing for discovery and inspection of books and papers was applicable to criminal cases was disapproved in *Hameyer v State* (1947) 148 Neb 798, 29 NW2d 458, supra § 12.

## JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

## JURISDICTIONAL TABLE OF STATUTES AND CASES

## SUPREME COURT

*Application of Landeros (1957, DC NJ) 154 F Supp 183*

*Mitchell v Wyrick (1982, ED Mo) 536 F Supp 395, affd (CA8 Mo) 698 F2d 940, cert den (US) 77 L Ed 2d 1373, 103 S Ct 3120*

*United States ex rel. Wade v Jackson (1957, DC NY) 153 F Supp 781, app dismd (CA2) 256 F2d 7, cert den 357 US 908, 2 L ed 2d 1158, 78 S Ct 1152, disapproved on other grounds *United States ex rel. Daniel v Wilkins (1961, CA2 NY) 292 F2d 348, cert den 372 US 917, 9 L ed 2d 723, 83 S Ct 731, reh den 372 US 950, 9 L ed 2d 975, 83 S Ct 938**

*Woodcock v Amaral (CA1 Mass) 511 F2d 985, cert den 423 US 841, 46 L Ed 2d 60, 96 S Ct 72*

*Woollomes v Heinze (1952, CA9 Cal) 198 F2d 577, cert den 344 US 929, 97 L ed 715, 73 S Ct 499*

## DISTRICT OF COLUMBIA COURT

*Fuller v United States (1949, Mun Ct App Dist Col) 65 A2d 589*

*Griffin v United States (1950) 87 App DC 172, 183 F2d 990, supra § 8 (apparently applying District of Columbia law)*

*Jackson v United States (Dist Col App) 329 A2d 782, cert den (US) 46 L Ed 2d 74, 96 S Ct 95*

*United States v Holmes (Dist Col App) 343 A2d 272*

## UNITED STATES CODE

*Fed. R. Crim. P. 26.2*

*Federal Rule of Criminal Procedure 16*

*Rule 15(a) of Federal Rules of Criminal Procedure*

*Rule 16 of Federal Rules of Criminal Procedure*

*Rule 16(a)(1)(A), Federal Rules of Criminal Procedure*

*Rule 16, Federal Rules of Civil Procedure*

## ALABAMA

*Allison v State (Ala) 200 So 2d 653*

*Bailey v State (1931) 24 Ala App 339, 135 So 407, infra § 9[c], footnote 1*

*Garrett v State (1958) 268 Ala 299, 105 So 2d 541, infra § 25[b]*

*McCorvey v State (Ala App) 339 So 2d 1053, cert den (Ala) 339 So 2d 1059*

*Parsons v State (1948) 251 Ala 467, 38 So 2d 209 (holding that the defendant's motion to request the Attorney General of the United States to release certain evidence concerning the present prosecution which was in the custody of the Department of Justice should have been granted)*

*See Spicer v State (1914) 188 Ala 9, 65 So 972, infra § 27[a]*

*Sowells v State (Ala App) 339 So 2d 1090*

*Spicer v State (1914) 188 Ala 9, 65 So 972*

*Thigpen v State, 49 Ala App 233, 270 So 2d 666*

## ALASKA

*United States v Rich (1922) 6 Alaska 670, infra § 25[a]*

## ARIZONA

*Burke v Superior Court of Pima County*, 3 Ariz App 576, 416 P2d 997  
*Cochrane v State* (1936) 48 Ariz 124, 59 P2d 658, disapproved on another ground *Kinsey v State* (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3, infra § 9[c], footnote 1  
*Cochrane v State* (1936) 48 Ariz 124, 59 P2d 658, disapproved on another ground *Kinsey v State* (1937) 49 Ariz 201, 65 P2d 1141, 125 ALR 3, supra § 9[c], footnote 1  
*State ex rel. Corbin v Superior Court of Maricopa County*, 103 Ariz 465, 445 P2d 441  
*State ex rel. Helm v Superior Court of Cochise County* (1961) 90 Ariz 133, 367 P2d 6  
*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887  
*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887, infra § 25[a]  
*State ex rel. Mahoney v Superior Court of Maricopa County* (1954) 78 Ariz 74, 275 P2d 887, supra § 25[a]  
*State ex rel. Polley v Superior Court of Santa Cruz County* (1956) 81 Ariz 127, 302 P2d 263  
*State v Colvin* (1957) 81 Ariz 388, 307 P2d 98  
*State v Colvin* (1957) 81 Ariz 388, 307 P2d 98, supra § 7  
*State v Fowler*, 101 Ariz 561, 422 P2d 125 (knife)  
*State v McGee* (162) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75, infra § 22[d]  
*State v McGee* (1962) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75  
*State v McGee* (1962) 91 Ariz 101, 370 P2d 261, cert den 371 US 844, 9 L ed 2d 79, 83 S Ct 75, supra § 13[b]  
*State v Raffaele*, 113 Ariz 259, 550 P2d 1060  
*State v Rogers*, 4 Ariz App 198, 419 P2d 102  
*State v Taylor*, 112 Ariz 68, 537 P2d 938  
*State v Wallace* (1965) 97 Ariz 296, 399 P2d 909  
*State v Wallace* (1965) 97 Ariz 296, 399 P2d 909, infra § 17  
*State v Wilder*, 22 Ariz App 541, 529 P2d 253, cert den 423 US 843, 46 L Ed 2d 64, 96 S Ct 78

## ARKANSAS

*Bailey v State* (1957) 227 Ark 889, 302 SW2d 796, cert den 355 US 851, 2 L ed 2d 59, 78 S Ct 77  
*Edens v State* (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551  
*Edens v State* (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551, infra § 16[a]  
*Edens v State* (1962) 235 Ark 178, 359 SW2d 432, cert den 371 US 968, 9 L ed 2d 538, 83 S Ct 551, supra § 16[a]  
 (statements of witnesses)  
*Edens v State* (1963) 235 Ark 996, 363 SW2d 923  
*Edens v State* (1963) 235 Ark 996, 363 SW2d 923, infra  
*Mobley v State* (Ark) 473 SW2d 176 (citing annotation)  
*Rodgers v State* (Ark) 547 SW2d 419

## CALIFORNIA

*Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291  
*Ballard v Superior Court of County of San Diego* (1965, Cal App) 44 Cal Rptr 291, infra § 22[d]  
*Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838, 18 ALR3d 1416  
*Ballard v Superior Court of San Diego County*, 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838, 18 ALR3d 1416 (purpose of inspection)  
*Brenard v Superior Court of Sacramento County* (1959) 172 Cal App 2d 314, 341 P2d 743  
*Brenard v Superior Court of Sacramento County* (1959) 172 Cal App 2d 314, 341 P2d 743, supra § 5[a]  
*Cash v Superior Court of Santa Clara County* (1959) 53 Cal 2d 72, 346 P2d 407, infra § 14  
*Hill v Superior Court of Los Angeles County* 10 Cal 3d 812 112 Cal Rptr 257, 518 P2d 1353  
*McAllister v Superior Court of San Diego County* (1958) 165 Cal App 2d 297, 331 P2d 654, infra § 13[a]

*Murguia v Municipal Court for Bakersfield Judicial Dist.*, 15 Cal 3d 286, 124 Cal Rptr 204, 540 P2d 44  
*Norton v Superior Court of San Diego County* (1959) 173 Cal App 2d 133, 343 P2d 139, *infra* § 23  
*People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102  
*People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102, *infra*  
*People v Burch* (1961) 196 Cal App 2d 754, 17 Cal Rptr 102, *supra* § 8  
*People v Carella* (1961) 191 Cal App 2d 115, 12 Cal Rptr 446, *supra* § 7  
*People v Cartier* (1959) 51 Cal 2d 590, 335 P2d 114, *infra* § 13[a]  
*People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694  
*People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694, *infra*  
*People v Cathey* (1960) 186 Cal App 2d 217, 8 Cal Rptr 694, *infra* § 18  
*People v Chapin* (1956) 145 Cal App 2d 740, 303 P2d 365, *infra* § 17  
*People v Chapman* (1959) 52 Cal 2d 95, 338 P2d 428, *infra*  
*People v Crovedi* (Cal App) 49 Cal Rptr 724, superseded 65 Cal 2d 199, 53 Cal Rptr 284, 417 P2d 868  
*People v Darnold* (1963) 219 Cal App 2d 561, 33 Cal Rptr 369, cert den 376 US 927, 11 L ed 2d 623, 84 S Ct 694, both *infra*  
*People v Gaulden*, 36 Cal App 3d 942, 111 Cal Rptr 803  
*People v Jordan* (1955) 45 Cal 2d 697, 290 P2d 484 (involving private notes used by an expert witness for the prosecution in the course of various tests conducted by him as to certain physical evidence)  
*People v Lindsay* (1964) 227 Cal App 2d 482, 38 Cal Rptr 755  
*People v McGowan* (1980, 1st Dist) 105 Cal App 3d 997, 166 Cal Rptr 725 (failure to disclose punishable by giving offended party proper opportunity to meet new evidence, rather than suppression)  
*People v Moore*, 50 Cal App 3d 989, 123 Cal Rptr 837  
*People v Morris* (1964) 226 Cal App 2d 12, 37 Cal Rptr 741, *infra*  
*People v Mort* (1963) 214 Cal App 2d 596, 29 Cal Rptr 650  
*People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816  
*People v Newville* (1963) 220 Cal App 2d 267, 33 Cal Rptr 816, *supra* § 7  
*People v Ratten* (1940) 39 Cal App 2d 267, 102 P2d 1097  
*People v Tarantino* (1955) 45 Cal 2d 590, 290 P2d 505, *infra* § 14  
*People v Terry* (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446  
*People v Terry* (1962) 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L ed 2d 318, 84 S Ct 446, *supra* § 7  
*People v Wilkins* (1955) 135 Cal App 2d 371, 287 P2d 555  
*People v Wilkins* (1955) 135 Cal App 2d 371, 287 P2d 555, *infra* § 17  
*People v Wilson* (1963) 222 Cal App 2d 616, 35 Cal Rptr 280, *infra* § 6[b]  
*People v Wilson* (1963) 222 Cal App 2d 616, 35 Cal Rptr 280, *supra* § 6[b]  
*Powell v Superior Court of Los Angeles County* (1957) 48 Cal 2d 704, 312 P2d 698  
*Powell v Superior Court of Los Angeles County* (1957) 48 Cal 2d 704, 312 P2d 698, *infra* § 13[a]  
*Rosser v United States* (1977, Dist Col App) 381 A2d 598  
*Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130  
*Walker v Superior Court of Mendocino County* (1957) 155 Cal App 2d 134, 317 P2d 130, *infra* § 16[a]  
*Yannacone v Municipal Court of San Francisco* (1963) 222 Cal App 2d 72, 34 Cal Rptr 838

## COLORADO

*Corbett v People* (1963) 153 Colo 457, 387 P2d 409, reh den 377 US 939, 12 L ed 2d 302, 84 S Ct 1346 (holding that the defendant had no right to examine an FBI investigative report in preparation for trial)  
*Massie v People* (1927) 82 Colo 205, 258 P 226, *infra*  
*Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587  
*Mendelsohn v People* (1960) 143 Colo 397, 353 P2d 587, *infra*  
*People v Austin* (Colo) 523 P2d 989

*People v Trujillo*, 186 Colo 329, 527 P2d 52  
*Rosier v People* (1952) 126 Colo 82, 247 P2d 448, infra § 7  
*Rosier v People* (1952) 126 Colo 82, 247 P2d 448, supra § 7  
*Roybal v People (Colo)* 493 P2d 9  
 See also *Massie v People* (1927) 82 Colo 205, 258 P 226, infra § 26.  
 See the Colorado cases referred to in the footnote below.  
*Silliman v People* (1945) 114 Colo 130, 162 P2d 793  
*Silliman v People* (1945) 114 Colo 130, 162 P2d 793, infra § 9[c], footnote § 12  
*Silliman v People* (1945) 114 Colo 130, 162 P2d 793, infra § 9[c], footnote 12  
*Silliman v People* (1945) 114 Colo 130, 162 P2d 793, supra. § 9[c], footnote 12  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287, infra  
*Walker v People* (1952) 126 Colo 135, 248 P2d 287, supra § 3

#### CONNECTICUT

But see *State v Trumbull* (1961) 23 Conn Supp 41, 176 A2d 887; *State v Fay* (1963) 2 Conn Cir 369, 199 A2d 358, both infra.  
 See *State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, infra  
 See *State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, infra § 16[a]  
*State v Cocheo* (1963) 24 Conn Supp 377, 190 A2d 916, infra § 16[a]  
*State v Marzbanian* (1963) 2 Conn Cir 312, 198 A2d 721, certif den (Conn) 197 A2d 944, supra § 13[c] (statements of defendant)  
*State v Trumbull* (1961) 23 Conn Supp 41, 176 A2d 887, supra § 13[c]

#### DELAWARE

See also *State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b] (apparently recognizing that blood test report is not subject to inspection).  
*State v Hutchins* (1957) 51 Del 100, 138 A2d 342, all supra § 11[b]  
*State v Hutchins* (1957) 51 Del 100, 138 A2d 342, both supra § 11[b]  
*State v Thompson* (1957) 50 Del 456, 134 A2d 266  
*State v Thompson* (1957) 50 Del 456, 134 A2d 266, supra § 11[b]  
*State v Winsett* (1964, Del) 200 A2d 237, supra § 11[b]  
*Wisniewski v State* (1957, Sup) 51 Del 84, 138 A2d 333

#### FLORIDA

*Cumbie v State* (1977, Fla) 345 So 2d 1061 (oral statement)  
*Ezzell v State* (1956, Fla) 88 So 2d 280, both supra § 11[c]  
*Glow v State (Fla App)* 319 So 2d 47  
*Miami v Jones* (1964, Fla App) 165 So 2d 775, infra § 11[c]  
*Padgett v State* (1912) 64 Fla 389, 59 So 946, infra  
*Peel v State* (1963)m Fla App) 154 So 2d 910, supra § 11[c].  
*Peel v State* (1963, Fla App) 154 So 2d 910, supra § 11[c] (tape recordings of conversations between defendant, accomplice, and others)  
*Potts v State* (1981, Fla App D4) 399 So 2d 505  
*Raulerson v State* (1958, Fla) 102 So 2d 281, supra § 11[c]  
*State v McCall (Fla App)* 186 So 2d 324  
*State v O'Steen (Fla App)* 213 So 2d 751

*Williams v State* (1940) 143 Fla 826, 197 So 562

*Williams v State* (1954, Fla) 74 So 2d 797

## GEORGIA

*Bass v State* (1958) 98 Ga App 570, 106 SE2d 845, cert den 359 US 969, 3 L ed 2d 836, 79 S Ct 882, infra § 16[a]

*Bass v State* (1958) 98 Ga App 570, 106 SE2d 845, cert den 359 US 969, 3 L ed 836, 79 S Ct 882, supra § 16[a]

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, infra (before trial)

*Blevins v State* (1965) 220 Ga 720, 141 SE2d 426, supra § 3

*Brooks v State* (1977) 141 Ga App 725, 234 SE2d 541

*Bryan v State*, 224 Ga 389, 162 SE2d 349

*Buford v State* (1982) 162 Ga App 498, 291 SE2d 256

*Clark v State*, 230 Ga 880, 199 SE2d 786

*Crosby v State* (1979) 150 Ga App 804, 258 SE2d 593

*Daniel v State*, 118 Ga App 370, 163 SE2d 863

*David v State*, 137 Ga App 425, 224 SE2d 83

*Ga. Code Ann.* § 17-16-4(3)

*Ga.Code Ann.* § 17-16-4(a)(3)

*Ga.Code Ann.* §§ 16-6-4(a)

*Hamby v State* (1979) 243 Ga 339, 253 SE2d 759

*Harvey v State* (1983) 165 Ga App 7, 299 SE2d 61

*Holton v State* (1979) 243 Ga 312, 253 SE2d 736

*Jefferson v State* (1981) 159 Ga App 740, 285 SE2d 213

*Jones v State*, 224 Ga 283, 161 SE2d 302, vacated on other grounds 393 US 21, 21 L Ed 2d 23, 89 S Ct 51

*Lundy v State*, 139 Ga App 536, 228 SE2d 717

*Mason v State* (1982) 162 Ga App 167, 290 SE2d 499

*Moten v State* (1979) 149 Ga App 106, 253 SE2d 467

*Osborn v State* (1982) 161 Ga App 132, 291 SE2d 22

*Phillips v State* (1978) 146 Ga App 423, 246 SE2d 438

*Pless v State* (1977) 142 Ga App 594, 236 SE2d 842

*Quick v State*, 139 Ga App 440, 228 SE2d 592

*Rautenstrauch v State*, 129 Ga App 381, 199 SE2d 613

*Roberts v State* (1979) 243 Ga 604, 255 SE2d 689

*Street v State*, 237 Ga 307, 227 SE2d 750

*Tippins v State* (1978) 146 Ga App 448, 246 SE2d 458

*Walker v State* (1959) 215 Ga 128, 109 SE2d 748, 927

*Walker v State* (1959) 215 Ga 128, 109 SE2d 748, 927, infra

*Wallace v State* (1982) 162 Ga App 367, 291 SE2d 437

*Welch v State* (1983) 251 Ga 197, 304 SE2d 391

*Whitaker v State* (1980) 246 Ga 163, 269 SE2d 436

*Whitlock v State*, 124 Ga App 599, 185 SE2d 90, affd in part and revd in part on other grounds 230 Ga 700, 198 SE2d 865

*Williams v State*, 222 Ga 208, 149 SE2d 449, cert den 385 US 887, 17 L Ed 2d 115, 87 S Ct 184

*Yeargin v State* (1982) 164 Ga App 835, 298 SE2d 606

## HAWAII

*State v Hashimoto* (1962) 46 Hawaii 183, 377 P2d 728, infra § 13[b]

## IDAHO

*State v Horn* (1980) 101 Idaho 192, 610 P2d 551

*State v Oldham* (Idaho) 438 P2d 275

## ILLINOIS

*People v Bailey* (1965) 56 Ill App 2d 261, 205 NE2d 756, infra § 16[a]

*People v Benhoff* (1977) 51 Ill App 3d 651, 9 Ill Dec 102, 366 NE2d 359

*People v Brown*, 52 Ill 2d 94, 285 NE2d 1

*People v Crosby*, 39 Ill App 3d 1008, 350 NE2d 805

*People v Dixon*, 19 Ill App 3d 683, 312 NE2d 390

*People v Donald* (1977) 56 Ill App 3d 538, 14 Ill Dec 48, 371 NE2d 1101

*People v Frazier*, 2 Ill App 3d 639, 276 NE2d 801 (materiality)

*People v Harrison* (1962) 25 Ill 2d 407, 185 NE2d 244, infra § 21[c]

*People v Hoagland*, 83 Ill App 2d 231, 227 NE2d 111

*People v Jones*, 66 Ill 2d 152, 5 Ill Dec 576, 361 NE2d 1104

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108, infra § 19

*People v Murphy* (1952) 412 Ill 458, 107 NE2d 748, cert den 344 US 899, 97 L ed 695, 73 S Ct 281, cert den 350 US 865, 100 L ed 767, 76 S Ct 108, infra § 19 (record of preliminary hearing)

*People v Nichols*, 27 Ill App 3d 372, 327 NE2d 186 (citing annotation)

*People v Schabatka*, 18 Ill App 3d 635, 310 NE2d 192, cert den (US) 43 L Ed 2d 400, 95 S Ct 1128

*People v Sullivan* (1977) 48 Ill App 3d 555, 6 Ill Dec 393, 362 NE2d 1313

*People v Tribbett* (Ill App) 232 NE2d 523

*People v Turner* (1963) 29 Ill 2d 379, 194 NE2d 349

*People v Veal* (1978) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963

*People v Wilken* (1980) 89 Ill App 3d 1124, 45 Ill Dec 489, 412 NE2d 1071

See *People v Gerold* (1914) 265 Ill 448, 107 NE 165, infra § 24[a]

## INDIANA

*Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, infra § 17

*Anderson v State* (1959) 239 Ind 372, 156 NE2d 384, supra § 17 (police reports)

*Brown v State* (1959, Ind) 158 NE2d 290

*Dillard v State*, 257 Ind 282, 274 NE2d 387

*Dillard v State*, 257 Ind 282, 274 NE2d 387 (materiality)

*Gubitz v State* (Ind App) 360 NE2d 259

*Hall v State* (1978, Ind App) 374 NE2d 62

*Kleinrichert v State* (Ind) 297 NE2d 822

*Lander v State* (1958) 238 Ind 680, 154 NE2d 507, infra § 25[d]

*Sexton v State* (Ind) 276 NE2d 836

*State v Bryant* (Ind App) 338 NE2d 690

*Thomas v State* (Ind App) 330 NE2d 325

## IOWA

See *State v Kelly* (1958) 249 Iowa 1219, 91 NW2d 562

*State v Cuevas* (1979, Iowa) 282 NW2d 74

*State v Eads (Iowa)* 166 NW2d 766 (citing annotation)  
*State v Froning (1982, Iowa)* 328 NW2d 333  
*State v Hall (Iowa)* 235 NW2d 702  
*State v Stump (1963)* 254 Iowa 1181, 119 NW2d 210, cert den 375 US 853, 11 L ed 2d 80, 84 S Ct 113, both infra

## KANSAS

See also *State v Hill (1964)* 193 Kan 512, 394 P2d 106, infra § 17.  
*State v Campbell*, 217 Kan 756, 539 P2d 329 (citing annotation)  
*State v Furthmyer (1929)* 128 Kan 317, 277 P 1019  
*State v Furthmyer (1929)* 128 Kan 317, 277 P 1019, supra § 13[c]  
*State v Furthmyer (1929)* 128 Kan 317, 277 P 1019, supra § 13[c] (statements of defendant and witness)  
*State v Glazer (1978)* 223 Kan 351, 574 P2d 942  
*State v Hill (1964)* 193 Kan 512, 394 P2d 106, supra § 17 (police report containing statements of witness)  
*State v Humphrey (Kan)* 537 P2d 155  
*State v Jeffries (1925)* 117 Kan 742, 232 P 873  
*State v Jeffries (1925)* 117 Kan 742, 232 P 873, supra § 12  
*State v Johnson (1977)* 223 Kan 119, 573 P2d 976 (name and address of undisclosed witness to robbery)  
*State v Kelly*, 216 Kan 31, 531 P2d 60  
*State v Martin (Kan)* 480 P2d 50 (citing annotation)  
*State v McQueen (1978)* 224 Kan 420, 582 P2d 251  
*State v Oswald*, 197 Kan 251, 417 P2d 261  
*State v Pierson (1977)* 222 Kan 498, 565 P2d 270  
*State v Schlicher (1982)* 230 Kan 482, 639 P2d 467  
*State v Taylor (1979)* 225 Kan 788, 594 P2d 211 as stated in *State v Hood*, 242 Kan 115, 744 P2d 816, appeal after remand 245 Kan 367, 780 P2d 160

## KENTUCKY

*Kinder v Commonwealth (1955, Ky)* 279 SW2d 782, infra (before trial)  
*Kinder v Commonwealth (1955, Ky)* 279 SW2d 782, supra § 3  
*Kindr v Commonwealth (1955, Ky)* 279 SW2d 782, supra § 3  
*Lefevers v Commonwealth (1977, Ky)* 558 SW2d 585 (commonwealth's attorney should have furnished statements to defendant's counsel as soon as reasonably possible after he received them)  
*Wendling v Commonwealth (1911)* 143 Ky 587, 137 SW 205  
*Wendling v Commonwealth (1911)* 143 Ky 587, 137 SW 205, infra  
*Wendling v Commonwealth (1911)* 143 Ky 587, 137 SW 205, supra § 3

## LOUISIANA

See *State v Dowdy (1950)* 217 La 773, 47 So 2d 496, cert den 340 US 856, 95 L ed 627, 71 S Ct 75, infra § 25[a]  
*State Ex Rel. Clark v Marullo (1977, La)* 352 So 2d 223  
*State v Anderson*, 254 La 1107, 229 So 2d 329  
*State v Baker (La)* 288 So 2d 52  
*State v Bankston (1928)* 165 La 1082, 116 So 565  
*State v Bankston (1928)* 165 La 1082, 116 So 565, infra § 16[b]  
*State v Breston (La)* 304 So 2d 313  
*State v Brown (La)* 288 So 2d 339  
*State v Browning (La)* 290 So 2d 322  
*State v Burkhalter* 260 La 27, 255 So 2d 62

*State v Coney*, 258 La 369, 246 So 2d 793  
*State v Crook*, 253 La 961, 221 So 2d 473  
*State v Dallao* (1937) 187 La 392, 175 So 4, app dismd and cert den 302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51, reh den 302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139  
*State v Dallao* (1937) 187 La 392, 175 So 4, app dismd and cert den 302 US 635, 636, 82 L ed 494, 495, 58 S Ct 48, 51, reh den 302 US 776, 777, 82 L ed 601, 58 S Ct 137, 138, 139, supra § 13[d], footnote 9  
*State v Darby* (La) 310 So 2d 547  
*State v Dowdy* (1950) 217 La 773, 47 So 2d 496, cert den 340 US 856, 95 L ed 627, 71 S Ct 75, supra § 25[a]  
*State v Fink*, 255 La 385, 231 So 2d 360  
*State v Frierson* (La) 302 So 2d 605  
*State v Green* (La) 275 So 2d 184  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411 (before trial)  
*State v Haddad* (1952) 221 La 337, 59 So 2d 411, infra § 13[d]  
*State v Herron* (La) 301 So 2d 312  
*State v Hills* (La) 337 So 2d 1155  
*State v Hudson*, 253 La 992, 221 So 2d 484  
*State v Huizar* (La) 332 So 2d 449  
*State v Hunter*, 250 La 295, 195 So 2d 273  
*State v Johnson* (La) 324 So 2d 349  
*State v Johnson*, 249 La 950, 192 So 2d 135, cert den 388 US 923, 18 L Ed 2d 1374, 87 S Ct 2144  
*State v Jones* (La) 332 So 2d 466  
*State v Lee* (1932) 173 La 966, 139 So 302  
*State v Lee* (1932) 173 La 966, 139 So 302, infra § 16[a]  
*State v Lee* (1932) 173 La 966, 139 So 302, supra § 16[a]  
*State v Lewis* (La) 315 So 2d 626  
*State v Linkletter* (1977, La) 345 So 2d 452  
*State v Lovett* (1978, La) 359 So 2d 163  
*State v Major* (La) 318 So 2d 19  
*State v Martinez* (1952) 220 La 899, 57 So 2d 888, cert den 344 US 843, 97 L ed 656, 73 S Ct 58  
*State v Matassa* (1952) 222 La 363, 62 So 2d 609 (before trial)  
*State v Michel* (1954) 225 La 1040, 74 So 2d 207, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144  
*State v Michel* (1954) 225 La 1040, 74 So 2d 207, affd 350 US 91, 100 L ed 83, 76 S Ct 158, reh den 350 US 955, 100 L ed 831, 76 S Ct 340, cert den 355 US 879, 2 L ed 2d 109, 78 S Ct 144, infra § 17  
*State v Nails*, 255 La 1070, 234 So 2d 184  
*State v Nelson* (La) 306 So 2d 745  
*State v Nero* (La) 319 So 2d 303  
*State v Owens* (La) 338 So 2d 645  
*State v Paillet* (1964) 243 La 483, 165 So 2d 294  
*State v Paillet* (1964) 246 La 483, 165 So 2d 294, infra § 13[d]  
*State v Redden*, 255 La 291, 230 So 2d 817  
*State v Rose* (La) 271 So 2d 863  
*State v Shourds* (1954) 224 La 955, 71 So 2d 340 (before trial)  
*State v Simpson* (1949) 216 La 212, 43 So 2d 585, cert den 339 US 929, 94 L ed 1350, 70 S Ct 625  
*State v Sims* (La) 329 So 2d 722  
*State v Spears* (1977, La) 350 So 2d 603  
*State v Square*, 257 La 743, 244 So 2d 200  
*State v Tauzier* (1981, La) 397 So 2d 494  
*State v Thomas* (La) 306 So 2d 696

*State v Wilde* (1948) 214 La 453, 38 So 2d 72, cert den 337 US 932, 93 L ed 1739, 69 S Ct 1484, reh den 338 US 842, 94 L ed 515, 70 S Ct 29 (involving papers, books, and records connected with the present prosecution for forgery which were in the possession of a third party)

*State v Williams* (1947) 211 La 782, 30 So 2d 834, infra (before trial)

*State v Williams (La)* 310 So 2d 528

#### MAINE

*State v Burnham (Me)* 350 A2d 577

*State v Smith* (1983, Me) 455 A2d 428

#### MARYLAND

*Couser v State* (1978) 282 Md 125, 383 A2d 389

*Glaros v State* (1960) 223 Md 272, 164 A2d 461, supra § 11[e]

*McKenzie v State* (1964) 236 Md 597, 204 A2d 678

*Tisdale v State* (1979, Md App) 396 A2d 289

*Washburn v State*, 19 Md App 187, 310 A2d 176

#### MASSACHUSETTS

*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950

*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, infra § 5[a]

*Commonwealth v Bartolini* (1938) 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L ed 1531, 58 S Ct 950, supra § 5[a]

*Commonwealth v Colella* 2 Mass App 706, 319 NE2d 923

*Commonwealth v Dominico* (Mass App) 306 NE2d 835

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, infra

*Commonwealth v Jordan* (1911) 207 Mass 259, 93 NE 809, affd 225 US 167, 56 L ed 1038, 32 S Ct 651, supra § 3

*Commonwealth v Lewinski* (Mass) 329 NE2d 738

*Commonwealth v MacDonald* (Mass) 333 NE2d 189

*Commonwealth v MacDonald* (Mass) 333 NE2d 194

*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE 2d 814, infra § 5[a]

*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE 2d 814, supra § 5[a]

*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814

*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, both supra § 5[a]

*Commonwealth v Noxon* (1946) 319 Mass 495, 66 NE2d 814, supra § 5[a]

*Commonwealth v Sheeran* 370 Mass 82, 345 NE2d 362

*Commonwealth v Stewart* (Mass) 309 NE2d 470

*Commonwealth v Sullivan*, 354 Mass 598, 239 NE2d 5, cert den 393 US 1056, 21 L Ed 2d 698, 89 S Ct 697

*Commonwealth v Walker* 370 Mass 548, 350 NE2d 678, cert den (US) 50 L Ed 2d 314, 97 S Ct 363

#### MICHIGAN

*People v Fleisher* (1948) 322 Mich 474, 34 NW2d 15, infra

*People v Fleisher* (1948) 322 Mich 474, 34 NW2d 15, supra § 8

*People v Florinchi* (1978) 84 Mich App 128, 269 NW2d 500

*People v Hayward* (1980) 98 Mich App 332, 296 NW2d 250

*People v Johnson* (1959) 356 Mich 619, 97 NW2d 739  
*People v Johnson* (1959) 356 Mich 619, 97 NW2d 739, infra § 13[a]  
*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568  
*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568, infra § 16[a]  
*People v Maranian* (1960) 359 Mich 361, 102 NW2d 568, supra § 16[a]  
*People v McIntosh* (Mich App) 234 NW2d 157  
*People v Salsbury* (1903) 134 Mich 537, 96 NW 936, infra § 9[c], footnote 1  
*People v Walton*, 71 Mich App 478, 247 NW2d 378  
 See also *People v Johnson* (1959) 356 Mich 619, 97 NW2d 739, infra § 13[a].

## MINNESOTA

*State ex rel. Robertson v Steele* (1912) 117 Minn 384, 135 NW 1128, infra § 13[c] (before trial)  
*State v Mastrian* (Minn) 171 NW2d 695

## MISSISSIPPI

*Armstrong v State* (Miss) 214 So 2d 589  
*Armstrong v State* (Miss) 214 So 2d 589, cert den 395 US 965, 23 L Ed 2d 750, 89 S Ct 2109  
*Bellew v State* (1958) 238 Miss 734, 106 So 2d 146, cert den and app dismd 360 US 473, 3 L ed 2d 1531, 79 S Ct 1430, reh den 361 US 858, 4 L ed 2d 96, 80 S Ct 43, infra § 16[a]  
*Eaton v State* (1932) 163 Miss 130, 140 So 729 (upholding the denial of the defendant's application for a subpoena duces tecum to have a United States attorney produce the transcribed notes of testimony taken by him on an investigation of the crime charged against the defendant).  
*Peterson v State* (Miss) 242 So 2d 420

## MISSOURI

*State ex rel. Page v Terte* (1930) 324 Mo 925, 25 SW2d 459, infra § 12  
*State ex rel. Page v Terte* (1930) 324 Mo 925, 25 SW2d 459, supra § 12  
*State ex rel. Phelps v McQueen* (1956, Mo) 296 SW2d 85 (involving books, papers, and documents which were in the possession of private corporations and their officers).  
*State v Aubuchon* (1964, Mo) 381 SW2d 807  
*State v Aubuchon* (1964, Mo) 381 SW2d 807, infra § 16[a]  
*State v Brown* (1950) 360 Mo 104, 227 SW2d 646, infra § 16[c]  
*State v Broyles* (1977, Mo App) 559 SW2d 614  
*State v Chambers* (1977, Mo App) 550 SW2d 846  
*State v Engberg* (1964 Mo) 377 SW2d 282, supra § 11[f]  
*State v Engberg* (1964, Mo) 377 SW 2d 282, supra § 11[f]  
*State v Engberg* (1964, Mo) 377 SW2d 282, infra § 11[f]  
*State v Fitzgerald* (1895) 130 Mo 407, 382 SW 1113, infra § 13[b]  
*State v Fitzpatrick* (Mo App) 525 SW2d 342  
*State v Gilliam* (1961, Mo) 351 SW 2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, infra  
*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, infra  
*State v Gilliam* (1961, Mo) 351 SW2d 723, cert den 376 US 914, 11 L ed 2d 612, 84 S Ct 670, supra § 7  
*State v Gillman* (1962, Mo) 354 SW2d 843, infra § 9[c], footnote 2  
*State v Hale* (1963, Mo) 371 SW2d 249, infra § 9[c], footnote 11  
*State v Hale* (1963, Mo) 371 SW2d 249, supra § 9[c], footnote 11  
*State v Hancock* (1937) 340 Mo 918, 104 SW2d 241, infra § 13[c]  
*State v Hicks* (Mo) 515 SW2d 518

*State v Hinojosa (1951, Mo) 242 SW2d 1, infra*  
*State v Hinojosa (1951, Mo) 242 SW2d 1, supra § 8*  
*State v Kelton (1957, Mo) 299 SW2d 493, supra § 12*  
*State v Mitchell (Mo App) 500 SW2d 320*  
*State v Richetti (1938) 342 Mo 1015, 119 SW2d 330, supra § 12*  
*State v Rodriguez (Mo App) 519 SW2d 565*  
*State v Spica (1965, Mo) 389 SW2d 35, infra*  
*State v Spica (1965, Mo) 389 SW2d 35, supra § 3*  
*State v Tressler (Mo) 503 SW2d 13, cert den 416 US 973, 40 L Ed 2d 563, 94 S Ct 2000*  
*State v Yates (Mo) 442 SW2d 21*  
*Westfall v Enright (1982, Mo App) 643 SW2d 839*

#### MONTANA

See also *State v Hall (1918) 55 Mont 182, 175 P 267, infra § 12.*  
*State ex rel. Keast v District Court of Fourth Judicial Dist. (1959) 135 Mont 545, 342 P2d 1071, infra*  
*State ex rel. Keast v District Court of Fourth Judicial Dist. (1959) 135 Mont 545, 342 P2d 1071, supra § 3*  
*State v Hall (1918) 55 Mont 182, 175 P 267, supra § 12*

#### NEBRASKA

*Cramer v State (1944) 145 Neb 88, 15 NW2d 323*  
*Cramer v State (1944) 145 Neb 88, 15 NW2d 323, infra*  
*Cramer v State (1944) 145 Neb 88, 15 NW2d 323, supra § 3*  
*Erving v State (1962) 174 Neb 90, 116 NW2d 7, cert den 375 US 876, 11 L ed 2d 121, 84 S Ct 151*  
*Hameyer v State (1947) 148 Neb 798, 29 NW2d 458*  
*Hameyer v State (1947) 148 Neb 798, 29 NW2d 458, infra § 24[a]*  
*Linder v State (1953) 156 Neb 504, 56 NW2d 734*  
*Linder v State (1953) 156 Neb 504, 56 NW2d 734, infra § 21[d]*  
*Parker v State (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775*  
*Parker v State (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775, infra § 5[a]*  
*Parker v State (1957) 164 Neb 614, 83 NW2d 347, cert den 356 US 933, 2 L ed 2d 763, 78 S Ct 775, supra § 5[a]*  
*Reizenstein v State (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265*  
*Reizenstein v State (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265, infra § 9[c], footnote 11*  
*Reizenstein v State (1958) 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265, infra § 13[b]*  
 See also *Marshall v State (1927) 116 Neb 45, 215 NW 564, infra § 24[b].*  
*State v Isley, 195 Neb 539, 239 NW2d 262*  
*State v Novak, 181 Neb 90, 147 NW2d 156*  
*State v Williams, 183 Neb 257, 159 NW2d 549*

#### NEVADA

*Pinana v State (1960) 76 Nev 274, 352 P2d 824*  
*Pinana v State (1960) 76 Nev 274, 352 P2d 824, supra § 5[a]*

#### NEW HAMPSHIRE

But see *State v Superior Court (1965, NH) 208 A2d 832, 7 ALR3d 1, infra.*

See also *State ex rel. McLetchie v Laconia Dist. Court* (1964, NH) 205 A2d 534, *infra* § 8.  
*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403  
*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, *infra*  
*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, *infra* § 8  
*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, *infra*.  
*State ex rel. Regan v Superior Court* (1959) 102 NH 224, 153 A2d 403, *supra* § 8  
*State v Booton*, 114 NH 750, 329 A2d 376 (citing annotation), cert den 421 US 919, 43 L Ed 2d 787, 95 S Ct 1584  
*State v Healey* (1965, NH) 210 A2d 486  
*State v Healey* (1965, NH) 210 A2d 486, *infra*  
*State v Healey* (1965, NH) 210 A2d 486, *infra* § 8  
*State v Healey* (1965, NH) 210 A2d 486, *supra* § 8  
*State v Lemire* (NH) 345 A2d 906  
*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1  
*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, *infra*  
*State v Superior Court* (1965, NH) 208 A2d 832, 7 ALR3d 1, *supra* § 3

#### NEW JERSEY

*State v Bunk* (1949, NJ County Ct) 63 A2d 842, *supra* § 13[b]  
*State v Bunk* (1949, NJ County Ct) 63 A2d 842, *supra* § 13[b] (confessions, investigation reports, and statements of witnesses)  
*State v Cicienia* (1951) 6 NJ 296, 78 A2d 568 cert den 350 US 925, 100 L ed 809, 76 S Ct 215, *infra* § 13[b]  
*State v Cook* (1965) 43 NJ 560, 206 A2d 359, *infra* § 11[g]  
*State v Cook* (1965) 43 NJ 560, 206 A2d 359, *supra* § 11[g]  
*State v Giberson* (1977) 153 NJ Super 241, 379 A2d 480  
*State v Johnson* (1958) 28 NJ 133, 145 A2d 313  
*State v Moffa* (1960) 64 NJ Super 69, 165 A2d 219, affd 36 NJ 219, 176 A2d 1  
*State v Reynolds* (1963) 41 NJ 163, 195 A2d 449, both *supra* § 11[g]  
*State v Tate*, 47 NJ 352, 221 A2d 12  
*State v Trantino* (1965) 44 NJ 358, 209 A2d 117, *supra* § 11[g]  
*State v Tune* (1953) 13 NJ 203, 98 A2d 881, *infra* § 13[b]  
*State v Tune* (1953) 13 NJ 203, 98 A2d 881, *supra* § 16[a] (statements of prospective witnesses)  
*State v Whitlow* (1965) 45 NJ 3, 210 A2d 763, *infra*  
*State v Winne* (1953) 27 NJ Super 304, 99 A2d 368

#### NEW MEXICO

*Chacon v State*, 88 NM 198, 539 P2d 218  
*State v Morris* (1961) 69 NM 244, 365 P2d 668  
*State v Zinn*, 80 NM 710, 460 P2d 240 (citing annotation)

#### NEW YORK

*Application of Guilianelle*, 80 Misc 2d 337, 363 NYS2d 220  
*Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843  
*Application of Hughes* (1943) 181 Misc 668, 41 NYS2d 843, *infra* § 25. [b]  
*Mulry v Beckmann* (1947) 188 Misc 648, 69 NWS2d 43, affd 272 App Div 780, 69 NYS2d 519, *infra* § 17  
*People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, *infra*  
*People ex rel. Lemon v Supreme Court of State of New York* (1927) 245 NY 24, 156 NE 84, 52 ALR 200, *supra* § 10[a]  
*People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203, *infra* § 13[a]

*People v Bach*, 33 App Div 2d 560, 305 NYS2d 677  
*People v Bradford*, 54 Misc 2d 54, 281 NYS2d 480  
*People v Bruno* (1962) 36 Misc 2d 330, 232 NYS2d 530  
*People v Buchalter* (1942) 289 NY 244, 45 NE2d 425, infra § 17  
*People v Calandrillo* (1961) 29 Misc 2d 491, 215 NYS2d 361  
*People v Calandrillo* (1961) 29 Misc 2d 491, 215 NYS2d 361, infra § 24[b]  
*People v Calandrillo* (1961) 29 Misc 2d 495, 215 NYS2d 364, supra § 5[a]  
*People v Carothers* (1960) 24 Misc 2d 734, 203 NYS2d 512 (stating that pretrial inspection may be granted where the defendant's statements are involved in the subject matter of the charge against him, as in a forgery indictment or an extortion case)  
*People v Chirico*, 61 Misc 2d 157, 305 NYS2d 237  
*People v Cleary*, 33 App Div 2d 814, 305 NYS2d 384  
*People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457  
*People v Courtney* (1963) 40 Misc 2d 541, 243 NYS2d 457, infra §§ 13[a], 21[b], 25[b] (approving "a gradual trend toward an 'evolving practice of liberal discovery in criminal cases'")  
*People v Cox* (1960) 24 Misc 2d 998, 202 NYS2d 607, infra § 21[b].  
*People v Fisher* (1958) 23 Misc 2d 391, 192 NYS2d 741.  
*People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130  
*People v Gatti* (1938) 167 Misc 545, 4 NYS2d 130, infra § 25[b]  
*People v Giles* (1961) 31 Misc 2d 354, 220 NYS2d 905, supra § 16[a] (statements, transcripts of interviews, and memoranda of conversations of witnesses)  
*People v Golly* (1964) 43 Misc 2d 122, 250 NYS2d 210, infra § 13[c]  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 221, infra § 16[a]  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222 (admissible evidence only)  
*People v Higgins* (1960) 21 Misc 2d 94, 196 NYS2d 222, infra § 21[b]  
*People v Jordan* (1953, Gen Sess) 128 NYS2d 457  
*People v Leahy* (1960) 26 Misc 2d 438, 207 NYS2d 619, infra § 13[b]  
*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698, supra § 7  
*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698, infra  
*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698, supra § 7  
*People v Marshall* (1958) 5 App Div 2d 352, 172 NYS2d 237, affd without op 6 NY 2d 823, 188 NYS2d 213, 159 NE2d 698 (admissible evidence only)  
*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588  
*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, infra  
*People v Martinez* (1959) 15 Misc 2d 821, 183 NYS2d 588, supra § 7  
*People v McDonald*, 59 Misc 2d 311, 298 NYS2d 625  
*People v McElroy* (1955) 285 App Div 846, 136 NYS2d 693, supra § 9[d]  
*People v Miller* (1964) 42 Misc 2d 794, 248 NYS 2d 1018, infra this section and infra § 25[a]  
*People v Miller* (1964) 42 Misc 2d 794, 248 NYS2d 1018, infra §§ 8, 25[a]  
*People v Miller* (1964) 42 Misc 2d 794, 248 NYS2d 1018, infra this section and infra § 25[a]  
*People v Munoz* (1960) 11 App Div 2d 79, 202 NYS2d 743, affd 9 NY 2d 638, 210 NYS2d 533, 172 NE2d 291  
*People v Paige*, 48 App Div 2d 6, 367 NYS2d 350  
*People v Parkinson* (1943, Gen Sess) 43 NYS 2d 690 (before trial)  
*People v Perrell* (1965) 47 Misc 2d 1024, 263 NYS2d 640  
*People v Powell*, 49 Misc 2d 624, 268 NYS2d 380  
*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542  
*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, infra § 21[a]  
*People v Preston* (1958) 13 Misc 2d 802, 176 NYS2d 542, infra § 21[a] (where the court stated: "I see no practical

reason why we should continue to cling to old shibboleths and rituals for which I have in my experience observed no adequate justification.")

*People v Prim*, 47 App Div 2d 409, 366 NYS2d 726

*People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599

*People v Quarles* (1964) 44 Misc 2d 955, 255 NYS2d 599, infra § 13[a]

*People v Remaley*, 26 NY2d 427, 311 NYS2d 473, 259 NE2d 901, cert den 400 US 948, 27 L Ed 2d 255, 91 S Ct 257

*People v Riley* (1965) 46 Misc 2d 221, 258 NYS2d 932, infra § 13[d]

*People v Rogas* (1936) 158 Misc 567, 287 NYS 1005, infra § 13[a]

*People v Roldan* (1964) 42 Misc 2d 501, 248 NYS2d 408, infra § 25[c]

*People v Schemnitzer* (1931) 142 Misc 16, 254 NYS 480, supra § 25[a]

*People v Simmons*, 36 NY2d 126, 365 NYS2d 812, 325 NE2d 139

*People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438

*People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[a]

*People v Skoyec* (1944) 183 Misc 764, 50 NYS2d 438, infra § 13[b]

*People v Stokes* (1960) 24 Misc 2d 755, 204 NYS2d 827

*People v Taylor*, 59 Misc 2d 597, 300 NYS2d 20

*People v Terzani* (1933) 149 Misc 818, 269 NYS 620, infra § 22[e]

*People v Testa*, 48 App Div 2d 691, 367 NYS2d 838

*People v Turner*, 48 App Div 2d 674, 367 NYS2d 562

*People v Utley*, 77 Misc 2d 86, 353 NYS2d 301

*People v Wargo* (1933) 149 Misc 461, 268 NYS 400, infra § 15[a]

*People v Wilson* (1959) 17 Misc 2d 349, 183 NYS2d 669, infra § 21[a]

See *People v Abbatiello* (1965) 46 Misc 2d 148, 259 NYS2d 203, infra

See also *People v Calandrillo* (1961) 29 Misc 2d 495, 215 NYS2d 364, infra.

*Silver v Sobel* (1958) 7 App Div 2d 728, 180 NYS2d 699 (admissible evidence only)

*Silver v Sobel* (1958) 7 App Div 2d 728, 180 NYS2d 699, infra § 21[b]

*Widziewicz v Golding*, 52 Misc 2d 837, 277 NYS2d 62

## NORTH CAROLINA

See *State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra § 17

*State v Alston* (1983) 307 NC 321, 298 SE2d 631

*State v Beam* (1984) 70 NC App 181, 319 SE2d 616, stay den 312 NC 86, 321 SE2d 223 and review den 312 NC 496, 322 SE2d 561

*State v Blue*, 20 NC App 368, 201 SE2d 548

*State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, infra § 17

*State v Goldberg* (1964) 261 NC 181, 134 SE2d 334, cert den 377 US 978, 12 L ed 2d 747, 84 S Ct 1884, supra § 17

*State v McDougald* (1978) 38 NC App 244, 248 SE2d 72

*State v Miller* (1983) 61 NC App 1, 300 SE2d 431

*State v Philyaw*, 291 NC 312, 230 SE2d 370

*State v Tatum*, 291 NC 73, 229 SE2d 562

## OHIO

**But see** *State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, supra § 3.

*Dayton v Thomas* (1963) 118 Ohio App 165, 25 Ohio Ops 2d 19, 193 NE2d 521, app dismd 175 Ohio St 179, 23 Ohio Ops 2d 462, 191 NE2d 806

See *State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437, infra § 13[b]

*State v Cope* (1946) 78 Ohio App 429, 34 Ohio Ops 171, 46 Ohio L Abs 528, 67 NE2d 912, supra § 9[c], footnote 11  
*State v Corkran* (1965) 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437  
*State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75  
*State v Hahn* (1937, CP) 10 Ohio Ops 29, 25 Ohio L Abs 449, affd 59 Ohio App 178, 11 Ohio Ops 560, 27 Ohio L Abs 27, 17 NE2d 392, app dismd 133 Ohio St 440, 11 Ohio Ops 106, 14 NE2d 354, app dismd 305 US 557, 83 L ed 351, 59 S Ct 75, infra  
*State v Hill* (1963, CP) 23 Ohio Ops 2d 255, 91 Ohio L Abs 125, 191 NE2d 235, infra § 13[a]  
*State v Johnson* (1950, App) 57 Ohio L Abs 524, 94 NE2d 791, reh den 58 Ohio L Abs 334, 96 NE2d 604, app dismd 154 Ohio St 236, 43 Ohio Ops 41, 94 NE2d 797  
*State v Laskey*, 21 Ohio St 2d 187, 50 Ohio Ops 2d 432, 257 NE2d 65  
*State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, infra  
*State v Regedanz* (1953, CP) 54 Ohio Ops 76, 68 Ohio L Abs 81, 120 NE2d 480, infra § 21[e]  
*State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE 2d 684, supra § 9[c], footnote 16  
*State v Sharp* (1954) 162 Ohio St 173, 55 Ohio Ops 88, 122 NE2d 684  
*State v Smith* (1976) 50 Ohio App 2d 183, 4 Ohio Ops 3d 160, 362 NE2d 1239  
*State v Strain* (1948) 84 Ohio App 229, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109, infra § 9[c], footnote 11  
*State v Strain* (1948) 84 Ohio App 299, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109, supra § 9[c], footnote 11  
*State v Thomasson* (1950, App) 46 Ohio Ops 402, 58 Ohio L Abs 402, 97 NE2d 42, infra § 13[c]  
*State v Yeoman* (1925) 112 Ohio St 214, 147 NE 3

#### OKLAHOMA

*Application of Killion* (1959, Okla Crim) 338 P2d 168  
*Application of Killion* (1959, Okla Crim) 338 P2d 168, both supra § 3  
*Application of Killion* (1959, Okla Crim) 338 P2d 168, infra this section and infra § 13[b] (before trial)  
*Application of Killion* (1959, Okla Crim) 338 P2d 168, supra § 5[a]  
*Bell v Webb* (1961, Okla Crim) 365 P2d 399  
*Bell v Webb* (1961, Okla Crim) 365 P2d 399, infra § 13[b]  
*Bettlyoun v State* (Okla Crim) 562 P2d 862  
*Layman v State* (1960, Okla Crim) 355 P2d 444  
*Layman v State* (1960, Okla Crim) 355 P2d 444, infra § 22[a]  
*Layman v State* (1960, Okla Crim) 355 P2d 444, infra § 22[a].  
*Melchor v State* (1965, Okla Crim) 404 P2d 63  
*Melchor v State* (1965, Okla Crim) 404 P2d 63, infra  
*Melchor v State* (1965, Okla Crim) 404 P2d 63, supra § 3.  
*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610  
*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610, infra this section and infra § 22[a] (before trial)  
*State ex rel. Sadler v Lackey* (1957, Okla Crim) 319 P2d 610, supra § 5[a]  
*Stidham v State* (Okla Crim) 507 P2d 1312

#### OREGON

*State v Koennecke* (1977) 29 Or App 637, 565 P2d 376  
*State v Leland* (1951) 190 Or 598, 227 P2d 785, affd 343 US 790, 96 L ed 1302, 72 S Ct 1002, reh den 344 US 848, 97 L ed 659, 73 S Ct 4  
*State v Michener* (Or App) 550 P2d 449  
*State v Tranchell* (Or) 412 P2d 520

## PENNSYLVANIA

**But see** *Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140; *Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35; *Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167; *Commonwealth v Zayac* (1954) 2 Pa D & C2d 646; *Commonwealth v Graham* (1955) 42 Del Co 313, all *infra*.  
*Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120, *supra* § 25[a]  
*Commonwealth v Butler* (1961) 405 Pa 36, 173 A2d 468, cert den 368 US 945, 7 L ed 2d 341, 82 S Ct 384, reh den 368 US 972, 7 L ed 2d 402, 82 S Ct 450  
*Commonwealth v Butler* (1961) 405 Pa 36, 173 A2d 468, cert den 368 US 945, 7 L ed 2d 341, 82 S Ct 384, reh den 368 US 972, 7 L ed 2d 402, 82 S Ct 450, *infra* § 9[c], footnote 13  
*Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, *infra* § 5[a] (before trial)  
*Commonwealth v Caplan* (1963) 411 Pa 563, 192 A2d 894, *supra* § 5[a]  
*Commonwealth v Doberstein*, 223 Pa Super 554, 302 A2d 513  
*Commonwealth v Jones* (Pa Super) 369 A2d 733  
*Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59, *infra* § 13[b]  
*Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59.  
*Commonwealth v Lowery* (1980, Pa Super) 419 A2d 604  
*Commonwealth v Martinolich*, 456 Pa 136, 318 A2d 680, cert den and app dismd (US) 42 L Ed 2d 661, 95 S Ct 651  
*Commonwealth v McQuiston* (1945) 56 Pa D & C 533, 60 York Leg Rec 140, *infra* § 5[a]  
*Commonwealth v Nelson* (1983, Pa Super) 456 A2d 1383  
*Commonwealth v Sherman* (1950) 72 Pa D & C 367, 66 Montg Co LR 167, *infra* § 5[a] (before trial); *Commonwealth v Schaub* (1964) 55 Luzerne Leg Reg R 49, *infra* § 16[a] (before trial)  
*Commonwealth v Smith* (1949) 67 Pa D & C 598, 60 Dauph Co 35, *supra* § 5[a]  
*Commonwealth v Stepper* (1952) 54 411 Pa 563, 192 A2d 894  
*Commonwealth v Stepper* (1952) 54 Lack Jur 205; *Commonwealth v Brown* (1959) 19 Pa D & C2d 196, 47 Del Co 120; *Commonwealth v Kotch* (1960) 22 Pa D & C2d 105, 51 Luzerne Leg Reg R 59.  
*Commonwealth v Wable* (1955) 382 Pa 80, 114 A2d 334, *infra* § 21[d]  
*Commonwealth v Wable* (1955) 382 Pa 80, 114 A2d 334, *infra* § 21[d] (before trial)  
*Commonwealth v Zayac* (1954) 2 Pa D & C2d 646; *Commonwealth v Graham* (1955) 42 Del Co 313, both *supra* § 5[a]  
*Lewis v Court of Common Pleas*, 436 Pa 296, 260 A2d 184  
*Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, *supra* § 25[a]  
See also *Commonwealth v Smith* (1965) 417 Pa 321, 208 A2d 21

*Commonwealth v Hoban* (1952) 54 Lack Jur 213, both *infra*.

See also *Petition of Di Joseph* (1958) 394 Pa 19, 145 A2d 187, *infra* § 25[a].

## RHODE ISLAND

See *State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, *supra* § 3  
*State v Di Noi* (1937) 59 RI 348, 195 A 497, reh den 60 RI 37, 196 A 795, *infra*

## SOUTH CAROLINA

*State v Flood*, 257 SC 141, 184 SE2d 549  
*State v Pickering* (SC) 207 NW2d 511

## SOUTH DAKOTA

*State ex rel. Wagner v Circuit Court of Minnehaha County* (1932) 60 SD 115, 244 NW 100  
*State ex rel. Wagner v Circuit Court of Minnehaha County* (1932) 60 SD 115, 244 NW 100, *infra* § 24[a]

*State v Goodale (SD) 198 NW2d 44*

*State v Wade (SD) 159 NW2d 396*

#### TENNESSEE

*Anderson v State (1960) 207 Tenn 486, 341 SW2d 385, infra*

*Anderson v State (1960) 207 Tenn 486, 341 SW2d 385, infra.*

*Anderson v State (1960) 207 Tenn 486, 341 SW2d 385, supra § 7*

*Banks v State (1977, Tenn Crim) 556 SW2d 88*

*Bolin v State (Tenn) 405 SW2d 768*

See *Ivey v State (1960) 207 Tenn 438, 340 SW2d 907, infra*

See also *Bass v State (1950) 191 Tenn 259, 231 SW2d 707, infra § 23.*

*Witham v State (1950) 191 Tenn 115, 232 SW2d 3, infra § 13[c]*

*Witham v State (1950) 191 Tenn 115, 232 SW2d 3, supra § 13[c]*

#### TEXAS

*Artell v State (1963, Tex Crim) 372 SW 2d 944, cert den 375 US 951, 11 L ed 2d 312, 84 S Ct 439, infra § 9[c], footnote 11*

*Artell v State (1963, Tex Crim) 372 SW2d 944, cert den 375 US 951, 11 L ed 2d 312, 84 S Ct 439, supra § 9[c], footnote 11*

*Brown v State (Tex Crim) 488 SW2d 818*

*Dagley v State (1965, Tex Crim) 394 SW2d 179, infra § 25[d] (before trial)*

*Dagley v State (1965, Tex Crim) 394 SW2d 179, infra 25[o]*

*Davis v State (1925) 99 Tex Crim 517, 270 SW 1022*

*Davis v State (1925) 99 Tex Crim 517, 270 SW 1022, infra § 13[c]*

*Davis v State (Tex Crim) 516 SW2d 157*

*Freeman v State (1958) 166 Tex Crim 626, 317 SW2d 726, infra § 13[c]*

*Granviel v State (1976, Tex Crim) 552 SW2d 107*

*Hackathorn v Decker (CA5 Tex) 369 F2d 150, cert den 389 US 940, 19 L Ed 2d 294, 88 S Ct 301 (stating Tex law)*

*Hanes v State (1960) 170 Tex Crim 394, 341 SW2d 428*

*Hanes v State (1960) 170 Tex Crim 394, 341 SW2d 428, infra § 25[a]*

*Hill v State (1958) 167 Tex Crim 229, 319 SW2d 318*

*Lopez v State (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213, infra*

*Lopez v State (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213, supra § 3*

*Lopez v State (1952) 158 Tex Crim 16, 252 SW2d 701, cert den 344 US 893, 97 L ed 691, 73 S Ct 213.*

*May v State (1935) 129 Tex Crim 2, 83 SW2d 338, supra § 22[a]*

*Nelson v State (Tex Crim) 511 SW2d 18*

*Payne v State (Tex Crim) 516 SW2d 675*

*Pierce v State (1928) 109 Tex Crim 503, 5 SW2d 516, infra § 13[c]*

*Quinones v State (1980, Tex Crim) 592 SW2d 933*

*Ransonette v State (1976, Tex Crim) 550 SW2d 36*

*Saldana v State (1964, Tex Crim) 383 SW 2d 599, infra § 16[a]*

*Sanchez v State (1950) 155 Tex Crim 364, 235 SW2d 149*

*Smith v State (1951) 156 Tex Crim 253, 240 SW2d 783, infra*

*Smith v State (1951) 156 Tex Crim 253, 240 SW2d 783, supra § 3*

*Spaulding v State (Tex Crim) 505 SW2d 919*

*St. Clair v State (1926) 104 Tex Crim 423, 284 SW 571, infra § 13[c]*

*Thomas v State (Tex Crim) 511 SW2d 302*

*Young v State (1982, Tex App 14th Dist) 644 SW2d 18, review ref*

## UTAH

*State v Dowell*, 30 Utah 2d 323, 517 P2d 1016, cert den and app dismd 417 US 962, 41 L Ed 2d 1135, 94 S Ct 3164  
*State v Knill* (1982, Utah) 656 P2d 1026  
*State v Lack* (1950) 118 Utah 128, 221 P2d 852

## VERMONT

See also *State v Fox* (1961) 122 Vt 251, 169 A2d 356, infra § 12.  
*State v Anair* (1962) 123 Vt 80, 181 A2d 61, infra § 11[i] (before trial)  
*State v Anair* (1962) 123 Vt 80, 181 A2d 61, supra § 11[i]  
*State v Fox* (1961) 122 Vt 251, 169 A2d 356  
*State v Fox* (1961) 122 Vt 251, 169 A2d 356, supra § 12  
*State v Kasper* (1979) 137 Vt 184, 404 A2d 85  
*State v Lavallee* (1960) 122 Vt 75, 163 A2d 856, infra (before trial)  
*State v Lavallee* (1960) 122 Vt 75, 163 A2d 856, supra § 3

## VIRGINIA

*Abdell v Commonwealth* (1939) 173 Va 458, 2 SE2d 293, infra (before trial)  
*Lowe v Commonwealth* (1977, Va) 239 SE2d 112, cert den (US) 55 L Ed 2d 526, 98 S Ct 1502

## WASHINGTON

For other cases wherein the court also held or recognized that an accused is not entitled to inspect, at least before trial, a statement made by a witness or any other person, see the following:

*Seattle v Apodaca* (1977) 18 Wash App 802, 572 P2d 732  
*State v Allen* (1924) 128 Wash 217, 222 P 502  
*State v Beard*, 74 Wash 2d 335, 444 P2d 651  
*State v Butler*, 4 Wash App 303, 480 P2d 785  
*State v Christopher* (1978, Wash App) 583 P2d 638  
*State v Clark* (1930) 156 Wash 543, 287 P 18  
*State v Clark* (1944) 21 Wash 2d 774, 153 P2d 297, cert den 325 US 878, 89 L ed 1994, 65 S Ct 1554  
*State v Clark* (1944) 21 Wash 2d 774, 153 P2d 297, cert den 325 US 878, 89 L ed 1994, 65 S Ct 1554, infra § 13[b] (before trial)  
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#### WEST VIRGINIA

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*Restatement (Third) of the Law Governing Lawyers* § 88

#### INDEX OF TERMS (Go to beginning)

Abortion prosecution, accused's right of inspection in §§ 8, 25[a]  
 Absence of jurisdiction, effect of § 5[b]  
 Abuse of discretion, trial court's denial of right to inspection as §§ 5[a], 6[a], 8, 9[c], 13[a, b], 16[a], 21[b], 25[a], 26  
 Accident report file, inspection of § 12

Accomplice, inspection of statement or confession of §§ 4[b], 6[a], 10[a], 11[c, i], 13[b], 16[b, c]  
Accounts and account books, inspection of §§ 11[c], 12, 24  
Admissibility in evidence of item, necessity for showing of § 10[a]  
Affidavits, inspection of § 27[a]  
After verdict is returned as proper time for inspection § 9[d]  
Age of accused, consideration of § 10[b]  
Alcohol, inspection of § 25[d]  
Alcohol test, inspection of results of §§ 18, 21[e]  
Analysis of nonmedical nature, inspection of § 22  
Approval of statement by defendant or witness who allegedly made it, necessity for showing of § 9[c]  
Arrest sheet of police officer, inspection of § 17  
Arson, inspection in prosecution for § 17  
Assault and battery, inspection in prosecution for § 25[a]  
Automobile, inspection of §§ 3, 11[b], 25[a]  
Autopsy reports, inspection of §§ 3, 4[b], 5[a], 8, 10[b], 11[b, g], 21, 23  
Background § 2  
Bad faith of prosecution as affecting right to inspection §§ 4[b], 6[a], 8  
Ballistics reports, inspection of §§ 3, 4[b], 6[a], 11[b, c], 22[b]  
Bank deposits, inspection of § 24[a]  
Bed records, inspection of § 21[a]  
Bill of particulars, accused's motion for § 3  
Bills of sale, inspection of § 12  
Blanket request for production of prosecution's evidence, denial of § 7  
Bloodstains, inspection of § 3  
Blood tests, inspection of §§ 4[a], 5[a], 10  
Blunt instrument, inspection of § 25[a]  
Body. Human body, infra  
Books, inspection of §§ 6[b], 7, 11[a, c, e, g, i], 12, 13[c], 24  
Breath test, inspection of § 11[b]  
Bribery, accused's right of inspection in prosecution for § 24[a]  
Broken glass, inspection of § 25[a]  
Bullets, inspection of §§ 3, 4[b], 5[a], 25[a, b]  
Burden of showing proper cause for inspection or of designating specific evidence §§ 7, 13, 17  
Burglary prosecution, accused's right of inspection in §§ 14, 25[a]  
Business records of defendant, inspection of § 3  
Call girls, inspection of police records of § 17  
Canes, inspection of § 7  
Capsules of narcotics, inspection of § 25[d]  
Cause for inspection, burden of showing § 7  
Charts, discovery of § 21[a]  
Checks, inspection of § 6[b]  
Chemical analysis reports, inspection of §§ 3, 10[a], 11[g], 18, 21, 22  
Chemical experiments, accused's right to inspection for purpose of § 3  
Civil statutes or rules of procedure relating to discovery, applicability of §§ 12, 17  
Clinical records, inspection of § 21[a]  
Clothing, inspection of §§ 3, 4[b], 6[a], 25[a-c]  
Codefendant, inspection of statement or confession of §§ 11[b], 16[b]  
Collateral matters, inspection of statements relating to § 8  
Comment § 2  
Committing magistrate, defendant's right to transcript of evidence taken before § 19

Comparison of handwriting, inspection of writing to be used for § 24

Confessions --

-accomplice or co-defendant, inspection of confession of §§ 4[b], 6[a], 10[a], 11[b, c, i], 13[b], 16[b, c]

-defendant's confession, inspection of §§ 3, 4[a], 5[a], 7, 8, 9[c], 11[b-e, g, h], 13, 18

Conspiracy prosecution, accused's right of inspection in §§ 6[a], 14

Constitutional rights, denial of inspection as violation of §§ 4, 8, 9[a], 13[d], 15[a], 16[c], 17, 22[b], 25[c]

Conversation of accused made or had before or during offense, inspection of § 14

Coroner's inquest, inspection of transcript or report of § 20

Corpse of victim, inspection of §§ 3, 5[a], 8, 26

Criminal statutes or rules of criminal procedure, inspection under § 11

Cross-examination, inspection of writing used for purpose of § 1[a]

Daybook of police department, inspection of entries made in § 9[d]

Deeds, inspection of § 12

Delay in trial, inspection for purposes of avoidance of §§ 8, 25[c]

Dentist, inspection of results of examination made by § 11[b]

Designation of specific evidence, accused's burden with respect to § 7

Desk book of police department, inspection of photostatic copies of entries made in § 9[d]

Diagrams of scene of alleged offense, inspection of § 8

Diary of defendant, inspection of §§ 3, 15 [b]

Dirt samples, inspection of § 25[a]

Discovery statutes, applicability to criminal trials of § 3

Discretionary power of trial court to permit inspection §§ 4[a], 5[a], 6[a], 7, 8, 9[c], 11[g], 13[a-c], 16[a], 21[b], 22[a], 24, 25[a, b], 26

Documents, inspection of §§ 3- 7, 9[b-d], 11[a-c, e-g], 12, 13[c, d], 16[b], 17, 21[a], 24, 27[a]

Door of building, inspection of § 25[a]

Due process of law, applicability of principle of §§ 4, 6[a], 8, 9[a], 15[a], 16 [c], 22[b], 25[c]

Dying declaration of victim, inspection of § 9[c]

Dynamite caps, inspection of § 25[a]

Electronic eavesdropping device, discovery of evidence obtained by §§ 7, 13[c, d], 16[a]

Embezzlement prosecution, inspection in §§ 6[b], 11[c], 24[a]

Engineer's reports, inspection of § 22[a]

Examination --

-defendant, inspection of report of examination of § 21[d]

-fingerprint examination, inspection of § 22[e]

-nonmedical nature, inspection of examination of § 22

-police officers' examination papers, inspection of § 24[b]

-post mortem examination, inspection of report of § 21[b]

-rape victim, inspection of examination of § 21[c]

Experiments of nonmedical nature, inspection of § 22

Expert witnesses, inspection of reports of § 6[a]

Exploratory purposes, prohibition of inspection for §§ 7, 13[a], 16[a], 25[a]

Extortion prosecution, accused's right of inspection in §§ 6[a], 14, 16[a], 24[a]

Factual basis of motion for production of prosecution's evidence, necessity for § 7

Fair trial, inspection as being in interest of §§ 8, 13[a, d], 14, 16[a]

False pretenses, accused's right of inspection in prosecution for §§ 22[a], 24[a]

Favorable evidence, inspection of § 8

FBI reports, inspection of §§ 7, 9[c], 10[b], 22[a]

Fiber insulation from automobile, inspection of § 3

Files --

-police files, inspection of §§ 9[b], 17

-prosecuting attorney, inspection of file of § 18  
 Fingerprint examination, inspection of §§ 4 [a], 5[a], 6[a], 11[b, c], 22[b, e]  
 Fire marshal, inspection of report of §§ 8, 17  
 Fishing expedition, prohibition of §§ 7, 13 [a], 16[a], 25[a]  
 Forgery prosecution, accused's right of inspection in §§ 6[a], 17, 24  
 Furniture, inspection of § 25[a]  
 Fuse, inspection of § 25[a]  
 Gambling prosecution, accused's right of inspection in §§ 9[c], 11[c], 24[a]  
 General considerations §§ 3- 12  
 Glass, inspection of piece of § 25[a]  
 Good or bad faith of prosecution as affecting right to inspection §§ 4[b], 6[a], 8  
 Grand jury, inspection of documents presented before § 5[a]  
 Grand theft, accused's right of inspection in prosecution for § 17  
 Guns, inspection of §§ 3, 5[a], 16[a], 25[a, b]  
 Hair, inspection of § 3  
 Handwriting --  
 -expert's analysis of handwriting, inspection of §§ 6[a], 11[b], 22[c]  
 -writing used for comparison with handwriting, inspection of § 24  
 Highway patrol, inspection of statements recorded by § 5[a]  
 Homicide prosecution, accused's right of inspection in §§ 3, 4, 5[a], 7- 12, 13[c], 15- 17, 20- 23, 25[a-c], 26  
 Hospital reports, inspection of §§ 4[b], 8, 11[g], 12, 18, 21  
 Hotel bills, inspection of § 15[b]  
 Human body --  
 -article taken from human body, inspection of § 6[b]  
 -fluids from human body, inspection of § 7  
 -parts, organs or tissues removed from human body, inspection of §§ 3, 5[a], 10[a], 21[b], 26  
 -victim, inspection of human body of §§ 3, 5[a], 8, 26  
 Identification, inspection of requested item when marked for § 9[c]  
 Identity of informer, exclusion of cases dealing with question as to accused's right to disclosure of § 1[a]  
 Impeachment, inspection of evidence for purpose of § 1[a]  
 Instruments used in alleged abortion, inspection of §§ 8, 25[a]  
 Interest of justice as warranting right to inspection §§ 8, 13[b], 16[a], 25[a, c]  
 Intoxicating liquor, accused's right of inspection in prosecution for illegal sale of § 7  
 Introduction §§ 1, 2  
 Investigation reports, inspection of §§ 3, 4[a], 6[a], 7, 11[b], 13[b], 17, 18, 22  
 Jurisdiction of court to permit inspection § 5  
 Justification for inspection, accused's burden with respect to § 7  
 Keys to car, inspection of § 25[a]  
 Knife, inspection of §§ 3, 5[a]  
 Laboratory reports, inspection of §§ 3, 4[b], 11[g], 21, 22  
 Lead slug, inspection of § 25[a]  
 Lease, inspection of § 24[a]  
 Letters, inspection of §§ 4[b], 7, 9[b, c], 11[c-i], 12, 13[a-c], 15[a]  
 Liberal discovery in criminal cases, trend in favor of § 3  
 Lie detector test, inspection of results of §§ 4[a], 11[b], 22[d]  
 Liquor, inspection of §§ 7, 25[d]  
 Lottery ticket, inspection of § 11[c]  
 Machine, inspection of § 12  
 Manslaughter prosecution, accused's right of inspection in §§ 5[a], 8, 21[b, e]  
 Maps, inspection of § 12

Marking item for identification, inspection at time of § 9[c]  
 Materiality of requested evidence, accused's burden as to showing of §§ 7, 8, 9[c], 11 [b], 13[c], 16[a], 17  
 Medical reports, inspection of §§ 4[b], 5 [a], 6[a], 8, 11[b], 18, 20, 21  
 Memorandum --  
 -oral statement, inspection of memorandum relating to § 13[d]  
 -person other than accused, inspection of memorandum of § 16[a]  
 -prosecuting attorney, inspection of memorandum of § 18  
 Men's shorts, inspection of §§ 4[b], 25[c]  
 Mental examination --  
 -inspection of report of §§ 11[b], 21[d]  
 -physician's use of confession for purpose of § 13[c]  
 Metal door of building, inspection of § 25[a]  
 Mirror on automobile, inspection of § 25[a]  
 Miscellaneous factors affecting right to inspection § 10  
 Mortgages, inspection of § 12  
 Motion pictures, inspection of §§ 3, 23  
 Murder prosecution, inspection in §§ 3, 4, 5[a], 7- 12, 13[a-c], 15- 17, 20- 23, 25 [a-c], 26  
 Narcotics prosecution, accused's right of inspection in §§ 6[a], 16[a], 22[a], 25 [d]  
 Necessity of inspection, showing of § 13[b]  
 Negligent operation of motor vehicle, accused's right of inspection in prosecution for §§ 12, 21[b, e], 22[a]  
 New trial, inspection at time of § 9[e]  
 Nondocumentary evidence, inspection of § 27[a]  
 Nonmedical reports, inspection of § 22  
 Notebook, production of § 8  
 Notes. Memorandum, supra  
 Numbers statutes, accused's right of inspection of prosecution for violation of § 9[c]  
 Objects used or directly involved in commission of offense, inspection of § 25  
 Offense --  
 -inspection of accused's confession or statement made subsequent to § 13  
 -inspection of accused's statement or conversation made or had before or at time of § 14  
 -police report of offense, inspection of §§ 9[c], 11[f], 17  
 Offering of item into evidence, inspection at time of § 9[b, c]  
 Oral statement, inspection of notes and memoranda relating to § 13[d]  
 Organ of body --  
 -inspection of --  
 -generally §§ 10[a], 26  
 -chemical analysis § 21[b]  
 Other kinds or types of evidence, inspection of § 27  
 Pandering prosecution, accused's right of inspection in § 17  
 Paraffin test, inspection of results of §§ 3, 22[a]  
 Particular kinds or types of evidence, inspection or disclosure of §§ 13- 27  
 Particular stages of proceedings, inspection at § 9  
 Parts of human body, inspection of §§ 3, 5[a], 10[a], 21[b], 26  
 Pellets, inspection of § 3  
 Perjury prosecution, accused's right of inspection in § 13[c]  
 Photographs, inspection of §§ 3, 5[a], 9[c], 11[c], 12, 16[a], 22[e], 23, 25[a]  
 Photostatic copies, inspection of §§ 9[d], 24  
 Physical examination, inspection of results of § 11[b]  
 Physical or tangible objects used or directly involved in commission of offense, inspection of § 25  
 Physician's reports, inspection of §§ 4[b], 5[a], 6[a], 8, 11[b], 18, 20, 21

Pistols, inspection of §§ 16[a], 25[a, b]  
Place of alleged offense, inspection of § 25[a]  
Police reports, inspection of §§ 4[a], 7, 9 [c], 11[b], 13[d], 16[a], 17, 18  
Polygraph tests, inspection of §§ 4[a], 11 [b], 22[d]  
Portions of writing offered into evidence, effect of § 9[c]  
Post mortem examination, inspection of report of §§ 10[a], 21[b]  
Power and jurisdiction of court to permit inspection § 5  
Practice pointers § 2[b]  
Prefatory matters § 1  
Preliminary hearing, inspection at time of §§ 9[a], 19  
Premises, inspection of §§ 5[b], 25[a]  
Prior convictions of defendant, inspection of alleged record of § 9[c]  
Proper cause for inspection, accused's burden of showing § 7  
Prosecuting attorney's notes, memorandum, file, or "work product," inspection of § 18  
Protection of constitutional rights, inspection for purpose of § 8  
Psychiatric report, inspection of §§ 4[b], 5 [b], 9[d], 11[g], 21  
Psychiatrist, use of defendant's confession by § 13[c]  
Psychologist's examination, inspection of § 11[b]  
Public policy as compelling discovery § 13[c]  
Radar equipment, inspection of § 27[a]  
Radio log book of police department, inspection of entries made in § 9[d]  
Rape prosecution, accused's right of inspection in §§ 5[b], 7, 15[a], 21[c], 22[d], 25[c]  
"Real" evidence, inspection of § 25[a]  
Receipts of town treasurer, inspection of § 24[a]  
Recordings, inspection of §§ 3, 5[a], 6[a], 8, 13[a, d], 14, 16[a], 18  
Refreshing recollection, inspection for purpose of §§ 9[c], 13[a]  
Related matters § 1[b]  
Relaxation of rule denying defendant right to inspection § 3  
Relevancy of requested evidence, accused's burden as to showing of §§ 7, 8, 9[c], 17  
Reports, inspection of §§ 3, 7, 9[b], 12, 13 [a, b], 16, 17, 20, 21[c, d], 22  
Revolver, inspection of §§ 16[a], 25[a, b]  
Rifles, inspection of § 3  
Robbery prosecution, accused's right of inspection in § 23  
Rugs, inspection of § 25[a]  
Rules of procedure relating to discovery --  
-civil procedure rule, admissibility under § 12  
-criminal procedure rule, admissibility under §§ 11, 16[b]  
Safe, inspection of § 25[a]  
Safe breaking, accused's right of inspection in prosecution for § 22[a]  
Samples of handwriting, inspection of § 24[b]  
Scientific records, inspection of §§ 11[g], 21, 22  
Scope of annotation § 1[a]  
Search warrant, inspection of § 27[a]  
Semen stains, inspection of § 11[c]  
Shells, inspection of §§ 11[b], 25[b]  
Shirt, inspection of § 25[a]  
Shoes, inspection of § 6[a]  
Shorts, inspection of §§ 4[b], 25[c]  
Side view mirror of automobile, inspection of § 25[a]  
Signature of statement by defendant, necessity for § 9[c]

Slides, inspection of §§ 5[a], 23  
Souvenirs, inspection of § 15[b]  
Specific evidence, necessity for designation of § 7  
Specimens removed from human person, inspection of § 26  
Speeding prosecution, accused's right of inspection in § 17  
State crime investigation agency, inspection of reports of §§ 3, 4[a], 6[a], 17, 22  
Statements --  
-accomplice, inspection of statements of §§ 4[b], 6[a], 10[a], 11[b, c, i], 13[b], 16[b, c]  
-accused, inspection of statements of §§ 3 [a], 4[a], 5[a], 7, 8, 9[b, c], 10[b], 11[a-e, g, h], 13, 14, 18  
-co-defendant, inspection of statement of § 16[b]  
-witnesses, inspection of statements of §§ 3, 4[a], 5[a], 6[a], 7, 8, 9[c], 11 [b, f, g], 16, 18  
Status of accused, consideration of § 10[b]  
Statutes, inspection as authorized by § 11, 12, 13[a]  
Stenographic record of statement, inspection of § 5[a]  
Sticks, inspection of § 7  
Stomach of homicide victim, inspection of contents of § 5[a]  
Subject of the charge, inspection of documents or papers directly related to § 24[a]  
Substance used to procure alleged abortion, inspection of § 25[a]  
Sufficient reason for inspection, necessity for showing of §§ 7, 16[a], 17  
Summary § 2[a]  
Suppression of evidence as violation of due process §§ 4[b], 6[a], 8  
Tangible objects used or directly involved in commission of offense, inspection of § 25  
Tape recordings, inspection of §§ 3, 4, 5 [a], 7, 9[a, c], 11[b, c], 13[a, b], 16 [a, b], 18  
Telegram, inspection of § 27[a]  
Telephone tapping, inspection of results of §§ 7, 13[d], 16[a]  
Teletype messages, inspection of § 17  
Testimony as to contents of statement, effect of § 9[c]  
Test of nonmedical nature, inspection of § 22  
Theft prosecution, accused's right of inspection in § 17  
Third persons, inspection of statements of § 16  
Timely request for inspection, necessity for § 6  
Tissue removed from body of victim, inspection of §§ 5[a], 26  
Transcript --  
-coroner's inquest, inspection of transcript of § 20  
-defense witness, inspection of, transcript of testimony of § 9[c]  
-preliminary hearing, inspection of transcript of testimony given at § 19  
Trial, right of inspection during progress of § 9[b]  
Trial court's discretionary power § 5[a]  
Types of evidence, inspection or disclosure of §§ 13- 27  
Undergarments, inspection of § 25[c]  
Unlawful search and seizure, exclusion of questions as to § 1[a]  
Unusual circumstances, necessity for showing of § 13[b]  
Urine test, inspection of § 11[b]  
Use of item by prosecution during trial, inspection at time of § 9[c]  
Vacuum sweepings, inspection of § 3  
Verdict, inspection subsequent to § 9[d]  
Waiver of right to inspection § 6  
Warrants, inspection of § 6[b]  
Weapon, inspection of §§ 3, 5[a], 7, 11[b], 16[a], 25[a, b]  
Whisky, inspection of § 25[d]

Wire tap recordings, inspection of §§ 7, 13 [d], 16[a]  
 Witnesses, inspection of statements of §§ 3, 4[a], 5[a], 6[a] 8 7, 8, 9[c], 11[b, f, g], 16, 18  
 Words and phrases --  
 -seizure § 11[b]  
 Work product of prosecuting attorney, inspection of §§ 7, 13[a], 18  
 Written confession and other types of confessions, cases making distinction between § 13[d]  
 Written material used or directly involved in commission of offense, inspection of § 24

#### TABLE OF REFERENCES(Go to beginning)

##### Annotations

See the related annotations listed in § 1[b]

##### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

##### A.L.R. Quick Index, Discovery and Inspection

Am. Jur. 2d, Depositions and Discovery §§ 307-323

Criminal law: need for disclosure of identity of informant, 33 Am. Jur. Proof of Facts 2d 549

Defending Minor Felony Cases, 13 Am. Jur. Trials 465

Investigating Particular Crimes, 2 Am. Jur. Trials 171

Investigating the Criminal Case; General Principles, 1 Am. Jur. Trials 481

#### ARTICLE OUTLINE (Go to beginning)

##### I. Introduction

§ 1 Prefatory matters

§ 1[a] Scope

§ 1[b] Related matters

§ 2 Background and comment

§ 2[a] Summary

§ 2[b] Practice pointers

##### II. In general

§ 3 Rule that ordinarily accused has no right to inspection or disclosure

§ 4 Constitutional objections to denial of inspection or disclosure

§ 4[a] Generally

- § 4[b] Suppression by prosecution of evidence favorable to defense
  - § 5 Power and jurisdiction of court to permit inspection
    - § 5[a] Trial court's discretionary power
    - § 5[b] Absence of jurisdiction
  - § 6 Necessity of making timely request; waiver of right to inspection
    - § 6[a] Generally
    - § 6[b] Timeliness of request
  - § 7 Burden of showing proper cause for inspection or designating specific evidence
  - § 8 Inspection of evidence relevant, material, or favorable to defense; inspection for fair trial or in interest of justice
  - § 9 Inspection at particular stages of proceedings
    - § 9[a] At preliminary hearing
    - § 9[b] During trial, generally
    - § 9[c] When requested item is offered in evidence, marked for identification, or used by prosecution during trial
    - § 9[d] After verdict is returned
    - § 9[e] At new trial
    - § 9[f] On Appeal
  - § 10 Miscellaneous factors affecting right to inspection
    - § 10[a] Admissibility in evidence
    - § 10[b] Age and status of accused
  - § 11 Inspection under criminal statute or rules of criminal procedure
    - § 11[a] Arizona
    - § 11[b] Delaware
    - § 11[c] Florida
    - § 11[d] Illinois
    - § 11[e] Maryland
    - § 11[f] Missouri
    - § 11[g] New Jersey
    - § 11[h] Tennessee
    - § 11[i] Vermont
    - § 11[j] Washington
    - § 11[k] Wisconsin
    - § 11[l] Wyoming
    - § 11[m] Other states
  - § 12 Applicability of civil statute or rule of civil procedure relating to discovery
- III. Inspection or disclosure of particular kinds or types of evidence
- § 13 Accused's confession or statement made after offense
    - § 13[a] Generally; inspection permitted
    - § 13[b] Inspection denied under circumstances
    - § 13[c] Inspection denied as matter of principle
    - § 13[d] Cases making distinction between written confession and other types of confessions; notes or memoranda

relating to oral statement

- § 14 Accused's statement or conversation made or had before or during offense
- § 15 Accused's letter, diary, or other written material
  - § 15[a] Letter
  - § 15[b] Other material
- § 16 Statement of person other than accused
  - § 16[a] Generally
  - § 16[b] Statement or confession of codefendant
  - § 16[c] Statement or confession of accomplice
- § 17 Police or investigation report; police record; investigation file
- § 18 Prosecuting attorney's notes, memoranda, file, or "work product"
- § 19 Transcript of testimony given at preliminary hearing
- § 20 Transcript or report of coroner's inquest
- § 21 Medical, psychiatric, or hospital report or record
  - § 21[a] Generally
  - § 21[b] Report of autopsy or post-mortem examination
  - § 21[c] Report of examination of rape victim
  - § 21[d] Report of examination of defendant
  - § 21[e] Blood test report
- § 22 Report of examination, experiment, test, or analysis of nonmedical nature
  - § 22[a] Generally
  - § 22[b] Ballistic report
  - § 22[c] Handwriting expert's report
  - § 22[d] Results of lie detector test
  - § 22[e] Fingerprints; photograph of fingerprints; report of fingerprint examination
- § 23 Photograph or slide of person or place or other objects; motion picture
- § 24 Written material used or directly involved in commission of offense; writing to be used for comparison of handwriting
  - § 24[a] Generally
  - § 24[b] Forgery cases
- § 25 Physical or tangible objects used or directly involved in commission of offense
  - § 25[a] Generally
  - § 25[b] Gun, bullet, or shell
  - § 25[c] Clothing
  - § 25[d] Liquor; narcotic
- § 26 Body, part thereof, or specimen therefrom

- § 27 Other kinds or types of evidence
- § 27[a] Documentary
- § 27[b] Nondocumentary

194 of 195 DOCUMENTS

American Law Reports 2d  
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Annotation

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Admissibility of evidence as to tire tracks or marks on or near highway

R. P. Davis

*23 A.L.R.2d 112*

JURISDICTIONAL TABLE OF STATUTES AND CASES

INDEX OF TERMS

TABLE OF REFERENCES

ARTICLE OUTLINE

**ARTICLE:** [\*I] Introduction

[\*1] Scope; related questions

This annotation supersedes that in *92 A.L.R. 475*.

Annotations on questions of general interest in connection with the subject herein annotated are listed below.n1

Cases involving the admissibility of evidence or testimony as to "gouge" marks, made by metal portions or parts of the automobile, present a factual situation different from that concerning tires or skid marks and are not exhaustively discussed or cited herein. See, in this connection, *Southern Oxygen Co. v. Martin (1942) 291 Ky 238, 163 SW2d 459*, in which it was held that there was no error in permitting certain witnesses to testify as to scars and gashes they observed the following day in the highway at the scene of the accident, the court pointing out that the marks on the road described by these witnesses were not of the fleeting nature of the imprint of a tire in dirt, but were of a rather permanent character made by steel instruments gouging into the blacktop road.

Also of the excluded type is *Whitfield v. Debrincat (1942) 50 Cal App2d 389, 123 P2d 591*, an action to recover for damages resulting from the collision of automobiles driven by plaintiff and defendant, where both parties contended that the other was driving on the left-hand side of the center line of the road, in which it was held that the trial court did not commit error in overruling an objection by defendant to a question asked of plaintiff's witness as to where a certain "gouge" in the road near the white post commenced.

The discussion is limited to the admissibility of evidence as to tire or skid marks as an original matter, to the exclusion of questions as to the admissibility of such evidence in the course of cross-examination of a witness in view of the scope and effect of the direct examination.

Admissibility and Weight of Fingerprint Evidence Obtained or Visualized by Chemical, Laser, and Digitally Enhanced Imaging Processes, *110 A.L.R.5th 213*

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, *64 A.L.R.4th 125*

Automobiles: Sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead, *75 A.L.R.3d 327*

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without front lights, or with improper front lights, *62 A.L.R.3d 560*

Automobiles: liability for accident arising from escape of trailer, *43 A.L.R.3d 725*

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection, *34 A.L.R.3d 1008*

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, *33 A.L.R.3d 1405*

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, *29 A.L.R.3d 248*

Liability of motorist colliding with person engaged about stalled or disabled vehicle on or near highway, *27 A.L.R.3d 12*

Violation of regulation governing size or weight of motor vehicles, or combinations of vehicles and loads, on the highway as basis of liability for personal injury, death, or damage to private property, *21 A.L.R.3d 989*

Liability for injury or damage caused by collision with portion of load projecting beyond rear or side of motor vehicle or trailer, *21 A.L.R.3d 371*

Liability for automobile accident, other than direct collision with pedestrian, as affected by reliance upon or disregard of stop-and-go signal, *2 A.L.R.3d 12*

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, *93 A.L.R.2d 287*

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds, *84 A.L.R.2d 979*

Propriety, in trial of civil action, of use of model of object or instrumentality, or of site or premises, involved in the accident or incident, *69 A.L.R.2d 424*

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, *66 A.L.R.2d 1048*

Admissibility of opinion evidence as to the cause of an accident or occurrence, *38 A.L.R.2d 13*

Footprints as evidence, *35 A.L.R.2d 856*

Admissibility of Expert or Opinion Evidence -- Supreme Court Cases, *177 A.L.R. Fed. 77*

## [\*2] Summary

Both in civil cases ( §§ 3-17) and in criminal prosecutions ( §§ 18-23) the general rule is that testimony or evidence as to tire or skid marks is admissible, that is, to the extent of allowing the witness to describe the marks and the circumstances under which he observed them, leaving it to the jury to draw their own opinion or conclusion as to what, if anything, the evidence indicated or tended to prove.

However, as indicated in numerous cases throughout the annotation, it is necessary that a foundation be laid as a prerequisite to admissibility of such evidence or testimony, such, for example, as showing that the tracks were made by the automobile involved in the accident, or by showing that the witness observed them before any change had taken place which would render it difficult to determine whether they were made by a particular car, a matter which, of course, would be affected by traffic conditions in the vicinity of the accident, weather conditions, etc.

The fact that the vehicle as to whose tracks the witness testified had been removed before the latter made his observation of the tracks is not necessarily a ground for rejecting the witness' testimony, as noted in § 4.

The time elapsing between the occurrence of the accident and the observation of the marks by the witness has an important bearing on the admissibility of evidence as to such marks, although, of course, no arbitrary time limit governing admissibility has been imposed by judicial authority. In relation to this matter, it is to be noted that testimony of one observing the marks three or four days after the accident may be admissible, while, on the other hand, depending upon weather conditions, etc., testimony of one seeing the marks within a few hours or a day after the collision may not be admitted, on the ground that conditions subsequent to the injury have rendered it doubtful whether the vehicle in question made the marks concerning which the testimony was given. This situation is discussed in § 5.

Testimony as to tire marks, when a sufficient foundation for its admissibility is laid, is for the purpose of aiding the jury in arriving at a conclusion as to how or why the collision occurred, or as bearing on the question of negligence in the operation of the vehicle. For example, such evidence has frequently been admitted as having some tendency to show whether the vehicle was being operated at a dangerous rate of speed under the circumstances. See, in this connection, § 7. Or, as shown in § 8, such evidence may be relevant on the question whether the operator of the car involved was driving it on his right side of the highway.

As to opinion evidence relative to what the tire marks observed by the witness signified, it has been held in some cases that such witness may state whether the tracks or marks were made by one of the automobiles involved in the collision, the theory being that such testimony is merely a statement of fact open to the observation of the witness, and that such statement is a part of the description of conditions which might have been difficult for him to reproduce to the jury otherwise. For illustrative cases see § 10. The above observation as to opinion evidence as to the identity of the car making the marks is true with respect to opinions as to the location of the car on the highway at the time of the accident, such testimony not being objectionable as being an opinion based on statements of others, but constituting a recital of a fact within the observation and knowledge of the witness. See, in this connection, § 11.

However, as shown in § 12, a nonexpert witness' opinion as to the speed of a motor vehicle, predicated on observation of tire or skid marks, is not admissible. An expert witness, on the contrary, as noted in § 15, may give his opinion as to the speed of the vehicle in question, based on the length of the marks.

Some cases have held that a nonexpert witness may be allowed to state whether from his observation of the tire marks the vehicle skidded, the distance it traveled after the collision or whether it was braked, etc., as will be seen by an examination of miscellaneous cases in § 13. But as also shown in this section a contrary conclusion has been reached.

Properly authenticated photographs of tire marks have been held admissible. Illustrative cases on this point are treated in § 16. Maps or diagrams have also been admitted under certain circumstances, as indicated in § 17.

In a number of cases involving prosecutions for involuntary homicide in the operation of a motor vehicle testimony as to tire marks has been held admissible for various purposes, such, for example, as showing whether the operator was driving the car on the wrong side of the road ( § 20), or whether the car was being operated at an unlawful rate of speed under the circumstances ( § 21).

In miscellaneous criminal prosecutions testimony as to tire marks corresponding to those on defendant's car which were observed at the scene of a crime has been admitted when introduced for the purpose of connecting defendant with the crime. See § 22.

Just as in civil cases, expert testimony as to tire marks is admissible in a criminal case on questions as to the speed of the vehicle. See for an illustrative case as to this and as to opinion evidence generally in criminal cases, § 23.

[\*II] Admissibility in civil cases

[\*3] Generally

The general rule is that testimony as to tire marks on the highway is admissible in civil actions for injury or damage, where a sufficient foundation therefor is laid as by showing, for example, that the condition of the road was the same as it was at the time of the accident, and had not been changed by the weather or traffic, and there is sufficient identification that the marks were made by the automobile involved in the accident.

#### SUPREME COURT

*American Film Co. v. Moyer* (1920, CA9th Cal) 267 F 419

#### ALABAMA

*Bains Motor Co. v. Le Croy* (1923) 209 Ala 345, 96 So 483

*Hodges v. Wells* (1932) 226 Ala 558, 147 So 672

*Alaga Coach Line v. McCarroll* (1933) 227 Ala 686, 151 So 834, 92 ALR 470

*McPherson v. Martin* (1937) 234 Ala 244, 174 So 791

#### ARKANSAS

*Cahill v. Bradford* (1926) 172 Ark 69, 287 SW 595

#### CALIFORNIA

*Flach v. Fikes* (1928) 204 Cal 329, 207 P 1079

*Hughes v. Hartman* (1929) 206 Cal 199, 273 P 560

*Meier v. Wagner* (1915) 27 Cal App 579, 150 P 797

*Fong Lin v. Probert* (1920) 50 Cal App 339, 195 P 437

*Vedder v. Bireley* (1928) 92 Cal App 52, 267 P 724

*Bowker v. Illinois Electric Co.* (1931) 112 Cal App 740, 297 P 615

*Douglass v. Crabtree* (1943) 57 Cal App2d 568, 134 P2d 912

#### CONNECTICUT

*Tomasko v. Raucci* (1931) 113 Conn 274, 155 A 64

#### ILLINOIS

*Hann v. Brooks* (1947) 331 Ill App 535, 73 NE2d 624

#### INDIANA

*Grossnickle v. Avery* (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395

*Smith v. Keyes* (1937) 103 Ind App 487, 9 NE2d 119

#### IOWA

*Nelson v. Hedin* (1918) 184 Iowa 657, 169 NW 37

*Stutzman v. Younkerman* (1927) 204 Iowa 1162, 216 NW 627

*McKeever v. Batcheler* (1934) 219 Iowa 93, 257 NW 567

*Harness v. Tehel* (1935) 221 Iowa 403, 263 NW 843

*Brady v. McQuown* (1949) 241 Iowa 34, 40 NW2d 25

*Thornbury v. Maley* (1951) -- Iowa --, 45 NW2d 576

#### KANSAS

*Briley v. Nussbaum* (1927) 122 Kan 438, 252 P 223, mod on other grounds 123 Kan 58, 254 P 351

*Thomas v. Meyer* (1939) 150 Kan 587, 95 P2d 267

#### KENTUCKY

*Schleeter v. Commonwealth* (1927) 218 Ky 72, 290 SW 1075

*Whitehead v. Stith* (1939) 279 Ky 556, 131 SW2d 455

*Bybee Bros. v. Imes* (1941) 288 Ky 1, 155 SW2d 492

*Conley v. Jennings* (1944) 296 Ky 652, 178 SW2d 185, 19 NCCA NS 228

*Bohn v. Sams* (1946) 302 Ky 63, 193 SW2d 459

*Lever Bros. Co. v. Stapleton* (1950) 313 Ky 837, 233 SW2d 1002

*Adrian v. McGillivray* (1951) -- Ky --, 243 SW2d 895

#### MARYLAND

*Opecello v. Meads* (1926) 152 Md 29, 135 A 488, 50 ALR 1385

*Cumberland & W. Transit Co. v. Metz* (1930) 158 Md 424, 149 A 4, reh den 158 Md 455, 149 A 565, app dismd

*American Oil Co. v. Metz*, 282 US 801, 75 L ed 720, 51 S Ct 40  
*Sheer v. Rathje* (1938) 174 Md 79, 197 A 613  
*Gloyd v. Wills* (1942) 180 Md 161, 23 A2d 665  
*Finney v. Frevel* (1944) 183 Md 355, 37 A2d 923  
*Williams v. Graff* (1950) -- Md --, 71 A2d 450, 23 ALR2d 106  
*Miller v. Graff* (1951) -- Md --, 78 A2d 220

#### MASSACHUSETTS

*Mernagh v. Lillie* (1942) 312 Mass 697, 45 NE2d 473

#### MICHIGAN

*Anderson v. Lynch* (1925) 232 Mich 276, 205 NW 134  
*Pearce v. Rodell* (1937) 283 Mich 19, 276 NW 883

#### MINNESOTA

*Romann v. Bender* (1934) 190 Minn 419, 252 NW 80, 34 NCCA 419  
*Raths v. Sherwood* (1935) 195 Minn 225, 262 NW 563, 38 NCCA 579  
*Lestico v. Kuehner* (1938) 204 Minn 125, 283 NW 122

#### MISSISSIPPI

*Wallace v. Billups* (1948) 203 Miss 853, 33 So2d 819

#### MISSOURI

*Clark v. Reising* (1937) 341 Mo 282, 107 SW2d 33  
*Young v. Bacon* (1916, Mo App) 183 SW 1079  
*Troxell v. De Shon* (1925, Mo App) 279 SW 438  
*Bear v. Devore* (1944, Mo App) 176 SW2d 862

#### NEBRASKA

*Koutsky v. Grabowski* (1948) 150 Neb 508, 34 NW2d 893  
*Ficke v. Gibson* (1950) 153 Neb 478, 45 NW2d 436  
*Danner v. Walters* (1951) 154 Neb 506, 48 NW2d 635

#### NEW HAMPSHIRE

*Abbott v. Hayes* (1942) 92 NH 126, 26 A2d 842

## NEW JERSEY

*Tischler v. Steinholtz* (1923) 99 NJL 149, 122 A 880

## NEW YORK

*Lazar v. Westchester Street Transp. Co.* (1944) 268 App Div 387, 51 NYS2d 533

*Boyer v. Scriptor* (1951) 278 App Div 601, 102 NYS2d 2

## NORTH CAROLINA

*Goss v. Williams* (1928) 196 NC 213, 145 SE 169

## NORTH DAKOTA

*Olson v. Wetzstein* (1929) 58 ND 263, 225 NW 459

*Hoffer v. Burd* (1951) -- ND -- , 49 NW2d 282

## OHIO

*Bailey v. Parker* (1930) 34 Ohio App 207, 170 NE 607

*A. Macaluso Fruit Co. v. Commercial Motor Freight* (1944, App) 57 NE2d 692, 41 Ohio L Abs 97

## OREGON

*Clark v. Fazio* (1951) -- Or -- , 230 P2d 553

## PENNSYLVANIA

*Hoover v. Reichard* (1916) 63 Pa Super 517

## SOUTH CAROLINA

*Eickhoff v. Beard-Laney, Inc.* (1942) 199 SC 500, 20 SE2d 153, 141 ALR 1010

## TENNESSEE

*Evansville Container Corp. v. McDonald* (1942, CA6th Tenn) 132 F2d 80

## TEXAS

*Akers v. Epperson* (1942, Tex Civ App) 172 SW2d 512  
*Langham v. Talbott* (1948, Tex Civ App) 211 SW2d 987, error ref n r e  
*Chesshir v. Nall* (1949, Tex Civ App) 218 SW2d 248, error ref n r e

#### VERMONT

*Maynard v. Westfield* (1914) 87 Vt 532, 90 A 504

#### WASHINGTON

*McCreedy v. Fournier* (1920) 113 Wash 351, 194 P 398  
*Collins v. Barmon* (1927) 145 Wash 383, 260 P 245  
*Stubbs v. Allen* (1932) 168 Wash 156, 10 P2d 983  
*Still v. Swanson* (1933) 175 Wash 553, 27 P2d 704

#### WEST VIRGINIA

*Dye v. Rathbone* (1926) 102 W Va 386, 135 SE 274  
*Bragg v. C. I. Whitten Transfer Co.* (1943) 125 W Va 722, 26 SE2d 217

#### WISCONSIN

*Anderson v. Sparks* (1910) 142 Wis 398, 125 NW 925

Evidence as to tracks or other marks made by motor vehicles on the pavement or roadway is generally held admissible in actions for damages where the witness testifying had an opportunity to make an observation of them before any change had taken place. *McPherson v. Martin* (1937) 234 Ala 244, 174 So 791.

In general, evidence of tire tracks and skid marks and the condition of the automobile subsequent to an accident may be admitted as a means of ascertaining responsibility for the accident. *Evansville Container Corp. v. McDonald* (1942, CA6th Tenn) 132 F2d 80.

Testimony of a witness that on the morning following the injury he visited the place where the collision occurred and found, in addition to a trail of blood, the track or imprint of a wheel made under restraint of brakes, was properly admitted as a circumstance corroborating the testimony of other witnesses that plaintiff, when struck by the fender of defendant's car, was dragged along the street for some distance, until defendant stopped his car. *Meier v. Wagner* (1915) 27 Cal App 579, 150 P 797.

Testimony of marks upon the road clearly shown to have been made by one of the cars in the accident is admissible. *Gloyd v. Wills* (1942) 180 Md 161, 23 A2d 665.

It is permissible to admit testimony as to tracks of an automobile on the highway as evidence, where there is sufficient identification of the tracks of the automobile as having been made by the automobile which injured the pedestrian. *Goss v. Williams* (1928) 196 NC 213, 145 SE 169.

In *Finney v. Frevel* (1944) 183 Md 355, 37 A2d 923, the court apparently approved the view that testimony as to skid marks upon the road, clearly shown to have been made by one of the cars in the accident, is admissible, but pointed out that reliance upon testimony alone of marks upon the road, even though clearly shown to be made by defendant's car, to establish negligence, has never been favored by the Maryland courts.

In *Young v. Bacon* (1916, Mo App) 183 SW 1079, an action for injury sustained by a pedestrian run over by defendant's automobile, the court held that it was not error to allow a nonexpert witness to testify that he examined the place on the roadway where the injury occurred, just after it occurred, and that he saw a fresh automobile track on the roadway, the court stating that this was a matter of common knowledge and not one requiring expert testimony.

A witness may describe the marks that he has observed near the place of an accident; the inference to be drawn from the testimony regarding such tire marks, skid marks, or scratches is solely the province of the jury. *Danner v. Walters* (1951) 154 Neb 506, 48 NW2d 635.

In *Boyer v. Scripser* (1951) 278 App Div 601, 102 NYS2d 2, an action for damages resulting from a collision of the automobiles of plaintiff and defendant at a street intersection, the exclusion of testimony as to skid marks, purporting to have been made by defendant's car, was, in the opinion of the court, error, but in view of other testimony in the case was not of sufficient gravity to require a reversal.

Testimony as to tire marks made by a car on a roadway should not be admitted unless it can be reasonably inferred from the time of the observation, or from the relative locations of the marks and the car, or from other convincing facts, that the marks were actually made by the car in question. *Williams v. Graff* (1950) -- Md --, 71 A2d 450, 23 ALR2d 106; *Miller v. Graff* (1951) -- Md --, 78 A2d 220.

In view of the fact that a police officer arrived shortly after the accident and saw the skid marks, and also in view of the close proximity of blood spots to the skid marks indicating where the child had been wounded, the court in *Miller v. Graff* (Md) supra, held that there was reasonable ground for the inference that the skid marks had been made by defendant's taxi, and the officer's testimony was admissible.

Testimony of a witness in an automobile collision case that he had found on the roadway certain tracks made after the collision is competent to go to the jury for what it is worth, even though the witness on cross-examination admits that he did not have any means of knowing what car made the tracks. *Troxell v. De Shon* (1925, Mo App) 279 SW 438.

And in *Maynard v. Westfield* (1914) 87 Vt 532, 90 A 504, it was held that testimony concerning automobile tracks in the road was properly received, where, although the witness did not connect these tracks with the automobile which was responsible for the accident, their character and location, and the proximity of the time when the witness examined them, in the absence of evidence to the contrary, warranted an inference that the tracks seen by the witness were made by that particular machine; the uncertainty regarding this, if any, affected only the weight of the evidence.

In *Scott v. O'Leary* (1912) 157 Iowa 222, 138 NW 512, where testimony regarding buggy and automobile tracks near the scene of the accident was objected to as calling for the conclusion of the witness, the court stated that manifestly these objections were untenable.

In *Appalachian Stave Co. v. Pickard* (1936) 266 Ky 565, 99 SW2d 472, testimony of certain witnesses that on the night of the accident or next day, another witness took them to the scene of the accident and pointed out tire tracks leading down to the place where the witness told them the car had stopped, was rejected as hearsay, although they and the other witness were cross-examined on the trial and all described conditions identical with the testimony of such witness. The recalling of the witness and proving by him that the condition was the same as it was at the time of the accident, according to the court, was no more than a statement of his opinion, and brought the questioned testimony within the rule governing hearsay evidence.

Testimony as to tire marks on highway is admissible in civil actions where sufficient foundation therefor laid:

#### SUPREME COURT

*Clifton v Mangum* (1966, CA10 NM) 366 F2d 250

*Logsdon v Baker* (1973, DC Dist Col) 366 F Supp 332, vacated 170 US App DC 360, 517 F2d 174, vacated on other grounds 170 App DC 360, 517 F2d 174

#### ALABAMA

*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319 (citing annotation)

#### ARIZONA

*Mattingly v Eisenberg* (1955) 79 Ariz 135, 285 P2d 174

*Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932 (admissibility assumed)

#### ARKANSAS

*Nelson v Busby* (1969) 246 Ark 247, 437 SW2d 799

#### CALIFORNIA

*Lynch v Birdwell* (1955) 44 Cal 2d 839, 285 P2d 919

*Stafford v Alexander* (1960, 2nd Dist) 182 Cal App 2d 301, 6 Cal Rptr 219

*Powley v Appleby* (1957, Cal App) 314 P2d 761, subsequent op on reh (2nd Dist) 155 Cal App 2d 727, 318 P2d 712, subsequent op on reh 155 Cal App 2d 727, 318 P2d 712 (by implication)

#### COLORADO

*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229 (superseded by statute as stated in *Public Service Co. v Board of Water Works* (Colo) 831 P2d 470) (citing annotation)

#### CONNECTICUT

*Engelke v Wheatley* (1961) 148 Conn 398, 171 A2d 402

#### IDAHO

*Hayward v Yost* (1952) 72 Idaho 415, 242 P2d 971

## INDIANA

*Taylor v Fitzpatrick* (1956) 235 Ind 238, 132 NE2d 919 (by implication)

*Sili v Vinnedge* (1979) 181 Ind App 658, 393 NE2d 251

## IOWA

*Smith v Darling & Co.* (1952) 244 Iowa 133, 56 NW2d 47

*Hackman v Beckwith* (1954) 245 Iowa 791, 64 NW2d 275

*Weilbrenner v Owens* (1955) 246 Iowa 580, 68 NW2d 293

*Soreide v Vilas & Co.* (1956) 247 Iowa 1139, 78 NW2d 41 (citing annotation)

*Brower v Quick* (1958) 249 Iowa 569, 88 NW2d 120 (citing annotation)

*Hamdorf v Corrie* (1960) 251 Iowa 896, 101 NW2d 836

## KANSAS

*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451 (citing annotation)

## KENTUCKY

*Shewmaker v Richeson* (1961, Ky) 344 SW2d 802

## MAINE

*Nutting v Wing* (1956) 151 Me 435, 120 A2d 563 (by implication)

## MICHIGAN

*Wilhelm v Skiffington* (1960) 360 Mich 348, 103 NW2d 451 (holding mark sufficiently identified as made by car involved in accident which was subject of litigation)

*Snyder v New York Cent. Transport Co.* (1966) 4 Mich App 38, 143 NW2d 791 (by implication; citing annotation)

*LaFave v Kroger Co.* (1966) 5 Mich App 446, 146 NW2d 850

## MISSISSIPPI

*Arnold v Reece* (1957) 229 Miss 862, 92 So 2d 237, *infra* § 11

## MISSOURI

*Wolfe v Harms* (1967, Mo) 413 SW2d 204

*Kitchen v Pratt* (1959, Mo App) 324 SW2d 144 (by implication)

## NEBRASKA

*Shields v Buffalo County* (1955) 161 Neb 34, 71 NW2d 701 (recognizing rule)  
*Egenberger v National Alfalfa Dehydrating & Milling Co.* (1957) 164 Neb 704, 83 NW2d 523 (superseded by statute as stated in *Kennedy v Kennedy*, 221 Neb 724, 380 NW2d 300) (recognizing rule)  
*Cox v Babington* (1958) 166 Neb 609, 90 NW2d 64  
*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697  
*Nisi v Checker Cab Co.* (1961) 171 Neb 49, 105 NW2d 523  
*Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236

## NEW MEXICO

*Padgett v Buxton-Smith Mercantile Co.* (1958, CA10 NM) 262 F2d 39 (citing annotation; applying NM law)  
*Alford v Drum* (1961) 68 NM 298, 361 P2d 451

## NEW YORK

*Regan v Bellows* (1960, 3d Dept) 11 App Div 2d 586, 200 NYS2d 575 (holding mark sufficiently shown to have been made by car involved in accident which was subject of litigation)  
*Coffin v Cunningham* (1960, 4th Dept) 11 App Div 2d 1082, 206 NYS2d 353  
*Hatcher v Clayton* (1955) 242 NC 450, 88 SE2d 104 (citing annotation)  
*Kirkman v Baucom* (1957) 246 NC 510, 98 SE2d 922  
*Shaw v Sylvester* (1960) 253 NC 176, 116 SE2d 351 (superseded by statute as stated in *State v Purdie*, 93 NC App 269, 377 SE2d 789) (by implication)

## NORTH DAKOTA

*Attleson v Boomgarden* (1955, ND) 73 NW2d 448

## OHIO

*Morris v Johnson* (1950, App, Franklin Co) 62 Ohio L Abs 399, 107 NE2d 406  
*Brewer v Crupper* (1960, Ohio App, Hamilton Co) 173 NE2d 178

## OKLAHOMA

*Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849

## OREGON

*Wood v Meyer* (1972) 261 Or 113, 492 P2d 468

## PENNSYLVANIA

*De Vita v Long* (1957, DC Pa) 147 F Supp 810 (citing annotation)

*Deeney v Krauss* (1959) 394 Pa 380, 147 A2d 369

*Mantz v Rufft* (1961) 403 Pa 436, 170 A2d 101

## TEXAS

*Ball v Martin* (1955, Tex Civ App Austin) 277 SW2d 182

*Butane Wholesale Co. v Buehring* (1959, Tex Civ App San Antonio) 325 SW2d 173, writ dism w o j (Jul 22, 1959) (citing annotation)

*Briggs v Lloyd* (1966, Tex Civ App Waco) 405 SW2d 865, writ dism w o j (Oct 26, 1966)

## VIRGINIA

*Richardson v Lovvorn* (1958) 199 Va 688, 101 SE2d 511

*Venable v Stockner* (1959) 200 Va 900, 108 SE2d 380

## WASHINGTON

*Knight v Borgan* (1958) 52 Wash 2d 219, 324 P2d 797 (citing annotation)

*Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446 (by implication)

## WEST VIRGINIA

*Workman v Wynne* (1956) 142 W Va 135, 94 SE2d 665 (by implication)

## WISCONSIN

*Atkinson v Huber* (1955) 268 Wis 615, 68 NW2d 447

*Jensen v Criter* (1960) 9 Wis 2d 177, 100 NW2d 380

*Rausch v Buisse* (1966) 33 Wis 2d 154, 146 NW2d 801 (citing annotation)

*Neider v Spoehr* (1969) 41 Wis 2d 610, 165 NW2d 171

The following additional authority is relevant to the issues discussed in this section:

◇

See *Glaze v Tennyson* (1977, Ala) 352 So 2d 1335, § 15.

Whether proper foundation had been laid for admission of police officer's testimony concerning accident based on visual inspection of vehicles and location of debris and skid marks was matter within sound discretion of trial court. *Starkey v Bryan* (1968) 166 Colo 43, 441 P2d 314.

Emergency medical technician who was passenger in ambulance that collided with automobile at intersection was properly allowed to testify as to skid marks made by ambulance, where he observed marks upon exiting ambulance at scene of accident and testified merely as to what he saw at scene, not as qualified accident reconstruction expert. *Nolan v Elliott* (1989, 2d Dist) 179 Ill App 3d 1077, 129 Ill Dec 288, 535 NE2d 1053, app den 126 Ill 2d 560, 133 Ill Dec 670, 541 NE2d 1108.

Witness testified concerning sufficient factual data to constitute adequate foundation for his opinion as to cause of automobile accident where witness detailed his personal observations of automobile and scene of accident, photographs taken by him, use of these in measuring and confirming tire skid marks, procedures and methods used in arriving at his conclusion, and matters upon which he relied for conclusion. *Plank v Holman* (1969, 2d Dist) 108 Ill App 2d 216, 246 NE2d 694, revd 46 Ill 2d 465, 264 NE2d 12 (among conflicting authorities noted in *Augenstein v Pulley* (5th Dist) 191 Ill App 3d 664, 138 Ill Dec 724, 547 NE2d 1345, app den 131 Ill 2d 557, 142 Ill Dec 879, 553 NE2d 393).

Physical evidence as debris, skid marks, and location of physical damage on vehicles involved is always admissible and relevant to a court in determining fault in automobile accident cases. *Moore v Johnson* (1972, La App 2d Cir) 262 So 2d 105.

Positive and certain identification of tire marks on roadway as having been made by particular vehicle is not necessary in order to render evidence thereof admissible; however, such evidence should not be admitted unless there is sufficient showing, either from time of observation, from relative locations of marks and car, or from other convincing facts, to support reasonable inference that marks had, in reality, been made by vehicle involved in accident. *Fowler v Smith* (1965) 240 Md 240, 213 A2d 549 (citing annotation).

In action to recover damages for injuries sustained 6-year-old child when hit by defendant's automobile, testimony of police officer as to skid marks shown on plat of accident scene was held admissible. *Levine v Beebe* (1965) 238 Md 365, 209 A2d 67.

Evidence of tire marks at scene of accident is admissible in civil actions where sufficient foundation is laid by showing that condition of road was same as it was at time of accident and had not been changed by weather or traffic, and where there is sufficient identification of tire marks to show that they were made by vehicles involved in accident. *Sheets v Davenport* (1967) 181 Neb 621, 150 NW2d 224.

Witness may describe marks observed near place of accident, while inference to be drawn therefrom is for jury. *Stillwell v Schmoker* (1963) 175 Neb 595, 122 NW2d 538 (superseded by statute as stated in *State v Rotella*, 196 Neb 741, 246 NW2d 74).

Witness may describe tire marks he observed near place of accident, and inference to be drawn from testimony is for jury. *Davis v Dennert* (1956) 162 Neb 65, 75 NW2d 112.

Although state trooper did not witness collision of two automobiles, diagram that trooper prepared showing position of vehicles, which had not been moved, and showing arrows indicating paths traversed by vehicles, which arrows reflected trooper's observation of pattern of skid marks present at scene, was properly admitted into evidence where testimony clearly indicated that diagram was based not on statements made by parties involved, but primarily upon trooper's own factual observation at accident scene. *Lee v Decarr* (1971, 3d Dept) 36 App Div 2d 554, 317 NYS2d 226.

Investigating officer who arrived at scene shortly after accident may describe to jury skid marks he had observed there. *Howard v Wood* (1964) 263 NC 241, 139 SE2d 252.

Trial court in personal injury action arising from collision of automobile with pedestrian as pedestrian stood alongside his car erred in admitting testimony of highway patrol officer as to speed of automobile based on skid marks. *Fowler v*

*Graves (1986) 83 NC App 403, 350 SE2d 155.*

In action arising out of collision, investigating police officer's reference to skid marks, in course of explanatory preface to his later testimony, was not prejudicial. *Miller v Hickman (1961, Okla) 359 P2d 172.*

Witness may describe skid marks but inference to be drawn from testimony is for jury. *Venable v Stockner (1959) 200 Va 900, 108 SE2d 380.*

Witness may describe marks observed near place of accident, but inference to be drawn therefrom is for jury. *Richardson v Lovvorn (1958) 199 Va 688, 101 SE2d 511.*

Although identification of skid marks can be established with certainty if witness observed marks being created by skidding car or saw marks extending right up to tires of car before it was removed, it does not follow that evidence as to skid marks may not be admitted for consideration by trier of fact if less foundation is offered; if evidence is not remote in time and is located so as to be reasonably attributable to car in question, trial court in its discretion may permit evidence to be admitted. *Zinda v Pavloski (1966) 29 Wis 2d 640, 139 NW2d 563 (citing annotation).*

[\*4] As affected by fact that person testifying did not see accident

Testimony of a witness as to tire marks is not necessarily rendered inadmissible by the fact that the witness did not see the collision or that the vehicle had been removed before he arrived at the scene of the accident.

#### INDIANA

*Grossnickle v. Avery (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395*

#### KENTUCKY

*Lever Bros. Co. v. Stapleton (1950) 313 Ky 837, 233 SW2d 1002*

#### MARYLAND

*Williams v. Graff (1950) -- Md --, 71 A2d 450, 23 ALR2d 106*

*Miller v. Graff (1951) -- Md --, 78 A2d 220*

#### WEST VIRGINIA

*Bragg v. C. I. Whitten Transfer Co. (1943) 125 W Va 722, 26 SE2d 217*

So, in *Grossnickle v. Avery (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395*, where the witness did not see the collision, but went outside when he saw people gathering, the court held that he was competent to testify that he saw skid marks which it might be inferred from the evidence were made by defendant's automobile, stating that the fact that the witness did not see the collision did not render him incompetent to describe what he saw in the way of marks on the pavement.

And testimony of a witness relative to the location of skid marks at the scene of the accident is competent, although the

witness did not see the collision and the vehicles had been removed before he arrived at the scene of the accident, notwithstanding the defendant's objection that the witness in his answer had attempted to give the location of the front wheels of the colliding vehicles, inasmuch as it was apparent from the context of the questions and answers that the location of the skid marks rather than the wheels of the vehicles was the subject matter of the inquiry, as well as of the testimony. *Bragg v. C. I. Whitten Transfer Co. (1943) 125 W Va 722, 26 SE2d 217.*

Also, in *Lever Bros. Co. v. Stapleton (1950) 313 Ky 837, 233 SW2d 1002*, an action to recover damages for fatal injuries to a child who stepped from a parked truck into the path of an oncoming automobile, it was held that there was no error in admitting, apparently for the purpose of showing that the car was being operated at an illegal rate of speed, testimony of the child's father, who described the skid or tire marks on the highway, and blood spots, as being fifty-four feet from the truck, although it had been moved at the time, eyewitnesses having pointed out all these things to the father and having testified that conditions were the same, except perhaps for the truck, when the father arrived on the scene.

As to admissibility generally of evidence of tire marks for purposes of showing that automobile was being operated at an unlawful rate of speed, see § 7, *infra*.

Testimony as to tire marks is not necessarily inadmissible because witness did not see accident:

#### SUPREME COURT

*Clifton v Mangum (1966, CA10 NM) 366 F2d 250*

#### ALABAMA

*Huguley v State (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319 (citing annotation)*

#### ARIZONA

*Mattingly v Eisenberg (1955) 79 Ariz 135, 285 P2d 174*

#### IOWA

*Hackman v Beckwith (1954) 245 Iowa 791, 64 NW2d 275 (by implication)*

#### MICHIGAN

*Snyder v New York Cent. Transport Co. (1966) 4 Mich App 38, 143 NW2d 791 (by implication; citing annotation)*

#### NEBRASKA

*Tate v Borgman (1958) 167 Neb 299, 92 NW2d 697*

#### NEW MEXICO

*Padgett v Buxton-Smith Mercantile Co. (1958, CA10 NM) 262 F2d 39* (citing annotation; applying NM law)

#### NORTH CAROLINA

*Hatcher v Clayton (1955) 242 NC 450, 88 SE2d 104* (by implication; citing annotation)

*Shaw v Sylvester (1960) 253 NC 176, 116 SE2d 351* (superseded by statute as stated in *State v Purdie, 93 NC App 269, 377 SE2d 789*)

#### OKLAHOMA

*Andrews v Moery (1951) 205 Okla 635, 240 P2d 447*

The following additional authority is relevant to the issues discussed in this section:

◇

Although expert may express opinion as to speed of automobile predicated on length of skid marks made by it before impact, testimony of police officer as to speed of defendant's motor vehicle was inadmissible where such opinion was based on distance that vehicle traveled after impact. *Holuska v Moore (1970) 286 Ala 268, 239 So 2d 192*.

Police officer could testify as to measurement of skid marks although he was not present when they were made where evidence showed that no other marks were present and that marks in question were freshly made. *Mattingly v Eisenberg (1955) 79 Ariz 135, 285 P2d 174*.

Police officer's testimony regarding certain skid marks found at site of crossing collision between plaintiff's automobile and defendant's train was not admissible to contradict plaintiff's testimony that he at no time applied his brakes, where officer also testified that he could not say what car had made the skid marks, and another officer testified that the skid marks were not made by plaintiff's car. *Jewell v Pennsylvania R. Co. (1962) 55 Del 6, 183 A2d 193*.

See *Shewmaker v Richeson (1961, Ky) 344 SW2d 802, infra § 5*.

Testimony of witness relative to tire marks is not rendered inadmissible by removal of vehicle prior to arrival of witness. *Fowler v Smith (1965) 240 Md 240, 213 A2d 549* (citing annotation).

Testimony of witness who did not see accident as to brake marks allegedly made by defendant's car was inadmissible, absent proof that marks were actually so made. *Winslow v Dietlin (1956) 100 NH 147, 121 A2d 573*.

Testimony of traffic consultant, whose information as to accident was derived solely from examination of locus and of photographs, as to cause of marks and scratches on highway was properly excluded. *Smith v Hardy (1955) 228 SC 112, 88 SE2d 865*.

Witness cannot testify that particular vehicle made skid marks if he did not see accident and was not able to trace marks to vehicle in question, but rule is to contrary where witness can trace marks to vehicle. *Butane Wholesale Co. v Buehring (1959, Tex Civ App San Antonio) 325 SW2d 173, writ dismissed (Jul 22, 1959)* (citing annotation).

[\*5] As affected by time elapsing between accident and observation of marks

The fundamental prerequisite for the admissibility of testimony or evidence as to tire marks is the identification of the marks with the automobile causing the injury, a matter which, in numerous cases, as will be shown below, seems to have been tied up with the factor of time intervening between the time of the accident and the observation of the marks on the road by the witness. The admissibility of evidence or testimony of the type referred to above, in so far as it may be said to be controlled by the time element, depends upon numerous factors, such as weather conditions, the amount of travel, and other conditions noted in the cases subsequently detailed in this section.

Testimony as to conditions at the scene of the accident an appreciable time thereafter, such as the existence and location of marks or tracks, is admissible upon a proper showing that there has been no change in conditions in the meantime. *Ficke v. Gibson (1950) 153 Neb 478, 45 NW2d 436.*

A different rule applies in the absence of a showing that conditions have not been changed subsequently to the accident. *Id.*

The length of time intervening between the accident and the examination, and the physical conditions surrounding the scene of the accident which would affect such marks, such as the amount of travel on the highway, and whether or not its surface was dry or wet, are elements which ordinarily affect the weight, rather than the materiality of such testimony. *Clark v. Reising (1937) 341 Mo 282, 107 SW2d 33.*

In the following cases, under the particular circumstances therein detailed, evidence of tire marks was held admissible where the period of time elapsing between the accident and the time the tire marks were observed by the witness ranged from a "reasonable" one to a matter of days and, at least in one instance, weeks.

Testimony of a witness as to wheel tracks, wheel prints, skid marks, or other marks, where the witness visited and examined the scene of an accident within a reasonable time, is ordinarily admissible. *Clark v. Reising (1937) 341 Mo 282, 107 SW2d 33.*

In *Bohn v. Sams (1946) 302 Ky 63, 193 SW2d 459*, it was held that testimony concerning mud and tracks on the highway was competent where the observation of same was made immediately after the accident and before another automobile had passed and while the conditions remained the same. The court pointed out that there was a distinction between that case and those cited by the person objecting to the admission of the testimony, in that in the cases referred to by the objector a considerable period of time had elapsed after the accident before the witness observed the tracks concerning which he testified, and there was no way to determine that the tracks had been made by the vehicle involved in the collision.

In *Williams v. Graff (1950) -- Md --, 71 A2d 450, 23 ALR2d 106*, where testimony as to skid marks on the highway was held admissible, the accident occurred at 10 a.m. and the witness, a police officer, testified that he received the call to come to the scene of the accident at about 10 a.m. and responded "promptly."

Notwithstanding the objection of defendant that the testimony was incompetent because the skidding might have been made by some other motor vehicle than the one defendant was operating, the court in *Whitehead v. Stith (1939) 279 Ky 556, 131 SW2d 455*, held competent testimony of a witness who saw the accident about a hundred feet from where it happened -- and who immediately went to the scene -- and testified that he saw fresh sliding tracks on the pavement extending back for about twenty-one feet from defendant's car after it stopped, following the accident, and in addition to such testimony, several witnesses testified to the effect that defendant at the time applied all four of his brakes, so as to produce a screeching noise which they all heard immediately following the sound of the horn emanating from the same automobile. The court observed that in the cases cited by defendant to support his objection to the testimony a period of time intervened between the accident and the discovery testified to by the witnesses within which other automobiles traveling over the same spot might have produced what the witness testified to; however, no intervening period

prevailed in the case at bar.

And in *Conley v. Jennings* (1944) 296 Ky 652, 178 SW2d 185, 19 NCCA NS 228, it was held that testimony of a witness concerning tracks made by a bus which fell over an embankment, causing the injuries complained of, was competent, where the witness arrived at the scene of the accident shortly after it occurred and traced the tracks to the point where the bus plunged over the embankment. The court said that the witness' testimony sufficiently identified the tracks as being those made by the bus to render the evidence competent.

Testimony of plaintiff's wife, plaintiff having been injured in a collision of automobiles at a street intersection, to the effect that she arrived at the scene within ten or twenty minutes after the accident occurred and as to the position of defendants' bus and plaintiff's car and the skid marks upon the pavement, should not have been excluded, there being testimony that plaintiff's car was in the same position an hour after the accident had occurred and that there was no other accident that morning up to that time, *Lazar v. Westchester Street Transp. Co.* (1944) 268 App Div 387, 51 NYS2d 533.

And in *Opecello v. Meads* (1926) 152 Md 29, 135 A 488, 50 ALR 1385, the court held admissible testimony of a policeman to the effect that he arrived at the scene of the accident about a half hour thereafter and found the wheel marks of an automobile which, according to his description, followed a course similar to that testified to by those in charge of the automobile at the time of the accident, such witness not being allowed to state any conclusions from his observations.

Also, in *Cumberland & W. Transit Co. v. Metz* (1930) 158 Md 424 149 A 4, reh den 158 Md 455, 149 A 565, app dismd *American Oil Co. v. Metz*, 282 US 801, 75 L ed 720, 51 S Ct 40, it was held that testimony of a witness for defendant, the bus company, who was at the scene of the accident within thirty-five minutes after its occurrence, to the effect that the tracks which he identified "showed them right up to the bus," was admissible, where it was shown that the bus had not been moved after the driver had brought it to a stop, and there was no evidence that any other bus could have made the tracks.

In *McCreedy v. Fournier* (1920) 113 Wash 351, 194 P 398, where the contention of the plaintiff was that defendant was traveling on the wrong side of the road at the time of the collision, which occurred shortly after 7 o'clock in the morning, the court, notwithstanding defendant's objection that there was proof of the passing of several other automobiles after the collision occurred and prior to the witness' reaching the scene, held as clearly admissible testimony of a witness for plaintiff to the effect that about 8 o'clock that morning he arrived at the scene of the accident and noticed swerving zig-zag tracks of an automobile driven on the lefthand side of the road; that the tracks led up to the immediate scene of the accident; that he did not see any other tracks on the road that attracted his attention; and that he traced the tracks to plaintiff's car on the right side of the road and around which the ground was torn up, and along the road to a point at which plaintiff's testimony showed defendant's car stopped after the collision.

And in *Clark v. Reising* (1937) 341 Mo 282, 107 SW2d 33, where the testimony was conflicting as to which party to the collision was on the wrong side of the road, the court held proper the submission of testimony of an automobile repairman, who arrived on the scene not more than an hour after the accident, as to tire marks on the pavement at the scene of the accident, notwithstanding the objection that such testimony was too remote, indefinite, and uncertain to constitute admissible evidence, because of the lapse of time between the accident and the witness' arrival at the scene.

In *Sheer v. Rathje* (1938) 174 Md 79, 197 A 613, it was held that there was no error in overruling an exception to testimony of a witness as to the location of skid marks, seen by him about an hour after the accident, even though his identification of the car that made the marks was based on the relative position of such marks and the location of the body of the plaintiff, a pedestrian, when she was picked up after the accident, and even though the witness himself admitted the difficulty of such an identification.

And in *Collins v. Barmon* (1927) 145 Wash 383, 260 P 245, an action for injuries received in a head-on collision of

automobiles going in opposite directions, the court held competent testimony of a witness as to skid marks upon the road, although he did not arrive there until about an hour and a half later, it was rainy and the pavement was wet and slippery, and the road was a main arterial highway admittedly known to be used by vehicles of every description going in both directions.

In *Adrian v. McGillivray* (1951) -- Ky --, 243 SW2d 895, evidence as to heavy black skid marks and a lighter one, which were observed about one and a half hours after the collision, was held admissible, where it appeared that the road was not traveled to the extent that even the lighter tire marks had been destroyed by traffic.

In *Flach v. Fikes* (1928) 204 Cal 329, 267 P 1079, it was held that the trial court did not commit error in admitting in evidence testimony of witnesses that they observed skid marks on the street the morning of the collision, notwithstanding the objection of defendant that, as these witnesses were not at the scene of the collision until four or five hours after it happened, their testimony was not admissible against him, the court being of the opinion that there was but little, if any, merit in this contention, inasmuch as although the street was one of the business streets of the city the evidence showed that there had been no great amount of travel thereon between the time of the collision and the time when these witnesses observed the skid marks on the street.

Also in *Stutzman v. Younkerman* (1927) 204 Iowa 1162, 216 NW 627, it was held that testimony of a witness that five hours after the accident he saw wheel marks in the mud and marks on the curb, which he described, and testimony by another witness that twelve hours after the accident the cement was scraped off the curb and that the tracks approached the curb at an angle of about 40 degrees, was admissible, the court overruling the objection that such evidence was too far removed from the accident in point of time to be of any value, and stating that its value was for the jury.

In *Wallace v. Billups* (1948) 203 Miss 853, 33 So2d 819, the court held that it was reversible error to exclude evidence of scratches and skid marks on the highway observed by witnesses at 7 o'clock in the morning, the accident having occurred the night before at 9 o'clock. It was said that the duration of time and amount of traffic that might have intervened between the time of the collision and the hour at which these witnesses made their observations would go to the weight rather than the competency of their testimony. As the court pointed out, there was no suggestion that any other automobile might have made scratches and skid marks, and the court said that the time could not be held to be too remote as a matter of law, since it was not unreasonable to suppose that the jury knew that skid marks and scratches would remain upon a concrete pavement throughout a clear and cold night.

And in *Raths v. Sherwood* (1935) 195 Minn 225, 262 NW 563, 38 NCCA 579, an action for death of a pedestrian who was walking on his right-hand side of the highway when struck by the defendant's car proceeding in the same direction, it was held that evidence of skid marks of a car on the right-hand side of the road, observed at the place of the fatal collision the morning after the accident, which occurred at 7:30 p.m., was properly admitted, it being for the jury to consider whether these skid marks were made by defendant's car when he tried to stop it after the first impact, or were made later on when the wrecking car was pulling it back to the garage.

In *Fong Lin v. Probert* (1920) 50 Cal App 339, 195 P 437, an action for death of a pedestrian, where defendant complained of the admission of testimony of the existence of scars in the asphalt that appeared on the roadway the morning after the accident, which markings were caused from the friction of rubber, the testimony having been introduced for the purpose of showing at what point defendant had applied his brakes, and defendant contended that this evidence was inadmissible for the reason that it was too remote, there being no preliminary proof that the tracks were caused by the defendant's automobile, and it being claimed that the street was a much-traveled one, and the evidence was received upon the condition that it be connected up, it was held that no connecting evidence was required of plaintiff in view of the fact that defendant himself admitted that he had examined the tracks the same morning and that his car had made the scars testified to.

In *Still v. Swanson* (1933) 175 Wash 553, 27 P2d 704, it was held that witnesses, one of whom had examined the skid

marks the morning after the accident, and the other the second morning thereafter, were competent to testify concerning skid marks on the strip or road where the collision occurred, the court stating that the testimony was sufficiently substantial and dependable to make it admissible and that its weight was for the jury, notwithstanding the objection that the observations were too remote in point of time to be of any probative value. The court remarked that the element of time in such cases is, of course, important, but not necessarily controlling, and that such observations within an hour in one case may possibly not be so convincing or dependable as those made a month after in another case, according to circumstances.

And in *Tomasko v. Raucci* (1931) 113 Conn 274, 155 A 64, it was held that the trial court did not err in admitting the evidence of police officers as to marks on the highway which were observed by one of them within an hour after the accident and by the other on the following morning.

In *American Film Co. v. Moyer* (1920, CA9th Cal) 267 F 419, it was held that there was a sufficient foundation for the admission of testimony of a witness relating to the condition of the road and certain marks thereon two days after the accident, where other witnesses had testified as to the condition of the road and marks thereon immediately following the accident, and they had been cross-examined as to every detail, the court being of the opinion that the jury was authorized to draw the proper inference from this evidence as to whether the condition of the road was the same at the time this witness saw it as it was at the time of the accident, or, if it had been changed by the weather or passing traffic, as to the extent of such change.

In *Langham v. Talbott* (1948, Tex Civ App) 211 SW2d 987, error ref n r e, testimony of a witness for plaintiff descriptive of what he termed the scene of the collision as viewed June 5 or 12 (the accident having occurred May 19), in regard to certain skid marks, as well as other things or objects observed by him on the scene, all of which was in substantial corroboration of testimony of defendant's witnesses relating to conditions on the ground at the time of the wreck, was held to be relevant and admissible as against the contention of no showing that conditions were the same as on the night of the collision and that the record affirmatively indicated changed conditions due to time and traffic.

But where there is no direct proof that the conditions at the scene of the accident, with reference to the footmarks and tire tracks or skid marks, were the same the next morning as they had been the previous afternoon immediately after the accident, it is error to admit the evidence relating thereto as of the next morning. *Ficke v. Gibson* (1950) 153 Neb 478, 45 NW2d 436.

So, in *Powell v. Commercial Standard Ins. Co.* (1943) 294 Ky 7, 170 SW2d 857, where a witness who reached the scene of the collision four hours afterward, undertook to explain what marks he observed, it was held that the trial court properly refused to consider this evidence, because it was not shown that conditions were the same as when the accident occurred.

And in *Girtman's Admr. v. Akins* (1938) 275 Ky 2, 120 SW2d 660, where complaint was made of the refusal of the trial court to permit witnesses to testify concerning marks they saw on the road about noon on the day following an accident which occurred at about 8 p.m., the appellate court held that it was not error to reject the offered testimony, where several witnesses who saw these marks shortly after the accident testified concerning them, and it appeared that the highway was a heavily traveled one, and no proof was offered to show that the condition at the scene of the accident had remained the same.

Similarly, in *Appalachian Stave Co. v. Pickard* (1935) 260 Ky 720, 86 SW2d 685, the court held incompetent testimony of a number of witnesses introduced by plaintiff to the effect that they went to the scene of the accident on the following day and saw the imprint made by an automobile tire in the dirt shoulder on the right-hand side of the road where plaintiff claimed he drove his car when the accident happened, where there was evidence that a number of automobiles had passed back and forth along the road in the meantime, and there was also evidence that at least one or two automobiles had been driven along the extreme right side of the road at this point, and there was no evidence to show

that the conditions had remained the same from the time of the accident until these witnesses made their observations on the following day, or that there were any distinguishing marks or circumstances by which the track seen by them could be identified as one having been made by plaintiff's car.

Also in *Marine v. Stewart* (1933) 165 Md 698, 168 A 891, an action to recover for damages resulting when plaintiff's automobile crashed into an unlighted road machine standing on the highway, it was held that questions about skid marks on the concrete in front of the road machine on the third day after the accident were properly forbidden, in the absence of proof that the conditions three days later were the same as when the automobile collided with the road machine, and that no other automobile had been there.

Testimony of a police officer cannot be admitted to prove that skid marks were attributable to one of the cars involved in the collision, where he arrived at the place of the accident an hour and a half after it occurred and after the automobile had been removed, and other traffic had passed over the highway during that interval. *Kirsch v. Ford* (1936) 170 Md 90, 183 A 240, 1 NCCA NS 633.

And in *Blodgett v. Springfield Street R. Co.* (1927) 261 Mass 333, 158 NE 660, an action to recover damages for injuries resulting when plaintiff's automobile was hit by defendant's streetcar at a point where a highway crossed the streetcar tracks, plaintiff's contention being that the view of the tracks at this point was obstructed by bushes so as to leave the crossing practically blind, the court held that evidence, submitted by defendant, of wheel tracks and the absence of grass in the highway, observed fifty-six days after the time the place described was shown by evidence of the plaintiff to have been covered with brush, had no probative value in disproof of evidence for plaintiff that the course of travel and the presence of bushes obstructed plaintiff's view in the direction of the colliding car.

The following additional authority is relevant to the issues discussed in this section:

◇

See *De Vita v Long* (1957, DC Pa) 147 F Supp 810 (citing annotation) *infra*, § 11.

In action involving automobile accident, evidence as to tracks observed 2 days after accident was properly excluded as too remote. *Alvarez v County of Los Angeles* (1955, 2nd Dist) 132 Cal App 2d 525, 282 P2d 531.

See *Hixson v Barrow* (1975) 135 Ga App 519, 218 SE2d 253, appeal after remand 142 Ga App 65, 234 SE2d 805, *infra* § 15.

Testimony of witnesses who observed tire marks on first, second, and fourth day following accident was not inadmissible as too remote. *McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation).

Trial court did not err in refusing to permit witness to testify as to marks on highway observed on day following the accident. *Romines v Illinois Motor Freight, Inc.* (1959, 2d Dist) 21 Ill App 2d 380, 158 NE2d 97.

Where witnesses inspected scene of collision some 4 to 6 hours after accident, their testimony relating to skid marks which they were not able to trace to tractor-trailer involved in accident was properly rejected in light of fact that much traffic used roadway at collision site between time of collision and time of inspection by witnesses. *Lowe v McMurray* (1967, Ky) 412 SW2d 571.

Absent showing that conditions remained unchanged after accident, in action for death of pedestrian struck by truck on much-traveled road, evidence as to skid marks observed more than 8 hours later was inadmissible and without probative value. *Mountain Petroleum Co. v Howard* (1961, Ky) 351 SW2d 178.

Testimony as to skid marks by witness who observed them 5 or 6 days after accident was admissible where other witness, who traveled road daily, testified marks remained clear 6 or more days after accident. *Shewmaker v Richeson* (1961, Ky) 344 SW2d 802.

Testimony as to length of skid marks was inadmissible where witness had not seen marks until day following accident. *Beasley v Evans' Adm'x* (1958, Ky) 311 SW2d 195.

Evidence as to tracks of motor vehicles on roadway are admissible where witness had opportunity to become acquainted with tracks before any change took place, but proper foundation must be laid by showing how soon after accident witness observed marking, conditions under which they were made, opportunity for accurate observation, and other explanatory factors. *Arnett v Dalton* (1953, Ky) 257 SW2d 585 (holding testimony inadmissible where time between accident and observation not shown).

Testimony as to skid marks on pavement at place of accident was properly excluded where based on observations made 1 1/2 to 2 1/2 hours after accident on prominent city street and marks were not identified as having been made by defendant's automobile. *Hakkers v Hansen* (1953) 337 Mich 620, 60 NW2d 487.

See *Arnold v Reece* (1957) 229 Miss 862, 92 So 2d 237, infra § 11.

Fact that observation of skid marks was made on morning following accident would not bar admission of evidence thereof, but only affect its weight. *Byram v Snowden* (1955) 224 Miss 74, 79 So 2d 541.

Fact that 2 1/2 hours elapsed between time of accident and time witness observed skid marks affected weight, not admissibility, of witness' testimony. *McCrary v Ogden* (1954, Mo) 267 SW2d 670.

Exclusion of testimony of highway patrolman that he observed tire marks on road 10 or 12 days after accident was proper where patrolman testified he did not see any tire marks on night of collision and he did not know what made marks he saw later. *McAbee v Love* (1953) 238 NC 560, 78 SE2d 405 (ovrld in part by *State v Jackson*, 302 NC 101, 273 SE2d 666).

Evidence of tire track was properly excluded where 6 hours elapsed between time of accident and witness' observation. *Rausch v Buisse* (1966) 33 Wis 2d 154, 146 NW2d 801 (citing annotation).

Exclusion of photographic exhibits introduced by plaintiff in automobile-collision action for purpose of showing marks upon road was proper where pictures were taken 30 days after accident. *Dr. Pepper Co. v Heiman* (1962, Wyo) 374 P2d 206.

[\*6] Purpose for which admissible; generally

Evidence of a skid mark fifty-one feet long observed on the roadway shortly after the accident and leading to the side of the automobile in which plaintiff had been riding is admissible as having some tendency to show what actually happened at the time of the collision. *Mernagh v. Lillie* (1942) 312 Mass 697, 45 NE2d 473.

But in *Johnson v. Philadelphia & R. R. Co.* (1925) 283 Pa 480, 129 A 569, an action for damages suffered when an automobile in which plaintiff was a passenger collided with a train at a railroad crossing, it was held that the trial court properly excluded an offer of testimony by defendant's witness, who came on the scene an hour or more after the accident and who would have testified that he saw marks on the pavement near the crossing where, apparently, the wheels of an automobile had slid as if set by a brake, from which it was sought to draw the conclusion that they were made by the car in which plaintiff was a passenger. The appellate court pointed out that there was no offer of proof that

the marks were not there before the accident, or that they were not made by some other car after the accident, and that as this was a public street and there was nothing to connect the marks with the car in question, the conclusion sought to be drawn was a mere guess and the offer was properly excluded.

The following additional authority is relevant to the issues discussed in this section:

◇

Testimony that skid marks indicated that car was going sidewise before brakes were applied was admissible. *Lynch v Birdwell* (1955) 44 Cal 2d 839, 285 P2d 919.

See *Jewell v Pennsylvania R. Co.* (1962) 55 Del 6, 183 A2d 193, infra § 4.

In action arising out of car-truck collision, trial court did not err in permitting accident investigator to testify about photographs he took of skidmarks left by automobile, length of skidmarks and stopping distance of average automobile where investigator gave no opinion concerning speed of car before collision and testified only as to skidmarks and average stopping distances; thus testimony was not prohibited by court decision holding that witness may not give opinion testimony concerning speed of vehicle before impact based solely on physical evidence observed after accident. *Viehweg v Thompson* (1982, App) 103 Idaho 265, 647 P2d 311.

Where only evidence tending to establish wilful and wanton misconduct of motorist is alleged traveling at high rate of speed along shoulder of pavement just prior to accident, negative evidence that there was no tire mark on such shoulder of pavement is admissible. *Klatt v Commonwealth Edison Co.* (1965) 33 Ill 2d 481, 211 NE2d 720.

Police officer's testimony about skid marks, braking speeds, and reaction time was admissible to show nature and extent of damage to vehicles involved. *Howard v Stoughton* (1967) 199 Kan 787, 433 P2d 567.

Court did not err in sustaining objection to question seeking to elicit from police officer "reaction time" indicated by skid marks on highway. *Johnson v Gaines* (1958, Ky) 313 SW2d 408.

Markings on road following accident are not positive proof of how accident happened, but may be helpful to jury. *Carpenter v Birkholm* (1954) 242 Minn 379, 65 NW2d 250.

There was no error in permitting police officer who arrived at scene of accident about 5 minutes after boy was struck by defendant's automobile while crossing street at school crosswalk, to testify as to skid marks found at scene where testimony was based on personal observation. *Neavill v Klemp* (1968, Mo) 427 SW2d 446.

Testimony as to presence of dual wheel tracks at point where pedestrian was allegedly struck by dual-wheel truck was admissible as relevant, although testimony was insufficient to identify tracks. *Hatcher v Clayton* (1955) 242 NC 450, 88 SE2d 104 (citing annotation).

Evidence of tire or skid marks, made by automobile involved in collision, which can be traced from where car was traveling to where car came to rest, is admissible to establish how collision actually occurred, where such tire or skid marks are observed within reasonable time after accident. *Grenz v Werre* (1964, ND) 129 NW2d 681.

Where defendant admitted negligence, statement of highway patrol officer that plaintiff's automobile had laid down skid marks after impact and that defendant's truck did not skid was admissible, since it tended to prove that defendant's admitted negligence was proximate cause of plaintiff's injuries. *Barnett v Richardson* (1966, Okla) 415 P2d 987.

See *Smith v Hardy* (1955) 228 SC 112, 88 SE2d 865, supra § 4.

[\*7] To determine questions as to speed

Testimony descriptive of skid marks constitutes pertinent and admissible evidence as bearing on the speed at which the motor vehicle was being operated at the time of the accident.

#### ALABAMA

*Bains Motor Co. v. Le Croy* (1923) 209 Ala 345, 96 So 483

#### CALIFORNIA

*Meier v. Wagner* (1915) 27 Cal App 579, 150 P 797

*Vedder v. Bireley* (1928) 92 Cal App 52, 267 P 724

*Douglass v. Crabtree* (1943) 57 Cal App2d 568, 134 P2d 912

#### ILLINOIS

*Hann v. Brooks* (1947) 331 Ill App 535, 73 NE2d 624

#### INDIANA

*Grossnickle v. Avery* (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395

#### KANSAS

*Briley v. Nussbaum* (1927) 122 Kan 438, 252 P 223, mod on other grounds 123 Kan 58, 254 P 351

#### KENTUCKY

*Lever Bros. Co. v. Stapleton* (1950) 313 Ky 837, 233 SW2d 1002

#### MISSOURI

*Bear v. Devore* (1944, Mo App) 176 SW2d 862

#### NEBRASKA

*Koutsky v. Grabowski* (1948) 150 Neb 508, 34 NW2d 893

## NEW JERSEY

*Tischler v. Steinholtz* (1923) 99 NJL 149, 122 A 880

## OHIO

*Bailey v. Parker* (1930) 34 Ohio App 207, 170 NE 607

## TEXAS

*Northern Texas Traction Co. v. Smith* (1920, Tex Civ App) 223 SW 1013

*Akers v. Epperson* (1942, Tex Civ App) 172 SW2d 512

## WASHINGTON

*Stubbs v. Allen* (1932) 168 Wash 156, 10 P2d 983

Skidding of a motor car alone is no evidence of excessive speed, but skidding may be considered, along with other circumstances and conditions, in determining the question of speed. *Bear v. Devore* (1944, Mo App) 176 SW2d 862.

So, in *Briley v. Nussbaum* (1927) 122 Kan 438, 252 P 223, mod on other grounds 123 Kan 58, 254 P 351, an action to recover for the death of one struck by an automobile, the court, considering an instruction that in determining the rate of speed at which the defendant's automobile was traveling at the time of the accident the jury might take into consideration, together with all the other evidence, the length of the skid marks made by the wheels when the driver threw on the brakes after he saw the decedent, stated that the evidence was competent and proper for the jury to consider, and that the instruction was not objectionable on the ground that it gave particular prominence to this evidence.

In *Koutsky v. Grabowski* (1948) 150 Neb 508, 34 NW2d 893, it was stated that various factors -- among others, skid marks -- constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in the accident or those in authority investigating the accident immediately thereafter.

And in *Tischler v. Steinholtz* (1923) 99 NJL 149, 122 A 880, an action to recover for the death of a pedestrian who was struck by an automobile, it was held competent for a bystander who saw the car skid after striking decedent to testify that immediately thereafter he noted skid marks made by the car on the surface of the street extending ten or fifteen feet from where the body was lying, and in the path taken by the automobile before it stopped, such testimony being evidential upon the question of negligence in the speed and control of the car.

Also, in an action by a guest to recover for an injury sustained when a tire blew out and the car in which he was riding overturned, and in which it was contended that the car was being operated at an unlawful speed, it was held that the jury, in considering the question of speed, might take into consideration the wheel marks of the car after the application of the brakes, the distance traveled after the tire burst, the car's course down the road, and the position and condition of the car after the accident. *Bailey v. Parker* (1930) 34 Ohio App 207, 170 NE 607.

And in *Akers v. Epperson* (1942, Tex Civ App) 172 SW2d 512, an action for damages for injuries sustained as result of collision of cars at a street intersection, where there was evidence that one of the automobiles in coming to a stop made skid marks on the pavement twenty-six to twenty-eight feet long, and it was a warm day and the pavement was dry, the

court stated that skid marks made by a motor vehicle in coming to a stop are evidence of the speed at which the vehicle was traveling at the time.

Also, in *Northern Texas Traction Co. v. Smith* (1920, *Tex Civ App*) 223 SW 1013, a suit for personal injuries alleged to have been sustained through a collision of a streetcar and plaintiff's automobile, the court held admissible testimony of a witness as to the location of the wrecked automobile the next morning after the accident, and the marks and tracks on the street that he found, tending to show that the automobile had been dragged a considerable distance, this evidence being admissible on the issue of whether the streetcar was running at an unlawful speed.

So too, in *Stubbs v. Allen* (1932) 168 Wash 156, 10 P2d 983, an action to recover damages arising out of an automobile accident, testimony as to skid marks at the scene of the accident observed quite a while after the accident occurred was held admissible as having a reasonable bearing on the question of the speed of defendant's car, the court stating that the exact place, courses, and distances of the marks, considered in connection with the dry weather conditions and others circumstances affecting the subject, relieved the admission of the testimony of any reasonable claim of error.

Testimony as to skid marks is admissible as bearing on speed of vehicle:

#### CALIFORNIA

*Jobe v Harold Livestock Com. Co.* (1952) 113 Cal App 2d 269, 247 P2d 951  
*Chadek v Spira* (1956, 2nd Dist) 146 Cal App 2d 360, 303 P2d 879 (recognizing rule)  
*Butticci v Schindel Furniture Co.* (1957, 1st Dist) 152 Cal App 2d 165, 313 P2d 62  
*Ungefug v D'Ambrosia* (1967, 4th Dist) 250 Cal App 2d 61, 58 Cal Rptr 223, *infra* § 15

#### COLORADO

*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229 (superseded by statute as stated in *Public Service Co. v Board of Water Works* (Colo) 831 P2d 470) (citing annotation)

#### GEORGIA

*Firestone Tire & Rubber Co. v King* (1978) 145 Ga App 840, 244 SE2d 905

#### INDIANA

*Samuel-Hawkins Music Co. v Ashby* (1965) 246 Ind 309, 205 NE2d 679

#### KENTUCKY

*Ryan v Payne* (1969, Ky) 442 SW2d 592 (citing annotation)

#### MISSOURI

*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260 (recognizing rule; citing annotation)

## NEBRASKA

*Shields v Buffalo County* (1955) 161 Neb 34, 71 NW2d 701 (recognizing rule)  
*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697  
*Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686

## NEW MEXICO

*Alford v Drum* (1961) 68 NM 298, 361 P2d 451

## OHIO

*Davis v Zucker* (1951, App, Cuyahoga Co) 62 Ohio L Abs 81, 106 NE2d 169

## OKLAHOMA

*Andrews v Moery* (1951) 205 Okla 635, 240 P2d 447

## TEXAS

*Ball v Martin* (1955, Tex Civ App Austin) 277 SW2d 182

## VIRGINIA

*Foster v Willhite* (1970) 210 Va 589, 172 SE2d 745

The following additional authority is relevant to the issues discussed in this section:

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See *Logsdon v Baker* (1973, DC Dist Col) 366 F Supp 332, vacated on other grounds 170 US App DC 360, 517 F2d 174, 170 App DC 360, 517 F2d 174, infra § 16.

See *Spain v McNeal* (1975, Dist Col App) 337 A2d 507, infra § 12.

Where evidence regarding speed of vehicles involved in intersectional collision was conflicting, photographs of accident scene which showed skid marks were admissible notwithstanding failure of proponent to call photographer to identify and verify them, in view of testimony of driver of one vehicle that photographs accurately depicted scene immediately after collision. *D. C. Transit System, Inc. v Acors* (1972, Dist Col App) 293 A2d 871.

Skid marks are pertinent and may be properly considered, even in absence of expert testimony, by jury in connection with other evidence whenever speed is in issue. *State v Arena* (1963) 46 Hawaii 315, 379 P2d 594, 20 ALR3d 450

(citing annotation).

See *Viehweg v Thompson* (1982, App) 103 Idaho 265, 647 P2d 311, § 6.

See *Diederich v Walters* (1975, 2d Dist) 31 Ill App 3d 594, 334 NE2d 283, revd 65 Ill 2d 95, 2 Ill Dec 685, 357 NE2d 1128, infra § 12.

Officer was properly permitted to testify as to measurement of skid marks, and as to tables in "Traffic Accident Investigation Manual" which, taken together, caused him to estimate speed of 28 miles per hour, where he admitted that this was not area of his expertise, in that he was only generally familiar with tables, and where he was not questioned as accident reconstruction expert, but instead, was used as expedient vehicle to get tables before jury. *Terre Haute First Nat'l Bank v Stewart* (1983, Ind App) 455 NE2d 362.

It was error to permit police chief to testify as to what speed, in his opinion, truck was traveling at time it collided with plaintiff's automobile, based upon observations of tire marks found at scene, but error was not prejudicial in view of other evidence from which jury could have determined speed. *Marsh v Johnson* (1968, Miss) 209 So 2d 906 (ovrld in part by *Hollingsworth v Bovaird Supply Co.* (Miss) 465 So 2d 311).

Police officer's estimate of vehicle's speed with certain skid marks was properly excluded where testimony was based solely on chart furnished him at police academy, and he had no personal knowledge of mathematical or physical factors involved and was not qualified as expert. *Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470 (citing annotation).

Where expert opinion on speed depended on resolution of many variables so that it was, in effect, a mere statement of possibility, court erred in permitting witness to state his opinion as to speed of defendant's automobile, and court should have confined witness' testimony to speed computed on basis of skid marks only. *Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236.

See *Fowler v Graves* (1986) 83 NC App 403, 350 SE2d 155, § 3.

Testimony concerning ruts more than half a mile from accident intersection is not material, especially where there is no testimony concerning any ruts near intersection. *Thompson v Nettum* (1968, ND) 163 NW2d 91 (ovrld in part by *Shark v Thompson* (ND) 373 NW2d 859).

Absent other evidence of excessive speed or reckless driving, tire skid marks made by motor vehicle involved in accident are not probative evidence of speed of vehicle without expert testimony as to how length of skid marks can be used to determine speed. *Suchy v Moore* (1972) 29 Ohio St 2d 99, 58 Ohio Ops 2d 194, 279 NE2d 878 (citing annotation).

Investigating officer was properly permitted to testify as to approximate speed of both vehicles involved in auto accident, based on measurement of skid marks, where factual predicate for officer's opinions concerning evasive actions taken by defendant and speed of defendant's vehicle was adequate, and where he was shown to be qualified to make such estimate, notwithstanding fact that he did not detail what physical evidence other than skid marks he had relied upon in coming to his conclusions. *Rogers v Gonzales* (1983, Tex App Corpus Christi) 654 SW2d 509, writ ref n r e (Sep 14, 1983)

Nonexpert testimony as to speed of vehicle, as indicated by skid marks, is admissible. *Knight v Borgan* (1958) 52 Wash 2d 219, 324 P2d 797 (citing annotation).

[\*8] To show location of vehicle with respect to center line of road or otherwise

It has frequently been held that testimony descriptive of tire or skid marks at the scene of the accident is competent on the question as to the location of the car or cars involved in the accident with respect to the center line of the highway or other part thereof at the time of the accident, where there is sufficient evidence from which it may be reasonably inferred that the tracks or marks were made by the car in question.

#### ALABAMA

*McWhorter Transfer Co. v. Peek* (1936) 232 Ala 143, 167 So 291

#### CALIFORNIA

*Hughes v. Hartman* (1929) 206 Cal 199, 273, P 560

*Bowker v. Illinois Electric Co.* (1931) 112 Cal App 740, 297 P 615

#### ILLINOIS

*Hann v. Brooks* (1947) 331 Ill App 535, 73 NE2d 624

#### INDIANA

*Grossnickle v. Avery* (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395

#### IOWA

*Brady v. McQuown* (1949) 241 Iowa 34, 40 NW2d 25

#### KANSAS

*Thomas v. Meyer* (1939) 150 Kan 587, 95 P2d 267

#### KENTUCKY

*Bybee Bros. v. Imes* (1941) 288 Ky 1, 155 SW2d 492

*Adrian v. McGillivray* (1951) -- Ky --, 243 SW2d 895

#### MARYLAND

*Williams v. Graff* (1950) -- Md --, 71 A2d 450, 23 ALR2d 106

#### MICHIGAN

*Anderson v. Lynch* (1925) 232 Mich 276, 205 NW 134  
*Pearce v. Rodell* (1937) 283 Mich 19, 276 NW 883

## MINNESOTA

*Romann v. Bender* (1934) 190 Minn 419, 252 NW 80, 34 NCCA 419

## NEW HAMPSHIRE

*Abbott v. Hayes* (1942) 92 NH 126, 26 A2d 842

## NORTH DAKOTA

*Olson v. Wetzstein* (1929) 58 ND 263, 225 NW 459  
*Hoffer v. Burd* (1951) -- ND -- , 49 NW2d 282

## OHIO

*A. Macaluso Fruit Co. v. Commercial Motor Freight* (1944, App) 57 NE2d 692, 41 Ohio L Abs 97

## OREGON

*Clark v. Fazio* (1951) -- Or -- , 230 P2d 553

## TEXAS

*Chesshir v. Nall* (1949, Tex Civ App) 218 SW2d 248, error ref n r e

## WEST VIRGINIA

*Dye v. Rathbone* (1926) 102 W Va 386, 135 SE 274

## WISCONSIN

*Anderson v. Sparks* (1910) 142 Wis 398, 125 NW 925

Testimony of a highway patrolman showing that certain tire marks led to defendant's car when it came to rest, and showing the course it took to reach that point, is admissible. *Brady v. McQuown* (1949) 241 Iowa 34, 40 NW2d 25

In *Hoffer v. Burd* (1951) -- ND -- , 49 NW2d 282, an action to recover damages for injuries sustained in a head-on collision of two automobiles, in which plaintiff contended that defendant's car was being operated on the wrong side of the road at the time of the accident, and there was testimony of two highway patrolmen who arrived on the scene of the

accident about an hour after it occurred and who testified that wheel tracks, observed by them, on the road led from the defendant's car to the point of the accident, which testimony was objected to on the ground that it was a conclusion of the witnesses and that no foundation had been laid for it, the appellate court held that this objection was not tenable, as the officers were testifying as to what they observed; that it was a statement of fact and if there was any conclusion fixed in that fact it was only such as always is involved in testimony describing observations.

And in *Pearce v. Rodell* (1937) 283 Mich 19, 276 NW 883, the court held that it was proper to admit testimony of one who went on the following morning to the scene of an accident which had occurred at 7:30 p.m. the preceding night, and who testified that he saw automobile tracks where they left the pavement, went toward the ditch on the right-hand side, ran along the ditch parallel thereto and back onto the pavement, and further testified that there were no other automobile tracks, there being a conflict in the evidence as to whether plaintiff was walking on the right-hand shoulder of the road as he asserted or on the vehicular part of the highway as defendant claimed.

In *McWhorter Transfer Co. v. Peek* (1936) 232 Ala 143, 167 So 291, an action under the Homicide Act by the personal representative of one who died as the result of the collision of an automobile in which he was riding with defendant's truck, it was held that evidence of plaintiff's witness to the effect that immediately after the accident he saw the tracks of the vehicles on the highway, and that the truck tracks were about in the center of the road, was properly admitted, because if anything had intervened to obscure or prevent discovery of the location of the tracks of the truck, this was matter for cross-examination, or opposing evidence.

In *Romann v. Bender* (1934) 190 Minn 419, 252 NW 80, 34 NCCA 419, it was held that the physical facts, consisting of markings on the cars left by the collision, the track marks on the highway, and the position of the cars after the accident, were proper for the consideration of the jury in an action involving a dispute as to the position of the cars on the highway when the accident occurred.

And in *Clark v. Fazio* (1951) -- Or --, 230 P2d 553, an action for damages for injuries resulting when plaintiff attempted to pass defendant's motor truck, at which juncture the truck made a left-hand turn and a collision resulted, it was held that the trial court did not commit error in admitting, over defendant's objection, testimony respecting tire marks on the pavement claimed to have been made by defendant's truck.

In *A. Macaluso Fruit Co. v. Commercial Motor Freight* (1944, App) 57 NE2d 692, 41 Ohio L Abs 97, an action to recover damages for a fatal injury resulting from collision of two automobile trucks, where the question was which of the two trucks, plaintiff's, which was proceeding in an easterly direction, or defendant's, which was proceeding in a westerly direction, was over the center of the highway, the court stated that a well-recognized rule was that a witness is permitted to give evidence in the minutest detail covering physical conditions, but should not be permitted to testify as to where, in his judgment, the accident happened, where the sole basis of the deduction is the marks on the highway or other physical conditions; however, it was held that the witness' answer conformed to the proper rule in that he described the marks on the highway and their location, in substance stating that there was a splatter of marks approximately right of the center line of the highway and also about six inches south of the center line of the highway, and that there were marks made by dual wheels from this point.

And in *Thomas v. Meyer* (1939) 150 Kan 587, 95 P2d 267, it was stated in a syllabus by the court that in an action for damages for injuries sustained in a collision between a truck and an automobile, it was proper to permit a witness who arrived at the scene of the collision a few minutes after it occurred, and before either of the vehicles had been moved, to testify that the tracks of the truck started at a certain point on the shoulder of the highway, and to permit the witness to testify as to the path followed by the tracks from the point where he first observed them to the point where the truck was when he arrived, such testimony having been introduced for the purpose of showing that the truck was on the left-hand side of the road at the time of the collision.

Also in *Chesshir v. Nall* (1949, Tex Civ App) 218 SW2d 248, error ref n r e, an action to recover damages for fatal

injuries resulting from a head-on collision of the car driven by plaintiff's wife, which was proceeding in an easterly direction, and one driven by defendant's intestate, which was being driven in a westerly direction, the appellate court was of the opinion that the trial court properly admitted testimony of witnesses who were on the scene of the accident immediately after it occurred and who testified that they traced the tire marks of the car of defendant's intestate from the place where it came to a stop to a point south of the center line of the highway. According to all the witnesses who appeared at the scene of the collision, the physical facts placed the point of collision on defendant's intestate's left-hand side of the center line, and no other witnesses testified to any physical facts or circumstances that would indicate or suggest that the point of contact occurred at any other place on the highway, and the appellate court was of the opinion that identification of the marks and tracks of the automobile on the highway could not be considered opinion or conclusion evidence. At any rate defendant waived any just complaint that he might have had to such testimony by failure to object to the same when offered in substance later, and by offering the same testimony in substance himself later on. The court said: "At any rate, if any error was committed it was a harmless error." (As to opinion evidence in connection with tire marks in civil cases, see §§ 9-13, *infra*.)

And in *Williams v. Graff* (1950) -- Md --, 71 A2d 450, 23 ALR2d 106, an action for injuries to one who testified that while attempting to cross from the south to the north side of the road he was struck, according to his version of the accident, while still on the south side of the road, by defendant's car which was proceeding in a westerly direction, it was held that testimony of a policeman who investigated the accident soon after it occurred, but not before the car had been removed, to the effect that he saw skid marks on the north side of the road, was admissible as against plaintiff's objection that such marks were not sufficiently identified as having been made by defendant's automobile, where there was reasonable ground for the inference that the skid marks had been made by the automobile, in view of the proximity of a pool of blood on the spot where plaintiff had been injured.

Also in *Olson v. Wetzstein* (1929) 58 ND 263, 225 NW 459, an action for damages sustained when a bus collided with a Ford operated by plaintiff, where the question of the position of the cars at the time of the collision had a bearing upon the question of negligence and contributory negligence, it was held that there was no error in permitting testimony of a witness who arrived on the scene about five minutes after the accident occurred, and who had previously investigated several accidents, to testify to the effect that he saw tire marks on the pavement at the place where the car stood, and could distinguish between the narrow skid marks of the Ford and the wider marks of the bus tires, and further testified that the narrow Ford tire marks began on the south side of the highway at the right of the division line of the pavement, from a foot and a quarter to two feet from the center and out on the edge of the pavement. The court observed that it was true that the Ford wreck had been removed, or was removed about the time he came there, but that the witness was testifying as to the skid marks, and the jury had a right to know these facts and could judge whether they were marks made by these vehicles.

In *Bybee Bros. v. Imes* (1941) 288 Ky 1, 155 SW2d 492, an action to recover damages for injuries sustained when defendant's truck crashed into plaintiff's automobile, the court, notwithstanding defendant's objection to testimony concerning skid marks on the ground that the witness was unable to identify the marks as being made by defendant's truck, held admissible testimony of a witness who arrived at the scene of the accident within a few minutes after it occurred and saw the skid marks that ran from the truck's right side of the road to the left side "and ran down to the place -- where the collision took place," the left side "and ran down to the truck admitted that he applied the brakes when he started from his side of the road to the left side, and when asked if he made skid marks said he would not call it skid marks but that he left "a black streak where I cut across the highway."

And in *Dye v. Rathbone* (1926) 102 W Va 386, 135 SE 274, it was held that testimony as to tracks seen on the road fifteen minutes after the accident was competent to prove that such tracks led to a rock into which plaintiff motorist crashed after being, allegedly, crowded off his side of the road.

In *Anderson v. Lynch* (1925) 232 Mich 276, 205 NW 134, an action for damages for the death of one driving a Ford touring car when there was a collision between it and a bus operated by an employee of the defendant, it was held that a

witness who, hearing the crash of the cars, went immediately to the scene of the accident, could testify as to the location of the marks of the bus wheels and those of the touring car, notwithstanding the objection of defendant that it was not for the witness to say that a certain track was a Ford track and that a certain other track was a bus track, the court stating that with the cars there and the marks on the pavement visible and traceable, it was of the opinion that the witness might well say he could see the tracks of the Ford car and the tracks of the bus. This testimony was apparently introduced for the purpose of showing that defendant bus driver was proceeding with the left wheels of the bus over the center line of the pavement and into the path of traffic proceeding in the opposite direction, plaintiff having alleged that the accident was so caused.

Where plaintiff was injured when the automobile in which she was a passenger and which was proceeding in an easterly direction was forced, about nine o'clock at night, off the road and over an embankment by a truck allegedly belonging to and driven by defendant, it was held proper to admit testimony of one who reached the scene of the accident about two and a half hours after it occurred to the effect that he observed certain tire marks, presumably made by plaintiff's machine, as they appeared along the southerly edge of the highway, and that "they got closer and closer until they got here and then they dropped off and went down to the fence," because, notwithstanding there was evidence that many machines passed over this point on the highway during the time intervening between the accident and the arrival of the witness in question, there was no evidence that any machine other than plaintiff's went over the embankment at the point on the highway to which the evidence of this witness related. *Hughes v. Hartman (1929) 206 Cal 199, 273 P 560.*

And in *Bowker v. Illinois Electric Co. (1931) 112 Cal App 740, 297 P 615*, an action to recover for injuries sustained when two cars collided, plaintiff's claim being that defendant's car was proceeding on the left-hand side of the road and crowded the car in which plaintiff was riding off the road, the court held as sufficiently relevant evidence of plaintiff's husband to the effect that he visited the scene of the accident during the early morning following its occurrence and found, among other things, two burned rubber marks starting about thirty feet from where the wreckage was and leading directly to the wreckage, the court being of the opinion that the proximity of the marks, leading as they did directly to the wreckage and apparently corroborating the testimony of some of the eyewitnesses, rendered the testimony sufficiently relevant to go to the jury.

In *Harness v. Tehel (1935) 221 Iowa 403, 263 NW 843*, where the testimony showed that the maintainer had just been over the road, showing that the tracks of the two cars could be plainly followed from where they came to the point of the collision, it was held that either side was entitled to have such testimony admitted to bolster up either theory of the case, which would show where the cars really were.

Where the real controversy was as to the place in the road where the collision occurred, testimony of a witness that on the night of the accident he, together with plaintiff, looked the ground over and examined automobile tracks which he thought were those of the defendant's automobile, is admissible. *Anderson v. Sparks (1910) 142 Wis 398, 125 NW 925.*

And in *Abbott v. Hayes (1942) 92 NH 126, 26 A2d 842*, it was held that there was no error on the part of the trial court in refusing defendant's request to strike out testimony that after a head-on collision there were brake marks near where one of the automobiles came to rest, although it was true that upon all the evidence the significance of these marks was somewhat problematical; their existence, however, at the scene of the accident was a part of the description of the locus, and the marks themselves were indicated in a photograph introduced by defendant. Apparently the testimony objected to was submitted for the purpose of showing that one of the cars was on the wrong side of the highway.

In *Quinn v. Zimmer (1931) 184 Minn 589, 239 NW 902*, where plaintiff's car, traveling in a northerly direction, collided at an intersection with defendant's car proceeding in an easterly direction, the court held not prejudicial the admission of testimony of plaintiff as to conditions at the place of the accident on the following day, wherein he disclosed that he found a depression in the road two and a half inches deep, three inches wide and two feet long, and that he located this depression in the north side of the trunk highway, the court stating that apparently at the last moment both cars were attempting to turn from each other and this would take them to the northeast, and the location of the so-called

depression was not, under the circumstances of this case, of substantial importance.

In one case the testimony was held to be inadmissible because of a failure to sufficiently identify the marks with the particular car in question.

Thus, in *Hoover v. Reichard* (1916) 63 Pa Super 517, an action for injuries resulting from a collision of automobiles proceeding in opposite directions, it was held that testimony offered by defendant to the effect that on the morning following the accident, and about twelve hours after it occurred, the witness went to the scene of the accident for the purpose of removing defendant's car and found tracks corresponding to the size of those made by plaintiff's car, which led across from plaintiff's side of the road to the place where defendant's car was standing, was properly excluded, the court stating that if the tracks had been identified as those made by plaintiff's automobile, the testimony would have been relevant, but the turnpike was a much traveled highway and the mere circumstance of a tire making a certain track that may have been the width of the tires of plaintiff's machine was not sufficient identification to send the evidence to the jury.

See also the following cases: *Clark v. Reising* (1937) 341 Mo 282, 107 SW2d 33, and *McCreedy v. Fournier* (1920) 113 Wash 351, 194 P 398, both supra, § 5.

Rule that testimony as to tire marks at scene of accident is competent to show location of vehicle involved in accident with respect to center line of highway, supported by:

#### CALIFORNIA

*Powley v Appleby* (1957, Cal App) 314 P2d 761, subsequent op on reh (2nd Dist) 155 Cal App 2d 727, 318 P2d 712, subsequent op on reh 155 Cal App 2d 727, 318 P2d 712 (by implication)

#### IDAHO

*McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787

#### IOWA

*Weilbrenner v Owens* (1955) 246 Iowa 580, 68 NW2d 293

#### MARYLAND

*Fowler v Smith* (1965) 240 Md 240, 213 A2d 549 (citing annotation)

#### TEXAS

*Briggs v Lloyd* (1966, Tex Civ App Waco) 405 SW2d 865, writ dismissed (Oct 26, 1966), infra § 11

The following additional authority is relevant to the issues discussed in this section:

◇

Expert testimony that scrape mark on north side of highway made by left dolly or parking wheel on plaintiffs' trailer and that plaintiffs' truck had therefore been on wrong side of highway at time of collision was admissible. *Clifton v Mangum* (1966, CA10 NM) 366 F2d 250.

In action for death of passenger in automobile as result of left rear end of car being struck by overtaking hearse, evidence of faint tire marks on highway shoulder considerable distance from point of impact was too speculative to raise jury question as to whether car had been driven onto highway from shoulder in front of hearse. *Becker v Adkins* (1966, Fla App D1) 184 So 2d 682, cert den (Fla) 189 So 2d 633.

Evidence as to absence of skid marks at scene of accident was admissible on question whether defendant applied brakes before colliding with parked cars. *Taylor v Fitzpatrick* (1956) 235 Ind 238, 132 NE2d 919.

Trooper's testimony that he was able to identify tire marks in highway and traced them to each vehicle involved in collision was competent in absence of element of speculation. *McCallum v Harris* (1964, Ky) 379 SW2d 438.

See *Dudek v Popp* (1964) 373 Mich 300, 129 NW2d 393, infra § 14.

Expert testimony was properly admitted in wrongful death action based on collision between automobile and motorcycle to show location of collision, where photograph of skidmark was received into evidence without objection, testimony as to other circumstances provided foundation, and no other evidence contradicted expert's opinion as to in which lane accident occurred. *Soulier v Hughes* (1986, 3d Dept) 119 App Div 2d 951, 501 NYS2d 480.

Testimony by highway patrolman that skid marks of defendant's decedent's vehicle began on wrong side of highway was admissible since jury could properly consider skidding in determining defendant's decedent's negligence in collision in which there were no survivors and to which there were no eyewitnesses. *Anderson v Webb* (1966) 267 NC 745, 148 SE2d 846.

Testimony of patrolman that there were marks on pavement indicating that particular vehicle was making a left turn at time of impact was admissible. *Deskins v Woodward* (1971, Okla) 483 P2d 1134.

[\*9] Opinion evidence by nonexpert witness; generally

With respect to the general rule of exclusion of opinion evidence it is stated in 20 Am Jur, Evidence § 765: "It is a fundamental principle of the law of evidence. . .that the testimony of witnesses upon matters within the scope of the common knowledge and experience of mankind, given upon the trial of a cause, must be confined to statements of concrete facts within their own observation, knowledge, and recollection -- that is, facts perceived by the use of their own senses -- as distinguished from their opinions, inferences, impressions, and conclusions drawn from such facts. Generally speaking, the opinion or conclusion of a witness upon a fact or facts in issue is incompetent and inadmissible, although there are exceptions to this rule as well settled as is the rule itself, where the issues involve facts and matters calling for special skill and study or where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them. . . He [witness] cannot, over objection, be asked questions calling for, or permitted to express, his opinion or conclusion upon facts which are in the province of, and are to be determined by, the jury or by the court trying a case without a jury, provided those facts are capable of being so detailed and described that they can be fully placed before the jury or the court by the witness. . .having actual knowledge of them. It is for the jury or the court, as the case may be, whenever the question is one which can be decided by ordinary experience and knowledge, to determine the truth as to the evidential facts from the facts stated by the witnesses, and to draw the conclusions deducible from such evidential facts by the exercise of their own judgment and reasoning powers without hearing the opinions of witnesses. . . It would be invading their peculiar province as triers of the facts, when the

question for determination involves matters of common knowledge and experience, to permit a witness to state to the jury his opinions as to the conclusions to be drawn from the concrete facts which he has observed. However, it is difficult in many cases to say where fact leaves off and opinion begins. Practically every statement of fact is the conclusion of him who makes it, based upon his powers of observation, his eyesight, his hearing, or his sense of smell or touch."

Applications of these broad general principles with respect to the testimony of witnesses based on their observation of tire or skid marks have been made in a number of specific instances, the nature of which will be indicated in succeeding sections.

[\*10] Identity of vehicle making marks

A witness who arrived at the scene of an accident immediately or soon after it occurred may properly be allowed to testify that marks leading up to a particular car, the position of which had not been changed subsequently to the accident, were made by such automobile.

Thus, a witness who testified that, although he did not see the collision, he arrived at the scene thereof before the water had run out of the radiator of the wrecked automobile truck, and observed tracks leading up to it on the right-hand side of the road, may properly be asked whether such tracks were the ones made by the wrecked truck, the court stating that it required but little effort to be able to trace the tracks backward along the road, and that it was not a question as to correspondence or similarity of tracks, but was one of fact, open to the personal observation of the witness; so the question did not fall within or was not governed by the rule excluding opinion evidence as to tracks, but called for the statement of a fact which was open to the observation of the witness. Thus a situation was presented different from that contemplated by cases from Alabama which hold that a witness cannot be allowed to state his opinion that a certain shoe or foot could or would make a particular track, that being the very fact the jury are to determine. *Alaga Coach Line v. McCarroll* (1933) 227 Ala 686, 151 So 834, 92 ALR 470.

And in *Cahill v. Bradford* (1926) 172 Ark 69, 287 SW 595, where plaintiff was injured when a car turning a corner at a street intersection got out of control and jumped the curb, and defendant alleged that the accident was due to the fact that another car sideswiped him, forcing him over the sidewalk, it was held that a witness for defendant was properly permitted to testify that the skid marks were those of the sideswiping car and that it looked as if defendant's car had been pushed or jammed toward the sidewalk and that the marks he saw were skid marks where defendant's car had been jammed or swiped sideways toward the sidewalk, notwithstanding the objection of plaintiff that the witness was permitted to state a conclusion, when he should have described the conditions which he saw and left the inferences therefrom to be drawn by the jury. The court was of the opinion that this objection was not well taken, as the position of the cars, when the witness saw them, had not been changed after the accident, and the witness could, of course, see and know what car had skidded and the place from which it began to skid and the place where it stopped, and he said this was true because he saw the skid marks, the court stating that this was not necessarily a matter of opinion. The court remarked that there was involved in the answer of the witness a mixture of fact and opinion, but that the portion of the answer which was objected to as an opinion was a part of the description of the conditions which the witness saw, and that it may have been difficult for him to have otherwise reproduced the scene to the jury, and the statement, as a whole, was one which men in general could comprehend and understand.

Testimony of the driver of plaintiff's car at the time of the collision to the effect that certain tire marks were tires of the automobile driven by the witness at the time of the collision was held admissible as against defendant's objection that this was a conclusion, the court pointing out that defendant failed to distinguish a conclusion from an observation of a fact, to which this witness was testifying. *Smith v. Keyes* (1937) 103 Ind App 487, 9 NE2d 119.

The court in *Thomas v. Meyer* (1939) 150 Kan 587, 95 P2d 267, approved the rule that where a witness has given special attention to tracking motor vehicles by tire marks, the admission of his opinion as to the identity of an

automobile tracked by him is not error, the subject matter of his testimony being an ordinary one, not calling for the knowledge of an expert.

And in *White v. East Side Mill & Lumber Co.* (1917) 84 Or 233, 164 P 736, 15 NCCA 848, an action to recover for the death of a traffic officer struck by a motor vehicle while he was in the center of a street intersection directing traffic, the testimony of a witness who examined the tracks of the automobile about thirty minutes after the injury that there were blotches in the dust that would be made by tires of the kind on the automobile in question, was held admissible upon the theory that, as the facts could not be reproduced to the jury, it fell within the exception to the general rule that a witness must testify to facts and not to conclusions or opinions. The court stated that there are exceptions to this rule, founded upon necessity, for the reason that the facts cannot be depicted to the jury precisely as they appear to the witness; that from the nature of the subject it is impracticable for him to relate what he might have seen without supplementing his description with his conclusion; and that under such circumstances a common observer, although not an expert, may testify to his opinion or conclusion regarding what he has seen. It would have been practically impossible in the case at bar, the court added, for the witness to describe the automobile truck tire, which appeared to be a kind of double-nonskid type, and the marks in the dust, both of which he had seen, and the jury could determine whether the tracks were made by the truck.

In *Silsby v. Hinchey* (1937, Mo App) 107 SW2d 812, where a witness for plaintiff, who was the first person upon the scene after the collision of the two automobiles, testified to the presence of certain skid marks which he had observed upon the highway, and which were looked upon as indicative of the course the respective automobiles had taken as a result of the collision, and was asked whether certain marks leading over to the side of the highway where defendant's car was standing could, in his opinion, have been made by that car, to which the witness, over defendant's objection, stated that he thought they could, and it was argued that the opinion of the witness was inadmissible for two reasons, the first that the witness lacked the necessary qualifications for giving opinion evidence, and the second that the subject of the inquiry was not a matter calling for opinion evidence, the court said that the actual fact was that regardless of all references to the matter of qualifications, and regardless of the use of the word "opinion" in framing the question objected to, the answer of the witness was not opinion evidence in its true sense at all, but that on the contrary, such testimony was directed to certain facts the witness had observed which were relevant to the question of which driver had been at fault in the collision, and while the question addressed to him might have been objectionable as calling for a conclusion, it was not objected to by counsel upon that ground. The court observed that the incident was at best but a trivial one, and could hardly have affected the outcome of the case one way or the other.

In *Blalack v. Blacksher* (1914) 11 Ala App 545, 66 So 863, it was held that there was no error in permitting a witness, on his examination in chief, to testify, over plaintiffs' objection, as to (1) plaintiffs' automobile making a certain track which he saw in the street, (2) the direction from which the car approached, (3) the tracks showing where plaintiffs' chauffeur applied the brake, and (4) the distance the car had skidded before it reached the place where the collision occurred, where the witness testified as though he had been present and had seen the car when it made the track. But where it was shown on cross-examination that the witness was not present and did not see the car make the track, nor the collision, and that it was his opinion that plaintiffs' car made a certain track, it was held that the trial court committed error in overruling plaintiffs' motion to exclude the testimony of this witness that the plaintiffs' car had made this track, inasmuch as the witness should have been required to state the facts, if there was any peculiarity about the track or any features by which it could be distinguished from any other automobile track, as these facts should have been shown, and then it was the province of the jury to determine whether the track in question was made by the plaintiffs' car or by some other car.

And in *Ficke v. Gibson* (1950) 153 Neb 478, 45 NW2d 436, it was held that where witnesses who examined the car tracks fifteen hours after the accident testified to the effect that the tire marks or skid marks were those of defendant's truck, referred to them in testifying, and, from their location, described how and where the accident occurred, an objection to the testimony as calling for the conclusion of the witnesses should have been sustained, there being no affirmative showing that the conditions at the scene of the accident had not changed by the time it was visited by the

witnesses the next morning.

Also, in *McKee v. Batcheler* (1934) 219 Iowa 93, 257 NW 567, it was held that the trial court committed reversible error in permitting seven witnesses to testify that certain tracks described by two other witnesses were the identical tracks which they, the seven witnesses, saw at the scene of the accident shortly after it happened, the two other witnesses having testified that, seventeen hours after the accident, defendant pointed out to them certain tracks on the highway which he said were made by his car at the time it struck decedent. The court stated that the testimony of such seven witnesses amounted to the expression of their opinion and conclusion, and invaded the peculiar province of the jury, and further stated that it would be sufficient for the seven witnesses in question to have described the tracks they saw, whereupon the jury could draw all necessary inferences therefrom. It is the settled rule of law, said the court, that a witness may describe automobile tire marks, if any, their appearance and length, and other circumstances relating thereto, and thereupon the inference to be drawn therefrom becomes the province of the jury. The court further observed that the question as to whether or not certain automobile tracks seen by a witness are identical with, or the same tracks as, those described by another witness, is not a matter of expert opinion evidence, and that the questions here challenged clearly called for the opinion and conclusion of the witnesses, and clearly invaded the province of the jury.

The following additional authority is relevant to the issues discussed in this section:

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Tire marks in photograph of accident scene, not shown caused by defendant's automobile, were not competent or admissible to show automobile's direction or course. *Mutz v Lucero* (1961) 90 Ariz 38, 365 P2d 49.

See *McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation), *infra* § 13.

Testimony as to tire marks on highway was admissible to identify vehicle making marks. *Soreide v Vilas & Co.* (1956) 247 Iowa 1139, 78 NW2d 41 (citing annotation).

Nonexpert testimony that drag marks on highway were "fresh" is incompetent to show marks were made by car which struck pedestrian. *Glazier v Tetrault* (1952) 148 Me 127, 90 A2d 809.

Nonexpert's testimony that marks on highway appeared to be skid marks of dual-wheel tractor was admissible. *Brawley v Esterly* (1954, Mo) 267 SW2d 655 (overruled as stated in *Bentley v Crews* (Mo App) 630 SW2d 99 (criticized by *Lauderdale v Siem* (Mo App) 725 SW2d 897 (criticized by *Parry v Staddon* (Mo App) 769 SW2d 811))).

Testimony as to tire marks was inadmissible where proof did not show identity of vehicle which made marks. *Egenberger v National Alfalfa Dehydrating & Milling Co.* (1957) 164 Neb 704, 83 NW2d 523 (superseded by statute as stated in *Kennedy v Kennedy*, 221 Neb 724, 380 NW2d 300) (recognizing rule).

In action arising out of collision, trial court erred in excluding testimony as to tire marks leading to vehicle parked in driveway. *Coffin v Cunningham* (1960, 4th Dept) 11 App Div 2d 1082, 206 NYS2d 353.

In action arising out of collision, trial court did not err in permitting police officers to testify that skid marks led to plaintiff's car. *Mantz v Ruffit* (1961) 403 Pa 436, 170 A2d 101.

Trial court properly sustained objection to testimony as to skid marks where no proper connection was shown between marks and defendant's car; but testimony as to mark was admissible, in view of identification and testimony as to its characteristics where defendant admitted that he skidded prior to accident. *Deeney v Krauss* (1959) 394 Pa 380, 147 A2d 369.

See *Butane Wholesale Co. v Buehring* (1959, Tex Civ App San Antonio) 325 SW2d 173, writ dismissed (Jul 22, 1959), supra § 4.

In automobile collision case, nonexpert testimony as to skid marks on road was admissible to establish that marks were made by cars involved in collision. *Atkinson v Huber* (1955) 268 Wis 615, 68 NW2d 447.

[\*11] Position of vehicles on highway at time of accident

It seems that where the witness made his observation of the tire tracks or skid marks within a short time after the accident or before there had been any change in the position of the cars or other conditions on the highway by traffic or otherwise at the scene of the accident subsequently to its happening, he may give his opinion as to the location of the cars on the highway at the time of the accident.

Therefore, a witness who was upon the scene of the accident within a minute or two after it occurred and was the first person to arrive there after the accident and who made an investigation of the facts, and had an opportunity to observe the tracks of the vehicles and the condition of the road, and whose testimony showed that no other vehicle had approached or passed the place of the accident, may give his opinion as to the point in the road at which, with reference to the center thereof, the impact occurred. *McPherson v. Martin* (1937) 234 Ala 244, 174 So 791; it was held that the trial court did not commit error in overruling objections of defendant to questions asked of a witness, who was upon the scene of the accident a minute or two after it occurred and who observed the tracks of both vehicles, no other vehicle having at that time approached or passed the place of the accident, as to just what point in the road with reference to the center of the highway the impact occurred and as to what impression there was to show this fact, notwithstanding the objection of defendant that the question called for the opinion or conclusion of the witness, the court pointing out that the witness had fully observed the conditions as he had found them, and these circumstances and conditions he had detailed to the jury, along with his conclusions. The court in this case applied the rule that where a fact cannot be reproduced and made apparent to the jury, the witness may describe the fact according to the effect produced on his mind; or if from the nature of the particular fact, better evidence cannot be obtained, the opinion of a witness, derived from observation, is admissible. This is one of the recognized exceptions to the general rule that a witness must testify to facts, and is not permitted to express mere matters of opinion.

And in *Lange v. Affleck* (1931) 160 Md 695, 155 A 150, 79 ALR 1274, it was held that testimony of a witness who saw an automobile collision and immediately afterward examined the marks made on the road by one of the cars involved, as to the position of the cars when they collided, was not objectionable as involving an expression of an opinion based on statements of others, or on an assumption of facts, but was a recital of facts all within the witness' observation and knowledge.

Also in *Lambert v. Caronna* (1934) 206 NC 616, 175 SE 303, an action for injuries sustained when the plaintiff's automobile crashed into the rear end of defendant's parked car, it was held that witnesses could give their opinion, based on skid marks they saw at the scene of the accident, as to the position of the parked car with relation to the road and shoulders. The court quoted from *Kepley v. Kirk* (1926) 191 NC 690, 132 SE 788, where it was said: "The witness knew the road and was familiar with the conditions and could state the facts from personal observation. Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact -- part of the common stock of knowledge."

Testimony of a witness who viewed the scene twelve hours after the accident, to the effect that from his observation of the tracks of the two cars, which were going in opposite directions, it seemed that defendant's automobile swerved toward the side of the road on which plaintiff was driving, is competent to show how the accident happened. *Jewel Tea Co. v. McCrary* (1938) 197 Ark 294, 122 SW2d 534. The witnesses testified that there were no other tracks at the scene of the collision.

And in *Nicholson v. Feagley* (1940) 339 Pa 313, 14 A2d 122, where the negligence asserted was that defendant's car was being driven on the wrong side of the road at the time of the collision, it was held that admission of testimony of a policeman, who arrived one and a half hours after the accident, as to the position of the cars, and his expression of opinion that their position had not been altered, his conclusion in part being based upon the marks leading to the vehicles, was not ground for reversal, it being pointed out that he was not asked to draw a conclusion of negligence from the position of the cars or the marks on the road, that he testified, not as an expert, but as an observer, and that the jury was free to draw its own inferences from his testimony. The court distinguished this case from that of *Johnson v. Philadelphia & Reading R. Co.* (1925) 283 Pa 480, 129 A 569, supra, § 6, in which it was held that a witness who inspected the scene of a grade crossing accident more than an hour after its occurrence could not be permitted to testify as to the existence of tire marks, indicating that an automobile had skidded at the place where the plaintiff's car was struck, the court therein observing that there was no offer of proof that the marks were not there before the accident, or that they were not made by some other car after the accident, whereas it was pointed out in the case at bar that the witness traced the tire marks to the automobiles involved in the collision.

See also, as involving opinion evidence, *A. Macaluso Fruit Co. v. Commercial Motor Freight* (1944, App) 57 NE2d 692, 41 Ohio L Abs 97, supra, § 8.

However, in *Arrick v. Fanning* (1950) 35 Ala App 409, 47 So2d 708, where a highway patrolman reached the scene about thirty minutes after the collision, but did not find any discernible vehicle track except at the point of impact, and did not see any skid marks, it was held that the conditions and markings that he observed did not authorize him to accurately answer the question: "Then the Fanning (plaintiff's) truck started the turn prior to reaching the center line of the crossroad?"

The following additional authority is relevant to the issues discussed in this section:

◇

Police officer's testimony as to marks on highway was admissible to show point of impact in auto accident case. *De Vita v Long* (1957, DC Pa) 147 F Supp 810 (citing annotation -- holding testimony admissible notwithstanding lapse of 40 minutes between time of accident and time of observation).

Police officer's testimony was admissible to show location of plaintiff's car at time of collision. *Powley v Appleby* (1957, Cal App) 314 P2d 761, subsequent op on reh (2nd Dist) 155 Cal App 2d 727, 318 P2d 712 (by implication).

Police officer's testimony as to scratch marks on highway, and as to approximate point of impact as determined from marks, was admissible. *Engelke v Wheatley* (1961) 148 Conn 398, 171 A2d 402.

Diagram indicating "deep scrape marks believed to be north point of impact" was admissible along with sheriff's opinion as to point of impact and that trailer involved in accident had jackknifed, where sheriff had opportunity to investigate scene of accident reasonably soon after accident and had sufficient evidence to form reasonable opinion based on his observation as to point of impact. *Schmitt v Jenkins Truck Lines, Inc.* (1969, Iowa) 170 NW2d 632, 46 ALR3d 636 (ovrld in part by *Weil v Moes* (Iowa) 311 NW2d 259 (ovrld in part by *Audubon-Exira Ready Mix, Inc. v Illinois C. G. R. Co.* (Iowa) 335 NW2d 148)).

Police officer is properly permitted to express his opinion as to point of impact after stating his observation of skidmarks. *Lucas v Duccini* (1965) 258 Iowa 77, 137 NW2d 634.

Testimony as to tire marks at place of collision was admissible on question of location of vehicles with respect to center

of highway where it could reasonably be inferred that marks were made by one of colliding vehicles. *Soreide v Vilas & Co.* (1956) 247 Iowa 1139, 78 NW2d 41 (citing annotation).

Nonexpert witnesses could only testify as to facts concerning skid marks made by vehicle involved in collision, such as direction, length, and starting and stopping points, and could not state opinions as to location of vehicle and how accident occurred, based thereon. *Mountain Petroleum Co. v Howard* (1961, Ky) 351 SW2d 178.

Police officer's testimony as to tire marks was admissible on question of position of vehicle at time of accident. *Nutting v Wing* (1956) 151 Me 435, 120 A2d 563.

Exclusion of police officer's testimony as to location of point of impact based on skid marks was reversible error. *LaFave v Kroger Co.* (1966) 5 Mich App 446, 146 NW2d 850.

Highway patrol officer's testimony as to marks on highway, indicating position of defendant's truck at time of accident, was admissible; witness' testimony as to observation of scene 2 days after accident was also admissible where it appeared that tracks existed on both occasions. *Arnold v Reece* (1957) 229 Miss 862, 92 So 2d 237.

Police officer's testimony as to tire marks was admissible to show position of vehicles at time of accident. *Kirkman v Baucom* (1957) 246 NC 510, 98 SE2d 922.

Permitting eyewitness to accident to testify as to location of point of impact of automobiles with reference to center of road was proper where eyewitness observed wheel tracks immediately following accident, and testimony was based on what he saw as well as on tracks. *Attleson v Boomgarden* (1955, ND) 73 NW2d 448.

In action where key issue was position of vehicle at time of impact, witness should have been permitted to testify that he saw skid marks. *Brice v Danisch* (1966) 244 Or 505, 419 P2d 18.

Testimony of farmer living near scene of accident as to location on highway of tire marks which he had observed and as to tire marks which led from point on defendant's side of road a distance of 150 yards to location of defendant's truck after collision on wrong side of road was admissible. *Briggs v Lloyd* (1966, Tex Civ App Waco) 405 SW2d 865, writ dismissed (Oct 26, 1966)

Police officer's testimony as to skid marks was admissible to show position of cars at time they collided. *Jensen v Criter* (1960) 9 Wis 2d 177, 100 NW2d 380.

[\*12] Speed

A nonexpert witness should not be allowed to give his opinion, based solely on tire or skid marks made by the tires of the car in question, as to the speed at which it was being operated at the time of the accident.

## IOWA

*Nelson v. Hedin* (1918) 184 Iowa 657, 169 NW 37  
*Ward v. Zerzanek* (1940) 227 Iowa 918, 289 NW 443

## NORTH CAROLINA

*Tyndall v. Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828

## OREGON

*Everart v. Fischer* (1915) 75 Or 321, 147 P 189, mod on reh 75 Or 316, 145 P 33

## WASHINGTON

*Cleasby v. Taylor* (1934) 176 Wash 251, 28 P2d 795

Thus in *Nelson v. Hedin* (1918) 184 Iowa 657, 169 NW 37, it was held that a witness who did not see the defendant's car in motion, but observed the marks made in the street by the skidding of the wheels, was not competent to testify as to the rate of speed at which the car must have been moving, since an answer to such question, if it should be thought to amount to anything more than mere guesswork, could at best be the merest conclusion. The court stated that it would doubtless be proper to prove the marks, if any, their appearance, length, and other circumstances relating thereto, and that the jury could draw all legitimate inferences therefrom as well and as correctly as the witness.

And in *Tyndall v. Harvey C. Hines Co.* (1946) 226 NC 620, 39 SE2d 828, it was held that a highway patrolman who, although he did not see the truck involved while in motion, went to the scene of the accident to make an investigation and gave testimony as to the marks on the shoulders of the road and upon the grass made by the truck, should not have been allowed to give his opinion, based upon these marks, as to the rate of speed at which the truck was being driven at the time of the impact, inasmuch as when he gave his estimate of speed he was not speaking of what he saw, but was giving a conclusion reached upon a consideration of the facts he observed, and the jury were just as well qualified as he to determine what inferences the facts about which he testified permitted or required. The court said: "He gave a plain, clear, and distinct description of the signs, marks, and conditions he found at the scene of the collision so that ordinary jurymen could readily understand and appreciate just what he saw. Hence the jury was just as well qualified as he to determine what inferences the facts about which he testified permitted or required."

Also in *Everart v. Fischer* (1915) 75 Or 321, 147 P 189, modg on reh 75 Or 316, 145 P 33, an action to recover for injuries resulting from a collision with an automobile, it was held that a nonexpert who did not see the automobile in motion or appear on the scene until some time after the accident had happened, but who testified that behind the car, and in the direction from which it came, she had observed two black streaks upon the pavement, was incompetent to give her opinion as to the speed of the automobile, the court stating that, conceding that it was a matter calling for opinion evidence, there were no adequate grounds upon which any expert could form an estimate; that the mere marks upon the pavement did not constitute a sufficient basis for that kind of testimony; that the ultimate object of the inquiry on that point was the speed of the vehicle; that it was reasonable that if a very heavily loaded car with wheels thus locked were propelled along a pavement at a very slow rate of speed, marks would be left behind; that, again, the condition of the tires and the street as to being rough or even would affect such marks; that naturally a very smooth tire upon a very smooth surface, which, in turn, might be affected by a condition of dampness or frost, would produce but a faint marking; that a variance in smoothness of either the tire or the pavement would produce different results; that there was no testimony about any such conditions, or at least none of them was suggested or mentioned by the witness; and that consequently the foundation for expert testimony did not exist. The court further said: "In this case the witness. . . did not see the car in motion nor witness the accident. The only circumstance upon which she bases her opinion is the existence of two black streaks on the pavement. . . . In our judgment it was not a matter for opinion or expert evidence because it did not involve anything of science or technical learning. The jury was quite as competent to judge of the speed of the car from that circumstance as a young girl who has not shown herself to be particularly skilled in the use or observation of motor vehicles. In brief, if she had seen the car in motion at the time of the accident, she could have given her opinion as a lay witness about its rate of speed. As her testimony on that point, however, involved a deduction from the circumstantial evidence of tracks, it was not for her, but for the jury alone, to make that or any deduction.

Moreover, if it could be considered a matter authorizing opinion evidence, there was not sufficient data disclosed by the testimony to authorize an opinion from even the most learned on such subjects."

In *Heidner v. Germschied* (1919) 41 SD 430, 171 NW 208, an action to recover for the death of a child struck by an automobile, in which it was claimed that the car was running at an unwarranted rate of speed, witnesses who had shown themselves familiar with the handling of cars, had examined the roadbed at the place of the accident, and had seen the marks made by the sliding car, were held competent to give their opinions as to the rate of speed at which the car must have been running, where there was evidence as to the kind of car, the condition of the roadbed, the place where the brakes were applied, the place where the child was struck, and the distance which the car slid along the ground before stopping. It is to be observed that in this case there was something more in the case than the mere observation of tire marks upon which to predicate an opinion; therefore, the case cannot be said to be contra the preceding cases.

And in *Bains Motor Co. v. Le Croy* (1923) 209 Ala 345, 96 So 483, it was held that there was no error in admitting testimony of witnesses giving their opinion as to the rate of speed at which the automobile was moving when it was several hundred feet from the curve in the road, before striking plaintiff, and its rate of speed when nearer to plaintiff, as well as the distance in which it was stopped, and the circumstances of its stopping, including wheel prints in the roadway or on the bank beside the roadway.

The following additional authority is relevant to the issues discussed in this section:

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Evidence as to car's skid marks was admissible, but not so conclusive as to overcome contrary testimony, in action arising out of collision between car and motorcycle. *Stafford v Alexander* (1960, 2nd Dist) 182 Cal App 2d 301, 6 Cal Rptr 219.

Opinion evidence of speed by mechanical engineer was admissible where expert based opinion on length of plaintiff's skid marks before and after collision, friction coefficient of pavement, weight of vehicles involved, and distance between center of gravity of defendant's vehicle and point at which it was struck by plaintiff's vehicle. *Spain v McNeal* (1975, Dist Col App) 337 A2d 507.

See *Hixson v Barrow* (1975) 135 Ga App 519, 218 SE2d 253, appeal after remand 142 Ga App 65, 234 SE2d 805, infra § 15.

In wrongful death action, court improperly allowed investigating officer to state opinion as to speed of defendant's auto based upon his analysis of length of skid marks through use of "Nomograph," where officer was not qualified as expert in estimating speed of motor vehicle from skid marks; even if officer was expert, reconstruction testimony would be unnecessary and inadmissible due to fact there were two eye witnesses to accident. *Diederich v Walters* (1975, 2d Dist) 31 Ill App 3d 594, 334 NE2d 283, revd on other grounds 65 Ill 2d 95, 2 Ill Dec 685, 357 NE2d 1128.

Expert may give opinion, based on length of skid marks as shown by picture, as to speed of car involved in accident. *Cherry v State Auto. Ins. Asso.* (1957) 181 Kan 205, 310 P2d 907.

Admission of state policeman's opinion as to speed of plaintiff's car, based on marks showing distance it shoved defendant's car, was error where witness was not qualified as expert and based opinion on force of impact, omitting consideration of other material factors. *Jackson v Trogan* (1961) 364 Mich 148, 110 NW2d 612.

See *Gray v Turner* (1962) 245 Miss 65, 145 So 2d 470 (citing annotation), supra § 7.

Admission of trooper's opinion that wheel marks indicated that defendant's car had been accelerating for some distance before it went off road was held not error where witness' duty was to investigate accidents, and he was on scene shortly after occurrence and saw tire tracks while they were still fresh and plain. *Zellers v Chase* (1964) 105 NH 266, 197 A2d 206.

Exclusion of testimony of investigating officer who was not engineer and had no special training in assessing speed of vehicles from skid marks was not abuse of discretion, since it is matter of common knowledge that skid marks may be affected not only by speed at which vehicle is being driven, but also by condition of surface of highway, type of tread and degree of wear of tires, weight of vehicle, condition of brakes, and manner in which they are applied. *Nesta v Meyer* (1968) 100 NJ Super 434, 242 A2d 386.

See *Fowler v Graves* (1986) 83 NC App 403, 350 SE2d 155, § 3.

Nonexpert witness should not be permitted to give opinion as to speed of vehicle at time of accident, based solely upon skid marks made by tires of vehicle. *Suchy v Moore* (1972) 29 Ohio St 2d 99, 58 Ohio Ops 2d 194, 279 NE2d 878 (citing annotation).

Trial court did not abuse its discretion in permitting testimony by mechanical engineer as to calibration of speedometer of truck and skid tests and as to speed of truck at times brakes were applied based on comparison with known length of skid marks created when driver applied brakes on same truck immediately prior to striking nine-year-old plaintiff where jury was properly instructed on how to evaluate assumed facts which formed basis of expert's opinion. *King v Branch Motor Express Co.* (1980, Montgomery Co) 70 Ohio App 2d 190, 24 Ohio Ops 3d 250, 435 NE2d 1124, motion overr

Expert witness may give his opinion as to speed of automobile from length of its skid marks. *Thomas v Harper* (1964) 53 Tenn App 549, 385 SW2d 130.

Trial court did not abuse discretion in permitting deputy sheriff to testify as to speed of car just before collision, judging from skidmarks on pavement, and not permitting witness to estimate speed at definite number of miles per hour. *St. Louis, S. R. Co. v Duffy* (1957, Tex Civ App Dallas) 308 SW2d 202, writ ref n r e (Feb 19, 1958) and reh of writ of error overr (Mar 26, 1958) n r e.

In action for damages for collision between defendant's truck and plaintiff's automobile, admission of plaintiff's nonexpert testimony as to speed of defendant's truck indicated by skid marks on highway was proper. *Ball v Martin* (1955, Tex Civ App Austin) 277 SW2d 182.

[\*13] Miscellaneous

In some cases statements of witnesses based on their observation of tire marks at the scene of the accident, as, for example, as to whether the motor vehicle went in a certain direction, whether it skidded, how far it went after the collision, or as to whether the wheels of the vehicle were braked at the time of the accident, have been held admissible as statements of fact within the personal observation of the witness and not objectionable as calling for the opinion of the witness.

For instance, in *Lestico v. Kuehner* (1938) 204 Minn 125, 283 NW 122, where defendant, driver of the car in which plaintiff was riding when it got out of control and ran off the highway, was asked, "Did you observe whether -- where you made the sudden turn, where the car had changed its direction from the tire marks?", and the trial court excluded this "as calling for the conclusion of the witness," the appellate court held that this ruling was wrong, because the question plainly asked for a fact within the personal observation of the witness.

In *Rice v. Shenk* (1928) 293 Pa 524, 143 A 231, in an action to recover for injury to the rider of a motorcycle which

collided with a truck, it was held competent for the witness to testify that from the condition of the road he concluded that the motorcycle had skidded. The court said that the witness' conclusion was stated as would have been that of any other observer who from experience would know the difference between markings on a road made by a locked wheel, and those made by one which was revolving; that there was nothing smacking of the expert in this, but that he was speaking as a result of ordinary experience and observation, just as one would say that marks on the ground indicated that a person had slipped.

And in *Johnson v. Martin (1951) 255 Ala 600, 52 So2d 688*, where a witness for plaintiff, who reached the scene of the accident some time after it occurred, testified to seeing marks on the pavement and sought to describe them, and in answering the question as to whether there were any skid marks showing where the car wheels themselves had skidded, stated that "there were some there where they had been pulled this way," to which answer objection was made, and overruled, it was held that there was no error, where, after so ruling, the trial court interrogated the witness as to whether he referred to the skid marks, the witness replying "Yes, sir." The appellate court was of the opinion that the statement objected to was merely a shorthand rendering of the facts and merely his description of the appearance of the skid marks.

In *Thornbury v. Maley (1951) -- Iowa --, 45 NW2d 576*, an action to recover damages for the death of passengers in a car which failed to make a turn in the road and struck a tree some distance from the paved highway, wherein a witness who had stated that in his opinion certain marks observed by him were from the rubber of an automobile was then questioned whether, if these marks were extended out, they would point to anything in particular, which question was objected to as calling for the opinion and conclusion of the witness, it was held that the trial court did not commit error in permitting the witness to give as his answer to the question that the marks pointed to a tree on the side of the road.

In *Mitrich v. Tuttle (1940) 90 NH 512, 11 A2d 818*, it was held that there was no error in permitting a witness to state how far defendant's car went after the point of collision, and other similar inferences from the character of the marks observed by the witness at the scene of the accident, notwithstanding the objection that the question and answer invaded the province of the jury, the court approving the view that this ground of objection was so unsound that it should be entirely repudiated.

In *Mace v. Watanabe (1939) 31 Cal App2d 321, 87 P2d 893*, the court held that it was proper to allow a witness to testify, over objection, that one of the marks of decedent's car appeared to have been made by a "free running wheel," the objection to such question being that the witness had not been qualified as an expert. The court, however, pointed out that the witness did not give expert testimony but merely testified to physical facts -- to what he observed on the roadway, further stating that the difference between the mark of a free running wheel and of a locked wheel was a matter of common knowledge and observation and, though the answer seemed to have been put in the way of an opinion, it was nothing more than a statement of what the witness had seen.

And in *Hodges v. Wells (1932) 226 Ala 558, 147 So 672*, it was held that there was no error in allowing a witness to describe skid marks made by one of the automobiles involved in the accident, where such witness had qualified to express his opinion of how such marks were made by the loaded truck which he knew was loaded with cottonseed, and testified that "similar marks could be caused by excessive load or swaying of the load."

However, a contrary view was taken in *Vredenburgh Saw Mill Co. v. Black (1948) 251 Ala 295, 37 So2d 212*, where a witness for defendant testified that he examined the tracks of the truck at the place of the accident, that the tracks indicated that the wheels were not turning free and that there was evidence of a cutting condition and that the tracks were deeper than normal, and the witness was asked if the tracks indicated that the wheels making them were being braked at the time, it was held that plaintiff's objection to the question was properly sustained, the court in this connection citing the case of *White v. State (1915) 12 Ala App 160, 68 So 521*, in which it was said that a witness who was not present when a track is made should not be allowed to state how it was made, this being manifestly a conclusion for the jury to draw.

And in *North American Acci. Ins. Co. v. McAlister* (1942) 290 Ky 88, 160 SW2d 385, a suit on an accident insurance policy, where one of the most material and vital features of the case was whether the wrecking or disablement of the automobile in which deceased was riding or driving at the time it went over a bank into a pond, was accidental, and where a witness stated that "the back right wheel showed on the ground the brake was applied," the appellate court stated that on the new trial the witness should be permitted to testify only as to the tracks or marks, leaving the jury to draw such inferences therefrom as they might see proper.

And in *Murphy v. Lake County* (1951) 106 Cal App 61, 234 P2d 712, an action to recover for damages sustained by plaintiff as a result of the wrecking of his truck when it plunged over the bank of a county road due to the alleged negligence of defendant in the maintenance of the same in a dangerous and defective condition, it was held that a question asked of a witness as to what the tracks on the shoulder of the road showed, called for the opinion of the witness, and hence was inadmissible and properly excluded.

In *Germ v. City & County of San Francisco* (1950) 99 Cal App2d 404, 222 P2d 122, where the injury was caused when a streetcar bumped into a taxi, pushing the latter onto and injuring plaintiff, and the taxi driver was asked by his counsel if there were any marks made on the street by his cab when it was being pushed by the streetcar and while he was holding onto the brakes on the taxi, and the city, which was a defendant, objected that this called for the witness' opinion, and the driver of the taxi was again asked if he could identify on a photograph in evidence the marks he saw on the street made by his cab after it was hit by the streetcar, to which objection was also made by the city, the court held that while the objections were good and should have been sustained, no prejudice resulted from their being overruled, inasmuch as a reading of the transcript showed that it must have been clear to the jury that the witness was giving merely his opinion and that it was for the jury to determine when the skid marks were made. Furthermore, his explanation of how he knew the origin of the marks was such that if the jury did not believe his testimony as to how fast he was going (and there was evidence by the city's witnesses to refute it) his whole conclusion would fall; his statement that the marks were made after his cab was struck was based upon and was no stronger than his testimony as to his actions after he saw the plaintiff.

The following additional authority is relevant to the issues discussed in this section:

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Where defendant driver testified that he locked his brakes when he first saw plaintiff pedestrian, and plaintiff produced expert witness who testified that if brakes were locked, defendant would have skidded in straight line and could not have turned, but evidence showed that there were 113 feet of continuous skid marks which were not in a straight line and expert answered in negative to court's question as to whether he was assuming that there were continuous skid marks, court properly concluded that expert's opinion was not based upon uncontroverted facts, and did not err in striking testimony and admonishing jury not to consider it. *Jackson v Nelson* (1967, CA10 NM) 382 F2d 1016.

Testimony of person who measured skid marks purportedly made by truck when it first applied its brakes that, counting "solid" skid marks and "bouncing" skid marks, the total was 419 feet, was admissible. *Hickory Springs Mfg. Co. v Emerson* (1970) 247 Ark 987, 448 SW2d 955.

In action for damages from collision, question as to whether nonexpert witness observed scars on railroad in vicinity of debris was proper as laying foundation for details, location and description of scars, after which location it is for jury to say whether they were made by vehicles involved, were connected with accident, and what conclusions are to be drawn from them. *McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation).

Nonexpert witness could testify that tire marks on highway were not brake marks. *Hamdorf v Corrie* (1960) 251 Iowa

896, 101 NW2d 836.

In civil action involving collision of cars, nonexpert testimony that skid marks on road appeared to lead to point of impact was admissible. *Weilbrenner v Owens* (1955) 246 Iowa 580, 68 NW2d 293.

Testimony of nonexpert who was first to arrive on scene after automobile collision, as to skid marks on road, was admissible. *Hackman v Beckwith* (1954) 245 Iowa 791, 64 NW2d 275.

Computation in wrongful death action involving skid marks and reaction time of defendant driver was faulty where skid marks were treated as made solely by front wheels of defendant driver's automobile and did not furnish basis for finding that deceased was in crosswalk when struck by automobile. *Brown v Rice* (1970, Ky) 453 SW2d 11.

[\*14] Expert opinions; generally

Under the particular circumstances of individual cases the admission of expert testimony relating to tire or skid marks has been both approved and disapproved.

In *Monaghan v. Keith Oil Corp.* (1932) 281 Mass 129, 183 NE 252, the court held as admissible testimony of one who examined the tire marks of the truck after the accident, and who was an expert in the control and repair of automobiles, as to how certain tire marks of a motor truck were made, where such evidence tended to show the position of the truck and the effect upon it of the collision.

And in *Carson v. Turrish* (1918) 140 Minn 445, 168 NW 349, LRA 1918F 154, it was held that the trial court did not err in permitting a witness, who was at the scene of the collision the morning following, and for whose testimony a foundation was laid, to testify as an expert on rebuttal as to wheel tracks on the pavement at the place of the collision, the morning after, and his opinion as to the movements of the car which they indicated, the conditions being so nearly the same as at the time of the accident.

See also, in this connection, *Alabama Power Co. v. Jackson* (1936) 232 Ala 42, 166 So 692, in which it was held that the trial court committed error in not permitting witnesses to testify that certain marks on the pavement at the place of the accident were those made by a skidding car, located as the car in which plaintiff's intestate was riding and in which she sustained injury, these witnesses having qualified to testify to such collective fact.

However, in *Danner v. Walters* (1951) 154 Neb 506, 48 NW2d 635, an action for damages sustained in the collision of two motor vehicles, in which a patrolman who arrived at the scene of the accident approximately one-half hour after it occurred gave evidence as to the tracks or other marks made by the truck and the defendant's car and as to what he observed with reference to the same and other circumstances surrounding the accident which he was in a position to know and testify about, and also testified that he investigated from fifty to one hundred accidents a year, and who was asked to say, from his experience as a traffic investigator, where the point of impact between the two vehicles was, to which an objection was sustained, and it was stated that if the witness were permitted to testify he would say that the approximate point of impact was one foot eleven inches south and east of the center line of the pavement, it was held that the trial court did not commit error in sustaining an objection to this offer of proof, it being pointed out that the physical facts from which this question was to be answered were all presented to the jury, that the issue did not call for the opinion of an expert, and that the jury was as competent to decide from the facts the point at which the impact took place as was the officer.

In *Farmer v. Fairbanks* (1945) 71 Cal App2d 70, 162 P2d 26, where a witness who had been engaged in police work for twenty-two years, for over seventeen years of that time as an officer of the state highway patrol delegated to investigate traffic accidents, and who testified that he went to the scene of the accident shortly after it occurred, and described the conditions which he noted in the highway, remarking upon certain tire marks which led up to or near the

point of impact, and was asked by the court whether, as a traffic expert, he could identify these marks as being made by any particular automobile, to which he answered that "they were made by the Oldsmobile," and objection was made "on the ground that question calls for an opinion on the very subject which is going to be left to the jury and no foundation has been laid," the court was of the opinion that the objection was well taken but that no prejudicial error arose since other officers previously testifying had given substantially the same testimony without objection thereto.

As to the admissibility of opinion of photographer or other expert based on a photograph of tire marks, see § 16, *infra*.

The following additional authority is relevant to the issues discussed in this section:

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Expert testimony of highway patrolman as to skid marks is admissible to show position and identity of vehicles at point of collision. *Padgett v Buxton-Smith Mercantile Co.* (1958, CA10 NM) 262 F2d 39 (citing annotation).

See *Glaze v Tennyson* (1977, Ala) 352 So 2d 1335, § 15.

Trained police officer may give opinion as to point of impact based on, inter alia, marks on highway. *Gray v Woods* (1958) 84 Ariz 87, 324 P2d 220.

Opinion of police officer as to his conclusion concerning a "rapid start" by vehicle was admissible since police officers are familiar with skids and can tell most of the time whether one was made on starting or on stopping, court saying that whether it is dragging of tire that made mark, or spinning of tire, was question which experienced officer could answer. *Nelson v Busby* (1969) 246 Ark 247, 437 SW2d 799.

Opinion testimony of police officer that some skid marks of automobiles observed by him at place of accident had been made by flat tire was admissible where officer had been investigating traffic collisions for 5 years and had attended various schools of instruction on such matters. *McCormick v Sexton* (1965) 239 Ark 29, 386 SW2d 930.

Officer who had 25 years experience as state trooper, and who had investigated 800 -- 1000 accidents in course of his duties, was properly permitted to testify as to his reconstruction of accident based on his investigation of scene and on his prior experience, where plaintiff was only witness with firsthand knowledge of accident, in that driver of other vehicle had not worked for defendant employer for four years preceding trial and his location at time of trial was unknown. *Miller v Bonar* (1983, Iowa) 337 NW2d 523.

Police officer could testify as to point of impact as indicated by skid marks. *Hamdorf v Corrie* (1960) 251 Iowa 896, 101 NW2d 836.

Expert testimony that skid marks on road were made by vehicles involved in collision was inadmissible where jury had full description of marks and could draw own conclusion as to which cars made marks. *Turcotte v De Witt* (1954) 332 Mass 160, 124 NE2d 241.

One property qualified in accident investigative background may testify, either from personal observation or from properly authenticated and admitted exhibits, that, in his opinion, certain marks are skid marks and that they were made by given motor vehicle, and he may, on same basis, state his opinion as to point of impact. *Dudek v Popp* (1964) 373 Mich 300, 129 NW2d 393.

There was no foundation upon which police officers could give expert opinion that automobile struck deceased, where only evidence pointing to such involvement was rubber mark found on curb and it was admitted that time when said

mark became affixed to curb had not been ascertained. *Estate of Blackwell v Hare* (1973) 50 Mich App 204, 213 NW2d 201, (citing annotation), rev'd on other grounds (Mich) 216 NW2d 419.

Trial court in negligence action arising from automobile collision properly excluded testimony of plaintiff's expert witness as to skid marks at scene of collision, where expert was not qualified in accident reconstruction and no showing was made that skid marks were made by either vehicle involved in collision. *Coffey v Callichio* (1988, 2d Dept) 136 App Div 2d 673, 523 NYS2d 1011.

See *Smith v Hardy* (1955) 228 SC 112, 88 SE2d 865, supra § 4.

Expert testimony of highway patrolman as to position of defendant's car at moment of impact was inadmissible where based only on skid marks made by defendant's tires; given direction of marks, jury was as well qualified as witness to judge position of vehicle. *Jenkins v Hennigan* (1957, Tex Civ App Beaumont) 298 SW2d 905, writ ref n r e.

It was error, although not reversible error, for police officer to testify that based on his observations of shoulder of road and conditions of weather and conditions of soil it could be assumed that if car had gone off hard surface road between point where plaintiff's body lay and where bridge was, car would have made tracks on that soil, court pointing out that such testimony was merely an expression of opinion on a matter of common knowledge as to which jury itself was competent to form an intelligent and accurate opinion. *Hill v Lee* (1969) 209 Va 569, 166 SE2d 274.

Expert testimony was admissible to show position of vehicles at time of accident based on marks on pavement and road shoulders. *Henthorn v M. G. C. Corp.* (1957) 1 Wis 2d 180, 83 NW2d 759, 79 ALR2d 142.

[\*15] As to speed

A witness qualified as an expert may give his opinion, based upon the length of skid marks, as to the speed of a motor vehicle involved in an accident.

#### ALABAMA

*Jackson v. Vaughn* (1920) 204 Ala 543, 86 So 469

#### CALIFORNIA

*Linde v. Emmick* (1936) 16 Cal App2d 676, 61 P2d 338

#### ILLINOIS

*Fannon v. Morton* (1923) 228 Ill App 415

#### NEBRASKA

*McKinney v. Wintersteen* (1932) 122 Neb 679, 241 NW 112

#### NEW YORK

*Saladow v. Keystone Transp. Co. (1934) 241 App Div 161, 271 NYS 293*

#### TEXAS

*Stamper v. Scholtz (1930, Tex Civ App) 29 SW2d 883, error ref*

#### WISCONSIN

*Luethe v. Schmidt-Gaertner Co. (1920) 170 Wis 590, 176 NW 63*

So, in *Fannon v. Morton (1923) 228 Ill App 415*, where there was testimony that after the accident distinct marks or tracks were found on the pavement, showing the distance the tires had slid or been dragged over the pavement, and it was admitted that the wheels on the car were locked, evidence by an expert was held admissible as to the estimated speed of the automobile, predicated on the distance the tires were dragged along the pavement.

It is error to exclude testimony of an automobile expert in the police department who had examined defendant's taxicab on the day of the accident, by which plaintiff sought to establish that such a taxicab, with four-wheel brakes applied, could not have produced skid marks sixty feet in length unless exceeding the maximum rate of speed allowed by law. *Saladow v. Keystone Transp. Co. (1934) 241 App Div 161, 271 NYS 293*.

In *Luethe v. Schmidt-Gaertner Co. (1920) 170 Wis 590, 176 NW 63*, an action to recover for an injury to one struck by an automobile, where there was evidence that there were skid marks of automobile wheels on the street for a distance equal to the length of a street crossing, and other evidence showing long skid marks, such evidence was held sufficient to furnish a proper ground for an expert to give his opinion as to the speed at which the car was traveling when the brakes were applied.

A witness qualified as an expert may give his opinion as to the speed of an automobile based on evidence to the effect that the automobile, in turning from one street into another, on a dry day, skidded forward twenty-two feet with the wheels locked. *Jackson v. Vaughn (1920) 204 Ala 543, 86 So 469*.

In *Stamper v. Scholtz (1930, Tex Civ App) 29 SW2d 883, error ref*, in holding that the evidence of experts was admissible to show, from the circumstances detailed to them, what the probable speed of an automobile was at the time a boy on a bicycle was struck, the court stated that almost any person acquainted with the movements of cars when brakes are applied suddenly would be competent to give an opinion from the marks of the skidding and other circumstances as to the speed of the automobile.

In the two Texas cases immediately following, although the opinions do not expressly so state, it is possible that the witnesses qualified as experts.

In one of these cases, *Rankin v. Joe D. Hughes, Inc. (1942, Tex Civ App) 161 SW2d 883, error ref w m*, an action to recover for damages resulting when plaintiff's car crashed into the rear end of defendant's parked truck, it was held that testimony of highway officers who had investigated a number of automobile collisions on the highway, as to their estimate of the speed of plaintiff's car, based on the skid marks on the pavement, was competent and sufficient to raise the issue of excessive speed.

And in *Southern Transp. Co. v. Adams (1940, Tex Civ App) 141 SW2d 739, error dismd*, an action for death of a pedestrian struck by an automobile, it was held that an officer was qualified to testify as to the speed of the truck from

his examination of the skid marks.

However, in *Linde v. Emmick* (1936) 16 Cal App2d 676, 61 P2d 338, it was held that the opinion of an expert as to the speed of an automobile based on the length of skid marks was inadmissible where the hypothetical question asked him erroneously assumed that the length of skid marks was 150 feet instead of 140 feet, as shown by the evidence, and also omitted the important factor of the condition of the brakes.

A showing that the witness had been a truck driver for a period of fifteen years did not, standing alone, qualify him to express an expert opinion concerning the speed of a car which he had not seen in motion, based on the skid marks which he related to the car. *Wisniewski v. Weinstock* (1943) 130 NJL 58, 31 A2d 401, affd 135 NJL 202, 50 A2d 894.

In *Frey v. Buchseib* (1936, App) 33 NE2d 862, 10 Ohio Ops 430, 22 Ohio L Abs 624, where in connection with the exhibition in evidence of parts of plaintiff's automobile, such as a tire, rim, and the remains of the hub and spokes of one of the wheels, a witness for plaintiff, apparently for the purpose of showing excessive speed of defendant's motor vehicle, gave his opinion concerning the relation between the marks on the highway and the damaged wheel of plaintiff's automobile, it was held that this evidence did not come strictly within the category of expert testimony, where, in connection with such testimony, the witness in question gave the facts upon which he predicated his opinion.

Also recognizing that expert witness may testify as to length of skid marks to show speed of vehicle:

#### ALABAMA

*Stanley v Hayes* (1964) 276 Ala 532, 165 So 2d 84

#### ARIZONA

*Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932 (admissibility assumed)

#### CALIFORNIA

*Jobe v Harold Livestock Com. Co.* (1952) 113 Cal App 2d 269, 247 P2d 951

*Hoffman v Slocum* (1963, 2nd Dist) 219 Cal App 2d 100, 32 Cal Rptr 635

*Bell v Myrtle* (1959, Mun Ct App Dist Col) 153 A2d 313 (citing annotation)

#### FLORIDA

*Kerr v Caraway* (1955, Fla) 78 So 2d 571 (superseded by statute as stated in *Beltran v Waste Management, Inc.* (Fla App D3) 414 So 2d 1145, petition den (Fla) 427 So 2d 738)

#### GEORGIA

*Firestone Tire & Rubber Co. v King* (1978) 145 Ga App 840, 244 SE2d 905

#### KANSAS

*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451 (citing annotation)

#### KENTUCKY

*Ryan v Payne* (1969, Ky) 446 SW2d 273 (citing annotation)

*Vanhook v Stanford-Lincoln County Rescue Squad, Inc.* (1984, Ky App) 678 SW2d 797

#### MICHIGAN

*Brummitt v Chaney* (1969) 18 Mich App 59, 170 NW2d 481

#### MINNESOTA

*Grapentin v Harvey* (1962) 262 Minn 222, 114 NW2d 578 (citing annotation)

#### MISSOURI

*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260 (citing annotation)

*Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503

#### NEBRASKA

*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697

*Nisi v Checker Cab Co.* (1961) 171 Neb 49, 105 NW2d 523

*Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686

#### NEW JERSEY

*Di Nizio v Burzynski* (1963) 81 NJ Super 267, 195 A2d 470

#### NEW MEXICO

*Alford v Drum* (1961) 68 NM 298, 361 P2d 451

*Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256

#### OHIO

*Davis v Zucker* (1951, App, Cuyahoga Co) 62 Ohio L Abs 81, 106 NE2d 169

*Barge v House* (1952) 94 Ohio App 515, 52 Ohio Ops 300, 63 Ohio L Abs 555, 110 NE2d 425

## OKLAHOMA

*Bonner v Polacari* (1965, CA10 Okla) 350 F2d 493 (applying Oklahoma law) (citing annotation)

*Andrews v Moery* (1951) 205 Okla 635, 240 P2d 447

*Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849

*Groninger & King, Inc. v T. I. M. E. Freight, Inc.* (1963, Okla) 384 P2d 39

*Swink v Colcord* (CA 10 Okla) 239 F2d 518 (citing annotation -- recognizing rule)

## TENNESSEE

*Monday v Millsaps* (1953) 37 Tenn App 371, 264 SW2d 6 (disapproved by *Foster v Amcon International, Inc.* (Tenn) 621 SW2d 142)

## WASHINGTON

*Knight v Borgan* (1958) 52 Wash 2d 219, 324 P2d 797 (citing annotation)

*Kiehn v Sprague School Dist.* (1958) 52 Wash 2d 565, 324 P2d 446 (by implication)

The following additional authority is relevant to the issues discussed in this section:

◇

See *Logsdon v Baker* (1973, DC Dist Col) 366 F Supp 332, vacated on other grounds 170 US App DC 360, 517 F2d 174, 170 App DC 360, 517 F2d 174, infra § 16.

Expert who was not eyewitness to collision could properly testify as to estimated speed of automobile, predicated on distance tires skidded or were dragged along before impact, but not distance tires skidded after impact. *Glaze v Tennyson* (1977, Ala) 352 So 2d 1335.

Trial court erred in permitting state trooper to give opinion, based on skid marks, as to speed of defendant's car, where skid marks were not measured and trooper's estimate on direct examination was that length of marks was from 50 to 75 feet and on cross-examination was that it could have been as much as 100 feet. *Giles v Gardner* (1971) 287 Ala 166, 249 So 2d 824.

Expert may testify as to his judgment as to speed of automobile predicated on skid marks before impact, but not on basis of skid marks after impact. *Rosen v Lawson* (1967) 281 Ala 351, 202 So 2d 716.

In personal injury action arising out of two-car collision, trial court did not abuse its discretion in granting new trial on grounds of error in admitting opinion of defendant's accident-reconstruction expert as to speed of plaintiff's automobile, where many factual assumptions made by expert in arriving at opinion, including "average acceleration," "average turning radius," expert's own estimation of lengths of deviated skid marks, and, without explanation, certain coefficient of friction of tires on pavement, lacked sufficient evidentiary support. *Richard v Scott* (1978, 4th Dist) 79 Cal App 3d 57, 144 Cal Rptr 672 (ovrld in part by *Weddle v State of California* (4th Dist) 141 Cal App 3d 737, 190 Cal Rptr 522, reprinted as mod (4th Dist) 142 Cal App 3d 657, 191 Cal Rptr 819, op withdrawn by order of ct (Jun 23, 1983)) and (criticized by *Mosesian v Pennwalt Corp.* (5th Dist) 191 Cal App 3d 851, 236 Cal Rptr 778).

Although officer's opinion as to speed of vehicle from length of skid marks merely by reference to chart has been held

to be inadmissible, where officer was permitted to testify, without objection, by reference to chart and there was no objection on ground of lack of proper foundation or on ground that officer had not been qualified as expert, admission of officer's testimony was not prejudicial error. *Ungefug v D'Ambrosia* (1967, 4th Dist) 250 Cal App 2d 61, 58 Cal Rptr 223.

In automobile accident case, expert testimony that there was only one tire mark at curve, indicating great speed at which car was rounding curve, was admissible. *Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229 (superseded by statute as stated in *Public Service Co. v Board of Water Works (Colo)* 831 P2d 470) (citing annotation).

Expert testimony is admissible to show relationship between skid marks and speed of car or speed at which car must be driven to make certain skid marks. *Bell v Myrtle* (1959, Mun Ct App Dist Col) 153 A2d 313 (citing annotation).

Admission of testimony as to estimate of speed of vehicle based upon witness' inference from examination of skid marks at scene was proper notwithstanding fact that such inference was subject of expert testimony, where witness had been insurance adjuster for two years and had investigated hundreds of collisions; admission of testimony as to estimate of length of skid marks was proper whether or not witness was expert, and effect upon witness' credibility of gap of less than four hours between accident and witness' observation of scene was jury question. *Hixson v Barrow* (1975) 135 Ga App 519, 218 SE2d 253, appeal after remand 142 Ga App 65, 234 SE2d 805.

After police officer who had 3 years' experience in investigation of automobile accidents and had been trained in connection with this work testified to physical facts and indications of skid marks and tire marks at scene of accident, his testimony to effect that there was no speed indication according to said skid marks was admissible over objection to such testimony on grounds that officer was not qualified as expert and that his opinion failed to prove that automobile was not exceeding speed limit. *Reeves v Morgan* (1970) 121 Ga App 481, 174 SE2d 460, revd on other grounds 226 Ga 697, 177 SE2d 68, on remand 123 Ga App 64, 179 SE2d 648 and (superseded by statute as stated in *Atlanta Newspapers, Inc. v Shaw*, 123 Ga App 848, 182 SE2d 683).

See *Diederich v Walters* (1975, 2d Dist) 31 Ill App 3d 594, 334 NE2d 283, revd 65 Ill 2d 95, 2 Ill Dec 685, 357 NE2d 1128, supra § 12.

In wrongful death action arising out of collision between car and defendant's disabled truck stopped on highway, question asked of expert witness as to whether skid marks indicated violation of speed laws by decedent's car called for legal conclusion and trial court erred in overruling defendant's objection. *Schlichte v Franklin Troy Trucks* (1978, Iowa) 265 NW2d 725.

Although recognizing that investigating officers may be qualified to express opinion as to speed from skid marks left by car braking to stop without meeting substantial resistance, it was held that officer failed to show he possessed sufficient expertise in specific area in which he was asked to express opinion and therefore was not qualified to express opinion. *Bernal v Bernhardt* (1970, Iowa) 180 NW2d 437 (citing annotation).

Trial court erred in excluding opinion testimony by police officer who investigated single-vehicle accident in which plaintiff's decedent died, where, in action against driver of truck that crashed, officer's training and experience qualified him as expert and testimony was as to estimate of truck's speed at time of accident based on skid marks. *Osner v Boughner* (1989) 180 Mich App 248, 446 NW2d 873, app gr, in part 435 Mich 861, 457 NW2d 344, vacated, app den 437 Mich 955, 467 NW2d 592.

Expert witness is qualified to give opinion as to speed of automobile where he is informed of factors testified to by witness at scene, including length of skid marks, composition and condition of pavement, and make and weight of automobile. *Snyder v New York Cent. Transport Co.* (1966) 4 Mich App 38, 143 NW2d 791 (citing annotation).

Estimates of speed are admissible in civil case where they are result of measuring length of skid marks, but where police officer stated his opinion was based on condition of vehicles after impact and did not include skid mark measurements, officer's opinion as to speed was erroneously admitted. *Missey v Kwan* (1980, Mo App) 595 SW2d 460.

Where expert testimony as to speed of vehicle is based on skid marks, it is immaterial whether vehicle was skidding sideways or traveling in normal direction. *Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256.

See *Fowler v Graves* (1986) 83 NC App 403, 350 SE2d 155, § 3.

Admission of expert's testimony as to speed of vehicle involved in accident determined from length of skid marks was not prejudicial notwithstanding that witness stated that he employed chart commonly used in determining automobile speed from skid marks. *Barge v House* (1952) 94 Ohio App 515, 52 Ohio Ops 300, 63 Ohio L Abs 555, 110 NE2d 425.

Opinion evidence of duly qualified expert as to speed of motor vehicle, based on skid marks and other physical facts, is admissible. *Continental Oil Co. v Elias* (1956, Okla) 307 P2d 849.

Admission of opinion as to speed of vehicle of expert witness, who was licensed civil engineer, head of engineering from specializing in highway design, highway safety and accident reconstruction, and assistant dean of engineering and professor at university, was proper where opinion was based on length of skid marks, weight of car, grade of street, characteristics of road surface and other considerations which witness identified. *Haerberle v Peterson* (1978) 262 Pa Super 247, 396 A2d 738.

In wrongful death action to recover for decedent's death resulting from collision between his pickup truck and another truck, where speed and turning path of decedent's truck had been established by direct testimony, court did not abuse discretion in excluding testimony by expert witness as to traces left by abrupt high speed turns. *Sanchez v Billings* (1972, Tex Civ App Houston (14th Dist)) 481 SW2d 911, writ ref n r e (Oct 4, 1972) n r e.

Estimated speed of motor vehicle, as based on skid marks and other physical facts, is a proper subject for expert opinion, determination of rate of speed based upon such facts not being within common knowledge of jurors. *Talley v Fournier* (1970) 3 Wash App 808, 479 P2d 96.

[\*16] Photographs

Subject to the rule that the trial court in the exercise of its sound discretion must be satisfied that the object photographed is a faithful representation of what it purports to reproduce, photographs of skid marks made by tires of motor vehicles may properly be admitted in evidence.

## ARKANSAS

*Reynolds v. Nutt* (1950) 217 Ark 543, 230 SW2d 949

## CALIFORNIA

*Hayes v. Emerson* (1930) 110 Cal App 470, 294 P 765  
*Miller v. Silvester* (1934) 140 Cal App 345, 35 P2d 387

## FLORIDA

*Stanley v. Powers* (1936) 125 Fla 322, 169 So 861

#### INDIANA

*Haven v. Snyder* (1931) 93 Ind App 54, 176 NE 149

#### KENTUCKY

*Square Deal Cartage Co. v. Smith's Admr.* (1948) 307 Ky 135, 210 SW2d 340

#### MICHIGAN

*Wallace v. Kramer* (1941) 296 Mich 680, 296 NW 838

#### MINNESOTA

*Kouri v. Olson-Keogh Produce Co.* (1934) 191 Minn 101, 253 NW 98

#### OHIO

*Senn v. Lackner* (1951) -- Ohio App -- , 100 NE2d 419, motion for order releasing supersedeas bond overruled -- Ohio App -- , 100 NE2d 432

#### WASHINGTON

*Schalow v. Oakley* (1943) 18 Wash2d 347, 139 P2d 296

#### WISCONSIN

*East Wisconsin Trustee Co. v. O'Neil* (1949) 255 Wis 528, 39 NW2d 369

In *Square Deal Cartage Co. v. Smith's Admr.* (1948) 307 Ky 135, 210 SW2d 340, where objection was made to the admission of a number of photographs of the highway, taken the morning after the accident, which had occurred in the late afternoon, the objection being particularly to what appeared to be marks in the road, and while the photographer was not introduced, the fairness and accuracy of the views were established by other witnesses whose testimony was to the effect that the conditions revealed in the pictures were the same as they were immediately after the accident, it was held that the photographs were properly admitted.

And in *Senn v. Lackner* (1951) -- Ohio App -- , 100 NE2d 419, motion for order releasing supersedeas bond overruled -- Ohio App -- , 100 NE2d 432, the court held admissible photographs of the highway at the place of collision, taken the day after the accident, as the evidence showed that the marks on the highway shown on the photographs existed immediately after the collision, and there was evidence to support the conclusion that the photographs clearly

represented the condition immediately after the collision.

So, too, in *Miller v. Silvester* (1934) 140 Cal App 345, 35 P2d 387, the court held clearly admissible photographs of skid marks on the pavement, taken on the third day following the accident, five or six witnesses who either were at the scene of the accident at the time it occurred or arrived there shortly afterward having testified as to the existence of the skid marks, their length and location on the pavement, and that the conditions as they observed them were correctly reproduced by the photographs. It was pointed out that the purpose of using the photographs as evidence in the present case was not to prove the existence of the skid marks, such fact having been fully established by the testimony of the six witnesses who saw them immediately after the accident occurred, but merely as an approximate aid in applying such testimony.

And in *Hayes v. Emerson* (1930) 110 Cal App 470, 294 P 765, it was held that the trial court did not abuse its discretion in admitting in evidence a photograph of skid marks, four or five inches in width and forty to forty-five feet in length, which had been painted white by the witness before he photographed them, his testimony showing that the skid marks showed black burned rubber, that he had them painted with lime, and that they were photographed the next day, and several witnesses testifying that the painting followed the line of the skid marks. The appellate court pointed out that no object in the photograph was placed before the jury which was not there at the time of the accident, and that it saw no reason why the mere painting of an object, in order that it might be more vividly reproduced by means of photography, rendered the photograph inadmissible; this is always, according to the court, subject to the rule that the trial court must be satisfied that the object photographed is a faithful representation of what it purports to reproduce; necessarily, a large measure of discretion is vested in the trial court in ruling upon a question of this character.

Photographs of skid marks on the concrete pavement alleged to have been made by the steel rim of plaintiff's car immediately after the accident, which corroborated defendant's testimony to the effect that the collision resulted because of the fact that plaintiff's car was too far over to the left of the center line of the road, may properly be admitted in evidence. *Stanley v. Powers* (1936) 125 Fla 322, 169 So 861.

And in *Haven v. Snyder* (1931) 93 Ind App 54, 176 NE 149, it was held that there was no error in admitting in evidence photographs of scratches and marks on the pavement purporting to have been made by the collision of two cars, taken two days after the accident, and introduced for the purpose of showing the path defendant's car traveled after the collision. In this connection the court observed that the objecting party admitted that testimony of the photographer as to what he saw in the way of marks on the pavement would be competent for the consideration of the jury, in consideration with all the other evidence in the case, in determining what connection, if any, they had with the matter in controversy, and the court said that it could see no reason why the photographs of what he saw should be excluded.

In *East Wisconsin Trustee Co. v. O'Neil* (1949) 255 Wis 528, 39 NW2d 369, it was held that photographs taken by a police officer on the afternoon of the accident, which occurred in the forenoon of that day, were properly admitted for the purpose of showing the location of the skid mark.

And in *Wallace v. Kramer* (1941) 296 Mich 680, 296 NW 838, an action for damages by a pedestrian, it was held that there was no abuse of discretion in permitting the introduction of photographs of skid marks left by defendant's car at the scene of the accident, although the road was heavily traveled and the photographs were taken twelve days after the accident, where they were taken under the direction of eye witnesses who testified that they were authentic, and this was corroborated by testimony of police officers who measured the original skid marks. The court stated that skid marks impressed upon a concrete pavement may remain for a considerable length of time and are not quickly obliterated, and remarked that there was no necessity to discuss whether it would have been an abuse of discretion on the part of the judge in this case to refuse to admit the photographs, but that it did hold that there was no abuse in permitting the introduction.

In *Schalow v. Oakley* (1943) 18 Wash2d 347, 139 P2d 296, where apparently the collision occurred because one of the

drivers left his side of the road and entered the rightful path of the other, it was held that the positions of skid marks testified to and shown by photographs had probative value, but that their force as evidence was a matter for the jury, and that it could not be said that these or other physical manifestations should have controlled its verdict, inasmuch as the marks were only a few feet in length, and might have been there before the collision occurred, and it was not impossible, although there was emphatic evidence to the contrary, that the marks were made when one of the cars was dragged from the road by a wrecker.

In some instances photographs purporting to be those of tire or skid marks have been held by the appellate court to have been properly rejected where there was no evidence to connect the marks up in some way with those made by the car involved in the accident or at the scene of the accident.

Thus, in *Brewer v. Berner* (1942) 15 Wash2d 644, 131 P2d 940, an intersection collision case, it was held that the question of admission of photographs was largely within the discretion of the trial court, and that there was no error in the latter court's ruling in refusing the offer in evidence of two photographs of the scene of the accident, which were taken several days thereafter and showed what appeared to be skid marks on the pavement, but there was no evidence or offer of proof which would connect the marks with those made by defendant's car, nor did they in any way conform to the evidence relating to the skid marks.

So, too, in *Heffelfinger v. Schell* (1940, Pa) 50 Dauph Co 1, it was held that an offer to submit in evidence a photograph of the scene of the accident showing certain skid marks was properly rejected where the objections to the admission of the photograph were that it was taken at an indefinite time after the accident, that it would be impossible to procure the exact conditions of the day of the accident and that it was not definitely established that the marks were made at the exact point of the accident.

See also *Weller v. Fish Transport Co.* (1937) 123 Conn 49, 192 A 317, in which it was held that the trial court did not err in excluding four small snapshots of the roadway showing pieces of paper placed thereon to designate the claimed location of certain gouge and tire marks, the appellate court stating that the trial court well might have concluded that the officer who made the photographs had placed the paper shown on the snapshots as a result of what was told him by the driver and others after the accident.

The right of a witness to express an opinion as to the operation of the car, based on his observation of photographs of brake or skid marks, may depend upon whether or not the witness qualified as an expert with respect to his knowledge of cars and how they operate under certain conditions.

To illustrate, in *Reardon v. Marston* (1941) 310 Mass 461, 38 NE2d 644, it was held that testimony of an inspector with thirteen and a half years' experience of the registry of motor vehicles, and who was familiar with the surface of the road where the accident occurred, and who qualified as an expert, that from photographs showing brake marks made by the automobile at the time of the accident he would say that the brakes were not in good working order, was competent.

On the other hand, in *Huggins v. Broom* (1938) 189 SC 15, 199 SE 903, where an expert photographer of ten years' experience in photographing wreck scenes was permitted to point out on his photographs the markings, such as skid marks, etc., shown on the highway at the place of the collision, and described these markings, it was held that the trial court properly excluded the opinion and conclusion of the witness as to how the markings were made and/or what made them -- the manner in which such markings were made -- the court stating that expert or opinion evidence is permissible, and often necessary, but where all the materials for judgment are already before the jury and no special skill or experience is requisite in order to reach a conclusion and more than one reasonable inference may be indulged in, especially where the offered witness is not shown to have had any training or experience different from the average citizen, opinion evidence is properly excluded as superfluity, if for no other reason.

See also in connection with the cases in this section *Abbott v. Hayes* (1942) 92 NH 126, 26 A2d 842, supra, § 8.

Generally as to the admissibility in civil cases of opinion evidence other than that based on photographs, see §§ 9-13, supra, and as to opinions by experts, §§ 14 and 15, supra.

Rule that photographs of tire skid marks are admissible, also supported in:

#### SUPREME COURT

*Kelly v United States (1955, DC Fla) 127 F Supp 201* (by implication)  
*Een v Consolidated Freightways (1955, CA8 ND) 220 F2d 82*

#### ILLINOIS

*Day v Ukena (1953) 351 Ill App 26, 113 NE2d 574*

#### MISSISSIPPI

*Flora v Fewell (1961) 241 Miss 345, 131 So 2d 187*

The following additional authority is relevant to the issues discussed in this section:

◇

Fact that expert testified, on basis on scientific analysis of scrape marks on highway, that plaintiff's trailer had been on wrong side of highway at time of collision was not inadmissible on ground that witness had seen copies of photographs not admitted into evidence. *Clifton v Mangum (1966, CA10 NM) 366 F2d 250*.

Where no evidence was introduced to link "brake marks" expert witness detected in photographs to truck involved in accident, expert's opinion testimony on vehicular speed was inadmissible based on such photographs. *Logsdon v Baker (1973, DC Dist Col) 366 F Supp 332*, vacated on other grounds *170 US App DC 360, 517 F2d 174*.

Photographs of scene of automobile collision offered to show presence and location of skid marks on highway after accident were improperly admitted where photographs were of busy thoroughfare and were taken more than five hours after accident; error was harmless, however, where skidmarks were same as those that appeared in photograph taken by police immediately after accident. *Tarquinio v Diglio (1978) 175 Conn 97, 394 A2d 198*.

Trial court did not abuse its discretion by admitting into evidence a photograph of a skid mark purportedly made by tractor-trailer which had been involved in accident in action arising from accident. *Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (1999)*, cert. denied, (May 28, 1999).

Photographs showing tire marks at scene of accident were properly admitted in evidence where party stipulated that photograph was taken day after the accident and that it fairly depicted scene of accident, and certain witnesses testified that they saw marks on pavement shown in the photograph. *Day v Ukena (1953) 351 Ill App 26, 113 NE2d 574*.

See *Thornton v Pender (1978) 268 Ind 540, 377 NE2d 613, § 5*.

Admission of photographs showing skid marks was proper, although not introduced through photographer, where witness through whom they were introduced identified various markings on road and testified that pictures were actual representations. *Miller v Quaipe* (1965, Ky) 391 SW2d 682.

Where crux of pedestrian's action for injuries caused when she was struck by plaintiff's automobile was whether accident occurred in pedestrian crosswalk, photograph indicating that accident did not occur there was not proof of incontrovertible physical fact where (1) identification of picture as skid marks depended entirely upon opinion testimony of photographer who was not eyewitness to accident; (2) only oral testimony established distance which vehicle traveled after it struck plaintiff before brakes took hold to cause skidding; and (3) no attempt was made to show whether front or rear wheels of vehicle made marks. *Kane v Scranton Transit Co.* (1953) 372 Pa 496, 94 A2d 560.

Photograph of skid marks taken 3 months after accident was admissible, probative value being for jury. *Venable v Stockner* (1959) 200 Va 900, 108 SE2d 380.

Even though skid marks shown in photographs of scene of accident were not specifically identified as coming from particular car in question, admission of such photographs is not improper in absence of definitive proof that skid marks did not come from such car. *Zinda v Pavloski* (1966) 29 Wis 2d 640, 139 NW2d 563 (citing annotation).

[\*17] Maps or diagrams

Maps or diagrams indicating tire or skid marks or their location at the scene of the accident have been held admissible under certain circumstances noted in the cases cited below.

#### INDIANA

*Buddenberg v. Morgan* (1941) 110 Ind App 609, 38 NE2d 287

#### IOWA

*Baker v. Zimmerman* (1917) 179 Iowa 272, 161 NW 479

#### OHIO

*Kalovsky v. Meyer Dairy Products Co.* (1928) 30 Ohio App 118, 164 NE 370

#### OREGON

*Walling v. Van Pelt* (1930) 132 Or 243, 285 P 262

Thus, in *Baker v. Zimmerman* (1917) 179 Iowa 272, 161 NW 479, it was held that there was no error on the part of the trial court in receiving in evidence a map prepared by a witness who testified that he had made certain measurements shortly after the collision and observed marks of automobile wheels on the ground, and that these were indicated correctly on the map prepared by him, the court stating that maps and diagrams shown to be correct representations of physical objects about which testimony is given may be exhibited before the jury to better enable them to understand the testimony, and witnesses may properly be allowed to refer thereto in giving testimony.

And in *Walling v. Van Pelt* (1930) 132 Or 243, 285 P 262, an action for damages for injuries sustained in a collision of motor vehicles at a street intersection, the court held admissible a map drawn by a police officer on the scene of the accident at which he arrived a short time after it occurred, which showed by the skid marks indicated thereon that defendant's car had not gone beyond the center of the intersection as it should have, in making a left turn, the court being of the opinion that the map was not a memorandum within the meaning of a statute allowing memoranda to be used to refresh the memory of a witness but prohibiting the introduction of the memorandum itself into evidence.

Also in *Kalovsky v. Meyer Dairy Products Co.* (1928) 30 Ohio App 118, 164 NE 370, where the evidence conflicted as to whether the accident or collision occurred some thirty or forty feet north of the turn at a street intersection, or happened at the immediate intersection, the location of the collision thus becoming an important issue in respect to negligence and contributory negligence, inasmuch as if it occurred at the intersection it would involve the claim that the plaintiff, a bicyclist, proceeded negligently into defendant's tractor, it was held that the trial court did not err in admitting in evidence a map, neither the competency of the maker nor the accuracy of the map being questioned, which indicated a skid mark at the immediate intersection rather than some thirty or forty feet north thereof, there being evidence in the record, beyond peradventure, that the skid mark existed, and that it was nine and a half feet long and eleven inches wide, the exact width of the tractor tires, and there being also positive, undisputed evidence of at least one witness that the right wheel of the tractor made the skid marks. The court said: "Now here was an object that had no power of locomotion and therefore could not shift itself. It was stationary. It was a fact created by reason of the collision, and therefore its accurate representation upon a map was as illuminating to the jury as if they had seen the production of the skid mark." The court stated that, in deciding as it did, it had in mind the law of Ohio, to the effect that the admissibility of evidence of this character depends upon the sound discretion of the court, considered in the light of all the circumstances appearing in the record of the case, and that the court is only responsible for an abuse of sound discretion.

See also *Tyrrell v. Goslant* (1919) 93 Vt 63, 106 A 585, an action to recover for injuries to plaintiff's person and automobile, caused by the alleged negligence of defendant, in which the court sustained the admissibility of testimony of a civil engineer called by defendant who had made a survey and plan of a portion of the highway some three days after the accident, and who described certain tracks pointed out at the time to him by defendant, the court observing that the witness was not present at the accident and had no personal knowledge concerning it, and that it became necessary for someone having knowledge thereof to point out to him on the ground the different places important to be located on the plan, from or to which measurements were to be made by him in connection with the objects so located.

In *Buddenberg v. Morgan* (1941) 110 Ind App 609, 38 NE2d 287, where it appeared that during the examination of a witness as to tire burns a short distance east of the point of collision a drawing made by an attorney of his interpretation of the witness' story, which was merely illustrative, was submitted to the witness, and upon this the witness indicated by marks the location of the tire burns, the court held that while it would not have been error to admit the exhibit, the trial court's refusal to admit it, under the circumstances, was within its discretion.

In *Roushar v. Dixon* (1942) 231 Iowa 993, 2 NW2d 660, it was held that there was no error in the ruling of the trial court refusing to admit in evidence an illustrative plat showing tire marks and distances inasmuch as several of the legends and marks on the plat were not made from the personal knowledge of the witness and no other witness for defendant stated that the marks and legends made by the witness on the plat were correct.

Map or diagram indicating tire or skidmarks at scene of accident held admissible:

IDAHO

*Hayward v Yost* (1952) 72 Idaho 415, 242 P2d 971

*McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation)

The following additional authority is relevant to the issues discussed in this section:

<>

Civil engineer's drawing showing, inter alia, tire tracks purported to have been made by vehicles involved in accident, was admissible in action to recover for injuries caused by accident. *McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation).

Map showing skid marks at scene of accident admissible where map was made by engineer (who was not present at time of accident) under instructions from chief of police to whom skid marks had been identified by owner of car making marks. *Hayward v Yost* (1952) 72 Idaho 415, 242 P2d 971.

[\*III] Admissibility in criminal cases

[\*18] Generally

In numerous prosecutions for violation of the criminal laws testimony of witnesses as to tire tracks or skid marks has been held admissible, as for example, to prove that defendant's car was at the scene of the crime, or, in prosecutions for involuntary homicide in the operation of a car, to show its speed, location with respect to the center line of the highway, etc. (These situations will be more specifically detailed in succeeding sections of the annotation.)

#### SUPREME COURT

*Patterson v. United States* (1933, CA10th Kan) 62 F2d 968

#### ALABAMA

*Blackmon v. State* (1945) 246 Ala 675, 22 So2d 29

*Adams v. State* (1947) 32 Ala App 626, 29 So2d 148

*Williams v. State* (1949) 34 Ala App 253, 39 So2d 29, cert den 251 Ala 696, 39 So2d 39

*Gills v. State* (1950) 35 Ala App 119, 45 So2d 44, cert den 253 Ala 283, 45 So2d 51

#### CALIFORNIA

*People v. Richardson* (1938) 25 Cal App2d 408, 77 P2d 483

#### GEORGIA

*Cooper v. State* (1944) 197 Ga 611, 30 SE2d 177

*Jackson v. State* (1936) 54 Ga App 413, 187 SE 893

#### INDIANA

*Foreman v. State* (1938) 214 Ind 79, 14 NE2d 546

#### KENTUCKY

*Schleeter v. Commonwealth* (1927) 218 Ky 72, 290 SW 1075  
*Summers v. Commonwealth* (1930) 236 Ky 499, 33 SW2d 594  
*Collier v. Commonwealth* (1947) 303 Ky 670, 198 SW2d 974

#### MASSACHUSETTS

*Commonwealth v. Klosek* (1928) 262 Mass 416, 160 NE 252

#### MICHIGAN

*People v. Ryczek* (1923) 224 Mich 106, 194 NW 609

#### MISSOURI

*State v. Prunty* (1918) 276 Mo 359, 208 SW 91, followed in *State v. Funk* (1918, Mo) 208 SW 97  
*State v. Robinson* (1937, Mo) 106 SW2d 425

#### NEBRASKA

*Watson v. State* (1942) 141 Neb 23, 2 NW2d 589

#### NEW JERSEY

*State v. Weiner* (1925) 101 NJL 46, 127 A 582

#### NORTH CAROLINA

*State v. McLeod* (1930) 198 NC 649, 152 SE 895  
*State v. Ormond* (1937) 211 NC 437, 191 SE 22  
*State v. Walker* (1946) 226 NC 458, 38 SE2d 531

#### NORTH DAKOTA

*State v. Hinesh* (1930) 59 ND 29, 228 NW 453

#### OKLAHOMA

*Courtright v. State* (1944) 79 Okla Crim 270, 154 P2d 588

#### OREGON

*State v. Miller* (1926) 119 Or 409, 243 P 72, affd 273 US 657, 71 L ed 825, 47 S Ct 344

#### SOUTH DAKOTA

*State v. Mehlhaff* (1947) 72 SD 17, 29 NW2d 78

#### TEXAS

*Haley v. State* (1919) 84 Tex Crim 629, 209 SW 675, 3 ALR 779

*Moses v. State* (1933) 124 Tex Crim 200, 61 SW2d 112

*Hamilton v. State* (1936) 131 Tex Crim 88, 96 SW2d 983

*Flippin v. State* (1940) 140 Tex Crim 615, 145 SW2d 1098

*Lamar v. State* (1941) 141 Tex Crim 361, 149 SW2d 89

#### VIRGINIA

*Lawrence v. Commonwealth* (1943) 181 Va 582, 26 SE2d 54

#### WASHINGTON

*State v. Simons* (1933) 172 Wash 438, 20 P2d 844

#### WISCONSIN

*Ronning v. State* (1924) 184 Wis 651, 200 NW 394

Also supporting rule that tire tracks or skidmarks are admissible in prosecutions for violation of criminal laws:

#### IOWA

*State v McCarty* (1970, Iowa) 179 NW2d 548

#### KENTUCKY

*Stewart v Commonwealth* (1972, Ky) 479 SW2d 23

## MASSACHUSETTS

*Commonwealth v Kater* (1983) 388 Mass 519, 447 NE2d 1190, appeal after remand 394 Mass 531, 476 NE2d 593, appeal after remand 409 Mass 433, 567 NE2d 885, appeal after remand 412 Mass 800, 592 NE2d 1328, subsequent civil proceeding 421 Mass 17, 653 NE2d 576

## NEBRASKA

*State v Rotella* (1976) 196 Neb 741, 246 NW2d 74

## NORTH CAROLINA

*State v Culbertson* (1969) 6 NC App 327, 170 SE2d 125 (involving footprints and tire tracks found near store where robbery occurred)

The following additional authority is relevant to the issues discussed in this section:

<>

In criminal prosecution, photographs which showed skid marks and other designs on pavement in area about store which defendant robbed were admissible even though lighting conditions in photographs were different than those which existed when skid marks were made. *Porter v State* (1979) 271 Ind 180, 391 NE2d 801 (overruled as stated in *Hampton v State* (Ind App) 468 NE2d 1077).

Testimony as to skid marks was admissible in careless driving prosecution to show course and speed of defendant's car where witness observed marks within reasonable time after accident. *State v Poucher* (1957, Mo App) 303 SW2d 197.

There was no error in murder prosecution in admitting testimony of detective who investigated crime scene that approximately six feet behind victim's truck there was skid mark or gouge-like place in shoulder of road that appeared to have been made by car tire, since investigator was merely using shorthand statement describing what he observed; although remark may have had slight probative value in absence of showing that mark corresponded with tires on defendant's car, or any car, it was not so prejudicial as to warrant exclusion. *State v Hinson* (1984) 310 NC 245, 311 SE2d 256, cert den 469 US 839, 83 L Ed 2d 78, 105 S Ct 138.

Trial court did not abuse its discretion, in murder prosecution, in concluding that witness was sufficiently qualified to testify as expert on shoe and tire print comparisons, where field of shoe and tire print comparisons was not particularly complex, witness' opinions were not conclusive and thus not pivotal to resolution of case, jury heard descriptions of physical comparisons upon which witness based his conclusions and saw exhibits relied upon by witness, and other evidence of defendant's guilt, including DNA analysis, was strong. Rules of Evid., Rule 702. *Rodgers v. State*, 2006 WL 1162091 (Tex. Crim. App. 2006) [citing annotation].

[\*19] Prosecutions for offenses involving operation of vehicles; generally

The courts have held admissible testimony as to tire or skid marks in some cases involving prosecutions for homicide in the operation of an automobile in which the opinions did not indicate for what particular purpose such testimony was sought to be introduced.

Thus, in *Gills v. State* (1950) 35 Ala App 119, 45 So2d 44, cert den 253 Ala 283, 45 So2d 51, a prosecution for manslaughter in connection with the operation of an automobile, the court held that the reception of evidence of officers who came to the scene soon after the collision and before the automobile was moved or the body of deceased was released from beneath it, and who were allowed to describe the signs and marks which they observed on the pavement, with particular reference to the skids and scratches, 204 feet in length, on the surface of the highway, did not constitute error.

And in *State v. Weiner* (1925) 101 NJL 46, 127 A 582, a prosecution for involuntary manslaughter in the operation of a bus, the court held admissible testimony of two witnesses, one of whom was at the scene of the accident immediately after it occurred, and the other of whom arrived about an hour thereafter, to the effect that skid marks were observed at the place where the accident occurred, notwithstanding the objection of defendant that there was nothing to show that these skid marks were made by the bus which struck deceased, the court pointing out, in addition to the evidence above referred to, that two passengers in the bus testified to the sudden application of the brakes to the bus. The court remarked that the evidence was admissible as descriptive of the scene of the accident, shortly after its occurrence, and that its admissibility rested upon the same principle as makes the testimony of articles found or footprints observed at the place of the commission of a crime admissible as part of the *res gestae*.

In *Summers v. Commonwealth* (1930) 236 Ky 499, 33 SW2d 594, it was held that where defendant in a prosecution for homicide in the operation of an automobile testified that his car ran into a ditch and then, when he pulled it therefrom, swerved across the road, and he introduced proof to the effect that the track of his car in the ditch at the side of the road was there the next day after the accident, the trial court properly permitted certain witnesses to testify in rebuttal that the track in the ditch on the side of the road was made by the wrecking car which pulled defendant's car out.

The following additional authority is relevant to the issues discussed in this section:

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In manslaughter prosecution evidence of tire marks and tracks of defendant's automobile at the place of collision shortly preceding the collision causing death was admissible as circumstance bearing on guilt or innocence of defendant. *Gossett v State* (1961) 105 Ga App 17, 123 SE2d 322.

In negligent homicide prosecution, police officer's testimony that he observed skid marks on highway made by defendant's car was not objectionable as hearsay because officer did not see accident, where officer testified that defendant admitted that marks were made by his car. *State v Coleman* (1959) 236 La 629, 108 So 2d 534.

In manslaughter prosecution growing out of automobile accident, testimony concerning marks on highway immediately after collision was proper as evidence of course of travel of automobiles involved; state was not required to present affirmative evidence that marks were not there before accident. *State v Feger* (1960, Mo) 340 SW2d 716.

In prosecution for drunken driving, police officer's testimony as to skid marks was admissible as relevant to whether defendant was operating car carefully at time of accident. *State v Ryan* (1955, Mo) 275 SW2d 350.

In prosecution for reckless driving, court correctly admitted testimony of highway patrolman who investigated accident as to patrolman's opinion regarding point of collision, such opinion being based upon, inter alia, skid marks on road. *Long v State* (1954, Okla Crim) 274 P2d 553.

In action for negligent homicide in operation of automobile, testimony that 1/2 hour before accident defendant made such accelerated start that he left 10 feet of tire marks is admissible upon issue of his state of mind at time of accident. *State v Betts* (1963) 235 Or 127, 384 P2d 198, 7 ALR3d 1445.

See *State v Golub* (1976) 24 Or App 19, 544 P2d 609, infra § 23.

In manslaughter prosecution, testimony of police officer as to length and nature of skid marks was admissible where marks were sufficiently identified as made by defendant's car. *Commonwealth v Smith* (1955) 178 Pa Super 251, 115 A2d 782.

Trial court in prosecution for felony driving under influence properly admitted investigating officer's testimony based on gouge marks left by vehicle when it left roadway to strike and kill two pedestrians, where testimony was admitted to show that point of impact was off roadway. *State v Nathari* (1990, App) 303 SC 188, 399 SE2d 597.

In prosecution for negligent homicide by operation of car while under influence of alcohol, evidence as to skid marks indicating point and manner of collision in which defendant's car was involved was admissible. *State v McMurray* (1955) 47 Wash 2d 128, 286 P2d 684.

[\*20] To show location of vehicle in relation to center line of highway

Testimony as to the location of tire or skid marks is relevant with respect to the question whether a machine involved in a collision was on the proper side of the highway or the vehicular portion thereof at the time of the accident.

Thus, in *People v. Ryczek* (1923) 224 Mich 106, 194 NW 609, a prosecution for involuntary manslaughter, the court was of the opinion that there had been no such change in the locus in quo as to make inadmissible testimony of a sheriff as to tracks made by an automobile in the road near the place where the accident occurred, even though his observations were made twenty-four hours after the accident, where it appeared that the road was a dirt one, that the tracks made by the automobile were still plain, and that no other automobile had been over that part of the road, although there were some wagon tracks, the testimony indicating that the left wheel of the automobile was on the footpath, on which the injured person was walking, along the side of the vehicular portion of the road.

Also in *Lawrence v. Commonwealth* (1943) 181 Va 582, 26 SE2d 54, a prosecution for homicide arising out of a head-on collision of defendant's automobile, proceeding in an easterly direction, with that of one in which deceased was a passenger, and which was proceeding in a westerly direction, it was held that there was no error in admitting testimony of an engineer, who could not of his own knowledge have known that the skid mark in question was made by defendant's automobile, but who made an examination at the place of the accident two days after it occurred, and whose evidence was to the effect that he saw a skid mark, apparently made by defendant's automobile, which skid mark measured on a straight line parallel to the highway was eighty feet from the point of beginning to the place of accident, and began in the passing lane for eastbound traffic, crossed over the center line of the highway at an angle of about thirty degrees, and ran diagonally for fifty-four feet across the gravel to the point of impact with the car in which deceased was a passenger.

And in *People v. Richardson* (1938) 25 Cal App2d 408, 77 P2d 483, a prosecution for negligent homicide committed in connection with the operation of an automobile, photographs of tracks made by defendant's car when it went from its right to its left side of the highway were held material and competent, as tending to prove that the automobile of the defendant was driven from its right to its left side of the highway.

However, in *Commonwealth v. Reed* (1943) 152 Pa Super 249, 31 A2d 595, a prosecution for violation of a provision of the motor vehicle code requiring automobiles to be driven on the right-hand side of the road, in which defendant offered to prove by his wife, who came to the scene of the accident after it occurred, that certain marks on the highway led directly to the car with which her husband's car collided, but the witness herself testified that when she arrived at the scene of the accident, the other car was no longer there, it was held that she was incompetent to testify to where the marks led.

The following additional authority is relevant to the issues discussed in this section:

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See *Eidson v State* (1983) 167 Ga App 184, 305 SE2d 787, § 23.

See *State v Feger* (1960, Mo) 340 SW2d 716, supra § 19.

See *State v Poucher* (1957, Mo App) 303 SW2d 197, supra § 18.

See *State v McMurray* (1955) 47 Wash 2d 128, 286 P2d 684, supra § 19.

[\*21] To show speed of vehicle

Where there is a question, in a prosecution for involuntary homicide in the operation of a motor vehicle, whether the vehicle was, at the time of the accident, being operated at an unlawful rate of speed under the circumstances, it has been held that testimony as to tire or skid marks is admissible as being relevant on such point.

So, in *Commonwealth v. Klosek* (1928) 262 Mass 416, 160 NE 252, a prosecution for operating an automobile in a public street so as to endanger the lives and safety of the public, the court held competent testimony of a witness that he measured the brake marks of defendant's car on the road for 120 feet, that they extended about thirty feet from the blood spot in the road to the place where the car stopped, this evidence being competent in view of defendant's testimony that he stopped his car within two or three feet after he struck the child.

And in *Ronning v. State* (1924) 184 Wis 651, 200 NW 394, a prosecution of the driver of an automobile for feloniously killing another while driving at an unlawful speed, it was held proper to show the tracks the machine made when it swerved or slid, and the distance of such swerving and sliding.

In *State v. Ormond* (1937) 211 NC 437, 191 SE 22, a prosecution for homicide while unlawfully operating an automobile on the highway, the court held that it was proper, on the question of speed at the time of the collision, to consider skid marks.

And in *State v. Miller* (1926) 119 Or 409, 243 P 72, affd 273 US 657, 71 L ed 825, 47 S Ct 344, a prosecution for involuntary manslaughter in the operation of an automobile at a high and dangerous rate of speed causing the death of one walking on the highway, where objection was made to the testimony of a certain witness, who went to the scene of the accident the following morning, that he traced skid marks for a distance of approximately 230 feet on the pavement, and it appeared also that another witness was about 150 or 200 feet away at the time decedent was struck, and testified that he traced skid marks in question to the automobile in the ditch, and stated that there were no marks of this kind prior to the accident and that the marks leading to the automobile were discernible on the pavement for a period of ten days or two weeks, and it appeared that there was no substantial change in conditions, the court was of the opinion that this and other evidence of similiar import, to which objection was made, was admissible.

It was also held proper to admit in evidence for reference purposes a map upon which appeared skid marks, measuring approximately 230 feet in length and leading to where the automobiles stopped. Id.

The following additional authority is relevant to the issues discussed in this section:

&lt;&gt;

In collision case where object struck offers little or no resistance, nonobserver may testify as to speed of car on basis of skid marks, but police officer could not testify, in manslaughter prosecution, as to defendant's speed as indicated by skid marks and damage to vehicles which collided, where there was no predicate for officer's opinion. *Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319 (citing annotation).

In prosecution for speeding, skid marks may be taken into consideration to determine speed of automobile. *State v Daley* (1963) 2 Conn Cir 439, 200 A2d 849.

Police officer's testimony, based on his examination of skid marks, that defendant was traveling 45 miles an hour in 15-mile-an-hour school zone was admissible where officer's qualifications, including his training with accident investigation units and his study of books covering subject of estimating speed from skid marks, were fully explored during cross-examination. *Bell v District of Columbia* (1966, Dist Col App) 218 A2d 520.

See *People v Ebejer* (1976) 66 Mich App 333, 239 NW2d 604, infra § 23.

See *State v Poucher* (1957, Mo App) 303 SW2d 197, supra § 18.

Expert testimony as to speed of vehicle as indicated by skid marks was admissible *State v Bosch* (1952) 125 Mont 566, 242 P2d 477.

Extent of damage to automobile, skid marks, and distance automobile traveled after it left highway are relevant on question of speed in action for negligent homicide in operation of automobile. *State v Betts* (1963) 235 Or 127, 384 P2d 198, 7 ALR3d 1445.

Police officer's testimony as to speed as indicated by skid marks is admissible although officer did not see accident, where circumstantial evidence indicated marks made by defendant's car. *State v Read* (1952) 121 Utah 453, 243 P2d 439.

See *State v McMurray* (1955) 47 Wash 2d 128, 286 P2d 684, supra § 19.

See *Lee v State* (1976, Wyo) 556 P2d 217, infra § 23.

[\*22] To prove that defendant's vehicle was at scene of crime

In prosecutions for various crimes intentionally committed testimony or evidence that tire marks similar to those on defendant's car were observed at the scene of the crime has been held admissible for the purpose of connecting defendant with the crime.

## ALABAMA

*Blackmon v. State* (1945) 246 Ala 675, 22 So2d 29

*Adams v. State* (1947) 32 Ala App 626, 29 So 2d 148

*Williams v. State* (1949) 34 Ala App 253, 39 So2d 29, cert den 251 Ala 696, 39 So2d 39

## GEORGIA

*Cooper v. State* (1944) 197 Ga 611, 30 SE2d 177  
*Jackson v. State* (1936) 54 Ga App 413, 187 SE 893

## INDIANA

*Foreman v. State* (1938) 214 Ind 79, 14 NE2d 546

## KENTUCKY

*Schleeter v. Commonwealth* (1927) 218 Ky 72, 290 SW 1075  
*Collier v. Commonwealth* (1947) 303 Ky 670, 198 SW2d 974

## MISSOURI

*State v. Prunty* (1918) 276 Mo 359, 208 SW 91, followed in *State v. Funk* (1918, Mo) 208 SW 97  
*State v. Robinson* (1937, Mo) 106 SW2d 425

## NEBRASKA

*Watson v. State* (1942) 141 Neb 23, 2 NW2d 589

## OKLAHOMA

*Courtright v. State* (1944) 79 Okla Crim 270, 154 P2d 588

## SOUTH DAKOTA

*State v. Mehlhaff* (1947) 72 SD 17, 29 NW2d 78

## TEXAS

*Haley v. State* (1919) 84 Tex Crim 629, 209 SW 675, 3 ALR 779  
*Moses v. State* (1933) 124 Tex Crim 200, 61 SW2d 112  
*Hamilton v. State* (1936) 131 Tex Crim 88, 96 SW2d 983  
*Flippin v. State* (1940) 140 Tex Crim 615, 145 SW2d 1098  
*Lamar v. State* (1941) 141 Tex Crim 361, 149 SW2d 89

## WASHINGTON

*State v. Simons* (1933) 172 Wash 438, 20 P2d 844

Thus, in *Blackmon v. State* (1945) 246 Ala 675, 22 So2d 29, a prosecution for the murder of a police officer, the court

held admissible testimony of a sheriff to having seen, on the night of the homicide, tire tracks, two of which tracks indicated that two tires were irregular, one on the left back wheel and one on the right front wheel, having "the same print," the other two tires being regular, which tracks were found near the scene of the crime and also at defendant's house, and which "appeared to be the same car tracks," and corresponded with those of defendant's car, this evidence tending to corroborate the testimony of one jointly charged with the crime but who had turned state's evidence.

And in *Haley v. State* (1919) 84 Tex Crim 629, 209 SW 675, 3 ALR 779, a prosecution for murder, where there was testimony that defendant owned an automobile, one tire of which was smooth and another, on the other side, had a diamond tread, and that there were found on the ground a short distance from the scene of the homicide tracks made by an automobile with a smooth tire on one side and a diamond-tread tire on the other; there was evidence that on the night the homicide took place defendant was recognized while driving his car; the imprint made by the diamond-tread tire on the mud near the scene of the homicide was preserved and introduced in evidence; and a plaster cast of the tire on defendant's car was also made, and proof was introduced that the tread on his car and the impression on the mud were identical in size and shape, the court held that the fact that it was possible that the track might have been made prior to the homicide or by an automobile other than that of defendant would, under the circumstances, relate to the weight of the testimony, but would not be legal ground for its rejection.

Also, in *Adams v. State* (1947) 32 Ala App 626, 29 So2d 148, a prosecution for murder, it was held that there was no error in permitting a witness to testify that he observed only one set of car tracks in the road at the scene of the killing and that these tracks were in about the center of the road, it appearing that the witness arrived at the scene of the shooting shortly after it occurred. In the opinion of the court such testimony had relevant value when considered in relation to the location of the deceased's body, and, in a circumstantial way, contributed to the jury's determination of the position of the defendant and deceased at the time of the shooting, and tended to shed light thereon, although it appeared that a number of witnesses had visited the scene before the witness in question arrived there.

In *Williams v. State* (1949) 34 Ala App 253, 39 So2d 29, cert den 251 Ala 696, 39 So2d 39, a prosecution for voluntary homicide, it was held that permitting some of the state's witnesses to testify that they observed car tracks which led from one point to another did not constitute an infraction of the rule which provides that a witness may not testify to a conclusion.

And in *Cooper v. State* (1944) 197 Ga 611, 30 SE2d 177, a prosecution for murder, the court stated that it was proper to allow a witness to describe a tire print or track.

In *Collier v. Commonwealth* (1947) 303 Ky 670, 198 SW2d 974, a prosecution for armed robbery, testimony of a highway patrolman that the day following the robbery he saw automobile tracks near the point where the prosecuting witness testified the car in which defendants took him to the place of the robbery was stopped, which tracks were made by a car with "mud grip tires," such as those on the car of one of the defendants, was admissible as establishing a link in the circumstantial chain by proving that a car with tires similar to those on defendant's car had been at the scene of the robbery.

So too, in *State v. Prunty* (1918) 276 Mo 359, 208 SW 91, followed in *State v. Funk* (1918, Mo) 208 SW 97, a prosecution for breaking and entering a bank and taking money therefrom, evidence showing fresh car tracks in a field three-quarters of a mile distant from the bank, the morning after the burglary, which tracks resembled those of a car in which defendants were apprehended, some 150 miles from the place of the burglary, with the loot, was held admissible to show the criminals were trailed.

And in *Foreman v. State* (1938) 214 Ind 79, 14 NE2d 546, prosecution for automobile banditry (apparently use of an automobile in connection with a robbery), the court held that any fact that legitimately tended to connect defendant with the commission of the crime was admissible; thus, the finding of tracks leading from the scene of the attempted robbery, where defendant was shown to have been, to a place where there was evidence that a parked automobile had been

standing, was competent. The court in this connection stated that evidence that a strange automobile was in the vicinity at the time, and the unusual manner in which it was operated, corroborated the other circumstances, and failure to directly connect the defendant with the tracks or the automobile would affect merely the weight of the evidence and not its admissibility.

Also, in *Moses v. State* (1933) 124 Tex Crim 200, 61 SW2d 112, the court held admissible, in a prosecution for burglary, testimony describing automobile tracks, made after a light rain, and in close proximity to the burglarized premises, as well as testimony that automobile tracks having the same peculiarity were observed on the next day in a town other than that where the burglary was perpetrated, and that these tracks were followed to a car on the street which belonged to defendant and was found at his home a short time thereafter.

Similarly, in *Schleeter v. Commonwealth* (1927) 218 Ky 72, 290 SW 1075, in view of evidence that defendant used a Cadillac touring car in transporting whisky stolen from the burglarized house, the court held that it was competent to admit evidence that a large Cadillac, with tires having treads similar to the tracks of the car that carried the whisky from the burglarized home, was found at the home of defendant, it being a circumstance, though slight, tending to connect defendant with the commission of the offense charged.

And in *Courtright v. State* (1944) 79 Okla Crim 270, 154 P2d 588, a prosecution for larceny of cattle, the court held admissible evidence of motor truck tracks observed by witnesses at the place where a truck had apparently been backed up to the prosecuting witness' fence for loading the cattle, it appearing that the truck used in transporting the cattle was a six-wheeled truck, four wheels on the back and two on the front, and that the defendant owned just such a truck, and that the imprints of the tracks observed were similar to the peculiar markings on the tires of defendant's truck.

And in *Lamar v. State* (1941) 141 Tex Crim 361, 149 SW2d 89, a prosecution for rape, the court held that it was proper to permit a member of the state highway patrol to testify that he examined the tires on defendant's car and found that they made "the same kind of a track as the tracks" he found in the pasture where it was alleged the assault had been committed, and to testify further "that was the only car track out there in the pasture that I found."

So too, in *State v. Robinson* (1937, Mo) 106 SW2d 425, a prosecution for rape, where it appeared that defendant took the prosecutrix in an automobile from her home to a spot about two miles distant, where she claimed he raped her, the court held admissible testimony of police officers that the tire tracks observed at the place where prosecutrix claimed she entered defendant's car were of the same in size and character as those on defendant's car.

In *Flippin v. State* (1940) 140 Tex Crim 615, 145 SW2d 1098, a prosecution for theft, the court overruled an exception to testimony of a sheriff that he made a diagram of the tracks of a truck at the time they were found at the scene of the alleged theft and that such tracks were similar to the tires on defendant's truck, the court stating that the objection thereto went to the weight rather than to the admissibility of the testimony.

As to the admissibility of maps or diagrams in civil cases, see § 17, supra.

Also in *Watson v. State* (1942) 141 Neb 23, 2 NW2d 589, prosecution for breaking and entering a corncrib with intent to steal, the court held that there was no error in admitting in evidence both a plaster cast of tire tracks found in a field between the corncrib and the road, the rear tires of defendant's truck having peculiar wear marks and treads similar to those found in the track at the scene of the crime, the court thus rejecting defendant's contention that such evidence was admissible only upon a showing that the truck was in the vicinity of the crib on the night in question and upon a showing as to how much the tires had been worn between August 22, the date of the crime, and August 27, apparently the date on which the casts were taken, it appearing that the witnesses identified the exhibits but expressed no opinion as to the conclusions to be drawn therefrom, and the comparison of the tires and the cast was left for the jury and they reached their own conclusion thereon, having had the benefit of defendant's testimony as to the amount of wear the tires had had in the five-day period between August 22 and August 27.

Likewise, in *Jackson v. State* (1936) 54 Ga App 413, 187 SE 893, a prosecution for burglary, where the evidence disclosed that a storehouse had been broken into and a quantity of sugar feloniously taken, the court held that evidence of tire tracks, identifiable because of certain peculiarities, as having been made by the automobile of one of the defendants, which tracks led away from the scene of the crime to the spot where the stolen property had been concealed, was competent to show defendant's guilt of the crime charged.

And in *State v. Mehlhaff* (1947) 72 SD 17, 29 NW2d 78, a prosecution for larceny of barley, the court, after stating that evidence relating to the identity of defendant as the person who committed the crime charged is permitted to take a broad range, held admissible testimony of the person from whom the grain was stolen, that tracks made by a car and trailer were found the next morning by the witness upon the ground where the larceny was committed and were traced by him into defendant's farmyard, the court holding such evidence admissible as a circumstance tending in some degree to connect defendant with the offense regardless of any ascertained or determined similarity between the tracks traced by the witness and tracks made by defendant's car and trailer.

In *Hamilton v. State* (1936) 131 Tex Crim 88, 96 SW2d 983, a prosecution for the theft of grain from a granary, the court stated that the fact that the tracks of the truck at the granary and the casings on defendant's truck corresponded in a general way was a circumstance to be considered by the jury, but that in its judgment such evidence was without much probative force.

Also recognizing that testimony or evidence that tire marks similar to those on defendant's car were observed at scene of crime is admissible for purpose of connecting defendant with crime:

#### ALABAMA

*Spellman v State* (1986, Ala Crim App) 500 So 2d 110

#### VIRGINIA

*Claud v Commonwealth* (1977) 217 Va 794, 232 SE2d 790

The following additional authority is relevant to the issues discussed in this section:

<>

In burglary case, trial court did not err in admitting black and white photographs of tire marks found at scene of burglary, where similar color picture had been received without objection, and where only argument was that black and white photograph was without probative value. *Wyss v State* (1977) 262 Ark 502, 558 SW2d 141.

Trial court did not err in permitting police officers to describe similarity between front tires on defendant's vehicle and tracks made near scene of burglary where vehicle had different and distinctive types of tread on two front tires. *Holmes v State* (1975) 257 Ark 871, 520 SW2d 715.

In grand larceny prosecution, nonexpert testimony of police officers that tire tracks at scene of crime were similar to those made by defendant's car was admissible. *Richardson v State* (1953) 221 Ark 567, 254 SW2d 448.

See *Sanders v State* (1975) 235 Ga 425, 219 SE2d 768, cert den 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 and

(superseded by statute as stated in *Godfrey v Francis*, 251 Ga 652, 308 SE2d 806, cert den 466 US 945, 80 L Ed 2d 475, 104 S Ct 1930, reh den 467 US 1231, 81 L Ed 2d 885, 104 S Ct 2691, habeas corpus proceeding (ND Ga) 613 F Supp 747, affd (CA11 Ga) 836 F2d 1557, reh den, en banc (CA11 Ga) 842 F2d 339 and cert dismd 487 US 1264, 101 L Ed 2d 977, 109 S Ct 27), infra § 23.

In kidnapping and rape case, opinion of investigating officer that tire tracks at scene of rape appeared to have been made by defendant's vehicle was admissible, where officer gave facts on which his opinion was based. *Calloway v State* (1978) 144 Ga App 457, 241 SE2d 575.

Pictures of automobile tracks found at point of alleged rape were held admissible where sufficient similarity between such tracks and tires of automobile allegedly used by defendant was shown. *State v Puckett* (1965) 88 Idaho 546, 401 P2d 784.

Testimony that tire marks similar to those made by accused's car were seen at scene of crime does not conclusively show accused's connection with crime, but is link in circumstantial chain. *Hocker v O'Klock* (1959) 16 Ill 2d 414, 158 NE2d 7 (citing annotation).

In prosecution for rape, criminal deviate conduct and criminal confinement, trial court did not abuse its discretion in determining that police officer was expert witness as to his testimony comparing plaster casts of tire print taken from scene with tire removed from defendant's automobile where officer testified that he worked in trace evidence section of police department and had taken special courses and training in microscopy; exhibits consisting of photograph of tire print or track found at scene, plaster cast of tire track and tire removed from defendant's automobile were relevant to corroborate testimony of prosecutrix and accomplice about what had occurred at abduction. *Forrester v State* (1982, Ind) 440 NE2d 475.

Plaster-of-Paris cast of tire tracks and shoe prints, made at scene of crime by deputy sheriff, and expert testimony of person from state crime laboratory that tire tracks at scene represented by plaster cast matched automobile tires of deceased and those of truck owned by defendant in criminal prosecution, were admissible over objection that deputy sheriff was unqualified by training or experience to make cast, where deputy had received training in making casts at law enforcement school at *Louisiana State University*. *State v Washington* (1970) 256 La 233, 236 So 2d 23.

Nonexpert may testify that tire marks on road were those of defendant's automobile, his statement being one of fact and not expression of opinion. *State v Scott* (1952) 221 La 643, 60 So 2d 71.

In murder prosecution, objection, on ground of its indefiniteness, to testimony of police officer as to marks corresponding to those made by accused's tires went to weight, not admissibility, of evidence. *Breeding v State* (1959) 220 Md 193, 151 A2d 743 (citing annotation).

In action for theft of livestock, trial court erred in permitting sheriff to testify that tires on defendant's truck would have made the tracks found at scene of crime; sheriff should have described in detail the tracks and left it for jury to decide whether or not car in question made them. *Joyce v State* (1956) 227 Miss 854, 87 So 2d 92.

See *State v Morse* (1976, Mo App) 542 SW2d 365, infra § 23.

Testimony of deputy sheriff, in grand larceny prosecution, relating to tire imprints was admissible where deputy sheriff gave opinion that imprints found were similar to those made by pickup truck operated by defendant. *State v Schumacher* (1969) 184 Neb 653, 171 NW2d 181.

See *State v Monk* (1976) 291 NC 37, 229 SE2d 163, infra § 23.

Use of cast made of automobile tracks at place in highway where dead body was found was competent to identify such tracks as having been made by defendant's automobile, discrepancies existing as to dates on which comparisons were made went to weight of evidence and not competency thereof. *State v Willis* (1972) 281 NC 558, 189 SE2d 190.

Where plaster cast was made of tire marks at scene of homicide and compared with tires on car which defendant admitted he was using, testimony of deputy sheriff concerning comparison of tire tracks was admissible. *State v Williams* (1970) 276 NC 703, 174 SE2d 503, rev'd on other grounds 403 US 948, 29 L Ed 2d 860, 91 S Ct 2290, on remand 279 NC 388, 183 SE2d 106 and (ovrld in part by *State v Taylor*, 337 NC 597, 447 SE2d 360), 403 US 948, 29 L Ed 2d 860, 91 S Ct 2290, on remand 279 NC 388, 183 SE2d 106.

In prosecution for murder, evidence of tire tracks which were found at scene of alleged crime and which corresponded to tires on defendant's automobile was properly admitted in evidence. *State v Brown* (1965) 263 NC 327, 139 SE2d 609, appeal after remand 271 NC 250, 156 SE2d 272.

In robbery, kidnapping, and assault prosecution, where tires removed from defendant's vehicle were in evidence, admission of plaster casts of tire prints found in clay soil at scene of crime did not constitute error. *State v Thompson* (1972) 15 NC App 416, 190 SE2d 355, cert den 282 NC 307, 192 SE2d 197.

There was no error in admitting evidence of plaster cast and photographs of tire tracks made by identification specialist few hours after crime had been committed, where obtained from fresh tire tracks found in alleyway behind building which had been broken into and from which safe had been stolen, and there was evidence that tire tracks from which cast was made corresponded in number of respects with tread on tires found on defendant's car when it was impounded on same night crime was committed. *State v Walker* (1969) 6 NC App 447, 170 SE2d 627 (ovrld in part by *State v Jackson*, 302 NC 101, 273 SE2d 666).

Where foundation presented reasonable inference that tire track was made by car used in committing larceny, photograph of track and photographs of tread pattern of tires on defendants' automobile at time of their arrest were admissible in larceny prosecution. *State v Jager* (1957, ND) 85 NW2d 240, later proceeding (ND) 87 NW2d 58, later proceeding (ND) 91 NW2d 337.

Court in prosecution for arson did not abuse its discretion in permitting sheriff to testify that tire tracks found 200 or 300 feet from destroyed property were similar to tires found on accused's truck, even though sheriff also testified that tires on accused's truck were standard make, that any other tire from same mold would have made same impression, and that he was not stating that track was in fact made by tire on accused's truck. *Case v State* (1976, Okla Crim) 555 P2d 619, cert den 431 US 965, 53 L Ed 2d 1061, 97 S Ct 2922.

In prosecution for larceny of livestock, testimony of sheriff relating to comparison of tire marks of truck found at scene of crime with tires on truck owned by defendant's father, which was introduced to prove identity of truck used in commission of crime, held admissible as descriptive statement of fact made from personal observation. *Allcorn v State* (1964, Okla Crim) 392 P2d 66.

In manslaughter prosecution, police officer's testimony as to defendant's speed as shown by skid marks was admissible, notwithstanding testimony by defendant's expert that, under conditions presented, no one could estimate speed at time of accident. *Wallen v State* (1959, Okla Crim) 338 P2d 170.

In murder prosecution, admission of photographs of tire marks at place where deceased was found was not error. *State v Goyet* (1957) 120 Vt 12, 132 A2d 623.

The solution of the question as to what testimony relating to tire marks is inadmissible as the expression of an opinion by a nonexpert witness is difficult, if not impossible, of generalization, and recourse must be had to the individual cases.

Although a witness may properly be allowed to describe a tire print he should not be allowed to give his opinion as to how long it had been there. *Cooper v. State* (1944) 197 Ga 611, 30 SE2d 177.

And in *State v. Hinesh* (1930) 59 ND 29, 228 NW 453, a prosecution for the larceny of grain, where there was evidence that automobile tire tracks conforming to the peculiar description of those on defendant's car were found on the morning after the theft leading to and from the prosecuting witness' granary, it was held that an objection was properly sustained to the question, "What kind of tread did the Goodyear tire have with reference to the kind of treads testified to as being found on the highway?", on the ground that it called for the conclusion of the witness, the court pointing out that in any event the witness was permitted to and did fully describe the tire referred to.

Also, in *Wallace v. State* (1942) 143 Tex Crim 596, 160 SW2d 256, a prosecution for homicide resulting from operation of an automobile which collided with a car in which decedent was riding, where the experience detailed to qualify a witness to give his conclusion, in answer to a hypothetical question, that defendant's car, which he observed at the scene of the wreck, together with the charred remains of the other car, was being driven at a speed between seventy-five and eighty miles per hour, was, chiefly, that he had been a highway patrolman for three and a half years, and had observed wrecks and the speed of automobiles and he testified that he observed marks on the highway, indicating that a tire had skidded there, but nothing was related to show, and it was not revealed, just how these marks aided his conclusion, and he further testified that skid marks went to both cars, and that he had driven an automobile for fifteen years, during which time he had observed quite a few wrecks, the speed of automobiles, and had made special study to determine the speed and the causes of wrecks and accidents, and to some extent, which he did not specify, had studied the impact of automobiles, the court held that under the facts testified to by the witness, under all the circumstances of this case, he had not shown himself to be in position to reach a conclusion as to the speed of defendant's car so definitely as to aid the jury beyond what the physical facts of the case, most of which appeared to be without dispute, would do; and the conviction was reversed.

The use of tire marks of a skidding automobile as the basis for expert testimony is well recognized. *State v. Lingman* (1939) 97 Utah 180, 91 P2d 457 (prosecution for involuntary manslaughter based on an automobile collision). The purpose of the testimony in this case was to determine the speed of the automobile, and was based on information given with respect to such marks.

The following additional authority is relevant to the issues discussed in this section:

◇

See *State v Farris* (1982, Mo) App) 639 SW2d 279, § 22.

Court properly permitted sheriff to give expert opinion as to comparison of tire tracks found in driveway of murder victim's home with tire tracks made by car driven by accused, where sheriff had 18 years of experience in tire recapping business. *Sanders v State* (1975) 235 Ga 425, 219 SE2d 768, cert den 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 and (superseded by statute as stated in *Godfrey v Francis*, 251 Ga 652, 308 SE2d 806, cert den 466 US 945, 80 L Ed 2d 475, 104 S Ct 1930, reh den 467 US 1231, 81 L Ed 2d 885, 104 S Ct 2691, habeas corpus proceeding (ND Ga) 613 F Supp 747, affd (CA11 Ga) 836 F2d 1557, reh den, en banc (CA11 Ga) 842 F2d 339 and cert dismd 487 US 1264, 101 L Ed 2d 977, 109 S Ct 27).

In prosecution for vehicular homicide, trial court properly admitted testimony of retired police officer and investigating patrolman, who examined tire tracks found on shoulder of wrong side of road and on pavement, that tire marks were

made by defendant's automobile, since both witnesses had seen automobile and tracks, and proper foundation thus had been laid from which witnesses could conclude that defendant's automobile had made tire tracks. *Eidson v State* (1983) 167 Ga App 184, 305 SE2d 787.

See *Calloway v State* (1978) 144 Ga App 457, 241 SE2d 575, § 22.

In manslaughter case, highway patrolman who has observed speeds of automobiles may base opinion as to speed of defendant's automobile at time of collision which caused death upon distance as indicated by marks on road and extent of damage. *Collins v State* (1952) 86 Ga App 157, 71 SE2d 99.

See *Forrester v State* (1982, Ind) 440 NE2d 475, § 22.

See *State v Scott* (1952) 221 La 643, 60 So 2d 71, supra § 22.

In prosecution for manslaughter wherein defendant alleged he had been driving motorcycle at low rate of speed immediately prior to colliding with two other vehicles, court properly permitted police officer to give opinion as to speed of motorcycle, where opinion was based in large part upon skid marks made by motorcycle and parked vehicle that had been moved by impact. *People v Ebejer* (1976) 66 Mich App 333, 239 NW2d 604.

In rape prosecution even if proper foundation was not laid for deputy's testimony that tire tracks made at crime scene were those of pickup truck, no manifest error occurred where on cross-examination defense counsel elicited deputy's testimony which demonstrated his qualifications to express his opinion as to origin of tire tracks and basis on which he formed that opinion. *State v Farris* (1982, Mo App) 639 SW2d 279.

Court in prosecution for burglary and stealing properly permitted highway patrol officer to give his opinion that tire tracks in photograph taken by him at scene of burglary were made by tires on accused's truck, where officer had 13 years of experience in taking pictures of tire tracks and comparing them to various tires. *State v Morse* (1976, Mo App) 542 SW2d 365.

Court in prosecution for armed robbery and murder properly permitted latent identification expert to testify that he had compared plaster cast of tire print made adjacent to scene of crime with tire taken from accused's automobile and that in his opinion, tire was same one that made imprint from which plaster cast was taken, where expert had over ten years of experience in tire print identification and analysis. *State v Monk* (1976) 291 NC 37, 229 SE2d 163.

See *Case v State* (1976, Okla Crim) 555 P2d 619, cert den 431 US 965, 53 L Ed 2d 1061, 97 S Ct 2922, supra § 22.

In prosecution for criminally negligent homicide arising out of intersection accident, investigating officer could express his opinion, based on his observation of skid marks, as to acceleration and deceleration of accused's vehicle. *State v Golub* (1976) 24 Or App 19, 544 P2d 609.

Court in prosecution for negligence homicide did not abuse its discretion in admitting police officer's testimony that tire marks left by accused's vehicle in his lane of travel were acceleration marks and not brake marks, where officer had observed accident scene shortly after occurrence of accident and had assisted in making measurements upon which diagram of accident was based and where officer's training in accident investigation at police academy had included instruction concerning rubber marks left on street as result of accident between motor vehicles. *Lee v State* (1976, Wyo) 556 P2d 217.

## FOOTNOTES

n1 Opinion evidence as to speed of automobile or motorcycle, 70 A.L.R. 540, supplemented in 94 A.L.R. 1190. Admissibility of posed photograph based on recollection of position of persons or movable objects, 19 A.L.R.2d 877. Use of photograph, plan, map, cast, model, etc., as evidence as affected by marking or legends thereon, 108 A.L.R. 1415.

## JURISDICTIONAL TABLE OF STATUTES AND CASES (Go to beginning)

### JURISDICTIONAL TABLE OF STATUTES AND CASES

#### SUPREME COURT

*American Film Co. v. Moyer* (1920, CA9th Cal) 267 F 419  
*Clifton v Mangum* (1966, CA10 NM) 366 F2d 250  
*Een v Consolidated Freightways* (1955, CA8 ND) 220 F2d 82  
*Kelly v United States* (1955, DC Fla) 127 F Supp 201 (by implication)  
*Logsdon v Baker* (1973, DC Dist Col) 366 F Supp 332, vacated 170 US App DC 360, 517 F2d 174, vacated on other grounds 170 App DC 360, 517 F2d 174  
*Patterson v. United States* (1933, CA10th Kan) 62 F2d 968

#### ALABAMA

*Adams v. State* (1947) 32 Ala App 626, 29 So 2d 148  
*Adams v. State* (1947) 32 Ala App 626, 29 So2d 148  
*Alaga Coach Line v. McCarroll* (1933) 227 Ala 686, 151 So 834, 92 ALR 470  
*Bains Motor Co. v. Le Croy* (1923) 209 Ala 345, 96 So 483  
*Blackmon v. State* (1945) 246 Ala 675, 22 So2d 29  
*Gills v. State* (1950) 35 Ala App 119, 45 So2d 44, cert den 253 Ala 283, 45 So2d 51  
*Hodges v. Wells* (1932) 226 Ala 558, 147 So 672  
*Huguley v State* (1957) 39 Ala App 104, 96 So 2d 315, cert den 266 Ala 697, 96 So 2d 319 (citing annotation)  
*Jackson v. Vaughn* (1920) 204 Ala 543, 86 So 469  
*McPherson v. Martin* (1937) 234 Ala 244, 174 So 791  
*McWhorter Transfer Co. v. Peek* (1936) 232 Ala 143, 167 So 291  
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*Stanley v Hayes* (1964) 276 Ala 532, 165 So 2d 84  
*Williams v. State* (1949) 34 Ala App 253, 39 So2d 29, cert den 251 Ala 696, 39 So2d 39

#### ARIZONA

*Anglin v Nichols* (1956) 80 Ariz 346, 297 P2d 932 (admissibility assumed)  
*Mattingly v Eisenberg* (1955) 79 Ariz 135, 285 P2d 174

#### ARKANSAS

*Cahill v. Bradford* (1926) 172 Ark 69, 287 SW 595  
*Nelson v Busby* (1969) 246 Ark 247, 437 SW2d 799  
*Reynolds v. Nutt* (1950) 217 Ark 543, 230 SW2d 949

#### CALIFORNIA

*Bell v Myrtle* (1959, *Mun Ct App Dist Col*) 153 A2d 313 (citing annotation)  
*Bowker v. Illinois Electric Co.* (1931) 112 Cal App 740, 297 P 615  
*Butticci v Schindel Furniture Co.* (1957, 1st Dist) 152 Cal App 2d 165, 313 P2d 62  
*Chadek v Spira* (1956, 2nd Dist) 146 Cal App 2d 360, 303 P2d 879 (recognizing rule)  
*Douglass v. Crabtree* (1943) 57 Cal App2d 568, 134 P2d 912  
*Flach v. Fikes* (1928) 204 Cal 329, 207 P 1079  
*Fong Lin v. Probert* (1920) 50 Cal App 339, 195 P 437  
*Hayes v. Emerson* (1930) 110 Cal App 470, 294 P 765  
*Hoffman v Slocum* (1963, 2nd Dist) 219 Cal App 2d 100, 32 Cal Rptr 635  
*Hughes v. Hartman* (1929) 206 Cal 199, 273 P 560  
*Hughes v. Hartman* (1929) 206 Cal 199, 273, P 560  
*Jobe v Harold Livestock Com. Co.* (1952) 113 Cal App 2d 269, 247 P2d 951  
*Linde v. Emmick* (1936) 16 Cal App2d 676, 61 P2d 338  
*Lynch v Birdwell* (1955) 44 Cal 2d 839, 285 P2d 919  
*Meier v. Wagner* (1915) 27 Cal App 579, 150 P 797  
*Miller v. Silvester* (1934) 140 Cal App 345, 35 P2d 387  
*People v. Richardson* (1938) 25 Cal App2d 408, 77 P2d 483  
*Powley v Appleby* (1957, Cal App) 314 P2d 761, subsequent op on reh (2nd Dist) 155 Cal App 2d 727, 318 P2d 712, subsequent op on reh 155 Cal App 2d 727, 318 P2d 712 (by implication)  
*Stafford v Alexander* (1960, 2nd Dist) 182 Cal App 2d 301, 6 Cal Rptr 219  
*Ungefug v D'Ambrosia* (1967, 4th Dist) 250 Cal App 2d 61, 58 Cal Rptr 223, infra § 15  
*Vedder v. Bireley* (1928) 92 Cal App 52, 267 P 724

#### COLORADO

*Ferguson v Hurford* (1955) 132 Colo 507, 290 P2d 229 (superseded by statute as stated in *Public Service Co. v Board of Water Works* (Colo) 831 P2d 470) (citing annotation)

#### CONNECTICUT

*Engelke v Wheatley* (1961) 148 Conn 398, 171 A2d 402  
*Tomasko v. Raucci* (1931) 113 Conn 274, 155 A 64

#### FLORIDA

*Kerr v Caraway* (1955, Fla) 78 So 2d 571 (superseded by statute as stated in *Beltran v Waste Management, Inc.* (Fla App D3) 414 So 2d 1145, petition den (Fla) 427 So 2d 738)  
*Stanley v. Powers* (1936) 125 Fla 322, 169 So 861

#### GEORGIA

*Cooper v. State* (1944) 197 Ga 611, 30 SE2d 177  
*Firestone Tire & Rubber Co. v King* (1978) 145 Ga App 840, 244 SE2d 905  
*Jackson v. State* (1936) 54 Ga App 413, 187 SE 893

#### IDAHO

*Hayward v Yost* (1952) 72 Idaho 415, 242 P2d 971  
*McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787  
*McKee v Chase* (1953) 73 Idaho 491, 253 P2d 787 (citing annotation)

## ILLINOIS

*Day v Ukena* (1953) 351 Ill App 26, 113 NE2d 574  
*Fannon v. Morton* (1923) 228 Ill App 415  
*Hann v. Brooks* (1947) 331 Ill App 535, 73 NE2d 624

## INDIANA

*Buddenberg v. Morgan* (1941) 110 Ind App 609, 38 NE2d 287  
*Foreman v. State* (1938) 214 Ind 79, 14 NE2d 546  
*Grossnickle v. Avery* (1926) 96 Ind App 479, 152 NE 288, reh den 154 NE 395  
*Haven v. Snyder* (1931) 93 Ind App 54, 176 NE 149  
*Samuel-Hawkins Music Co. v Ashby* (1965) 246 Ind 309, 205 NE2d 679  
*Sili v Vinnedge* (1979) 181 Ind App 658, 393 NE2d 251  
*Smith v. Keyes* (1937) 103 Ind App 487, 9 NE2d 119  
*Taylor v Fitzpatrick* (1956) 235 Ind 238, 132 NE2d 919 (by implication)

## IOWA

*Baker v. Zimmerman* (1917) 179 Iowa 272, 161 NW 479  
*Brady v. McQuown* (1949) 241 Iowa 34, 40 NW2d 25  
*Brower v Quick* (1958) 249 Iowa 569, 88 NW2d 120 (citing annotation)  
*Hackman v Beckwith* (1954) 245 Iowa 791, 64 NW2d 275  
*Hackman v Beckwith* (1954) 245 Iowa 791, 64 NW2d 275 (by implication)  
*Hamdorf v Corrie* (1960) 251 Iowa 896, 101 NW2d 836  
*Harness v. Tehel* (1935) 221 Iowa 403, 263 NW 843  
*McKeever v. Batcheler* (1934) 219 Iowa 93, 257 NW 567  
*Nelson v. Hedin* (1918) 184 Iowa 657, 169 NW 37  
*Smith v Darling & Co.* (1952) 244 Iowa 133, 56 NW2d 47  
*Soreide v Vilas & Co.* (1956) 247 Iowa 1139, 78 NW2d 41 (citing annotation)  
*State v McCarty* (1970, Iowa) 179 NW2d 548  
*Stutzman v. Younkerman* (1927) 204 Iowa 1162, 216 NW 627  
*Thornbury v. Maley* (1951) -- Iowa -- , 45 NW2d 576  
*Ward v. Zerzanek* (1940) 227 Iowa 918, 289 NW 443  
*Weilbrenner v Owens* (1955) 246 Iowa 580, 68 NW2d 293

## KANSAS

*Briley v. Nussbaum* (1927) 122 Kan 438, 252 P 223, mod on other grounds 123 Kan 58, 254 P 351  
*Foreman v Heinz* (1959) 185 Kan 715, 347 P2d 451 (citing annotation)  
*Thomas v. Meyer* (1939) 150 Kan 587, 95 P2d 267

## KENTUCKY

*Adrian v. McGillivray* (1951) -- Ky -- , 243 SW2d 895  
*Bohn v. Sams* (1946) 302 Ky 63, 193 SW2d 459  
*Bybee Bros. v. Imes* (1941) 288 Ky 1, 155 SW2d 492  
*Collier v. Commonwealth* (1947) 303 Ky 670, 198 SW2d 974  
*Conley v. Jennings* (1944) 296 Ky 652, 178 SW2d 185, 19 NCCA NS 228

*Lever Bros. Co. v. Stapleton* (1950) 313 Ky 837, 233 SW2d 1002  
*Ryan v Payne* (1969, Ky) 442 SW2d 592 (citing annotation)  
*Ryan v Payne* (1969, Ky) 446 SW2d 273 (citing annotation)  
*Schleeter v. Commonwealth* (1927) 218 Ky 72, 290 SW 1075  
*Shewmaker v Richeson* (1961, Ky) 344 SW2d 802  
*Square Deal Cartage Co. v. Smith's Admr.* (1948) 307 Ky 135, 210 SW2d 340  
*Stewart v Commonwealth* (1972, Ky) 479 SW2d 23  
*Summers v. Commonwealth* (1930) 236 Ky 499, 33 SW2d 594  
*Vanhook v Stanford-Lincoln County Rescue Squad, Inc.* (1984, Ky App) 678 SW2d 797  
*Whitehead v. Stith* (1939) 279 Ky 556, 131 SW2d 455

## MAINE

*Nutting v Wing* (1956) 151 Me 435, 120 A2d 563 (by implication)

## MARYLAND

*Cumberland & W. Transit Co. v. Metz* (1930) 158 Md 424, 149 A 4, reh den 158 Md 455, 149 A 565, app dismd  
*American Oil Co. v. Metz*, 282 US 801, 75 L ed 720, 51 S Ct 40  
*Finney v. Frevel* (1944) 183 Md 355, 37 A2d 923  
*Fowler v Smith* (1965) 240 Md 240, 213 A2d 549 (citing annotation)  
*Gloyd v. Wills* (1942) 180 Md 161, 23 A2d 665  
*Miller v. Graff* (1951) -- Md --, 78 A2d 220  
*Opecello v. Meads* (1926) 152 Md 29, 135 A 488, 50 ALR 1385  
*Sheer v. Rathje* (1938) 174 Md 79, 197 A 613  
*Williams v. Graff* (1950) -- Md --, 71 A2d 450, 23 ALR2d 106

## MASSACHUSETTS

*Commonwealth v Kater* (1983) 388 Mass 519, 447 NE2d 1190, appeal after remand 394 Mass 531, 476 NE2d 593, appeal after remand 409 Mass 433, 567 NE2d 885, appeal after remand 412 Mass 800, 592 NE2d 1328, subsequent civil proceeding 421 Mass 17, 653 NE2d 576  
*Commonwealth v. Klosek* (1928) 262 Mass 416, 160 NE 252  
*Mernagh v. Lillie* (1942) 312 Mass 697, 45 NE2d 473

## MICHIGAN

*Anderson v. Lynch* (1925) 232 Mich 276, 205 NW 134  
*Brummitt v Chaney* (1969) 18 Mich App 59, 170 NW2d 481  
*LaFave v Kroger Co.* (1966) 5 Mich App 446, 146 NW2d 850  
*Pearce v. Rodell* (1937) 283 Mich 19, 276 NW 883  
*People v. Ryczek* (1923) 224 Mich 106, 194 NW 609  
*Snyder v New York Cent. Transport Co.* (1966) 4 Mich App 38, 143 NW2d 791 (by implication; citing annotation)  
*Wallace v. Kramer* (1941) 296 Mich 680, 296 NW 838  
*Wilhelm v Skiffington* (1960) 360 Mich 348, 103 NW2d 451 (holding mark sufficiently identified as made by car involved in accident which was subject of litigation)

## MINNESOTA

*Grapentin v Harvey* (1962) 262 Minn 222, 114 NW2d 578 (citing annotation)

*Kouri v. Olson-Keogh Produce Co.* (1934) 191 Minn 101, 253 NW 98  
*Lestico v. Kuehner* (1938) 204 Minn 125, 283 NW 122  
*Raths v. Sherwood* (1935) 195 Minn 225, 262 NW 563, 38 NCCA 579  
*Romann v. Bender* (1934) 190 Minn 419, 252 NW 80, 34 NCCA 419

#### MISSISSIPPI

*Arnold v Reece* (1957) 229 Miss 862, 92 So 2d 237, *infra* § 11  
*Flora v Fewell* (1961) 241 Miss 345, 131 So 2d 187  
*Wallace v. Billups* (1948) 203 Miss 853, 33 So2d 819

#### MISSOURI

*Bear v. Devore* (1944, Mo App) 176 SW2d 862  
*Clark v. Reising* (1937) 341 Mo 282, 107 SW2d 33  
*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260 (citing annotation)  
*Dillenschneider v Campbell* (1961, Mo App) 350 SW2d 260 (recognizing rule; citing annotation)  
*Edwards v Rudowicz* (1963, Mo App) 368 SW2d 503  
*Kitchen v Pratt* (1959, Mo App) 324 SW2d 144 (by implication)  
*State v. Prunty* (1918) 276 Mo 359, 208 SW 91, followed in *State v. Funk* (1918, Mo) 208 SW 97  
*State v. Robinson* (1937, Mo) 106 SW2d 425  
*Troxell v. De Shon* (1925, Mo App) 279 SW 438  
*Wolfe v Harms* (1967, Mo) 413 SW2d 204  
*Young v. Bacon* (1916, Mo App) 183 SW 1079

#### NEBRASKA

*Brugh v Peterson* (1968) 183 Neb 190, 159 NW2d 321, 29 ALR3d 236  
*Cox v Babington* (1958) 166 Neb 609, 90 NW2d 64  
*Danner v. Walters* (1951) 154 Neb 506, 48 NW2d 635  
*Egenberger v National Alfalfa Dehydrating & Milling Co.* (1957) 164 Neb 704, 83 NW2d 523 (superseded by statute as stated in *Kennedy v Kennedy*, 221 Neb 724, 380 NW2d 300) (recognizing rule)  
*Ficke v. Gibson* (1950) 153 Neb 478, 45 NW2d 436  
*Flory v Holtz* (1964) 176 Neb 531, 126 NW2d 686  
*Koutsky v. Grabowski* (1948) 150 Neb 508, 34 NW2d 893  
*McKinney v. Wintersteen* (1932) 122 Neb 679, 241 NW 112  
*Nisi v Checker Cab Co.* (1961) 171 Neb 49, 105 NW2d 523  
*Shields v Buffalo County* (1955) 161 Neb 34, 71 NW2d 701 (recognizing rule)  
*State v Rotella* (1976) 196 Neb 741, 246 NW2d 74  
*Tate v Borgman* (1958) 167 Neb 299, 92 NW2d 697  
*Watson v. State* (1942) 141 Neb 23, 2 NW2d 589

#### NEW HAMPSHIRE

*Abbott v. Hayes* (1942) 92 NH 126, 26 A2d 842

#### NEW JERSEY

*Di Nizio v Burzynski* (1963) 81 NJ Super 267, 195 A2d 470  
*State v. Weiner* (1925) 101 NJL 46, 127 A 582

*Tischler v. Steinholtz* (1923) 99 NJL 149, 122 A 880

#### NEW MEXICO

*Alford v Drum* (1961) 68 NM 298, 361 P2d 451

*Hanberry v Fitzgerald* (1963) 72 NM 383, 384 P2d 256

*Padgett v Buxton-Smith Mercantile Co.* (1958, CA10 NM) 262 F2d 39 (citing annotation; applying NM law)

#### NEW YORK

*Boyer v. Scripser* (1951) 278 App Div 601, 102 NYS2d 2

*Coffin v Cunningham* (1960, 4th Dept) 11 App Div 2d 1082, 206 NYS2d 353

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#### NORTH CAROLINA

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#### OREGON

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*Walling v. Van Pelt* (1930) 132 Or 243, 285 P 262  
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## VERMONT

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## VIRGINIA

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*Still v. Swanson* (1933) 175 Wash 553, 27 P2d 704  
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## WISCONSIN

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*Ronning v. State* (1924) 184 Wis 651, 200 NW 394

## INDEX OF TERMS (Go to beginning)

- Accident insurance policy, admissibility in action on, . § 13
- Arterial highway, significance of fact that accident occurred on, . § 5
- Attorney, admissibility of drawing made by, to illustrate testimony of witness under examination, . § 17
- Automobile banditry, admissibility in prosecution for, . § 22
- Bicycle, accident involving motor vehicle striking, . §§ 15, 17
- Blood spots, significance of fact that tire marks were located near, . §§ 3, 8
- Blowout of tire, accidents involving, . § 7
- Brakes --
  - admissibility to show point of application of, . §§ 5, 10, 13
  - working order, admissibility to show whether brakes were in, . § 16
- Breaking and entering, admissibility in prosecutions for, . § 22
- Buggy, testimony as to marks of, . § 3
- Burglary, admissibility in prosecutions for, . § 22
- Bus, admissibility of marks of, . §§ 5, 8, 19
- Cattle, admissibility in prosecution for larceny of, . § 22
- Center line of highway, admissibility to show vehicle's location with respect to, . §§ 8, 11, 16, 17, 20
- City. Municipal corporation, *infra*.
- Civil cases, admissibility in, . §§ 3- 17
- Civil engineer, admissibility of testimony of, . §§ 17, 20
- Collision of vehicles, accidents involving, . §§ 3- 8, 10- 17, 20, 23
- Corncrib, admissibility in prosecution for breaking and entering, . § 22
- County, action against, based on defect in highway, . § 13
- Criminal cases, admissibility in, . §§ 18- 23
- Cross-examination, admissibility as affected by circumstance that question is asked on, excluded generally, . § 1
- Diagrams, admissibility of, . §§ 17, 22
- Direction of vehicle, opinion evidence as to, . § 13
- Dirt road, significance of fact that marks appeared in, . § 20
- Distance traveled by vehicle, opinion evidence as to, . § 13
- Dry or wet, significance of fact as to whether pavement was, after accident, . §§ 5, 7, 15
- Engineer. Civil engineer, *supra*.
- Expert witness, opinion evidence by, . §§ 14- 16, 23
- Free-running or locked, opinion evidence as to whether wheels were, . § 13
- Garageman. Mechanic, *infra*.
- "Gouge" marks on highway, admissibility of, excluded generally, . § 1
- Grain, admissibility in prosecution for larceny of, . §§ 22, 23
- Hearsay, admissibility as against objection that testimony is, . § 3
- Highway --
  - accidents involving allegedly defective, . § 13
  - dirt, significance of fact that highway is made of, . § 20
- Homicide, admissibility in prosecutions for, generally, . §§ 19- 23
- Hypothetical question, expert's opinion as affected by form of, . § 15
- Identity of vehicle --
  - admissibility to establish in criminal case, . § 22
  - necessity of establishing, as condition to admission, . §§ 3, 4, 6, 8, 16, 19, 22
  - opinion evidence as to, . §§ 10, 14, 23
- Instructions to jury, propriety of, . § 7

Insurance policy, admissibility in action on accident, . § 13  
Intersection, accidents occurring at, . §§ 3, 5, 7, 8, 10, 16, 17  
Larceny, admissibility in prosecutions for, . §§ 22, 23  
Lawyer. Attorney, supra.  
Left side --  
-right-hand, infra.  
-wrong side, infra.  
*Livestock. Cattle, supra.*  
Location of vehicles --  
-admissibility to show, generally, . §§ 8, 16, 20, 22  
-opinion evidence as to, . §§ 11, 14  
Locked or free-running, opinion evidence as to whether wheels were, . § 13  
Maintainer, significance of fact that prior to accident highway had been served by, . § 8  
Manslaughter, admissibility in prosecutions for, . §§ 19- 21, 23  
Maps, admissibility of, . §§ 17, 21  
Mechanic or garageman, admissibility of testimony of, . §§ 5, 14  
Memorandum, map made by witness as, within statute relating to use of memoranda by witness, . § 17  
Motorcycle, testimony as to marks left by, . § 13  
Municipal corporation, action against, . § 13  
Murder, admissibility in prosecutions for, . § 22  
Negligent homicide, admissibility in prosecutions for, . § 20  
Nonexpert witness, opinion evidence by, . §§ 9- 13, 23  
Officers. Police officers, infra.  
Opinion evidence --  
-civil cases, . §§ 9- 15, 16  
-criminal cases, . §§ 22, 23  
Overturning. Upset, infra.  
Painting of marks prior to photographing them, effect of, . § 16  
Parked vehicle, collision between moving vehicle and, . §§ 11, 15  
Patrolman. Police officers, infra.  
Pedestrian, accidents involving injuries to, . §§ 3- 5, 7, 8, 10, 12, 15, 16, 21  
Photographs --  
-admissibility of, . §§ 16, 20  
-identification by witness of marks on, . § 13  
*Plan or plat. Maps, supra.*  
Plaster cast of mark or tire, use of, . § 22  
Police officers --  
-admissibility of testimony of, . §§ 3, 5, 8, 11, 12, 14- 16, 19, 20, 22, 23  
-injuries to, accident involving, . § 10  
Position. Location, supra.  
Purpose for which admissible --  
-civil cases, . §§ 6- 8, 10- 15  
-criminal cases, . §§ 19- 23  
Railroad crossing accidents, admissibility in connection with, . § 6  
Rain, significance of occurrence of, at or after accident or crime, . §§ 5, 22  
Rape, admissibility in prosecutions for, . § 22  
Related questions, . § 1  
Removal of vehicle prior to arrival of witness, significance of, . §§ 4, 5, 8, 20  
Repairman. Mechanic, supra.  
Right-hand side of road, admissibility in prosecution for failing to drive on, . § 20

Road. Highway, *supra*.  
 Robbery, admissibility in prosecutions for, . § 22  
 Scene of crime, admissibility to show presence of vehicle at, . § 22  
 Scope, . § 1  
 See accident, effect of circumstance that witness did not, . § 4  
 Sheriff. Police officers, *supra*.  
 Sideswiping of one vehicle by another, accident involving, . § 10  
 Skidded, opinion evidence as to whether vehicle had, . §§ 13, 14  
 Speed --  
 -admissibility to show, generally, . §§ 7, 21  
 -opinion evidence as to, . §§ 12, 15, 23  
 Statute relating to memoranda used by witness, effect of, . § 17  
 Stop street. Arterial, *supra*.  
 Streetcar, accidents involving collisions with, . §§ 5, 7, 13  
 Street. Highway, *supra*.  
 Sugar, admissibility in prosecution for stealing, . § 22  
 Summary, . § 2  
 Taxicabs, accidents involving, . §§ 13, 15  
 Theft. Larceny, *supra*.  
 Time, significance of length of, between accident and observation of marks, . §§ 5, 10, 11, 13, 16, 20- 22  
 Tractor, admissibility of marks made by, . § 17  
 Traffic or travel, significance of amount of, after accident, . §§ 5, 8, 20  
 Tree, accident involving collision with, . § 13  
 Truck driver, status of, as expert witness, . § 15  
 Truck, testimony as to marks left by, . §§ 8, 10- 15, 22  
 Upset or overturning of vehicle, accidents involving, . §§ 5, 7, 8, 13  
 Wagon, Buggy, *supra*.  
 Weather conditions after accident or crime, bearing of, on admissibility, . §§ 5, 7, 15, 22  
 Wet or dry, significance of fact as to whether pavement was, after accident, . §§ 5, 7, 15  
 Wrong side of road, admissibility on issue of location of vehicle on, . §§ 5, 8, 11, 16, 17, 20

#### TABLE OF REFERENCES(Go to beginning)

##### Annotations

See the related annotations listed in § 1

##### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

Reconstruction of traffic accidents, 9 Am. Jur. Proof of Facts 3d 115  
 Identification of Hit-And-Run Vehicle and Driver, 27 Am. Jur. Proof of Facts 287  
 Tailgating, 22 Am. Jur. Proof of Facts 43  
 Reconstruction of accident, 10 Am. Jur. Proof of Facts 152  
 Skid marks on pavement, 9 Am. Jur. Proof of Facts 192  
 Unwitnessed Automobile Accident Cases, 18 Am. Jur. Trials 443  
 Vehicular Homicide, 13 Am. Jur. Trials 295

527, Divider Line Automobile Accident Cases, 10 Am. Jur. Trials 493  
677, Preparing and Using Maps, 2 Am. Jur. Trials 669

ARTICLE OUTLINE (Go to beginning)

I. Introduction

§ 1 Scope; related questions

§ 2 Summary

II. Admissibility in civil cases

§ 3 Generally

§ 4 As affected by fact that person testifying did not see accident

§ 5 As affected by time elapsing between accident and observation of marks

§ 6 Purpose for which admissible; generally

§ 7 To determine questions as to speed

§ 8 To show location of vehicle with respect to center line of road or otherwise

§ 9 Opinion evidence by nonexpert witness; generally

§ 10 Identity of vehicle making marks

§ 11 Position of vehicles on highway at time of accident

§ 12 Speed

§ 13 Miscellaneous

§ 14 Expert opinions; generally

§ 15 As to speed

§ 16 Photographs

§ 17 Maps or diagrams

III. Admissibility in criminal cases

§ 18 Generally

- § 19 Prosecutions for offenses involving operation of vehicles; generally
- § 20 To show location of vehicle in relation to center line of highway
- § 21 To show speed of vehicle
- § 22 To prove that defendant's vehicle was at scene of crime
- § 23 Opinion evidence

195 of 195 DOCUMENTS

American Law Reports 2d  
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Annotation

The ALR databases are made current by the weekly addition of relevant new cases as available from the publisher.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for  
measuring speed, temperature, time, and the like

C. S. Patrinelis

*21 A.L.R.2d 1200*

#### TABLE OF REFERENCES

#### ARTICLE OUTLINE

**ARTICLE:** [\*1] Generally

As far as decisions directly touching the question to be annotated are concerned, an almost tomb-like silence is to be found on whether there is any presumption, or where the burden of proof lies, as to the accuracy of scientific and mechanical instruments used to measure speed, temperature, time, and the like. Whether such silence arises from a failure of the party interested to raise the question, either by objecting to the competency or admissibility of evidence of such measurements without proof of the accuracy of the measuring instrument, or whether the litigation involved is not of the type which lends itself to appellate review, it is difficult to say, but an investigation of the cases which in any way deal with the question of scientific or mechanical measurements and their introduction as evidence would seem to indicate that both factors have been responsible.

The admissibility and weight of evidence of scientific tests for lie detection,<sup>n1</sup> intoxication,<sup>n2</sup> and blood type,<sup>n3</sup> have been discussed in other annotations, and cases of this type will not be found in the present discussion. Other examples of cases involving the weight and admissibility of evidence as to the accuracy of measuring instruments, such as speedometers,<sup>n4</sup> chronometers,<sup>n5</sup> stop watches,<sup>n6</sup> tachometers,<sup>n7</sup> weighing scales,<sup>n8</sup> oil thermometers,<sup>n9</sup> voltmeters,<sup>n10</sup> hygrothermographs,<sup>n11</sup> and automatic fire-alarm indicators,<sup>n12</sup> as well as of various other instruments, may be found, but since such cases do not discuss the question whether the data evidenced by such instruments is presumed to be accurate without special proof of accuracy, they do not fall within the scope of the present annotation. It is suggested, however, that such cases be at least referred to as of possible collateral interest to the question involved herein, for such cases are, in some instances, examples of the pitfalls which await the lawyer who has failed to make timely objection to evidence whose accuracy has not been proven and may not be possible to prove.

Attention is also called to the fact that while the scope of the present annotation is not confined to scientific or mechanical measurements made at or during the time when the particular situation forming the basis of the litigation has occurred, yet the various objections which appear to be made to tests conducted after such time seem to have thus far effectively barred a consideration of this question from the viewpoint of the presumption and burden of proof of the accuracy of the measuring instrument.<sup>n13</sup>

The following additional authority is relevant to the issues discussed in this section:

◇

In prosecution for speeding, state was required to prove accuracy of particular speed measuring device used to establish defendant's speed whether it was "speed gun" or conventional radar speed meter. *People v Donohoo* (1977, 5th Dist) 54 Ill App 3d 375, 12 Ill Dec 49, 369 NE2d 546.

Courts may take judicial notice of underlying principles and reliability of properly tested and operated radar devices for determining speed of motor vehicles without requiring expert testimony concerning theory and mechanics of a particular unit, but where only means of testing accuracy of radar device is internal mechanism which is integral part of unit, and where there is no other evidence other than radar reading that motorist was speeding, speeding conviction could not be sustained. *State v Gerdes* (1971) 291 Minn 353, 191 NW2d 428.

In prosecution for obtaining money by false pretenses through fraudulent use of grain elevator scale, trial court did not err in admitting testimony as to tests of scale and finding that it was accurate, or in excluding defendant's evidence with respect to claimed errors in weighing loads on scale before and after alleged crimes. *Beyl v State* (1957) 165 Neb 260, 85 NW2d 653.

Arresting officer's testimony, that he made visual estimate of defendant's speed as 50 miles an hour and then used calibrated radar device that confirmed that speed, established defendant's guilt for speeding in 30 mile per hour zone. *People v. Hodos*, 720 N.Y.S.2d 710 (J. Ct. 2000).

Accuracy of radar instrument used to determine speed of cars was not established beyond reasonable doubt by testimony of officer that he tested instrument on day of claimed violation by use of tuning fork where there was no proof that tuning fork was accurate. *People ex rel. McCann v Martirano* (1966) 52 Misc 2d 64, 275 NYS2d 215.

Speeding conviction reversed where only evidence as to speed was arresting officer's testimony as to speed at which he clocked defendant, and there was no evidence as to testing of speedometer. *People v Barone* (1960) 24 Misc 2d 1020, 205 NYS2d 914.

Police officer's estimate of speed, taken together with reading of untested speedometer, was sufficient to sustain speeding conviction. *People v Belle-Isle* (1957) 9 Misc 2d 487, 168 NYS2d 920.

Conviction for violating statute limiting truck weight reversed on ground of insufficiency of legal proof of accuracy of scales employed. *People v Marotta* (1957) 5 Misc 2d 947, 165 NYS2d 639.

There are no presumptions that properly calibrated police speedometer becomes inaccurate after any specific time or miles of use. *County of Waukesha v Mueller* (1967) 34 Wis 2d 628, 150 NW2d 364.

[\*2] Presumptions, burden of proof, and prima facie evidence

Apparently there are no American decisions directly holding that evidence of measurements by mechanical or scientific instruments will be presumed to be correct in the absence of any evidence that the instrument has been tested for accuracy within a reasonable period.<sup>n14</sup>

Thus, in *Spokane v. Knight* (1917) 96 Wash 403, 165 P 105, for example, it was held that testimony of a police officer that he followed the defendant's car for a certain distance and that the speed registered on a tested speedometer attached to his motorcycle was between 27 and 30 miles per hour was sufficient to sustain a conviction for operating a motor

vehicle in excess of the 20-mile per hour speed limit, despite the defendant's testimony that his own speedometer, which he alleged was correct, registered less than 20 miles per hour, the court pointing out that while there was evidence that speedometers sometimes get out of order it was for the jury to determine whether the police officer's speedometer was out of order and did not register the speed correctly, and stating: "Speedometers, like other machines, may get out of order; but, where they are tested regularly, they may be relied upon with reasonable certainty to determine accurately the rate of speed at which a machine is driven. It cannot be said therefore that, because speedometers may be out of order, rates of speed may not be measured by instruments manufactured for that purpose, and which usually give approximately correct rates of speed. The question was one for the jury."

Whether the dearth of American authority on the point is any indication that the American courts are committed to a negative view as to the presumption of accuracy, it is impossible to say. It should be observed, however, that in many of the American cases there has been a failure to object to the introduction of such evidence on the ground that the measuring instrument has not been tested for accuracy. In other cases proof of accuracy has been accepted, and so no presumption was needed.

In England, on the other hand, there are at least two cases which seem to indicate that there is a presumption that either a watch or a speedometer is reasonably accurate, and that, unless the degree of accuracy contended for is hair-splitting or otherwise unreasonable, such evidence will carry the case in the absence of evidence of inaccuracy.

Thus, in *Nicholas v. Penny* [1950] 2 KB 466, [1950] All Eng 89, 21 ALR2d 1159, a police constable having testified that he drove a police car at an even distance behind the defendant's automobile for four-tenths of a mile along a road on which the speed limit was thirty miles per hour, and that the speedometer of the police car registered an even speed of forty miles per hour, the court held that such testimony was prima facie evidence of the fact that the defendant's car was traveling in excess of the speed limit of thirty miles per hour, even though no admissible evidence was introduced of the accuracy of the speedometer. The court pointed out that its holding was not to the effect that evidence of a speedometer reading was evidence of the exact accuracy of the device, since the question in the present case did not go that far, but that evidence of a speedometer reading of forty miles per hour was sufficient evidence upon which the court could act to obtain a conviction that the defendant was exceeding the speed limit of thirty miles per hour, although it was not strictly proved that the speedometer had been tested.

The court in the Nicholas Case also discussed the earlier English case of *Melhuish v. Morris* [1938] 4 All Eng 98, 82 Sol Jo 854, where two police officers who had followed appellant in a police vehicle testified that an observation of the speedometer in their car indicated that he had been driving at speeds of thirty-eight to forty-four miles per hour whereas the speed limit was thirty miles per hour. The giving of such testimony, it was there pointed out, did not constitute opinion evidence as to speed, but was evidence adduced entirely from an observation of a mechanical device, the accuracy of which had not been tested. Declaring that a holding that the speedometer must be tested for accuracy before evidence based upon it could be admitted into evidence went too far, the court in the Nicholas Case stated that it would not follow the Melhuish decision, pointing out that it was not bound to do so, especially since it was shown therein that the prosecution was not represented on appeal, and that certain material cases, which showed that the case was decided incorrectly, were not brought to the court's attention.

And attention is called to *Gorham v. Brice* (1902, Eng) 18 Times L 424 -- Div Ct, in which a motorist was charged with exceeding the speed limit of twelve miles per hour by driving at twenty-four miles per hour, after it was shown that a police constable stationed at the end of a measured distance of 176 yards had timed the rate of speed with an ordinary watch which had a second hand. The motorist denied that he was exceeding the speed limit, claiming that he had not traveled at more than eight miles per hour. In holding the evidence of the rate of speed admissible, despite the contention of appellant's counsel to the contrary, which was based on the theory that the watch used to time the rate of speed had not been tested and there was thus nothing to show that it was accurate, the court stated that it could not understand the motives of motorists in bringing such appeals, or what they thought to gain by suggesting there was no evidence as to speed simply because they did not like the findings of magistrates. The court declared that while the

magistrates may have come to a wrong decision, it had no power to interfere with their findings of fact, since they had the evidence before them and there was no suggestion made that the testimony of the constable ought not to be believed, nor was it possible for them to hold that observations as to time ought not to be admitted into evidence unless it was proved that the time in question was Greenwich time.

[\*3] Generally

[\*3a] Statutory provisions --

In *Joseph v. East Ham Corp. (Eng) [1936] 1 KB 367* -- CA, a homeowner protested a bill for electricity, contending that since the bill was for far more electricity than had ever been previously used in a similar period in his home, the meter was incorrect. A statute provided that an electric inspector should be appointed to duly certify the company's meters, but it was shown that no inspector had ever been appointed for the area. In upholding an injunction issued at the instance of the homeowner against cutting off his electricity, since a bona fide dispute had arisen between the consumer and supplier of electricity, the court pointed out that while the proper certification of the meter would have constituted conclusive evidence of the value of the supply, and therefore in such case the injunction could not have issued, since the consumer would have had to accept the meter reading as correct, the failure of certification was not a compliance with the statutory provisions and since the correctness of the meter reading could be questioned a bona fide dispute upon which an injunction could be founded had arisen.

The following additional authority is relevant to the issues discussed in this section:

◇

Court may take judicial notice that radar device can accurately record speed of automobile, and speed recorded on radar unit may be admissible in evidence provided accuracy of unit at time in question is established by tests made within reasonable time before and after speed was recorded and provided speed recorded was for defendant's automobile. *State v Carta, 2 Conn Cir 68, 194 A2d 544* (holding that whether test of radar unit by means of 40 and 60 mile-an-hour tuning forks, was sufficient for range of 20 to 70 miles per hour was for jury).

Trial court's determination that radar equipment was properly set up and tested for accuracy, was functioning properly, and was correct recorder of automobile speed, held supported by evidence. *State v Dantonio, 18 NJ 570, 115 A2d 35, 49 ALR2d 460* (affg (County Court) *31 NJ Super 105, 105 A2d 918*), also holding that lack of evidence that speedometers in state police cars had been recently tested at time defendant was alleged to have violated speed limit was immaterial where defendant did not raise point before close of trial.

Defendant automobile driver's conviction for speeding could not stand upon mere evidence of speedometer reading without more, since it was not shown that speedometer from which police officer testified was accurate. *Government of Virgin Islands v Rodriguez (1969, DC VI) 300 F Supp 909*.

In prosecution for violation of truck weight limitation, question of accuracy of scales on which truck was weighed was for jury, where evidence was conflicting; testimony that scales had been tested for accuracy by proper authority gave rise to presumption that one charged with legal duty would perform that duty. *Leonard v State (1955) 38 Ala App 138, 79 So 2d 803, cert den 262 Ala 702, 79 So 2d 808* (citing annotation), cert den 262 Ala 702, 79 So 2d 808.

Usefulness of radar for testing speed is so well established that expert testimony to prove its reliability is not necessary, courts taking judicial notice of such fact; but it is necessary to prove accuracy of particular equipment involved in case being tried. *Everight v Little Rock (1959) 230 Ark 695, 326 SW2d 796*.

Prosecution must prove radar instrument used to measure defendant's speed was accurate and was accurately operated. *State v Tomanelli* (1964) 152 Conn 727, 203 A2d 675.

Speeding conviction would be upheld where radar device was checked for accuracy by tuning fork test conducted three weeks after defendant's arrest. *State v Stoll* (1983, Super Ct) 39 Conn Supp 313, 464 A2d 64.

There being no presumption that speedometer is accurate, prosecution must submit evidence from which jury could find that device was operating properly and had been tested within reasonable time before date of its use in question, and evidence that speedometer was tested 7 months before date in question was not evidence that state trooper's speedometer had been tested within reasonable time before defendant's car was clocked at excessive speed. *State v Ellis* (1968) 5 Conn Cir 190, 248 A2d 71.

Evidence of speed of defendant's car as indicated by trooper's speedometer made out prima facie case of statutory violation of speeding. *State v Lane* (1967) 4 Conn Cir 368, 232 A2d 518.

In prosecution for speeding, testimony of officer "making a clock" of reading of his speedometer is prima facie evidence of violation of speed laws, though no evidence of accuracy of speedometer is introduced. *State v Tarquinio* (1966) 3 Conn Cir 566, 221 A2d 595.

In speeding prosecution, state had burden of proof of accuracy of radar device used to check speed of cars. *State v Moffitt* (1953, Super Ct) 48 Del 210, 100 A2d 778.

In prosecution for speeding, testimony of state trooper that radar showed defendant going 67 miles per hour in 55 mile per hour zone was sufficient to support defendant's conviction where defendant presented no evidence or expert testimony which demonstrated inaccuracy of radar unit or any circumstances which would cause inaccuracy. *People v Boalbey* (1980, 3d Dist) 90 Ill App 3d 738, 46 Ill Dec 113, 413 NE2d 553.

State sufficiently proved accuracy and proper operation of radar equipment in prosecution for speeding and reckless driving where arresting officer testified that he tested radar unit by accepted procedures before and after apprehending defendant. *People v Burch* (1974, 4th Dist) 19 Ill App 3d 360, 311 NE2d 410.

Court takes judicial notice of accuracy of radar devices in determining speed of moving object, subject to necessary proof as to accuracy and proper operation of particular device under consideration, and, where substantial testimony was that radar device used by police and tachograph used by defendant were accurate, it was function of trial court hearing case without jury to determine credibility of witnesses and weight afforded their testimony. *People v Barbic* (1969, 2d Dist) 105 Ill App 2d 360, 244 NE2d 626.

Expert testimony was not necessary to prove accuracy of radar device which determined speed of moving vehicle, and testimony of state trooper that radar was checked 15 minutes prior to occurrence in question by driving car past it at set speed and by use of tuning fork was sufficient to show accuracy of device. *People v Cash* (1968, 5th Dist) 103 Ill App 2d 20, 242 NE2d 765.

Although state had burden to prove that radar device used to measure defendant's speed at 74 miles per hour was reliable and accurate, defendant could not complain on appeal that his stop was without probable cause and his resulting conviction for drunk driving should be overturned, where defendant failed to make probable cause argument in trial court. *Smith v State* (1986, Ind App) 502 NE2d 122.

Evidence that radar speed meter showed defendant going 94 miles per hour was sufficient to present prima facie case of speeding, although there was no evidence as to when tuning fork device used to test meter had itself been tested, where evidence showed that meter had been tested with tuning fork with identical results both before and after defendant's

arrest and it had also been tested by comparison with speedometer of police car driven through radar zone. *State v Shimon (1976, Iowa) 243 NW2d 571.*

Burden of proof of accuracy of device used by police to measure speed of automobiles held sustained by prosecution. *Carrier v Commonwealth (1951, Ky) 242 SW2d 633.*

In action for speeding, evidence was sufficient to prove beyond reasonable doubt that defendant was speeding, where deputy testified at trial that he was certified to use radar gun and that he had checked gun to assure its accurate calibration and proper functioning. *State v Edwards (1989, La App 5th Cir) 537 So 2d 855.*

In prosecution for speeding, trial court did not abuse its discretion in finding violation on basis of evidence presented, where prosecution presented prima facie case of traffic violation by introducing radar measurement and driver's contention that he had overcome presumption of radar's validity was question for trial court. *State v Arnheiter (1991, Me) 598 A2d 1183.*

Results of radar speed measurement were properly accepted as prima facie evidence of speed of defendant's car, pursuant to statute not requiring proof of prior calibration. *State v Caron (1987, Me) 525 A2d 1049.*

In prosecution for speeding, evidence of defendant's speed as determined by "speed watch" was admissible where testimony showed that instrument was properly set up, was checked before use by officers operating it, was periodically checked by experts, and officer operating instrument observed defendant's car and testified as to his estimation of its speed. *People v Kenney (1958) 354 Mich 191, 92 NW2d 335.*

In prosecution for speeding, evidence met statutory requirements regarding evidentiary standard for speed calibrated by radar where officer's testimony indicated radar unit was thoroughly tested day defendant was ticketed, where records were introduced verifying accuracy of both radar and tuning fork used in testing, where officer testified that he was certified to operate radar unit and where officer testified there was no outside interference with unit as defendant's speed was calibrated. *State v Bogren (1987, Minn App) 410 NW2d 383.*

In vehicular speeding prosecution, prima facie case for admission of radar reading of defendant's speed taken from moving patrol car was established by testimony of officer who had made reading as to his training and experience and expert testimony as to how radar unit worked. *State v Calvert (1984, Mo) 682 SW2d 474.*

In prosecution for exceeding speed limit, driving while intoxicated, assaulting police officer, possessing controlled substance, and resisting arrest, trial court properly found driver guilty of speeding based on sufficient evidence tending to prove that radar gun had been tested and accurately displayed driver's automobile exceeding speed limit, where officer testified that he personally tested radar gun shortly before he began monitoring traffic by tuning gun with two different tuning forks and checking internal calibration to insure that all diodes were properly working which resulted in accurate display from gun, where officer testified that he was certified radar instructor and that his particular gun had last been certified one month previously, and where he testified that he pointed gun out through rear window of his vehicle, that no other car interfered with radar reading of speed of driver's car, and that radar displayed speed of seventy-seven miles per hour. *Berkeley v Stringfellow (1990, Mo App) 783 SW2d 501.*

In prosecution of motorist for exceeding speed limit, prosecution was required to prove that radar unit was operating accurately at time it was used to determine defendant's speed; prosecution met that burden by presenting testimony of trooper that he had used tuning forks to check accuracy of unit before starting his shift and immediately after defendant's arrest; however, state was not required to prove accuracy of unit's frequency finder, where trooper had tested accuracy of tuning forks by holding them in front of frequency finder about eight months prior to defendant's arrest, and certificate of accuracy to that effect had been admitted into evidence. *State v Moore (1985, Mo App) 700 SW2d 880.*

In prosecution for speeding, where evidence showed police officer had tested VASCAR equipment used to apprehend defendant with stop watch and test indicated equipment was accurate, but officer could not testify as to accuracy of stop watch, city failed to meet its burden of proving accuracy of VASCAR equipment; value of VASCAR evidence depends upon accuracy of measuring device against which it is checked and particular measuring device must be shown to be accurate. *St. Louis v Martin* (1977, Mo App) 548 SW2d 622.

In prosecution for speeding, admitting evidence of accuracy of stopwatch was not error notwithstanding that at time when watch was tested it was not connected with cable and hose as it was at time of defendant's arrest. *Webster Groves v Quick* (1959, Mo App) 323 SW2d 386.

Radar evidence was admissible where device had been tested for accuracy shortly before it indicated that defendant's speed was 15 miles per hour over limit. *State v Graham* (1959, Mo App) 322 SW2d 188 (citing annotation).

Use of stationary radar gun to make arrest for speeding was proper, where officer testified that his radar unit was used correctly and was operating properly, where defendant failed to present any evidence that challenged validity of use of radar, and where statute authorized use of radar to detect speeding violations. *Billings v Skurdal* (1986) 224 Mont 84, 730 P2d 371, cert den 481 US 1020, 95 L Ed 2d 508, 107 S Ct 1902, reh den 482 US 910, 96 L Ed 2d 384, 107 S Ct 2492.

Foundation may be laid for admission of radar evidence as to speed of car by evidence of experience of persons in handling of such equipment indicating that equipment correctly indicates speed of moving vehicles. *Dietze v State* (1956) 162 Neb 80, 75 NW2d 95.

In drunk-driving prosecution, it is for trial court to determine whether policeman who operated alcometer had sufficient knowledge and experience and whether device was operating properly. *State v Roberts* (1960) 102 NH 414, 158 A2d 458.

Absent competent proofs as to scientific reliability of radar device, speed measurement from that device should not have been admitted into evidence and defendant's conviction for speeding was reversed. *State v Musgrave* (1979) 171 NJ Super 477, 410 A2d 64.

In prosecution for speeding, testimony by arresting officer that he had checked calibration of radar device with serialized tuning fork cut at 50 mph, the accuracy of which was not in itself established, was not sufficient to establish accuracy of radar device and radar reading was, therefore, not admissible; without it in evidence state had failed to prove beyond reasonable doubt that defendant was speeding. *State v Readding* (1978) 160 NJ Super 238, 389 A2d 512.

Drunkometer is sufficiently established as scientifically reliable and accurate for determining alcoholic content of blood to admit testimony of reading obtained upon properly conducted test without antecedent expert testimony that reading is trustworthy index of blood alcohol, or why. *State v Miller* (1960) 64 NJ Super 262, 165 A2d 829.

In drunk-driving prosecution, where drunkometer evidence is used, prosecution must prove that operator of drunkometer has been certified, that machine was in proper working order, and that chemicals were in proper condition. *State v Greul* (1959) 59 NJ Super 34, 157 A2d 44 (citing annotation).

In drunk-driving prosecution, drunkometer evidence is to be weighed along with other relevant evidence; possibility of error in operation of drunkometer would not bar admission of finding, but would affect weight. *State v Damoorgian* (1958) 53 NJ Super 108, 146 A2d 550.

Radar and speedometer readings are generally admissible in speeding prosecutions and may be sufficient in themselves

if there is reasonable proof of their accuracy. *People v Dusing* (1959) 5 NY2d 126, 181 NYS2d 493, 155 NE2d 393.

Evidence of reading of untested speedometer in police car was insufficient, of itself, to sustain speeding conviction. *People v Heyser* (1957) 2 NY2d 390, 161 NYS2d 36, 141 NE2d 553.

In prosecution for exceeding speed limit, arresting officer sufficiently established accuracy of radar device, where he had used two tuning forks and internal calibration test before and after stopping speeding driver and where officer testified that his visual estimates of speed had been proven to be within three to five miles per hour of actual vehicle speeds. *Henig v State Dep't of Motor Vehicles* (1986, 2d Dept) 122 App Div 2d 250, 505 NYS2d 174.

Arresting officer sufficiently established accuracy of radar device by using tuning fork and internal calibration tests at beginning and end of tour of duty. *Graf v Foschio* (1984, 2d Dept) 102 App Div 2d 891, 477 NYS2d 190.

State has burden of proving accuracy of "Vascar" device used for measuring speed of vehicle. *People v Leatherbarrow* (1972) 69 Misc 2d 563, 330 NYS2d 676.

Reasonable proof of accuracy of radar was given where arresting officer testified to calibration of radar speed detection device by tuning fork and test car 2 hours before, 20 minutes before, and 10 minutes after defendant's arrest. *People v Stuck* (1967) 54 Misc 2d 811, 283 NYS2d 564.

Testimony of arresting officer that his car was tested by radar just prior to use was not sufficient to establish accuracy of speedometer, and evidence of reading of untested speedometer, although admissible, is not, without more, sufficient for speeding conviction. *People v Skupien* (1962) 33 Misc 2d 908, 227 NYS2d 165.

Where police speedometer had been tested but test results were not shown, evidence of speedometer reading alone was insufficient to sustain speeding conviction, speedometer being classed as untested instrument. *People v Page* (1961) 32 Misc 2d 179, 222 NYS2d 450.

Testimony that "speedwatch" was checked against calibrated speedometer warrants admission of watch reading in speeding prosecution. *People v Tiedeman* (1960) 25 Misc 2d 413, 207 NYS2d 95.

Presumption of accuracy of speedometer continues from first date of examination before infraction until next examination after infraction, but where examiner seeks to elicit whether speedometer has been repaired or adjusted in interim, such information should be forthcoming by proper entries or otherwise, and if repair or adjustment has been made after infraction and before examination, presumption of accuracy on date of infraction would be destroyed. *People v Kossifos* (1959) 36 Misc 2d 8, 234 NYS2d 179.

Speeding conviction reversed on ground of lack of proof of legal testing of police speedometer for accuracy where there was no additional evidence of speed except opinion of arresting officer. *People v Harndon* (1959) 15 Misc 2d 100, 180 NYS2d 799.

Prosecution has burden of showing accuracy of scientific device used to prove element of crime; evidence sufficiently showed accuracy of scales used to prove truck weight violation. *People ex rel. Harding v Matessino* (1958) 15 Misc 2d 7, 179 NYS2d 911.

Violation of speeding ordinance was established by evidence including evidence of speed as measured by "Foto-Patrol," where there was expert testimony as to scientific principles underlying device, and speed as recorded by device was substantiated by tests made by police cars, and by opinion of police officer. *People v Pett* (1958) 13 Misc 2d 975, 178 NYS2d 550.

In speeding prosecution, evidence of reading of untested police speedometer is admissible, but is not itself sufficient to sustain conviction. *People v Tanner (1957) 6 Misc 2d 1007, 165 NYS2d 308.*

In prosecution for violating statute limiting truck weight, trial court erred in admitting proof of weight of truck over defendant's objections that it was obligatory first to prove accuracy of scales used. *People v Brandon (1957) 5 Misc 2d 946, 165 NYS2d 640.*

Conviction of vehicle weight violation reversed for failure to show accuracy of weighing devices. *Davis v Silverberg (1956) 14 Misc 2d 744, 155 NYS2d 321.*

To prove accuracy of police speedometer, officer operating vehicle having speedometer whose accuracy is at issue must prove the speedometer was tested for accuracy every 15 days; if he witnessed the test he must say so, and if not, person who witnessed them must testify; testimony must show result of test to be accurate; and manner in which test was made must be shown. *People v Sachs (1955) 1 Misc 2d 148, 147 NYS2d 801*, holding that to establish accuracy of radar used to check car speed, state must prove (1) that radar car was properly set up in detecting location; (2) that radar instruments were working; (3) that apprehending car was set in its own location; (4) that both cars were visible to each other at a reasonable distance; (5) that motorcycle or other vehicle equipped with calibrated speedometer had been used to test accuracy of radar set; (6) that graph sheet shows result of radar test; (7) that speedometer on motorcycle or other vehicle had been properly tested and found accurate; (8) that radar car officer observed speeding vehicle as well as any other vehicle and could describe speeding vehicle; and (9) that operator of speeding vehicle was apprehended and served with summons.

Burden of proof of accuracy of radar speed meter was on state. *People of Buffalo v Beck (1954) 205 Misc 757, 130 NYS2d 354* (rule supported by implication; trial court held to have erred in taking judicial notice of accuracy of radar device).

Accuracy of radar speed meter was established by expert testimony. *People v Sarver (1954) 205 Misc 523, 129 NYS2d 9.*

Expert testimony established accuracy of radar speed meter. *People of Rochester v Torpey (1953) 204 Misc 1023, 128 NYS2d 864.*

Accuracy of radar instrument used to determine speed of cars is not proper subject for judicial notice. *People v Offermann (1953) 204 Misc 769, 125 NYS2d 179.*

Proof of accuracy of state scales used to weigh trucks was required before testimony as to weight obtained from scales could be admitted, there being no presumption that state scales were more accurate than any others. *People v Du Shane (1953, Co Ct) 125 NYS2d 9.* To the same effect, see *People v Vadakin (1953) 204 Misc 904, 125 NYS2d 25* (disapproved on other grounds by *People v Rodenbach, 204 Misc 905, 126 NYS2d 295*, aff'd 307 NY 614, 120 NE2d 826).

In absence of legislation to contrary, accuracy of speed detection device must be proved to satisfaction of trier of facts, but where evidence of speed as recorded by speed detection device was admitted without objection as to accuracy and testing of device such evidence stood unimpeached and could be used to convict for speeding. *State v Albers (1973, ND) 211 NW2d 524.*

In prosecution for speeding, trial court improperly admitted evidence of speeding based on reading of radar unit using "doppler effect" where unit was mounted on police car approaching defendant's vehicle and no testimony was offered showing that unit could differentiate between relative speeds of 2 vehicles or, if it could, was set to do so. *State v Wilcox (1974, Franklin Co) 40 Ohio App 2d 380, 69 Ohio Ops 2d 333, 319 NE2d 615.*

In prosecution for speeding, trial court improperly admitted radar evidence without first requiring prosecution to show unit was properly set up and functioning in accurate manner. *State v Bonar (1973, Monroe Co) 40 Ohio App 2d 360, 69 Ohio Ops 2d 320, 319 NE2d 388.*

City had burden of proving that "Vascar" device, designed to measure average speed of vehicle over distance measured, was properly tested and used. *Tiffin v Whitmer (1970) 32 Ohio Misc 169, 60 Ohio Ops 2d 367, 290 NE2d 198.*

In speeding prosecution, state was required, as part of prima facie case, to show that speedometer used to clock defendant was tested against another speed-testing standard and that speedometer was operating properly at time of alleged violation. *State v Mancino (1975) 115 RI 54, 340 A2d 128.*

In speeding prosecution, testimony as to police speedometer reading is admissible on showing that operating efficiency of device has been tested within reasonable time. *State v Barrows (1959) 90 RI 150, 156 A2d 81.*

In drunk-driving prosecution, evidence established competency of police officer who conducted drunkometer test. *Ward v State (1960) 169 Tex Crim 589, 335 SW2d 839.*

"Certificate of radar accuracy test" which certified that two officers conducted accuracy tests by "calibrated speedometer of a radio microwave device" was inadmissible and failed to meet test of statute which provided that certificate of officers testing radar device must reflect not only its accuracy but also the accuracy of the speedometer of any motor vehicle used in such test. *Sweeny v Commonwealth (1971) 211 Va 668, 179 SE2d 509, 47 ALR3d 817.*

In prosecution for excessive speed of motor vehicle in which radar evidence is used, Commonwealth must prove that radar machine used to measure speed had been properly set up and recently tested for accuracy, but proof of accuracy of speedometer is sufficiently established by showing that it was checked against calibrated master speedometer. *Farmer v Commonwealth (1964) 205 Va 609, 139 SE2d 40.*

Statute providing that result of radio microwave check of motor vehicle speed should be accepted as prima facie evidence of speed of motor vehicle establishes prima facie presumption of accuracy of radar device used to measure speed; presumption is rebuttable, but was not rebutted by mere argument that radar might have been "thrown off" and might have improperly recorded speed. *Dooley v Commonwealth (1956) 198 Va 32, 92 SE2d 348, app dismd 354 US 915, 1 L Ed 2d 1432, 77 S Ct 1377.*

Use of radar unit to issue traffic citation to defendant for speeding was proper, where officer had proper training and experience with radar device, where device had been tested both before and after actual use by tuning forks, and where officer had verified radar readout with visual comparison of speedometer of officer's vehicle even though officer did not check accuracy of vehicle's speedometer after issuance of citation. *Washington County v Luedtke (1987) 135 Wis 2d 131, 399 NW2d 906.*

In prosecution for speeding, speed reading taken by VASCAR (Visual Average Speed Computer And Recorder) was admissible in evidence without any qualified expert testimony establishing scientific reliability and accuracy of device since prima facie presumption of accuracy applies to stationary radar devices such as *State v Frankenthal (1983, App) 113 Wis 2d 269, 335 NW2d 890.*

In prosecution for speeding in which issue of accuracy of moving radar device was raised, test performed by police officer on device one hour before defendant's arrest and 12 minutes after arrest to ascertain whether device was functioning properly was sufficient to raise rebuttable presumption that radar device was functioning accurately, and therefore defendant's conviction would be affirmed. *State v Kramer (1981) 99 Wis 2d 700, 299 NW2d 882.*

In speeding prosecution trial court properly held that prima facie presumption of accuracy applied to stationary radar and city was not required to meet judicially set forth criteria regarding proof of radar accuracy which were applicable to moving radar in light of fact that moving radar has unique characteristics that warrant proof of accuracy. *Wauwatosa v Collett (1980, App) 99 Wis 2d 522, 299 NW2d 620.*

In prosecution for speeding, although there was prima facie presumption of accuracy of moving speed radar device and also expert testimony that device was accurate all but one per cent of time, existence of credible, conflicting expert testimony that device was inaccurate between 15 and 20 per cent of time raised issue of fact. *State v Hanson (1978) 85 Wis 2d 233, 270 NW2d 212.*

[\*3b] Pennsylvania speed laws

Under a Pennsylvania statute providing that a police officer suspecting a violation of the speed laws must follow an automobile on the highway to time its speed for a distance of not less than one-quarter of a mile, using a motor vehicle equipped with a speedometer which had been tested for accuracy within a period of thirty days prior to the alleged violation, it was held in *Commonwealth v. Parish (1940) 138 Pa Super 593, 10 A2d 896*, that a prima facie case of violation of the fifty-mile speed limit was made out against a defendant when a police officer testified that he had followed the vehicle driven by defendant for 1.9 miles timing its rate of speed at sixty miles per hour with a speedometer which had been tested for accuracy in his presence at an official speedometer testing station twelve days before. The court declared: "The Commonwealth made out a prima facie case through the arresting officer who testified that he was present and observed the test as it was made, and by his further testimony that he followed the defendant on the highway for more than one-quarter of a mile and, from a reading of his speedometer, determined that the defendant was driving his car at a speed in excess of the legal limit. There was no burden on the Commonwealth of proving the accuracy of the officer's speedometer except by competent proof that it had been 'tested for accuracy within a period of thirty days prior to the alleged violation.' This device has been in common use on automobiles for more than 25 years and is recognized as an instrument reasonably reliable in measuring rates of speed. If absolute proof of its accurate operation were required, it would be necessary for the Commonwealth to prove, also, the accuracy of the mechanical devices used in applying the test, making it difficult if not impossible of obtaining a conviction in any case. Proof of the accuracy of a stop-watch used in determining speed over a measured stretch of highway is not part of the Commonwealth's case under another section of the act and by analogy, proof of the accurate operation of a speedometer should not be required in the first instance, in cases of this nature, though a number of factors may make the latter the less reliable of the two."

In the absence of a showing that the speedometer used to time the motorist's rate of speed has been tested for accuracy as required by statute, however, it would appear that no such prima facie case will be held to have made out against a motorist, there being no presumption of accuracy of the police speedometer under such circumstances.

Thus, in *Commonwealth v. Penman (1939) 36 Pa D & C 634*, it was held that a summary conviction of a motorist for exceeding the speed limit of fifty miles per hour, upon evidence of a motor policeman who clocked the defendant's car for a distance of half a mile at a speed of sixty-five miles per hour, where the defendant denied having exceeded the speed limit, contending that his car was equipped with a signal device which flashed red whenever his car was driven at fifty miles per hour or more, and that no red signal had appeared, could not be sustained in view of the failure of the Commonwealth to produce any evidence showing what person had tested the speedometer of the police car for accuracy, or to show by the party making the test what the results were of the test and the method adopted for making the test. The court pointed out that there were no presumptions as to accuracy of the police speedometer, and since its accuracy had been challenged by contrary evidence of the defendant, the burden was on the Commonwealth to show by competent evidence that the speedometer on the car operated by the policeman had been tested for accuracy within the thirty-day period set out by the vehicle code.

So, where it was admitted by witnesses testifying in a prosecution of the defendant for driving a motor vehicle at a

speed of fifty miles per hour, which, it was alleged, was not careful and prudent having due regard to the traffic surface and width of the highway, that the speedometer on the police vehicle used to time the rate of speed of defendant had not been tested for accuracy within thirty days prior to the alleged violation, the defendant denying that he was operating his motor vehicle at any such speed, it was held in *Commonwealth v. Feyka (1947) 62 Pa D & C 353*, that the conviction for speeding could not be sustained.

And because of the Pennsylvania statute requiring the testimony of police officers as to speed violations to be based upon readings of speedometers tested for accuracy within thirty days prior to the alleged violation, it was held in *Commonwealth v. Harvey (1940, Pa) 49 Dauph Co 43*, that the failure to include such evidence on the trial, although it may have been contained in the information, was insufficient to sustain a conviction for violation of the speed law.

Hearsay or other secondary evidence as to the testing of the speedometer within the thirty-day period will not suffice, it being necessary under the Pennsylvania statute that direct evidence be introduced.

Consequently, evidence that a police officer followed defendant's vehicle and timed a rate of speed on the speedometer in the police vehicle in excess of the speed limit of fifty miles per hour was held insufficient in *Commonwealth v. Hilands (1939) 36 Pa D & C 472*, to sustain a conviction for violating the speed laws, where, although the testimony of the motor policeman was that his speedometer had been tested, such testimony was based upon a card stating that such a test had been made rather than upon the personal knowledge of the police officer, and where the person who had made the test could not testify with certainty that the particular speedometer had been tested, but only that the speedometer of a car bearing the license number of the police vehicle had been tested.

A later amendment to the Pennsylvania statute which attempted to make the production of a certificate as to the due making of the speedometer accuracy test proof of such fact, has been declared to be unconstitutional.

Thus, where objection had been made to the introduction into evidence of a certificate that the speedometer on a police vehicle used to time defendant's rate of speed for a distance of a quarter of a mile, in accordance with the amendment to the vehicle code providing that such evidence was prima facie evidence of the accuracy of the speedometer, it was held in *Commonwealth v. Obenreder (1940) 40 Pa D & C 155*, that such provision violated the state constitution, which gave a defendant in a criminal prosecution the right to meet the witnesses against him face to face. The court stated: "Certainly the presentation of a certificate with no evidence as to the person issuing the same, nor of the fact that a test was made, and no opportunity granted the accused to face the witnesses making the test and the certificate and to examine them is a violation of the constitutional guaranty."

To similar effect see *Commonwealth v. Baddorf (1941) 42 Pa D & C 276*, where it was alleged that defendant had exceeded the speed limit of fifty miles per hour by going sixty miles per hour, the police officer having timed the defendant's car for a distance of not less than a quarter of a mile and presented in evidence of the accuracy of his speedometer at the trial a certificate from the official speedometer testing station indicating a test for accuracy within thirty days prior to the alleged violation. The court cited the Obenreder Case with approval, declaring that an official certificate from an official speedometer testing station as to the accuracy of the speedometer on the vehicle driven by the policeman who timed defendant's speed would not meet the constitutional requirement that "the accused hath a right. . . to meet the witness face to face."

In *Commonwealth v. Leitzel (1941) 40 Pa D & C 410*, defendant was arrested and convicted of operating his motor vehicle at a rate of speed of over fifty miles per hour, the maximum speed permitted by law, upon the testimony of a police officer that he had timed defendant and found him to be traveling at sixty miles per hour. Upon being asked upon cross-examination whether he had his certificate showing that his speedometer had been tested for accuracy within thirty days, in accordance with the amendment to the vehicle code requiring either that such certificate or the testimony of the person who had tested the speedometer be produced, and that the production of such certificate would constitute prima facie evidence of the accuracy of the speedometer, the officer replied in the negative, testifying that it had been

tested within thirty days, but not that it was correct. It was held that since neither of the above provisions of the amendment had been complied with the conviction would be reversed, the court pointing out that the present case was a criminal case which required a strict construction of the law, putting the burden on the commonwealth to show by competent evidence that the speedometer on the car operated by the police officer had been tested for accuracy within the thirty-day period set out in the vehicle code.

The following additional authority is relevant to the issues discussed in this section:

<>

Pennsylvania statute permitting prima facie proof of accuracy of speedometer by official certificate from official speedometer-testing station did not violate constitutional provisions giving accused in criminal prosecution right to meet witnesses face to face. *Commonwealth v Schumann (1953) 87 Pa D & C 477.*

Statute providing that official certificate from official speedometer-testing station should be prima facie evidence of the accuracy of the speedometer held constitutional as against contention that statute prevented speed violator from cross-examining mechanic who tested speedometer of arresting officer. *Commonwealth v Coldsmith (1954) 176 Pa Super 283, 106 A2d 649.*

## FOOTNOTES

n1 Physiological or psychological deception tests, *139 A.L.R. 1174*, supplementing *34 A.L.R. 147*, *86 A.L.R. 616*, and *119 A.L.R. 1200*.

n2 Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, *159 A.L.R. 209*, supplementing *127 A.L.R. 1513*.

n3 Blood-grouping tests, *163 A.L.R. 950*.

n4 See *Adams v. State (1925) 21 Ala App 15, 105 So 714*, cert den *213 Ala 570, 105 So 715*; *State v. Buchanan (1911) 32 RI 490, 79 A 1114*; and *Russel v. Beasley [1937] 1 All Eng 527, 53 Times L 298*.

n5 See *Commonwealth v. Buxton (1910) 205 Mass 49, 91 NE 128*.

n6 See *Plancq v. Marks (1906, Eng) 94 LT NS 577, 22 Times L 432 -- Div Ct.*

n7 See *Cooper v. Hoeglund (1946) 221 Minn 446, 22 NW2d 450*.

n8 See *De Filippo v. Di Pietro (1928) 265 Mass 186, 163 NE 742*.

n9 See *Hatcher v. Dunn (1897) 102 Iowa 411, 71 NW 343, 36 LRA 689*.

n10 See *Blakeney v. Alabama Power Co. (1931) 222 Ala 394, 133 So 16*.

n11 See *Silver Falls Timber Co. v. Eastern & Western Lumber Co. (1935) 149 Or 126, 40 P2d 703*.

n12 See *State v. McDaniel (1901) 39 Or 161, 65 P 520*.

n13 For a discussion of experimental evidence as affected by similarity or dissimilarity of conditions, see *85 A.L.R. 479*, supplementing *8 A.L.R. 18*; and for admissibility of test or experiment after accident as bearing on

condition of automobile at time of accident, see 72 *A.L.R.* 863.

n14 See cases involving statutory provisions as to testing of speedometers under heading " -- Pennsylvania speed laws," *infra*.

#### TABLE OF REFERENCES(Go to beginning)

#### REFERENCES

The following references may be of related or collateral interest to the user of this annotation.

Foundation for admission of thermogram, 46 *Am. Jur. Proof of Facts* 2d 275  
Reliability of Scientific Devices, 2 *Am. Jur. Proof of Facts* 2d 545  
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480, 499, Preparing and Using Experimental Evidence, 3 *Am. Jur. Trials* 427  
155, Investigating Particular Civil Actions, 2 *Am. Jur. Trials* 1

#### ARTICLE OUTLINE (Go to beginning)

§ 1 Generally

§ 2 Presumptions, burden of proof, and prima facie evidence

§ 3 Generally

§ 3[a] Statutory provisions --

§ 3[b] Pennsylvania speed laws