

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

JOHN KOLB,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CASE NO.: CVA1 06-23  
LOWER COURT CASE NO.:  
06-TR-000113-E

Appeal from the County Court  
for Orange County,  
John E. Jordan, Judge

Matthew A. Leibert, Esq., on behalf of Appellant.

No appearance on behalf of Appellee

Before RODRIGUEZ, KIRKWOOD and BLACKWELL, J.J.

PER CURIAM

**ORDER AFFIRMING APPELLANT'S CONVICTION**

Appellant, John Kolb, timely appeals the lower court's "Determination of Infraction" that he was unlawfully speeding, entered on February 17, 2006. This Court has jurisdiction pursuant to sections 318.16, 318.33, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c). We dispense with oral argument. Fla. R. App. P. 9.320.

**INTRODUCTION**

On December 20, 2005, Appellant was issued a traffic citation for unlawfully speeding. Appellant subsequently requested a hearing to contest the citation; this hearing was held on February 17, 2006. At the hearing, the ticketing officer testified that he obtained both a visual estimate of Appellant's speed, as well as a radar reading confirming that Appellant was speeding.

Appellant questioned the officer as to whether the radar had been tested as required by section 316.1905, Florida Statutes. Although admitting he was not present when the testing occurred, the officer produced a paper entitled “Radar Speed Measuring Device Certification” (hereinafter “Radar Certificate”), purporting to be the six month test of the officer’s radar device. Appellant objected to the entry of the Radar Certificate on hearsay and testimonial hearsay grounds. The court overruled these objections after concluding the Radar Certificate was admissible under the business records exception and found Appellant guilty of speeding. This appeal followed.

### STANDARD OF REVIEW

This Court reviews a lower court’s decision to admit or exclude evidence using an abuse of discretion standard. *Black v. State*, 920 So. 2d 668 (Fla. 5th DCA 2006); *Stewart & Stevenson Servs., Inc. v. Westchester Fire Ins. Co.*, 804 So. 2d 584 (Fla. 5th DCA 2002).

### DISCUSSION

The Radar Certificate was offered to prove that the ticketing officer’s radar device was tested as required by Florida Administrative Code Rule 15B-2.009.<sup>1</sup> Unless covered by one of the hearsay exceptions, the Radar Certificate is undeniably inadmissible hearsay. In the case at bar, the ticketing officer testified that he turned his radar over to the technician to be tested,<sup>2</sup>

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<sup>1</sup> Florida Administrative Code Rule 15B-2.009(1)(a) requires all “RSMD’s” to be tested no less than every six months by a certified electronic technician.

<sup>2</sup> J: October 10, 2005 now do you know if that certificate showing that the radar device had been checked certified by the technician was it made on that date and how do you know that

O: that was the date I was told to have the radar unit at the police department to be tested that day

J: and did you turn in your unit that time

O: yes sir

J: you turned it in that day

O: yes sir

J: do and did you see the person who was performing the testing of the unit

received a copy of the Radar Certificate after the testing was completed, and kept a copy of the Radar Certificate as part of his records.<sup>3</sup> The ticketing officer also testified that he was not present when his radar device was tested but that his lieutenant witnessed the testing.<sup>4</sup> Appellant objected to the admission of the Radar Certificate on hearsay grounds contending that the witnessing officer needed to testify in order to lay the proper foundation because the ticketing officer could not “testify as to the manner of preparation and to the reliability and trustworthiness of the record.” (Tr. 12.) Stated differently, Appellant argues that it was error to admit the Radar

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O: yes sir . . .

(Tr. 10.)

<sup>3</sup> J: ok now this certificate you have here showing the October 10, 2005 inspection of your geneses model one

O: yes sir

J: after the, the technician sign that and witness by the lieutenant there where does that document go?

O: umm the copy is put in the books at the police department and the copy either comes here to the court room or in this case I keep it my books since I'm the only one using this

J: ok and so did you keep a copy on October 10, 2005

O: uh this is the copy that was given to me by the lieutenant

J: did you get it that day

O: yes sir

J: ok did you keep it with you after that

O: yes sir

(Tr. 11.)

<sup>4</sup> O: the a gentleman comes to the police department and does all the units the same day

M: are you there when he does the unit

O: yes sir I am

M: ok and you watch him do the unit

O: uh I don't watch him do the whole thing no but the uh I believe the Sergeant does or in this case it was the lieutenant

M: ok so you're not present when he is doing the testing of your unit

O: no I don't have to sit there and watch him do the whole thing

M: ok and you don't watch him record what he records on the piece of paper

O: no sir

(Tr. 7-8.)

Certificate into evidence as a business records hearsay exception because the ticketing officer was not present at the time the radar was tested and thus, was not the records custodian or other qualified witness that could establish the proper foundation for its admission. The trial judge overruled Appellant's objection and admitted the Radar Certificate as a business record after concluding that the ticketing officer "testified he is a custodian of the record and that he does keep it afterwards and they obtained it on the same day." (Tr. 12.)

Contrary to Appellant's argument, it was not necessary to call the witnessing officer in order to establish the Radar Certificate as a business record. *See* Charles W. Ehrhardt, *Florida Evidence* § 803.6 (2007 ed.). The ticketing officer could establish the foundational requirements if he was the records custodian. The ticketing officer could also establish the requisite foundation if he was a "qualified witness." To be a qualified witness, the ticketing officer would have to know and testify about how the Radar Certificate was made. *Id.*; also see *Mann v. State*, 787 So. 2d 130 (Fla. 3d DCA 2001). In the case at bar, the trial judge concluded that the ticketing officer was the records custodian of the Radar Certificate. This conclusion seems primarily based on the fact that the ticketing officer kept a copy of the Radar Certificate. As Appellant points out, the mere fact that a police officer stands "in court with a piece of paper" does not transform him into the records custodian. (IB 10.) This Court need not decide whether the ticketing officer was, in fact, a custodian of the Radar Certificate because the ticketing officer was a qualified witness.

The ticketing officer identified the persons who made the Radar Certificate, indicated that the Radar Certificate was made on the same date he received a copy of it, and that the department had a procedure to keep the Radar Certificate as a business record. This was sufficient to establish the ticketing officer as a qualified witness. *See Nordyne, Inc. v. Fla.*

*Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1288 (Fla. 1st DCA 1993) (comptroller laid predicate for admission of business records where he testified that the records were created at or about the time of the events they addressed, by persons with knowledge, and in the ordinary course of business). Accordingly, the trial judge did not abuse his discretion in admitting the Radar Certificate as a business record.

Appellant also argues that the Radar Certificate was inadmissible testimonial hearsay according to the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). This argument is unpersuasive because a citation for unlawful speeding is not a criminal infraction; it is a noncriminal moving violation. § 316.183(7), Fla. Stat. (2005). Consequently, the protection afforded by the court in *Crawford v. Washington* against testimonial hearsay in criminal cases is totally inapplicable.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the lower court's February 17, 2006, order finding Appellant guilty of unlawfully speeding is **AFFIRMED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, on this  
22 day of October, 2007.

/S/ \_\_\_\_\_  
**JOSE R. RODRIGUEZ**  
Circuit Judge

/S/ \_\_\_\_\_  
**LAWRENCE R. KIRKWOOD**  
Circuit Judge

/S/ \_\_\_\_\_  
**ALICE L. BLACKWELL**  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to: **Matthew A. Leibert**, Esq., 112 East Concord Street, Orlando, Florida 32801 and **Office of the State Attorney**, 415 North Orange Avenue, Orlando, Florida 32810 on this 23 day of October, 2007.

\_\_\_\_\_/S/\_\_\_\_\_  
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Judicial Assistant