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

JOHN KOLB,

Appellant,

v.

CASE NO.: CVA1 07-17
Lower Court Case No.: 06-TR-024979-E

STATE OF FLORIDA,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Faye Allen, Judge.

Matthew A. Leibert, Esquire,
for Appellant.

State Attorney,
for Appellee.

Before BRONSON, FLEMING, MIHOK, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant John D. Kolb was charged with unlawful speed, and timely appeals the final judgment of guilt rendered by the county court on February 9, 2007. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On November 15, 2006, at approximately 9:44 a.m., Officer Bosworth of the Winter Park Police Department stopped Appellant at Osceola Avenue and Trismen Terrace and issued a citation for speeding at a rate of 48 miles per hour in a 30 mile per hour zone. The citation referenced section 316.187(1), Florida Statutes. Appellant entered a plea of not guilty and

requested a hearing which took place on February 9, 2007. Appellant was represented by counsel.

At the beginning of the hearing, Appellant objected to the admission of testimony of the speed measuring device until the predicates were laid under section 316.1905, Florida Statutes. Officer Bosworth testified that he was conducting selective enforcement for speeders in the area of Osceola Avenue and Trismen Terrace, observed Appellant approaching from the West bound land, visually estimated his speed to be above the posted limit, engaged his laser, and pulled Appellant over on Trismen Terrace. Officer Bosworth identified Appellant by his Florida Drivers License and issued a citation for unlawful speed.

Officer Bosworth stated that his Laser 7560 was certified by the State of Florida on October 10, 2006, and tested on November 15, 2006, at 9:09 a.m. and 15:30 p.m. He also testified that he has been certified to operate speed measuring devices since 1991 and his device was operating normally on November 15, 2006.

Appellant objected as to hearsay when Officer Bosworth tried to submit the six month bench test certificate into evidence. The Court permitted Appellant to voir dire the witness as to the location, manner of preparation, and trustworthiness of the document. Officer Bosworth testified that the test was in Lakeland, Florida, but was unable to testify as to the manner of preparation, recording, and trustworthiness of the document. Appellant argued that Officer Bosworth could not meet the predicates for the business records exceptions to hearsay and that section 316.1905(3)(b), Florida Statutes, is unconstitutional. The Court overruled the objections and allowed the certificate to be introduced into evidence.

The trial court found Appellant guilty of speeding, withheld adjudication, directed him to pay the statutory fine plus court costs in the amount of $210.50, and required him to attend a four

hour defensive driving course within sixty days.

Where the trial court's decision rests on a pure matter of law that can be evaluated equally as well by the appellate and trial courts, the standard of review is de novo. In Re Caldwell's Estate, 247 So. 2d 1, 3 (Fla. 1971) (statutes are favored with a presumption of constitutionality); Hertless v. State, 12 Fla. L. Weekly Supp. 107(a) (Fla. 9th Cir. Ct. Sept. 14, 2004), citing Racetrac v. Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998) (judicial interpretation of state statutes is a purely legal matter and therefore subject to de novo review).

Appellant asserts that the trial court incorrectly admitted evidence pertaining to the certification of Officer Bosworth's speed measuring device because he was not the proper custodian of records as required by the business records exception to hearsay under section 90.803(6), Florida Statutes. Additionally, Appellant maintains that because the document showing that the speed measuring device had been tested is testimonial hearsay, the Sixth Amendment rights to confront and cross-examine witnesses have been invoked. Alternatively, Appellant contends that even if the hearsay evidence was properly admitted, section 316.1905(3)(b), Florida Statutes, creates an unconstitutional irrebuttable presumption because the substance of the legislative statute is procedural not substantive.

The State did not file an answer brief.

Compliance with section 316.1905(1), Florida Statutes, and the Florida Rules of Evidence

Pursuant to section 316.1905(1), Florida Statutes, and chapter 15B-2, Florida Administrative Code, whenever a law enforcement officer is using a speed measuring device to enforce motor vehicle laws, the device must be of an approved type and tested not less than once

each six months according to department procedures. Additionally, rule 15B-2.015(1), Florida Administrative Code, provides that prior to and subsequent to each shift where a laser speed measuring device is used, the operator must perform the following accuracy checks and record the results into a written log: display check; internal accuracy check; laser distance/alignment check; and sight alignment check. Appellant does not dispute Officer Bosworth's compliance with 15B-2.015(1), but rather the trial court's compliance section 90.803(6), Florida Statutes.

Florida Traffic Court Rule 6.460(a) provides that "[t]he rules of evidence applicable in all hearings for traffic infractions shall be the same as in civil cases . . . and shall be liberally construed by the official hearing the case." Accordingly, Appellant argues that the trial court erred in admitting into evidence the laser certification because Office Bosworth was neither a proper custodian nor a qualified witness as required by the business records hearsay exception in section 90.803(6), Florida Statutes. Section 90.803(6) states that the following are not inadmissible as evidence:

> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness

In Arnett v. State, the First District Court of Appeal noted that "business records are admissible if the records custodian or other qualified witness testifies as to manner of preparation, reliability and trustworthiness of the record." 843 So. 2d 340, 342 (Fla. 1st DCA 2003). Appellant asserts that Officer Bosworth was not a qualified witness because he was unable to testify as to the manner of preparation, recording, and trustworthiness of the laser certification. However, the Twelfth Judicial Circuit, in State v. Tapp, did not require the State to produce the annual inspector or any other FDLE employee in order to authenticate the annual

certificate of assurance for the subject breathalyzer. 12 Fla. L. Weekly Supp. 978a (Fla. 12th Cir. Ct. July 8, 2005). The court agreed with the State's position that because the annual inspection reports are routinely kept by the FDLE "for the purpose of recording the operation, use and maintenance of instruments within the control of FDLE," such records "are admissible as routine business records under the Florida Evidence Code, section 90.803(6)." Id.

In a similar case addressing the admissibility of evidence of the speed of a vehicle measured by a speed measuring device, the Fifth Judicial Circuit held that it is sufficient to provide the court with "proof that the radar unit is of an accepted type and has been certified in accordance with the applicable regulations." Melchor v. State, 12 Fla. L. Weekly Supp. 1115a (Fla. 5th Cir. Ct. Oct. 5, 2005). The law at issue in Melchor was section 316.1906(2), Florida Statutes, which provides:

> Evidence of the speed of a vehicle measured by any radar speed-measuring device shall be inadmissible in any proceeding with respect to an alleged violation of provisions of law regulating the lawful speed of vehicles, unless such evidence of speed is obtained by an officer who:
> (a) Has satisfactorily completed the radar training course . . .
> (b) Has made an independent visual determination that the vehicle is operating in excess of the applicable speed limit.
> (c) Has written a citation based on evidence obtained from radar when conditions permit the clear assignment of speed to a single vehicle.
> (d) Is using radar which has no automatic speed locks and no audio alarms, unless disconnected or deactivated.
> (e) Is operating radar with audio Doppler engaged.
> (f) Is using a radar unit which meets the minimum design criteria for such units established by the Department of Highway Safety and Motor Vehicles.

Although the court vacated the trial court's order, it rejected appellant's argument that detailed testimony and evidence was required to establish each predicate. 12 Fla. L. Weekly Supp. 1115a. Furthermore, the court noted that it was not "necessary to call several witnesses besides the officer writing the citation to prove that the radar instrumentation was properly manufactured, calibrated, and tuned." Id.

Given prior case law declaring annual inspection reports of breathalyzers to be routine business records and dismissing the need for the actual inspector to authenticate such routine business records, the Court finds that the trial court properly admitted the officer's laser certification into evidence under the business records exception in section 90.803(6), Florida Statutes.

Visual Speed

It is important to note that even if the trial court erred in admitting the certification into evidence under the business records exception, Officer Bosworth's visual estimate of the Appellant's speed is sufficient to establish beyond a reasonable doubt that Appellant was exceeding 30 miles per hour.

The Ninth Judicial Circuit, in its appellate capacity, previously held that "a visual estimate of speed can establish proof beyond a reasonable doubt when the testified-to observed speed is substantially above the posted speed limit." Jasper v. State, 14 Fla. L. Weekly Supp. 203a (Fla. 9th Cir. Ct. Dec. 5, 2006) (citing State v. Cash, 12 Fla. L. Weekly Supp. 476a (Fla. 9th Cir. Ct. Feb. 28, 2005)). In Jasper, appellant argued that the state failed to show that the trooper's speedometer had been tested and certified pursuant to section 316.1905(3)(a)-(b), Florida Statutes, and rule 15B-2.011, Florida Administrative Code. 14 Fla. L. Weekly Supp 203a. While the court could not consider the trooper's testimony about the speedometer's calibration as conclusive evidence of speed, it could rely on the visual estimate to establish a speeding violation. Id. The trial court's judgment was affirmed because given the trooper's twenty years of experience, it was reasonable to believe that the appellant was violating the law when his speed was estimated to be in excess of 100 mph in an area with a posted speed limit of 55 mph. Id.

Similarly, in Cash, the Ninth Judicial Circuit found that where the defendant was visually estimated to be traveling over 50 mph in an area with a posted speed limit of 30 mph, the State was able to establish beyond a reasonable doubt that a speeding violation occurred. 12 Fla. L. Weekly Supp. 476a.

In the instant case, Officer Bosworth testified that he visually estimated Appellant's speed to be well above the posted speed limit of 30 mph and he has been certified to operate speed measuring devices since 1991. Therefore, this Court finds that the visual estimate was sufficiently reliable to establish beyond a reasonable doubt that Appellant was exceeding 30 miles per hour.

Testimonial Evidence

As a prerequisite to the introduction of testimonial evidence in a criminal trial, the Sixth Amendment requires unavailability of the witness and a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68 (2004). In Crawford, the United States Supreme Court defined "testimony" as a "solemn declaration or affirmation made for the purposes of establishing or proving some fact." Id. at 51. While the court left open the comprehensive definition of "testimonial," it did provide that testimonial statements include in-court testimony, affidavits, custodial examinations, depositions, and other statements which persons would reasonably expect to be used at a later trial. Id. at 51-52. However, the court held that unlike testimonial statements, States have the flexibility to develop their own laws governing the admission of non-testimonial hearsay. Id.

Appellant argues that the laser certification offered by Officer Bosworth was "testimonial hearsay" subject to the Sixth Amendment rights to confrontation and cross-examination as provided for in Crawford. 541 U.S. at 36. Appellant supports this argument by citing to Shiver

v. State, 900 So. 2d 615 (Fla. 1st DCA 2005) and Belvin v. State, 922 So. 2d 1046 (Fla. 4th DCA 2006), which arguably conclude that affidavits kept by police for use at trial are testimonial hearsay. However, the cases cited by Appellant do not necessarily categorize machine maintenance reports as testimonial evidence and are distinguishable from the case at hand.

For instance, in Shiver, appellant appealed his conviction of driving under the influence and argued that the admission of his breath test results was a violation of his constitutional right to confrontation and cross-examination under Crawford. 900 So. 2d at 616. Unlike the instant case where the actual laser certification was introduced into evidence, the State in Shiver offered the trooper's affidavit as "presumptive proof" of both the breath test results and compliance with the statutorily required machine maintenance. Id. at 617. The First District Court of Appeal held that appellant's constitutional rights were violated because the trooper's affidavit was only prepared for use at trial and parts of the affidavit contained testimonial hearsay evidence. Id. at 618.

Similarly, Appellant's reliance on Belvin is misplaced. In Belvin, the Fourth District Court of Appeal concluded that "those portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering the breath test" were testimonial in nature and admitted in violation of the petitioner's rights to confrontation and cross-examination under Crawford because the technician did not testify. 922 So. 2d at 1054. However, the issue of "whether those portions of the breath test affidavit pertaining to the maintenance and inspection of the breath test instrument violate the Confrontation Clause under Crawford" was not raised; therefore, the court did not address it. Id. at 1052.

Where an affidavit or record contains "neither expressions of opinion nor conclusions requiring the exercise of discretion and is not made or kept" for trial purposes, such evidence is

not considered testimonial hearsay. Card v. State, 927 So. 2d 200, 203 (Fla. 5th DCA 2006). The Fifth District Court of Appeal rejected the argument that driving records are testimonial hearsay because driving records are "not accusatory and [do] not describe specific criminal wrongdoing." Id. Accordingly, driving records fall "within the type of hearsay recognized in Crawford that [are] admissible in a criminal trial without implicating the defendant's confrontational rights." Id.

Like driving records, breathalyzer inspection reports have also been held to not be testimonial hearsay. Pflieger v. State, 952 So. 2d 1251 (Fla. 4th DCA 2007); Tapp, 12 Fla. L. Weekly Supp. 978a. In Pflieger, the Fourth District Court of Appeal noted:

> An inspection report, like [a] hospital record of a blood test, is intended for the non-testimonial purpose of making sure the machine is still working properly or for accurate medical treatment, respectively. Using these reports for a litigation purpose is a secondary purpose and therefore does not raise the concerns expressed in Crawford of unreliability.

952 So. 2d at 1254.

In this case, Officer Bosworth's laser certification, similar to the breathalyzer certification in Tapp, was "not specifically prepared for the purpose of being admitted into evidence to prove the guilt of a criminal defendant." 12 Fla. L. Weekly Supp. 978a. Rather, the certification was prepared in accordance with section 316.1905(1), Florida Statutes, and chapter 15B-2, Florida Administrative Code, in order to ensure the laser was accurate and properly maintained. Therefore, this Court finds that the laser certification is non-testimonial hearsay subject to the business records exception in 90.803(6), Florida Statutes.

Constitutionality of section 316.1905(3)(b), Florida Statutes

Section 316.1905(3)(b), Florida Statutes, states:

> Upon the production of a certificate, signed and witnessed, showing that such device was tested within the time period specified and that such device was

> working properly, a presumption is established to that effect unless the contrary shall be established by competent evidence.

Appellant argues that the above-stated presumption is unconstitutional because it is a procedural law that has never been ratified by the Florida Supreme Court and remains in direct conflict with Florida Traffic Court Rule 6.460(a), which provides for the application of the rules of evidence to hearings for traffic infractions. The Florida Supreme Court has defined *substantive law* as "that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991); State v. Garcia, 229 So. 2d 236 (Fla. 1969). Alternatively, *procedural law* "encompasses the course, form, manner, means, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." Haven, 579 So. 2d at 732.

Appellant contends that the presumption in section 316.1905(3)(b), Florida Statutes, is irrebuttable because a defendant in traffic court has no way of challenging the document held by the law enforcement officer purporting to show the speed measuring device's six month bench test. However, with respect to speed measuring device testing under section 316.1905, Florida Statutes, and chapter 15B-2, Florida Administrative Code, the Florida Supreme Court previously stated that the "appellant has the right to attack the reliability of the scientific tests or equipment and the competence of the operator." Yolman v. State, 388 So. 2d 1038, 1040 (Fla. 1980). In Yolman, the appellant was issued a traffic citation for driving 50 mph in a 35 mph zone and challenged the constitutionality of section 316.058, renumbered as 316.1905, Florida Statutes. Id. at 1038. While the court specifically rejected the appellant's argument that the Department of Highway Safety and Motor Vehicles must expressly adopt or ratify the manufacturer's operating manual, it held that section 316.1905, Florida Statutes, and the implementing administrative rules

were constitutional. Id. at 1040.

Accordingly, given the reliability safeguards embedded in the business records hearsay exception and a defendant's entitlement to have the officer who actually operated the device present in Court to testify, the presumption contained in section 316.1905(3)(b) is not unconstitutional. § 90.803(6), Fla. Stat. (2006); § 316.1905(3)(c), Fla. Stat. (2006).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order from February 9, 2007, is **AFFIRMED.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the __5__ day of ____February_____, 2008.

___/S/_____
THEOTIS BRONSON
Circuit Judge

___/S/_____
JEFFREY M. FLEMING
Circuit Judge

__/S/_____
A. THOMAS MIHOK
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 to: **Office of the State Attorney, Appeals Unit**, 415 N. Orange Avenue, Orlando, Florida 32801 and **Matthew A. Leibert, Esq.,** 112 E. Concord Street, Orlando, Florida 32801 on the ____5_____ day of ____February_____, 2008.

_____/S/_____
Judicial Assistant